

**PUBLIC VERSION**  
**UNDER THE RULES OF ARBITRATION OF THE**  
**UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW**  
**AND**  
**CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT**

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**RESOLUTE FOREST PRODUCTS INC.,**

**Claimant/Investor**

**v.**

**GOVERNMENT OF CANADA**

**Respondent/Party**

**PCA Case No. 2016-13**

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**CLAIMANT'S REPLY MEMORIAL**

**December 6, 2019**

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**I. INTRODUCTION**

1. But for the Nova Scotia Measures, the Port Hawkesbury SC Paper mill would not have reentered the North American SC Paper market. But for this re-entry, Resolute would not have suffered the damages that flowed inevitably from a 25 percent increase in supply, in the presence of dwindling demand. Canada disputes the amount and value of assistance GNS provided PWCC, but does not contest that, whatever the amount and value, Port Hawkesbury would not have reopened without it.

2. Whatever the reason, the Government of Canada (“Canada”) did not produce [REDACTED] [REDACTED] by Canada’s chosen experts (Pöyry), until ten weeks after receiving Resolute’s Memorial on the Merits of its claims. Resolute did not have this document, therefore, when it prepared and served its Memorial on Canada and delivered it to the Tribunal.

3. The document Canada eventually produced reveals that GNS knew, before restarting the mill at Port Hawkesbury, that it would [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

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<sup>1</sup> “GNS” refers throughout this Memorial to the decision-making apparatus of the Government of Nova Scotia, including its executive, legislative, and judicial branches, distinguished from the “Province of Nova Scotia,” which refers to Nova Scotia’s territory and jurisdiction.

<sup>2</sup> R-161, [REDACTED]

<sup>3</sup> *Id.* at 10, 53.

<sup>4</sup> *Id.* at 9, 15.

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[REDACTED]

[REDACTED]

[REDACTED]<sup>7</sup> Canada has ridiculed Resolute's use of the phrase, but knowingly costing Resolute jobs in Québec in order to restore jobs at Port Hawkesbury in Nova Scotia was an act of robbing Peter to pay Paul.

4. Nova Scotia's knowing, willful acts involved a deliberate and detailed analysis of the North American market.<sup>8</sup> To make its plan of action work, GNS extended tax benefits to PWCC operations beyond Nova Scotia's borders,<sup>9</sup> thus both invading and capitalizing on the North American market and not, in any way, limiting itself to the territory or jurisdiction of Nova Scotia.

5. Private companies in capitalist societies create jobs and sustain economies. Political systems need them and partner with them. But there are boundaries and limits. Within NAFTA's terms, governments cannot favor a domestic investor over a foreign investor by funding and regulating to the express and deliberate advantage of a domestic investor over a foreign investor. The standards of fair and equitable treatment and national treatment prescribe boundaries and limits on discrimination.

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<sup>5</sup> *Id.* at 6, 53.

<sup>6</sup> *Id.* at 10.

<sup>7</sup> *See id.* at 6.

<sup>8</sup> *See generally id.*

<sup>9</sup> *See* Claimant's Memorial on Merits and Damages ¶¶ 102-103 (Dec. 28, 2018) ("Resolute Memorial").

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6. GNS respected those boundaries in discussions with Resolute over Bowater Mersey. The GNS efforts for Port Hawkesbury erased those boundaries, crossing a line from making a private actor competitive to giving the private actor advantages that necessarily would put other, competing private actors out of business. This dispute arises because GNS crossed that line. Nothing short of that line, such as the negotiations between Bowater Mersey and GNS, is germane to resolving this dispute.

7. Canada nowhere denies the expectation or intent of the Government of Nova Scotia. Nowhere does it substitute the indefinite article (as in “a” low cost producer) for the reality of Port Hawkesbury, to be *the* low-cost producer. Canada’s strategy in this dispute is to distract, divert, and deny, but not to deny the central claim—that the Government of Nova Scotia was the instrument that positioned PHP in exactly the manner [REDACTED], so that PHP would prosper expressly at the expense of its North American competition and [REDACTED] particularly to the detriment of Resolute.

8. Distraction. Canada seeks to distract from the larger picture, the ensemble of measures that, taken together, enabled the resurrection of a business that could not revive and survive without an extraordinary infusion of assistance. The distraction is to break up the ensemble into components and argue that each component was not extraordinary or, in the case of the electricity deal, not even a state action.

9. The key to understanding the importance of the Nova Scotia Measures as an ensemble is not to treat them separately as Canada would have it, but to recognize

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them as PWCC demanded. Repeatedly PWCC threatened to break off negotiations and walk away if it were not to receive the benefits of every measure, large or small. PWCC said there would be no deal without a [REDACTED],<sup>10</sup> and no deal without long-term preferential electricity rates.<sup>11</sup> PWCC threatened to walk away over renewable energy,<sup>12</sup> and did walk away over tax deductions.<sup>13</sup> In each instance, Nova Scotia accommodated, thereby taking the threats seriously. For PWCC it was all or nothing, and Nova Scotia made it all.

10. Canada may show that one or another of the measures of itself did not cause injury, but the overall deal would not have happened but for each of the measures. PWCC did not differentiate in its negotiations between large and small. It treated every measure as equally important. Resolute would not have been injured by a property tax break on its own, but then PHP would not have revived and re-entered the market had PWCC received only a break on the local property tax. Hence, all the Nova Scotia Measures matter, even if any one or another of them might not have mattered so much, or have been so extraordinary, on its own. As Ernst & Young experts here testify, the comprehensive ensemble is what makes the Nova Scotia Measures extraordinary and unique.

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<sup>10</sup> See *infra* ¶¶ 161, 178.

<sup>11</sup> See C-165, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Pre-Filed Evidence of Pacific West Commercial Corporation at 4-5 (NSUARB Apr. 27, 2012) (“Absent approval of the load retention rate requested, PWCC will not be in a position to finalize its arrangements to acquire control of NPPH and cause NPPH to restart the Mill.”); C-184, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Decision ¶ 146 (NSUARB Aug. 20, 2012) (“PWCC made it clear throughout the course of the proceedings that it would not proceed with the acquisition of the mill unless it obtains the term and reopener provisions as requested.”).

<sup>12</sup> See *infra* ¶ 58.

<sup>13</sup> See *infra* ¶ 184; Resolute Memorial ¶¶ 101-102.



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11. Canada has assembled a collection of witness statements authored by GNS officials defending their actions in the interest of Nova Scotia. Resolute does not contend, however, that GNS was not self-interested. Rather, Resolute contends that GNS acted in its own interest, knowingly and deliberately at the expense of competitors outside Nova Scotia but within Canada, including especially a foreign investor. The self-serving witness statements are a distraction, justifying individual actions that cumulatively denied Resolute of its NAFTA rights.

12. Diversion. Canada seeks to divert the Tribunal's attention from the actions of GNS to the actions of Resolute, demanding a discussion of Bowater Mersey.

13. Canada contends that the Nova Scotia Measures, intended to vault PHP from the depths of insolvency to the top of the market, were neither discriminatory, nor unusual, unfair or inequitable. To the contrary, Canada argues, Nova Scotia treated Bowater Mersey the same way as it treated PWCC, and complains that Resolute “conspicuously” has not discussed in these proceedings its negotiations with GNS over the Bowater Mersey newsprint mill.

14. Nova Scotia's failed effort to keep Bowater Mersey open and operating is not consequential because, as much as Canada would like the Bowater Mersey and Port Hawkesbury stories to sound and look the same, they are critically different. Bowater Mersey is nothing more here than a diversion from the central story, which is the GNS determination to make PHP more than merely competitive—to make it the most competitive in its industry, immediately and in perpetuity, so that in a declining market it could be sure to be the last SC Paper producer standing.

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15. Canada wants the Tribunal to see Resolute in the same light as PWCC, both collaborating with GNS to drive down their costs (Resolute at Bowater Mersey, PWCC at Port Hawkesbury) and make them competitive from remote locations in Nova Scotia disadvantaged by distance and consequent transportation costs.

16. There are only two aspects of the Bowater Mersey saga relevant to the case here, and then only to the narrative, not to the law: (1) the GNS effort to keep Bowater Mersey open failed; and (2) GNS seemed to learn from that experience that it had to do far more to keep Port Hawkesbury open than it had done, and proposed to do, for Bowater Mersey.

17. The premise for the Bowater Mersey negotiations was, as Canada says repeatedly in its Counter-Memorial, to make the mill “a low cost producer,” and to assure that it would be “competitive” in the North American market for newsprint.<sup>14</sup> The premise for Port Hawkesbury was to guarantee it would be “*the* low cost producer,” an invulnerable giant that no other SC Paper producer could out-compete. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The premise for Bowater Mersey was a five-year horizon, staying open long enough to smooth a transition in Nova Scotia for workers and communities. The premise for Port Hawkesbury was production with no sunset.

18. GNS abided, in negotiating with Bowater Mersey, by the basic rule that it may encourage competition by helping a company without giving one company decisive

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<sup>14</sup> See *infra* ¶¶ 335-338.

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advantages over another. The unhappy result, however, was that the company—in this instance Bowater Mersey—concluded it could not overcome the natural handicaps of location, costs, equipment, and product—there was no future for newsprint produced in Nova Scotia.

19. GNS could do nothing about the Bowater Mersey decision to close despite reasonable efforts of both the company and the government. But GNS could do something about Port Hawkesbury by committing to unreasonable, disproportionate efforts.

20. The certainty of Bowater Mersey's closure preceded completion of the deal with PWCC. GNS economic forecasts and analyses dictated that Port Hawkesbury had to restart, whatever the cost to Nova Scotia, and whatever the cost to competitors in North America. Premier Dexter was unambiguous in perceiving political necessity. Staying closed, as GNS seemed to have seen things, would have meant the collapse of the forest industry in Nova Scotia—[REDACTED]<sup>15</sup> Premier Dexter looked no further than Nova Scotia and, for him, there was no option, but the price—a virtual guarantee to become immediately and to remain in perpetuity North America's lowest cost producer—was unprecedented.

21. Canada wants to make Resolute's injuries self-inflicted, the consequence of questionable business decisions, and argues that Resolute failed to take advantage of the same opportunities offered to PHP. However, only after Resolute declined the

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<sup>15</sup> See Government of Canada Counter-Memorial on Merits and Damages ¶ 33 (April 17, 2019) ("Canada Counter-Memorial").

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GNS offer for Bowater Mersey by recognizing it was not enough and the cause was hopeless, did GNS offer PHP a whole lot more.

22. The subject here is not Bowater Mersey and the GNS attempt to keep it open. That discussion is a diversion from PHP. The only pertinent issue here is what GNS did for PHP and, consequently, to Resolute.

23. Denial. Canada denies that measures instituted by GNS caused harm to Resolute. To make this argument, Canada seeks to disaggregate the ensemble of measures and attacks Resolute's experts, arguing that they have failed to consider all the factors that may have caused Resolute harm. The most elementary facts in this story, however, do not support the denial. The introduction into a market in secular decline of overwhelming volumes produced at the lowest cost (possible only through massive government assistance) had to harm competitors. GNS knew those consequences because its consultants told it those would be the consequences. Canada can no longer claim that the harm to Resolute was collateral damage because, with the [REDACTED] it cannot deny that damages were knowingly, even willfully, inflicted.

24. Canada denies that some measures caused harm, and that other measures were acts of state. But for all the measures taken together, none of them would have been enacted for PWCC, and but for the vigorous interventions of state organs, none of them may have enabled PHP. They are all attributable to Nova Scotia and, therefore, to Canada.

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### II. THE ELECTRICITY MEASURES ARE ATTRIBUTABLE TO CANADA

25. Canada proclaims, incorrectly, that “Resolute pins its attribution argument on Article 8 of the ILC Articles.”<sup>16</sup> Not so. As Resolute explained in its Memorial, three interrelated categories of reasons justify why the electricity measures were an act of State attributable to GNS and, therefore, Canada.

26. First, the electricity measures are attributable to GNS because they are inseparable from the remainder of the Port Hawkesbury bailout package. The evidence Canada proffers confirms that the electricity benefits were part of an ensemble of measures indispensable and attributable, jointly and severally, to GNS.<sup>17</sup>

27. Second, Resolute demonstrated that the electricity benefits, even if separated from the remainder of the package, should be regarded as “adopted or maintained” by GNS under NAFTA Article 1101(1).<sup>18</sup> Canada tries to portray the electricity measures as a private transaction between NSPI and PWCC by ignoring that GNS “organs” acted to provide the electricity benefits: (1) both the NSUARB and the [REDACTED]; and (2) GNS promised and later acted to overcome obstacles created by renewable energy requirements. Therefore, the electricity measures are attributable to GNS and Canada under ILC Articles 4 and 11.

28. Third, the electricity package is attributable to GNS under Article 8 of the ILC Articles. GNS’s multiple actions to ensure passage of the electricity measures

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<sup>16</sup> Canada Counter-Memorial ¶ 156.

<sup>17</sup> See Resolute Memorial ¶¶ 153-161.

<sup>18</sup> See Resolute Memorial ¶¶ 162-175.

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exceeded a mere “commercial agreement negotiated between private parties.”<sup>19</sup> These multiple actions, taken together, constitute instructions sufficient to attribute the electricity measures to GNS.<sup>20</sup>

29. Canada did not contest that the remainder of the measures was attributable to GNS (and, under NAFTA, to Canada).<sup>21</sup> Therefore, the Tribunal need only consider whether the electricity measures are attributable to Canada.

**A. Canada Confirmed The Electricity Benefits Were Inseparable From The Remainder Of The Port Hawkesbury Bailout Package**

30. Resolute stated in its opening Memorial that all of the measures, including the electricity package, were considered indispensable and should not be disaggregated: “The Tribunal should reject breaking apart the Port Hawkesbury bailout package and, instead, should treat the entire package as a single ensemble of measures that is attributable to GNS and, therefore, Canada.”<sup>22</sup> PWCC insisted that all of the measures were needed to ensure that it would be the lowest cost producer of SC Paper, and PWCC said repeatedly that it would not have purchased the mill without all of the measures.<sup>23</sup> Canada’s evidence now confirms that the electricity benefits were inseparable from the other measures.

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<sup>19</sup> Government of Canada Statement of Defence ¶ 75 (Sept. 1, 2016) (“Statement of Defence”).

<sup>20</sup> See CL-111, James Crawford, *State Responsibility: The General Part* at 145 (Cambridge University Press 2013).

<sup>21</sup> See Canada Counter-Memorial ¶¶ 156-221 (addressing only the electricity measures as being attributable to Canada); *accord id.* ¶¶ 11-12.

<sup>22</sup> See Resolute Memorial ¶ 159.

<sup>23</sup> C-197, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Pacific West Commercial Corporation Application for Amendments to Load Retention Tariff (NSUARB Sep. 22, 2012) (“PWCC Amended NSUARB Application”), PWCC Evidence at 8; Resolute Memorial ¶ 109; see also C-336, Email From Duff Montgomerie, Jeannie Chow, Paul Black, and other GNS Officials attaching PH Customer Conference Call

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31. GNS knew that profitability in the SC Paper business meant that PHP had to become the lowest cost producer because PWCC repeatedly told the provincial government (and others) that a calculated assurance to be the lowest cost producer was a precondition for buying and operating the mill. For example, PWCC's

[REDACTED]

[REDACTED]<sup>24</sup> Similarly, PWCC told GNS attorney John Traves<sup>25</sup> that the “story” to tell the regulator was that PWCC can “turn this into a profitable mill” because it will be “the lowest cost SC mill in North America.”<sup>26</sup> PWCC announced this goal publicly during the NSUARB proceedings, stating that the “strategy of becoming the lowest cost operator in North America implicitly means the discount is greater than the level necessary merely to operate competitively....The paper business is a struggling industry and only the very lowest cost operators will have a chance to succeed.”<sup>27</sup>

32. GNS acceded to PWCC's demands to make PHP the lowest cost producer of SC Paper. Canada's witness, Jeannie Chow (a former Senior Investment Manager at the GNS Department of Economic and Rural Development and Tourism

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Talking Points (Aug. 12, 2012) at CAN000530\_0002 (stating that GNS had a “strong desire to see the mill succeed”).

<sup>24</sup> C-163, [REDACTED]  
[REDACTED] at CAN000004\_0009 (Apr. 26, 2012)

<sup>25</sup> Witness Statement of Murray Coolican ¶ 17 (“Coolican Witness Statement”).

<sup>26</sup> C-147, PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 2 (2011-12) at page 135 of 165 (“PWCC Meeting Notes”).

<sup>27</sup> C-174, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Redacted Rebuttal Evidence of Pacific West Commercial Corporation at 24 (NSUARB July 9, 2012) (“PWCC Rebuttal Evidence”).

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responsible for analyzing the PWCC deal),<sup>28</sup> stated that "[REDACTED]  
[REDACTED]"<sup>29</sup>.

GNS and Ms. Chow further stated that [REDACTED]  
[REDACTED]  
[REDACTED].<sup>30</sup> GNS later confirmed in a press release that its goal was the same as  
PWCC's—to make PHP the lowest cost producer of SC Paper.<sup>31</sup>

33. The importance of PWCC's power rate to this goal was stressed during  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>32</sup> A few weeks later, [REDACTED]  
[REDACTED].<sup>33</sup>

34. PWCC needed a discount on its electricity rate that was "greater than the  
level necessary merely to operate competitively";<sup>34</sup> [REDACTED]

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<sup>28</sup> See Witness Statement of Jeannie Chow ¶¶ 1, 6 ("Chow Witness Statement").  
<sup>29</sup> C-338, [REDACTED] at  
CAN000130\_0002.  
<sup>30</sup> C-158, [REDACTED]  
[REDACTED] at CAN0000087\_0003 ([REDACTED]).  
<sup>31</sup> See C-183, *Province Invests in Jobs, Training and Renewing the Forestry Sector*, Nova  
Scotia Press Release (Aug. 20, 2012) ("Aug. 20, 2012 Nova Scotia Press Release").  
<sup>32</sup> C-318, [REDACTED]  
[REDACTED] (Oct. 20, 2011).  
<sup>33</sup> C-319, [REDACTED]  
[REDACTED] (Nov. 4, 2011).  
<sup>34</sup> C-174, *supra* n.27, PWCC Rebuttal Evidence.



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[REDACTED]. Canada states this reasoning as a [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>35</sup>

35. According to Ms. Chow, GNS “[REDACTED]  
[REDACTED]”<sup>36</sup> which  
was to make PHP the lowest cost producer of SC Paper:

[REDACTED]

36. As GNS told the NSUARB, “the LRR being applied for is both necessary for the planned acquisition of control of NPPH by PWCC, and sufficient for the long-term viability of the mill business.”<sup>37</sup> But for the electricity rate, the mill likely would have shut down.<sup>38</sup> PWCC would not have bought it.

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<sup>35</sup> C-182, [REDACTED] at CAN000002\_0004 (Aug. 14, 2012) (“[REDACTED]”); see also C-346, [REDACTED] (Sept. 21, 2012) at CAN000124\_0002 to 0003 (detailing [REDACTED]).

<sup>36</sup> Chow Witness Statement ¶ 17.

<sup>37</sup> See C-205, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Government of Nova Scotia Letter Regarding Amended PWCC Load Retention Rate (NSUARB Sept. 27, 2012).

<sup>38</sup> C-178, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Opening Statement of the Government of Nova Scotia (NSUARB July 12, 2012) (“GNS Opening Statement”) (“Mr. Chair, the stakes in this application are high. PWCC has said

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37. PWCC demanded additional benefits prior to executing the final bailout package. PWCC already had stated that it would not have accepted the revised electricity measures but for amendments to the bailout package to include enhanced loan terms (*i.e.*, making a \$40 million credit facility potentially forgivable when it was originally repayable) and other benefits (such as allowing PWCC to harvest \$1 billion in tax losses for assets located outside Nova Scotia):<sup>39</sup>

Q13 Would PWCC have agreed to the acquisition of NPPH and the restart of the Mill absent a favourable ATR if the Provincial government had not subsequently revisited its support package with PWCC?

A. No....<sup>40</sup>

Ms. Chow's witness statement confirms that these additional benefits were inseparable from the electricity package.<sup>41</sup>

38. PWCC admitted that all the measures were required to reopen the mill, and GNS confirmed that all the measures were necessary to reopen the mill. By its own evidence, Canada has demonstrated that the entire bailout package was an inseparable ensemble of measures. Therefore, all the measures made the reopening of the mill and market re-entry of the lowest cost SC Paper producer possible. All the measures, required by GNS and subject to GNS approval, should be attributable to GNS and Canada.

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in its evidence that there is a very high probability that the mill will be shut down if the requested application is not granted.”).

<sup>39</sup> Resolute Memorial ¶¶ 103, 105. Canada's argument that GNS's ability to offset the tax losses against extra-provincial assets is addressed elsewhere. See *infra* ¶¶ 184-185.

<sup>40</sup> C-197, *supra* n.23, PWCC Amended NSUARB Application, PWCC Evidence at 8.

<sup>41</sup> Chow Witness Statement ¶¶ 9, 10 (linking loan forgiveness to PHP's electricity benefits needed for the mill to restart operation).

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### **B. Canada Cannot Rebut That The Electricity Measures Were Enacted By Nova Scotia State Organs**

39. Even if the electricity measures were disaggregated from the remainder of the bailout package, they would be attributable to GNS and, therefore, Canada, because State organs of Nova Scotia enacted them. Instead of constituting a private act by NSPI, as Canada contends, the electricity benefits should be regarded as “adopted or maintained” by GNS pursuant to NAFTA Article 1101(1).

#### **1. Canada Ignores Evidence Of Direct State Action**

40. Canada’s attribution defense ignores that direct State action gave force to the electricity measures and maintained them in place through (1) the approvals of the benefits by the [REDACTED] and the NSUARB, and (2) the actions taken by GNS to address renewable energy issues.

41. Article 4 of the ILC Articles provides that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercised legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central Government or of a territorial unit of the state.”<sup>42</sup> This principle “extends to organs of government whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at principal or even local level,” and includes Government officials acting in their official capacity.<sup>43</sup> “Article 4 states the

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<sup>42</sup> CL-145, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) (“ILC Articles”) at Article 4(1).

<sup>43</sup> CL-145, *supra* n.42, ILC Articles at Article 4, commentary ¶¶ 6-7; see also CL-104, *William Ralph Clayton and others v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶ 306 (Mar. 17, 2015) (“*Bilcon*”).

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basic rule attributing to the State the conduct of its organs.”<sup>44</sup> The facts pertaining to the electricity measures bring them within the terms of Article 4.

42. The tribunal in *von Pezold v. Zimbabwe* stated:

It is clear under Article 4 of the ILC Articles and the Commentary thereon that organs of State include, for the purposes of attribution, the President, Ministers, provincial government, legislature, Central Bank, defence forces and the police, inter alia, as argued by the Claimants. The Respondent does not seriously dispute this.

Responsibility for the actions of these State organs is unlimited provided the act is performed in an official capacity (*i.e.*, it includes *ultra vires* acts performed in an official capacity). Only acts performed in a purely private capacity would not be attributable. That issue does not arise in this case.

As the Claimants note, indirect liability for the acts of others can also occur under Article 4 – for example, the failure to stop someone doing something that violated an obligation. It does not matter that a third party actually undertook the action, if a State organ (such as the police) were aware of it and did nothing to prevent it.<sup>45</sup>

### 2. GNS State Organs Adopted The Measures

43. The electricity measures are attributable to GNS because the NSUARB is a State organ of Nova Scotia and GNS, through the [REDACTED]

[REDACTED]

44. Canada argues that the NSUARB is an independent, quasi-judicial body.<sup>46</sup> However, a body that exercises regulatory and judicial functions can be an “organ of the State” under ILC Article 4 even when that body may be formally independent from the

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<sup>44</sup> CL-145, *supra* n.42, ILC Articles at Article 4, Commentary proceeding Article 4 & Article 4 ¶ 8.

<sup>45</sup> RL-121, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award ¶¶ 443-445 (July 28, 2015) (“*von Pezold*”).

<sup>46</sup> Canada Counter-Memorial ¶ 188.

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executive and legislative branches.<sup>47</sup> In this case, the NSUARB is empowered by statute to “exercise elements of [GNS’s] governmental authority.”<sup>48</sup>

45. The NSUARB, by statute (the Nova Scotia *Public Utilities Act*, R.S.N.S. 1989, c. 380 (“PUA”)), approves electricity rates for NSPI’s customers.<sup>49</sup> NSUARB members are appointed by the Government of Nova Scotia (through the Governor in Council),<sup>50</sup> each Board member is considered a GNS employee,<sup>51</sup> and GNS determines the remuneration for each Board member.<sup>52</sup> The Board reports annually to GNS on all its activities.<sup>53</sup> GNS has authority to approve or reject any changes made by the NSUARB to its rules and regulations relating to electricity rates.<sup>54</sup> The NSUARB may

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<sup>47</sup> CL-104, *supra* n.43, *Bilcon* ¶ 308; CL-145, *supra* n.42, ILC Articles, ILC Articles at Article 4, Commentary ¶ 6 (“It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs.”); *see also* CL-212, *Robert Azanian, Kenneth Davitan, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award ¶ 98 (Nov. 1, 1999) (“Although independent of the Government, the judiciary is not independent of the State: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.”) (citing Eduardo Jiménez de Aréchaga, “International Law in the Past Third of a Century,” 159-1 *Recueil des cours* (General Course in Public International law, The Hague, 1978)).

<sup>48</sup> CL-104, *supra* n.43, *Bilcon* ¶ 308.

<sup>49</sup> C-101, *Public Utilities Act*, R.S.N.S., c. 380, s. 64(1) (1989) (“Public Utilities Act”). The NSUARB also sets rules relating to electricity rates, *id.* s. 65(1), and can cancel contracts and electricity rates upon investigation if those rates “are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential,” *id.* s. 87. The NSUARB is limited on how often electricity rates can be increased in a 24-month period absent findings of exceptional circumstances. *Id.* s. 64A. Electricity rates must be charged equally to persons “under substantially similar circumstances and conditions in respect of service of the same description.” *Id.* s. 67(1).

<sup>50</sup> R-386, *Utility and Review Board Act*, R.S.N.S., c. 11, s. 5(1) (1992) (“Utility and Review Board Act”).

<sup>51</sup> *Id.* s. 10.

<sup>52</sup> *Id.* s. 7.

<sup>53</sup> *Id.* s. 33.

<sup>54</sup> C-101, *supra* n.49, *Public Utilities Act* s. 25.

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issue subpoenas,<sup>55</sup> take evidence,<sup>56</sup> and issue orders that can have the force and effect of the Nova Scotia Supreme Court (the court of first instance in Nova Scotia).<sup>57</sup> And the decisions of the NSUARB are appealable to the Nova Scotia Court of Appeals, which serves as Nova Scotia's court of last resort.<sup>58</sup>

46. Pursuant to its authority over electricity rates, the NSUARB approved PWCC's requested electricity benefits in decisions dated August 20, 2012 and September 27, 2012.<sup>59</sup> These approvals, and not any private deal between NSPI and PWCC, gave force and effect to the electricity measures. As NSPI stated, setting "power rates was a matter for the province's Utility and Review Board to decide."<sup>60</sup>

47. In addition to the NSUARB's approval, the sale of the mill and the associated bailout package would not have gone forward had GNS not [REDACTED]

[REDACTED]

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<sup>55</sup> R-386, *supra* n.50, Utility and Review Board Act s. 17.

<sup>56</sup> *Id.* s. 18, *see also id.* s. 19 ("The Board may receive in evidence any statement, document, information or matter that, in the opinion of the Board, may assist it to deal with the matter before the Board ....").

<sup>57</sup> *Id.* s. 29.

<sup>58</sup> *Id.* s. 30; C-365, Nova Scotia Utility and Review Board, "About," available at <https://nsuarb.novascotia.ca/about> ("Orders of the Board may be appealed to the Nova Scotia Court of Appeal upon any question of its jurisdiction or upon any question of law."). The statute provides that review is to the Appeal Division of the Nova Scotia Supreme Court, which has since been renamed the Nova Scotia Court of Appeals. See C-366, "The Courts of Nova Scotia," available at [http://www.courts.ns.ca/History\\_of\\_Courts/history\\_home.htm](http://www.courts.ns.ca/History_of_Courts/history_home.htm).

<sup>59</sup> See Resolute Memorial ¶¶ 88, 111.

<sup>60</sup> See R-324, Global News, *Bowater Mersey paper mill needs government help: Nova Scotia premier* (Nov. 2, 2011).

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[REDACTED]<sup>61</sup> According to Ms. Chow, [REDACTED]

[REDACTED]

[REDACTED]<sup>62</sup> [REDACTED]

[REDACTED]

[REDACTED]

48. Canada contends Resolute makes a “concocted argument” because this

[REDACTED] but, rather, a provision “[REDACTED]

[REDACTED]

[REDACTED]”<sup>63</sup> But GNS did everything possible, including promises of legislative and regulatory adjustments, to ensure that it would not have to “back out.” The total deal required a profitable mill, possible only with “the LRR [PWCC] needed to make it profitable.” GNS made sure PWCC got the rate it needed.<sup>64</sup>

49. The [REDACTED]

[REDACTED],

confirmed when the complete GNS offer was conveyed to PWCC.

50. The NAFTA tribunal in *Bilcon v. Canada* found similar conduct attributable to Canada. Pursuant to the *Canadian Environmental Assessment Act*, an assessment was conducted by an independent regulatory body called the Joint Review Panel (“JRP”), which held hearings, operated like a court (with rights to summon witnesses for

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<sup>61</sup> C-182, *supra* n.35, [REDACTED] at CAN000002\_0004.

<sup>62</sup> Chow Witness Statement ¶ 17.

<sup>63</sup> Canada Counter-Memorial ¶ 197.

<sup>64</sup> See generally *supra* ¶¶ 30-36 (detailing importance of power rate to mill).

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testimony and order the production of documents),<sup>65</sup> and prepared a report with recommendations that was submitted to the Minister of Environment and Climate Change.<sup>66</sup> Members of the JRP were appointed by the Minister.<sup>67</sup> The *Bilcon* tribunal explained that “[a] body that exercises impartial judgment, however, can well be an organ of the state; Article 4 of the ILC Articles...specifically includes those exercising ‘judicial’ functions.”<sup>68</sup>

51. In addition to the JRP, the *Bilcon* tribunal addressed the Canadian federal government’s role in overseeing a JRP. The Minister of Environment and Climate Change and the remainder of the Canadian federal cabinet could approve or reject the JRP’s recommendations: “The final decision of the responsible authority, when the assessment is made by the way of a [JRP], must be exercised with the approval of the Governor-in-Council—that is, the federal cabinet, the senior decision making body in the executive of Canada.”<sup>69</sup>

52. The *Bilcon* tribunal ruled that the measures in question were attributable to Canada because “[t]he functions that the JRP must discharge are of a governmental nature...[T]he JRP was *de jure* an organ of Canada, equipped with a clear statutory role that included making formal and public recommendations to state authorities which the latter were obliged by law to consider—and indeed ended up accepting.”<sup>70</sup>

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<sup>65</sup> CL-104, *supra* n.43, *Bilcon* ¶¶ 308-309.

<sup>66</sup> CL-104, *supra* n.43, *Bilcon* ¶¶ 25, 220.

<sup>67</sup> CL-104, *supra* n.43, *Bilcon* ¶ 314.

<sup>68</sup> CL-104, *supra* n.43, *Bilcon* ¶ 308.

<sup>69</sup> CL-104, *supra* n.43, *Bilcon* ¶ 311.

<sup>70</sup> CL-104, *supra* n.43, *Bilcon* ¶¶ 308, 319.



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53. The function of the NSUARB here is indistinguishable from the JRP in *Bilcon*, save for ultimate control referencing the provincial instead of the federal government. A quasi-judicial regulatory body approved the electricity measures after GNS promised to pass regulations and take other actions to address renewable energy concerns. GNS, through a Minister, approved the electricity measures.

3. GNS Preserved The Electricity Measures By Acting To Address “Integrally Connected” Renewable Energy Issues

54. The electricity measures are the result of State action because GNS modified renewable energy requirements “integrally connected” to the remainder of the electricity package, an act necessary for approval of the electricity measures and specifically and uniquely tailored for PHP. Canada does not dispute that the NSUARB would have denied the proposed electricity benefits without the renewable energy modifications.

55. PHP’s advantageous electricity benefits consisted of an “integrally connected” set of components that resulted from a “long period of dialogue involving NS Power, PWCC, the CCAA Monitor, and [GNS].”<sup>71</sup> The electricity measures included components for the fixed costs of power, incremental costs for power, and the term of the deal.<sup>72</sup> GNS was involved with [REDACTED]

[REDACTED]

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<sup>71</sup> C-164, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Notice of Application For Approval Of A Load Retention Rate ¶ 8 (NSUARB Apr. 27, 2012).

<sup>72</sup> Resolute Memorial ¶¶ 74-79.

[REDACTED]

[REDACTED]<sup>73</sup>

56. However, GNS, PWCC, NSPI, and the CCAA Monitor could not resolve two issues prior to the July 16-18 NSUARB hearing:<sup>74</sup> (1) the effect of the mill's restart on the province's renewable energy standards;<sup>75</sup> and (2) payment for steam generation from the mill's onsite Biomass Plant.<sup>76</sup>

57. But for resolution of these issues, the NSUARB would have denied all of the electricity benefits. The NSUARB explained: "[i]t became clear during the course of the proceeding that, without some resolution to these two [Renewable Energy Standard –“RES”] issues, the LRT would not likely recover all its incremental costs," which would prevent the NSUARB from approving the electricity measures.<sup>77</sup> GNS, not a private organization or party, resolved both issues.

58. PWCC and GNS had a longstanding dispute over who would pay for any additional renewable energy costs to comply with provincial regulations caused by PHP's return to the electricity grid. PWCC head Ron Stern, during a meeting with GNS officials, was adamant that PHP "can't handle any RES cost increase, avg or incremental" and that GNS "also cannot leave door open by [NSUARB] that RES will/may apply in the future" because it "has to be never." Government attorney John

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<sup>73</sup> C-323, [REDACTED]; see also C-318, *supra* n.32, [REDACTED]

<sup>74</sup> C-184, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Decision ¶ 16 (Aug. 20, 2012) ("Aug. 20, 2012 NSUARB Dec.").

<sup>75</sup> Resolute Memorial ¶¶ 80-82.

<sup>76</sup> Resolute Memorial ¶¶ 83-85.

<sup>77</sup> C-184, *supra* n.74, Aug. 20, 2012 NSUARB Dec. ¶ 177.

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Traves cautioned during this meeting that resolving this issue “may require a legislative change” that was “not palatable @ this time.”<sup>78</sup> Speaking for the Government, he did not doubt that resolution was required.

59. This issue was unresolved by the July 16-18, 2012 NSUARB hearing, when the NSUARB Chair made clear that GNS needed to act to solve the problem:

THE CHAIR: Okay. And I think, Mr. Stern, my next question is for you and some of this may get answered in the material that’s going to be filed, but - - and I’m coming back to the risk to other ratepayers with respect to the RES requirements, and I understand its [sic] your position there’s enough renewables on the system to accommodate this load. But it seems to me that risk could be eliminated completely by an action of the Province of Nova Scotia, and has the Province of Nova Scotia been approached to solve that problem?

MR. STERN: Yes, we’ve had some discussions with them.

THE CHAIR: And are they prepared to solve it?

MR. STERN: No, they’ve sent us here.

THE CHAIR: You agree with me that, if indeed the renewable targets changed as a result of government action or if certain of the renewables that are currently being contemplated couldn’t be built that there is a risk with respect to other ratepayers having to pick up the cost of renewables serving your load?

MR. STERN: I think I agree -- I think I agree with -- if the government changed the policies, as far of what I’ve been told there’s no need for additional renewables today ---

THE CHAIR: Based on what we know today, but seven years is a long time in a life of an electric system, isn’t it?

MR. STERN: Of course, I can’t speak about the future in that way. You’re right. I mean, if there was some huge addition to the load from other customers, I guess that would change things.

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<sup>78</sup> C-147, *supra* n.26, PWCC Meeting Notes at page 91 of 165.

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THE CHAIR: Would you agree with me that a government that wants this transaction to happen should seriously consider taking away this risk?

MR. STERN: I agree, sir, it would make things easier for all of us.<sup>79</sup>

60. The issue of who would pay to run the Biomass Plant fulltime, even were it to make no economic sense for the province's ratepayers, was also unresolved as of the NSUARB hearing. During the hearing, NSPI Vice President Mark Sidebottom testified that, but for PHP's needs, the Biomass Plant "would likely run infrequently in 2013 and 2014 and it may or may not run in 2015 depending on generation additions."<sup>80</sup> NSPI President and CEO Rob Bennett testified that the additional cost to run the Biomass Plant "could easily swamp" certain payments from PHP.<sup>81</sup> One prediction, later proven true,<sup>82</sup> estimated the additional Biomass Plant expenditure would cost other ratepayers approximately \$7 million per year.<sup>83</sup> The NSUARB would not and could not approve this rate increase.<sup>84</sup>

61. To resolve these two issues, GNS Deputy Minister and Canada witness Murray Coolican delivered, on July 20, 2012, a letter on behalf of the Nova Scotia Government (approved by the Nova Scotia Executive Council<sup>85</sup>), to the NSUARB. GNS

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<sup>79</sup> R-397, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Hearing Transcript Part A at 159-161 (NSUARB July 16, 2012).

<sup>80</sup> C-184, *supra* n.74, Aug. 20, 2012 NSUARB Dec. ¶ 173.

<sup>81</sup> See C-184, *supra* n.74, Aug. 20, 2012 NSUARB Dec. ¶ 174.

<sup>82</sup> C-235, *In the Matter of A Hearing into Nova Scotia Power Incorporated 2016 Base Cost of Fuel Reset*, Hearing Transcript at 25-33 (NSUARB Oct. 19, 2015) ("Oct. 2015 NSUARB Hr'g Tr.").

<sup>83</sup> C-184, *supra* n.74, Aug. 20, 2012 NSUARB Dec. ¶ 175.

<sup>84</sup> See C-184, *supra* n.74, Aug. 20, 2012 NSUARB Dec. ¶¶ 181-183.

<sup>85</sup> C-337, GNS Communications Plan Regarding Amendments to Renewable Energy Regulations (Aug. 14, 2012) at CAN000024\_0027; see also C-362, Canada Log Entry 8 (Aug. 24, 2018)

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committed that: (1) “PWCC [would] receive[] the full benefit of the proposed arrangement it reached with Nova Scotia Power Inc.” through regulatory amendments that designated the Biomass Plant as “must run;” and (2) neither PWCC nor other ratepayers would incur additional renewable energy costs caused by PHP’s return to the power grid.<sup>86</sup> GNS intended the letter “to ensure Stern Group receives the full benefit of the deal they sign with Nova Scotia Power.”<sup>87</sup>

62. These two commitments were later memorialized, with the renewable energy standard commitment resolved in [REDACTED] GNS and PHP,<sup>88</sup> and the Biomass Plant costs addressed through January 2013 regulations that mandated the plant run full time.<sup>89</sup>

63. Canada argues that GNS had other reasons to solve these issues besides PHP: (1) GNS had a long-standing policy to diversify its energy sources; (2) GNS did not anticipate additional RES generation would be required when reconnecting the Port Hawkesbury mill to the power grid; and (3) wanted to use biomass as a hedge against

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<sup>86</sup> See C-179, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing at 1-2 (NSUARB July 20, 2012) (“GNS Letter Regarding PWCC LRT”).

<sup>87</sup> *Id.* At the time it issued this letter, GNS was already aware from [REDACTED]. See C-333, [REDACTED] at CAN000424\_10.

<sup>88</sup> C-210, [REDACTED] (Sep. 28, 2012).

<sup>89</sup> C-217, Amendments to the *Renewable Electricity Regulations*, N.S. Reg. 155/2010 (Jan. 17, 2013). Further discussion of GNS’s regulatory changes for the Biomass Plant can be found *infra* at paragraphs 162-175.

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other sources of renewable energy generation.<sup>90</sup> Some of these reasons were presented during the NSUARB hearing; however, the NSUARB was not persuaded.<sup>91</sup>

64. Canada also argues that GNS, in July 2012, was, unrelated to Port Hawkesbury, in the process of amending its renewable energy regulations.<sup>92</sup> Yet, the Biomass Plant concerned only Port Hawkesbury and was central to the renewable energy regulatory discussions.

65. The RES issues were still in flux after Premier Dexter's September 22, 2012 statement announcing the deal (after the day before when he announced the deal was off).<sup>93</sup> On September 25, 2012, a GNS official commented that [REDACTED] [REDACTED].<sup>94</sup> On September 28, 2012, the final day by which PWCC needed the mill to restart to ensure a successful operation,<sup>95</sup> GNS and PWCC were still negotiating the RES issues: [REDACTED]

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<sup>90</sup> See generally Canada Counter-Memorial ¶¶ 201-221.

<sup>91</sup> For example, the NSUARB noted that “[b]oth NSPI and PWCC argued that NSPI will have excess renewable energy through at least 2019 whether the mill operates or not. They stated that with the planned additions of additional renewable energy to be built for 2015 pursuant to awards arising from the request for proposals by the Renewable Electricity Administrator, and with the recent closing of Bowater, the mill is not expected to cause a requirement for any more RES energy than would already be built or purchased by NSPI.” C-184, *supra* n.74, Aug. 20, 2012 NSUARB Dec. ¶ 172. Nonetheless, the NSUARB still required additional action by GNS to resolve this issue.

<sup>92</sup> Canada Counter-Memorial ¶ 211.

<sup>93</sup> Resolute Memorial ¶¶ 100-105 (explaining last-minute negotiations between GNS and PWCC regarding Port Hawkesbury mill bailout package revisions).

<sup>94</sup> C-348, [REDACTED]

<sup>95</sup> Resolute Memorial ¶ 99 (citing C-190, Preparatory Activities Agreement § 1 and CAN000120\_0013 (Aug. 27, 2012); R-397, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Hearing Transcript Part A at 39-40 (July 16, 2012). PWCC judged September 28 the latest possible date to start up, test, and sell enough in response to seasonal demand to be economically viable.

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██████████.<sup>96</sup> PWCC demanded a solution to the RES issues, which nearly scrapped the entire deal on the last day.

66. GNS had to resolve the renewable energy issues in order to ensure approval of the entire suite of electricity measures fashioned for Port Hawkesbury. But for resolution of the renewable energy issues, and but for the consequent electricity package for PHP, there would have been no deal and Port Hawkesbury would not have reopened. GNS may have had other, additional reasons for resolving the renewable energy issues, but those other or additional reasons have no effect on attribution. Whether for Port Hawkesbury (unmistakably the on-site Biomass Plant, which PHP needed to run regardless of a cost to the public utility), or for other reasons, it was GNS that acted and it was PHP who benefitted.

67. Canada does not dispute that NSUARB would not have approved the “integrally connected” elements of the electricity measures but for GNS’s renewable energy actions. As the NSUARB stated:

Having regard to the stated position of the Province related to any RES incremental costs, approval of the Board will be subject to two conditions:

(a) If the mill load does trigger additional RES costs during the term those costs may not be passed along to ratepayers; and

(b) No costs related to operating the Biomass Plant out of the normal economic dispatch order may be passed along to ratepayers unless and until, as a result of Legislation or Regulations imposed by the Province, it becomes a “must run” facility.<sup>97</sup>

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<sup>96</sup> C-349, ██████████

<sup>97</sup> C-184, *supra* n.74, Aug. 20, 2012 NSUARB Dec. ¶ 236.

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Therefore, the entire electricity package is attributable to Canada regardless of the reasons for GNS's actions.

4. The Ensemble Of Electricity Measures Was Acknowledged And Adopted By GNS As Its Own

68. Even if the Tribunal were to find that the electricity measures were the product of private actors, GNS's actions constitute "acknowledgement and adoption" under ILC Article 11. The NSUARB's decisions and orders approving the electricity rates, [REDACTED], [REDACTED], and GNS's actions to address the renewable energy issues are evidence that GNS "acknowledge[d] and adopt[ed]" the electricity measures.

69. Article 11 provides, in pertinent part, that "[c]onduct which is not attributable to a state under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."

70. According to the ILC Commentary, "merely acknowledg[ing] the factual existence of conduct or express[ing] its verbal approval"<sup>98</sup> is insufficient to rise to the level of attribution under Article 11. The International Court of Justice, for example, found in the *Diplomatic and Consular Staff* case that the policy announced by Iranian authorities and the repeated approval given to support the detention of American diplomats as hostages translated private acts into acts of State, effectively receiving

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<sup>98</sup> CL-145, *supra* n.42, ILC Articles, Commentary to Article 11 ¶ 6.



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“the seal of official governmental approval” through “the decision to perpetuate” the situation.<sup>99</sup>

71. Similarly, the tribunal in *Ampal-American Israel Corp. v. Egypt* found that the Egyptian General Petroleum Corporation’s decision to terminate a natural gas sale was attributable to Egypt under ILC Article 11. The Minister of Petroleum was the chairman of the Egyptian General Petroleum Corporation and all the Corporation’s decisions were submitted to him for review. The tribunal held that the Minister of Petroleum’s “ratification” of the termination was attributable to Egypt.<sup>100</sup>

72. The *Bilcon v. Canada* tribunal also determined that “Article 11 would establish the international responsibility of Canada even if the JRP were not one of its organs.”<sup>101</sup> According to the tribunal, a government Minister had adopted the JRP’s essential findings in determining that the project in dispute should be denied under environmental laws: “the link between the findings and recommendations of the JRP and the Minister’s final decision would be sufficient to constitute an acknowledgement and adoption for the purposes of Article 11”<sup>102</sup>.

73. For the same reasons articulated by these tribunals, the electricity benefits are attributable to GNS, whose actions were more than an acknowledgement of the electricity benefits’ “factual existence.” Instead, GNS “ratified” the electricity measures

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<sup>99</sup> CL-210, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, International Court of Justice, Judgments [1980] ICJ 1; ICJ Reports 1980, p 3 [1980] ICJ Rep 3 ¶¶ 73, 74 (May 24, 1980).

<sup>100</sup> CL-234, *Ampal-American Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss ¶¶ 145-146 (Feb. 21, 2017).

<sup>101</sup> CL-104, *supra* n.43, *Bilcon* ¶ 322.

<sup>102</sup> CL-104, *supra* n.43, *Bilcon* ¶ 324.

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and, similar to the Government minister approvals in *Ampal* and *Bilcon*, took the final actions to ensure their passage.

### **C. GNS Is Responsible For The Electricity Deal Under ILC Article 8**

74. Alternatively, the electricity deal is attributable to Canada pursuant to ILC Article 8, which provides attribution for actions taken “on the instruction of, or under the direction or control of, [the] State in carrying out the conduct.” Under this provision, “[i]nvestment tribunals have recognized that sovereign instructions, directions or control in contractual relations with an investor constitute cogent evidence of sovereign interference.”<sup>103</sup> As Resolute explained in its Memorial and Canada concedes in its Counter-Memorial, these terms are “disjunctive”:<sup>104</sup> “In the text of article 8, the three terms ‘instructions’, ‘direction’ and ‘control’ are disjunctive; it is sufficient to establish any one of them.”<sup>105</sup>

75. The instructions required to satisfy the Article 8 test may be “a more general instruction which leaves it open as a method of fulfilling the instruction,” so that “acts which are considered incidental to the task in question or conceivably within its expressed ambit may be considered attributable to the state”.<sup>106</sup>

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<sup>103</sup> CL-238, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award ¶ 570 (Aug. 22, 2018).

<sup>104</sup> Resolute Memorial ¶ 176; Canada Counter-Memorial ¶ 175 (“While Article 8 expresses the three terms ‘instructions’, ‘direction’ and ‘control’ disjunctively ....”

<sup>105</sup> CL-145, *supra* n.42, ILC Articles, Commentary to Article 8 ¶ 7; see also CL-110, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award ¶ 303 (Mar. 10, 2014) (“*Tulip*”) (“Plainly, the words “instructions”, “direction” and “control” in Art 8 are to be read disjunctively. Therefore, the Tribunal need only be satisfied that one of those elements is present in order for there to be attribution under Art 8.)

<sup>106</sup> See CL-111, James Crawford, *State Responsibility: The General Part* at 145 (Cambridge University Press 2013).

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76. Canada attempts to distinguish *Bayindir v. Pakistan* (cited by Resolute<sup>107</sup>) as a “departure from the ‘effective control’ test” because the acts in question required “approval by the highest levels of the Pakistani government.”<sup>108</sup> But the same is true here: among other actions, “the highest levels of the” GNS government approved the July 20, 2012 letter instrumental to the NSUARB’s decision;<sup>109</sup> regulations making the Biomass Plant must run;<sup>110</sup> the [REDACTED] guaranteed PHP would not incur additional renewable energy costs;<sup>111</sup> and [REDACTED] for the mill.<sup>112</sup>

77. Here, GNS gave instructions to NSPI within the meaning of Article 8 to ensure an electricity rate passed. In addition to the actions set forth above in paragraphs 30-38 and 54-67, GNS: (1) recognized the importance of the electricity rate immediately after the mill closed;<sup>113</sup> (2) requested that NSPI initiate discussions with PWCC “as soon as they were selected” as the winning bidder;<sup>114</sup> (3) took an active role in crafting the electricity deal during negotiations by (among other things) providing work

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<sup>107</sup> Resolute Memorial ¶¶ 177-178.

<sup>108</sup> Canada Counter-Memorial ¶ 178.

<sup>109</sup> *Supra* ¶¶ 61-62 & n.85 (explaining [REDACTED]).

<sup>110</sup> R-225, Order in Council, No. 2013-12 (Jan. 17, 2013).

<sup>111</sup> C-210, *supra* n. 88, [REDACTED] ( [REDACTED] ).

<sup>112</sup> See C-182, *supra* n.35, [REDACTED] at CAN000002\_0004 [REDACTED] ).

<sup>113</sup> See C-123, Nova Scotia Legislature House of Assembly Debates and Proceedings Third Session at 3009-10 (Nov. 2, 2011).

<sup>114</sup> C-160, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Evidence of Nova Scotia Power, Inc. at 9 (NSUARB Apr. 2012). NSPI also noted that it was directed by the NSUARB “to work with PWCC to develop a pricing mechanism pursuant to the Load Retention Tariff.” *Id.*

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product and reviewing others' work product;<sup>115</sup> (4) hired an electricity expert and sponsored his testimony before the NSUARB;<sup>116</sup> (5) linked PHP's bailout package to the electricity deal;<sup>117</sup> and (6) had Premier Dexter personally contact NSPI's CEO during the rate negotiations.<sup>118</sup> Collectively, these acts demonstrate that GNS instructed, directed, or controlled the electricity deal.

78. Canada also cites a number of distinguishable decisions. The tribunal in *von Pezold v. Zimbabwe* determined that the Government "encouraged" a particular action but did not direct it.<sup>119</sup> The tribunal in *Electrabel v. Hungary* found similarly that Hungary "invit[ed]" a particular action but did not instruct it.<sup>120</sup> And the tribunal in *Tulip Real Estate v. Turkey* determined that there was "an absence of proof that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests."<sup>121</sup> All of these decisions found that the State did not provide sufficient direction to attribute the measure in question to State conduct.

79. Canada further relies on a World Trade Organization ("WTO") Panel ruling in an international trade dispute over Nova Scotia's same electricity measures, but the Panel acted according to international trade rules applicable only to states. The terms of art, "entrust and direct," may sound similar to ILC Article 8, but they do not have the

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<sup>115</sup> Resolute Memorial ¶ 181.

<sup>116</sup> Resolute Memorial ¶¶ 180-182, 184.

<sup>117</sup> Resolute Memorial ¶¶ 104-109; *supra* ¶¶ 47-48.

<sup>118</sup> Resolute Memorial ¶ 59.

<sup>119</sup> RL-121, *supra* n.45, *von Pezold* ¶ 448.

<sup>120</sup> RL-113, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.113 (Nov. 30, 2012).

<sup>121</sup> CL-110, *supra* n.105 *Tulip* ¶ 326.

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same meaning for international investment as they do for international trade, and the WTO Panel Report is not binding on Resolute, which was not and was not allowed to be a party.

80. The United States argued before the WTO Panel that GNS “entrusted and directed” the electricity rate because NSPI had a statutory duty to provide electricity. The Panel “observe[d] that the [United States Department of Commerce’s] finding that [GNS] entrusted or directed NSPI to provide electricity to all customers in the province is based overwhelmingly on the general service obligation that the USDOC read from Section 52 of the Public Utilities Act.”<sup>122</sup> Beyond the differences in the standard, Resolute is making arguments that the United States did not advance. Therefore, the WTO finding has no bearing on whether the electricity measures, for purposes of this arbitration, are attributable to GNS.

### **III. THE NOVA SCOTIA MEASURES VIOLATED ARTICLE 1105**

81. GNS knew that the Port Hawkesbury mill was not commercially viable and that the only private investor who considered operating the mill as a going concern was willing to do so only with the government’s help and assurances that the mill would become the lowest cost producer in the SC Paper market.

82. Documents produced by Canada also show that GNS knew that such help and assurances could be made only at a harmful cost to Resolute, the only foreign

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<sup>122</sup> R-238, *United States – Countervailing Measures on Supercalendered Paper from Canada*, Report of the Panel ¶ 7.50 (World Trade Organization July 5, 2018 ); see also *id.* ¶ 7.55 (“[t]he United States explained that the [United States Department of Commerce’s] financial contribution determination is not based on the discussion of Nova Scotia’s possible entrustment of NSPI to create an LRR....”).

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investor producing SC Paper in Canada. The Nova Scotia Measures would serve Nova Scotia's parochial interests at the expense of the foreign investor.

83. Despite knowing that the Nova Scotia Measures would be harmful to Resolute, Canada has provided no evidence to suggest that GNS took any steps to mitigate that harm.

84. The evidence demonstrates that the help and assurances provided by GNS to PHP were highly unusual, if not unique. Expert evidence from Mr. Alex Morrison of Ernst & Young confirms the extraordinary nature of the Nova Scotia Measures that were intended to resurrect PHP and put it in a better competitive position than Resolute in the SC Paper market.

85. GNS's knowing, intentional, and extraordinary measures to resurrect and advance PHP to the harm of Resolute in the SC Paper market were unfair, unjust, a violation of good faith, and a violation of the minimum standard of treatment under NAFTA's Article 1105.

86. Resolute responds first to the Article 1105 analytical framework presented by Canada in its Counter-Memorial—the standard under Article 1105, deference to government measures, Article 1108(7)—and then addresses Canada's arguments on the merits.

**A. The Standard To Be Applied Under Article 1105 Is Settled And Largely Undisputed**

87. Canada's arguments about the importance of recognizing the Free Trade Commission's interpretation of Article 1105; its warnings about "open-ended obligations" and "autonomous standards"; and its demands for proof of consistent and substantial state practice to establish a rule of customary international law, have been heard many

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times before by NAFTA Chapter 11 tribunals. They have been repeated by Mexico and the United States, either as respondents or in Article 1128 submissions. These arguments have not moved tribunals to construe Article 1105 as narrowly as Canada supposes or apparently would like.

88. The difficult questions regarding how to interpret the minimum standard of treatment under Article 1105 largely have been settled. A consensus has emerged among NAFTA Chapter 11 tribunals around the following propositions:

- a. The Free Trade Commission's Notes of Interpretation mean that "the treatment required under Article 1105(1) is fair and equitable treatment and full protection and security consistent with the minimum standard of treatment under customary international law."<sup>123</sup>
- b. The fair and equitable treatment standard is an obligation under customary international law,<sup>124</sup> and one that has evolved and will continue to evolve along with customary international law.<sup>125</sup>

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<sup>123</sup> CL-123, *Windstream v. Canada*, UNCITRAL, PCA Case No. 2013-22, Award ¶ 356 (Sept. 27, 2016) ("*Windstream*"); CL-121, *Chemtura v. Canada*, UNCITRAL, PCA Case No. 2008-01, Award ¶¶ 111, 115, 121-122 (August 2, 2010) ("*Chemtura*") (citing CL-122, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶¶ 116, 117, 125) (Oct. 11, 2002) ("*Mondev*").

<sup>124</sup> The fair and equitable treatment standard is an obligation under customary international law. CL-123, *supra* n.123, *Windstream* ¶ 357; CL-116, *Pope & Talbot v. Canada*, 40 ILM 258 (2001), Interim Award at 26 (June 26, 2000) ("*Pope & Talbot Interim Award*"); RL-170, *Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4, Award ¶ 152 (May 22, 2012) ("*Mobil Award*"); CL-101, *Merrill & Ring v. Canada*, ICSID Case No. UNCT/07/01, Award ¶ 211 (Mar. 31, 2010) ("*Merrill & Ring Award*") ("Canada has argued that the existence of the rule must be proven. But against the backdrop of the evolution of the minimum standard of treatment discussed above, the Tribunal is satisfied that fair and equitable treatment has become a part of customary law."); CL-118, *Cargill v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶¶ 266-305 (Sept. 18, 2009) ("*Cargill v. Mexico Award*") (citing CL-122, *supra* n.123, *Mondev* ¶ 121 & CL-130, *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award ¶ 178 (Jan 9, 2003)).

<sup>125</sup> CL-121, *supra* n.123, *Chemtura* ¶ 122 ("In line with *Mondev*, the Tribunal will take account of the evolution of international customary law in ascertaining the content of the international

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- c. Tribunals have said that state conduct that is egregious, unjust, arbitrary, grossly unfair, idiosyncratic, discriminatory, that exposes a claimant to sectional prejudice, or that violates due process would breach the obligation of fair and equitable treatment within the minimum standard of treatment under customary international law.<sup>126</sup>
- d. The determination of whether a respondent's conduct is "'unfair' or 'inequitable' in accordance with the customary international law minimum standard of treatment" must be determined "in the context of the facts of this particular case."<sup>127</sup>

89. Canada and Resolute appear to agree that these principles have emerged to frame the minimum standard of treatment under customary international law. Some

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minimum standard. Such inquiry will be conducted, as necessary, in analyzing each specific measure allegedly in breach of Article 1105 of NAFTA.”).

<sup>126</sup> CL-101, *supra* n.124, *Merrill & Ring Award* ¶ 208; CL-134, *Waste Management, Inc. v. Mexico*, ICISD Case No. ARB (AF)/00/3, Award ¶ 98 (Apr. 30, 2004) (“*Waste Management II*”); CL-118, *supra* n.124, *Cargill v. Mexico Award* ¶¶ 283-284; see also Resolute Memorial ¶¶ 240-241 (listing cases discussing standard).

<sup>127</sup> CL-123, *supra* n.123, *Windstream* ¶ 357; see also CL-121, *supra* n.123, *Chemtura* ¶ 123 (“[W]hether the treatment afforded to the Claimant’s investment was in accordance with the international minimum standard ... is an assessment that must be conducted *in concreto*.”); CL-122, *supra* n.123, *Mondev* ¶¶ 118, 127 (“A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these. In doing so, the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts....In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.”); CL-101, *supra* n.124, *Merrill & Ring Award* ¶ 210 (“What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness. Of course, the concepts of fairness, equitableness and reasonableness cannot be defined precisely: they require to be applied to the facts of each case.”), cited in CL-104, *supra* n.43, *Bilcon* ¶ 435.



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difference remains, however, over how unfair and inequitable the state treatment must be to constitute a breach of the minimum standard under Article 1105.

90. Canada prefers citing to tribunals such as *Glamis Gold v. United States* which, adopting a strict *Neer* standard, defined unfair and inequitable treatment by extreme situations and in hyperbolic terms.<sup>128</sup> Emphasizing adverbs and adjectives to precede the descriptions of what constitutes unfair and inequitable treatment, the *Glamis Gold* tribunal said that Article 1105 “requires an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination, or a manifest lack of reasons....”<sup>129</sup>

91. Subsequent tribunals and legal scholars have considered the *Glamis Gold* interpretation too narrow and extreme.<sup>130</sup> The *Bilcon v. Canada* tribunal held: “NAFTA tribunals have, however, tended to move away from the position more recently expressed in *Glamis*, and rather move towards the view that the international minimum standard has evolved over the years towards greater protection for investors.”<sup>131</sup> “NAFTA awards make it clear that the international minimum standard is not limited to

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<sup>128</sup> See Canada’s Counter-Memorial ¶ 285.

<sup>129</sup> CL-025, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award ¶ 627 (June 8, 2009).

<sup>130</sup> See CL-223, Margaret Clare Ryan, *Glamis Gold, Ltd. v. The United States and the Fair and Equitable Treatment Standard*, McGill Law Journal Vol. 56, No. 4 (June 2011) (“[The *Glamis* tribunal’s] reassertion of the *Neer* standard as the applicable threshold test for finding a violation of article 1105 represents a major deviation, which the tribunal did not fully justify, from NAFTA awards rendered after the FTC interpretation.”); see also CL-205, Roland Klager, *Fair and Equitable Treatment in International Investment Law* at 210 (Cambridge University Press (2011) (“[T]he [*Glamis Gold*] tribunal took an extremely narrow approach and required – in questionable exaggeration – ‘egregious and shocking’ state actions beyond mere illegality, ‘a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.’”).

<sup>131</sup> CL-104, *supra* n.43, *Bilcon* ¶ 435.

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conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection.”<sup>132</sup>

92. It is recognized that “any kind of unfairness does not violate the international minimum standard....The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.”<sup>133</sup> “At the same time, the international minimum standard exists and has evolved in the direction of increased investor protection precisely because sovereign states—the same ones constrained by the standard—have chosen to accept it.”<sup>134</sup>

93. The *Bilcon* tribunal cited approvingly the explanation of the tribunal in *Merrill & Ring v. Canada* that “[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention....What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.”<sup>135</sup>

94. Determining whether GNS’s conduct in this case may be considered unfair, inequitable, or otherwise a violation of the minimum standard of treatment under customary international law “is best done, not in the abstract, but in the context of the facts of this particular case, taking into account the indirect evidence of the content of

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<sup>132</sup> CL-104, *supra* n.43, *Bilcon* ¶ 433.

<sup>133</sup> CL-104, *supra* n.43, *Bilcon* ¶¶ 436, 437.

<sup>134</sup> CL-104, *supra* n.43, *Bilcon* ¶ 438.

<sup>135</sup> CL-104, *supra* n.43, *Bilcon* ¶ 435 (*citing* CL-101, *supra* n.124, *Merrill & Ring Award* ¶¶ 207, 208, 210, 213 and other NAFTA tribunal authorities).

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the customary international law minimum standard of treatment as evidenced in the decisions of other NAFTA tribunals.”<sup>136</sup>

95. The *Windstream* tribunal observed that the *Mondev* and *Pope & Talbot* tribunals approached the issue in similar fashion.<sup>137</sup> “[J]ust as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts.”<sup>138</sup>

### **B. Canada’s Arguments For Deference Are Exaggerated And Inappropriate Particularly As To The Nova Scotia Measures**

96. Canada argues that a “high measure of deference” must be given to the Nova Scotia Measures under international law because such deference is owed to “States when they make policy decisions within their territory.”<sup>139</sup> Canada cites the *Mesa Power* tribunal for the proposition that deference is owed to a State “when it comes to assessing how to regulate and manage its affairs.”<sup>140</sup>

97. The degree of deference, where appropriate, should not be exaggerated. The U.S. District Court for the District of Columbia—the federal court reviewing the claimant’s challenge of the *Mesa Power* award—explained that “the tribunal’s

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<sup>136</sup> CL-123, *supra* n.123, *Windstream* ¶ 358.

<sup>137</sup> CL-123, *supra* n.123, *Windstream* ¶ 359.

<sup>138</sup> CL-123, *supra* n.123, *Windstream* ¶ 362. The *Windstream* tribunal went on to find that Canada was responsible for the Government of Ontario’s violation of the minimum standard of treatment under Article 1105 when it failed “to take the necessary measures ... within a reasonable period of time after the imposition of the moratorium [on offshore wind energy projects] to bring clarity to the regulatory uncertainty surrounding the status and the development of [the investor’s proposed wind energy project].” CL-123, *supra* n.123, *Windstream* ¶ 380.

<sup>139</sup> Canada Counter-Memorial ¶¶ 272, 287.

<sup>140</sup> Canada Counter-Memorial ¶ 287.

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‘deference’ merely amounted to an acknowledgment that a government is entitled to make policy choices that are not perfectly rational.”<sup>141</sup> Some international tribunals have referred to this principle as having a “measure of appreciation” for the regulatory and policy decisions that states make with respect to constituents within their own territory.

98. The *Mesa Power* tribunal cited the following paragraph from *Bilcon v. Canada* to describe the degree of deference owed to the State:

Even when state officials are acting in good faith there will sometimes be not only controversial judgments, but clear-cut mistakes in following procedures, gathering and stating facts and identifying the applicable substantive rules. State authorities are faced with competing demands on their administrative resources and there can be delays or limited time, attention and expertise brought to bear in dealing with issues. The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.<sup>142</sup>

99. The *Mesa Power* tribunal also cited *Chemtura Corp. v. Canada* as “recognizing, in the context of a review process evaluating the environmental and public health impacts of a pesticide, that ‘it is not for the Tribunal to judge the correctness or adequacy of the scientific results.’”<sup>143</sup> There is no dispute that the minimum standard of treatment under customary international law does not apply strict liability for policy imperfections.

100. Still, deference is not “unlimited”: “it is equally clear that deference to the primary decision-makers cannot be unlimited, as otherwise a host state would be

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<sup>141</sup> CL-206, *Mesa Power Group LLC v. Government of Canada*, 255 F. Supp. 3d 175, 187 (D.D.C. 2017).

<sup>142</sup> See CL-108, *Mesa Power Group LLC v. Canada*, PCA Case No. 2012-17, Award ¶ 505 (March 24, 2016) (“*Mesa Power*”) (citing CL-104, *supra* n.43, *Bilcon* ¶¶ 437, 440).

<sup>143</sup> CL-108, *supra* n.142, *Mesa Power* ¶ 505 n.236 (citing CL-121, *supra* n.123, *Chemtura* ¶ 153).

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entirely shielded from state responsibility and the standards of protection contained in BITs would be rendered nugatory.”<sup>144</sup>

101. Resolute’s claim is not about a quest for perfection in provincial regulations, nor a complaint about civil servants who may have delayed some action, overlooked an issue, or stumbled under the weight of normal government administration.

102. Resolute’s claim concerns measures taken deliberately and rationally by the government when it knew and apparently intended that those measures would harm Resolute for the benefit of its own provincial champion, a company that already had failed the test of viability in the declining commercial market for SC Paper.

103. The same experts engaged by Canada and GNS in this case were engaged by GNS to study the impact on the SC Paper market of restarting the mill at Port Hawkesbury more than seven years ago. The [REDACTED]

[REDACTED]

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<sup>144</sup> CL-232, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award ¶ 584 (Apr. 4, 2016).

<sup>145</sup> R-161, [REDACTED] at 8, 53 (July 23, 2012) (“[REDACTED]”).

<sup>146</sup> *Id.* at 10, 53.

<sup>147</sup> *Id.* at 9, 15.

<sup>148</sup> *Id.* at 6, 53.

<sup>149</sup> *Id.* at 10.

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104. GNS knew the Port Hawkesbury mill was commercially unviable on its own; that private investors would not participate in the mill's resurrection without assurances of assistance that would make the mill the lowest cost producer in the market; and that it would have to take actions detrimental to Resolute in order to make PHP the market winner and champion. The government's decisions were made consciously, with appreciation for the consequences. No matter how high the deference, government measures in such circumstances are not immune from scrutiny with respect to the obligations of NAFTA's Chapter 11.

105. Deference also must be principled to be appropriate. Arbitration tribunals have found deference appropriate for regulatory measures taken within the geographical and jurisdictional authority of the government.

106. The Nova Scotia Measures exceeded those bounds and, therefore, should be given very limited deference, if any. They were not provincial regulatory measures within the normal geographic and jurisdictional authority of the government, but instead were measures taken to favor and confer competitive advantages on PHP in its sales of SC Paper in markets outside of Nova Scotia. The Nova Scotia Measures were taken out of self-interest rather than the public interest. They conferred a disproportionate advantage on the company relative to what might be necessary to support furloughed mill employees. Inasmuch as Canada claims that the loans and grants were subsidies, Canada is precluded from claiming deference for those measures because Canada then would benefit unfairly from violating its obligation to report those measures as subsidies to the WTO.

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### 1. No Deference Is Warranted For Conferring Competitive Advantages On PHP's Performance Outside Of Nova Scotia

107. Canada asserts that a “high measure of deference” is owed to “States when they make policy decisions within their territory.”<sup>150</sup> Tribunals have described deference within the parameters of the sovereign powers of a State to administer policies and regulate activities within its own jurisdictional and geographic territory, particularly when those matters require technical expertise.

108. The *Mesa Power* tribunal said, “when defining the content of Article 1105 one should further take into consideration that international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs”<sup>151</sup>

109. The *S.D. Myers* tribunal said that a determination of a violation of Article 1105 “must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”<sup>152</sup>

110. In *Mercer v. Canada*, deference was owed due to “extensive and complex technical matters calling for specialist judgment to be exercised by BC Hydro and the BCUC at the particular time.”<sup>153</sup> The *Chemtura* panel similarly based deference on the principle of technical expertise in the scientific results of environmental and public health reviews.<sup>154</sup>

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<sup>150</sup> Canada Counter-Memorial ¶¶ 272, 287.

<sup>151</sup> CL-108, *supra* CL-108, *supra* n.142, *Mesa Power* ¶ 505.

<sup>152</sup> RL-059, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award ¶ 263 (Nov. 13, 2000) (“*S.D. Myers* Partial Award”).

<sup>153</sup> RL-122, *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award ¶ 7.33 (Mar. 6, 2018).

<sup>154</sup> See, e.g., CL-121, *supra* n.123, *Chemtura* ¶¶ 133-163.

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111. This case differs from those in which a government was applying technical expertise to regulate activities or manage internal affairs within its own territory.

112. GNS was not exercising technical expertise when it provided loans and other assistance to make PHP the lowest cost producer in the SC Paper industry and disrupt the competitive standing of participants in the market. Nor were the Nova Scotia Measures regulating internal affairs within GNS's own borders.

113. The markets for buying SC Paper are located outside of Nova Scotia's territory. The Nova Scotia Measures were intended to confer a competitive advantage on a Nova Scotia mill in its competition against a foreign investor elsewhere in Canada and in the United States, where the SC Paper markets were located.

114. When GNS intervened in the SC Paper market, it put Resolute's SC Paper mills at a competitive disadvantage to Nova Scotia's champion in the continental market. Nova Scotia distorted market competition in favor of one company, domestic, over another, a foreign investor. The Nova Scotia Measures went beyond the scope of jurisdictionally and geographically limited sovereign powers for which judicial authorities give deference.

115. NAFTA does not authorize GNS to pick the winners in a free marketplace for Canada, or more broadly, North America. Such authority would contravene one of the fundamental objectives of NAFTA Article 102 to "promote conditions of fair competition in the free trade area."<sup>155</sup>

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<sup>155</sup> Canada has called some of these measures "subsidies" in this proceeding, while denying they were subsidies at the WTO. See *infra* ¶¶ 276-290. Even accepting Canada's "subsidy" characterization here, a government's subsidy policies are not given deference in WTO jurisprudence, nor in domestic litigation of subsidy disputes.



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116. Canada publicly “reaffirm[ed] the Government of Canada’s commitment to a rules-based business environment that facilitates free trade and encourages investment”.<sup>156</sup> The GNS interventions in the free market, and Canada’s defense of them in these proceedings, undermine that reaffirmation of NAFTA’s public purpose and must not be rewarded with deference.

### 2. No Deference Is Warranted For Nova Scotia Measures That Are Not Taken In The Public Interest

117. Canada argues that the Nova Scotia Measures were taken in the “public interest”<sup>157</sup> and, therefore, are owed deference.<sup>158</sup> Canada describes the GNS public interest as including the economic and environmental importance of Nova Scotia’s forests in Nova Scotia;<sup>159</sup> the jobs of employees who worked at the PHP mill;<sup>160</sup> and the interest in fostering clean energy policies.<sup>161</sup> In addition to these motivations, GNS had incentives to resuscitate the enterprise for the provincial tax revenues it would generate, and to assure for the local public utility its most important customer.

118. Canada even suggests that Resolute is to blame for creating these public interest needs when it had the temerity to close the Bowater Mersey newsprint mill in Nova Scotia because it was not commercially viable, with or without government assistance.<sup>162</sup>

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<sup>156</sup> See C-311, Foreign Affairs and International Trade Canada Issues Statement on AbitibiBowater Settlement (Aug. 24, 2010).

<sup>157</sup> Canada Counter-Memorial ¶¶ 2, 9, 110, 310.

<sup>158</sup> Canada Counter-Memorial ¶¶ 272, 287.

<sup>159</sup> Canada Counter-Memorial ¶¶ 18-23.

<sup>160</sup> Canada Counter-Memorial ¶ 70.

<sup>161</sup> Canada Counter-Memorial ¶ 24.

<sup>162</sup> Canada Counter-Memorial ¶ 28.

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119. The core of the “public interest” advanced by Canada is that GNS had a parochial interest in resurrecting and promoting its own SC Paper production over the interests of Resolute in the declining SC Paper market. A “public interest” to justify measures conferring a competitive advantage on PHP’s business to the detriment of Resolute’s business more accurately should be described as parochial “self-interest” at the expense of foreign investors and other Canadian provinces where their investments are located.

120. If narrow, parochial self-interest were the equivalent of a public interest, a public interest defense would swallow investor-state claims whole. Under Canada’s public interest theory here, Newfoundland would have been justified in its expropriation of more than \$130 million in AbitibiBowater’s assets in hydroelectric facilities, surface rights and a paper mill because the province would have benefited from taking those assets.<sup>163</sup> Canada would have been justified in banning the export of hazardous chemical compounds in *S.D. Myers* because the government had a parochial self-interest in ensuring that PCB waste would be processed in Canada rather than in the United States by an American foreign investor.

121. GNS should not be accorded deference because it recognized that the Nova Scotia Measures would enable it to serve its own provincial enterprise, PHP, at the expense of Resolute’s enterprises located elsewhere in Canada, outside Nova

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<sup>163</sup> Canada settled AbitibiBowater’s NAFTA Chapter 11 claim arising from the Newfoundland expropriation in August 2010. C-312, *AbitibiBowater Inc. v. Government of Canada*, ICSID, Consent Award (Dec. 15, 2010).

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Scotia;<sup>164</sup> or because it viewed the forest products industry in Nova Scotia as more important than the forest products industry in Québec; or because the job losses experienced in Nova Scotia due to high costs and a lack of market competitiveness could be shifted to Resolute's mills in Québec;<sup>165</sup> or because the Province could support its own tax revenues by keeping PHP afloat.<sup>166</sup>

122. The measure of the public interest should coincide with the scope of the government's measures and intervention. The Nova Scotia Measures were extraterritorial in purpose and effect, impacting adversely Québec and other parts of Canada. Robbing Resolute's SC Paper mills in Québec to pay PHP's mill in Nova Scotia should not be considered policy in the public interest merely because such opportunistic behavior benefits GNS and its own constituents.

123. Resolute's investments are in Canada. GNS knew from the beginning of its interest in resurrecting Port Hawkesbury that its measures taken in Nova Scotia would impact Resolute's Canadian investments adversely. Canada now defends those measures as in the public interest, forsaking the interests of the rest of Canada for the presumed interest of a single province. In international law, the interest of a constituent element does not overcome the interests of the greater whole.

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<sup>164</sup> R-161, *supra* n.2, [REDACTED] at 10 ("[REDACTED]").

<sup>165</sup> See R-016, Resolute Press Release, *Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Quebec* (Sept. 2, 2014).

<sup>166</sup> See C-194, Statement and Backgrounder, Nova Scotia Premier's Office (Sept. 22, 2012) (referencing additional revenue GNS will earn from taxes).

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### **C. Canada Wrongly Claims That The Procurement And Subsidies Exceptions in Article 1108(7) Apply To Article 1105**

124. Canada contends that Article 1108(7) demonstrates that “subsidies or grants provided to a domestic investor but not to a foreign investor” cannot be found as a breach of the minimum standard of treatment, including fair and equitable treatment, under Article 1105. Canada’s theory is that Article 1108(7)’s explicit exception of subsidies from the Article 1102 national treatment obligation must mean, intuitively and implicitly, that subsidies could never be the subject of claims under Article 1105 or any other Chapter 11 obligation. To reach this conclusion, Canada must both misread the text of Article 1108 and mischaracterize Resolute’s claims.

#### **1. The NAFTA Parties Made No Procurement Or Subsidies Exceptions Or Reservations To Article 1105**

125. The textual structure of NAFTA’s Chapter 11 does not support Canada’s argument. The NAFTA Parties were deliberate in their drafting of exceptions to claims under NAFTA Chapter 11. Article 1108 lists multiple reservations and exceptions, and the NAFTA Parties were selective as to which obligations were affected by any given exception.

126. The first exception in Article 1108(1) for existing, non-conforming measures applies only to claims under Articles 1102, 1103, 1106 and 1107. The exception in Article 1108(5) for measures derogating from Article 1703 obligations with respect to Intellectual Property National Treatment applies only to Articles 1102 and 1103. The exception in Article 1108(6) for “treatment accorded by a Party pursuant to agreements, or with respect to sectors, set out in its Schedule to Annex IV,” applies only to Article 1103. The exceptions in Article 1108(7)(a) for procurement and (b) for subsidies apply only to Articles 1102, 1103 and 1107.

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127. The text of Article 1108, among other examples in NAFTA, demonstrates that the Parties were deliberate in their identification of Articles that would be exempt from Chapter 11 claims, and they made no exception for Article 1105. Logically, no exception should be made because Article 1105 contains the “minimum standard of treatment” of foreign investors. It is the floor of conduct beneath which no government should descend.

128. When a government has agreed to ensure foreign investors that they will receive the minimum standard of treatment, prohibiting government “conduct that is egregious, unjust, arbitrary, grossly unfair, idiosyncratic, discriminatory, that exposes a claimant to sectional prejudice, or that violates due process,” it would be odd and illogical to assume that the government nevertheless would condone such conduct when cloaked as measures taken in the name of procurement or subsidies.

### 2. Canada Distracts From Resolute’s Article 1105 Claim By Arguing It Is Only About Discrimination

129. Canada contends that Resolute’s Article 1105 claim is only a relabeled Article 1102 claim for denial of national treatment, and that discriminatory treatment is permissible under the minimum standard of treatment in Article 1105. Canada is mistaken on both points.

130. Canada has mischaracterized Resolute’s Article 1105 claim as an Article 1102 complaint that Resolute should have gotten money from GNS but did not because it was an American company.<sup>167</sup> Canada has even advanced a story of Resolute’s closure of the Bowater Mersey mill in Nova Scotia in furtherance of this

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<sup>167</sup> See Canada Counter-Memorial ¶¶ 288-290.

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mischaracterization, positing that Resolute could have gotten money for its Bowater Mersey newsprint mill in Nova Scotia and, therefore, was in similar circumstances with PHP and did not experience discrimination.

131. Resolute's Article 1102 claim is that GNS accorded PHP's owners and their SC Paper mill treatment that was more favorable than it accorded Resolute and its SC Paper mills. Resolute does not claim that GNS needed to give Resolute money for its SC Paper mills but, instead, that it was wrong for GNS to give PHP competitive assistance in the SC Paper market knowing it would not accord Resolute the same treatment in that same market.<sup>168</sup> That claim is separate and distinct from Resolute's Article 1105 claim.

132. Resolute's Article 1105 claim goes beyond the differential treatment identified in the Article 1102 claim. GNS knew there were only four other producers of SC Paper in the North American market, which was a market in secular decline. It knew that PHP's predecessor had not been competitive and could not be competitive in that market on freely competitive terms. It knew that PHP could not be resuscitated without massive assistance sufficient to make it the lowest-cost producer in the market. It knew that the resuscitation of PHP on those terms would be harmful specifically to Resolute, but it did so anyway, putting in PHP's grasp the means to make it the leader in the market at Resolute's expense.

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<sup>168</sup> Canada's introduction of Resolute's closure of the Bowater Mersey mill is an irrelevant distraction. Whether Nova Scotia would have given some smaller amount of assistance, insufficient to maintain Resolute's newsprint mill in Nova Scotia, has nothing to do with whether Nova Scotia conferred advantages on PHP to favor its SC Paper production above other SC Paper producers in the Canadian and North American SC Paper markets. See *infra* ¶¶ 318-340.

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133. PHP was not viable in the market on its own terms. Nevertheless, GNS brought PHP out of bankruptcy and propped it up as its national champion knowing that it was doing so to the harm and detriment of Resolute's Canadian investments.

134. These actions, even if not "discriminatory," were egregious, unjust, inequitable and a violation of the minimum standard of treatment under Article 1105 that exists independent of Resolute's claim that Nova Scotia provided more favorable treatment to a domestic investor in violation of Article 1102.

135. The *S.D. Myers* tribunal explained that "the 'minimum standard' provision is necessary to avoid what otherwise might be a gap....The 'minimum standard' is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner."<sup>169</sup>

136. Canada also contends that discriminatory treatment is permissible under Article 1105, without explaining how discriminatory treatment comports with the minimum standard of treatment, which expressly includes the assurance of "fair and equitable treatment."<sup>170</sup> To the extent that the Nova Scotia Measures were "discriminatory" in ways not otherwise cognizable by Article 1102, such treatment still falls below the floor of the minimum standard of treatment of foreign investors under Article 1105.

137. NAFTA Chapter 11 tribunals have identified "discriminatory conduct" as grounds for a violation of the minimum standard of treatment. The tribunal in *Merrill &*

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<sup>169</sup> RL-059, *supra* n.152, *S.D. Myers* Partial Award ¶ 259.

<sup>170</sup> Canada waived the argument that "fair and equitable treatment" does not apply to "subsidies" when it represented to the WTO that there were no Nova Scotia subsidies for PHP. See *infra* ¶¶ 276-311.

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*Ring v. Canada* defined a breach of the minimum standard of treatment as “[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process,” observing that such conduct “has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention.”<sup>171</sup>

The tribunal in *Mobil v. Canada* explained that:

[T]he fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.<sup>172</sup>

The tribunal in *Loewen v. United States* acknowledged that discrimination and sectional prejudice in legal proceedings are “clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.”<sup>173</sup> The tribunal in *S.D. Myers v. Canada* found that Canada’s policies and measures to ensure that hazardous PCB waste “should be disposed of...in Canada by Canadians” had breached Canada’s obligations under both Article 1102 and Article 1105, illustrating that discriminatory treatment may violate Article 1105.<sup>174</sup>

138. Other investment arbitration tribunals have found discriminatory conduct to be a breach of fair and equitable treatment. The *Lauder v. Czech Republic* tribunal stated that “most of the arguments denying the existence of any arbitrary and discriminatory measure from the Czech Republic as from 1996 also apply to the

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<sup>171</sup> CL-101, *supra* n.124, *Merrill & Ring Award* ¶ 208.

<sup>172</sup> RL-170, *supra* n.124, *Mobil Award* ¶ 152.

<sup>173</sup> RL-057, *Loewen v. United States*, ICSID Case No. ARB (AF)/98/3, Award ¶¶ 135-137 (June 26, 2003).

<sup>174</sup> RL-059, *supra* n.152, *S.D. Myers Partial Award* ¶¶ 169-171, 265-269.



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Respondent's compliance with the obligation to provide fair and equitable treatment."<sup>175</sup>

The tribunal in *CMS Gas Transmission Co. v. Argentina* stated that "[t]he standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment."<sup>176</sup> The *Saluka Investments BV v. Czech Republic* tribunal held that "[t]he standard of 'reasonableness' has no different meaning in this context than in the context of the 'fair and equitable treatment' standard with which it is associated; and the same is true with regard to the standard of 'non-discrimination.'"<sup>177</sup> And the tribunal in *Parkerings-Compagniet AS v. Lithuania* explained that "[v]arious tribunals have held that a discriminatory conduct is a violation of the standard of the fair and equitable treatment."<sup>178</sup>

139. Resolute does not contend that Article 1105 requires host governments to treat domestic and foreign investments identically. Such an obligation would go beyond "fair and equitable treatment." But a host government may not knowingly and unreasonably adopt measures to harm a foreign investment for the sake of advancing its own national or provincial interests.

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<sup>175</sup> See, e.g., CL-213, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award ¶¶ 237, 293-294, 295 (Sept. 3, 2001).

<sup>176</sup> CL-133, *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award ¶ 290 (May 12, 2005).

<sup>177</sup> CL-216, *Saluka Investments BV v. Czech Republic*, UNCITRAL, PCA Case No. 2001-04 Partial Award ¶¶ 307, 460 (Mar. 17, 2006).

<sup>178</sup> RL-168, *Parkerings-Compagniet AS v. Lithuania*, ICSID Arbitration Case No. ARB/05/8, Award ¶¶ 280 and 287 (Sept. 11, 2007). The tribunal in *MTD v. Chile* noted that Judge Steven Schwebel submitted an opinion stating that "fair and equitable treatment" is "a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination, and proportionality." CL-215, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 Award ¶ 109 (May 25, 2004).

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D. **Canada Claims Incorrectly The Nova Scotia Measures Are Not Unfair Or Egregious**

140. Canada argues that “[n]othing the GNS did remotely approaches the type of egregious, manifestly arbitrary, or grossly unfair conduct so as to fall below the accepted international standards and violate NAFTA Article 1105.”<sup>179</sup> Canada’s argument is incorrect.

141. GNS knew, from the [REDACTED] [REDACTED]. [REDACTED]. [REDACTED]. GNS, regardless of the damage inflicted on others, decided to provide the bailout package that PWCC/PHP demanded to restart the mill.

142. Canada’s other expert, Peter Steger, confirms the importance of the bailout package. Based on his analysis, [REDACTED] [REDACTED], the mill would not have survived without GNS’s assistance. And Mr. Steger’s analysis likely discounts the value of certain benefits, such as the electricity measures, the property tax discount, the Ramp-Up Agreement, and the \$1 billion in tax losses that PWCC was able to apply in part to assets located outside of Nova Scotia.

143. Expert evidence from Mr. Alex Morrison of Ernst & Young confirms the extraordinary nature of the bailout package. Mr. Morrison explains that the assistance was “unique in the context of other CCAA cases” because of the comprehensiveness of

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<sup>179</sup> Canada Counter-Memorial ¶ 17.

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the Nova Scotia Measures and the Province's desire to make PHP the national champion.<sup>180</sup>

1. GNS Knew It Would Harm Resolute Before Giving PHP The Bailout Package

144. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 181 [REDACTED]

[REDACTED] 182

145. [REDACTED]

[REDACTED] 183 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 184

146. [REDACTED]

[REDACTED]

[REDACTED]

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<sup>180</sup> See Expert Report of Alex Morrison of Ernst & Young ¶ 89 (December 6, 2019) (“CWS-EY”).

<sup>181</sup> R-161, *supra* n.2, [REDACTED] at 6.

<sup>182</sup> R-161, *supra* n.2, [REDACTED] at 10 (“[REDACTED]”).

<sup>183</sup> R-161, *supra* n.2, [REDACTED] at 9.

<sup>184</sup> R-161, *supra* n.2, [REDACTED] at 9.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>185</sup> As Dr. Kaplan explained in his expert report, “[REDACTED]

[REDACTED]

[REDACTED]<sup>186</sup>

147. [REDACTED]

[REDACTED]<sup>187</sup> [REDACTED]

[REDACTED]<sup>188</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>189</sup>

148. GNS knew from Pöyry about the potential effects of Port Hawkesbury on Resolute but, nonetheless, proceeded to provide PWCC/PHP with the full and complete bailout package. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>185</sup> R-161, *supra* n.2, [REDACTED] at 53.

<sup>186</sup> Expert Report of Seth Kaplan ¶ 25 (Dec. 6, 2019) (“CWS-Kaplan-2”).

<sup>187</sup> R-161, *supra* n.2, [REDACTED] at 38.

<sup>188</sup> R-161, *supra* n.2, [REDACTED] at 33.

<sup>189</sup> R-161, *supra* n.2, [REDACTED] at 38.

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[REDACTED],<sup>190</sup> [REDACTED]

[REDACTED]<sup>191</sup>

149. Canada, until filing its Response Memorial, withheld production of the [REDACTED].<sup>192</sup> Canada had to know that the [REDACTED] constitutes a detailed admission that the Port Hawkesbury restart would be possible only and entirely through the Nova Scotia Measures and necessarily would harm Resolute.

150. Additional documents produced by Canada show GNS knew that it would be harming SC Paper producers by resurrecting the defunct Port Hawkesbury mill. For example, PWCC stated that “[REDACTED] [REDACTED]”<sup>193</sup>

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<sup>190</sup> See C-334, [REDACTED] (July 24, 2012).

<sup>191</sup> See C-333, [REDACTED]. The [REDACTED] and [REDACTED] (R-161 and R-146) were not the only reports worked on or sought to prepare for GNS. In November 2011, [REDACTED] C-321. On December 1, 2011, [REDACTED] prepared a report entitled [REDACTED] C-322. In June 2012, [REDACTED] pitched for further work regarding [REDACTED] C-332. In August 2012, GNS was considering [REDACTED] C-341. On December 5, 2012, [REDACTED] prepared a report entitled [REDACTED] C-351. In August 2013, [REDACTED] were helping to pitch for more work regarding [REDACTED] C-354.

<sup>192</sup> R-161, *supra* n.2, the [REDACTED] should have been produced in response to Resolute’s First Document Request 28, which sought “Business plans and financial/economic (or similar) analyses and related documents (including projections and supporting data/documents) relating to PHP/ PWCC provided to GNS/GOC and/or prepared by or on behalf of GNS/GOC.”

<sup>193</sup> C-325, [REDACTED] at CAN000704\_003 (Dec. 13, 2011).

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2. Canada's Expert Evidence Demonstrates PHP Could Not Have Reopened Profitably But For The Nova Scotia Measures

151. Mr. Steger's report confirms that PHP would not have reopened but for the Nova Scotia Measures. His report also confirms, consistent with Resolute's analysis, that the mill's potential profitability was low under optimal market conditions. This evidence demonstrates that the Nova Scotia Measures are "the type of egregious, manifestly arbitrary, or grossly unfair conduct so as to fall below the accepted international standards and violate NAFTA Article 1105."

152. According to Mr. Steger's analysis, PHP projected a [REDACTED]  
[REDACTED]  
[REDACTED]<sup>194</sup> He then "segregated the [REDACTED]  
[REDACTED] into two groups": (1) [REDACTED] attributed to the Nova Scotia Measures; and (2) [REDACTED] attributed to PWCC's own efforts and expertise.<sup>195</sup> But for the [REDACTED], however, the [REDACTED] would have been irrelevant.

153. Mr. Steger also analyzed PHP's [REDACTED]  
[REDACTED]  
[REDACTED] (see Schedule 29), [REDACTED]  
[REDACTED]  
[REDACTED]<sup>196</sup> Mr. Steger states

<sup>194</sup> See Expert Report of Peter Steger ¶¶ 106, 109 (Apr. 18, 2018) ("Steger Report").

<sup>195</sup> Steger Report ¶ 109.

<sup>196</sup> Steger Report ¶ 107. The [REDACTED] 2014-15. Steger Report Schedule 29 at p. 91.

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this [REDACTED] is “proximate roughly to the [REDACTED] that PWCC projected....”<sup>197</sup>

154. Mr. Steger concluded that PHP’s “financial position would have been [REDACTED] from an estimated annual [REDACTED] for PM2 under NewPage to generating [REDACTED] after implementing the various management-derived initiatives contemplated solely by PWCC and before any assistance derived from the Nova Scotia Measures.”<sup>198</sup>

155. Mr. Steger’s expert report demonstrates that PHP would not have survived but for the Nova Scotia Measures. According to his analysis, the mill had [REDACTED] of: [REDACTED].<sup>199</sup>

But for the [REDACTED] Mr. Steger attributed to GNS, PHP’s EBITDA would have been [REDACTED] between 2013-15: [REDACTED] [REDACTED]<sup>200</sup> PHP’s net income (before taxes), absent the Nova Scotia Measures, is [REDACTED] (not including 2012) of [REDACTED] during 2013-15.<sup>201</sup>

156. Mr. Steger notes that [REDACTED]  
[REDACTED]  
[REDACTED]

<sup>197</sup> Steger Report ¶ 108.

<sup>198</sup> Steger Report ¶ 110.

<sup>199</sup> Steger Report Schedule 29 at p. 91. According to Mr. Steger’s report, PHP [REDACTED] before any consideration of the GNS benefits.

<sup>200</sup> These losses do not include the [REDACTED].

<sup>201</sup> Steger Report ¶ 113; Steger Report Schedule 25 at p. 79.

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[REDACTED] <sup>202</sup> [REDACTED]

[REDACTED]

[REDACTED] <sup>203</sup> [REDACTED]

[REDACTED]

157. [REDACTED]

[REDACTED]

[REDACTED] <sup>204</sup> [REDACTED] <sup>205</sup> [REDACTED]

[REDACTED]

[REDACTED]

158. Still lauding PHP's innovative cost savings, Mr. Steger's report [REDACTED]

[REDACTED]. Consequently, he

[REDACTED] PHP's EBITDA:

- According to Schedule 28B in his report (on page 86), Mr. Steger attributes [REDACTED] property tax reduction [REDACTED] [REDACTED].” But that reduction was only \$1.3 million<sup>206</sup> and, regardless, is a measure attributable to a government and not PWCC.

<sup>202</sup> Steger Report ¶ 111 (citing C-109, [REDACTED] at RFP0004981 ([REDACTED])).

<sup>203</sup> See Steger Report ¶ 110.

<sup>204</sup> C-109, *supra* n.202, [REDACTED] at RFP0004963; see also C-119, [REDACTED] at RFP0011525 ([REDACTED]).

<sup>205</sup> C-109, *supra* n.202, [REDACTED] at RFP0004963; see also C-119, *supra* n.204, [REDACTED] at RFP0011524.

<sup>206</sup> See Canada Counter-Memorial ¶ 133.



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- Mr. Steger attributes [REDACTED] for a new power rate [REDACTED].<sup>207</sup> As detailed above,<sup>208</sup> that power rate reduction must be attributed to GNS.
- Mr. Steger's analysis provides a [REDACTED] for [REDACTED] that he attributes to [REDACTED].<sup>209</sup> But this figure neither accounts for [REDACTED] of funding from PHP's Outreach Agreement with GNS (which paid PHP \$3.8 million per year for ten years for certain forestry activities)<sup>210</sup> nor the additional benefits PHP received through the Forest Utilization License Agreement with Canada.<sup>211</sup>

159. In total, Mr. Steger attributes [REDACTED] [REDACTED]. Properly attributed, PHP's EBITDA, absent the Nova Scotia Measures, would have been [REDACTED]

[REDACTED]<sup>212</sup> [REDACTED], [REDACTED]

[REDACTED]<sup>213</sup> Based upon [REDACTED] there is no way the Port Hawkesbury mill would have been able to operate but for the Nova Scotia Measures.

160. As PWCC explained to its benefactor, 2012 [REDACTED] [REDACTED]

<sup>207</sup> Steger Report Schedule 28B at page 86. This benefit, as discussed elsewhere, had [REDACTED] PHP's EBITDA.

<sup>208</sup> See *supra* ¶¶ 25-80.

<sup>209</sup> Steger Report Schedule 28B at page 86.

<sup>210</sup> See Resolute Memorial ¶ 94. Mr. Steger's attributes [REDACTED] Steger Report Schedule 28B at page 86.

<sup>211</sup> See Resolute Memorial ¶¶ 95-96.

<sup>212</sup> As before, this total does not consider PHP's [REDACTED] the effects of any Nova Scotia Measures during this time period.

<sup>213</sup> C-325, *supra* n.205, [REDACTED] at CAN000704\_0001.

[REDACTED]

[REDACTED]<sup>214</sup>

161. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>215</sup>

According to PWCC, every part of the package was indispensable, and the deal was possible only if PHP would become the lowest cost producer.

3. Canada's Expert Also Discounts The Full Benefit Of PHP's Electricity Package Including The Biomass Plant

162. Mr. Steger and Canada fail to account for the "full benefit" of the electricity deal PWCC received for the Port Hawkesbury mill. PHP saved over [REDACTED] from 2013-15 (an average of [REDACTED] per year),<sup>216</sup> in comparison to payments at the rate NewPage-Port Hawkesbury would have had to make.<sup>217</sup>

163. NewPage-Port Hawkesbury paid \$64.20/MWh in 2011,<sup>218</sup> and Mr. Steger acknowledges that NewPage-Port Hawkesbury's rate would have increased in 2013-

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<sup>214</sup> C-324, [REDACTED] at CAN000451\_0002 (Dec. 9, 2011).

<sup>215</sup> C-345, [REDACTED] at CAN000439\_0005 (September 12, 2012).

<sup>216</sup> Resolute Memorial ¶¶ 118-120.

<sup>217</sup> Mr. Steger contends that PHP saved only [REDACTED] per year. He fails to consider the increased rates the mill would have had to pay in 2012 and beyond without the new deal.

<sup>218</sup> See Steger Report ¶ 100 n.107; see also Canada Counter-Memorial ¶ 162 n. 318.

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2015.<sup>219</sup> Nonetheless, to minimize the impact of the electricity deal, he projected the 2011 rate, apparently because the NSUARB supposedly “deferred” on whether to implement the new rate for NewPage-Port Hawkesbury.<sup>220</sup>

164. The NSUARB’s 2011 decision applied explicitly to both NewPage-Port Hawkesbury and to Bowater Mersey.<sup>221</sup> The so-called “deferral” by the NSUARB concerned whether the Port Hawkesbury mill’s new ownership was entitled to a reduced electricity rate:

When the owner is identified, provisions of the LRT, as proposed by NewPage, should be followed in that the new company should apply to NSPI who would then come to the Board. The focus of any examination by NSPI and the Board would be whether the mill and its new owner continue to meet the necessity test. In saying that, the Board believes that the LRR being approved in this Decision would have been an appropriate LRR for NewPage, had it continued to operate the mill.<sup>222</sup>

165. PHP’s 2013-15 electricity savings would have been greater than [REDACTED] using the rates cited by Canada in its Counter-Memorial. Canada notes that NewPage-Port Hawkesbury’s electricity rates would have gone up to at least \$71.09/MWh in 2012 absent a new rate determination,<sup>223</sup> which would have raised the

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<sup>219</sup> See Steger Report ¶ 101. Mr. Steger did not dispute Resolute’s calculation for PHP’s increased electricity rate. Instead, he noted that the calculation from Resolute was based upon the LRT previously given to NewPage-Port Hawkesbury. *Id.*

<sup>220</sup> Steger Report ¶¶ 100-101 & n. 108 (citing Witness Statement of Murray Coolican ¶ 10 (April 17, 2019 (“Coolican Witness Statement”))).

<sup>221</sup> See C-138, *In re an Application by NewPage-Port Hawkesbury and Bowater Mersey Paper Company*, Decision ¶¶ 281-288 (Nov. 29, 2011) (deciding rate for “NPB,” which was defined as NewPage-Port Hawkesbury and Bowater Mersey).

<sup>222</sup> C-138, *supra* n.221, *In re an Application by NewPage-Port Hawkesbury and Bowater Mersey Paper Company*, Decision ¶ 224.

<sup>223</sup> The increase to \$71.09/MWh may have been too low, as it ignores “possible increases also in each of the presently applicable riders supplementing this base rate.” C-112, Affidavit of Tor. E. Suther, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.* ¶ 39 (Sept. 6, 2011) (“Suther Aff.”). For this reason, NewPage-Port Hawkesbury stated that rates were going to increase by 16.6% in 2012, C-314, *In re an Application by NewPage Port*

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mill's 2012 electricity costs (in comparison to its 2011 costs) by about \$15 million.<sup>224</sup>

And NSPI stated publicly that the NewPage-Port Hawkesbury electricity rates would go up even more in 2013-15.<sup>225</sup> For these reasons, NewPage-Port Hawkesbury (along with the Bowater Mersey mill) sought lower rates from NSPI.<sup>226</sup>

166. Canada's analysis and Mr. Steger's report also ignore the added benefit PHP received when GNS enacted regulations mandating that the onsite Biomass Plant run fulltime to support the mill's steam requirements (which needed only 24% of the Biomass Plant's capacity).<sup>227</sup> This benefit, valued at \$6-\$8 million, "is on top of a \$124-million provincial bailout package."<sup>228</sup>

167. Canada argues that its 2013 regulations mandating the Biomass Plant run full time were not passed to benefit PHP but, rather, for "economic and technical reasons."<sup>229</sup> But advice GNS officials gave the Nova Scotia Executive Council (the Nova Scotia cabinet) stated that these changes were to benefit PWCC: the "Executive Council agreed that a letter be sent to the UARB outlining the province's support to ensure [the] Stern Group receives the full benefit of the deal they signed with Nova

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*Hawkesbury and Bowater Mersey Paper Company Ltd.*, Application ¶ 3 (NSUARB June 22, 2011) ("NPB Application"), making the mill's rate approximately \$74.86/MWh.

<sup>224</sup> Canada Counter-Memorial ¶ 162 n. 318; see also C-112, *supra* n.223, Suther Aff. ¶ 40.

<sup>225</sup> See C-112, *supra* n.223, Suther Aff. ¶ 40; C-314, *supra* n.223, NPB Application ¶ 3.

<sup>226</sup> See generally C-314, *supra* n.223, NPB Application.

<sup>227</sup> See Resolute Memorial ¶¶ 83-85, 122-124. PHP paid for its 24% share pursuant to an agreement with NSPI; the additional benefit was incurred by other ratepayers because of the GNS regulations. See C-235, *supra* n. 82, Oct. 2015 NSUARB Hr'g Tr. at 25-33; *id.* at 30:12-31:7 (explaining that the \$6-\$8 million payment is the result of the analysis that NSPI "has undertaken to determine the incremental difference associated with running the [Biomass] plant, as you're mandated to [by GNS regulations], versus economically dispatching it").

<sup>228</sup> C-051, CBC News, *Nova Scotia Power ratepayers foot \$7M bill for Port Hawkesbury Paper* (Oct. 20, 2015).

<sup>229</sup> Canada Counter-Memorial ¶ 317.

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Scotia Power. It would be accomplished through a regulatory change that focuses exclusively on biomass at this stage.”<sup>230</sup> GNS’s July 20, 2012 letter to the NSUARB states nearly the same thing—the regulations will “ensur[e] that PWCC received the full benefit of the proposed arrangement it reached with” NSPI.<sup>231</sup>

168. Canada further contends the benefit PHP receives from the Biomass Plant is minimal because the mill “would still be able to obtain the necessary steam from its own gas-fired boiler (PB4).”<sup>232</sup> However, PWCC wanted to use the Biomass Plant because doing so would aid its efforts to be the “lowest cost” producer of SC paper with one of the lowest (if not the lowest) electricity rates in North America.<sup>233</sup> NSPI CEO Mr. Bennett testified that using PB4 “may not work for [PWCC’s] business case because that boiler is more expensive to operate,”<sup>234</sup> and NSPI Vice-President of Power Generation and Delivery Mark Sidebottom<sup>235</sup> testified that doing so “changes the cost structure for PWCC.”<sup>236</sup>

169. Ever in denial that the Biomass Plant regulatory change was expressly part of the package getting PHP to its lowest-cost target, GNS next implies that the July 20 letter and the subsequent regulatory change were the results of “public consultation”

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<sup>230</sup> C-337, *supra* n.85, GNS Communications Plan Regarding Amendments to Renewable Energy Regulations at CAN000024\_0027.

<sup>231</sup> C-179, *supra* n.86, GNS Letter Regarding PWCC LRT.

<sup>232</sup> Canada Counter-Memorial ¶ 213.

<sup>233</sup> Resolute Memorial ¶ 52.

<sup>234</sup> R-398, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Hearing Transcript Part A at 588:15-590:3 (NSUARB July 18, 2012) (“July 18, 2012 Part A NSUARB Hr’g Tr.”).

<sup>235</sup> R-400, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Hearing Transcript Part B at 278:8-13 (NSUARB July 16, 2012).

<sup>236</sup> R-400, *supra* n.234, July 18, 2012 Part A NSUARB Hr’g Tr. at 592:19-593:8.

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and a detailed regulatory process.<sup>237</sup> Yet, the regulations GNS proposed in the summer of 2011<sup>238</sup> did not address the Biomass Plant,<sup>239</sup> and no subsequent amendments were proposed prior to the NSUARB hearing.

170. On July 18, 2012, the NSUARB and the parties to the electricity deal first realized that running the Biomass Plant as PWCC wanted for its “business case” would increase costs, impermissibly, for NSPI’s ratepayers. NSPI CEO and President Rob Bennett testified that running the Biomass Plant to supply PHP’s steam could cause NSPI’s ratepayers to incur millions in additional costs that PWCC would not cover:

**MR. OUTHOUSE:** But my point is that certainly in 2013 and ‘14, and perhaps beyond, depending on how certain other things unfold, there is going to be, if this proposal is approved, an additional fuel cost injected into the system which is going to be paid by other ratepayers, correct, not the mill?...

**MR. BENNETT:** The circumstances are still in flux, load on the system. And as we discussed before, the point that you make about the biomass plant operation being necessary in order to supply steam, but not being necessary in order -- potentially not necessary in order to meet renewable energy compliance creates an issue that needs to be resolved.

**MR. OUTHOUSE:** And if it isn’t resolved; that is, if this works as the proposal currently stands and that incremental cost isn’t recovered from, it doesn’t technically qualify as an incremental cost, it’s clear that the additional fuel costs that other customers may pay through the FAM could easily swamp either the \$2 million contribution or the \$20 million contribution over five years, couldn’t it?

**MR. BENNETT:** That’s the essence of the issue, if the biomass plant is not required to run to meet RES targets.<sup>240</sup>

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<sup>237</sup> See Canada Counter-Memorial ¶¶ 211-212.

<sup>238</sup> Coolican Witness Statement ¶ 38.

<sup>239</sup> C-313, Draft Nova Scotia Renewable Electricity Regulations (June 2011).

<sup>240</sup> R-400, *supra* n.234, July 18, 2012 Part A NSUARB Hr’g Tr. at 581:17-582:20.

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171. Mr. Bennett later testified that “this is an issue that is a new issue on the table and it’s now we’re aware of the issue and it’s something I believe that will need to be resolved or clarified.”<sup>241</sup> Todd Williams, the expert GNS hired and presented at the NSUARB hearing, said he had never considered the issue previously, but he agreed that these additional costs to run the Biomass Plant to support PWCC’s electricity rate “were a problem that has to be addressed.”<sup>242</sup>

172. At the end of the NSUARB hearing on July 18, 2012, GNS acknowledged the importance and potential cost of running the Biomass Plant and promised to resolve the problem expeditiously.<sup>243</sup> Two days later, GNS committed to give PWCC “the full benefit” of its electricity deal.<sup>244</sup> The NSUARB later stated that the electricity deal would have been denied but for the Government’s emergency intervention.<sup>245</sup>

173. PWCC testified it would not have accepted the electricity deal if it had to pay for these additional costs to operate the Biomass Plant or use PB4 to generate steam at a higher price. PWCC CEO Stern responded in testimony:

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<sup>241</sup> R-400, *supra* n.234, July 18, 2012 Part A NSUARB Hr’g Tr. at 594:2-5.

<sup>242</sup> See R-401, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Hearing Transcript Part B at 773:12-780:15 (NSUARB July 18, 2012) (“July 18, 2012 Part B NSUARB Hr’g Tr.”).

<sup>243</sup> See R-401, *supra* n.242, July 18, 2012 Part B NSUARB Hr’g Tr. at 850:15-853:10 (NSUARB July 18, 2012) (GNS attorney Mark Rieksts promising to address the RES issue within the existing schedule that required further briefing within a week).

<sup>244</sup> C-179, *supra* n.86, GNS Letter Regarding PWCC LRT.

<sup>245</sup> See Resolute Memorial ¶¶ 168-169, 173-174.

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**[MR. BLACKBURN]:** After listening to your testimony, Mr. Stern, it appears to me that the application, as filed by PWCC, is it. In other words, it's – you're not prepared to change or have the Board change or tweak any of the – any parts of your application. Is that what I'm hearing?

**MR. STERN:** Yes. I mean, we've been at it for six months and we've gone as far as we can in terms of economics and commitments, Mr. Blackburn.<sup>246</sup>

174. Premier Dexter confirmed that the Biomass Plant was necessary to run the mill. He disputed criticism—which contrary to his view was found ultimately to be correct—that other ratepayers would pay for the Biomass Plant to be a “must run” facility.<sup>247</sup>

175. Canada states that “[i]f Resolute’s allegations were true, that would mean that NSPI, a private company, negotiated away the value of steam to PHP in exchange for less than adequate remuneration while it was under no obligation to do so and contrary to its own interests and those of its other customers.”<sup>248</sup> However, NSPI did not “negotiate” anything away. GNS passed regulations aiding PHP—at the expense of other ratepayers—requiring the Biomass Plant run full time regardless whether it was economical to do so.<sup>249</sup>

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<sup>246</sup> R-397, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Hearing Transcript Part A at 91:19-92:4 (NSUARB July 16, 2012).

<sup>247</sup> C-339, *The Canadian Press, Dexter Says Consumer Advocate is Wrong to Criticize Power Deal* (August 21, 2012); Resolute Memorial ¶ 122.

<sup>248</sup> Canada Counter-Memorial ¶ 214.

<sup>249</sup> Resolute Memorial ¶¶ 83-85.



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### 4. Canada Discounts Other Nova Scotia Measures Improperly

176. Canada contends that the \$1.3 million property tax reduction PHP obtained “was approximately twice what PWCC would have otherwise been required to pay under provincial law.”<sup>250</sup> Not so. PWCC was obligated by the court overseeing the CCAA process to pay \$2.6 million, but GNS passed special, targeted legislation to reduce PHP’s property tax, beginning in 2013, from \$2.6 million to \$1.3 million.

177. In 2006, the Port Hawkesbury mill (then owned by Stora Enso) entered into a ten-year agreement with Richmond County, the local municipality that saved NewPage-Port Hawkesbury nearly \$3.9 million as compared to the assessed value of the mill.<sup>251</sup> Such savings, however were exceeded by PHP’s new deal.

178. The Richmond County agreement required the mill to pay \$2.6 million in annual property taxes from 2013-16.<sup>252</sup> This property tax obligation was going to pass to PWCC, who argued it should pay approximately \$420,000 per year.<sup>253</sup> PWCC moved the CCAA court to disclaim the NewPage agreement, contending that, “[a]mong the critical Changes [sic] that underlie PWCC’s assessment and plan to restructure the

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<sup>250</sup> Canada Memorial ¶ 135. Based upon the Tribunal’s Decision on Jurisdiction and Admissibility, the municipal tax portion of the package is only applicable to Resolute’s claim under Article 1102. See Resolute Memorial ¶ 115 n.176. However, this measure is part of what PWCC demanded, and got, to reopen the mill. See, e.g., *supra* ¶ 9.

<sup>251</sup> C-342, Second Supplemental Affidavit of Stewart MacDonald, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.* ¶ 9 (Sept. 10, 2012) (“MacDonald Aff.”).

<sup>252</sup> C-303, *An Act Respecting the Taxation of Port Hawkesbury Paper GP Ltd. by the Municipality of the County of Richmond*, SNS 2006, c 51 (2006) (“*Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*”). Relevant to this case, the agreement would cover three years of taxes, not four.

<sup>253</sup> C-343, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Written Submissions of PWCC Relating to Property Taxes (Sept. 10, 2012) (“PWCC Property Tax Submissions”). This valuation was based on a PWCC appraisal that was disputed by Richmond County. See C-342, *supra* n. 251, MacDonald Affidavit ¶ 13.

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business is that the Tax Agreement would not continue.”<sup>254</sup> Marc Dube submitted an affidavit on behalf of PWCC stating that “I am concerned that if the Tax Agreement is not disclaimed, it could jeopardize the likelihood of closing the transaction.”<sup>255</sup> The CCAA court, though, refused to grant the requested disclaimer—meaning PWCC was responsible, as of September 10, 2012—for the full \$2.6 million contractual obligation.<sup>256</sup>

179. PWCC was able to procure a reduced property tax payment despite its contractual and legal obligation to pay \$2.6 million per year. The new agreement between PWCC and Richmond County cut the property tax in half and provided that “[a]ny capital assets acquired ... during the Term will not be subject to further property taxes and the disposition of any capital assets shall not reduce the property taxes during the Term.”<sup>257</sup> This agreement was contingent on legislative approval, which was granted in the *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*.<sup>258</sup>

180. [REDACTED] the \$1.5 million that PHP received under the Ramp-up Agreement (also known as the “Preparatory Activities Agreement”) to prepare for the mill’s restart was not “additional funding” but, instead, funds re-allocated from other GNS funding pools: (1) \$1.2 million from unused hot-idle funding; and (2)

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<sup>254</sup> C-344, Supplemental Affidavit of Marc Dube, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.* ¶ 12 (Sept. 10, 2012) (“Dube Supplemental Affidavit”). Although unsigned, this is version available on the [CCAA Monitor’s Website](#) and referenced in PWCC’s filings. C-343, *supra* n.253, PWCC Property Tax Submissions at 2.

<sup>255</sup> C-344, *supra* n.254, Dube Supplemental Affidavit ¶ 19.

<sup>256</sup> See C-204, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Sixteenth Report of the Monitor ¶ 28 (Sept. 25, 2012) (“Sixteenth Monitor’s Report”).

<sup>257</sup> C-303, *supra* n.252, *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*.

<sup>258</sup> C-303, *supra* n.252, *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*.

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\$300,000 taken from other PWCC-bound assistance.<sup>259</sup> Canada concedes<sup>260</sup> the preparatory activities funded by the Ramp-Up Agreement were critical to the mill's survival because the mill would have been shut out of "100,000 tons of potential orders" that would "result in the [m]ill not having the financial resources to continue to operate."<sup>261</sup>

181. Under the November 28, 2011 Indemnity Agreement, [REDACTED]

[REDACTED]

[REDACTED].<sup>262</sup> As Resolute noted, [REDACTED]

[REDACTED]<sup>263</sup>

[REDACTED]<sup>264</sup> However, the Indemnity Agreement [REDACTED]

[REDACTED]

[REDACTED]

182. PWCC, through the CCAA process, did not inherit the mill's outstanding pension liability of approximately \$130 million.<sup>265</sup> That relief (which was predicated on

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<sup>259</sup> Canada Counter-Memorial ¶ 137; C-340, Preparatory Activities Agreement between NewPage-Port Hawkesbury, Pacific West Commercial Corporation, and GNS ¶ 2(b)-(c) (Aug. 27, 2012) ("Preparatory Activities Agreement"). The \$1.2 million amount was paid for these preparatory activities between September 9-22, 2012, see C-204, *supra* n.256, Sixteenth Monitor Report at Appendix D, after PHP had obtained its initial NSUARB approval, agreed to a financial assistance package with GNS, and committed to purchasing the mill.

<sup>260</sup> Canada Counter-Memorial ¶ 137 n.255 (citing C-190 at CAN000120\_0013).

<sup>261</sup> C-340, *supra* n.259, Preparatory Activities Agreement at Schedule A. The operations funded by this agreement included maintenance work, continued operation of equipment, regulatory tasks needed to start-up, purchase of raw materials needed to make paper, hiring of additional employees, and installation and configuration of computers.

<sup>262</sup> Resolute Memorial ¶ 42.

<sup>263</sup> C-136, [REDACTED] at CAN000020\_0013.

<sup>264</sup> Resolute Memorial ¶ 42. n.45.

<sup>265</sup> Resolute Memorial ¶ 49.

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[REDACTED]  
[REDACTED])<sup>266</sup> was a necessary requirement to ensure that PHP would be the lowest-cost producer of SC Paper.<sup>267</sup>

183. GNS purchased approximately 50,000 acres from PWCC for \$20 million, after it had previously agreed to purchase similar (if not the same land) from NewPage-Port Hawkesbury for [REDACTED].<sup>268</sup> Canada never explains in its Counter-Memorial why GNS gave PWCC [REDACTED] than it had promised to pay for the same land from NewPage-Port Hawkesbury.

184. PWCC, under the original deal (*i.e.*, before the Canada Revenue Agency denied the tax structure proposed for the electricity deal), could not use the \$1 billion in tax losses on assets outside the province, and GNS would not agree to a revised deal where PWCC could use the tax losses in this fashion because, GNS said, it would carry “too much risk.”<sup>269</sup> Yet, hours after the whole deal appeared to fall apart, GNS agreed to what PWCC demanded—PWCC could use the tax losses provided it paid GNS 32% of any tax savings and reinvested 18% into the mill.<sup>270</sup> PWCC’s ability to use these tax

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<sup>266</sup> C-329; [REDACTED] see also C-347, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Plan Sanction Order at 59 (Sept. 25, 2012) (stating, as a condition to implement the plan to purchase, that “the Plan Sponsor and the Government of Nova Scotia shall have entered into a letter agreement, in a mutually acceptable form, regarding certain pension matters.”). The “Plan Sponsor” is defined as Pacific West Commercial Corporation. *Id.* at 30-31.

<sup>267</sup> C-148, *Pacific West now lone bidder for idled NewPage paper mill in Cape Breton*, *The Canadian Press* (Jan. 4, 2012).

<sup>268</sup> See Resolute Memorial ¶¶ 97-98.

<sup>269</sup> See Resolute Memorial ¶¶ 101-103, 105; C-196, *Province Negotiates New, Better Deal to Reopen Mill, Support the Strait*, Nova Scotia Press Release (Sept. 22, 2012).

<sup>270</sup> See Resolute Memorial ¶ 103. Canada states that PWCC [REDACTED], see Canada Counter-Memorial ¶ 116, but that PWCC’s reinvestment in the mill was something PWCC was likely to do regardless.

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losses, therefore, are inseparable from the remainder of the deal and were expressly extra-territorial.

185. Canada contends that using tax losses is a right belonging to all Canadian companies,<sup>271</sup> yet fails to explain why GNS refused to allow PWCC to exercise this right until the deal almost fell apart. And Canada fails to rebut that PWCC's ability to use the tax losses, by incorporating assets outside Nova Scotia into the mill, demonstrates that GNS's policies regarding PHP were intended to have extraterritorial effect.<sup>272</sup>

### 5. Ernst & Young Recognized The Uniqueness Of The Nova Scotia Measures

186. Resolute suggested in its Memorial that the resuscitation of a shuttered and bankrupt operation, bankrolled at government expense, enabled with legislation to assume a superior competitive position in the industry appeared to be unique among bankruptcies in North America. GNS's selection of PHP as the leading and lowest cost producer in the market came at Resolute's expense and was egregious, unnecessary, and a violation of Article 1105.<sup>273</sup>

187. Canada rejected Resolute's evidence of the number of companies liquidated through bankruptcy proceedings in Canada and the United States from 2010 through 2017 as mere "photocopies of a bankruptcy yearbook with no probative

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<sup>271</sup> Canada Counter-Memorial ¶ 116.

<sup>272</sup> See Resolute Memorial ¶ 256.

<sup>273</sup> See Resolute Memorial ¶¶ 274-279.

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value.”<sup>274</sup> Yet, Canada offered no contrary data nor explanation for PHP’s exceptional treatment.<sup>275</sup>

188. In response to Canada’s assertions that there is “no evidentiary value to this ‘analysis,’” Resolute requested that Ernst & Young (“EY”) “review publicly available information in other CCAA cases since mid-2009 to determine whether there were other instances of Canadian government assistance being provided to insolvent debtors who filed for CCAA protection similar to that provided to PHP.”<sup>276</sup>

189. EY reviewed 174 CCAA cases from 2009 to May 30, 2019.<sup>277</sup> It identified “117 CCAA Cases that had no apparent form of government assistance during the restructuring proceedings.”<sup>278</sup> None of the remaining CCAA cases received assistance comparable to that received by PHP:

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<sup>274</sup> Counter-Memorial at ¶ 291.

<sup>275</sup> Canada’s apparent defense is to assert that there is no customary international law violation—“insufficient State practice and *opinio juris*”—because non-market-oriented economies “do not always allow commercially unviable companies to fail.” Canada Counter-Memorial ¶ 291 n. 600. By that argument, due process would not be a customary international law principle because some countries, likely some of the same non-market-oriented economies, do not always provide it. Canada also seems to justify itself by non-market economy standards rather than the NAFTA standards to which it agreed. See, e.g., Article 102: “Objectives “1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to...(b) promote conditions of fair competition in the free trade area.” Canada also appears to misquote Resolute as making a statement about “non-market-oriented economies” when that phrase does not exist in Resolute’s Memorial.

<sup>276</sup> CWS-EY ¶ 3.

<sup>277</sup> CWS-EY ¶¶ 4, 33, 46, 87.

<sup>278</sup> CWS-EY ¶ 47.

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- “EY identified 2 cases where, as part of the restructuring plan, a government agency or Crown corporation contributed to a pool of funds that was/would be available to claimants of the debtor in order to settle claims (typically in the context of litigation)” but “EY did not consider these CCAA Cases to be comparable to the PHP case.”<sup>279</sup>
- “EY identified 2 cases where, as part of the CCAA proceedings, a government agency or Crown corporation arranged for interim financing and/or ultimately bought the assets....EY did not consider these CCAA cases to be comparable to the PHP case as the interventions by the government were based on preserving a social service for particular communities.”<sup>280</sup>
- “EY identified a small number of CCAA Cases whereby the debtor or a purchaser of the assets of the debtor received some form of government assistance measures to assist the company to emerge from CCAA proceedings [which it found to be] generally exceptional in that Canadian governments do not typically bail out companies from insolvency or bankruptcy proceedings.”<sup>281</sup>

190. Based on the results of its review:

EY is of the opinion that the PHP case was unique in the context of other CCAA cases in that the PHP case distinguished itself in i) the stated goal of the government (GNS) was not only to assist in making PHP competitive, but to help the mill become the lowest cost and most competitive producer of supercalendered paper; and ii) the comprehensiveness of government assistance: interim funding with limited recourse while searching for a going concern buyer; forgivable loans and grants for operations and mill improvements; and a favourable reduction in electricity rates through regulatory changes, all to assist the mill in obtaining a competitive advantage.<sup>282</sup>

This unique set of measures was adopted knowingly to benefit PHP at the expense of Resolute in a declining market.

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<sup>279</sup> CWS-EY ¶ 49.

<sup>280</sup> CWS-EY ¶ 50.

<sup>281</sup> CWS-EY ¶ 87.

<sup>282</sup> CWS-EY ¶ 89.

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### **E. The Nova Scotia Measures Offend The Customary International Law Principle Of Proportionality**

191. GNS arguably had two objectives. The first was to save local jobs and the Nova Scotia forest industry. The second, dictated by PWCC, was to assure the long life of PHP by making it the lowest cost producer in North America.

192. The C\$124 million or more that Nova Scotia chose to spend on PHP could have been spent any number of ways to assist former employees in their transition from a commercially non-viable enterprise, including assistance directly to the employees, or investments in manufacturing sectors that were not in secular decline.

193. GNS, determined to keep an SC Paper manufacturing business alive, concluded that the means for accomplishing the first objective required serving the second because no private party could be enlisted for the first objective without Nova Scotia's commitment to the second. GNS appears to have understood that it would have to go beyond what might have been reasonable and proportionate to accomplish the first objective from its contemporaneous and realistic experience with Bowater Mersey. What might have been proportionate—the kind of proposal made to Bowater Mersey to keep it temporarily competitive but not a champion—was insufficient for PHP. Once PWCC began dictating that it could not be enlisted for anything less than a long run and substantial profit, Nova Scotia began crossing the line by supplying PWCC with everything it wanted, all designed knowingly to inflict harm on Resolute.

194. A potentially proportionate response to the challenge of saving jobs and the forest industry ceased to be available when the aim moved to satisfying PWCC's requirements to be more than merely competitive. What other tribunals have regarded as proportionate, always in response to reasonable aims, is instructive here because



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Nova Scotia's disproportionate measures may have been necessary, without alternatives, but only because the objective itself—defined at least as much by PWCC as Nova Scotia—was illegitimate and unreasonable.

195. Both the objective to be the national champion and the measures undertaken to pursue it exceeded the bounds of reasonable assistance that a government might provide in order to protect displaced workers in the community, promote economic development, or to protect an industry.

196. The NAFTA Parties' commitment to "promote conditions of fair competition in the free trade area,"<sup>283</sup> and "the Government of Canada's commitment to a rules-based business environment that facilitates free trade and encourages investment" would be meaningless if a provincial government could convert a defeated company into a national champion, intended more than to compete, but instead to defeat all competition.<sup>284</sup> Such actions promote parochial interests and protectionism without regard for the rules and principles of competition incorporated in NAFTA for the advancement of fair and free competition.

197. Customary international law recognizes that even when a "measure of appreciation" may be owed to a state's regulations or policy measures undertaken for its own constituents, the state must act in good faith and balance the goals of those measures in a way that avoids harming the interests of foreign individuals who would be

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<sup>283</sup> NAFTA Article 102.

<sup>284</sup> See C-311, Foreign Affairs and International Trade Canada Issues Statement on AbitibiBowater Settlement (Aug. 24, 2010). The occasion of this announcement was Canada's settlement of another NAFTA Chapter 11 dispute with Resolute's predecessor, AbitibiBowater, which involved Newfoundland's blatant and unlawful expropriation of over \$130 million of AbitibiBowater's assets.

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adversely affected. The principle of proportionality requires that actions taken by the host state that adversely affect a foreign investment must be reasonable, necessary, and not disproportionate in response to the state's necessity. The principle ensures a proportionate balance between the host state's regulatory powers and the interests of the foreign investor.<sup>285</sup> Cases addressing this principle have concerned measures that may be within a government's authority but have been taken to a disproportionate extreme. The measures may have been serving what appeared to be a reasonable policy aim, but without reasonable, due consideration of the obligations owed to a foreign investor under the applicable free trade agreement or bilateral investment treaty and harmful impact on the investor.

198. In this case, the policy aim itself was illegitimate and unreasonable because it went beyond merely helping workers in transition. The Nova Scotia policy aim crossed a line between encouraging competition and defeating competition, especially foreign competition. Anything done in the service of crushing foreign

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<sup>285</sup> See CL-230, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, ¶ 179 (Nov. 25, 2015) ("A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented. In the Tribunal's view, this includes the requirement that the impact of the measure on the investor be proportional to the policy objective sought. The relevance of the proportionality of the measure has been increasingly addressed by investment tribunals and other international tribunals, including the ECtHR. The test for proportionality has been developed from certain municipal administrative laws, and requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved."); CL-240, *RREEF Infrastructure (G.P.) Ltd. & RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum ¶ 464 (Nov. 30, 2018) ("*RREEF v. Spain* Award"); CL-235, *PL Holdings S.à.r.l. v. Republic of Poland*, Arbitration Institute of the Stockholm Chamber of Commerce, Partial Award ¶ 355 (June 28, 2017) ("*PL Holdings v. Poland* Partial Award").

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competition is inherently “disproportionate,” but the principle of proportionality may nonetheless be instructive, by analogy, of the limits to which a government may go.

199. The *RREEF v. Spain* tribunal explained that proportionality “is a weighing mechanism that seeks a fair balance between competing interests and/or principles affected by the regulation, taking into account all the relevant circumstances. The regulation must be closely adjusted to the attainment of its legitimate objective, interfering as little as possible with the effective exercise of the affected rights.”<sup>286</sup>

200. The tribunal in *Occidental v. Ecuador*<sup>287</sup> found that the obligation for fair and equitable treatment included an obligation of proportionality. The Government of Ecuador cancelled a contract for the exploration and exploitation of hydrocarbons on grounds that the claimants had transferred certain rights under the contract without government approval and in violation of Ecuadoran law.<sup>288</sup> Claimants argued that they had not breached the contract or Ecuadorian law, but even if they had the cancellation of the contract on that ground was a disproportionate measure under Ecuadoran and international law.<sup>289</sup>

201. The *Occidental* tribunal ruled that claimants did breach the contract and Ecuadoran law,<sup>290</sup> but that Ecuador’s response to such a breach was disproportionate. The tribunal characterized the proportionality analysis as “one of overall judgment,

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<sup>286</sup> CL-240, *supra* n.285, *RREEF v. Spain* Award ¶ 465.

<sup>287</sup> CL-225, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (II) ICSID Case No. ARB/06/11, Award (Oct. 5, 2012).

<sup>288</sup> See, e.g., *Id.* ¶¶ 2, 211.

<sup>289</sup> See *id.* ¶ 388.

<sup>290</sup> *Id.* ¶ 442

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balancing the interests of the State against those of the individual, to assess whether the particular sanction is a proportionate response in the particular circumstances.”<sup>291</sup>

202. The tribunal found that Ecuador had not suffered a loss as a result of the transfer of rights to a third party, and that there were alternatives to termination:

[T]he overriding principle of proportionality requires that any such administrative goal must be balanced against the Claimants’ own interests and against the true nature and effect of the conduct being censured. The tribunal finds that the price paid by the Claimants – total loss of an investment worth many hundreds of millions of dollars – was out of proportion to the wrongdoing alleged against OEPC, and similarly out of proportion to the importance and effectiveness of the “deterrence message” which the Respondent might have wished to send to the wider oil and gas community.<sup>292</sup>

Therefore, the cancellation of the contract was “not a proportionate response...[and was] in breach of customary international law” and deprived the claimants of “fair and equitable treatment.”<sup>293</sup>

203. The *PL Holdings v. Poland* tribunal analyzed sanctions imposed on the claimant (as holder of shares in a bank).<sup>294</sup> Among the factors, the tribunal found the sanctions were not necessary because there were “milder available remedies and sanctions [Respondent] could have addressed to Claimant” and were not the “least drastic means.”<sup>295</sup> The tribunal also found the measures excessive because “the

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<sup>291</sup> *Id.* ¶ 417.

<sup>292</sup> *Id.* ¶ 450.

<sup>293</sup> *Id.* ¶ 452.

<sup>294</sup> CL-235, *supra* n.285, *PL Holdings v. Poland* Partial Award ¶ 354. The Respondent contended that the claim “should be viewed through the prism of the fair and equitable treatment standard,” and the tribunal explained that “[f]air and equitable treatment is denied when a State fails to apply measures in a proportional manner.” *Id.* ¶ 278; see also *id.* ¶ 266 (claimant also relying on fair and equitable treatment standard).

<sup>295</sup> See CL-235, *supra* n.285, *PL Holdings v. Poland* Partial Award ¶¶ 377-382.

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situation facing [Respondent] was [not] so dire as to justify” the measures.<sup>296</sup> The tribunal concluded that Respondent could not satisfy the three-factor proportionality test.<sup>297</sup>

204. The tribunal in *Azurix v. Argentina* asked when a measure “that, being legitimate and serving a public purpose, [nevertheless] should give rise to a compensation claim”?<sup>298</sup> The tribunal found “useful guidance”<sup>299</sup> in language from the European Court of Human Rights case of *James and Others*, which also had been considered by the tribunal in *Tecmed v. Mexico*:

The Court held that “a measure depriving a person of his property [must] pursue, on the facts as well as in principle, a legitimate aim ‘in the public interest’”, and bear “a reasonable relationship of proportionality between the means employed and the aim sought to be realized”. This proportionality will not be found if the person concerned bears “an individual and excessive burden.” The Court considered that such “a measure must be both appropriate for achieving its aim and not disproportionate thereto.” The Court found relevant that non-nationals “will generally have played no part in the election or designation [of the measure’s] authors nor have been consulted on its adoption” and observed that “there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.”<sup>300</sup>

205. Investment treaty tribunals have continued to rely on the doctrine of proportionality. The tribunal in *S.D. Myers* (also cited by *Azurix v. Argentina* as “useful guidance”)<sup>301</sup> considered the proportionality principle in its award:

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<sup>296</sup> See CL-235, *supra* n.285, *PL Holdings v. Poland* Partial Award ¶¶ 384, 389.

<sup>297</sup> See CL-235, *supra* n.285, *PL Holdings v. Poland* Partial Award ¶¶ 390, 391.

<sup>298</sup> CL-233, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award ¶ 310 (July 14, 2016) (“*Azurix v. Argentina* Award”).

<sup>299</sup> CL-233, *supra* n.298, *Azurix v. Argentina* Award ¶ 312.

<sup>300</sup> CL-233, *supra* n.298, *Azurix v. Argentina* Award ¶ 311 (citing *In the case of James and Others*, sentence of February 21, 1986, ¶¶ 50, 63; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), ¶¶ 121-122 (May 29, 2003)).

<sup>301</sup> CL-233, *supra* n.298, *Azurix v. Argentina* Award ¶¶ 310-312.

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CANADA was concerned to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future. This was a legitimate goal, consistent with the policy objectives of the Basel Convention. *There were a number of legitimate ways by which CANADA could have achieved it, but preventing SDMI from exporting PCBs for processing in the USA by the use of the Interim Order and the Final Order was not one of them.* The indirect motive was understandable, but the method contravened CANADA's international commitments under the NAFTA. CANADA's right to source all government requirements and to grant subsidies to the Canadian industry *are but two examples of legitimate alternative measures.* The fact that the matter was addressed subsequently and the border re-opened also shows that CANADA was not constrained in its ability to deal effectively with the situation.<sup>302</sup>

206. GNS declared itself concerned with jobs and economic development.

There were numerous other ways to pursue those goals without discriminating against a small, finite number of vulnerable companies, including a foreign investor. GNS, however, chose to save the old rather than build the new.

207. GNS was fully aware that the Nova Scotia Measures were indispensable for the activation of PHP, and that PHP's reentry into the marketplace would harm Resolute. Yet, the evidence and arguments from Canada give no indication that GNS ever considered actions to mitigate the damage.

208. The policy goal GNS chose and the measures it chose to implement it—resurrecting PHP and making it the lowest cost producer—were disproportionate

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<sup>302</sup> RL-059, *supra* n.152, *S.D. Myers* Partial Award ¶ 255 (emphasis added). The *ADM v. Mexico* tribunal also considered the proportionality of the countermeasure Mexico employed to protect its sugar industry in response to an alleged NAFTA violation by the United States of America. According to the tribunal, Mexico had alternatives other than a tax on high fructose corn syrup products to remedy the supposed violation. "The adoption of the Tax was not proportionate or necessary and reasonably connected to the aim said to be pursued." RL-092, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award ¶¶ 153, 158-159 (November 21, 2007) ("*ADM v. Mexico* Award").

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because they violated the principles of NAFTA and sacrificed Resolute to GNS's parochial interests, assigning to Resolute "an individual and excessive burden."

**IV. THE NOVA SCOTIA MEASURES VIOLATED ARTICLE 1102**

209. Canada, through GNS, breached its obligations to provide Resolute and its investments with "treatment no less favorable than the most favorable treatment accorded, in like circumstances," to PWCC/PHP.<sup>303</sup> The Nova Scotia Measures favored Nova Scotia's SC Paper company in a North American market comprised of only four other producers, ensuring that PHP would be the national champion. The GNS goal was not only to help a domestic enterprise, but to enhance it in relation to its competitors by making and keeping it the lowest cost producer of SC Paper, [REDACTED]

[REDACTED]

[REDACTED]<sup>304</sup>

210. Canada has misconstrued the applicable standard and misapplied the three-part UPS test in arguing that these actions did not constitute a breach of Article 1102. Also, Canada errs in arguing that the Nova Scotia Measures are excluded from national treatment claims under Article 1102 because of the subsidies and procurement exceptions found in NAFTA Article 1108.

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<sup>303</sup> NAFTA Article 1102(3).

<sup>304</sup> C-324, *supra* n.214, [REDACTED]

[REDACTED] at CAN000451\_0002.

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### A. Canada Breached Its Obligations To Provide Resolute With “The Most Favorable Treatment”

211. NAFTA Article 1102(3) provides that “[t]he treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.”

212. The three-part test for a violation of Article 1102, formulated in *UPS* and adapted for Article 1102(3) where provincial treatment is concerned, requires that:

- a. the foreign investor or its investment has been accorded treatment by a province with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;
- b. the foreign investor or its investment is in like circumstances with the local investor or investment (*i.e.*, the investor or investment of the Party of which the province forms a part) that has been accorded the most favorable treatment by that province; and
- c. that province has treated the foreign investor or investment less favorably than it treats the investor or investment accorded the most favorable treatment.

213. GNS’s actions breached Article 1102(3) because: (1) GNS distorted and damaged Resolute’s market, thereby according Resolute “treatment” in the operation and disposition of its investments; (2) Resolute and its investments are in the same sector, producing and selling the same product in the same North American market as PHP and, therefore, are in “like circumstances” with PWCC/PHP; and (3) GNS treated Resolute and its investments less favorably than the domestic investor and investment that were accorded the most favorable treatment, PWCC/PHP. Canada cannot justify



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its breach of Article 1102 because its measures are unreasonable and undermine NAFTA's core value of fair competition.

1. A Breach Of Article 1102(3) Does Not Require That GNS Discriminate Against Foreign Investors On The Basis Of Nationality—Only That GNS Provided Resolute Less Favorable Treatment Than The Most Favorable Treatment Accorded To A Domestic Investor

214. Canada contends that Article 1102(3) requires evidence that GNS discriminated against foreign investors on the basis of nationality.<sup>305</sup> Article 1102(3) does not require proof of nationality-based discrimination.

- a. *Article 1102(3) Does Not Require Proof Of Nationality-Based Discrimination*

215. Article 1102(3) states that “[t]he treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.”

216. The Tribunal must be guided by the specific terms of Article 1102(3) to determine the content and scope of the “national treatment” obligation in respect of sub-national measures. The exercise of interpreting Article 1102(3), a specific and special provision for sub-national measures embedded in Article 1102, begins with a consideration of the entire Article, which provides:

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<sup>305</sup> See Canada Counter-Memorial ¶¶ 250-253.

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### Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

217. The ordinary meaning of Article 1102(3), in the context of the other paragraphs of Article 1102, reveals that the comparison in Article 1102(3) is not between the treatment of a foreign investor and the treatment of domestic investors in like circumstances as a class, as is the case in Articles 1102(1) and (2).

218. Article 1102(3) does not presume that a provincial government accords all domestic and all foreign investors the same treatment. A provincial government may discriminate among domestic investors, but the foreign investor then is entitled to the “most favorable treatment” that the provincial government accords to any domestic investor. All domestic investors might not receive the same treatment. The provision

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that a foreign investor is entitled to the “most favorable treatment” necessarily implies that, within the same province, one domestic investor might have received better treatment than another. Nationality, therefore, need not be the basis for inconsistent treatment by the province. When the province treats domestic investors differently, the foreign investor is entitled to the same treatment as the favored domestic investor.

219. There would be no reason for a “most favorable treatment” provision if Article 1102(3) were to recognize a breach only for nationality-based discrimination. All domestic investors of the host Party would be treated the same.

220. Canada recites the full text of Article 1102(3),<sup>306</sup> but in a 24-page section on “national treatment” makes no further mention of it.<sup>307</sup> Canada ignores the plain meaning of the text—that national treatment does not require discrimination based on nationality—and that Resolute’s national treatment claim arises under this provision, Article 1102(3).

221. Article 1102(4) further demonstrates that where the Parties wanted to prohibit discrimination on the basis of nationality, they said so expressly. Paragraph 4(b) prohibits a Party from requiring a foreign investor, “by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.”

222. Hence, a province must accord to the foreign investor the “most favorable treatment” that province has accorded to any domestic investor, regardless of how

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<sup>306</sup> See Canada Counter-Memorial ¶ 245.

<sup>307</sup> “The national treatment obligation in Article 1102 is designed to protect against nationality-based discrimination.” Canada Counter-Memorial at ¶ 250. There is only a single indirect reference, in paragraph 277, where Canada quotes from paragraph 290 of the Tribunal’s Decision on Jurisdiction and Admissibility, in which the Tribunal referred to the correct provision—Article 1102(3).

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some other domestic investors may have been treated. The motive for the difference in treatment does not matter, whether from nationality, provincial considerations, or something else.

223. The interpretation of Article 1102(3) advanced by Resolute also accords with the object and purpose of NAFTA. If this interpretation were not adopted, there would be a loophole for sub-national protectionism among the NAFTA Parties for measures adopted by a provincial or state government. Any province or state then could discriminate against a foreign investor by discriminating, at the same time, against domestic investors from other provinces or states in the same country. It is more consistent with the object and purpose of NAFTA to conclude that, under Article 1102(3), a foreign investor affected adversely by a provincial or state protectionist measure is protected even when such a measure affects not only the foreign investor but domestic investors from other provinces or states in the same country.

224. As the *Pope & Talbot* tribunal explained, “the language of Article 1102(3) was intended simply to make clear that the obligation of a state or province was to provide investments of foreign investors with the best treatment it accords *any* investment of its country, not just the best treatment it accords to investments of *its* investors.”<sup>308</sup>

225. 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

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<sup>308</sup> CL-114, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 ¶ 41 (Apr. 10, 2001) (“*Pope & Talbot* Award on the Merits of Phase 2”) (emphases in original).

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criterion “by reason of nationality” in Article 1102(3), as they did in Article 1102(4). In that case, Article 1102(3) would have read:

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part, *by reason of the nationality of the investors*.

Without this explicit language, there is no basis for the Tribunal to read into Article 1102(3) a requirement that the prohibited differentiation in the province’s treatment be motivated by nationality-based considerations.

*b. International Tribunal Decisions And Other Legal Authorities Support The View That Article 1102(3) Does Not Require Proof Of Nationality-Based Discrimination Or Protectionist Intent*

226. Canada is wrong to the extent it argues that Article 1102, as a general matter, requires a specific showing of nationality-based discrimination or protectionist intent. NAFTA tribunals have explained that the national treatment obligation under Article 1102 does not require proof of discrimination based on nationality. The *Thunderbird v. Mexico* tribunal held that the claimant “is not expected...to show separately that the less favourable treatment was motivated because of nationality. The text of Article 1102 of the NAFTA does not require such showing. Rather, the text contemplates the case where a foreign investor is treated less favourably than a national investor.”<sup>309</sup>

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<sup>309</sup> CL-131, *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award ¶ 177 (Jan. 26, 2006).

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227. The *Bilcon* tribunal held that “the UPS test [to determine whether a national treatment violation exists] does not require a demonstration of discriminatory intent.”<sup>310</sup>

228. The tribunal in *S.D. Myers* explained that whether Article 1102 is violated is based upon the “practical impact”: “[t]he word ‘treatment’ suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.”<sup>311</sup>

229. The tribunal in *ADM* stated that “previous Tribunals have relied on the measure’s adverse effects on the relevant investors and their investors rather than on the intent of the Respondent state.”<sup>312</sup>

230. The *Merrill & Ring* tribunal found that the claimant in that case demonstrated “a practical impact” by “identify[ing] the adverse effects it believes arises from the treatment received” even though a discriminatory motive or intent was “not an issue that arises in the instant case.”<sup>313</sup>

231. The tribunal in *Pope & Talbot* stated that the “approach proposed by the NAFTA Parties”—which, they argue, “prohibits treatment that discriminates on the basis of the foreign investment’s nationality”—“would tend to excuse discrimination that is not facially directed at foreign owned investments.”<sup>314</sup>

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<sup>310</sup> CL-104, *supra* n.43, *Bilcon* ¶ 719.

<sup>311</sup> RL-059, *supra* n.152, *S.D. Myers* Partial Award ¶ 254.

<sup>312</sup> RL-092, *supra* n.302, *ADM v. Mexico* Award ¶ 209.

<sup>313</sup> CL-101, *supra* n.124, *Merrill & Ring* Award ¶ 80.

<sup>314</sup> CL-114, *supra* n.308, *Pope & Talbot* Award on Merits Phase 2 ¶ 79.

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232. Tribunals outside NAFTA have reached a similar conclusion that a discriminatory intent is not required to breach national treatment obligations.

- The tribunal in *Standard Chartered Bank v. Tanzania* held that, “There appears weak support from other tribunals for the proposition that intention to disfavor or discriminate is an essential element to establish less favourable treatment or discrimination...The Tribunal takes the view that Article 16.1 of the Implementation Agreement does not support a requirement of intent; what is addressed is the discriminatory action and its consequences. Intent is a distinct element and one that is burdensome to prove and should not be readily implied since it would reduce the scope of protection without explicit mention.”<sup>315</sup>
- The *Siemens A.G. v. Argentina* tribunal held that “intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment.”<sup>316</sup>
- The *Cargill v. Poland* tribunal called national treatment an “objective provision” where “[o]nly the impact or result of the [measures] must be examined;” “it may be left open whether the Respondent imposed national and negotiated [measures] with the intent to protect the interests of its nationals to the detriment of the foreigner.”<sup>317</sup>
- The *Bayindir v. Pakistan* tribunal similarly held that the test was objective, that “an intent to discriminate is [not] required” and that “a showing of discrimination of an investor who happens to be a foreigner is sufficient.”<sup>318</sup>

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<sup>315</sup> CL-243, *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania II*, ICSID Case No. ARB/15/41, Award of the Tribunal ¶¶ 407-408 (Oct. 11, 2019).

<sup>316</sup> CL-217, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award ¶ 321 (Feb. 6, 2007).

<sup>317</sup> CL-221, *Cargill, Incorporated v. Republic of Poland*, UNCITRAL, Award ¶¶ 343-345 (Mar. 5, 2008) (“*Cargill v. Poland Award*”).

<sup>318</sup> CL-112, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award ¶ 390 (Aug. 27, 2009) (“*Bayindir*”).

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233. Canada claims its position is supported by “commentators and scholars.”<sup>319</sup> However, the prevailing view is that anti-alien motivation is not a required element under Article 1102.<sup>320</sup>

234. Contrary to Canada’s arguments,<sup>321</sup> Professors Newcombe and Paradell suggest the following methodology under Article 1102:

In analyzing national treatment, NAFTA investment tribunals have considered three distinct issues. First, tribunals have identified the relevant subjects for comparison – are they in like circumstances? Second, they have considered the relative treatment each subject received and whether one received less favourable treatment. Finally, they have considered whether there are legitimate, non-protectionist rationales to justify differences in treatment.<sup>322</sup>

However, proof of discriminatory intent of discrimination is not required:

Further, while national treatment serves to discipline nationality-based discrimination, the investor need not demonstrate protectionist intent or motive....There is no requirement that the claimant prove that less favourable treatment is due to nationality....

However, proof of protectionist intent is neither a necessary nor a sufficient condition for a finding that there has been a breach of national treatment....

In practice, host state regulatory measures rarely result from one decision-maker whose motives and intent are clearly identifiable. A state regulatory measure that affects foreign investments may be the result of a large number of competing and overlapping interests.<sup>323</sup>

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<sup>319</sup> See Canada Counter-Memorial ¶ 250 n.527.

<sup>320</sup> See, e.g., RL-059, *supra* n.152, *S.D. Myers* Partial Award ¶ 254.

<sup>321</sup> See Canada Counter-Memorial ¶ 250 n.527.

<sup>322</sup> CL-117, Andrew Newcombe and Luis Paradell, *Law and Practise of Investment Treaties: Standards of Treatment* § 4.12 (Kluwer Jan. 2009) (“Newcombe and Paradell”).

<sup>323</sup> CL-117, *supra* n.322, Newcombe and Paradell §§ 4.6, 4.17.



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235. Christoph Schreuer explains that

A further question concerns the objective or subjective nature of discrimination. Put differently: is the fact of differential treatment a sufficient basis for finding discrimination or is it necessary to prove discriminatory intent? In general, tribunals seem to favour an objective approach that looks at the discriminatory consequences of a particular measure. An intention to discriminate appears to be secondary. Tribunals interpreting Article 1102 of the NAFTA on national treatment come to the conclusion that what mattered was a measure's practical effect and not an intent to discriminate....

Despite some cases pointing to discriminatory intent, the preponderant view in arbitral practice is that discrimination need not be based on an intention by the host State's authorities to discriminate or on an explicitly discriminatory rule of its domestic law. *De facto* discrimination is enough. That means that the investor does not bear the burden of proof that the differential treatment was motivated by foreign nationality. The fact of discrimination and the existence of the foreign nationality are enough.<sup>324</sup>

236. *Redfern and Hunter on International Arbitration* states that “[t]ribunals do not require proof of discriminatory or protectionist intent in order to find a treaty breach.”<sup>325</sup>

237. Sabina Sacco and Mónica C. Fernández-Fonseca state that investors need not “prove discriminatory intent”:

A final question that arises in the context of differentiated treatment is whether differences in treatment must be based on the investor's foreign nationality (*i.e.*, whether there must be discriminatory intent), or whether it is sufficient to demonstrate a less favourable treatment. The trend among BIT and NAFTA tribunals seems to favour the position that the investor does not need to prove discriminatory intent, and that it is sufficient to prove that there has been a difference in treatment.<sup>326</sup>

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<sup>324</sup> CL-219, Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, at 16-18 (Dec. 22, 2007).

<sup>325</sup> CL-229, *Redfern and Hunter on International Arbitration* at 486, Nigel, Partasides, Redfern, et al. (6th ed. Sep 2015).

<sup>326</sup> CL-226, Sabina Sacco and Mónica C. Fernández-Fonseca, Chapter 8B: National Treatment in Investment Arbitration, *WTO Litigation, Investment Arbitration, and Commercial Arbitration* at 258 (Huerta-Goldman, Romanetti and Stirnimann Fuentes (eds), Jan 2013).

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### c. *Diversion And Distraction Cannot Salvage Canada's Argument*

238. Canada tries to divert the Tribunal's attention away from the specific language of Article 1102(3) by making only one passing reference to that provision in its 24-page argument on national treatment.<sup>327</sup> Canada ignores this language and fails to acknowledge that Resolute's claim arises under Article 1102(3) as concerning provincial treatment and discrimination.

239. Canada passes over the text of the provision by focusing instead on references dealing with Articles 1102(1) and 1102(2) and arguing that "Canada, the United States and Mexico have consistently agreed on this point," that the reach of Article 1102 is limited to nationality-based discrimination.<sup>328</sup> Canada also contends that "[t]he consistent and concordant views of the NAFTA Parties constitutes 'subsequent practice' under Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*."<sup>329</sup>

240. Canada, in footnotes, cites to various statements of the NAFTA Parties in other arbitrations to contend that Resolute must demonstrate nationality-based discrimination.<sup>330</sup> However, the NAFTA Parties did not advance arguments regarding Article 1102(3) in the materials cited by Canada, and those tribunals did not interpret the provision:

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<sup>327</sup> There is only a single indirect reference, in paragraph 277, where Canada quotes from paragraph 290 of the Tribunal's Decision on Jurisdiction and Admissibility, in which the Tribunal referred to the correct provision (*i.e.*, Article 1102(3)).

<sup>328</sup> Canada Counter-Memorial ¶ 250.

<sup>329</sup> Canada Counter-Memorial ¶ 250 n.256.

<sup>330</sup> See Canada Counter-Memorial ¶ 250 & nn. 523-525, where Canada refers to its own pleadings, and those of the United States and Mexico, respectively, in support of its argument that the NAFTA Parties have advanced a consistent position on the interpretation of Article 1102 in NAFTA cases.

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- In *Methanex*, neither the United States' Statement of Defense (cited by Canada)<sup>331</sup> nor the Article 1128 submissions cited Article 1102(3).<sup>332</sup>
- In *Bilcon*, where the tribunal rejected the argument that “a demonstration of discriminatory intent” is required,<sup>333</sup> neither Canada<sup>334</sup> nor the United States referenced Article 1102(3).<sup>335</sup>
- The same is true of *Mesa Power*, where Canada<sup>336</sup> and the United States<sup>337</sup> ignored Article 1102(3).
- The four *Mercer International* submissions cited by Canada contain a solitary reference (from a quotation from a different NAFTA Arbitration) to Article 1102(3); this quotation had no bearing on the remainder of Canada's Article 1102 arguments in *Mercer*.<sup>338</sup>
- In *Windstream*, neither the tribunal's award<sup>339</sup> nor the submissions cited by Canada reference Article 1102(3).<sup>340</sup>

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<sup>331</sup> RL-153, *Methanex Corporation v. The United States of America*, UNCITRAL, Amended Statement of Defense of Respondent United States ¶ 284 n. 479 (Dec. 3, 2003).

<sup>332</sup> RL-144, *Methanex Corporation v. The United States of America*, UNCITRAL, Canada's Fourth Submission pursuant to Article 1128 ¶¶ 4-5 (Jan. 30, 2004); RL-159, *Methanex Corporation v. The United States of America*, UNCITRAL, Mexico's Fourth Submission pursuant to Article 1128 ¶¶ 15-16 (Jan. 30, 2004).

<sup>333</sup> *Supra* ¶ 227 (citing CL-104, *supra* n.43, *Bilcon* ¶ 719).

<sup>334</sup> RL-147, *William Ralph Clayton and others v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Counter-Memorial ¶ 401 (Dec. 9, 2011).

<sup>335</sup> RL-038, *William Ralph Clayton and others v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04 ¶ 7 (Apr. 19, 2013) (“Article 1102 paragraphs (1) and (2) are not intended to prohibit all differential treatment among investors or investments.”)

<sup>336</sup> RL-149, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Counter-Memorial and Reply on Jurisdiction ¶¶ 349-54 (Feb. 28, 2014).

<sup>337</sup> RL-155, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America ¶¶ 11-15 (July 25, 2014).

<sup>338</sup> RL-150, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Counter-Memorial ¶ 360 (August 22, 2014); RL-041, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Canada's Rejoinder, ¶ 242 n.467 (Mar. 31, 2015); RL-040, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, United States' Submission, ¶¶ 10-11 (May 8, 2015); RL-162, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Mexico's Submission, ¶¶ 10-15 (May 8, 2015).

<sup>339</sup> CL-123, *supra* n.123, *Windstream* ¶¶ 410-416.

<sup>340</sup> RL-151, *Windstream Energy LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2013-22, Canada's Rejoinder ¶ 67 (Nov. 6, 2015); RL-156, *Windstream Energy LLC v.*

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- The *Apotex* tribunal did not interpret Article 1102(3),<sup>341</sup> and the United States did not mention that section of the law when it considered discrimination based on nationality in its Counter-Memorial.<sup>342</sup>
- The *Gami* tribunal did not interpret Article 1102(3),<sup>343</sup> nor was there any reference to that provision in the section of Mexico's Statement of Defense dealing with discrimination based on nationality.<sup>344</sup>
- In *Cargill*, there was no mention of Article 1102(3) in the award,<sup>345</sup> and Mexico's Rejoinder dealing with discrimination based on nationality did not address that provision.<sup>346</sup>

241. Besides the hazard of quoting oneself for authority, Canada has not fully and faithfully reported its own previous position. Citing to paragraph 585 of its counter-memorial in the *UPS* case,<sup>347</sup> Canada wrote:

Article 1102 must be interpreted according to the rules set out in Article 31 of the *Vienna Convention*. The terms of Article 1102, read in their context and in light of NAFTA's object and purpose set out the precise content of the national treatment obligation it prescribes. They also reveal the article's general purpose of preventing nationality-based discrimination.<sup>348</sup>

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*Government of Canada*, UNCITRAL, PCA Case No. 2013-22, United States' Submission ¶¶ 27-28 (Jan. 12, 2016).

<sup>341</sup> CL-228, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (Aug. 25, 2014). Inasmuch as the provision was federal, there was no reason to reference the provincial provision in Article 1102(3).

<sup>342</sup> RL-154, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objections to Jurisdiction ¶ 323 (Dec. 14, 2012).

<sup>343</sup> CL-017, *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award (Nov. 15, 2004).

<sup>344</sup> RL-158, *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Statement of Defense ¶ 273 (Nov. 24, 2003). Like in *Apotex*, there was no reason for a provincial provision to be addressed.

<sup>345</sup> See generally CL-118, *supra* n. 124, *Cargill v. Mexico* Award.

<sup>346</sup> RL-161, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Rejoinder of the Respondent ¶ 286 (May 2, 2007).

<sup>347</sup> See Canada Counter-Memorial ¶ 250 n.523 (citing RL-145, *United Parcel Service v. Canada*, UNCITRAL, Canada's Counter Memorial (Merits Phase) (June 22, 2005)).

<sup>348</sup> RL-145, *supra* n.347, *United Parcel Service v. Canada*, UNCITRAL, Canada's Counter Memorial (Merits Phase) ¶ 585.

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Yet, in the preceding paragraph of its *UPS* counter-memorial (¶ 584), Canada cited only Articles 1102(1) and (2).<sup>349</sup> Canada excluded “[t]he precise content” of Article 1102(3) from “[t]he terms of Article 1102.”<sup>350</sup> The measures in that case were national and, therefore, did not implicate Article 1102(3): they related to the treatment of Canada Post by the Government of Canada. No provincial measures were involved, and the tribunal did not address the meaning of Article 1102(3) in its award.<sup>351</sup>

242. Under Article 31(3)(b), a “subsequent practice”—even when established—is not binding on a tribunal. Rather, it is to be “taken into account” together with the “context.” For this Tribunal, therefore, the question is not about identifying a subsequent practice to follow, but how much weight to give to any “subsequent practice” the NAFTA Parties may have established.<sup>352</sup> In this matter, the Tribunal should disregard what Canada refers to as “subsequent practice” because, contrary to Canada’s assertions, the NAFTA Parties have not interpreted Article 1102(3) as to

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<sup>349</sup> RL-145, *supra* n.347, *United Parcel Service v. Canada*, UNCITRAL, Canada’s Counter Memorial (Merits Phase) ¶ 584.

<sup>350</sup> None of the paragraphs in Canada’s *UPS* rejoinder, to which Canada also refers, mentioned Article 1102(3) either. See RL-146, *United Parcel Service v. Canada*, UNCITRAL, Canada’s Rejoinder (Merits Phase) ¶¶ 41, 70, 159 (Oct. 6, 2005). Canada also refers to Mexico’s Article 1128 submission in *UPS*. See Canada’s Counter-Memorial ¶ 250 n. 525. However, Mexico’s submission made no mention of Article 1102(3), see RL-160, *United Parcel Service v. Canada*, UNCITRAL, Submission of the United Mexican States ¶¶ 7-11 (Oct. 20, 2005), while at the same time supporting the importance of “adhering to the plain language of the text” of the provision in question, *id.* ¶ 9.

<sup>351</sup> CL-113, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, (May 24, 2007) (“*UPS Award*”).

<sup>352</sup> See CL-237, *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶ 160 (July 13, 2018). Also, as confirmed in the *Bilcon* case, “only analyzing subsequent practices does not replace the primary rule of interpretation of Article 31(1).” CL-241, *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Damages ¶ 379 (Jan. 10, 2019).

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nationality-based discrimination,<sup>353</sup> and there are statements in NAFTA Party submissions that confirm Resolute's view that the tests under Articles 1102(1) and (2), on the one hand, and Article 1102(3), on the other, are different.

243. Instead of relying upon various statements in arbitral submissions, the appropriate mechanism for the NAFTA Parties to reach agreement on a matter of interpretation is the Free Trade Commission. It is the Commission, pursuant to NAFTA Article 2001, that "shall resolve disputes that may arise" regarding interpretation or application of NAFTA, and it is only an interpretation of a provision by the Commission (which is comprised of cabinet-level representatives of the Parties) that is binding on a tribunal established under Chapter Eleven.<sup>354</sup>

### 2. GNS Accorded "Treatment" To Resolute And Its Investments

244. Resolute's Memorial explained that Resolute was accorded treatment by GNS with respect to the expansion, conduct, and operation of its investments.<sup>355</sup> To meet GNS's stated objective of making PHP the lowest cost SC Paper producer in North America, "[i]t is obvious," just as it was in *Corn Products v. Mexico*,<sup>356</sup> that the Nova Scotia Measures would affect Resolute (and the few remaining SC Paper

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<sup>353</sup> Cf. CL-224, *United Mexican States v. Cargill*, 2011 ONCA 622, Judgment of the Ontario Court of Appeal on Application to Set Aside Award ¶¶ 80-84 (Oct. 4, 2011) (finding that the NAFTA Parties' submissions evidenced a "general agreement" on damages principles, but did not address "the specific damages issue that has arisen in Cargill" and that the Cargill NAFTA tribunal therefore did not commit an error of jurisdiction in failing to give effect to the NAFTA Parties' "subsequent practice" under Article 31(3)(b) of the *Vienna Convention*).

<sup>354</sup> Article 1131(2) of NAFTA.

<sup>355</sup> Resolute Memorial ¶¶ 194-208.

<sup>356</sup> CL-107, *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility ¶ 119 (Jan. 15, 2008) ("*Corn Products*"); Resolute Memorial ¶ 206.

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producers) and its Canadian investments outside of Nova Scotia. That effect amounts to “treatment” under Article 1102.

245. Resolute has demonstrated that GNS accorded Resolute “treatment” even though it had no SC Paper investments in Nova Scotia, relying in part on the Tribunal’s holding from the Jurisdictional and Admissibility Decision that the Nova Scotia Measures “were intended to put the purchaser [of the mill at Port Hawkesbury] in a favourable position, and in a small and saturated market it was to be expected that competitors would be affected.”<sup>357</sup> The Nova Scotia Measures “related to” Resolute under Article 1101(1).

246. The analysis applicable to Article 1101(1) is relevant to Article 1102(3), contrary to Canada’s contention that the Tribunal’s jurisdictional holding does not necessarily demonstrate “treatment” under Article 1102.<sup>358</sup> Canada relies on *Methanex*, the only case that rejected a claim based upon Article 1101(1). There, however, the tribunal decided the merits of Methanex’s claims, including its Article 1102 claim, before determining it lacked jurisdiction because the measures had no “legally significant connection” to Methanex under Article 1101(1).<sup>359</sup> And, in the other cases (all of which denied Article 1101(1) defenses), the tribunals considered the Article 1101(1) defense in conjunction with the merits. Therefore, these decisions demonstrate that the two

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<sup>357</sup> Resolute Memorial ¶¶ 195-198; Decision on Jurisdiction and Admissibility ¶¶ 247-48 (Jan. 30, 2018) (“Jurisdictional and Admissibility Decision”).

<sup>358</sup> Canada Counter-Memorial ¶¶ 256-257.

<sup>359</sup> RL-054, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, at Part IV, Chapters B and E (Aug. 3, 2005) (“*Methanex* Final Award”).

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inquiries (*i.e.*, whether a measure “relates to” an investor/investment and whether an investor/investment has been accorded “treatment”) are closely related.<sup>360</sup>

247. Canada also ignores the substance of the Tribunal’s Article 1101(1) decision. Resolute does not contend that the Tribunal’s decision requires an automatic finding that Resolute received treatment under Article 1102. Instead, Resolute contends the facts supporting the Tribunal’s decision—that GNS’s benefits to PHP enabled the mill to restart, forcing a decline in the price of SC Paper in a small and shrinking market—is evidence of treatment under Article 1102.<sup>361</sup>

248. Canada ignores Dr. Kaplan’s expert testimony, which demonstrates that GNS accorded Resolute treatment. Dr. Kaplan explained, as presented in Resolute’s Memorial, that<sup>362</sup>: (1) the Nova Scotia Measures enabled PHP to restart as the lowest cost SC Paper producer (when it was previously a bankrupt high-cost mill); (2) SC Paper prices dropped when PHP reentered the market fully; (3) the North American market for SC Paper is an integrated market so that PHP’s reentry as a high volume and low cost mill would cause prices to decline throughout the market; and (4)

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<sup>360</sup> See CL-118, *supra* n. 124, *Cargill v. Mexico* Award ¶¶ 162-180 (deciding that Article 1101(1) was met), ¶¶ 185-223 (finding violation of Article 1102); RL-051, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award ¶¶ 6.1-6.34 (Aug. 25, 2014) (addressing Article 1101(1)); ¶¶ 8.1-8.78 (addressing Article 1102 claim); CL-104, *supra* n.43, *Bilcon* ¶¶ 232-241 (finding Article 1101(1) was satisfied); ¶¶ 605-731 (concluding that Canada breached Article 1102); CL-108, *supra* n.142, *Mesa Power* ¶¶ 252-260 (stating that requirements of Article 1101(1) were met); *id.* ¶¶ 706(iii) (deciding that claim under Article 1102 lacked jurisdiction based upon a different NAFTA provision other than Article 1101(1)).

<sup>361</sup> Resolute Memorial ¶¶ 197-198 (citing Jurisdictional and Admissibility Decision ¶¶ 247, 248, 290).

<sup>362</sup> See Resolute Memorial ¶¶ 199-202.



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Resolute's SC Paper losses in Québec were the direct consequence of the Nova Scotia Measures provided exclusively to PHP.

249. New evidence, [REDACTED], produced by Canada subsequent to Resolute's opening Memorial, demonstrates that GNS accorded Resolute treatment for purposes of Article 1102(3).<sup>363</sup> The GNS consultants told GNS that the re-opening of PHP (which would not have happened but for the Nova Scotia Measures), would [REDACTED] [REDACTED].<sup>364</sup> The [REDACTED] included the following observations and conclusions:

- [REDACTED] 365
- [REDACTED] 366
- [REDACTED] 367
- [REDACTED] 368
- [REDACTED] 369

In his Reply Report, Dr. Kaplan confirms that "PWCC would not have assumed ownership and re-opened the PH facility without the substantial benefits package it

<sup>363</sup> R-161, *supra* n.2, [REDACTED]

<sup>364</sup> R-161, *supra* n.2, [REDACTED] at 10.

<sup>365</sup> R-161, *supra* n.2, [REDACTED] at 12.

<sup>366</sup> R-161, *supra* n.2, [REDACTED] at 6.

<sup>367</sup> R-161, *supra* n.2, [REDACTED] at 8.

<sup>368</sup> R-161, *supra* n.2, [REDACTED] at 9.

<sup>369</sup> R-161, *supra* n.2, [REDACTED] at 10.

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received from the NSG.”<sup>370</sup> Hence, the Nova Scotia Measures enabled the re-opening of PHP, something GNS officials knew from the [REDACTED] would harm other paper mills, particularly Resolute.

250. Instead of addressing these issues, Canada attempts a diversion by advancing its own definition of the term “treatment”: “behavior in respect of an entity or person.”<sup>371</sup> Canada contends that Resolute “has not identified any ‘treatment’ it received from Nova Scotia that would meet [Canada’s] definition.”<sup>372</sup> But the NAFTA Parties chose not to define the term “treatment.” As the *UPS* tribunal observed,

The answer to Canada’s assertion is a practical one. The effect of Canada Customs decisions respecting processing of items, allocation of costs and responsibilities associated with the processing, etc., affects the speed, cost, and quality of service associated with shipment of items via particular routes and using particular entities. Changes in these characteristics affect demand for the service, and changes in demand for the service affect the returns associated with it. The changes affect both the entity that delivers the good to Canada Customs and the entity that delivers the good after it clears Customs. Competition between the streams of goods and entities shipping through the different streams is clear. So long as there is financial gain/loss associated with the choice of one or another stream, there is treatment of those whose business is associated with the particular stream. In addition to the reasons above, failure to narrow the term “treatment” in NAFTA definitions is consistent with the practical approach to the issue. No tribunal has adopted the approach urged by Canada.<sup>373</sup>

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<sup>370</sup> Expert Report of Seth Kaplan ¶ 66 (Dec. 6, 2019) (“CWS-Kaplan-2”).

<sup>371</sup> Canada Counter-Memorial ¶ 257.

<sup>372</sup> Canada Counter-Memorial ¶ 258.

<sup>373</sup> CL-113, *supra* n.351, *UPS Award* ¶ 86; see also RL-165, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction ¶ 85 (Aug. 3, 2004) (“If it were the intention to limit the content of Article 3 beyond the limits of those exceptions, then the terms ‘treatment’ or ‘activities’ would have been qualified. The fact that this is not the case is an indication of their intended wide scope.”).

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Here, the Nova Scotia Measures led to a “financial gain/loss measure,” through depressed prices from the reemergence of the highest volume and lowest cost producer of SC Paper in a shrinking market composed of few producers.

251. The “treatment” Resolute received is consistent with the concept applied in the high-fructose corn-syrup cases (“HFCS”) of *ADM, Corn Products* and *Cargill*. There, Mexico imposed a tax on the bottlers of soft drinks containing HFCS. Similar to the case here, Mexico adopted the measure to favor its domestic industry (sugar) over the foreign producers of a comparable product (HFCS).<sup>374</sup> The production of HFCS was “concentrated in foreign-owned enterprises...whereas production of sugar was largely carried out by Mexican nationals...Thus, the effect of what was, in substance, a special tax on HFCS was the distortion of the market in favour of domestic suppliers and to the disadvantage of the foreign investors.”<sup>375</sup> That finding is also similar to this case, where a small number of SC Paper producers dominate the North American market, all of whom reside outside Nova Scotia except for PHP. The effect of the Nova Scotia Measures was the distortion of the market in favour of PHP to the disadvantage of foreign investments (including Resolute’s foreign investments) outside the province.

252. Canada argues these cases are distinguishable because the claimants had made investments in Mexico, which imposed the tax on bottlers of soft drinks (but not on the claimants, the producers of the soft drinks).<sup>376</sup> However, the claimants’ Mexican investments were not relevant to the findings of “treatment” in the HFCS cases.

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<sup>374</sup> See, e.g., RL-092, *supra* n.302, *ADM v. Mexico Award* ¶¶ 145-147.

<sup>375</sup> E.g., CL-107, *supra* n.356, *Corn Products* ¶ 132.

<sup>376</sup> See Canada Counter-Memorial ¶ 261.

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The bottlers, not the claimant producers, were subject to the jurisdiction of Mexico's tax. Consistent with the "practical approach," the economic effect of the tax on the claimants—not the tax itself—constituted the treatment. Moreover, the tax's effect on the relevant entities in the soft-drink market caused that economic effect—an economic and market, not a jurisdictional issue.<sup>377</sup> The claimants in those cases still had to demonstrate they had an investment in Mexico to obtain protection under NAFTA. Here, similarly, there is no dispute that Resolute had investments in Canada to qualify for protection.

253. Canada also attempts to distinguish the HFCS cases because those tribunals supposedly found that the discrimination was based on nationality or that there was some protectionist intent by Mexico.<sup>378</sup> That is not, however, the standard that Resolute must meet under NAFTA or international law.<sup>379</sup> The tribunals in *Corn Products*, *ADM*, and *Cargill* also were considering measures imposed by the federal Mexican government (the tax on HFCS) but not sub-national measures governed by Article 1102(3).

254. Even if proof of discrimination and intent were required to constitute "treatment," that standard would be met here. GNS knew from the [REDACTED] that Resolute and the other SC Paper producers in North America, all of whom were

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<sup>377</sup> CL-107, *supra* n.356, *Corn Products* ¶ 119 ("In these circumstances, it would be the 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 sweeteners, precluded it from amounting to treatment of the latter for the purposes of Article 1102."); RL-092, *supra* n.302, *ADM v. Mexico Award* ¶ 211 ("The effect of the Tax was that U.S. producers and distributors of [high fructose corn syrup] in Mexico received treatment less favorable than that accorded to Mexican sugar producers.").

<sup>378</sup> See Canada Counter-Memorial ¶ 261.

<sup>379</sup> See *supra* ¶¶ 214-243.

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outside Nova Scotia, would be affected directly and adversely by GNS's decision to resuscitate PHP. Resolute was a known and anticipated victim of GNS's parochial policy favoring PHP, GNS's national champion. These acts are similar to acts under the same circumstances in the three *HFCS* cases. Therefore, these acts constitute "treatment" under Article 1102(3), even under a standard requiring proof of discriminatory intent (which is not and should not be required).

### 3. Resolute And Its Investments Are In "Like Circumstances" To PWCC And PHP

255. Resolute and its investments are in "like circumstances" to PWCC and PHP because the Nova Scotia Measures were aimed directly at making PHP the national champion, the lowest-cost producer in North America.<sup>380</sup> Resolute's investments were the competitors in the North American SC Paper market that, along with a handful of other producers, the Nova Scotia Measures impaired. The competitors in that same sector are in "like circumstances" for purposes of Article 1102 when a measure singles out and discriminates in favor of one competitor in that sector.

256. As the tribunal in *Corn Products* found, producers of HFCS were in like circumstances to Mexican sugar producers because both "operated in the same business or economic sector...their products were in direct competition with one another, treated both by customers and Mexican law as being interchangeable. The purpose of the HFCS tax was avowedly to alter the terms of competition between them."<sup>381</sup>

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<sup>380</sup> See Resolute Memorial ¶¶ 209 – 215.

<sup>381</sup> CL-107, *supra* n.356, *Corn Products* ¶ 120; see also *id.* ¶ 143 (explaining tribunal found *prima facie* breach of Article 1102); ¶¶ 191-192 (rejecting counter measures (*i.e.*, justification) defenses of Mexico).

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257. In its Counter-Memorial, Canada stuffs a strawman to contend that “[t]he Claimant’s arguments with respect to the ‘in like circumstances’ analysis focuses on the circumstances the *investors and their investments* were in rather than on the circumstances in which the treatment was accorded.”<sup>382</sup> That strawman cannot stand up. Resolute argues a violation of Article 1102(3) based upon the treatment provided to it as a comparator investor and to its comparator investments. The “like circumstances” test is met because the Nova Scotia Measures, which gave whatever support was needed to make the Port Hawkesbury mill the lowest cost producer and national champion of SC Paper, discriminated in favor of PWCC/PHP, as evidenced by the [REDACTED] [REDACTED].<sup>383</sup> It was Resolute’s investments, along with those of a handful of other producers, that “the Nova Scotia Measures were designed to impair.”<sup>384</sup>

258. Contrary to Canada’s contention, Resolute followed the “like circumstances” test developed in prior NAFTA awards,<sup>385</sup> such as: (1) *Corn Products*, discussed above;<sup>386</sup> (2) *Pope & Talbot*, which applied a highly fact specific test<sup>387</sup> that

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<sup>382</sup> Canada Counter-Memorial ¶ 265 (emphasis in original); see also *id.* ¶ 266 (“In applying the ‘in like circumstances’ test like it does, the Claimant allows itself to focus on a single element, namely the fact that the two companies (and their investments) allegedly operate within the same economic sector and it leaves important factors out of the equation.”).

<sup>383</sup> R-161, *supra* n.2, [REDACTED] at 10.

<sup>384</sup> Resolute Memorial ¶ 210.

<sup>385</sup> See Resolute Memorial ¶¶ 211-215.

<sup>386</sup> *Supra* ¶¶ 251, 256.

<sup>387</sup> CL-114, *supra* n.308, *Pope & Talbot Award on Merits Phase 2* ¶ 75 (“It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, ‘circumstances’ are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept of ‘like’ can have a range of meanings, from ‘similar’ all the way to ‘identical’[...]).

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depended on “the character of the measures under challenge”<sup>388</sup>; (3) *ADM v. Mexico*, which stated that “all ‘circumstances’ in which the treatment was accorded are to be taken into account in order to identify the appropriate comparator;<sup>389</sup> and (4) *S.D. Myers*, which requires “an examination of whether a non-national investor complaining of less favourable treatment is in the same ‘sector’ as the national investor,” including the same “economic sector” and “business sector.”<sup>390</sup>

259. Non-NAFTA tribunals have reached similar conclusions. The *Cargill v. Poland* tribunal considered (among other factors) whether the entities were in the “same economic/business sector” and whether the products at issue were substitutable.<sup>391</sup> The *Olin Holdings v. Libya* tribunal found that factories operating “in the same business sector,” “reinforced by the existence of a similar location,” meant that the comparator entities were “similarly situated.”<sup>392</sup> As Dr. Kaplan explained, Resolute’s SC Paper was substitutable with PHP’s product and was sold in the same North American market as PHP’s product.<sup>393</sup>

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<sup>388</sup> CL-114, *supra* n.308, *Pope & Talbot Award on Merits Phase 2* ¶ 76.

<sup>389</sup> RL-092, *supra* n.302, *ADM v. Mexico Award* ¶ 197.

<sup>390</sup> RL-059, *supra* n.152, *S.D. Myers Partial Award* ¶ 250.

<sup>391</sup> See CL-221, *supra* n.317, *Cargill v. Poland Award* ¶ 312. The other factors considered in that case included whether there was an identical product for sale, which is not at issue here; any justification for the measures, which that tribunal considered separately, see *id.* ¶¶ 332-333; and whether the entire Polish sugar industry was the appropriate comparator, see *id.* ¶¶ 334-338.

<sup>392</sup> CL-236, *Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Final Award ¶¶ 205-207 (May 25, 2018). The product in question there was the “dairy and juice market in Libya.”

<sup>393</sup> See CWS-Kaplan-2 ¶¶ 17, 34.

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260. Canada argues that “tribunals have repeatedly confirmed that treatment accorded under different legal and regulatory regimes cannot be compared.”<sup>394</sup> But Resolute is not asking the Tribunal to compare treatment under “different legal and regulatory regimes” because this dispute is not a regulatory case (although Resolute is asking the Tribunal to consider the special regulatory and legislative measures that GNS implemented on PHP’s behalf). Therefore, the decision in *Grand River* (cited by Canada) and the awards cited by that tribunal are distinguishable: all were about regulatory measures.<sup>395</sup>

261. Instead, this arbitration compares the impact on PHP of GNS’s comprehensive bailout package (which gave PHP the support it demanded to make it the lowest cost producer of SC Paper) to its impact on Resolute. These impacts, as Canada knew from the [REDACTED] and Dr. Kaplan confirmed in his expert report, were inseparable.<sup>396</sup> The description in the [REDACTED] effectively created the comparator, comparing directly the likely fate of Resolute’s mill to the likely fate of PHP, the only difference in the circumstances being the Nova Scotia Measures. For purposes of Article 1102(3), Resolute and PHP were in like circumstances.

262. Canada contends Resolute was not “in like circumstances” because “GNS could not extend the same type of treatment provided to Port Hawkesbury to Resolute’s mills in Québec.”<sup>397</sup> Canada argues there can be no “like circumstances” in this case

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<sup>394</sup> Canada Counter-Memorial ¶ 268.

<sup>395</sup> See Canada Counter-Memorial ¶ 268.

<sup>396</sup> See, e.g., R-161, *supra* n.2, [REDACTED] at 10; Expert Report of Seth Kaplan ¶¶ 33-35 (Dec. 28, 2018) (“CWS-Kaplan-1”); CWS-Kaplan-2 ¶ 33.

<sup>397</sup> Canada Counter-Memorial ¶ 271.



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because, so the argument goes, Nova Scotia could not spend money outside of its territorial jurisdiction and Resolute was unavailable and ineligible for the kind of assistance given to Port Hawkesbury.

263. Canadian constitutional law would not restrict the exercise of a province's spending power to its territorial jurisdiction,<sup>398</sup> but Canada's framing of the argument is a distraction. The important point is that GNS could have refrained from adopting the Nova Scotia Measures, thereby sparing Resolute and its investments from the treatment it was accorded. GNS, knowing the harm it was doing to Resolute, could have fashioned and taken steps to mitigate the damage. And GNS could have spent its considerable resources in other ways to boost employment.

#### 4. Resolute And Its Investments Received Less Favorable Treatment Than PWCC And PHP

264. When provincial treatment is at issue, Article 1102(3) provides that the foreign investor and its investment is entitled to "treatment no less favorable than the most favorable treatment" accorded by the province to a domestic investor or

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<sup>398</sup> The "spending power," which exists at both the federal and provincial levels of government in Canada, is the power that each government has to spend the money that it has collected through taxation, and to dispose of its property. This power, which is not set out explicitly in the *Constitution Act, 1867*, has nevertheless been recognized in Canadian constitutional law (both in the cases and in scholarly writings). When a federal or provincial government spends money, it is not confined by the limits of its respective legislative power. See CL-030, Peter W. Hogg, *Constitutional Law of Canada* § 6.8, 5th ed. Supp. (Toronto: Carswell, 2016) ("Spending Power"). Prof. Hogg observes that "the provinces have never recognized any limits on their spending power and have often spent money for purposes outside their legislative competence, for example, by running a commuter train service on interprovincial trackage, by acquiring an airline, by giving international aid, or by paying casino profits to Indian communities." CL-030, Hogg, § 6.8(b), page 6-23 (2012-Rel. 1). He adds: "although the spending of money by the Crown requires an appropriation by the Legislature (or the Parliament), it is clear that the spending power is not subject to the restrictions that apply to other legislative powers, including the extraterritorial restriction. Therefore, a province may spend, or lend, or guarantee, or otherwise dispose of public funds, outside the boundaries of the province." CL-030, Hogg, § 13.4, page 13-16 (2008-Rel. 1).

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investment in like circumstances. That most favorable treatment was the Nova Scotia Measures, which provided PWCC and PHP with an extraordinary package of financial, regulatory, and statutory benefits in connection with PWCC's purchase of the Port Hawkesbury mill out of bankruptcy, including \$64 million in forgivable loans; over \$40 million in grants; \$20 million to purchase land; the ability to use tax losses to offset gains from PWCC investments outside of Nova Scotia; a reduced electricity rate; protection from renewable energy regulations; and the adoption of regulations that forced ratepayers to incur the cost to run the PHP Biomass Plant fulltime for PHP's benefit.<sup>399</sup>

265. Resolute received none of these benefits. The nature of the treatment accorded to Port Hawkesbury—market intervention to make it the “most competitive” producer of SC Paper in North America<sup>400</sup>—meant that no other producer could receive equivalent treatment, as only one mill could be the most competitive. Instead, Resolute and its investments were left to suffer the consequences of Port Hawkesbury's revival.

266. Canada cannot deny that Resolute received less favorable treatment, so it again tries to divert the Tribunal's attention. In paragraph 275 of the Counter-Memorial, Canada raises the question of what benefits Québec provided to Resolute. But that question is irrelevant, as Canada already has acknowledged elsewhere: “tribunals have repeatedly confirmed that treatment accorded under different legal and regulatory regimes cannot be compared.”<sup>401</sup> Canada has no other answer to the claim. If Resolute were accorded treatment by the Nova Scotia Measures (it was), and if it (and

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<sup>399</sup> See Resolute Memorial ¶ 219.

<sup>400</sup> C-187, Nova Scotia Press Release: *Province Invests in Jobs, Training and Renewing the Forestry Sector* (Aug. 20, 2012).

<sup>401</sup> Counter-Memorial, para. 268.

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its investments) were in like circumstances with PWCC and PHP (they were), then at this stage Canada cannot defend itself against the charge of a violation of Article 1102(3) on the basis of Resolute operating outside Nova Scotia (so was PHP).<sup>402</sup>

267. Canada contends that Resolute could have obtained the same benefits from GNS had it bid on the Port Hawkesbury mill in the CCAA process.<sup>403</sup> But there was only one SC Paper mill in Nova Scotia and, therefore, only one potential beneficiary, only one potential producer of SC Paper. There could be only one beneficiary of the province's largesse, and Resolute had no reason to think it might have been Resolute.

268. Based upon his experiences with Bowater Mersey, former Resolute President and CEO Richard Garneau has explained that he never expected GNS would provide the level of assistance to anyone else that was provided to PWCC/PHP.<sup>404</sup> Resolute's experience with Bowater Mersey led Resolute to conclude GNS would not offer an extensive assistance program or provide any support in obtaining a reduced electricity rate.<sup>405</sup>

269. Canada claims that the Tribunal's Decision on Jurisdiction and Admissibility provides "two instances that could constitute a breach of national treatment: (1) 'protective measures taken for the benefit of local investors while

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<sup>402</sup> Canada points to the electricity rate Resolute received from Hydro-Québec, which was the "L" rate that every large industrial producer is eligible to obtain in Québec. Unlike the unique rate PHP obtained from GNS, the L rate is a standard rate.

<sup>403</sup> Canada Counter-Memorial ¶ 276.

<sup>404</sup> See *infra* ¶¶ 359-366; Witness Statement of Richard Garneau ¶ 18 (Dec. 6, 2019) ("Resolute management never imagined the kind of government intervention and assistance we now know Nova Scotia gave for Port Hawkesbury.") ("CWS-Garneau").

<sup>405</sup> See *infra* ¶¶ 335-340; CWS-Garneau ¶ 19 ("The Government of Nova Scotia never offered to Resolute assistance comparable to the assistance it gave to PWCC.").

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effectively keeping NAFTA investors or their investments out’; and (2) ‘a Methanex-style scenario if the out-of-province investor had been the specific target of a provincial campaign to cause it loss.’”<sup>406</sup>

270. Contrary to Canada’s contention,<sup>407</sup> these two scenarios are not the only ways Resolute can establish a breach of Article 1102(3). The Tribunal stated that both scenarios were just “examples” of violations of Article 1102 and that Resolute could “establish on the merits a breach of Article 1102 on some other basis.”<sup>408</sup> And Resolute has satisfied at least one of the Tribunal’s examples, the *Methanex*-style scenario.<sup>409</sup>

### 5. The Discrimination Against Resolute’s Investments Cannot Be Justified

271. Resolute has made out its claim under Article 1102(3), having established each element of the *UPS* three-part test. Under the approach to Article 1102 developed in earlier NAFTA cases, the onus shifts to Canada to justify the discrimination. Canada has tried and failed.<sup>410</sup>

272. In *Pope & Talbot*, the tribunal wrote:

Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.<sup>411</sup>

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<sup>406</sup> Canada Counter-Memorial ¶ 277 (quoting Jurisdictional and Admissibility Decision ¶ 290).

<sup>407</sup> Counter-Memorial ¶ 278.

<sup>408</sup> Jurisdictional and Admissibility Decision ¶ 290.

<sup>409</sup> See *supra* ¶ 254.

<sup>410</sup> Canada Counter-Memorial ¶¶ 269-270.

<sup>411</sup> CL-114, *supra* n.308, *Pope & Talbot* Award on Merits Phase 2 ¶ 78.

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273. The burden to justify differential treatment falls on the Respondent. In

*Bilcon*, the tribunal wrote:

The approach taken in *Pope & Talbot*, would seem to provide legally appropriate latitude for host states, even in the absence of an equivalent of Article XX of the GATT, to pursue reasonable and non-discriminatory domestic policy objectives through appropriate measures even when there is an incidental and reasonably unavoidable burden on foreign enterprises. Consistently with the approach taken in the *Feldman* case, however, the present Tribunal is also of the view that once a *prima facie* case is made out under the three-part UPS test, the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102. It is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies and circumstances, that an apparently discriminatory measure is in fact compliant with the “national treatment” norm set out in Article 1102.<sup>412</sup>

The *Bilcon* tribunal determined that Canada failed to meet this test because: (1) the approach adopted by the Joint Review Panel to approve the project at issue “was at odds with the law and policy” behind the Canadian Federal environmental legislation; and (2) the JRP’s approach “was not consistent with the investment liberalizing objectives of NAFTA; indeed the Tribunal has found it to be incompatible with Article 1105.”<sup>413</sup>

274. Similarly, Canada failed to meet its burden here. First, the Nova Scotia Measures were unreasonable and had a devastating *de facto* effect on Resolute, a foreign investor in the SC Paper sector, as GNS knew they would.<sup>414</sup>

275. Second, the Nova Scotia Measures violate the core investment liberalizing objectives of NAFTA to “promote conditions of fair competition in the free trade area.”<sup>415</sup>

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<sup>412</sup> CL-104, *supra* n.43, *Bilcon* ¶ 723.

<sup>413</sup> CL-104, *supra* n.43, *Bilcon* ¶ 724.

<sup>414</sup> R-161, *supra* n.2, [REDACTED] at 10.

<sup>415</sup> NAFTA Article 102.

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Resolute, an American company incorporated in Delaware, invested in Canada understanding that it would be competing with other companies producing the same merchandise, but not that it would be competing with a provincial government that would decide to confer upon the one mill in its province extreme competitive advantages. GNS converted an operation with no possibility to compete into an advantaged company with an ongoing guarantee to be competitively superior. The discriminatory policy pursued by GNS cannot be justified under NAFTA.

### **B. The Nova Scotia Measures Are Not Excluded By 1108(7)**

276. Canada contends that several measures are not actionable under Article 1102(3): the \$40 million credit facility; the \$24 million loan; the \$1.5 million workforce training package; the \$1 million marketing contribution; the Indemnity Agreement; the Ramp-Up Agreement; the FULA; and the Outreach Agreement all fall, according to Canada, within Article 1108(7)(b), while the Outreach Agreement, FULA, and the Land Purchase also fall within Article 1108(7)(a).<sup>416</sup> According to Canada, these measures are barred by Article 1108(7), which provides that Article 1102 does not apply to both procurement measures (Article 1108(7)(a)) and subsidies or grants (Article 1108(7)(b)).<sup>417</sup>

277. Canada took a different position before the World Trade Organization (“WTO”), where it denied that GNS provided any subsidies (including grants, loans, and

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<sup>416</sup> See *generally* Canada Counter-Memorial ¶¶ 222-234.

<sup>417</sup> Canada does not assert that the electricity measures (including the integrally-related rate obtained by PHP/PWCC, the renewable energy regulations that mandated the Biomass Plant operate as a “must run” facility, and the relief from potential renewable energy requirements) and the property tax legislation are exempt under Article 1108(7).

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procurement) to PHP/PWCC<sup>418</sup>. Although it claims the “plain text” of NAFTA “unambiguously appl[ies]” to most of the Nova Scotia Measures,<sup>419</sup> Canada did not advance its Article 1108 defense during the jurisdictional and admissibility phase of this arbitration; instead, Canada waited until the Department of Commerce proceeding against the subsidies settled, which mooted the possibility of any further trade remedies imposed by the United States.

278. Canada should not be permitted to “blow hot and cold”—claiming in one forum that GNS provided no subsidies while, in another forum, asserting subsidies were provided (and only doing so after proceedings in the other forum concluded).

279. Canada invokes the absence of “detrimental reliance” to deny it is estopped from taking a position diametrically opposed to the position it took previously in another international forum subject to international law. The principle Canada is violating, however, is not only the narrow principle of “estoppel,” but the broader prohibition on self-contradiction.

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<sup>418</sup> The failure to report was not an oversight. Just a few months earlier, the United States asked of Canada, at the WTO, about the support for Port Hawkesbury at the time that Canada was declaring “nil” to the Subsidies and Countervailing Measures Agreement Committee. *Compare* C-037, Questions Regarding Reports of Assistance to Port Hawkesbury (Oct. 12, 2012) and C-350, Email from Paul Black regarding European Union Issues With Subsidies for Port Hawkesbury Mill (Oct. 27, 2012) *with* C-021, World Trade Organization, *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures – Canada*, WTO Doc. G/SCM/N/253/CAN § 12 (July 1, 2013) (“2013 Notification”).

<sup>419</sup> Canada Counter-Memorial ¶ 14; *see also id.* ¶ 224 (“With the exception of the electricity rate negotiated between NSPI and PWCC, which is not attributable to the GNS, all of the measures challenged by Resolute plainly fall within Article 1108(7)(a) or (b).”); *id.* ¶ 225 (“There is no controversy on this question.”); *id.* ¶ 228 (“Again, there can be no debate that the Article 1108(7)(b) exclusion for “government sponsored loans” applies and that Article 1102 does not.”); *id.* ¶ 229 (“It squarely falls under the Article 1108(7)(b) exclusion....”);

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280. Canada is not free, under the norms of good faith and self-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. In this deceit Canada seeks to have Resolute penalized twice, first exposing Resolute to a countervailing duty investigation by the United States that Resolute urged Canada to avoid,<sup>420</sup> and now denying Resolute's claim of damages arising from the very same measures.

1. Canada Declared To The WTO That GNS Provided No Subsidies To PHP/PWCC

281. Article 25 of the Agreement on Subsidies and Countervailing Measures provides that “[m]embers shall notify any subsidy...which is specific...granted or maintained within their territories.”<sup>421</sup> As defined in that Agreement, a subsidy includes: (1) “government practices [that] involve[] a direct transfer of funds (e.g., grants, loans, and equity infusion”); (2) “government revenue that is otherwise due [that] is foregone or not collected (e.g., fiscal incentives such as tax credits);” and (3) the purchase of goods.<sup>422</sup>

282. On October 12, 2012, the United States Trade Representative (“USTR”) sent questions to Canada regarding the Nova Scotia Measures.<sup>423</sup> On October 23,

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<sup>420</sup> See CWS-Garneau ¶¶ 21-24 (explaining Resolute informed Canada about the risks of a countervailing duty case but Canada took no actions to prevent it).

<sup>421</sup> C-367, World Trade Organization, *Agreement on Subsidies and Countervailing Measures*.

<sup>422</sup> *Id.* at Article 1. Article 2 provides that “[w]here the granting authority... explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.”

<sup>423</sup> See Statement of Defence ¶ 57.



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2012, the United States “raised concern[s]” (shared by the European Union) regarding the Nova Scotia measures at the WTO’s Committee on Subsidies and Countervailing Measures meeting; the United States “invited Canada to provide details regarding each of the elements of the assistance package that had been or would be provided to”

PHP.<sup>424</sup> [REDACTED]

[REDACTED]<sup>425</sup>

283. On April 22, 2013, the United States and the European Union raised this issue again during a WTO Committee on Subsidies and Countervailing Measures meeting:

The [United States] 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.

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. Specifically, according to industry and trade press sources, since the re-opening of the plant a few months earlier: (1) imports into the US from Canada had increased 13 per cent – despite a market that was shrinking overall; (2) shipments from US producers had decreased 10 per cent; (3) US capacity utilization was down; and (4) prices had fallen. 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, and avoid the negative consequences this

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<sup>424</sup> R-078, WTO Committee on Subsidies and Countervailing Measures, Minutes of Meeting held on 23 Oct. 2012 ¶¶ 61-62 (Jan. 10, 2013).

<sup>425</sup> C-212, Canada Response to USTR Questions of October 10, 2012 (Nov. 23, 2012).

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package appeared to be having on US producers and others competing in the US market.

The minutes also state that “[t]he [European Union] presumed that this scheme would be notified in Canada’s 2013 new and full subsidy notification.”<sup>426</sup>

284. Canada disagreed, stating 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.”<sup>427</sup>

285. After rejecting the requests that it notify the measures as subsidies under Article 25, Canada reported “Nil” for GNS subsidies in its 2013, 2015, and 2017 WTO notifications, which covered the period from April 1, 2010 through March 21, 2016.<sup>428</sup>

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<sup>426</sup> C-353, World Trade Organization, Committee on Subsidies and Countervailing Measures, “Minutes of the Regular Meeting held on 22 April 2013”, WTO Doc. G/SCM/M/85, ¶¶ 128-132 (Aug. 5, 2013).

<sup>427</sup> *Id.* ¶ 131.

<sup>428</sup> C-021, *supra* n.418, 2013 Notification § 12; C-359, World Trade Organization, *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures – Canada*, WTO Doc. G/SCM/N/284/CAN § 12 (July 9, 2015) (“2015 Notification”); C-361, World Trade Organization, *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures – Canada*, WTO Doc. G/SCM/N/315/CAN § (July 3, 2017) (“2017 Notification”). “Nil means that in accordance with Article 25 of the ASCM and Article XVI:1 of the GATT 1994, Governments of each Province and Territory informs that they do not grant or maintain within their territory any subsidy within the meaning of Article 1:1 of the Agreement which is specific within the meaning of Article 2 of the Agreement, or which operates directly or indirectly to increase exports from or reduce imports into their territory within the meaning of Article XVI:1 of GATT 1994.” See, e.g., C-021, *supra* n.418, 2013 Notification at p. 50.

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286. At the same time that it was reporting “Nil” for Nova Scotia subsidies, Canada was reporting subsidies in other provinces and even, from the federal government, in Nova Scotia. For example, Canada provided notifications in 2013 for the British Columbia Pork Production Protocol Enhancement Program (an initiative to assist the pork industry transition from hogs as a generic commodity to specialty pork) for \$99,716 in FY 2010/11 disbursements<sup>429</sup> and the Nunavut Arts & Crafts Development Program (to assist Nunavut artists with the purchase of art supplies and equipment, a program that disbursed a mere \$350,000 in FY 2010/11 to Nunavut artists). In its 2015 notification, Canada listed \$214,360 in disbursements for the Canada-Nova Scotia Strawberry Assistance Initiative (a program to provide assistance to commercial strawberry producers in Nova Scotia affected by a strawberry virus)<sup>430</sup> and the British Columbia Feeder Associations Loan Guarantee Program (an initiative introduced to help BC beef and sheep producers raise their calves or lambs to heavier weights before sale), even though no payments had yet been made under the program and the loan amounts under the program were no greater than \$300,000 in any year.<sup>431</sup> In the 2017 notification, Canada provided notice of the Canada-Nova Scotia Fire Blight Initiative and the Canada-Nova Scotia Maple Sector Initiative, both of which are federal programs intended to benefit Nova Scotia.<sup>432</sup>

287. Yet, Canada chose not to assert what it now calls “plainly” applicable Article 1108 defenses in this arbitration, even though it was advancing other partial

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<sup>429</sup> C-021, *supra* n.418, 2013 Notification § 7.2.

<sup>430</sup> C-359, *supra* n.428, 2015 Notification § 2.1.

<sup>431</sup> C-359, *supra* n.428, 2015 Notification § 7.1

<sup>432</sup> C-361, *supra* n.428, 2017 Notification §§ 2.2 and 2.3.

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jurisdictional and admissibility defenses during the bifurcated first phase.<sup>433</sup> Canada argued in its September 29, 2016 Request for Bifurcation that it was entitled to assert preliminary defenses as “the most fair, efficient and economical method of proceeding in this arbitration.”<sup>434</sup> Canada claimed that not doing so would “cost both disputing parties many millions of dollars in legal and expert fees and expenses and years of complicated argument.”<sup>435</sup>

288. Canada requested bifurcation on, among other issues, its: (1) Article 2103 defense, which addressed whether Resolute could assert Article 1105 and 1110 violations for property tax reductions given to PHP;<sup>436</sup> and (2) Article 1102(3) defense, which addressed whether Resolute received “treatment” from GNS so that Resolute could bring a national treatment claim under Article 1102.<sup>437</sup> Neither of these defenses would have disposed of Resolute’s entire claim;<sup>438</sup> as Canada contended during the bifurcation hearing, “[i]f successful, our third and fourth objections with respect to 1102(3) and 2103 will eliminate critical aspects of their claim and, if a merits phase is necessary, it will be a lot more efficient, economical and fair to both parties.”<sup>439</sup>

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<sup>433</sup> See *supra* ¶ 276.

<sup>434</sup> Canada Request for Bifurcation at 4 (Sep. 29, 2016) (“Canada Bifurcation Request”).

<sup>435</sup> Canada Bifurcation Request ¶ 32.

<sup>436</sup> Canada Bifurcation Request ¶¶ 19-20.

<sup>437</sup> Canada Bifurcation Request ¶¶ 21-23.

<sup>438</sup> See, e.g., Canada Bifurcation Request ¶ 26 (“If Canada’s Articles 1101(1), 1116(2) and 1117(2) objections are not accepted by the Tribunal in whole or in part, an early ruling on the Article 1102(3) interpretation advanced by Canada would still save both disputing parties significant time and cost of presenting extensive factual arguments and evidence in support or defence of the national treatment claim on the merits.”).

<sup>439</sup> Tr. of Bifurcation H’rg at 9:9-13 (Nov. 7, 2016).

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289. During this same time period, Canada was informing the WTO that GNS had no subsidies and was defending GNS's actions before the U.S. Department of Commerce by denying that GNS had conferred subsidies.

290. Canada did not advance its Article 1108 defense until March 2019, after PHP and Irving (but not Resolute) paid nearly \$42 million to settle the Department of Commerce proceeding.<sup>440</sup> At this point, neither Canada nor PHP would suffer any adverse consequence arising from Canada's failure to comply with its WTO reporting obligations.

### 2. Canada Cannot Blow "Hot And Cold" In Different Proceedings

291. Canada contends that Resolute must demonstrate some type of detrimental reliance on Canada's change of position between the WTO proceedings and its March 2019 Counter-Memorial.<sup>441</sup> Not so. Under established international law principles, Canada is not permitted to "blow hot and cold" in different proceedings.

292. Dr. Iain MacGibbon has stated that there is a "requirement that a State ought to be consistent in its attitude to a given factual or legal situation," which "often is grounded on considerations of good faith." He further explained that:

What appears to be the common denominator of the various aspects of estoppel which have been discussed, is the requirement that a State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions. At its simplest, estoppel in international law reflects the possible variations, in circumstances and

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<sup>440</sup> That settlement was executed on March 20, 2018. See C-242, Settlement Agreement Between Verso, PHP, and Irving. [REDACTED]

[REDACTED] C-328, [REDACTED] at CAN000450\_0006-0007 ([REDACTED]).

<sup>441</sup> Canada Counter-Memorial ¶ 240.

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effects, of the underlying principle of consistency which may be summed up in the maxim *allegans contraria non audiendus est*....<sup>442</sup>

Dr. Bin Cheng has explained that “[t]he principle [of good faith] applies equally, though perhaps not with the same force, to other admissions of a State which do not give rise to an equitable estoppel.”<sup>443</sup>

293. The principle of good faith has been followed in numerous arbitral awards. Judge Ricardo J. Alfaro (then Vice-President of the International Court of Justice) stated in his concurring opinion in the case of *Temple of Preah (Cambodia v. Thailand)* that “a state party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation.”<sup>444</sup> Judge Alfaro explained that “[t]he primary foundation of this principle is the good faith that must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith.”<sup>445</sup> This principle “is not to be regarded as a mere rule of evidence or procedure” but, rather, is a substantive rule.<sup>446</sup>

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<sup>442</sup> CL-204, I. MacGibbon, *Estoppel in International Law*, 7 *International and Comparative Law Quarterly* 468 at 45 (1958).

<sup>443</sup> CL-203, B. Cheng, *General Principles of Law, as Applied by International Courts and Tribunals* at 144-45 (1953, reprinted 1987) (footnotes omitted); accord CL-239, *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II ¶ 7.90 (Aug. 30, 2018) (“*Chevron Track II Second Partial Award*”).

<sup>444</sup> CL-136, Separate Concurring Opinion of Vice-President Alfaro in *Temple of Preah Vihear (Cambodia v. Thailand)* at 39, ICJ (June 15, 1962) (“*Temple of Preah Alfaro Opinion*”).

<sup>445</sup> CL-136, *supra* n.444, *Temple of Preah Alfaro Opinion* at 42.

<sup>446</sup> CL-136, *supra* n.444, *Temple of Preah Alfaro Opinion* at 41.

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294. Judge Alfaro's opinion relied upon cases such as *The Lisman*,<sup>447</sup> where the claimant adopted one position before the British Prize Court and another position during arbitration. The sole arbitrator in *The Lisman* found that the claimant was precluded from adopting an inconsistent factual position:

By the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful, and that he did not complain of them, but only of undue delay from the failure of the Government to act promptly, claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on, that these acts were unlawful, and constitute the basis of his claim.<sup>448</sup>

Reliance was not at issue in *The Lisman*; instead, the key factor was the claimant's change of position in different proceedings.

295. Another case cited by Judge Alfaro was *The Behring Sea* arbitration<sup>449</sup>, where the arbitrators rejected the United States' argument that Great Britain had conceded that Russia had exclusive jurisdiction over certain fur-seals fisheries in the Behring Sea because Great Britain had protested Russia's claim in an earlier dispute. Lord McNair, in his commentary on this case, explained that "international jurisprudence

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<sup>447</sup> CL-136, *supra* n.444, *Temple of Preah* Alfaro Opinion 39. On page 49 of his opinion, Judge Alfaro also cited *The Mechanic*, which held that "Ecuador ... having fully recognized and claimed the principle on which the case now before us turns, whenever from such a recognition rights or advantages were to be derived, could not in honour and good faith deny the principle when it imposed an obligation." *Id.* at 49. This portion is reprinted on page 142 of Dr. Cheng's book, CL-203, *supra* n.443, B. Cheng, *General Principles of Law, as Applied by International Courts and Tribunals*.

<sup>448</sup> CL-202, *The S.S. Lisman (U.S. v. U.K.)*, Award, Oct. 5, 1937 ("*Lisman Award*"), 3 R.I.A.A. 1767, 1790 (1950).

<sup>449</sup> CL-200, *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, XXVIII RIAA 263 (Aug. 15, 1893), reprinted from J.B. Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. I at 935 (1898).

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has a place for some recognition of the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est.*<sup>450</sup>

296. The *Arbitral Award by the King of Spain*<sup>451</sup> is cited in *Brownlie's Principles of International Law* as a “good example of judicial application of the broader version of the principle” against self-contradiction.<sup>452</sup> That case involved a boundary dispute settled by the King of Spain, who was appointed as arbitrator. Nicaragua did not implement the award and Honduras sought relief from the International Court of Justice. Nicaragua disputed the appointment of the prior arbitrator, claiming that certain prerequisite steps had not been completed and that the treaty had expired. The ICJ found that Nicaragua’s conduct before and during the earlier arbitration was inconsistent with the position it was advancing before the ICJ, as set out in detail in the Court’s judgment.<sup>453</sup>

297. The ICJ concluded that “Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award.” The ICJ did not analyze whether Honduras relied upon Nicaragua’s statements or conduct, and the ICJ did not refer to estoppel. Instead, the ICJ applied the principle against self-contradiction to preclude Nicaragua from changing its position. As Judge Sir Percy Spender explained in his Separate Opinion:

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<sup>450</sup> CL-201, A. McNair, “The Legality of the Occupation of the Ruhr,” 5 *British Yearbook of International Law* 17 at 35 (1924).

<sup>451</sup> CL-207, *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)*, ICJ Reports 1960 at 192 (“*King of Spain Award*”).

<sup>452</sup> CL-244, James Crawford, *Brownlie's Principles of International Law* at 407 (9th ed. 2019).

<sup>453</sup> CL-207, *supra* n.451, *King of Spain Award* at 206-211.



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I do not find it necessary to determine whether the King's appointment involved any non-compliance with the provisions of the Treaty. Although I incline strongly to the view that the appointment was irregular, this contention of Nicaragua fails because that State is precluded by its conduct prior to and during the course of the arbitration from relying upon any irregularity in the appointment of the King as a ground to invalidate the Award.<sup>454</sup>

298. Similarly, the Permanent Court of International Justice (the predecessor to the ICJ) applied a broad concept of preclusion in *Legal Status of Eastern Greenland*: “Norway reaffirmed that she recognized the whole of Greenland as Danish” and, therefore, “has debarred herself from contesting Danish sovereignty over the whole of Greenland.”<sup>455</sup> Detrimental reliance was not considered by the tribunal; instead, Norway’s statements were sufficient, by themselves, for preclusion to apply.

299. The broad principle of preclusion was addressed in the Iran-US Claims tribunal case of *Oil Fields of Texas*. NIOC, an Iranian-state owned oil company, entered into an agreement in 1954 with a foreign consortium of eight major oil companies that allowed the consortium certain rights to oil. A replacement agreement in 1974 required the consortium to form OSCO, a service company that entered into the services contract with NIOC. Later, NIOC wanted to take over all OSCO’s contracts, telling some companies that NIOC (not OSCO) was the counter-party to those contracts signed by OSCO. But NIOC did not want to take on, as a successor company, OSCO’s liabilities.

300. Judge Richard Most, in his concurring opinion, found that NIOC could not disclaim successor liability:

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<sup>454</sup> CL-207, *supra* n.451, *King of Spain Award* at 219.

<sup>455</sup> CL-208, *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment at 69-69, 1933 P.C.I.J., Ser. A/B, No. 53 (Apr. 5, 1933).

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Moreover, NIOC has, in order to derive certain benefits, represented itself as the party to contracts executed by OSCO. Iranian Government entities have even represented to this Tribunal that NIOC is OSCO's successor.... At the very least, such representations should be viewed as admissions, which would constitute powerful evidence of succession. In addition, there is authority for the proposition that Iran and NIOC should not now be able to disavow these representations.

This principle has long been accepted as a rule of international law.... There are suggestions that in international law, "estoppel", or its equivalent, may be utilized, even in the absence of technical municipal law requirements, such as reliance.... Underlying the use of estoppel or analogous doctrines in international law "is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation." Such a principle should apply in the instant case.<sup>456</sup>

301. Based on the broad principle against self-contradiction, the tribunal in *Chevron Corp. v. Republic of Ecuador* denied Ecuador's jurisdictional objection that Chevron had not made an investment in Ecuador. That tribunal relied on findings of Ecuadorian courts that Chevron had done so: "That duty of good faith precludes clearly inconsistent statements, deliberately made for one party's material advantage or to the other's material prejudice, that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can 'have it both ways' or 'blow hot and cold,' to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment."<sup>457</sup> The tribunal explained that it was basing "its decision on the general principle of good faith under international law" instead of an estoppel principle, stating that "Dr Bin Cheng recognised that, although estoppel is consistent with the general principle of good faith, it is a different doctrine under

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<sup>456</sup> CL-211, *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran*, Award No. ITL-10-43-FT, 1982 WL 229382, at \*24-25 (Dec. 9, 1982).

<sup>457</sup> CL-239, *supra* n.443, *Chevron Track II Second Partial Award* ¶ 7.106 (emphasis added).

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international law” that “preclude[es] a state...from ‘blowing hot and cold’; *i.e.*, the principle of good faith.”<sup>458</sup>

302. Canada’s declarations to the WTO about whether GNS provided subsidies (including grants, loans, and procurement) to PHP/PWCC were made pursuant to an international law obligation with which Canada must comply in good faith.<sup>459</sup> Canada and the other NAFTA Parties also reaffirmed in NAFTA Article 103 “their existing rights and obligations with respect to each other under the *General Agreement on Tariffs and Trade* and other agreements to which such Parties are party.”

303. Canada invoked the Article 1108(7) subsidy exception, along with an Article 2106 cultural industries exception, in *UPS v. Canada* for Canada’s Publications Assistance Program (PAP). UPS had challenged the PAP as a discriminatory measure for requiring publications to use Canada Post to deliver their publications as a condition for eligibility to receive benefits under the PAP program. The tribunal held that the Article 2106 cultural industry exception applied, and therefore did not decide the Article 1108(7) subsidy exception.<sup>460</sup> Dean Ronald Cass, writing in a separate statement of the award, addressed whether, in his view, the Article 1108(7) subsidy exception should have applied. He noted that Canada Post “has declared—in materials not prepared in contemplation of the current dispute—that it receives no subsidies of any kind.”<sup>461</sup>

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<sup>458</sup> CL-239, *supra* n.443, *Chevron* Track II Second Partial Award ¶ 7.107.

<sup>459</sup> See Article 26 of the Vienna Convention on the Law of Treaties; CL-209, *Nuclear Tests (Australia v. France)*, ICJ, Judgment, 1974 ICJ Reports 253 ¶ 46 (Dec. 20, 1974) (“One of the basic principles governing the creation and performance of legal obligation, whatever their source, is the principle of good faith.”); CL-239, *supra* n.443, *Chevron* Track II Second Partial Award ¶ 7.84;

<sup>460</sup> CL-113, *supra* n.351, *UPS* Award ¶ 172.

<sup>461</sup> CL-113, *supra* n.351, *UPS* Award, Separate Statement of Dean Ronald A. Cass ¶ 156.

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Dean Cass observed that, to invoke Article 1108(7), “It is, at a minimum, reasonable to ask a NAFTA Party seeking to avail itself of the subsidy exclusion from Chapter 11 to clearly designate its conduct as a subsidy somewhere other than in defense of its conduct before a tribunal seeking to resolve a dispute under Article 1116 or 1117,” which is consistent with “the broad protection for investors and investments that is evidence in NAFTA’s preamble and in the various provisions of Chapter 11....”<sup>462</sup> He concluded that he would not find the PAP constituted a subsidy excepted from Article 1102 by virtue of Article 1108(7).

304. Canada’s declarations of “nil” subsidies for Nova Scotia were made to other WTO members, some of whom (such as the United States and the European Union) questioned Canada directly and specifically about the Port Hawkesbury bailout measures. In responses to those questions, Canada denied that the measures were subsidies. Now, after the costs of countervailing duties imposed by the United States already have been borne and further risk has been extinguished, Canada claims the measures are subsidies after all and seeks a determination that the Article 1108(7) exception bars Resolute’s claims.

305. Canada’s authorities do not contradict the broad principle against self-contradiction.<sup>463</sup> In *Cambodia Power Company v. Kingdom of Cambodia*, the parties did not raise the broader principle against self-contradiction, relying solely on the narrower estoppel formulation.<sup>464</sup> In *Pope & Talbot*, Canada relied on the investor’s

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<sup>462</sup> CL-113, *supra* n.351, *UPS Award*, Separate Statement of Dean Ronald A. Cass ¶ 163.

<sup>463</sup> See Canada Counter-Memorial ¶ 240.

<sup>464</sup> RL-126, *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge LLC*, ICSID Case No. ARB/09/18, Decision on Jurisdiction ¶ 261 (Mar. 26, 2011). The issue in this case is whether an agreement by a Cambodian state-owned entity (EDC) agreed to submit

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conduct “as evidenced through [the investor’s] participation in consultations and acquiescence in its (Canada’s) SLA implementation” to argue that the investor was estopped from arguing that the Softwood Lumber Agreement caused injury.<sup>465</sup> The tribunal, however, found Canada’s argument insufficient to count as a representation satisfying the estoppel test.<sup>466</sup>

306. Nowhere does the *Pope & Talbot* tribunal address the broader principle against self-contradiction. The tribunal in *Pac Rim Cayman LLC v. Republic of El Salvador* applied the narrow form of estoppel and did not discuss the broader principle against self-contradiction.<sup>467</sup> There, however, the claimant contended that detrimental reliance was an element that needed to be proven under the estoppel test.<sup>468</sup> The tribunal in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*<sup>469</sup> found that Malaysia’s failure to contest Singapore sovereignty over certain islands for over 30 years meant that Singapore owned the

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its dispute to ICSID through contractual clauses when it had not provided the formal notification required under Article 25(1) of the ICSID convention. See *id.* ¶¶ 217, 258-59. The tribunal found there was no unequivocal statement because the agreement was conditioned on a “potential future event.” See *id.* ¶¶ 262-63.

<sup>465</sup> CL-116, *supra* n.124, *Pope & Talbot* Interim Award ¶ 110.

<sup>466</sup> CL-116, *supra* n.124, *Pope & Talbot* Interim Award ¶ 112.

<sup>467</sup> RL-127, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award ¶ 8.47 (Oct. 14, 2016).

<sup>468</sup> CL-227, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Claimant’s Reply on the Merits and Quantum ¶ 320 n.625 (Apr. 11, 2014) (“[T]he State assumes the risk for the acts of its organs or officials which, by their nature, may reasonably *induce reliance* in third parties. As such, what is relevant for estoppel is that there has been a declaration, representation, or conduct which has in fact induced reasonable reliance by a third party ....”) (emphasis in original).

<sup>469</sup> Canada Counter-Memorial ¶ 240 n.505; RL-133, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, ICJ Reports (2008) 12 (May 23, 2008) (“*Malaysia/Singapore* Judgment”).

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islands.<sup>470</sup> While it rejected Singapore's estoppel argument,<sup>471</sup> that tribunal did not discuss the broader principle against self-contradiction.

307. Similarly, the tribunals in *Chevron v. Ecuador*; *Pan American Energy v. Argentina*; *Canfor Corporation v. United States*; *Philippe Gruslin v. Malaysia*; *Československa obchodní Banka, A.S. v. Slovak Republic*; *Land and Maritime Boundary between Cameroon and Nigeria*, *Land, Island and Maritime Frontier Dispute*; *the North Sea Continental Shelf Cases*; *Payment of Various Serbian Loans Issued in France*; *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*; *The "ARA Libertad" Case*; *the Railway Land Arbitration*; and *the Chagos Marine Protected Area Arbitration*, all of which were cited by Canada, are distinguishable. These decisions applied the narrow form of estoppel, without any reference to the broader principle against self-contradiction.<sup>472</sup>

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<sup>470</sup> RL-133, *supra* n.469, *Malaysia/Singapore Judgment* ¶¶ 274-76.

<sup>471</sup> RL-133, *supra* n.469, *Malaysia/Singapore Judgment* ¶ 228.

<sup>472</sup> RL-128, *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits ¶¶ 354, 352-353 (Mar. 30, 2010) (refusing to apply judicial estoppel concepts rooted in domestic law and failing to find any clear and unequivocal representations made by Claimants); RL-129, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13 Decision on Preliminary Objections ¶¶ 159-160 (July 27, 2006); RL-130, *Canfor Corporation v. United States of America*; *Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal ¶¶ 168-69 (Sept. 7, 2005) (permitting consolidation of two related arbitration when the United States made no promises whether it would seek consolidation at a later time); RL-131, *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award ¶¶ 20.1-20.5 (Nov. 27, 2000) (finding respondent's failure to raise issue earlier was not estoppel); RL-132, *Československa obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction ¶ 47 (May 24, 1999) (refusing to apply estoppel as to whether treaty was effective based upon gazette notices when treaty had yet to be ratified officially); RL-134, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)*, ICJ Reports (1998) 275, Judgment ¶¶ 57-60 (June 11, 1998) (refusing to find Cameroon was estopped from bringing ICJ case when it had agreed previously to bilateral negotiations); RL-135, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua intervening)*, ICJ Reports (1990) 92, Judgment (Sept. 13, 1990) (finding that no statements by parties in dispute amounted to estoppel as to interests of Nicaragua); RL-136,

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308. The Tribunal should not allow Canada to ignore its international obligations in one proceeding and now, when it is more convenient for Canada, take the opposite position. Canada is blowing hot and cold and should be precluded from invoking the Article 1108(7) exceptions.

3. Neither The Procurement Nor The Subsidies Exception Applies To The Entirety Of The Outreach Agreement And Forest Utilization License Agreement

309. The exception for procurement under Article 1108(7)(a) does not apply to all parts of the Forest Utilization License Agreement (“FULA”), nor the Outreach Agreement. GNS “procures” nothing in these agreements—it is not buying goods or services—when PHP pays for stumpage under the FULA.<sup>473</sup>

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*North Sea Continental Shelf Cases (Germany v. Denmark and Germany v. the Netherlands)*, ICJ Reports (1969) 3, Judgment ¶ 30 (Feb. 20, 1969) (refusing to apply estoppel as to whether Germany ratified 1958 Convention on the Continental Shelf when it had not done so); RL-137, *Payment of Various Serbian Loans Issued in France (France v. Serbia)*, 1929 PCIJ Series A, No. 20, 4 ¶¶ 26, 78-80 (declining to find estoppel when French bondholders had not previously insisted on their rights to be paid in gold francs); RL-138, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Case No. 16, Judgment ¶ 119-125 (Mar. 14, 2012) (failing to invoke estoppel when there was insufficient evidence detailing whether parties adhered to their prior agreement); CL-222, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Case No. 16, Memorial of Bangladesh ¶ 5.23 (July 1, 2010) (relying upon narrow form of estoppel); RL-139, *The “ARA Libertad” Case (Argentina v. Ghana)*, ITLOS Case No. 20, Joint Separate Opinion of Judges Rüdiger Wolfrum and Jean-Pierre Cot ¶¶ 52-69 (Dec. 15, 2012) (applying estoppel because observing that “[e]stoppel by deed, to use the English vocabulary, finds its equivalent in international law in “estoppels by treaty, compromise, exchange of notes, or other undertaking in writing....Such is the situation here” where Ghana had provided official assurances to Argentina respecting the visit of an Argentinian ship to Ghana); RL-140, *Railway Land Arbitration (Malaysia/Singapore)*, PCA Case No. 2012-01, Award ¶ 199 (Oct. 30, 2014) (“Singapore’s pleadings did not spell out the particulars of the alleged estoppel and Singapore’s counsel had some difficulty in formulating this plea.”); RL-141, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award ¶¶ 438, 448 (Mar. 18, 2015) (applying narrow version of estoppel to prevent United Kingdom from denying its binding prior commitments).

<sup>473</sup> See C-207, Forest Utilization License Agreement §§ 4 and 5 (Sept. 27, 2012) (detailing how PHP pays for stumpage for paper making and Biomass).

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310. Similarly, the procurement exception does not apply to all parts of the Outreach Agreement, [REDACTED]

[REDACTED]<sup>474</sup> Canada has refused to produce documents itemizing how much money was attributable to each different cost category in the Outreach Agreement, despite Resolute's request for production of this information and the Tribunal's order for Canada to provide it.<sup>475</sup> Canada's withholding of the information as to whether GNS paid fair market prices prevents an assessment as to whether either procurement or subsidies are at issue. Canada cannot now claim the benefit of the procurement exception when it has refused to provide evidence of the value of what it did and did not procure.

311. Canada also contended that both these measures are covered by the subsidies exception of Article 1108(7)(b).<sup>476</sup> By invoking this exception, Canada concedes that: (1) Canada is receiving less than adequate remuneration for the fiber, a subsidy according to the Subsidies and Countervailing Measures Agreement and (2) Canada is providing subsidies to PHP under the Outreach Agreement. Because

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<sup>474</sup> See C-360, [REDACTED].

<sup>475</sup> See Procedural Order No. 9 at Document Request 16 (Aug. 21, 2018). That request sought documents submitted by PWCC/PHP to GNS for funds under the Outreach Agreement. The Tribunal granted the document request. Instead of complying with its obligations to make the production, Canada redacted the amounts paid by GNS to PWCC/PHP under each cost category. See CAN000042 through CAN000064, CAN000070. Canada did provide limited itemization for the second and third quarters of 2014 and generalized audit documentation through 2014. See CAN000042, CAN000044, CAN000045. Given the length of these documents, Resolute is not providing them as exhibits but can do so were the Tribunal to request them

<sup>476</sup> See Canada Counter-Memorial ¶¶ 232, 234.



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Canada denied in an international forum any subsidies, Canada should not be able to invoke the Subsidies Exception as a defense to claims of exceptional assistance.

### V. CANADA SEEKS TO DIVERT FROM GNS'S CONDUCT BY BLAMING RESOLUTE FOR FAILING TO BID ON PORT HAWKESBURY AND CLOSING BOWATER MERSEY

312. Instead of focusing on GNS's conduct, Canada introduces two diversions, blaming Resolute for accepting some assistance for the Bowater Mersey mill while not bidding on the Port Hawkesbury mill.

313. Resolute's Bowater Mersey mill was old, inefficient, and produced newsprint for an export (*i.e.*, outside North America) market. Newsprint was facing even greater secular decline than SC Paper, as [REDACTED] [REDACTED] another analysis that Canada failed to produce during the initial discovery period. Given the age of the facility and the secular decline of the market for newsprint, Bowater Mersey was certain to close at some point; GNS's proffered assistance package was seeking to delay the inevitable for a few years so GNS could adjust, largely at Resolute's expense.<sup>477</sup>

314. GNS's proposed assistance package for Resolute's Bowater Mersey facilities was far less than what the province offered Port Hawkesbury, was insufficient, and likely would have been insufficient under any and all circumstances. The newsprint facility continued to deal with the same challenges it faced prior to receiving GNS's funds (some of which were earmarked for long-term projects and were returned). The inherent difficulties operating the Bowater Mersey mill, coupled with unfavorable foreign

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<sup>477</sup> PHP's closure of the mill's newsprint line upon restart is further proof that production of newsprint in Nova Scotia was not sustainable.

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currency fluctuations and a higher-than-sought electricity rate (GNS never supported for Resolute a significantly lower rate), were too much for Resolute to continue operating the mill.

315. Resolute had sound reasons not to bid on Port Hawkesbury. [REDACTED]

[REDACTED]  
[REDACTED] But Resolute had never expected that a potential purchaser would receive the extensive support that PHP received from GNS. To the contrary, [REDACTED]

316. Resolute learned from the Bowater Mersey experience that GNS was not likely to provide the kind of assistance necessary to rescue mills producing goods that had to be exported from Nova Scotia. GNS, for its part, also learned from the Bowater Mersey experience.

317. GNS learned that it would have to provide much more assistance to resuscitate Port Hawkesbury than it had been willing to spend to sustain Bowater Mersey. It opened its coffers more generously, and it supported aggressively the electricity rate critical for the Port Hawkesbury mill. GNS wanted to make Bowater Mersey a low-cost producer of newsprint but concluded that survival in declining industries would require making the beneficiary of its largesse *the* low-cost producer, the likely last producer standing when the industry eventually would die.

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### A. Bowater Mersey Was Eventually Going To Close Even With GNS Assistance

318. Canada contends that Resolute's Article 1105(1) claim should fail because GNS offered some financial support to the Bowater Mersey newsprint mill.<sup>478</sup> According to Canada, GNS did not act improperly when providing the Port Hawkesbury Measures because GNS also provided assistance to Bowater Mersey, thereby providing similar treatment in like circumstances.

319. But GNS, in contrast to the support provided to the Port Hawkesbury mill, never intended to turn Bowater Mersey from an unprofitable, dying mill into *the* low-cost producer in the newsprint industry. Instead, GNS wanted "to keep the [Bowater Mersey] mill going in an appropriate manner"<sup>479</sup> and extend its life for an "orderly transition"<sup>480</sup> by making it a low-cost producer of newsprint.<sup>481</sup> There was never a question as to whether Bowater Mersey was going to die; the only question, for both GNS and Resolute, was when.

#### 1. Bowater Mersey Was An Old And Inefficient Newsprint Mill

320. The Bowater Mersey and Port Hawkesbury mills differed in multiple ways. Resolute produced newsprint, not SC Paper, at the Bowater Mersey mill. Newsprint was and still is suffering from an even steeper secular decline than SC Paper. Additional disadvantages, including the old age of the facility, high production costs, distance from markets, and sensitivity to foreign currency fluctuations, ensured the

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<sup>478</sup> See Canada Counter-Memorial ¶¶ 301-303.

<sup>479</sup> Witness Statement of Duff Montgomerie ¶ 14 (April 17, 2019) ("Montgomerie Witness Statement").

<sup>480</sup> C-352, Atlantic Business, *Knock on Wood* (Feb. 20, 2013); CWS-Garneau ¶ 19(c).

<sup>481</sup> Canada Counter-Memorial ¶ 47.

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facility was always going to close. Canada witness and GNS chair of the Mills Committee<sup>482</sup> Duff Montgomerie stated “[REDACTED]”<sup>483</sup> And GNS conceded that Bowater Mersey had lost over \$40 million in 2010-11.<sup>484</sup> GNS’s overtures to assist Bowater Mersey were to save jobs in Nova Scotia, but not to afford Resolute a worthwhile long-term investment.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>482</sup> Montgomerie Witness Statement ¶ 2; see also R-146, [REDACTED] (“[REDACTED]”).

<sup>483</sup> Montgomerie Witness Statement ¶ 10.

<sup>484</sup> C-326, Email between Duff Montgomerie and others relating to losses incurred by Bowater Mersey (Dec. 29, 2011).

<sup>485</sup> R-146, *supra* n.482, [REDACTED].

<sup>486</sup> R-146, *supra* n.482, [REDACTED] at 6, 14-15.

<sup>487</sup> See R-146, *supra* n.482, [REDACTED] at 7-8.

<sup>488</sup> R-146, *supra* n.482, [REDACTED] at 31-32, 35-36.

<sup>489</sup> R-147, [REDACTED]

<sup>490</sup> R-147, *supra* n.489, [REDACTED] at 7.



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costs that are not consistent with what they're getting in other places. All of these things completely through the supply chain are creating a problem for the mill."<sup>495</sup>

### 2. It Was Only A Matter Of Time Before Bowater Mersey Closed

326. Resolute concluded, in the spring of 2011, that its Bowater Mersey newsprint operations were no longer financially feasible.<sup>496</sup> On August 26, 2011, Resolute told Premier Dexter that it intended to announce publicly the permanent closure of the Bowater Mersey mill.<sup>497</sup> The mill's costs were too high, it had lost more than \$50 million during 2009-10,<sup>498</sup> and its Asian and Latin American export markets (representing 90 percent of the mill's sales) were "shrinking fast as cheaper local mills came on stream."<sup>499</sup> Premier Dexter requested that Resolute hold off on its announcement so that GNS would have an opportunity to consider how the mill might remain open.<sup>500</sup> Resolute agreed even though it believed that Bowater Mersey would be unable to lower its prices to competitive levels.<sup>501</sup>

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<sup>495</sup> C-123, Nova Scotia Legislature House of Assembly Debates and Proceedings, Third Session at 3009 (Nov. 2, 2011). Canada contends that Resolute inaccurately portrayed this statement from Premier Dexter as dealing with the Port Hawkesbury mill, see Canada Counter-Memorial ¶ 45, but Canada neither disputes that the identical issues were plaguing Port Hawkesbury nor explains how the Port Hawkesbury mill's expensive cost structure differed from Bowater Mersey's input cost structure. [REDACTED]

[REDACTED] See R-146, *supra* n.482, [REDACTED] at 7, 10 (stating that Port Hawkesbury's [REDACTED]).

<sup>496</sup> CWS-Garneau ¶ 6.

<sup>497</sup> Montgomerie Witness Statement ¶ 9.

<sup>498</sup> Canada Counter-Memorial ¶ 38.

<sup>499</sup> C-352, *supra* n.480, Atlantic Business, *Knock on Wood*.

<sup>500</sup> See Montgomerie Witness Statement ¶ 9; R-323, CBC News, *Bowater mill owner delivers ultimatum* (Nov. 2, 2011).

<sup>501</sup> See also R-324, *supra* n.60, Global News, *Bowater Mersey paper mill needs government help: Nova Scotia premier*, C-352, *supra* n.480, Atlantic Business, *Knock on Wood*; see also CWS-Garneau ¶¶ 6-7 (explaining issues surrounding Bowater Mersey mill).

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327. By the end of September, Resolute was convinced that the province had no serious plan to reduce costs at Bowater Mersey. M. Garneau's contemporaneous notes reflect that [REDACTED]

[REDACTED].<sup>502</sup> Therefore, Resolute would not be able to keep the mill open much longer. Nonetheless, provincial officials pleaded for still more time and Resolute acquiesced.<sup>503</sup>

328. On November 1, 2011, Resolute announced publicly that it would close the Bowater Mersey mill but stated the mill could reopen if its costs could be lowered.<sup>504</sup> As of that date, GNS had talked with Resolute for weeks but the parties had made no progress.<sup>505</sup> Only then did GNS act; Premier Dexter responded to the closure announcement by stating that GNS would "do everything in our power to try and ensure we take costs out of the supply chain from one end to the other, in order to ensure that that [sic] mill in fact has a future."<sup>506</sup>

329. On December 1, 2011, GNS and Resolute entered a deal consisting primarily of a \$25 million loan, \$23.75 million (which Resolute needed to spend at

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<sup>502</sup> C-119, *supra* n.204, [REDACTED] at RFP0011526 ([REDACTED]).

<sup>503</sup> CWS-Garneau ¶ 10.

<sup>504</sup> R-321, CBC News, *Bowater Mill to close for one week* (Nov. 1, 2011); R-322, Global News, *Bowater Mersey paper mill in Nova Scotia to close for a week amid weak market* (Nov. 1, 2011); R-323, *supra* n.500, CBC News, *Bowater mill owner delivers ultimatum*.

<sup>505</sup> R-323, *supra* n.500, CBC News, *Bowater mill owner delivers ultimatum*; see also R-324, *supra* n.60, Global News, *Bowater Mersey paper mill needs government help: Nova Scotia premier*.

<sup>506</sup> R-323, *supra* n.500, CBC News, *Bowater mill owner delivers ultimatum*.

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Bowater Mersey) for the province to purchase 25,000 acres of land, and a \$1.5 million workforce training agreement.<sup>507</sup>

330. Duff Montgomerie characterized the land purchased from Resolute as “high-value land,” and “prime land” with “[m]any of [GNS’s] key and very diverse stakeholders hav[ing] complimented the government for that particular deal.” He stated that GNS received a “good deal” because the province paid about \$200 less per acre than similar land it purchased from Resolute in 2007. Mr. Montgomerie also stated that GNS had “seen incredible interest in those lands from various sources for future use” even though the Bowater Mersey mill closed. “I’m very confident that [the value of the 25,000 acres bought from Resolute is] higher than the \$900” per acre GNS paid.<sup>508</sup> The deal was not going to keep Resolute in business in Nova Scotia. Rather, it was going to turn over coveted land to the province.

331. Despite Premier Dexter’s expression of optimism, Resolute’s M. Garneau remained skeptical that this deal, even with a new power rate and a new labour agreement, would yield the needed cost reductions.<sup>509</sup> Within weeks after the land sale and loan were announced, downtime at the mill (which started around Christmas 2011) was extended through January 16, 2012.<sup>510</sup> Bowater Mersey closed for additional

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<sup>507</sup> Montgomerie Witness Statement ¶ 12; R-149, [REDACTED]

[REDACTED]; see also CWS-Garneau ¶ 11.

<sup>508</sup> R-152, Nova Scotia House of Assembly, Committee on Public Accounts at 7-9 (Oct. 3, 2012). Mr. Montgomerie further stated that GNS did not overpay for this land just to keep the Bowater Mersey mill open.

<sup>509</sup> CWS-Garneau ¶ 11.

<sup>510</sup> C-327, Bridgewater, NS, Canada: *Breaking: Shut Dow at Bowater Mersey Extended* (Jan. 6, 2012).



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downtime during a two-week stretch in March 2012, and further downtime was taken May 6-21. Bowater Mersey closed for downtime on four occasions between December 2011 and June 2012.<sup>511</sup>

332. Even had the loan and land purchase enabled the mill to run at the peak of its performance capability, the GNS deal was only supposed to help keep Bowater Mersey open for about five more years.<sup>512</sup> As one article stated, “[Paul] Black<sup>513</sup> and Montgomerie believed they’d bought five to eight years, long enough to plan for a more orderly transition.”<sup>514</sup> Another news article provided that, “Dexter said he couldn’t guarantee the mill will be running after five years because nobody really knows where the newsprint market will ultimately land.”<sup>515</sup> Resolute, while hopeful the operation would survive, made no promises that Bowater Mersey would remain open for at least five more years.<sup>516</sup>

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<sup>511</sup> C-330, Bridgewater, NS, Canada: *More Downtime Expected at Bowater Mersey* (April 25, 2012); see also CWS-Garneau ¶ 12 (“Resolute senior management concluded quickly that the substance of the offer would not reverse the fortunes of the mill and in or around April 2012 we thanked the province but advised that we would close definitively. Resolute was unable to reduce the mill’s costs enough, senior management did not foresee further meaningful cost reductions as possible, and the worldwide currency market fluctuations ensured that the Bowater Mersey mill could no longer compete with foreign producers in export markets outside North America.”).

<sup>512</sup> Montgomerie Witness Statement ¶¶ 12-13; R-149, *supra* n.507, [REDACTED] at 5.

<sup>513</sup> Mr. Black was Premier Dexter’s Director of Policy, which was his senior policy advisor; he later became Premier Dexter’s Principal Secretary and served as the primary political and policy advisor to the Premier. C-364, LinkedIn profile of Paul Black.

<sup>514</sup> C-352, *supra* n.480, Atlantic Business, *Knock on Wood*.

<sup>515</sup> R-316, The Chronicle Herald, *Resolute boss confident plan will keep Bowater mill running* (Dec. 6, 2011); see also R-336, Nova Scotia House of Assembly Debates and Proceedings, No. 11-61 (Dec. 7, 2011) (Premier Dexter unable to provide any guarantees against additional layoffs at Bowater Mersey mill).

<sup>516</sup> R-144, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company Ltd.*, Redacted Bowater Mersey Responses to Information Requests from the Avon Group at 12 (NSUARB Aug. 2, 2011) (“In light of the excess capacity and the ‘shrinking demand’ [for newsprint] cited by Bowater Mersey, there is no guarantee that the plant will

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333. Ultimately, Bowater Mersey's deficiencies could not be overcome, and certainly not with the assistance offered by GNS. Resolute announced the mill's permanent closure in June 2012. At that time, Resolute stated that it did not spend any of the \$25 million GNS loan (which was returned to the province<sup>517</sup>) because "[w]e have not been able to identify a project within the assigned budget which would help sustain [the mill] long term...especially considering today's export market conditions."<sup>518</sup> Premier Dexter explained that "[t]here is no question that we are continuing to see an erosion in that [newsprint] market that is very difficult."<sup>519</sup>

334. When Resolute announced the Bowater Mersey closure, the local union president stated the mill's closure was sooner than expected but that "most people reached a point of feeling it was a question of not if, but when the mill would close."<sup>520</sup> M. Garneau explained that "[t]he economic slowdown around the world has made the situation untenable" and that Resolute had not expected export demand outside North America to drop by 25%.<sup>521</sup>

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remain viable even with the approval of the Load Retention Rate."); R-316, *supra* n.515, The Chronicle Herald, *Resolute boss confident plan will keep Bowater mill running* (Richard Garneau stating that Bowater Mersey's ability to remain operational is "related to market and being able to achieve the cost reductions we have identified.").

<sup>517</sup> R-149, *supra* n.507, [REDACTED]

<sup>518</sup> C-331, CBC, *Bowater mill postpones upgrades* (June 14, 2012) (second alteration in original).

<sup>519</sup> C-331, CBC, *Bowater mill postpones upgrades* (June 14, 2012).

<sup>520</sup> R-343, CBC News, *Bowater Mersey Mill shutting down* (June 15, 2012).

<sup>521</sup> R-343, CBC News, *Bowater Mersey Mill shutting down* (June 15, 2012); *see also* R-153, Resolute Forest Products Press Release, *Resolute to Indefinitely Idle Mersey Mill in Nova Scotia* (June 15, 2012) (stating that currency fluctuations led to a decline of prices in export markets).

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### 3. GNS Did Not Make Bowater Mersey The Lowest Cost Producer Of Newsprint

335. Premier Dexter claimed that “it was the province’s responsibility to do everything it could to protect jobs on the South Shore, and help this mill survive.”<sup>522</sup> But “everything” did not include the scale and type of assistance extended to PHP, including and especially an electricity rate. Unlike what it did for PHP’s electricity rate,<sup>523</sup> GNS did nothing to aid Bowater Mersey during the NSUARB proceedings: GNS did not make a statement in support of an electricity rate, hire a consultant, present an expert witness, introduce evidence, answer information requests, make representations to the NSUARB regarding Government action, or enact legislation to ensure passage of an LRR.<sup>524</sup>

336. Resolute had requested an electricity rate for five years: \$55.60 in 2012, \$60.57 in 2013, \$65.55 in 2014, \$70.52 in 2015, and \$75.50 in 2016.<sup>525</sup> However, the Board approved only a three-year term at higher rates than sought by Resolute: \$60.24 in 2012, \$65.77 in 2013, and \$67.86 in 2014.

337. By contrast to the treatment experienced by Resolute, PHP received a seven-year term, with an average rate of \$ [REDACTED] in 2013, \$ [REDACTED] in 2014, and \$ [REDACTED] in 2015.<sup>526</sup> These rates do not include additional GNS electricity rate support, such as the \$7 million per year benefit PHP received from July 2013—April 2016 through the “must-run” Biomass Plant regulations GNS instituted for PHP’s steam requirements.<sup>527</sup> As it

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<sup>522</sup> R-344, CBC News, *Mill CEO blames closure on market conditions* (June 15, 2012).

<sup>523</sup> See, e.g., *supra* ¶¶ 30-38, 54-67.

<sup>524</sup> See e.g., C-320, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company Ltd.*, Exhibit List (NSUARB Nov. 4, 2011) (“NPB Exhibit List”).

<sup>525</sup> C-314, *supra* n.223, NPB Application at 2.

<sup>526</sup> See Resolute Memorial ¶¶ 118-120.

<sup>527</sup> See Resolute Memorial ¶¶ 121-126.

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told the NSUARB, GNS passed these regulations to ensure PHP “receive[d] the full benefit of the proposed arrangement it reached with” NSPI.<sup>528</sup>

338. Despite its attempt to reduce costs at the mill, Bowater Mersey was not *the* low cost—nor even a low cost—*Resolute* newsprint mill. Bowater Mersey’s per ton costs were, despite the GNS loan and land purchase and Resolute’s internal cost reductions, higher than Resolute’s per ton costs to make newsprint elsewhere; according to M. Garneau, the closure of Bowater Mersey is “certainly going to bring the [Resolute] cost [to make newsprint] down overall because we know that in Nova Scotia, the power cost is quite high and also fiber cost, so it’s going certainly to bring our costs down.”<sup>529</sup>

339. The assistance GNS offered to Resolute was never expected—neither by GNS nor by Resolute—to keep the Bowater Mersey mill open very long. The mill’s costs were too high, newsprint demand was dropping too fast, and foreign competition was undercutting Resolute’s exports outside North America because of currency fluctuations. GNS did not offer enough assistance, neither to make Bowater Mersey competitive, nor to turn it into a national champion. Nor had GNS intended to do so. For these reasons, Resolute, predictably and inevitably, closed Bowater Mersey without using the inexpensive cash GNS had offered.

340. Resolute had offers to sell the mill to foreign purchasers. Instead, Resolute sold the shares of the Bowater Mersey mill to GNS for \$1.00. This sale included:

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<sup>528</sup> C-179, *supra* n.86, GNS Letter Regarding PWCC LRT at 1.

<sup>529</sup> C-335, Resolute Forest Products Inc. Second Quarter 2012 Earning Call at 11 (Aug. 1, 2012).

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- 555,000 acres of land that an independent evaluator appraised at \$117.7 million.
- An onsite biomass generation station known as Brooklyn Power Corp. that GNS resold to NSPI's parent (Emera) for \$25 million.
- [REDACTED]
- The mill site itself, which was valued at \$5 million
- Cash for equipment, inventory, and accounts receivables owned by the mill.<sup>530</sup>

In exchange, GNS assumed (1) pension and severance liabilities and (2) an intracompany loan Resolute (which was a separate corporate entity) had made to Bowater Mersey as part of the desperate effort to keep the mill open. In total, GNS received assets worth approximately \$150.4 million and assumed liabilities worth \$136.4 million—a net gain of \$14 million to the province.<sup>531</sup>

### **B. Resolute's Decision Not To Bid For Port Hawkesbury Reinforced GNS's Determination To Offer Extraordinary Measures To Make PHP A National Champion**

341. Canada argues that “Resolute Cannot Complain of Unfairness When It Was Invited and Encouraged to Bid on Port Hawkesbury but Decided Not to Do So.”<sup>532</sup> Canada blames Resolute for not buying the Port Hawkesbury mill. To support its argument, Canada cherry-picks isolated statements from [REDACTED]

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<sup>530</sup> See R-155, Nova Scotia Premier's Office, Province Takes Crucial Step to Build Forestry of Future (Dec. 10, 2012).

<sup>531</sup> GNS's original analysis stated that it netted \$14 million. However, Resolute repaid GNS nearly [REDACTED] an audit of the intercompany loan between Resolute and Bowater Mersey. See C-356, [REDACTED].

<sup>532</sup> Canada Counter-Memorial at 114.

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342. Resolute could not have foreseen GNS's largesse in light of its experience with the same Nova Scotia Government and Resolute's due diligence on the Port Hawkesbury mill. GNS's "offers" and treatment of Bowater Mersey convinced Resolute that GNS would not provide the assistance needed to make the Port Hawkesbury mill profitable.

343. Resolute was almost certainly right. GNS was trying to persuade Resolute to bid, not so that Nova Scotia could offer Resolute what it ultimately offered PWCC, but so that it could have more than one serious bidder, raise what the creditors would be paid and perhaps suppress the price the province ultimately would have to pay.<sup>533</sup> Resolute's refusal left GNS with only one serious bidder. GNS had to pay a ransom that might have been limited or controlled had more than one serious bidder wanted to buy Port Hawkesbury.

344. [REDACTED]

[REDACTED] Resolute also knew that accepting a benefits package like what GNS ultimately provided to Port Hawkesbury would come with a high price for Resolute—the certain closure of other SC Paper mills, including especially at least one Resolute mill, and the likelihood of an SC Paper trade remedy case instituted by the United States.<sup>534</sup>

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<sup>533</sup> CWS-EY ¶¶ 42-43.

<sup>534</sup> R-082, Letter from Richard Garneau to Minister Ed Fast relating to trade investigation in United States (Mar. 2, 2015); see also Statement of Claim ¶¶ 65-68, 73-75; CWS-Garneau ¶¶ 21-24.

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1. Resolute's Analysis Demonstrates That The Port Hawkesbury Mill Could Not Be Successful

345. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 535

[REDACTED]

[REDACTED]

[REDACTED] 536 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 538 [REDACTED]

[REDACTED]

[REDACTED] 539 [REDACTED]

[REDACTED]

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<sup>535</sup> C-107, [REDACTED] at RFP0005610 (June 1, 2011).

[REDACTED] See Resolute Memorial ¶ 28 (citing C-108, Resolute PowerPoint at RFP0004950 [REDACTED]); CWS-Garneau ¶¶ 14, 16.

<sup>536</sup> C-315, [REDACTED] (July 26, 2011).

<sup>537</sup> See C-109, *supra* n.202, [REDACTED] at RFP004972-4982, 4986, 4993, 4997-4998.

<sup>538</sup> C-109, *supra* n.202, [REDACTED] at RFP0004980.

<sup>539</sup> C-109, *supra* n.202, [REDACTED] at RFP0004988.

[REDACTED]

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347. Resolute [REDACTED]

[REDACTED]

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348. [REDACTED]

[REDACTED]

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<sup>540</sup> C-316, [REDACTED] (August 10, 2011).

<sup>541</sup> See C-316, [REDACTED] (August 10, 2011); C-109, *supra* n.202, [REDACTED].

<sup>542</sup> See Resolute Memorial ¶ 29; C-109, *supra* n.202, [REDACTED] at RFP0004989.

<sup>543</sup> C-109, *supra* n.202, [REDACTED] at RFP004982.



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[REDACTED]<sup>544</sup> [REDACTED]

[REDACTED]

349. On August 22, 2011, NewPage-Port Hawkesbury announced the indefinite idling of the mill.<sup>546</sup> On September 6, 2011, NewPage-Port Hawkesbury filed for creditor protection;<sup>547</sup> on September 9, 2011, the CCAA Court granted NewPage-Port Hawkesbury's application and authorized the Monitor overseeing the CCAA process to solicit offers to sell the mill.<sup>548</sup> The Monitor hired Sanabe to assist with the sale.<sup>549</sup> Sanabe's contract with the Monitor provided that the investment bank would receive a bonus for selling the mill as a going concern.<sup>550</sup>

350. Sanabe's [REDACTED]  
[REDACTED]. [REDACTED] Sanabe [REDACTED] stated that the EBITDA for NewPage-Port Hawkesbury was negative \$12.0 million for the first six months of 2011.<sup>551</sup> But this forecast, too, was overly optimistic.

351. Resolute's [REDACTED] NewPage-Port Hawkesbury would endure severe losses in 2011. NewPage-Port Hawkesbury lost over

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<sup>544</sup> C-109, *supra* n.202, [REDACTED] at RFP004990.

<sup>545</sup> CWS-Garneau ¶ 14.

<sup>546</sup> Canada Counter-Memorial ¶ 27; CWS-Garneau ¶ 13.

<sup>547</sup> Canada Counter-Memorial ¶ 27.

<sup>548</sup> Canada Counter-Memorial ¶ 74.

<sup>549</sup> Canada Counter-Memorial ¶ 74.

<sup>550</sup> C-317, Sanabe & Associates, LLC Terms and Conditions for sale of Port Hawkesbury mill at 2 (Sept. 6, 2011). The term "Sale Transaction" required the mill to be sold as a going concern and not "for the purposes of conducting a liquidation or auction sale."

<sup>551</sup> R-361, Sanabe Confidential Information Memorandum for Sale of Port Hawkesbury mill at 39 (September 2011) ("Sanabe CIM"). Sanabe adjusted the 2010 EBITDA for the mill to negative \$40.6 million.

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\$50 million in the year before it filed for CCAA protection and claimed it was “in dire financial straits.”<sup>552</sup> The high cost of electricity, freight, labor, and fiber in Nova Scotia plagued the mill.<sup>553</sup>

352. As part of the sales process, Sanabe and the Monitor contacted 110 parties directly to invite them to purchase the Port Hawkesbury mill.<sup>554</sup> Sanabe reached out to Resolute, then the largest SC Paper producer in North America (who had just completed extensive due diligence on the mill). The Monitor also placed advertisements in *The Globe and Mail* (Canada’s newspaper of record) and the *Halifax Chronicle Herald*.<sup>555</sup> Interested bidders had less than three weeks, from around September 9 until September 28, 2011, to make an initial offer for the Port Hawkesbury mill.<sup>556</sup> Despite the broad outreach by Sanabe and the Monitor, only 27 potential bidders decided to participate in the process.<sup>557</sup>

353. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] <sup>558</sup> [REDACTED]

<sup>552</sup> Resolute Memorial ¶ 26.

<sup>553</sup> See generally C-110, *NewPage to Initiate Downtime at Port Hawkesbury Mill*, NewPage Press Release (Aug. 22, 2011); C-125, PWCC Discussion Memorandum (Nov. 9, 2011).

<sup>554</sup> Canada Counter-Memorial ¶ 75.

<sup>555</sup> C-120, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Second Report of the Monitor ¶ 14 (Oct. 3, 2011).

<sup>556</sup> Canada Counter-Memorial ¶ 76.

<sup>557</sup> Canada Counter-Memorial ¶ 76.

<sup>558</sup> Canada Counter-Memorial ¶ 87. Canada also cites a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

354. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 560

355. Canada cites [REDACTED]

[REDACTED]

[REDACTED] 561 [REDACTED]

[REDACTED]

[REDACTED] 563

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[REDACTED] R-361, *supra* n.551, Sanabe CIM at 47. But over 92% of PHP's exports were going to the United States in 2013-14. See C-046, *In re Supercalendered Paper from Canada*, Port Hawkesbury Initial Questionnaire Responses at 13-14 (May 27, 2015); Steger Report ¶ 115(b) & Table 13.

<sup>559</sup> R-358, [REDACTED] (Sept. 13, 2011).

<sup>560</sup> R-358, [REDACTED] (Sept. 13, 2011).

<sup>561</sup> R-359, [REDACTED] (September 2011).

<sup>562</sup> R-359, *supra* n.561, [REDACTED] at RFP0009572.

<sup>563</sup> R-359, *supra* n.561, [REDACTED] at RFP0009571.

356. [REDACTED]

[REDACTED] 565 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] cost [REDACTED]

[REDACTED] 566 [REDACTED]

[REDACTED] 567 [REDACTED]

[REDACTED] 568

357. [REDACTED]

[REDACTED] 569 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 570 [REDACTED]

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<sup>564</sup> R-359, *supra* n.561, [REDACTED] at RFP0009569-70. Compare R-360, [REDACTED] (Sept. 26, 2011), with R-359, *supra* n.561, [REDACTED] at RFP0009569.

<sup>565</sup> C-119, *supra* n.204, [REDACTED]

<sup>566</sup> C-119, *supra* n.204, [REDACTED] at RFP0011518.

<sup>567</sup> See *supra* ¶ 353.

<sup>568</sup> *Supra* ¶ 347; see also CWS-Garneau ¶ 15 (“At the request of the province, Resolute senior management examined the possibility [REDACTED] of buying the Port Hawkesbury mill. [REDACTED] studied options, including closure of newsprint production and the continuation of only one machine, dedicated to producing supercalendered paper.”).

<sup>569</sup> C-119, *supra* n.204, [REDACTED] at RFP0011519.

<sup>570</sup> C-119, *supra* n.204, [REDACTED] at RFP0011524.

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[REDACTED] the Bowater Mersey mill.<sup>571</sup>

358. Canada ascribes exaggerated importance to a cherry-picked statement that [REDACTED]<sup>572</sup> But Canada ignores [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>573</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>574</sup> [REDACTED]

[REDACTED]<sup>575</sup> [REDACTED]

[REDACTED]<sup>576</sup> As M. Garneau explains:

Resolute's senior management concluded that there was no commercial way to make the Port Hawkesbury facility financially viable. Although blessed with relatively new equipment of very high quality for the production of supercalendered paper, the mill was afflicted with many of the same problems as Bowater Mersey, including costly electricity, labour and fibre. Projected EBITDA indicated massive losses.

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<sup>571</sup> See *supra* ¶¶ 320-325.

<sup>572</sup> See Canada Counter-Memorial ¶ 299 (citing C-119, *supra* n.204, [REDACTED] at RFP0011526).

<sup>573</sup> R-359, *supra* n.561, [REDACTED] at RFP0009571.

<sup>574</sup> C-119, *supra* n.204, [REDACTED] at RFP0011520.

<sup>575</sup> C-119, *supra* n.204, [REDACTED] at RFP0011525.

<sup>576</sup> C-119, *supra* n.204, [REDACTED] at RFP0011526.

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The Port Hawkesbury mill was very far away from markets, resulting in high transportation costs.... Resolute's senior management did not think Port Hawkesbury could return to the market as a competitive private enterprise.<sup>577</sup>

2. Resolute, Informed By Its Bowater Mersey Experience, Never Expected GNS To Provide The Assistance Necessary To Make The Port Hawkesbury Mill Viable

359. [REDACTED] did not consider that GNS would provide a potential NewPage-Port Hawkesbury purchaser with enough assistance to turn a failing mill into the "lowest cost and most competitive producer of super calendar [sic] paper."<sup>578</sup> Canada contends that Resolute was "aware of the possibility to obtain assistance from GNS,"<sup>579</sup> argues that Resolute's failure to anticipate the extreme measures GNS would provide PWCC was a "business decision,"<sup>580</sup> and states that [REDACTED]

[REDACTED]  
[REDACTED]<sup>581</sup> But nothing presented to Resolute, neither in the Bowater Mersey experience nor in the selling of Port Hawkesbury, ever [REDACTED] that GNS would provide anything close to the bailout package demanded by and given to PWCC. It is also improbable that what GNS gave away to PWCC it would have given to anyone in the presence of more than one serious bidder. Yet, without the commitment to long-term survival there may not have been any bidders, at least not for a going concern.<sup>582</sup>

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<sup>577</sup> CWS-Garneau ¶¶ 16-17.

<sup>578</sup> C-183, *supra* n.31, Aug. 20, 2012 Nova Scotia Press Release.

<sup>579</sup> Canada Counter-Memorial ¶ 276; *see also* Canada Counter-Memorial ¶ 298.

<sup>580</sup> Canada Counter-Memorial ¶ 300.

<sup>581</sup> Canada Counter-Memorial ¶ 79.

<sup>582</sup> *See* CWS-EY ¶¶ 42-43.

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360. Canada's contentions regarding the "possibility of assistance" are not supported by contemporaneous documents from September 2011. On August 26, 2011, Resolute had informed GNS and Premier Dexter about its intention to close the Bowater Mersey newsprint mill.<sup>583</sup> Premier Dexter requested that Resolute not make a public announcement so that GNS could consider how to keep the mill open (even though Resolute was persuaded that costs could not be lowered enough to make the mill competitive).<sup>584</sup> GNS, not Resolute, sought the chance to provide some assistance.

361. By September 28, 2011, Premier Dexter had been [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>585</sup> [REDACTED]  
[REDACTED]<sup>586</sup>

362. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>587</sup> [REDACTED] just months

<sup>583</sup> Montgomerie Witness Statement ¶ 9.

<sup>584</sup> See Montgomerie Witness Statement ¶ 9; R-323, *supra* n.500, CBC News, *Bowater mill owner delivers ultimatum*; also R-324, *supra* n.60, Global News, *Bowater Mersey paper mill needs government help: Nova Scotia premier*, C-352, *supra* n.480, Atlantic Business, *Knock on Wood*.

<sup>585</sup> C-119, *supra* n.204, [REDACTED] at RFP0011526.

<sup>586</sup> C-119, *supra* n.204, [REDACTED] at RFP0011525.

<sup>587</sup> C-119, *supra* n.204, [REDACTED] at RFP0011529; see also *id.* at RFP0011529 (stating that a [REDACTED]).

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earlier, GNS had done nothing during NSUARB proceedings to meet Resolute's and NewPage-Port Hawkesbury's joint request for a lower electricity rate for Bowater Mersey.<sup>588</sup> Once Bowater Mersey was no longer in play, however, GNS acted to ensure PWCC would receive a much more favorable electricity rate, exclusively for PHP, that would make the ambition of making Port Hawkesbury the lowest cost producer possible.<sup>589</sup>

363. At the time bids were due on September 28, 2011, [REDACTED] [REDACTED] GNS would act to obtain passage of PHP's electricity rate.<sup>590</sup> And given GNS's reluctance to provide [REDACTED] Resolute had no reason to expect that GNS would provide adequate assistance to Resolute if it were to purchase the Port Hawkesbury mill. When Bowater Mersey and Port Hawkesbury had bid together for an electricity rate, they had come up empty.

364. Resolute also had no reason to expect GNS would have provided Resolute with a bailout package that would turn the moribund Port Hawkesbury mill into the lowest cost producer of SC Paper. According to M. Garneau's testimony:

We did not think Port Hawkesbury could return to the market as a free private enterprise.

The Government of Nova Scotia seems to have invited PWCC to define exactly what it thought it needed from the province to make it the lowest cost operator in North America, and then the province seems to have given PWCC everything it asked for. In my forty years of experience in the forestry industry, I've never seen anything like it. Based on our experience with the province asking Bowater Mersey not to close and looking for ways to make it viable, Resolute

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<sup>588</sup> See e.g., C-320, *supra* n.524, NPB Exhibit List.

<sup>589</sup> See *supra* ¶¶ 54-67 (detailing GNS's commitments to PWCC/PHP regarding renewable energy).

<sup>590</sup> See *supra* ¶¶ 335-338.



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management never imagined the kind of government intervention and assistance we now know Nova Scotia gave for Port Hawkesbury.

The Government of Nova Scotia never offered to Resolute assistance comparable to the assistance it gave to PWCC....

Nor was comparable assistance, to the best of my knowledge, offered to NewPage, the preceding owner and operator of the mill. Based on my experience in the industry, I do not believe Port Hawkesbury could have become competitive in North America without the support, in scale and kind, given by the Government of Nova Scotia.<sup>591</sup>

365. Regardless, there could have been only one winner. Resolute, based upon the [REDACTED]  
[REDACTED]  
[REDACTED] a choice it was not willing to make.<sup>592</sup> That assistance, as Resolute predicted (correctly) and informed Canada about, placed the entire Canadian SC Paper industry at risk of trade remedies to be initiated by the United States.<sup>593</sup>

366. As M. Garneau states, the mill restart was possible only with the Nova Scotia Measures:

We believe, based on our study of the Port Hawkesbury sale to PWCC, that but for the support from the Government of Nova Scotia, Port Hawkesbury would never have reopened as a producer of supercalendered paper because it could not have been financially sound and commercially competitive. But for the reopening, there never would have been a countervailing duty case brought against all Canadian producers of supercalendered paper, including Resolute. Prices would not have fallen so much because there would not have been excess supply in the market.<sup>594</sup>

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<sup>591</sup> CWS-Garneau ¶¶ 18-20.

<sup>592</sup> See C-119, *supra* n.204, [REDACTED] at RFP0011524.

<sup>593</sup> See CWS-Garneau ¶¶ 21-24.

<sup>594</sup> CWS-Garneau ¶ 18; see *also id.* ¶ 23 (“All producers of supercalendered paper in Canada paid a high price for the support given Port Hawkesbury, in the form of a countervailing duty case brought by the United States just as we had predicted. Resolute would not have wanted

**VI. THE NOVA SCOTIA MEASURES CAUSED INJURY TO RESOLUTE**

367. Canada argues that the reemergence of North America's largest SC Paper machine, which was made possible by the Nova Scotia Measures, into a shrinking market for the product did not cause Resolute's injuries.<sup>595</sup> Instead, Canada contends that other factors, such as imports, grade substitution, and "supply changes," were at fault.<sup>596</sup> However, Dr. Kaplan and Canada's experts at Pöyry both demonstrate that the reemergence of PHP caused Resolute's damages.

368. Canada also contends that Resolute's damages are speculative.<sup>597</sup> But MIT Professor Jerry Hausman, using a combination of Resolute data and industry market forecasts for SC Paper, showed that Resolute incurred between \$91 million and \$137 million in damages because of Port Hawkesbury's restart.

369. The ILC Articles provide that Canada "is under an obligation to make full reparation for the injury caused by the internationally wrongful act."<sup>598</sup> "In other words, [Canada] must endeavor to 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.'"<sup>599</sup> Answering whether Canada caused the injury requires examining

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assistance on such a scale as to bring about a case against all Canadian exports to the United States and, in any event, no such assistance was ever offered to Resolute.").

<sup>595</sup> See Canada Counter-Memorial ¶ 327; CWS-Kaplan-2 ¶¶ 72-73.

<sup>596</sup> See Canada Counter-Memorial ¶ 327.

<sup>597</sup> See Canada Counter-Memorial ¶ 325.

<sup>598</sup> CL-145, *supra* n.42, ILC Articles at Article 31.

<sup>599</sup> *Id.* at Article 31, Commentary ¶ 3 (citing *Factory at Chorzow*, Merits Judgment No. 13, 1928, PC.LJ., Series A, No. 17, p. 47); see also RL-092, *supra* n.302, *ADM v. Mexico Award* ¶ 275; RL-180, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award ¶ 774 (July 24, 2008) (citing CL-145, *supra* n.42, ILC Articles, ILC Articles at Article 36); CL-242, *William Ralph Clayton and others v. Canada*, PCA Case No. 2009-04, Award on Damages ¶¶ 94, 133 (Jan. 10, 2019).

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whether the injury was a “foreseeab[le]” consequence of the breach.<sup>600</sup> This analysis is flexible; the “requirement of causal link is not necessarily the same in relation to every breach of an international obligation.”<sup>601</sup> If Canada were to have caused the injury, “[t]he compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”<sup>602</sup>

### A. The GNS Resuscitation Of The Port Hawkesbury Mill Caused Resolute’s Injury

370. Canada relies on a 2013 price increase to argue that PHP’s return to the market did not cause injury to Resolute.<sup>603</sup> Canada, however, omits what happened after this price increase: “[T]he reversal in the second half of 2013 was only temporary. The price of SCA began falling in December 2013 and trended downward until January 2017.”<sup>604</sup> [REDACTED]

[REDACTED]<sup>605</sup>

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<sup>600</sup> CL-145, *supra* n.42, ILC Articles at Article 31, Commentary ¶ 10.

<sup>601</sup> CL-145, *supra* n.42, ILC Articles at Article 31, Commentary ¶ 10.

<sup>602</sup> CL-145, *supra* n.42, ILC Articles at Article 36; *see also* CL-231, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award ¶¶ 362-363 (Dec. 17, 2015) (finding that the claimant was entitled to “be placed in the same situation” that would have existed but for the treaty violations); CL-214, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award ¶ 618 (Sept. 13, 2001) (“*CME Czech Republic*”) (stating claimant was entitled to “the fair market value of Claimant’s investment as it was before consummation of the Respondent’s breach of the Treaty in August 1999.”); RL-092, *supra* n.302, *ADM v. Mexico* Award ¶¶ 281, 287, 293 (explaining that both damages and profits may be awarded and awarding lost profits for loss of sales).

<sup>603</sup> *See* Canada Counter-Memorial ¶¶ 357-362 (“Contrary to Dr. Kaplan’s theory, the July price increase is clear proof of a strong market in 2013.”).

<sup>604</sup> CWS-Kaplan-2 ¶ 52.

<sup>605</sup> C-355, Resolute Pulp and Paper Sales & Marketing Update to Board of Directors at 11816 (Oct. 10, 2013).

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371. Canada also fails to address the importance of the so-called 2013 price increase. “[E]ven with this temporary reversal, the average price in 2013 was \$26 per MT lower than the average price in 2012.”<sup>606</sup> This \$26 price decrease is almost identical to the [REDACTED], predicted would occur if PHP were to restart.<sup>607</sup> Contrary to Canada’s assertion, the July 2013 price increase was not “clear proof of a strong market in 2013.”<sup>608</sup>

372. Canada further contends that Dr. Kaplan’s causation theory is flawed because SC Paper prices should have increased when the Port Hawkesbury mill closed from 2011-12. However, Pöyry’s report explains why prices for SC Paper remained flat. “Bleached Softwood Kraft Pulp (‘BKSP’) constitutes a significant cost item in SC-paper manufacturing.... The relationship between pulp prices and SC Paper prices demonstrates that SC Paper prices move in parallel with market pulp prices.”<sup>609</sup> The price of BSKP dropped in 2011-2012, leading SC Paper prices to remain flat instead of rising:

The record demonstrates that in late 2011 and for much of 2012, the price of Bleached Softwood Kraft Pulp (“BSKP”) trended lower. All other things being equal, this decline in raw materials costs would have resulted in a lower price of SCP. Instead, the price of SCP held steady during 2012 until the re-opening of the PHP mill.<sup>610</sup>

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<sup>606</sup> CWS-Kaplan-2 ¶ 52.

<sup>607</sup> CWS-Kaplan-2 ¶ 27 (citing R-161, *supra* n.2, [REDACTED] at 5).

<sup>608</sup> Canada Counter-Memorial ¶ 360.

<sup>609</sup> Expert Witness Report of Pöyry ¶ 79 & Figure 5-6 (Apr. 16, 2019) (“Pöyry Expert Report”).

<sup>610</sup> CWS-Kaplan-2 ¶ 54.

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373. Another Canadian criticism of Dr. Kaplan’s report is his supposed failure to address substitutability between different SC Paper grades.<sup>611</sup> Canada contends that PHP and Resolute do not compete with each other because Resolute makes primarily lower quality grades (SCB/SNC) of SC Paper while PHP makes higher quality paper (SCA+/SCA++).<sup>612</sup> Dr. Kaplan did consider this issue, relying (in part) on the U.S. International Trade Commission (“ITC”) investigation that addressed this same issue but nonetheless found different grades of SC Paper belong to a single SC Paper market.<sup>613</sup> Dr. Kaplan also relied on pricing data that showed an “extremely high correlation between” SCA and SCB grades during 2012-2017.<sup>614</sup>

374. Pöyry , [REDACTED]

[REDACTED]<sup>615</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>616</sup>

375. Canada relies on isolated [REDACTED] regarding PHP’s quality as a purportedly differentiating factor.<sup>617</sup> Those comments, at most, explain some particular sales. Canada’s reliance on a few statements do not rebut Dr. Kaplan’s

<sup>611</sup> See Canada Counter-Memorial ¶ 347.

<sup>612</sup> See Canada Counter-Memorial ¶ 347.

<sup>613</sup> See Kaplan Witness Statement ¶¶ 36-41.

<sup>614</sup> CWS-Kaplan-2 ¶ 42.

<sup>615</sup> R-146, *supra* n.482, [REDACTED] at 65.

<sup>616</sup> R-161, *supra* n.2, [REDACTED] at 29.

<sup>617</sup> See Canada Counter-Memorial ¶¶ 348-349.

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conclusions about the substitutability of different grades of SC Paper. As Dr. Kaplan concluded:

Second, there is overlap in competition because both PHP and Resolute produce and sell SCA and because at the margin SCA competes with SCA+, and is therefore affected by changes in the prices of SCA+. Third, because all levels of SCA are considered to have better attributes than SCB, the price of SCA normally sets a cap on the price of SCB. Since PHP's re-entry, the prices of SCB and SCA have moved in tandem and the traditional gap between them was absent during the 2012-to-2017 period.<sup>618</sup>

376. Canada makes similar arguments regarding the substitutability of SC Paper to higher grades (such as coated paper) or lower grades (such as newsprint). These arguments were rejected in the U.S. ITC proceedings.<sup>619</sup> Dr. Kaplan explained that his analysis considered substitutability with other paper products: “the downward slope of all demand curves is a measure of the substitutability of the nearest alternatives. The fact that there is a substitutable nearest alternative is a characteristic of every market. It is well understood that even a monopolist faces substitute products.”<sup>620</sup>

377. In addition, the substitutability of PHP's SCA+ products with coated paper has an effect on other SC Paper prices. “If the prices for SCA+ are low enough to cause demand shifts from other grades, it stands to reason that those low prices also

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<sup>618</sup> CWS-Kaplan-2 ¶ 47; see also *id.* ¶ 59 (“As an initial matter, I did mention that SC paper grades are highly substitutable and, as a result, their prices tend to move together. This also is demonstrated in Figure 5-2 of the Pöyry Expert Report. Second, there is overlap in competition because both PHP and Resolute produce and sell SCA and because at the margin SCA competes with SCA+, and is therefore affected by changes in the price of SCA+. Finally, because all levels of SCA are considered to have better attributes than SCB, the price of SCA normally sets a cap on the price of SCB. Since PHP's re-entry, the prices of SCB and SCA have moved in tandem with the price for SCA above the price of SCB.”)

<sup>619</sup> CWS-Kaplan-2 ¶¶ 39, 41.

<sup>620</sup> CWS-Kaplan-2 ¶ 48.

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will have adverse effects on the prices of adjacent grades in the same family.”<sup>621</sup>

[REDACTED]

[REDACTED]<sup>622</sup> As a result of the Nova Scotia Measures, PHP was able to open up as the lowest cost producer of a high grade of SC Paper, causing the grade switching.

378. Canada claims Dr. Kaplan’s model was a “purely theoretical framework of basic economics.”<sup>623</sup> But it is Canada and its experts who lack understanding of the economics, infecting the remainder of their analysis. “The problem is not that my analysis is too theoretical, but rather that [Canada’s experts] fail to appreciate the application of a parsimonious partial equilibrium model and how it incorporates the key market factors they claim I ignore.”<sup>624</sup>

379. For example, Canada cites the Pöyry Expert Report to argue that “[i]mmediately following the temporary shutdown of the Port Hawkesbury mill in 2011,

[REDACTED]

[REDACTED]<sup>625</sup> However, as Dr. Kaplan points out, Pöyry ’s statement is incorrect—consumption, not demand, declined.<sup>626</sup> “[T]his is not a

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<sup>621</sup> CWS-Kaplan-2 ¶ 60.

<sup>622</sup> R-161, *supra* n.2, [REDACTED] at 54.

<sup>623</sup> Canada Counter-Memorial ¶ 342.

<sup>624</sup> CWS-Kaplan-2 ¶ 32.

<sup>625</sup> Canada Counter-Memorial ¶ 353 (citing Pöyry Expert Report ¶ 51) (internal alterations omitted).

<sup>626</sup> CWS-Kaplan-2 ¶ 30 (citing Pöyry Expert Report ¶¶ 7, 14, 46, 81, 91, 93).

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trivial semantic distinction but rather an error that renders their analysis deeply flawed and their conclusions analytically unsupported.”<sup>627</sup>

380. Dr. Kaplan further explains how this error infected Pöyry’s analysis:

While there is agreement that *consumption* fell in 2012 and increased in 2013, the question is why: was it due to a change in market supply, a change in market demand, or both? This is not a mystery. The prime driver of the decrease in SCP consumption in 2012 was the decrease in SCP supply caused by the exit of the Port Hawkesbury mill. Similarly, the increase in SCP consumption in 2013 was caused primarily by an increase in SCP supply due to the re-entry of the PHP mill. This conclusion is only made more obvious by the fact that all parties agree that the new PHP capacity would need to be operated at high levels of utilization to be viable. An increase in capacity or number of suppliers is a textbook definition of an increase in supply. In a “but for” context, an increase in supply will cause equilibrium prices to fall and equilibrium quantity (consumption) to increase. In the instant matter, the 25 percent increase in North American SCP capacity attributable to the PHP re-entry resulted in the same outcome.<sup>628</sup>

Later in his report, Dr. Kaplan again explains the import of Pöyry’s mistake:

The correct analysis is that the exit and re-entry of PHP capacity, represented by shifts in the supply curve illustrated in Figure 2 of my initial report, caused movements along the demand curve, resulting in a reduction in the quantity consumed. The Pöyry Report’s failure to correctly distinguish between supply and demand undermines the credibility of the whole Pöyry analysis, in particular the report’s criticism of my conclusion that the significant addition of supply caused by PHP’s re-entry was not due to, or met with, a significant increase in demand.<sup>629</sup>

381. With a proper understanding of the economics, which takes into account Canada’s criticisms,<sup>630</sup> “the re-start of PHP shifted the supply curve to the right, which must depress the price of SCP, including the products sold by Resolute. But for this re-

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<sup>627</sup> CWS-Kaplan-2 ¶ 30.

<sup>628</sup> CWS-Kaplan-2 ¶ 31 (citations omitted, emphasis in original).

<sup>629</sup> CWS-Kaplan-2 ¶ 35 (citations omitted).

<sup>630</sup> See CWS-Kaplan-2 ¶¶ 70-71.



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entry, market prices would have been higher and Resolute's sales would have been greater."<sup>631</sup>

382. Even if it were correct that additional factors participated in causing Resolute's damages, Canada would still be liable. The tribunal in *CME Czech Republic B.V. v. The Czech Republic*<sup>632</sup> provides that Canada (on behalf of GNS) is still liable even if there were a "concurrent cause of that harm and that another is responsible for that harm."<sup>633</sup> According to that tribunal:

The U.N. International Law Commission observed that sometimes several factors combine to cause damage. The Commission in its Commentary referred to various cases, in which the injury was effectively caused by a combination of factors, only one of which was to be ascribed to the responsible State. International practice and the decisions of international tribunals do not support the reduction or attenuation of reparation of concurrent causes, except in cases of contributory fault.

It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct.<sup>634</sup>

383. The *Gavazzi v. Romania* tribunal reached a similar conclusion, holding that "[i]n international law, where a State has caused damage by a breach of its international obligations, and where the claimant has shown that its losses are sufficiently and reasonably linked to the State's breach, causation is held to have been

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<sup>631</sup> CWS-Kaplan-2 ¶ 63.

<sup>632</sup> CL-214, *supra* n.602, *CME Czech Republic*.

<sup>633</sup> CL-214, *supra* n.602, *CME Czech Republic* ¶ 581 (Quoting (J.A. Weir, "Complex Liabilities", in A. Tunc (ed.), *International Encyclopedia of Comparative Law* (Tubingen, Mohr, 1983), vol. XI., p. 41)).

<sup>634</sup> CL-214, *supra* n.602, *CME Czech Republic* ¶ 583.

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established. Other possible concurrent events that are not attributable to the State are irrelevant; such events do not diminish the State’s responsibility, nor do they reduce the amount of compensation for damages due.”<sup>635</sup>

384. Even if other factors or non-actionable measures contributed to Resolute’s damages, those damages would not have been incurred but for the actionable Nova Scotia Measures. Dr. Kaplan’s “but for” analysis is “widely used in economics,” including in [REDACTED].<sup>636</sup> Using a similar methodology,<sup>637</sup> that report reached the same conclusion that Dr. Kaplan has reached here.<sup>638</sup>

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

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<sup>635</sup> CL-218, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of Award ¶ 269 (Apr. 18, 2017).

<sup>636</sup> CWS-Kaplan-2 ¶ 33.

<sup>637</sup> R-161, *supra* n.2, [REDACTED] at 8 ([REDACTED]).

<sup>638</sup> CWS-Kaplan-2 ¶ 4.

• [REDACTED] 639

385. [REDACTED] summarizes exactly what happened to Resolute. [[

[REDACTED]

]] Unfortunately for Resolute, PHP's reentry led to the worst case.<sup>640</sup>

**B. Resolute Incurred Damages From The Nova Scotia Measures**

386. Canada disputes multiple aspects of Resolute's damages analysis performed by Professor Hausman. According to Canada, Prof. Hausman's reliance on market forecasts to determine the price for SC Paper during 2013-2017 *but for the*

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<sup>639</sup> R-161, *supra* n.2, [REDACTED] at 6, 8, 10, 53, 54.

<sup>640</sup> R-161, *supra* n.2, [REDACTED] at 55.

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return of PHP was improper.<sup>641</sup> Canada similarly claims that Prof. Hausman’s future losses period (from 2018-2028) were based on the same market forecasts.<sup>642</sup>

387. Canada misstates Prof. Hausman’s reliance on RISI data. Prof. Hausman did not rely on RISI forecasts to predict the actual level of prices; instead, he used the RISI forecasts to predict the yearly change in prices absent the restart of Port Hawkesbury.<sup>643</sup> Using the 2012 Resolute mill net prices (representing the last year in real prices that Resolute had prior to Port Hawkesbury’s full reopening in 2013), Prof. Hausman multiplied the prior year price by the RISI annual price change prediction. For 2013-2017, the RISI prediction was, respectively, [REDACTED] [REDACTED].<sup>644</sup>

388. Canada complains about Dr. Hausman’s use of RISI price forecasts for these minimal annual changes, but Pöyry’s [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>645</sup> Canada, citing Mr. Steger, claims there was “a \$50 difference between the 2012 RISI price prediction and the [lower] actual price.”<sup>646</sup> That actual price, though,

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<sup>641</sup> See Canada Counter-Memorial ¶¶ 378-386.

<sup>642</sup> Canada Counter-Memorial ¶ 388.

<sup>643</sup> See Witness Statement of Prof. Jerry Hausman ¶ 14 n. 35 (Dec. 6, 2019) (“CWS-Hausman-3”); Witness Statement of Prof. Jerry Hausman ¶¶ 23, 26 (Dec. 28, 2018) (“CWS-Hausman-2”).

<sup>644</sup> CWS-Hausman-2 ¶¶ 26-27.

<sup>645</sup> See R-161, *supra* n.2, [REDACTED] at 51.

<sup>646</sup> Canada Counter-Memorial ¶ 383 (citing Steger Report ¶ 35).

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includes PHP's re-entry into the market and, therefore, is not the product of a "but for" analysis.<sup>647</sup>

389. Canada contends that the future losses lack support for a [REDACTED] percent year over year profit decrease from 2018-2028 or a ten percent discount rate.<sup>648</sup> Prof. Hausman explained why he assumed profits will decrease by [REDACTED] percent annually:

The first reason is that I understand Resolute expects a [REDACTED] percent decline in future profits. The second reason is that the RISI price and cost forecasts show that costs are growing at a faster rate than prices will rise. CAGR implied in the price forecast over 2012 to 2016 was 0.84 percent, while the CAGR of the variable costs forecast was 1.49 percent over the same time period. By using the [REDACTED] percent decline, I take a more conservative approach in calculating future profits.<sup>649</sup>

The 2028 terminal date was a conservative determination, based upon the current state of the SC Paper industry and the state of Resolute's mills.<sup>650</sup> And notwithstanding Canada's complaint about the discount rate of ten percent used by Prof. Hausman (based upon Resolute's Weighted Average Cost of Capital), this rate is conservative and actually lowers the present value of Resolute's damages.<sup>651</sup>

390. Canada relies upon Pöyry to argue that SC Paper prices would have decreased even without PHP's reentry into the market; and upon Mr. Steger to contend

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<sup>647</sup> See Steger Report ¶ 35.

<sup>648</sup> See Canada Counter-Memorial ¶¶ 387-390.

<sup>649</sup> CWS-Hausman-2 ¶ 42.

<sup>650</sup> CWS-Hausman-2 ¶ 43.

<sup>651</sup> For example, the Weighted Average Cost of Capital for the Paper Industry in January 2018 would have been approximately 7%. <http://pages.stern.nyu.edu/~adamodar/>

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that the SC Paper price drop was limited to six months, leading to C\$9.419 million of losses for Resolute.<sup>652</sup>

391. Prof. Hausman disagrees with Mr. Steger’s analysis, stating that “Mr. Steger is assuming that even though the re-opening of PHP added 20%-25% capacity and between █████-360K tons of extra production to the SC market, this added capacity and production had no effect on prices. This assumption makes no economic sense and Mr. Steger gives no explanation in terms of supply and demand in the SC market.”<sup>653</sup>

392. Based upon additional data from Resolute, Prof. Hausman revised his damages calculation for 2018-2028 by incorporating 2018 actual data and using a base period average of 2016-18 to calculate damages in 2019-2028:<sup>654</sup>

	<b>2013-2018</b>	<b>2019-2028</b>	<b>Total</b>
RISI Costs	104,945	43,793	148,738
Inflation	90,402	13,565	103,967

Damages for 2013-18 are actual damages based on the methodology Prof. Hausman used in his initial expert report.

393. Canada contests whether Resolute is entitled to pre-award interest, arguing that Resolute supposedly delayed three years from bringing its claim.<sup>655</sup> Not so. Resolute spent nearly eighteen months attempting to resolve this dispute with

<sup>652</sup> Canada Counter-Memorial ¶¶ 391-392. Dr. Kaplan, in his report, explained why supercalendered paper prices did not rise in 2012 when Pöyry claims they should have. *Supra* ¶ 372.

<sup>653</sup> CWS-Hausman-3 ¶ 20.

<sup>654</sup> See CWS-Hausman-3 ¶¶ 28-30 & Table 5. Prof. Hausman also offers an “economic approach” as an alternative theory that estimates damages could be over \$216 million. See CWS-Hausman-3 ¶¶ 31-34.

<sup>655</sup> Canada Counter-Memorial ¶ 395.

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Canadian officials, to no avail.<sup>656</sup> Canada should not be able to benefit from Resolute's attempts to resolve this dispute amicably, short of commencing an arbitration under NAFTA.

### VII. CONCLUSION

394. Canada contests whether the Nova Scotia Measures were so extraordinary as to be actionable, and contests whether they were extraordinary. The record and expert testimony show them to be extraordinary and egregious and reveal that GNS knew their implementation would cause damages generally to others in the SC Paper industry, and specifically to Resolute. Canada contests there were any damages, but Canada's own experts forecast those damages with considerable accuracy.

395. Canada argues that Resolute could have had the same benefits from GNS that were provided to PHP, had Resolute only been operating in Nova Scotia and had Resolute only bid to buy Port Hawkesbury. Yet, Resolute was in Nova Scotia, at Bowater Mersey. Canada argues that Resolute was the beneficiary of generous GNS offers at Bowater Mersey, but the record proves otherwise by orders of magnitude, and Resolute did not bid on Port Hawkesbury because its experience at Bowater Mersey and its own due diligence cautioned it not to bid. GNS's largesse manifested itself only after Bowater Mersey closed and there was only one bidder left for Port Hawkesbury.

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<sup>656</sup> Resolute Statement of Claim ¶¶ 58-79. Canada even produced in these proceedings proof of Resolute's good faith efforts to reach an accommodation with Canada. R-081, Draft Notice of Intent (Mar. 2, 2015).

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396. The key questions for the Tribunal are:
- a. How much assistance, how much government intervention, how much government favoring of one company over another, is too much? There is a line, defined by the particular facts of the case, between a government making a company competitive and guaranteeing that it will be more competitive and necessarily prevail over a foreign investor. The facts of this case show that Nova Scotia knowingly crossed that line.
  - b. At what point is unbalanced and targeted government intervention unfair and inequitable? Although there is no intent test—Resolute does not have to show that harm to it was deliberately and knowingly caused by Nova Scotia (and, in its dealings with the WTO and the United States Department of Commerce, Canada) -- yet in this case, remarkably, Canada's own experts provide ample evidence of intent. Intentional infliction of harm, expressly robbing Peter to pay Paul, must be actionable and compensable.

### **VIII. RELIEF REQUESTED**

397. Resolute respectfully requests that the Tribunal issue an award in Resolute's favor providing the following relief:

- a) a finding that the Measures are attributable to GNS, and therefore to Canada;
- b) a finding that Canada has violated its obligations to Resolute under Article 1102;
- c) a finding that Canada has violated its obligations to Resolute under Article 1105;



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- d) a finding that Canada's breaches of its obligations under NAFTA Chapter 11 caused Resolute to incur damages;
- e) an award of damages in the amount of at least US\$103,967,000 or such other amount to be determined by the Tribunal;
- f) an award to Resolute for its costs and fees of this arbitration; and
- g) such other relief as the Tribunal may determine to be lawful and appropriate under the circumstances.

Respectfully submitted,



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