

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

**- between -**

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

**(the “Investors”)**

**- and -**

**GOVERNMENT OF CANADA**

**(the “Respondent” and, together with the Investors, the “Parties”)**

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**AWARD ON JURISDICTION AND LIABILITY**

**17 MARCH 2015**

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**ARBITRAL TRIBUNAL:**

Judge Bruno Simma (President)

Professor Donald McRae

Professor Bryan Schwartz

**SECRETARY:**

Dr. Dirk Pulkowski

Permanent Court of Arbitration (PCA) Case No. 2009-04

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## GLOSSARY OF DEFINED TERMS

ANFO	Ammonium Nitrate Fuel Oil
Bilcon	Bilcon of Nova Scotia, a limited liability company incorporated on 24 April 2002 in Nova Scotia and a wholly owned subsidiary of Bilcon of Delaware
Blasting Conditions	Blasting conditions added to the Approval dated 30 April 2002 by the Province of Nova Scotia “for the construction and operation of a Quarry, at or near Little River, Digby County in the Province of Nova Scotia” pursuant to Part V of the Nova Scotia Environment Act
Blasting Guidelines	Guidelines for the Use of Explosives In or Near Canadian Fisheries Waters, Canadian Technical Report of Fisheries and Aquatic Sciences 2107 by D.G. Wright and G.E. Hopky, 1998
CEA Agency	Canadian Environmental Assessment Agency
CEAA	Canadian Environmental Assessment Act, S.C. 1992, c. 37 (in force until 6 July 2012)
Counter-Memorial	Respondent’s Counter-Memorial dated 9 December 2011
DFAIT	Canada’s Department of Foreign Affairs and International Trade
DFO	Canada’s Department of Fisheries and Oceans
Draft EIS Guidelines	Draft Environmental Impact Statement Guidelines released for public comments on 10 November 2004
EA	Environmental Assessment
EIS	Environmental Impact Statement
EIS Guidelines	Environmental Impact Statement Guidelines issued by the Joint Review Panel for the Whites Point project on 31 March 2005
Fisheries Act	Fisheries Act, R.S.C. 1985, c. F-14, as in force from 11 May 2000 to 31 March 2003
FTC Notes	Notes of Interpretation of Certain Chapter Eleven Provisions, Free Trade Commission, 31 July 2001
GQP	Global Quarry Products, Partnership between Nova Stone and Bilcon of Nova Scotia entered into on 24 April 2002
ha	Hectare
HADD	Harmful alteration, disruption or destruction of fish habitat
ILC Articles	Articles on Responsibility of States for Internationally Wrongful



	Acts, adopted by the International Law Commission (ILC) in 2001
iBoF	Inner Bay of Fundy
Investors' Article 1128 Response	Investors' Response to the Submission of the United States of America pursuant to NAFTA Article 1128, dated 17 May 2013
JRP	Joint Review Panel
JRP Hearing Transcript	Whites Point Quarry and Marine Terminal Public Hearing Transcript
JRP Report	Environmental Assessment of the Whites Point Quarry and Marine Terminal Project: Joint Review Panel Report, October 2007, submitted to the Canadian Minister of the Environment and the Nova Scotia Minister of Environment and Labour
Memorial	Investors' Memorial, dated 25 July 2011
NAFTA	North American Free Trade Agreement, entered into force on 1 January 1994
Notice of Intent	Notice of Intent to submit a Claim to Arbitration, dated 5 February 2008
Nova Stone	Nova Stone Exporters, Inc., a corporation formed pursuant to the laws of Nova Scotia, Canada
NSDEL	Nova Scotia Department of Environment and Labour
NSEA	Nova Scotia Environment Act, S.N.S. 1994-95, c. 1
NWPA	Navigable Waters Protection Act, R.S.C. 1985, c. N-22 (as in force from 1 March 1999 to 10 May 2004)
PCA	Permanent Court of Arbitration
Rejoinder	Respondent's Rejoinder Memorial, dated 21 March 2012
Reply	Investors' Reply Memorial, dated 21 December 2011
TOR	Terms of reference of the Joint Review Panel
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 1976
US Article 1128 Submission	Submission of the United States of America pursuant to NAFTA Article 1128, dated 19 April 2013
Whites Point project	A quarry and a marine facility proposed to be constructed and operated by Bilcon at Whites Point in Digby Neck, Nova Scotia

## I. INTRODUCTION

### A. THE PARTIES

1. The Investors acting as claimants in the present arbitration are Messrs. William Ralph Clayton, William Richard Clayton, Douglas Clayton and Daniel Clayton, all nationals of the United States of America, as well as Bilcon of Delaware, Inc., a limited liability company incorporated under the laws of the State of Delaware. The Investors' addresses for service are as follows:

Mr. William Ralph Clayton	Bilcon of Delaware, Inc.
Mr. William Richard Clayton	1355 Campus Parkway
Mr. Douglas Clayton	Monmouth Shores Corporate Park
Mr. Daniel Clayton	Neptune, NJ 07753
PO Box 3015	United States of America
Lakewood, NJ 08701	
United States of America	

2. The Investors are represented in these proceedings by Mr. Barry Appleton of Appleton & Associates, 77 Bloor Street West, Suite 1800, Toronto, Ontario, M5S 1M2, Canada.
3. The Respondent in the present arbitration is the Government of Canada. Its address for service is Trade Law Bureau (JLT), Department of Foreign Affairs and International Trade Canada, 125 Sussex Drive, Ottawa, Ontario, K1A 0G2, Canada.
4. The Respondent is represented in these proceedings by the following counsel at the Trade Law Bureau:

Ms. Sylvie Tabet  
Mr. Scott Little  
Mr. Shane Spelliscy  
Mr. Reuben East  
Mr. Jean-François Hébert

5. The Parties'<sup>1</sup> dispute revolves around the Investors' proposal to operate a quarry and a marine terminal<sup>2</sup> in Nova Scotia at Whites Point in Digby Neck ("Whites Point project"). Beginning in

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<sup>1</sup> The Tribunal notes the use of the phrase "disputing parties" within the text of NAFTA Chapter Eleven, as defined in Article 1139, in distinction to the NAFTA contracting "Parties". In the interest of better readability, the Tribunal will reserve the terms "Party" and "Parties" in this Award to designate the parties to the present arbitral proceedings.

2002, the Whites Point project underwent a lengthy environmental assessment (“EA”) by Nova Scotia and the Canadian Federal Government. Both governments rejected the project on environmental grounds in line with the recommendations of a Joint Review Panel (“JRP”) at the end of 2007. The Parties differ starkly as to the appropriateness of various aspects of the EA and the treatment that the Investors received during this process. While the Investors contend that the treatment they received at every stage of the EA was unfair, politically biased and discriminatory, the Respondent maintains that the relevant authorities dealt with the proposal fairly and professionally. In the Respondent’s view, it was the Investors who acted unprofessionally at various stages of the EA.

**B. THE ESSENCE OF THE INVESTORS’ CASE**

6. The Investor’s position is essentially as follows.
7. The Clayton Group of Companies, founded over fifty years ago, are principally engaged in supplying building materials, including concrete. The Clayton Group was managed by Mr. William Ralph Clayton, and his three sons, Mr. William Richard Clayton, Mr. Douglas Clayton and Mr. Daniel Clayton were also involved in the corporate operations. In 2008 the senior Mr. Clayton reduced his workload and transferred his interest in the Clayton Group to his sons. The Clayton Group requires a substantial, secure and economical supply of aggregate for its projects. The Clayton Group has a long history of providing needed products in a lawful manner. Its activities help to supply the roads, bridges and buildings needed by both the public and private sectors.<sup>3</sup> The Clayton Group has been recognized for its leadership in corporate social responsibility, especially in the areas of health and education.<sup>4</sup>
8. As will be described later in detail, Bilcon of Delaware, Inc., is a member of the Clayton Group and was incorporated under the laws of Delaware in 2002. The shareholders are the Clayton brothers. In the same year, Bilcon of Delaware, Inc., in turn incorporated as a subsidiary a new Nova Scotia company, Bilcon of Nova Scotia (“Bilcon”), to operate the Whites Point project,

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<sup>2</sup> Although the Investors also refer to the marine-based construction as “marine terminal” in their Reply (e.g., Reply, paras. 59, 62, 64), in their Memorial, they use the term “dock” and emphasize that “it was not a ‘marine terminal’ at all within the meaning of the *CEAA*, Canada’s federal environmental authority” (Memorial, para. 487, referring to First Expert Report of David Estrin, para. 164). Without prejudice to the Investors’ position on the qualification of marine terminal for the purposes of the *Canadian Environmental Assessment Act* (“*CEAA*”) and for the decision to scope the quarry and the marine terminal in the federal EA, the Tribunal will use the term “marine terminal”.

<sup>3</sup> Memorial, paras. 32-42; Witness Statement of William Richard Clayton, paras. 1-3.

<sup>4</sup> Memorial, para. 33 (full details of the corporate family’s official awards and honours provided in a lengthy footnote).

the purpose of which was to provide a reliable supply of aggregate for Bilcon of Delaware and the Clayton Group of Companies. Bilcon entered into a partnership with a Nova Scotia company, Nova Stone Exporters, Inc. (“Nova Stone”), to develop a quarry and marine terminal at Whites Point Quarry. The partnership was acquired entirely by Bilcon in 2004.

9. For the purposes of its Chapter Eleven claims, the Investors are defined as Bilcon of Delaware and four individual investors, Messrs. William Ralph Clayton, William Richard Clayton, Douglas Clayton and Daniel Clayton. The Investors define their Investment as including Bilcon of Nova Scotia and the tangible and intangible property of the Investors associated with the Whites Point project.<sup>5</sup>
10. Bilcon submits that the Province of Nova Scotia had a publicly stated policy of encouraging investment in its mining industry. Its political and technical officials were informed of the interest by Bilcon in developing a mining quarry and marine terminal at Whites Point, in Digby County, Nova Scotia. They welcomed Bilcon’s interest and provided political and technical support. The overall regulatory framework in place in Nova Scotia and federal Canada includes requirements for environmental assessment and approval. Both jurisdictions have legislated policies of “sustainable development”. The core of this philosophy is to encourage and promote economic development while conserving and promoting environmental quality.<sup>6</sup> Bilcon was from the outset committed to complying with the environmental processes and standards of both federal Canada and Nova Scotia. It expected that it could address all relevant concerns about potential adverse effects by consulting with the community, assembling expert evidence on physical, biological and social impacts, and putting in place appropriate plans to prevent and mitigate environmental harm. It was interested in sound environmental practices as a matter of its own sense of corporate social responsibility.
11. Bilcon contends, however, that its legitimate expectations, created by the regulatory framework and specific expressions of encouragement by governments, were frustrated unfairly and in breach of the safeguard that Chapter Eleven of NAFTA provides for investors and investments concerning non-discrimination (Articles 1102 and 1103) and fair treatment (Article 1105).
12. In 2001, the Investors began to consider a project at Whites Point, in Digby County, Nova Scotia. Nova Stone applied to Nova Scotia environmental regulators for approval of a 3.9 hectare (“ha”) quarry at that location. Nova Scotia regulators recommended approval. Shortly

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<sup>5</sup> Memorial, para. 43.

<sup>6</sup> CEAA, preamble.

thereafter, Bilcon entered into a partnership agreement with Nova Stone to develop and operate the Whites Point Quarry. Nova Stone's original application, however, was sent back as it turned out to actually exceed 4.0 ha.

13. Nova Stone revised the application to meet the 3.9 ha ceiling, and attempted to obtain industrial approvals to operate a small quarry on the site of the eventual project. It wanted to conduct test blasts. The results would assist in planning the project and making the case to regulators and the public that the quarry would be safe for the environment. Even though a small land-based quarry is ordinarily within provincial jurisdiction, Nova Scotia regulators stipulated, unlawfully, contends Bilcon, that blasting could only be carried out in accordance with federal Canada's guidelines on marine blasting.
14. Approval to conduct the test blast, however, was never obtained. First, federal Canada's officials wrongly stated that Bilcon needed to conduct the blasts as far as 500 metres from the shore. The officials later realized that this was a mistake and the blasting guidelines only required a 100 metre setback but, they delayed disclosing the truth to Bilcon. The key federal Canada official with respect to marine mammals, Mr. Jerry Conway, informed his colleagues that he had "no concerns" about the impact of blasting if care was taken to avoid blasting if whales were sighted within a kilometre from the test site. Again, disclosure of this fact to Bilcon was long delayed. Bilcon tried for several more years to obtain the cooperation of regulatory authorities to conduct test blasts, but eventually gave up. Concerns over the environmental impact of blasting, however, ended up being cited by the JRP that recommended against the project.
15. Bilcon submits that behind the scenes there was inappropriate political interference in the regulatory process. The Federal Minister of Fisheries was also the Member of Parliament representing the local area in which the project was located. He was aware that some constituents strongly opposed the idea of a quarry and marine terminal project. He would eventually, at the JRP, argue against its proceeding. One senior federal Canada official noted "[The Minister] wants process dragged out as long as possible".<sup>7</sup> Aware of the Minister's desire, officials recommended that the project be subjected to a JRP. This process is the most rigorous, protracted and expensive kind of review. It involves public hearings and a report by an independent panel.

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<sup>7</sup> Journal note by Bruce Hood, undated, p. 801619, Exhibit C-370.

16. According to Bilcon, JRPs were never used except with respect to projects of far greater risk or magnitude. Referring the Bilcon project to such a panel was in stark contrast to another project on the Digby Neck Peninsula, the Tiverton Quarry. The Minister supported that project, which was locally owned. Approval was promptly granted with respect to test blasting in that case, even though it involved carrying out explosions in the ocean rather than in a land area set back from the shore. The environmental assessment process used for the Tiverton project was a mere screening rather than a JRP.
17. Bilcon argues that federal Canada officials knew full well that the referral to a JRP was unwarranted. Federal officials believed that the scope of any federal environmental assessment should be confined to the marine terminal, not the quarry.<sup>8</sup> They were aware of court cases that had taught that environmental assessments by a provincial or federal government should not encroach on the authority of the other level of government. Under the federal laws of the time, federal Canada officials were also aware, contends Bilcon, that there was no basis to believe that any projected activities at the quarry triggered an environmental assessment under the *CEAA*. There was no reasonable basis to be concerned that blasting or other land activities would damage fish habitat or endanger marine mammals.
18. Once the matter was referred to a JRP, Bilcon exercised every reasonable effort to address the issues identified by federal Canada's and Nova Scotia's environmental assessment laws and that were specifically mentioned in the Terms of Reference for the JRP. In 2006 Bilcon filed an Environmental Impact Statement ("EIS") of over 3,000 pages, comprising 17 volumes. It was the product of millions of dollars of work involving thirty-five experts.<sup>9</sup> It attempted to address physical, biological and social impacts of the project. Bilcon responded to numerous requests from the JRP for additional information.
19. The hearing itself, however, did not afford Bilcon a reasonable opportunity to present its case. Over the course of ninety hours of hearings, Bilcon's experts testified for only about ninety minutes. Instead, the Panel permitted the hearing to become a forum for the expression of anti-American venting by a variety of citizens, representatives of organizations, and politicians—including former Minister of Fisheries Mr. Robert Thibault. The Panel did not act to limit or

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<sup>8</sup> E-mail from Bruce Hood to Reg Sweeney, dated 9 December 2003, Exhibit C-62.

<sup>9</sup> Memorial, para. 472, citing Witness Statement of Paul Buxton, para. 70.

criticize condemnations that were grounded in nationality-based bias and lacking in scientific merit, but instead at times displayed its own scolding and disrespectful tone.<sup>10</sup>

20. During the hearing, the Chair of the JRP at one point referred to the process as “in a small way” a “kind of a referendum”.<sup>11</sup> The JRP Report in the end decided that “community core values” were the overriding consideration in assessing the project. The community, reported the JRP, had an “exceptionally strong and well defined vision of its future”<sup>12</sup> that precluded the development. “The imposition of a major long-term industrial site would introduce a significant and irreversible change to Digby Neck and Islands, resulting in sufficiently important changes to that community’s core values to warrant the Panel assessing them as a Significant Adverse Environmental Effect that cannot be mitigated”.<sup>13</sup>
21. In Bilcon’s submission, the finding on “community core values” was indeed the overriding consideration in the JRP Report. The latter did not make clear and comprehensive findings on whether all the specific impacts of the project would leave “significant adverse effects after mitigation”, which is the standard required under the *CEAA*. Instead, having decided that the project was incompatible with the “community’s core values”, the Panel found it unnecessary to methodically assess the project’s impact in terms of identifying risks, likelihood of each risk, magnitude of the risk and the existence of measures that might prevent the risk from being realized or mitigate it by way of restorative measures or compensation. Instead, the Panel identified a series of risks, largely driven by worst-case-scenarios, but made no thorough evidence-based effort to measure them against the standard of the *CEAA* and make recommendations on how they could be addressed by the proponent.
22. Bilcon submits that the JRP also misapplied the statutory requirements in other fundamental respects.<sup>14</sup>
23. Bilcon contends that “community core values” are not among the environmental impacts that are the lawful or proper scope of an environmental assessment process under the laws of federal Canada or Nova Scotia.<sup>15</sup> The guidelines for the JRP refer to various social effects, like impact on values such as “sense of place”, but do not refer to the concept of “community core values”

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<sup>10</sup> Witness Statement of Hugh Fraser, para. 13.

<sup>11</sup> Counter-Memorial, para. 512.

<sup>12</sup> JRP Report, dated October 2007, p. 4, Exhibit C-34/R-212.

<sup>13</sup> JRP Report, dated October 2007, p. 14, Exhibit C-34/R-212.

<sup>14</sup> Memorial, para. 242 et seq.

<sup>15</sup> Memorial, para. 257.

that was decisive for the JRP. While social impacts can be considered, it should be in the context of a rational and evidence-based process whereby specific effects are identified and measures to avert or mitigate them are considered. As the concept is used by the JRP, “core values” in effect grant to local opponents a veto over the project<sup>16</sup> which cannot be addressed effectively by any possible measure involving consultation, investigation and planning. No preventive or restorative measure could possibly be put in place to overcome it.

24. Bilcon contends that it was provided no notice that the concept of “core values” was a factor the Panel was going to consider,<sup>17</sup> let alone a predominant one. Even within the ambit of its own overriding concern with “community core values”, submits Bilcon, the JRP acted unfairly and unreasonably. Its conclusions disregarded the evidence before it that there were strong supporters, as well as opponents of the project;<sup>18</sup> indeed, thirty per cent of the residents had signed a petition supporting the project. There was no basis to characterize opposition to the project as authorized to define the values of the community as a whole or to disregard the substantial measure of local support that existed and was publicly manifested, notwithstanding the intimidating tactics of some of the opponents.
25. Following the submission of the JRP Report, Bilcon argues, the Governments of Nova Scotia and federal Canada each had a statutory duty to consider objections from Bilcon about flaws in the JRP’s process or conclusions. Under the Nova Scotia Environment Act (“*NSEA*”), the Minister of the Environment had a duty to consider whether to approve the project and to impose such conditions as the Minister deems appropriate.<sup>19</sup> When a project is rejected, the Minister must provide reasons in writing.<sup>20</sup> The Minister, however, declined to meet with the proponent to hear its concerns, did not invite or receive any detailed written submission, and accepted the report.<sup>21</sup> In this way, the Minister abdicated his responsibility to exercise his independent discretion, denied procedural fairness to Bilcon, and failed to explain his decision.<sup>22</sup> The Government of federal Canada similarly abdicated its responsibilities, and instead “rubberstamped” the JRP’s recommendations.

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<sup>16</sup> Memorial, para. 258.

<sup>17</sup> Memorial, para. 256.

<sup>18</sup> First Expert Report of David Estrin, paras. 250-251.

<sup>19</sup> *NSEA*, s. 39(2).

<sup>20</sup> *NSEA*, s. 39(3).

<sup>21</sup> Memorial, para. 270.

<sup>22</sup> Memorial, para. 275.



26. It is Bilcon's perspective that its project was consistent with both environmental integrity and economic development. The quarrying would have taken place in modest increments each year, with each area restored after it was used up. Natural visual barriers and designed buffer zones could have protected the land areas from disruption, and the marine terminal would have been built and operated in a manner consistent with preserving the natural habitat and industries, such as ecotourism and marine resource harvesting. The project would have provided needed jobs in an area that was threatened with the ongoing loss of population due to insufficient economic opportunities. Bilcon was taking on the investment risk needed to create the economic development in accordance with general and specific encouragements from government officials at both the political and technical levels to pursue a coastal quarry investment in Nova Scotia and indeed at the Whites Point area. All concerned expected that the project would have to go through environmental assessment in accordance with the laws of federal Canada and Nova Scotia, but Bilcon did not expect that it would be subjected to an adverse process and standard of evaluation different from that accorded to other investors, including Canadian investors, and that was not legally mandated.

**C. THE ESSENCE OF THE RESPONDENT'S CASE**

27. The essence of Canada's case is as follows.
28. Canada submits that the site of the White Points Quarry was in an ecologically sensitive area.<sup>23</sup> The site had not previously been home to industrial development of the nature of the proposed Bilcon project. Whatever encouragements of a general or specific nature from governments concerning mining and export projects were subject to the clear understanding that the proponent would have to comply with both federal and provincial laws concerning the environment.
29. As officials of Nova Scotia and federal Canada became aware of the project, including by way of a request for permission to conduct test blasts, federal and provincial officials consulted with each other in a normal and lawful manner. It was reasonable and appropriate for Nova Scotia officials to consult with federal Canada officials on matters such as the potential damage to marine life and to draw on their expertise in matters such as the appropriate conditions to attach to test blasting.<sup>24</sup>

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<sup>23</sup> Counter-Memorial, paras. 22-32.

<sup>24</sup> Counter-Memorial, para. 71.

30. Minister Thibault submitted a sworn affidavit<sup>25</sup> to the effect that when he first heard of the project he remembers thinking that it might be good news for his constituents, but he also heard from the outset about opposition to it. He understood that environmental assessment should not be used for the purpose of either rubber stamping or stopping a project. While he wanted to stay informed about events in his own riding, as Minister of the Department of Fisheries and Oceans, at no time did he interfere with the work of public servants and only made decisions when they requested him to do so. He swore that he found it incomprehensible that anyone would think that it was in his interests to delay the environmental assessment of the project. Bilcon chose not to cross-examine Minister Thibault.
31. Canada introduced affidavit evidence from a number of officials who were involved in the various decisions along the way from consideration of the test blast application to the decision to refer the matter to a JRP. Some of them appeared at the hearing and were subjected to rigorous cross-examination. Canada submits that unless it was demonstrated by Bilcon that these officials were not telling the truth, the conclusion must be that they indeed acted throughout in a reasonable and good faith manner.<sup>26</sup> Canada argues that it is important, in assessing the various steps taken, to not view any particular observation or step in isolation, but to recognize that there was a collaborative process among officials carried out over a course of time. Various officials weighed in with their perspectives from time to time in light of a developing understanding of the facts and issues involved.<sup>27</sup>
32. Canada contends that the decision to refer the project to a JRP must be appreciated in context. A marine terminal project of this size would, in any event, by law have to be subjected to a Comprehensive Study, which in itself is an extensive and rigorous kind of environmental assessment.<sup>28</sup> Carrying out the most summary form of assessment, a screening, was not a lawful option. It was a lawful and reasonable interpretation of the *CEAA*, as then stated and interpreted by officials and judges, that the quarry would be assessed along with the marine terminal as the former was sufficiently connected with the latter and because the quarry raised concerns within the scope of federal jurisdiction, such as impact of blasting on marine mammals.
33. The referral to a federal Canada Review Panel rather than a Comprehensive Study, was a lawful and reasonable decision in light of concerns about environmental impacts and concerns

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<sup>25</sup> Affidavit of Robert Thibault, dated 26 November 2011.

<sup>26</sup> Hearing Transcript, 31 October 2013, p. 280.

<sup>27</sup> Hearing Transcript, 31 October 2013, pp. 258-259.

<sup>28</sup> Counter-Memorial, para. 133.

expressed by a number of members of the local community.<sup>29</sup> Federal Canada officials and Nova Scotia officials concurred that a JRP would be an appropriate means of coordinating the assessments by the two jurisdictions.

34. In Canada's submission, Bilcon's emphasis on alleged failures to comply with the *CEAA* was misguided. Both federal Canada and Nova Scotia had to approve of the project under their environmental assessment laws. The provincial law was more expansive than federal Canada's with respect to the scope of assessment. Nova Scotia had rejected the project following the submission of the JRP Report and before Canada's final decision. Any alleged errors in the JRP's application of federal Canada's law or by Canada in making a final decision were therefore moot.<sup>30</sup>
35. Canada submitted a report by an experienced and independent expert that reviewed the procedural path and report of the JRP. In his opinion, the mandate of the JRP, the composition of the Panel and the manner in which it conducted the hearings were proper. The analysis and conclusions in the report were appropriate within the overall framework of federal Canada and Nova Scotia environmental assessment laws. Any Investors' complaints based on the alleged scope of assessments under the former were irrelevant in light of the latter. With respect to the "community core values" approach, the environmental assessment guidelines stipulated by the JRP provided adequate notice to Bilcon and the approach itself was consistent with both the mandate of the JRP and the overall framework of federal Canada and provincial law governing environmental assessments. The JRP did not treat the matter as a "referendum"; its lengthy and detailed final report in fact reviewed the environmental impact of the project in light of its thorough review of all the evidence. The Investors are responsible for the inadequacies in their own environmental impact statement, and the JRP had the duty to consider and take into account the submissions of community members, including information about "community core values" and the impact the project would have on them. After the JRP reported, the Investors had a fair opportunity to submit their position to federal Canada and Nova Scotia before the authorities arrived at their final determinations in light of the information and analysis provided by the JRP.
36. With respect to any NAFTA challenge, Canada submitted a number of jurisdictional defences. Canada contended that part of the Investors' complaint concerned events that could not be the subject of a NAFTA claim because they were barred by the time limitation periods under

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<sup>29</sup> Counter-Memorial, para. 150.

<sup>30</sup> Counter-Memorial, para. 300.

Chapter Eleven. Further, argued Canada, the JRP was not an entity for which Canada was accountable in international law. To the extent that the JRP had jurisdiction over the various complaints by Bilcon, Canada argued that it was necessary to evaluate the facts in light of a proper understanding of the relevant norms for state conduct in Chapter Eleven. The “minimum international standard” is meant to address matters where state conduct is egregious. NAFTA precedents concerning the minimum standard under international law have consistently emphasized that there is a high threshold of seriousness that must be reached before alleged misconduct raises to a level that implicates international responsibility on the basis that it breaches the minimum international standard of fair and equitable treatment. While NAFTA does not require that local remedies be exhausted before bringing a complaint, the fact remains that any complaints of the Investors could have been considered in a judicial review process by Canadian courts under Canadian law and were not matters that triggered international responsibility.

37. With respect to Article 1102, National Treatment, and Article 1103, Most Favored Nation, the cases invoked by the Investors did not involve investors in “like circumstances”. It is important to appreciate the distinct facts of this case, which involved a long-term industrial scale marine terminal and quarry project in an environmentally sensitive area in which many members of the local community expressed strong concerns and objections. Consequently, a JRP was commissioned rather than some other mode of assessment.
38. Canada submitted that Bilcon’s complaint should be dismissed entirely at the liability stage, thereby concluding the matter.
39. This Award addresses the Respondent’s challenges to the Tribunal’s jurisdiction as well as the Respondent’s liability in principle pursuant to NAFTA Chapter Eleven. As agreed between the Parties, the quantification of damages will be dealt with in a separate phase of the present arbitration if and to the extent that the Tribunal finds liability in principle.

## **II. PROCEDURAL HISTORY**

### **A. COMMENCEMENT OF THE ARBITRATION**

40. On 5 February 2008, the Investors served upon the Government of Canada a Notice of Intent to submit a Claim to Arbitration (“Notice of Intent”) in accordance with NAFTA Articles 1116 and 1119 with respect to Respondent’s alleged violation of its obligations under Section A of NAFTA Chapter Eleven.

41. On 26 May 2008, the Investors filed a Notice of Arbitration pursuant to Article 3 of the UNCITRAL Rules and NAFTA Articles 1116 and 1120. On 5 August 2008, the Parties agreed that the effective filing date of the Notice of Arbitration was 17 June 2008.
42. The Investors appointed Professor Bryan Schwartz as the first arbitrator. The Respondent appointed Professor Donald McRae as the second arbitrator. On 26 January 2009, the Parties invited Judge Bruno Simma to act as President of the Tribunal. On 29 January 2009, Judge Bruno Simma accepted the invitation. The Parties confirmed the proper constitution of the Tribunal at the first procedural meeting, as recorded in Procedural Order No. 1 of 9 April 2009.
43. On 30 January 2009, the Investors filed their Statement of Claim.
44. On 20 March 2009, the Parties and the Tribunal held a first procedural meeting in Toronto, Ontario, Canada.
45. On 9 April 2009, the Tribunal issued Procedural Order No. 1, which fixed Toronto, Ontario, Canada as the place of arbitration and provided that the Permanent Court of Arbitration (“PCA”) would administer the arbitral proceedings and provide registry services and administrative support.
46. The Respondent filed its Statement of Defense on 4 May 2009.
47. On the same date, the Tribunal issued Procedural Order No. 2 providing the Parties with guidance on the appropriate classification of confidential information. The Order also provided that any hearings would be open to the public except when necessary to protect confidential information.
48. On 11 May 2009, the Respondent applied for bifurcation of the proceedings between a liability phase and a damages phase. The Investors objected on 14 May 2009. On 3 June 2009, the Tribunal issued Procedural Order No. 3 ordering the bifurcation of the proceedings as between jurisdiction/liability, on the one hand, and quantum, on the other hand. In the same Order, the Tribunal established principles for the taking of evidence in the present arbitration, including by making provision for document production.
49. On 16 June 2009, the Respondent filed a motion challenging the Investors’ designation of confidential information in the Notice of Arbitration and Statement of Claim. The Tribunal resolved the question in its Procedural Order No. 4 dated 17 July 2009, after considering comments from both sides.

50. On 3 December 2009, at the Tribunal's direction, the Investors submitted an Amended Statement of Claim, elaborating certain aspects of their claims.
51. The Respondent submitted an Amended Statement of Defense on 18 December 2009.

## **B. DOCUMENT PRODUCTION**

### **1. The Process for Document Requests and Objections**

52. Pursuant to the direction of the Tribunal in Procedural Order No. 3, the Parties exchanged requests for documents in the possession, custody or control of the other side on 2 July 2009.
53. On 9 July 2009, the Respondent requested that the Tribunal order the Investors to amend their document production requests on the ground that they lacked the specificity required by the Tribunal's earlier direction. After receiving the views of the Parties, on 24 July 2009, the Tribunal issued Procedural Order No. 5, in which it ordered the Investors to revise certain document requests and invited the Respondent to interpret other requests "in light of the Disputing Parties' previous submissions (in particular, the Investors' Statement of Claim)".
54. On 20 August 2009, following an exchange of documents, and notices from both sides refusing to produce certain documents, the Investors requested that the Tribunal grant an extension of time for it to comment on the Respondent's production, alleging that the Respondent's failure to provide an index of the documents that it had produced prejudiced the Investors in respect of their ability to respond. After receiving the views of both sides, the Tribunal issued Procedural Order No. 6 on 26 August 2009, denying the Investors' requested extension.
55. On 11 September 2009, both sides submitted to the Tribunal an application in the form of a Redfern Schedule detailing requests for documents, the objections of the opposing side, and the requesting Party's replies thereto.
56. On 16 October 2009, the Tribunal held a first case management meeting with the Parties in Toronto to discuss the process for their ongoing document production and explore ways in which the Parties' disagreement might be limited. The Tribunal was assisted in this regard by briefs submitted by the Parties on 13 October 2009.
57. On 20 November 2009, the Tribunal issued Procedural Order No. 7, providing further instructions concerning document production. The Tribunal also defined a process for dealing with claims of cabinet privilege, political sensitivity, or legal privilege in a separate process.

58. On 25 November 2009, the Tribunal issued Procedural Order No. 8, in which it provided guidance on the scope and nature of production and ordered the Parties to produce, by 18 December 2009, all remaining documents requested by the other side, with the exception of documents subject to a privilege claim. On 2 December 2009, the Respondent filed an application for an extension of the time period set out in Procedural Order No. 8 for it to complete its document review and production. The Respondent estimated that its lawyers were required to review at least 75,000 documents to respond to the Investors' requests.
59. On 14 December 2009, the Tribunal revised the timetable for production set out in Procedural Order No. 8, fixing 25 April 2010 as the new deadline for the production of remaining documents (except for documents subject to privilege claims), and invited the Parties to report periodically on the progress made in the location, review and production of documents. The Parties filed their first reports in response to the Tribunal's invitation on 25 February 2010.
60. On 12 April 2010, the Respondent reported again on the progress of its document production and requested "an indefinite extension" of the deadline for document production. The Tribunal denied the Respondent's requested extension by letter dated 11 May 2010. On 14 June 2010, the Respondent provided a third status report on document production.
61. On 28 June 2010, the Tribunal held a second case management meeting with the Parties in Toronto to discuss the progress of the Parties' document production. On 16 July 2010, in light of the discussion at the meeting and following additional submissions from both sides, the Tribunal issued Procedural Order No. 9 giving guidance to the Parties on outstanding questions regarding document production, such as indexing and automated searches on the basis of date parameters and search terms. The Tribunal also established that some documents—Category A documents—would be produced as a matter of priority, whereas other documents—Category B documents—would be produced no later than the due date of the Respondent's Counter-Memorial.
62. Following a further status update from the Respondent on 19 August 2010, and additional communications from both Parties, the Tribunal issued Procedural Order No. 10 on 2 September 2010, in which it fixed a revised timetable for the remaining phases of document production.

## **2. Documents Not Produced for Reasons of Privilege**

63. In their 11 September 2009 request for the production of documents, and subsequent amended requests, the Investors objected to the Respondent's refusal to produce certain documents due to

what the Respondent called their “special political or institutional sensitivity” as well as other documents over which the Respondent claimed solicitor-client privilege and attorney work product privilege.

64. On 13 October 2009, further to a request by the Tribunal, each Party commented on the legal principles governing the Tribunal’s consideration of claims of legal privilege and political sensitivity, as well as the process and schedule for the Tribunal’s consideration of privilege objections. As noted above, following the 16 October 2009 case management meeting with the Parties, the Tribunal’s Procedural Order No. 7 dated 20 November 2009 defined a process for the exchange of privilege logs justifying claims that documents should not be produced for reasons of privilege or sensitivity.
65. On 10 March 2010, following a review of the Parties’ document production status reports of February 2010, the Tribunal reiterated that the Parties would be invited to exchange privilege logs following the completion of document production by 25 April 2010.
66. On 16 April 2010, the Investors requested that the Respondent be required to file an interim privilege log on all documents reviewed up to that date. The Respondent answered on the same day, arguing that the preparation of an interim privilege log would further delay the production of documents. On 6 May 2010, the Investors complained to the Tribunal that the Respondent had indicated it would not comply with the Tribunal’s instruction to provide any privilege logs.
67. Following the 28 June 2010 case management meeting, the Tribunal revised the timeline and procedure for the exchange of privilege logs, setting out these changes in Procedural Order No. 9.
68. On 27 August 2010, the Tribunal denied a request by the Investors to require the Respondent to produce letters exchanged between Canada’s Trade Law Bureau and other government departments, agencies and individuals. The Respondent had maintained that the disclosure of these letters served no useful purpose and that, in any event, they were protected by solicitor-client privilege and litigation privilege. The Tribunal considered that production of those letters would not assist the document production process.
69. On 1 April 2011, the Investors informed the Tribunal that the Respondent advised them that it “may have inadvertently disclosed documents ... which it now contends are covered by privilege”. After reviewing the comments of both Parties on the matter, the Tribunal, on



19 April 2011, informed the Parties that it would take up the issue of the inadvertently disclosed documents together with the other issues of privilege.

70. On 21 June 2011, the Investors requested an extension to file their Memorial to review the newly produced documents that the Respondent had belatedly located. The Tribunal granted the Investors' request on 29 June 2011.
71. On 13 July 2011, the Investors filed a motion requesting that the Tribunal order that the Respondent explain all redactions, including the identity of those who made the determination that redaction was needed, the timing of the determination, and the criteria used for making the determination; that the Respondent produce non-redacted copies of all documents that had been redacted on any basis other than privilege; and that the Investors and their experts be entitled to adduce any resulting evidence in subsequent successive rounds of pleadings. In reply, the Respondent argued by letter dated 20 July 2011 that it had complied with its document production obligations by redacting documents that were either partially irrelevant or privileged.
72. On 10 August 2011, the Tribunal issued Procedural Order No. 11, in which it directed that redactions made for reasons of privilege be noted in the Respondent's privilege log. It requested that, with regard to documents redacted on the basis of partial irrelevance, the Respondent provide the Investor with the full unredacted documents; however, if the Respondent had reason to believe that the disclosure of such information would prejudice a third party, the Respondent could apply for an exception to the direction.
73. On 15 February 2012, the Investors filed a motion in which they requested that the Tribunal order the Respondent to make available for examination Mr. Yves LeBoeuf, Vice President of Operations at the Canadian Environmental Assessment Agency ("CEA Agency"), who provided a statement supporting the Respondent's representation of its privilege submission.
74. On 16 February 2012, the Tribunal suspended the timetable of the Investors' replies on the Respondent's objections to production in respect of such documents for which the Respondent relied on Mr. LeBoeuf's affidavit to justify their privileged status. On 23 February 2012, the Tribunal informed the Parties that it would reserve its decision on the Investors' request concerning Mr. LeBoeuf until it had a full picture of the Parties' contested privilege claims and accompanying evidence.
75. Following the submission of several revised privilege logs from the Parties and exchanges of views on each Party's privilege claims, on 2 May 2012, the Tribunal issued Procedural Order

No. 12, in which it established standards to be applied to the Parties' claims regarding solicitor-client privilege and work product privilege, and determined that the Respondent had not waived privilege over the inadvertently disclosed documents. The Tribunal ordered that the Respondent review its claims of privilege in light of the elaborated standards and produce any documents that did not qualify for protection under those standards.

76. On 17 May 2012, the Investors informed the Tribunal that they no longer wished to examine Mr. LeBoeuf at the procedural hearing planned for 8 June 2012. The Respondents asserted on 18 May 2012 that the procedural hearing was therefore "no longer necessary as all of the outstanding contested claims of privilege may be resolved without requiring the disputing parties to incur the significant costs of an oral hearing". On 23 May 2012, having considered the Parties' correspondence, the Tribunal informed the Parties that the 8 June 2012 procedural hearing would be maintained. The hearing was held in Toronto.
77. On 11 July 2012, the Tribunal issued Procedural Order No. 13 addressing the objections to document production on the basis of special political or institutional sensitivity. It required that certain documents be reviewed again by the Respondent in light of the Tribunal's interpretation of the rules on privilege applicable in NAFTA Chapter Eleven arbitrations; and concluded that the Respondent had shown that other documents had been subject to sufficient review in good faith to be considered privileged and did not need to be disclosed.
78. By separate letter also dated 11 July 2012, in response to a request by the Respondent concerning the Investors' blanket privilege claim over documents created after 1 October 2007, the Tribunal ordered the Investors to provide the Respondent with a supplemental privilege log listing all such privileged documents responsive to the Respondent's earlier document request.

### **3. Documents in the Possession of Third Parties**

79. During the 28 June 2010 case management meeting, and in two letters dated 30 June 2010 and 5 July 2010, as well as in a 16 July 2010 motion, the Investors requested that the Tribunal issue an interim award ordering that certain electronic records said to be under the control of former JRP members involved in the Whites Point project EA be preserved, and that the Investors be allowed to examine the JRP members.
80. Having considered the views of both Parties, the Tribunal noted in its 27 August 2010 letter to the Parties that it did not consider it appropriate to make an order or to issue an interim award in respect of non-parties to the proceedings as requested by the Investors; however, the Tribunal

asked the Respondent to undertake certain efforts to seek further information from the three former JRP members on the topic of the existence and preservation of electronic correspondence in respect of the Whites Point project.

81. On 30 September 2010 and 14 October 2010, the Respondent provided the Tribunal and the Investors with copies of letters from the members of the JRP responding to the query set out by the Tribunal.
82. On 3 November 2010, the Investors alleged that the JRP members did not fully answer the questions they were asked and, on 23 November 2010, the Investors filed a supplemental motion for the examination of the JRP members. On 9 December 2010, the Respondent provided additional correspondence from the JRP members in response to the questions put to them.
83. Following a further exchange of views with the Parties, the Tribunal on 30 December 2010 stated that it would not require the examination of the JRP members at that stage and reserved the Respondent's request for the allocation of costs for further consideration.

#### **4. Documents Post-dating 5 February 2008**

84. On 10 August 2012, the Investors sought an order from the Tribunal that the Respondent disclose documents dated later than 5 February 2008 (the date of the Notice of Intent). On 15 August 2012, the Respondent replied that it did not possess any such documents and noted its view that "anything that postdates February 5th, 2008, can't be relevant for this claim, can't be relevant or responsive to a document request for this claim".
85. On 17 August 2012, the Tribunal asked the Respondent to clarify:

whether there are – or may be – any documents that are responsive to the Investors' request and were created after 5 February 2008. If that is the case, the Tribunal requests the Respondent to provide ... a short submission ... in support of its position that it need not produce any documents created subsequently to the Notice of Intent in the present proceeding.

The Tribunal invited the Investors to comment on the Respondent's clarification and/or submission.

86. On 24 August 2012, the Respondent replied that it was not aware of any documents responsive to the Investors' request for documents created after the date of the Notice of Intent. In addition, according to the Respondent, the Investors had waived the question of a cut-off date by not

raising the issue earlier in the proceedings. Finally, the Respondent argued that to carry out an additional search for such documents would be overly time-consuming and burdensome.

87. Having considered the communications of both Parties, on 19 September 2012, the Tribunal issued Procedural Order No. 14. In this Order, the Tribunal affirmed the Parties' continuing duty to disclose new information relevant and material to the arbitration and responsive to an opposing Party's request. However, the Tribunal also considered that it "would not be productive for the Disputing Parties to conduct an additional search for documents post-dating February 5, 2008 that may be responsive to the opposing Party's document production requests", referring to procedural economy and the small likelihood that such a search would result in the production of new evidence of significant probative value. Without prejudice to this general direction, the Tribunal requested the Respondent to produce certain letters that the Respondent had already identified in prior correspondence, the identification of which accordingly did not require a new search.
88. On 26 October 2012, the Investors informed the Tribunal that they believed that the Respondent had omitted certain non-privileged documents post-dating 5 February 2008 when it produced responsive documents on 19 October 2012 pursuant to Procedural Order No. 14. They requested that the Tribunal draw an adverse inference against the Respondent on the ground that its 19 October 2012 production did not include "relevant documents that obviously exist, or that must be taken to exist".
89. On 15 November 2012, taking note of the Parties' correspondence regarding the "non-production of relevant documents", the Tribunal reserved its decision as to whether any adverse inference should be drawn from the Respondent's alleged non-production.

### **C. INTERROGATORIES**

90. On 9 May 2012, the Investors sought leave to issue a set of interrogatories to the Respondent including: questions seeking further document production or clarification regarding the existence of documents; questions seeking clarification of facts articulated in the Respondent's Counter-Memorial; and, questions related to information contained in witness affidavits.
91. Following direction from the Tribunal at the 8 June 2012 procedural hearing, on 9 July 2012, the Respondent submitted its responses to the Investors' interrogatories. On 10 August 2012, the Tribunal requested that the Respondent provide more information in response to one of the

Investors' interrogatories, regarding which the Respondent could likely provide an immediate response. The Respondent replied on 11 September 2012.

92. On 11 January 2013, the Respondent filed an application for leave to file interrogatories directed to the Investors.
93. On 23 January 2013, after receiving comments from both sides, the Tribunal issued Procedural Order No. 17, granting the Respondent leave to file a limited number of interrogatories and setting out the process in this regard.
94. On 11 February 2013, the Investors submitted their responses to the Respondent's interrogatories.

#### **D. WRITTEN PLEADINGS**

95. The Investors submitted their Memorial on 25 July 2011.
96. The Respondent submitted its Counter-Memorial on 9 December 2011.
97. After considering comments from the Parties concerning a proposed timetable, on 17 October 2012, the Tribunal issued Procedural Order No. 15 in which it adopted a revised procedural calendar and confirmed that the hearing on jurisdiction and merits would take place from 17 to 28 June 2013.
98. On 21 December 2012, the Investors submitted their Reply.
99. On 21 March 2013, the Respondent submitted its Rejoinder.
100. On 28 March 2013, the Tribunal offered the non-disputing NAFTA Parties an opportunity to make submissions pursuant to NAFTA Article 1128. On 19 April 2013, the Tribunal received a submission from the United States of America.

#### **E. HEARING ON JURISDICTION AND MERITS**

101. On 16 April 2013, the Tribunal issued Procedural Order No. 18, which addressed logistical and procedural matters concerning the hearing on jurisdiction and merits and which asked the Parties to provide an agreed timeline of facts relevant to the dispute.

102. On 26 April 2013, pursuant to Procedural Order No. 18, each of the Parties identified the witnesses and experts it intended to cross-examine at the hearing on jurisdiction and merits.
103. On 17 May 2013, each side provided the Tribunal with its version of a timeline of relevant facts.
104. On 28 May 2013, the Tribunal informed the Parties that the hearing on jurisdiction and merits had to be postponed. On 17 June 2013, the Parties agreed to the Tribunal's proposed revised dates for the hearing: from 22 October to 1 November 2013.
105. The hearing on jurisdiction and merits was held in Toronto from 22 October to 25 October 2013, and from 28 October to 31 October 2013. The following persons attended the hearing:

**For the Investors:**

Mr. Barry Appleton  
Mr. Gregory J. Nash  
Mr. Frank S. Borowicz  
Dr. Alan Alexandroff  
Mr. Kyle Dickson-Smith  
Mr. Josh Scheinert  
Ms. Celeste Mowatt  
Mr. Chris Elrich  
Professor Robert Howse  
Ms. Sue Ki  
Mr. Josh Hauser  
Mr. John Evers  
Mr. David Consky  
Ms. Jessica McKeachie  
Ms. Jennifer Montfort  
Ms. April Jangkamolkulchai  
Ms. Sandra Albia  
Ms. Mary Grace Ruaya  
Ms. Lauren Wilcocks  
Mr. Michael Pogorzelski  
Mr. Vasyl Didukh  
Mr. William Richard Clayton  
Mr. John Lizak  
Mr. Paul Buxton  
Mr. David Estrin  
Professor Murray Rankin

**For the Respondent:**

Mr. Scott Little  
Mr. Shane Spelliscy  
Mr. Jean-François Hébert  
Mr. Stephen Kurelek  
Mr. Reuben East  
Mr. Adam Douglas  
Mr. Robert Connelly  
Ms. Elizabeth Hrubesz  
Ms. Cheryl Fabian-Bernard  
Mr. Alex Miller  
Ms. Chris Reynolds  
Ms. Jasmine Rokolj

Mr. Alex George  
Mr. David Bartol  
Mr. Kevin LeBlanc  
Mr. Neil Bellefontaine  
Mr. Stephen Chapman  
Mr. Christopher Daly  
Mr. Bruce Hood  
Mr. Mark McLean  
Mr. Bob Petrie  
Mr. Lawrence E. Smith

**The Arbitral Tribunal:**

Judge Bruno Simma  
Professor Donald McRae  
Professor Bryan Schwartz

**For the Registry:**

Dr. Dirk Pulkowski  
Ms. Kathleen Claussen

106. On 20 December 2013 and 14 February 2014, the Parties submitted annotated versions of their opening and closing statements, respectively, as presented at the hearing.
107. The Tribunal has made every effort to ensure that both Parties have had a full and fair opportunity to discover and present relevant evidence. It ordered the production of documents from both sides, an exercise which resulted in the identification and review of thousands of documents and the production to the other side of a great many of them. The Parties, with an exemplary level of diligence and skill, submitted detailed written submissions that reviewed the documentary evidence, identified and argued vigorously for their view of the law, and proposed how the law applied to the facts. The Parties then participated in an eight-day hearing on jurisdiction and merits in which they cross-examined selected witnesses from each side.
108. The Tribunal has carefully studied the submissions of both Parties, both on fact and law. It listened attentively throughout eight days of the hearing on jurisdiction and merits and has reviewed the transcripts. In writing this Award, the Tribunal has attempted to provide a reasonably concise explanation of its reasoning and conclusions. The fact that not all evidence and arguments have been referred to in these reasons should not be construed in any way as an omission to take conscientiously into consideration the entire record in the course of its deliberation. The Tribunal has in fact reviewed with care all the material submitted. In presenting its conclusions, however, the Tribunal has attempted to proceed in a reasonably focused manner. It is hoped that this distilled approach will assist the Parties and the international community in understanding the Tribunal's conclusion and contribute to the understanding and development of the law in this area.

### **III. THE PARTIES' REQUESTS**

#### **A. THE INVESTORS**

109. The Investors request the following relief:

- (a) A declaration that Canada has acted in a manner inconsistent with its Chapter 11 obligations of national treatment, most favored nation treatment, and international law standards of treatment, in breach of its obligations under NAFTA Articles 1102, 1103 and 1105;
- (b) A declaration dismissing Canada's jurisdictional objections;
- (c) A declaration that the claim proceed forthwith to the Quantification of Damages;
- (d) Damages arising from the delays, suppression of evidence, and non-production of documents by Canada; and
- (e) An award in favor of the Investors' for all costs, disbursements and expenses incurred in the merits phase of the arbitration for legal representation and assistance, plus interest, and costs of the Tribunal.<sup>31</sup>

#### **B. THE RESPONDENT**

110. The Respondent requests the following relief:

Canada respectfully requests that this Tribunal render an award dismissing the Claimants' claims in their entirety and ordering the Claimants to bear the costs of the arbitration in full and to indemnify Canada for its legal costs, disbursements and expenses incurred in the defence of this claim, as well as the costs of the Tribunal, plus interest. Canada also requests the opportunity to make submissions on the costs that it has been forced to incur as a result of this claim.<sup>32</sup>

### **IV. STATEMENT OF FACTS**

111. The present arbitration results from the Parties' disagreement as to the appropriateness of the treatment accorded by the Respondent to the Investors in the context of the EA of the Whites Point project.

112. As noted earlier, various corporate entities were involved in the project proposal on the Investors' side. Bilcon is a company incorporated in Nova Scotia; it is a wholly owned subsidiary company of Bilcon of Delaware, Inc., a company incorporated in Delaware, which is

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<sup>31</sup> Memorial, para. 779.

<sup>32</sup> Counter-Memorial, para. 491; Rejoinder, para. 215.



in turn owned and controlled by Messrs. Douglas Clayton, William Richard Clayton and Daniel Clayton.<sup>33</sup>

113. Together with Nova Stone, also a company incorporated in Nova Scotia, Bilcon formed Global Quarry Products (“GQP”), a partnership registered in Nova Scotia in April 2002.<sup>34</sup> On 1 April 2004, Bilcon acquired Nova Stone’s interest in GQP. As a result, GQP was dissolved, and Bilcon itself entered into a lease agreement with the owners of the Whites Point property.
114. In addition to members of the Clayton family, Mr. Paul Buxton, the registered agent and project manager for Bilcon, played a material role in the planning and application for regulatory approval of the Whites Point project. Much of the relevant communication in relation to the project application was relayed to Respondent’s authorities through Mr. Buxton.
115. Key actors on the Respondent’s side include: Mr. Robert Thibault, former Department of Fisheries and Oceans (“DFO”) Minister and the Member of Parliament for the riding in which the Whites Point project was located; the Honourable Kerry Morash, Minister of Nova Scotia’s Department of Environment and Labour (“NSDEL”); and Mr. Gordon Balsler, former Minister in Nova Scotia, who was the provincial member of the Nova Scotia Legislative Assembly for the constituency in which the Whites Point project was located.
116. At the civil servant level, the Parties frequently refer to Mr. Robert (“Bob”) Petrie, District Manager in the Regional Environmental Monitoring and Compliance Division at the NSDEL and Mr. Bruce Hood, former Senior Liaison Officer for Habitat Operations at the DFO in Ottawa.
117. Two general remarks should be made at the outset. First, while the Investors’ core claim stems from the decisions of Nova Scotia and Canada to reject the Investors’ Whites Point project proposal, the Investors also advance numerous specific claims with regard to their treatment by the federal and provincial authorities from when these authorities began to evaluate a proposal by Nova Stone to operate a 3.9 ha quarry. The factual summary focuses mainly on the EA of the Whites Point proposal by Nova Scotia and Canada, and is hence not exhaustive. The Parties

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<sup>33</sup> Memorial, paras. 32 et seq.

<sup>34</sup> The Investors refer to 24 April 2002 as the relevant date of the partnership. Partnership Agreement between Bilcon of Nova Scotia and Nova Stone Exporters, Inc., Exhibit C-22; Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, dated 28 March 2002, Exhibit C-5; Memorial, para. 46. The Respondent refers to 25 April 2002 as the relevant date. Application for Registration of a Business Name, Sole Proprietorship or Partnership by Nova Stone Exporters Inc. and Bilcon of Nova Scotia, Corp., dated 24 April 2002, Exhibit R-291; Global Quarry Products Certificate of Registration, dated 25 April 2002, Exhibit R-292; Counter-Memorial, para. 41.

discuss many of the disputed facts in connection with their legal arguments. To limit repetition, the Tribunal summarizes certain facts in Part VI concerning the merits of the Investors' claims rather than in the present Part. Secondly, the Investors do not consistently distinguish between Bilcon and GQP. By contrast, the Respondent distinguishes these two different undertakings as it contests the standing of Bilcon to bring claims with respect to Nova Stone's industrial approval for the 3.9 ha quarry. For the sake of clarity and without prejudice to the Investors' position, the Tribunal follows the Respondent's terminology and distinguishes between the different undertakings, except when it quotes from the submissions of the Investors.

118. For the purpose of the present Award, the Tribunal has reviewed a voluminous record of evidence, documenting all aspects of the case that the Tribunal has found to be relevant to the Parties' claims and defences in detail. Accordingly, the Tribunal is confident that it was put in a position where it was able to reach an informed determination of the facts, without the need to have recourse (as the Parties' have invited the Tribunal to do) to the drawing of adverse inferences.

119. Due to the large number of disputed facts, the Statement of Facts is divided into four main sections, which are organized chronologically: the request for an industrial approval to operate a 3.9 ha quarry; the interactions between the government entities and the Investors in the lead-up to the EA; the referral to the JRP, the establishment and the work of the JRP; and finally the ministerial decisions following the recommendation made by the JRP.

## **A. THE REQUEST FOR AN INDUSTRIAL APPROVAL TO OPERATE A 3.9 HA QUARRY**

### **1. Undisputed Facts**

120. On 6 February 2002, Nova Stone applied to the Canadian Coast Guard under s. 5 of the *Navigable Waters Protection Act* ("NWPA") for a permit to build a "floating loading dock" in Nova Scotia at Whites Point in Digby Neck.<sup>35</sup>

121. On 18 February 2002, Nova Stone applied to the NSDEL for a permit to construct and operate a quarry on the Whites Point project site. The NSDEL rejected this application on 15 April 2002 as it concluded that the proposed quarry exceeded 4 ha, the maximum size permitted through the

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<sup>35</sup> Memorial, para. 103; Application Form by Nova Stone Exporters Inc., 6 February 2002, Exhibit C-35.

basic NSDEL approval process.<sup>36</sup> Any quarry greater than 4 ha requires an EA before it can proceed in Nova Scotia.<sup>37</sup>

122. On 23 April 2002, Nova Stone submitted a new application for a permit to build a quarry at the Whites Point project site that was limited to 3.9 ha.<sup>38</sup> The NSDEL issued this permit on 30 April 2002. The approval was made subject to certain blasting conditions added at the DFO's request (the "Blasting Conditions").
123. The Blasting Conditions required Nova Stone to carry out blasting in accordance with Guidelines for the Use of Explosives In or Near Canadian Fisheries Waters (the "Blasting Guidelines"); and to submit a report in advance of any blasting activity verifying that the intended charge size would not have an impact on marine mammals in the area.<sup>39</sup> As explained further below, the Parties disagree on whether the DFO had authority to attach certain of the Blasting Conditions to the permit and whether the concerns about the impact of blasting on marine mammals in the Bay of Fundy were genuine.
124. Between September and November 2002, Nova Stone submitted three blasting plans to the NSDEL and the DFO in connection with Blasting Conditions applicable to the 3.9 ha quarry. The DFO requested additional information with regard to the first two blasting plans. As explained below, the Parties diverge on the reasons that led the DFO to request further information. While the third blasting plan was sufficiently detailed, the DFO did not allow Nova Stone to proceed with blasting, maintaining that the determination on the blasting plan had become tied to the determinations necessary for the EA of the Whites Point project.<sup>40</sup>
125. On 29 May 2003, the DFO found that the proposed blasting activity on the 3.9 ha quarry required authorization under s. 32 of the *Fisheries Act* ("Fisheries Act") and directed a setback distance of 500 meters from the shoreline.<sup>41</sup>

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<sup>36</sup> The Respondent states that the first application was redesigned by the Investors and submitted as a new application (Counter-Memorial, para. 66; Application for Approval, 23 April 2002, Exhibit R-78). In its Rejoinder, it states that the 15 April 2002 application was rejected (para. 52). The Investors do not specifically address the two applications.

<sup>37</sup> Counter-Memorial, para. 66; E-mail from Mark McLean to Brad Langille and Bob Petrie, dated 11 April 2002, Exhibit R-76.

<sup>38</sup> Rejoinder, para. 52, n.92; Nova Stone Application for Approval, 23 April 2002, Exhibit R-78.

<sup>39</sup> Approval for the Construction and Operation of a Quarry at or near Little River, Digby County in the Province of Nova Scotia, 30 April 2002, Exhibit C-31.

<sup>40</sup> Counter-Memorial, para. 90.

<sup>41</sup> Letter from Phil Zamora to Paul Buxton, dated 29 May 2003, Exhibit C-129.

126. Nova Stone's permit for the 3.9 ha quarry terminated on 1 May 2004.

## **2. Disputed Facts**

127. Several facts are in dispute: whether Digby Neck was already an industrialized area prior to Bilcon's investment or whether it was an area of particular environmental concern; whether provincial and federal authorities encouraged the investment in the area of Digby Neck in the summer of 2002; whether the DFO had authority to attach certain of the Blasting Conditions to the 3.9 ha permit of 30 April 2002; whether the concerns about the impact of blasting on marine mammals in the Bay of Fundy were genuine; and, whether the blasting plans submitted by Nova Stone were unfairly not approved.

### **(a) Whether Digby Neck was an Industrialized Area**

#### **i. The Investors' Position**

128. The Investors contend that Nova Scotia is "no stranger to industry".<sup>42</sup> They maintain that rock quarries have a long history in Nova Scotia. The Investors point to documents made available by provincial entities such as a circular of the Nova Scotia Department of Natural Resources, entitled "Industrial Minerals in Nova Scotia,"<sup>43</sup> its leaflet entitled "Minerals—A Policy for Nova Scotia,"<sup>44</sup> and another leaflet entitled "Take Advantage of Mineral Exploration and Development in Nova Scotia".<sup>45</sup> According to the Investors, these pamphlets illustrate the government's encouragement for and recognition of the mineral industry by exploration and mining activities as part of its overall industrial strategy. In these documents, the province recognized mineral exploration and mining "as a key sector contributing to jobs, wealth and a high quality of life for Nova Scotians".<sup>46</sup>

129. The Investors further observe that the proposed site of the quarry is in a sparsely populated rural area separated from local communities by a mountain. According to the Investors, the quarry

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<sup>42</sup> Reply, para. 31.

<sup>43</sup> NSDNR, Information Circular ME 24, "Industrial Minerals in Nova Scotia", dated 1992, Exhibit C-10.

<sup>44</sup> NSDNR, "Minerals—A Policy for Nova Scotia", dated 1996, Exhibit C-7.

<sup>45</sup> NSDNR, Information Circular, "Take Advantage of Mineral Exploration and Development in Nova Scotia", dated 1996, Exhibit C-8.

<sup>46</sup> NSDNR, "Minerals—A Policy for Nova Scotia", dated 1996, Exhibit C-7, p. 1.

site had been clear-cut logged and used as a gravel pit to build roads and highways in Nova Scotia.<sup>47</sup>

ii. The Respondent's Position

130. The Respondent emphasizes the importance and uniqueness of the biophysical and human environment in Digby Neck and the adjacent Bay of Fundy.<sup>48</sup> It maintains that “there are no large-scale quarries or other industrial developments and no significant marine terminals [in the area of Digby Neck]. Further, efforts to establish such projects have been firmly resisted by the community”.<sup>49</sup> The Respondent argues that the Bay of Fundy is the habitat of many endangered species and the economy of the local area is based on the region's ecological assets. Fishing and ecotourism have been strong components of the local economy in recent years, according to the Respondent.<sup>50</sup>

131. Accordingly, the Respondent alleges that:

Given the surrounding biophysical and human environment of the Digby Neck and the sheer magnitude of the Whites Point project, any proponent who had seriously considered the regulatory environment would have known that it was naive to believe that only a ‘minimal environmental assessment’ would be required...<sup>51</sup>

**(b) Whether the Investors were Encouraged to Invest in the Digby Neck Area**

i. The Investors' Position

132. The Investors allege that Nova Scotia actively solicited industrial-quarry investments.<sup>52</sup> More specifically, the Investors submit that the Nova Scotia Department of Natural Resources

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<sup>47</sup> Reply, para. 36; Supplemental Witness Statement of Paul Buxton, paras. 4-6 (“Whites Point had a history of industrial use”).

<sup>48</sup> The Atlas of Canada, UNESCO Biosphere Reserves, Natural Resources Canada, Exhibit R-282 and UNESCO Biosphere Reserve Information, Southwest Nova, Exhibit R-460; Rejoinder, para. 14; *see also* Affidavit of Neil Bellefontaine, paras. 25-28.

<sup>49</sup> Whites Point Quarry and Marine Terminal Public Hearing Transcript (“JRP Hearing Transcript”), Vol. 5, dated 21 June 2007, pp. 1062-1063, Exhibit R-284.

<sup>50</sup> Hearing Transcript, 22 October 2013, pp. 125-127.

<sup>51</sup> Counter-Memorial, para. 7.

<sup>52</sup> Reply, para. 32-33; Memorial, paras. 48-54; Witness Statement of Paul Buxton, paras. 16, 18-19, 22; Witness Statement of William Richard Clayton, paras. 16-17; Dan Kontak, Jarda Dostal and John Greenough, 2006, “Geology and Volcanology of the Jurassic North Mountain Basalt, Southern Nova Scotia”, p. 112, Exhibit C-6; Witness Statement of John Lizak, paras. 11, 19; Internal Stratigraphy of the Jurassic North Mountain Basalt, Nova Scotia, Dan J. Kontak (Report of Activities, 2001), Exhibit C-364; NSDNR, “Minerals—A Policy for Nova Scotia”, dated 1996, pp. 1, 3, 7, Exhibit C-7; NSDNR, Information Circular: “Take Advantage of Mineral Exploration and Development in Nova Scotia” (1996),

encouraged the investment in Digby Neck. Gordon Balser, a minister in the Nova Scotia government, actively supported the project.<sup>53</sup>

133. The Investors emphasize the special treatment shown to their staff and representatives. As the Tribunal heard at the hearing on jurisdiction and merits, when the Investors' geological expert visited the region, he was taken on a helicopter ride around potential sites in the region and provided with other "perks" that were, in his experience, unusual in that they "wouldn't happen [on the east coast] U.S" and impressive to the point where he stated that the access and treatment he received made it "kind of a dream project" or the "gem in the Crown".<sup>54</sup>

ii. The Respondent's Position

134. The Respondent submits that the alleged "encouragement" or "invitation" to invest in Nova Scotia did not amount to more than standard investment promotion activities, falling far short of any specific inducement or assurance.<sup>55</sup> In any event, according to the Respondent, investment promotion activities took place in late 2002 and 2003—after Bilcon had decided to invest.<sup>56</sup>

135. Moreover, according to the Respondent, any encouragement that was made would have been made to Nova Stone, the entity that applied for, and was granted, the permit for the 3.9 ha quarry.<sup>57</sup> That permit was never transferred to GQP and, as a result, Bilcon was never involved in the 3.9 ha quarry in any way.<sup>58</sup>

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Exhibit C-8; NSDNR Information Circular ME 20, "Aggregate in Nova Scotia" (1993), p. 6, "Export Market", Exhibit C-9; NSDNR Information Circular ME 24, "Industrial Minerals in Nova Scotia" (1992), Exhibit C-10; Witness Statement of Paul Buxton, para. 19.

<sup>53</sup> Memorial, para. 48. *See generally* paras. 48-54. "In 2002 and 2003, the Province of Nova Scotia was engaged in a prominent advertising campaign, proclaiming that 'Nova Scotia was Open for Business'. . . ." Witness Statement of Paul Buxton, para. 16.

<sup>54</sup> Hearing Transcript, 22 October 2013, p. 237, lines 22-24; p. 255, lines 17-25.

<sup>55</sup> Counter-Memorial, para. 393.

<sup>56</sup> Counter-Memorial, para. 393.

<sup>57</sup> First Affidavit of Bob Petrie, para. 15.

<sup>58</sup> Hearing Transcript, 22 October 2013, pp. 18-21; Hearing Transcript, 31 October 2013, p. 145.

(c) **Whether the DFO had Authority to Issue Blasting Conditions**

i. The Investors' Position

136. The Investors contend that they applied for a standard quarry permit for the 3.9 ha quarry on the understanding that no Blasting Conditions would be attached.<sup>59</sup> According to the Investors, internal correspondence between the NSDEL and the DFO reveals that DFO “contrived to assert authority over the application on the pretext of the potential effect of blasting on whales”.<sup>60</sup>
137. The Investors contend that, even though the DFO admitted that there were no genuine concerns about such effects at Whites Point and hence “no legitimate federal government authority to apply the *Fisheries Act* to restrict blasting at Whites Point on the basis of risk to whales,” the DFO still imposed blasting conditions.<sup>61</sup> The Investors claim that internal departmental correspondence exchanged in relation to the *NWPA* floating dock application shows that the DFO saw “no real whale concerns in the Whites Point area”.<sup>62</sup>
138. Finally, the Investors maintain that “[i]t is extraordinary that a federal government department [the DFO] inserted itself into a wholly provincial approval process”.<sup>63</sup>

ii. The Respondent's Position

139. The Respondent alleges that it is common for small quarries to be subjected to conditions.<sup>64</sup> Moreover, due to Canada's federal system, it is common for provinces to approach the DFO when a proposed project has the potential to impact either fish or fish habitat. In these cases “there is no such thing as a purely provincial assessment process”.<sup>65</sup> For Nova Scotia to reach out “for DFO's advice and expertise on blasting activities that had the potential to harm both

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<sup>59</sup> Memorial, paras. 99-100; Witness Statement of Paul Buxton, para. 38; Fax from Danette Daveau to Mark Lowe re Standard Terms and Conditions—Rock Quarry Permit Approval, dated 25 January 2002, Exhibit C-29; Nova Stone Application for Approval, dated 23 April 2002, Exhibit C-30; Approval for the Construction and operation of a Quarry at or near Little River, Digby County in the Province of Nova Scotia, dated 30 April 2002, Exhibit C-31.

<sup>60</sup> Memorial, para. 105.

<sup>61</sup> Memorial, paras. 106-107.

<sup>62</sup> Memorial, para. 106; Fisheries and Oceans Comments on the Whites Point Quarry and Marine Terminal Blasting Protocol, undated, Exhibit C-401; E-mail from Phil Zamora to Norman Cochrane, dated 17 February 2005, Exhibit C-400.

<sup>63</sup> Reply, para. 45.

<sup>64</sup> Counter-Memorial, para. 67; First Affidavit of Bob Petrie, paras. 5-6; Nova Scotia Department of the Environment, Pit & Quarry Guidelines, dated May 1999, Exhibit R-74.

<sup>65</sup> Counter-Memorial, paras. 70-71; First Expert Report of Lawrence Smith, para. 144.

fish and fish habitat on other Nova Scotia projects” was, according to the Respondent, standard practice.<sup>66</sup>

140. The NSDEL, due to the proximity of the blasting operation to the Digby Neck coastline, raised concerns regarding the effect of the proposed blasting operation on the 3.9 ha quarry on marine mammals in the Bay of Fundy.<sup>67</sup> Therefore, “NSDEL reached out to DFO for advice and input. Specifically, on April 9, 2002 NSDEL’s Brad Langille contacted DFO’s marine mammals advisor, Jerry Conway, to discuss whether Nova Stone’s proposed blasting engaged DFO concerns”.<sup>68</sup>
141. According to the Respondent, the DFO was concerned about the potential impact of the blasting on marine mammals, including the endangered North Atlantic Right Whale.<sup>69</sup> The Respondent maintains that these concerns were heightened because the DFO was aware that the project would not be limited to “just a few blasts” but involve “prolonged blasting activity” for the duration of “a 30 year lease agreement to extract aggregate from a 350 acre parcel of land”.<sup>70</sup> On the basis of these concerns, the DFO requested that any industrial approval issued to Nova Stone include Blasting Conditions.<sup>71</sup> It was not unusual for the DFO to require that project proponents submit reports before any blasting activity takes place to show that the blasting will not result in any harmful alteration, disruption or destruction of fish habitat (“HADD”). S. 37 of the *Fisheries Act* expressly authorized the DFO to request reports.<sup>72</sup>

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<sup>66</sup> Counter-Memorial, para. 71; Nova Scotia Department of the Environment, Pit & Quarry Guidelines, dated May 1999, Exhibit R-74.

<sup>67</sup> Counter-Memorial, para. 68; Engineer’s Report on the Nova Stone Exporters, Inc. Quarry, by Robert Balcom, 21 March 2002, p. 3, Exhibit R-79.

<sup>68</sup> Counter-Memorial, para. 69; Letter from Brad Langille to Jerry Conway, dated 9 April 2002, Exhibit R-83; Telephone Log of call by Brad Langille to Brian Jollymore, dated 22 April 2002, Exhibit R-85.

<sup>69</sup> Counter-Memorial, para. 72; E-mail from Brian Jollymore to Bob Petrie, dated 26 April 2002, Exhibit R-86.

<sup>70</sup> Counter-Memorial, para. 72.

<sup>71</sup> Counter-Memorial, paras. 73-78 (explaining the rationale behind the blasting conditions); Exhibit R-86; Blasting Guidelines, pp. 3-4, Exhibit R-115; First Expert Report of Lawrence Smith, paras. 148-149.

<sup>72</sup> Counter-Memorial, para. 78; *Fisheries Act*, s. 37.



**(d) Whether Nova Stone’s Blasting Plans were Inappropriately Disapproved**

i. The Investors’ Position

142. The Investors maintain that their blasting plans were sufficiently detailed to receive approval to blast.<sup>73</sup> In the Investors’ view, the real reason for the delay in approval of the plans was a political desire by the provincial and federal authorities to prolong the process as much as possible, and to prevent the project proponent from gathering data that was necessary to its EIS.<sup>74</sup> The Investors maintain that internal correspondence shows that the DFO was satisfied with the second blasting plan submitted on 15 October 2002 but subsequently changed its position due to political pressure:

Having reviewed the blasting plan, Jim Ross, the section head of DFO’s Habitat Management Division, wrote to Bob Petrie at NSDEL that the blasting plan “seems to be within the *Guidelines*”. This conclusion was shared by Dennis Wright, a co-ordinator of Environmental Affairs at DFO’s Central and Arctic Region and a co-author of the DFO Guidelines referred to in 10.h.15.

Mr. Wright also informed Mr. Ross that the DFO *Guidelines* “are designed chiefly to protect fish,” adding “When we use them for protection of marine mammals, we are really flying by the seat of our pants”. [...] Jerry Conway, a whale specialist at the DFO, wrote to Mr. Ross saying that “I have no concerns in respect to marine mammal issues in respect to this specific proposal”.<sup>75</sup>

143. On 3 December 2003, “the Minister of NSDEL, the Honourable Kerry Morash, wrote to Bilcon assuring it that a blasting permit would be issued upon satisfying conditions [the “Blasting Conditions”].”<sup>76</sup> No such permit was ever issued. The Investors assert that DFO withheld necessary information that GQP required for the blasting permit.

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<sup>73</sup> See, e.g., Engineer’s Report on the Nova Stone Exporters, Inc. Quarry, by Robert Balcom, dated 21 March 2002, Exhibit R-79; Letter from Jim Ross to Bob Petrie, dated 30 September 2002, Exhibit R-117.

<sup>74</sup> The Investors point to excerpts from several communications: “I have been advised by the Minister’s office (Nadine) that we are not to accept a report on the effects of blasting on Marine Mammals as per section (i), item 10 of the NS Approval issued April 30<sup>th</sup> until such time as the Minister’s office has reviewed the application.” E-mail from Tim Surette to Neil Bellefontaine, dated 26 June 2002, Exhibit C-256. See also E-mail from Derek MacDonald’s to Stephen Chapman, dated 10 June 2003, Exhibit C-403: “Although not proceeding with the 3.9 ha operation is arguably the ‘high road’, there is no clear legal impediment to its operation. A cynical view might be that DFO wants to avoid making a decision on the blasting plan and the Agency is a convenient scapegoat. The proponent is clearly frustrated, and with good reason, I think. I find it frustrating and it’s not even my money.”

<sup>75</sup> Reply, paras. 48-50 (internal citations omitted); Action Log Report re Whites Cover-Quarry Construction, p. 005554, Exhibit C-675. See also Testimony of Neil Bellefontaine, Hearing Transcript, 28 October 2013, p. 274, lines 23-24.

<sup>76</sup> Reply, para. 67; Letter from Kerry Morash to Paul Buxton, dated 3 December 2003, Exhibit C-617.

144. It is the Investors' position, therefore, that the Respondent deliberately delayed test blasting for 15 months,<sup>77</sup> to deprive Bilcon of the opportunity to collect blasting data that were a necessary input for the EIS.<sup>78</sup> In the meantime, the Respondent imposed overly onerous conditions in the form of an excessive setback distance<sup>79</sup> for blasting for which the DFO refused to give any justification and, moreover, concealed from the Investors after confirming that the setback was in fact excessive.<sup>80</sup>

ii. The Respondent's Position

145. The Respondent argues that it was only Nova Stone's third blasting plan of November 2002, submitted more than seven months after the issuance of the industrial approval that was sufficiently detailed for governmental review to commence. The delay due to the inadequacy of the two earlier blasting plans was, in the Respondent's view, Nova Stone's responsibility.<sup>81</sup>

146. The Respondent contends that Nova Stone's first blasting plan of 17 September 2002 omitted the issue of marine mammals altogether.<sup>82</sup> It was silent on the issue even though Nova Stone's own expert, Dr. Paul Brodie, had raised concerns regarding the impact of the quarry on marine mammals and examined possible steps to mitigate such impact.<sup>83</sup> On 30 September 2002, noting "insufficient detail" in the second blasting plan, the DFO requested the "additional information that Nova Stone should have provided under the Blasting Guidelines".<sup>84</sup>

147. On 15 October 2002, Nova Stone filed an additional one-page document regarding its blasting plan, again without information regarding the potential impact of blasting on marine mammals. On 30 October 2002, the DFO provided Nova Stone with further information about necessary

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<sup>77</sup> Memorial, paras. 176-184; Letter from Paul Buxton to Derek McDonald, dated 20 April 2003, requesting approval to conduct test blasting on the 3.9 ha test quarry, Exhibit C-128.

<sup>78</sup> Memorial, para. 182; Journal note by Bruce Hood, dated 26 October 2005, p. 801579, Exhibit C-330.

<sup>79</sup> E-mail from Larry Marshall to Peter Amiro and Rod Bradford, dated 23 May 2003, Exhibit C-129.

<sup>80</sup> Hearing Transcript, 31 October 2013, p. 67, lines 8-25 (citing testimony and exhibits).

<sup>81</sup> Counter-Memorial, paras. 82-90; E-mail exchange between Paul Buxton and Dr. Paul Brodie, dated 3 June 2002, Exhibit R-300; Report of Dr. Paul Brodie re: Proposed blasting activity at Whites Point, dated 19 June 2002, Exhibit R-301; E-mail from Brian Jollymore to Bob Petrie, dated 26 April 2002, Exhibit R-86 (noting that the Second Application is for a quarry of less than 4 ha, but that "the company intends to get much larger"; expressing concern as to the possible effects of blasting on marine animals; and requesting that conditions 10.h and 10.i be added to the approval).

<sup>82</sup> Counter-Memorial, para. 86; Blasting Guidelines, Application Procedure, p. 8, Exhibit R-115.

<sup>83</sup> Counter-Memorial, para. 83; E-mail exchange between Paul Buxton and Dr. Paul Brodie, dated 3 June 2002, Exhibit R-300.

<sup>84</sup> Counter-Memorial, para. 86; Letter from Jim Ross to Bob Petrie, dated 30 September 2002, Exhibit R-117.

components to the blasting plan, noting that this information was required before the plan could undergo internal review within DFO.<sup>85</sup>

148. On 20 November 2002, Nova Stone submitted a third, more detailed, blasting plan. DFO review commenced immediately, according to the Respondent. “However . . . by the time the plan was submitted, GQP had already taken steps that triggered an EA of the Whites Point project, which subsumed the 3.9 ha quarry. As such, the outcome of DFO’s review of the 3.9 ha quarry blasting plan became tied to the determinations that had to be made in connection with the EA of the Whites Point project”.<sup>86</sup>
149. The conditional industrial approval for the 3.9 ha quarry was obtained before the EA of the Whites Point project was under way.<sup>87</sup> GQP could have still obtained a blasting permit for the 3.9 ha quarry, if the blasting plan had been appropriately modified and limited to gathering data for the EA. Based on Mr. Buxton’s response to a request for information, the “proposed blasting on the 3.9 ha quarry was to be used to commence quarry operations and construct infrastructure for the larger project (which subsumed the 3.9 ha quarry and was now under EA)”.<sup>88</sup>
150. The Respondent contends that the DFO remained open to allowing a test blast on the 3.9 ha quarry site, as test blasts for the purpose of gathering data for an EA are not considered to “enable a project to proceed in whole or in part”. However, Nova Stone never took steps to redesign the blasting plan as suggested by the DFO. Nor did it ever agree to limit blasting on the 3.9 ha quarry for the generation of data for the EA process. Further, neither Nova Stone, nor GQP, nor Bilcon, ever submitted a blasting plan describing a test blast or requesting a *Fisheries Act* authorization in connection with the impacts that a test blast might have on fish or fish habitat.<sup>89</sup>
151. As for the setback distance, the Respondent maintains that the DFO calculated setback distances for Nova Stone’s quarry out of a bona fide concern over the potential impacts of the blasting

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<sup>85</sup> Counter-Memorial, para. 87; Letter from Paul Buxton to Bob Petrie, dated 8 October 2002, received by NSDEL on 15 October 2002, Exhibit R-118; Letter from Jim Ross to Bob Petrie, dated 30 October 2002, Exhibit R-119.

<sup>86</sup> Counter-Memorial, para. 90; Letter from Paul Buxton to Bob Petrie, dated 20 November 2002, attaching “Whites Point Quarry Blasting Plan”, dated 18 November 2002, Exhibit R-80.

<sup>87</sup> Rejoinder, para. 20; Nova Stone Approval to Construct and Operate a quarry near Little River, Digby County, dated 30 April 2002, Exhibit R-87; Whites Point Quarry—Project Description, faxed from Paul Buxton to Helen MacPhail, dated 30 September 2002, Exhibit R-129.

<sup>88</sup> Counter-Memorial, para. 129; Letter from Phil Zamora to Paul Buxton, dated 29 May 2003, Exhibit R-55.

<sup>89</sup> The Investors did not need a permit to test blast, *see* Hearing Transcript, 23 October 2013, p. 136, lines 10-18, 19-24.

activity on endangered salmon and whales.<sup>90</sup> It emphasizes that the setback affected only Nova Stone, not any of the claimants in these proceedings.<sup>91</sup> The Respondent further attributes the lack of DFO communication, which it acknowledges, to the Investors' "fragmented" approach to seeking regulatory approval.<sup>92</sup> The Respondent further notes that Mr. Mark McLean and Mr. Stephen Chapman testified that by the time DFO determined a revised setback might be feasible, the project was already under the review of the JRP.<sup>93</sup>

## **B. DEVELOPMENT OF THE PROJECT LEADING TO THE ENVIRONMENTAL ASSESSMENT**

### **1. Undisputed Facts**

152. The Parties agree that, under s. 5 of the *CEAA*, industrial activity that affects rivers and oceans which are habitat for fish and marine life generally comes under federal legislative authority; put differently, and more specifically, the federal legislation sets out that a EA is required where the responsible federal authority concludes that a project poses a risk of destruction of fish, disruption of fish habitat, or a danger to marine life owing to work in navigable waters.<sup>94</sup> These three potentialities are referred to as "triggers" for a federal EA. Industrial activity on land generally comes under provincial authority; there, a provincial authority may also conclude there is a need for an EA.<sup>95</sup>
153. Between August 2002 and March 2003, GQP went through three rounds of filing project descriptions with NSDEL that would be used for an EA of the intended project.<sup>96</sup> The final, accepted description included project infrastructure that consisted of a 152 ha quarry and a 170 m long marine terminal.<sup>97</sup>

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<sup>90</sup> Rejoinder, para. 125; First Affidavit of Mark McLean, paras. 21, 40; E-mail from Peter Amiro to Phil Zamora, dated 27 May 2003, Exhibit R-150; Letter from Phil Zamora to Paul Buxton, dated 29 May 2003, Exhibit R-55.

<sup>91</sup> Hearing Transcript, 31 October 2013, p. 147, lines 10-12.

<sup>92</sup> Rejoinder, para. 127; Letter from Phil Zamora to Paul Buxton, dated 29 May 2003, Exhibit R-55.

<sup>93</sup> Second Affidavit of Mark McLean, paras. 4-5; Second Affidavit of Stephen Chapman, para. 4.

<sup>94</sup> Memorial, para. 65.

<sup>95</sup> *See, e.g., NSEA*, s. 31(1).

<sup>96</sup> The Investors refer to both 9 August 2002 and 30 September 2002 as the relevant date of the project description; *see* Memorial, para. 113, n.98; Fax from Paul Buxton to Helen MacPhail, dated 9 August 2002, attaching a Draft Whites Point Quarry Project Description List entitled "Environmental Component Outline", Exhibit C-47; Draft WPQ Project Description, dated 30 September 2002, Exhibit C-48.

<sup>97</sup> *See* Rejoinder, para. 13; Letter from Paul Buxton to Derek McDonald, copied to Christopher Daly, attaching third project description, dated 10 March 2003, Exhibit R-181.

154. While the project description exchange was ongoing with the Nova Scotia authority, on 8 January 2003, GQP filed a Navigable Waters Protection Application with the Canadian Coast Guard related to the building of the marine terminal at Whites Point. On 17 February 2003, the Coast Guard determined that GQP's marine terminal required a permit under the *NWPA* which triggered a federal EA.
155. In addition, on 7 April 2003, the DFO determined that the Whites Point project as described in its third project description submitted to NSDEL required a so-called HADD authorization under s. 35(2) of the *Fisheries Act* which is also a federal trigger for an EA. On 14 April 2003, the DFO advised GQP that the scope of the project for its EA purposes would include both the quarry and marine terminal.
156. Once it is determined that a federal EA is required, the *CEAA* sets out factors for deciding the type of EA to be applied to the project. Relevant to the Whites Point project are the following determinations: (1) whether the project is included in the "Comprehensive Study List Regulations"; (2) the project's potential for "significant adverse environmental effects"; and (3) the "public concerns" associated with the project.<sup>98</sup>
157. On 20 June 2003, the DFO and the NSDEL agreed to conduct a joint EA of the Whites Point project by way of a JRP. On 26 June 2003, Minister Thibault wrote to the federal Minister of the Environment, David Anderson, recommending that the Whites Point project be referred to a JRP. On 7 August 2003, Minister Anderson referred the Whites Point project to a JRP.

## **2. Disputed Facts**

158. The Parties differ on the following points: whether there was a sufficient basis to refer the project to a JRP; whether the Investors were led to believe that the EA would take the form of a comprehensive study and not a JRP; whether the scope of the EA was unnecessarily broad.

### **(a) Whether There Was Sufficient Basis to Refer the Project to a JRP**

#### **i. The Investors' Position**

159. The Investors take issue with the commencement of the EA for the Whites Point project in two principal respects. First, they maintain that Nova Scotia could only commence an EA of a quarry larger than four ha if they registered the Whites Point project as required under the

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<sup>98</sup> *CEAA*, ss. 20(1)(c), 23(b), 25 and 28.

*NSEA*; thus, in their view, commencing the EA process was beyond the authority of the provincial government as the preliminary registration process was not carried out for the larger quarry until 2006 (the 3.9 ha quarry was exempt).<sup>99</sup>

160. Secondly, the Investors dispute the federal government’s “trigger” to carry out a federal EA. The Investors claim that the DFO had acknowledged to the NSDEL that it did not have any legislative basis to require an environmental assessment of the quarry under the *CEAA*.<sup>100</sup> They maintain that the DFO “contrived internally” to create another pretext for carrying out an EA in the context of the *NWPA* application by determining that the dock was designed to handle vessels larger than 25,000 DWT [deadweight tonnage].<sup>101</sup>
161. Even accepting that a federal EA was needed, the Investors note the rarity of JRPs as the adopted method for the EA and argue that their project did not fall within the small category of projects requiring JRP review. The Investors submit that there was insufficient evidence for the EA to take the form of a JRP as “there was no empirical evidence of any public concern” regarding the Whites Point project nor did the environmental impact of the project rise to the level of other projects subjected only to a comprehensive study.<sup>102</sup>

ii. The Respondent’s Position

162. The Respondent underscores that the Whites Point project would, at a minimum, have had to undergone a comprehensive study EA under federal legislation.<sup>103</sup> It asserts that the project had attracted considerable scrutiny since its inception, and not just from those living in the Digby Neck area, but also from the people of Nova Scotia more generally.<sup>104</sup> It contends that there was

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<sup>99</sup> Hearing Transcript, 31 October 2013, p. 12, lines 1-7; Testimony of Bob Petrie, Hearing Transcript, 25 October 2013, p. 36, lines 21-25, p. 40, lines 5-14, pp. 46-47, lines 25-3.

<sup>100</sup> Memorial, paras. 108-109. *See also* Proponent’s Guide to Environmental Assessment, Nova Scotia Environment and Labour, s. 5.1, p.14, Exhibit R-163.

<sup>101</sup> E-mail from NSDEL to DFO, dated 16 January 2003, Exhibit C-46.

<sup>102</sup> Memorial, para. 137, n.134; Memorandum to Deputy Minister prepared by Barry Jeffrey, dated 17 April 2007, Exhibit C-69; Briefing note approved by Peter Sylvester, dated 19 October 2007, Exhibit C-70; Executive Summary, JRP Report, 22 October 2007, Exhibit C-71.

<sup>103</sup> *CEAA Comprehensive Study List Regulations*, SOR/94-638, Exhibit C-265. *See also* Letter from Phil Zamora to Paul Buxton, dated 14 April 2003, Exhibit R-54; Counter-Memorial, para. 133.

<sup>104</sup> Counter-Memorial, para. 143. E-mail from Melanie MacLean to Greg Peacock, dated 16 May 2002, discussing meeting at Sandy Cove School on proposed quarry development, Exhibit R-311; Memorandum for the Minister—Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, dated 14 January 2003, Exhibit R-65. *See also* Counter-Memorial, paras. 144-145; Public notice pursuant to *NWPA*, R.S.C. 1985, Chapter M-22, Halifax Chronicle Herald, dated 3 March 2003, Exhibit R-56; E-mail from Melinda Donovan to Tim Surrette, Neil Bellefontaine and others, dated 4 March 2003, Exhibit R-57; Complaints to Minister Thibault’s office regarding siltation incident of

a “persistent flow of letters of concerns sent to both the federal and provincial governments”<sup>105</sup> between July 2002 and October 2003. Many voiced criticism of the Whites Point project in the Community Liaison Committee that was established as part of a public information program under the conditional approval for the 3.9 ha quarry obtained by Nova Stone and in the months leading up to DFO’s determination regarding the appropriate type of assessment to be used in March and May 2003. These events showed the DFO “how engaged and opposed the local community was to the project”,<sup>106</sup> precipitating the decision to carry out a JRP.

163. As for environmental impact, it is the Respondent’s position that the possibility of significant adverse environmental effects was high, considering the planned size of the full quarry and the fact that it would be the first large marine terminal to be constructed on the Digby Neck.<sup>107</sup> The Respondent notes the concern raised among regulators in considering the ecological diversity of the area, as well.<sup>108</sup>

**(b) Whether the Investors Were Misled About the Form the Assessment Would Take**

164. The Parties differ as to whether DFO officials made representations on what form the EA would take (i.e., comprehensive review or JRP) and on the exact content of such alleged representations.

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25 May 2003, Exhibit R-58. *See also* Rejoinder, para. 30; Second Expert Report of David Estrin, para. 106; E-mail from Melinda Donovan to Tim Surrette, Neil Bellefontaine and others, dated 4 March 2003, Exhibit R-57.

<sup>105</sup> Counter-Memorial, para. 80; Brad Langille note to file re: conversation with Mary Linyak, dated 27 March 2002, Exhibit R-88; Brad Langille note to file re: conversation with Jim Thurber, dated 2 April 2002, Exhibit R-89; Brad Langille note to file re: conversation with Tonya Wimmer, dated 3 April 2002, Exhibit R-90; E-mail from Brad Langille to Bob Petrie advising of inquiry from Chronicle Herald newspaper on quarry information, dated 9 April 2002, Exhibit R-91; Briefing Note by Brad Langille, dated 1 May 2002, that notes “there is a high degree of public concern over this project and inquiries have been received from the public, media and the NDP caucus”, Exhibit R-92; First Affidavit of Bob Petrie, para. 14.

<sup>106</sup> Counter-Memorial, para. 144; Public notice pursuant to NWPA, R.S.C. 1985, Chapter M-22, Halifax Chronicle Herald, dated 3 March 2003, Exhibit R-56; E-mail from Melinda Donovan to Tim Surrette, Neil Bellefontaine and others, dated 4 March 2003, Exhibit R-57; Affidavit of Neil Bellefontaine, paras. 36-37.

<sup>107</sup> Affidavit of Neil Bellefontaine, paras. 12, 21-28.

<sup>108</sup> Memorandum for the Minister—Proposed Rock Quarry and Shipping Terminal, dated 14 January 2003, Exhibit R-65. *See also* Memorandum for the Minister—Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, dated 13 March 2003, Exhibit R-66.

i. The Investors' Position

165. The Investors contend that the DFO led them to believe that the type of EA would be a comprehensive study<sup>109</sup> and that federal officials “were manoeuvring behind the scenes to elevate the quarry proposal into a JRP”.<sup>110</sup> They argue that “political considerations affected the actions of officials involved in what was supposed to be an empirical process”.<sup>111</sup>
166. The Investors allege that, on 6 January 2003, the DFO, Environment Canada, the CEA Agency and NSDEL officials agreed in a meeting that the EA would be conducted as a purely scientific comprehensive study.<sup>112</sup> GQP was told “that it had to submit a revised project description to initiate the environmental assessment process”.<sup>113</sup>
167. However, on 12 May 2003, DFO staff were instructed to “avoid stuff in writing” in relation to the Whites Point project.<sup>114</sup> The Investors refer to DFO’s briefing note dated 26 May 2003 to its Assistant Deputy Minister according to which “the DFO continued to maintain that the marine terminal would be subject to a Comprehensive Study. It also advised the ADM that it had ‘yet to be determined’ whether both projects would be scoped together, even though by this time it had already told Bilcon it would do so”.<sup>115</sup>
168. According to the Investors, on 26 June 2003, internal correspondence of DFO officials confirms that Mr. Thibault, the Minister of Fisheries and Oceans, wanted to prolong the assessment process. They allege that the Minister “deliberately used his authority over the administration of

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<sup>109</sup> Reply, para. 63; Letter from Phil Zamora to Paul Buxton, dated 14 April 2003, Exhibit C-28.

<sup>110</sup> Reply, para. 68. *See also* Reply, para. 663. Exhibit C-28; E-mail from Bill Coulter to Bruce Young, Steve Burgess, Paul Bernier, Derek McDonald, dated 17 February 2003, Exhibit C-813.

<sup>111</sup> Reply, para. 71; Journal note by Bruce Hood, dated 25 April 2003, p. 801610, Exhibit C-284; Hearing Transcript, 31 October 2013, pp. 31-32.

<sup>112</sup> Memorial, para. 115; Notice of Meeting and list of attendees dated 6 January 2002, Exhibit C-50; Notice of Meeting and Attendees, dated 6 January 2003, Exhibit C-51; Notes from Meeting, dated 6 January 2003, Exhibit C-52; Meeting Notes, dated 6 January 2003, Exhibit C-53. The Memorial makes no mention of GQP being present at this meeting, whereas the Respondent claims the GQP participated in the meeting and even though a comprehensive study was more likely, a panel was mentioned by government officials as a distinct possibility.

<sup>113</sup> Memorial, para. 115; Memorandum from Derek McDonald to unknown distribution list, attaching the proponent’s revised project description, dated 5 February 2003. Exhibit C-54; E-mail from Derek McDonald to Barry Jeffrey, Jim Ross and Bill Coulter, dated 16 January 2003, Exhibit C-55.

<sup>114</sup> Memorial, para. 130; Journal note by Bruce Hood, dated 12 May 2003, p. 801615. Exhibit C-331.

<sup>115</sup> Reply, para. 64; Memorandum for the Assistant Deputy Minister of Oceans, “Environmental Assessment of Proposed Quarry” and Shipping Terminal, Whites Cove, Digby County, Nova Scotia Pre-Meeting for Meeting with Associate Deputy Minister,” Exhibit C-509.



the *NWPA* as the basis for changing the assessment of the Whites Point Quarry from a Comprehensive Study to a Joint Review Panel”.<sup>116</sup>

169. In support, the Investors rely on journal notes of Mr. Bruce Hood, Chief of the Environmental Assessment and Major Projects Branch of the DFO.<sup>117</sup> Furthermore, the Investors contend that “Mr. Hood’s notes also clearly show why, DFO Minister Thibault was so interested in the Whites Point Quarry project”. In this context, the Investors highlight the following statements in Mr. Hood’s journal notes: “Minister sensitive because [it’s] in his riding”,<sup>118</sup> and that the DFO knew it “had no trigger for [the] quarry”. According to the Investors, Mr. Hood’s journal notes demonstrate “that political pressure was being put on the DFO by the CEA Agency and by the Province of Nova Scotia, to include the quarry within a federal environmental assessment”.<sup>119</sup>

ii. The Respondent’s Position

170. The Respondent contends that at no point were GQP or Bilcon misled about the EA’s likely character. It is the Respondent’s position that government officials were consistent in advising the Investors that, given the nature of their project and the environment for which it was proposed, it could be referred to a review panel.<sup>120</sup>
171. The Respondent explains that, due to the presence of the marine terminal as an integral part of the Whites Point project, officials concluded early on that the project would require at a minimum a comprehensive study.<sup>121</sup> However, this determination was just a starting point:

From the time of their review of GQP’s first rudimentary project description, government officials believed that these statutory grounds were likely to be engaged by this project. In particular, DFO officials commented early on that “given the level of public concern, potential for numerous federal *CEAA* triggers and environmental issues as well as the size,

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<sup>116</sup> Memorial, para. 119; Letter from Robert Thibault to David Anderson, recommending that the White Point Quarry assessment be referred to Panel Review, dated 26 June 2003, Exhibit C-61.

<sup>117</sup> Memorial, para. 126; Journal note by Bruce Hood, disclosing a statement made by Minister Robert Thibault evidencing his use of powers to lengthen the environmental assessment of the Whites Point Quarry, undated, p. 801619, Exhibit C-370.

<sup>118</sup> Memorial, para. 132; Journal note by Bruce Hood, undated, p. 801641, Exhibit C-381; Journal note by Bruce Hood, undated, p. 801639, Exhibit C-382.

<sup>119</sup> Memorial, para. 120; Journal note by Bruce Hood, noting that the DFO did not possess a valid legislative trigger which would provide jurisdiction to include the quarry within the federal environmental assessment, dated Fall 2007, p. 801603, Exhibit C-365.

<sup>120</sup> Rejoinder, para. 31; Christopher Daly’s notes of 6 January 2003 meeting with GQP, Exhibit R-178; Letter from Phil Zamora to Paul Buxton, dated 14 April 2003, Exhibit R-54.

<sup>121</sup> Counter-Memorial, paras. 133-134; Exhibit R-54.

extent and duration of the overall project a Panel Review may be warranted”. They even discussed this possibility with GQP representatives at their January 6, 2003 meeting.<sup>122</sup>

172. The NSDEL first met with GQP on 14 June 2002<sup>123</sup> and there advised GQP that the project would require a provincial EA and might also require a federal EA. A second meeting took place on 25 July 2002. The Respondent maintains that federal and provincial officials notified GQP that public concerns had already been raised and that DFO took public consultation “very seriously”. It is the Respondent’s position that there is no evidence that any representative of the Investors took issue with the potential approaches to an EA laid out by DFO.<sup>124</sup>
173. The Respondent expressly rejects the Investors’ interpretation of the content of the 6 January 2003 meeting: “The Claimants’ assertion in their Memorial... that it was ‘agreed’ at the January 6, 2003 meeting that the type of EA would be a ‘comprehensive study’ is, thus, demonstrably wrong”.<sup>125</sup> According to the Respondent’s account of this meeting with GQP on 6 January 2003, it informed GQP that a JRP remained a possibility:

... As to the type of EA that would be used, officials advised GQP that while “comp study is more than likely” there was “possibility of a panel” in light of the “likely significant effects” and “public concerns” being voiced over the project. So that a decision could be made on the type of assessment, officials requested GQP to submit a more thorough project description.<sup>126</sup>

174. On 31 March 2003, an intergovernmental working group considered the third project description. Participants agreed in principle to harmonize the required federal and provincial EAs. A comprehensive study was considered to be “the most likely federal EA track” but participants recognize that public reaction “may influence [the] EA track decision”.<sup>127</sup> At this meeting, the possibility of referral to the JRP remained on the horizon:

a “Highlights and Action Items” summary prepared after the meeting acknowledged the possibility that the project could be referred to a review panel, indicating that “Comprehensive Study is the most likely federal EA track” but that “[p]ublic reaction to

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<sup>122</sup> Counter-Memorial, para. 134 (internal citations omitted).

<sup>123</sup> The Investors do not expressly dispute that this meeting took place. They do not refer to this meeting in their Memorial, Reply or their Timeline of Relevant Facts of 17 May 2013.

<sup>124</sup> Counter-Memorial, para. 94.

<sup>125</sup> Counter-Memorial, para. 134, n.293; Christopher Daly’s Notes of 6 January 2003 meeting with GQP, Exhibit R-178.

<sup>126</sup> Counter-Memorial, para. 101; Christopher Daly’s notes of 6 January 2003 meeting with GQP, Exhibit R-178; Lorilee Langille’s notes of 6 January 2003 meeting with GQP, Exhibit R-132. *See also* Counter-Memorial, para. 134; E-mail from Reg Sweeney to Jim Ross and Thomas Wheaton, dated 4 December 2002, Exhibit R-130.

<sup>127</sup> Counter-Memorial, para. 136; Highlights and Action Items Whites Point Inter-Agency EA Meeting, dated 31 March 2003, Exhibit R-145.

Scope and MOU may influence EA track decision”. Mark McLean’s notes of this meeting also indicate that “public review/concerns can bump CSR [Comprehensive Study Review] to panel” and “will be challenged on decision on comp study,” implicitly acknowledging the public concerns that could warrant referral to a panel.<sup>128</sup>

175. On 14 April 2003, the DFO wrote to Mr. Buxton, not only advising GQP that the scope of the project for EA purposes included both quarry and marine terminal, but also raising the possibility of the project being referred to a review panel. In this letter, DFO stated “that because of the size of the marine terminal ‘the type of screening used for the EA will therefore be a ‘comprehensive study’”. However, it was made clear in the letter that “although the type of assessment being used for this project is a ‘comprehensive study’, *CEAA* (s. 23) includes the provision that the project could be referred to a mediator or review panel”.<sup>129</sup>
176. In May 2003, DFO officials reached a decision to recommend that the Whites Point project be referred to a JRP on the basis that the statutory criteria had been satisfied.<sup>130</sup> On 20 June 2013 the NSDEL confirmed that Nova Scotia was interested in participating in a JRP of the project.<sup>131</sup> The Respondent describes the chain of events as follows:

Once Nova Scotia confirmed its interest, DFO officials prepared a briefing note for decision to DFO Minister Thibault, recommending that he refer the project to the Minister of the Environment for referral to a review panel. This was the first decision DFO officials had requested from their Minister in the context of the Whites Point EA. Over the course of the previous ten months, DFO officials had provided him with informational briefings to keep him and his office advised on the matter. Given that Minister Thibault was the Member of Parliament for Southwest Nova (which includes the Digby Neck), it is not surprising that he was interested in the proposal. However, as both Minister Thibault and Neil Bellefontaine make clear, the determinations made by DFO officials were their own, and Minister Thibault did not in any way interfere in the work of officials, or otherwise direct or instruct them in their work. The only guidance that the Minister ever offered was that the EA process used to review the Whites Point project would “need to ensure public concerns over the project were adequately heard and addressed” and that it was to be “a full and fair comprehensive environmental assessment of the proposal that strictly complied with the rules, did not cut any corners and allowed the public to have a voice”.<sup>132</sup>

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<sup>128</sup> Counter-Memorial, para. 136 (internal citations omitted). Highlights and Action Items Whites Point Inter-Agency EA Meeting, dated 31 March 2003, Exhibit R-145; Notes of Mark McLean of 31 March 2003 interagency meeting, Exhibit R-144.

<sup>129</sup> Counter-Memorial, para. 137; Letter from Phil Zamora to Paul Buxton, dated 14 April 2003, Exhibit R-54.

<sup>130</sup> Counter-Memorial, para. 146; Affidavit of Neil Bellefontaine, para. 40; Memorandum for the Assistant Deputy Minister, Oceans—Environmental Assessment of Proposed Quarry and Shipping Terminal, Whites Cove Digby County, Nova Scotia Pre-Meeting for Meeting with Associate Deputy Minister, dated 26 May 2003, Exhibit R-69.

<sup>131</sup> Counter-Memorial, para. 148; Letter from Paul Boudreau to Christopher Daly, dated 20 June 2003, Exhibit R-70; Letter from Christopher Daly to Paul Boudreau, dated 20 June 2003, Exhibit R-71.

<sup>132</sup> Counter-Memorial, para. 149 (internal citations omitted).

177. Minister Thibault explains that he was convinced that the overwhelming amount of public concern that had been expressed over the project, as well as the significant environmental concerns associated with it, more than justified a referral to a review panel.

**(c) Whether the Scope of the EA Was Overly Broad**

i. The Investors' Position

178. The Investors assert that the scope required for their EA was unnecessarily broad. They argue that the quarry was included in the assessment for purely political reasons.<sup>133</sup> As noted above, a trigger is required to activate the jurisdiction of the federal government over the environmental aspects of a certain project. According to the Investors, as late as 2007, government officials admitted that the DFO had no trigger for the quarry.<sup>134</sup> Correspondence among and notes of government officials suggest that the scope of the EA had been politicized.<sup>135</sup>

179. The Investors assert that DFO's practice at the time had been to "scope to the trigger" and not beyond, meaning that the only elements of a project that would be included in any EA would be the piece(s) that triggered federal oversight and nothing further.<sup>136</sup> For their project, however, the Investors maintain that the evidence demonstrates collusion between the federal and

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<sup>133</sup> But *see* Memorandum for the Assistant Deputy Minister of Oceans, "Environmental Assessment of Proposed Quarry" and Shipping Terminal, Whites Cove, Digby County, Nova Scotia Pre-Meeting for Meeting with Associate Deputy Minister", Exhibit C-509: ". . . the proposed project has been very controversial and the Province is therefore anxious to have federal involvement with assessment of both the terminal and quarry. . . DFO has determined that the marine terminal will require CEAA assessment, however, it has yet to be determined if there is a trigger for assessment of the quarry. It is likely, due to public opposition of the proposal that there will be a court challenge if the scope of project for the CEAA assessment does not include both the quarry and the terminal."

<sup>134</sup> Journal note by Bruce Hood, noting that the DFO did not possess a valid legislative trigger which would provide jurisdiction to include the quarry within the federal environmental assessment, undated, p. 801603, Exhibit C-365.

<sup>135</sup> Journal note by Bruce Hood, noting that the public would be upset if the quarry was not included in the scope of the DFO's assessment, dated Fall 2007, p. 801604, Exhibit C-366 ("[T]he public will likely be mad if DFO doesn't scope in [the] quarry"); Journal note by Bruce Hood, dated 25 April 2003, p. 801610, Exhibit C-284 ("Every time we scope broadly to accommodate someone else we get screwed. We want to get our Minister off this file"); Journal note by Bruce Hood, undated, p. 801619, Exhibit C-380 ("don't mention scoping . . . don't send up note").

<sup>136</sup> *See, e.g.*, E-mail from Bruce Hood to Reg Sweeney, dated 9 December 2003, Exhibit C-62: "[b]ased on our present practice of project scoping to DFO legislative authority." The Investors also rely on the Mining Watch case, *Mining Watch Canada v. Canada* (Fisheries and Oceans), 2010 SCC 2, [2010] 1 S.C.R. 6.

provincial authorities to go beyond the trigger of the marine terminal and to drag out the process as long as possible.<sup>137</sup>

ii. The Respondent's Position

180. The Respondent emphasizes that under Nova Scotia law, a quarry in excess of 4 ha requires approval of the Nova Scotia Minister of Environment and Labour which in turn requires that an EA must be conducted in accordance with Nova Scotia law.<sup>138</sup> Thus, an EA would have to be conducted of the quarry regardless of the Investors' assertions that the *federal* government did not have a trigger in the quarry. According to the Respondent, because the federal and provincial officials decided to harmonize their EAs,<sup>139</sup> this meant the scope would have to include both the quarry and the marine terminal.

181. In any event, there was nothing improper in the Respondent's view of the manner through which the DFO asserted its oversight over the quarry component in the context of the EA.<sup>140</sup> The Respondent observes that under *CEAA*, s. 15, the "scope of project" can include components of a project or projects in addition to those that triggered the *CEAA* in the first place.<sup>141</sup> It notes that all officials involved in the reviewing process concluded that the scope of the project should include both the marine terminal and the quarry, and that GQP never challenged that determination.<sup>142</sup>

182. The Respondent maintains that this decision was made for several reasons: First, the two elements were interdependent, even as presented by the proponent, and therefore should have been considered together for that reason.<sup>143</sup> Secondly, the DFO had determined that the quarry

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<sup>137</sup> The Investors highlight the following excerpts from the Journal note by Bruce Hood: "Thibault wants this process dragged out as long as possible." Journal note by Bruce Hood, dated Fall 2007, p. 801619, Exhibit C-370; "Minister sensitive because it's his riding"; "flood of Ministers letters". Journal note by Bruce Hood, undated, p. 801641, Exhibit C-381.

<sup>138</sup> First Affidavit of Christopher Daly, paras. 4, 7-17; *NSEA*, ss. 31-32.

<sup>139</sup> Consistent with the *CEAA*'s purpose of eliminating unnecessary duplication the EA process, *see CEAA*, s. 4(b.1).

<sup>140</sup> The Respondent notes that in respect of the hearing on jurisdiction and merits in these proceedings, the Investors chose not to cross-examine Minister Thibault who said in his then unchallenged witness statement that the issues surrounding approval of the Whites Point project were not political.

<sup>141</sup> Counter-Memorial, para. 55; *CEAA*, s. 15. *See also* Expert Report of Robert Connelly, paras. 42-44.

<sup>142</sup> Counter-Memorial, para. 117; First Affidavit of Stephen Chapman, paras. 15-18; Affidavit of Neil Bellefontaine, paras. 29-34; Affidavit of Mark McLean, paras. 36-38; Affidavit of Bruce Hood, paras. 11-17.

<sup>143</sup> Bruce Hood Notes, dated March-June 2003, pp. 801602-801604, Exhibit R-260: "if we don't scope in the quarry, [we will be] contrary to the advice of [the] Agency and EA practices." *See also* E-mail from Brian

might require authorization under the *Fisheries Act* so it was prudent to include it; in fact, DFO concluded in May 2003 that the proposed blasting at the 3.9 ha quarry would require authorization under the *Fisheries Act*, triggering an EA.<sup>144</sup> The Respondent comments that the Investors' assertion that "DFO acknowledged the lack of a trigger for the quarry"<sup>145</sup> identifies correspondence exemplifying an "academic discussion" occurring before any visit to the site.<sup>146</sup>

## C. THE ESTABLISHMENT AND WORK OF THE JRP

### 1. Undisputed Facts

183. The federal Minister of the Environment and the provincial Minister of the NSDEL released a draft JRP Agreement and the JRP's Terms of Reference ("TOR") for public comment on 11 August 2003. The final JRP Agreement and associated TOR were signed on 29 October and 3 November 2004 respectively.
184. On 5 November 2004, the Minister of the Environment and the Minister of the NSDEL jointly announced the establishment of the JRP and the appointment of the panellists: Dr. Robert Fournier (as chair), Dr. Gunter Muecke and Dr. Jill Grant. Dr. Fournier is a professor of oceanography at Dalhousie University; he had prior experience as chair of another JRP. Dr. Muecke is a professor emeritus of geochemistry, geology and environmental studies at Dalhousie University. Dr. Grant is a professor at the School of Planning at Dalhousie University.
185. On 10 November 2004, the CEA Agency and the NSDEL released draft EIS guidelines for public comment (the "draft EIS Guidelines"). After the JRP held four public scoping meetings on the draft EIS Guidelines in four different locations in southwest Nova Scotia from 6 to 9 January 2005, Bilcon submitted its comments on the draft EIS Guidelines. In total, the CEA

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Jollymore to Brad Langille, dated 22 April 2002, Exhibit C-38: "I would like to add. If the proponent eventually needs to get approval for a wharf to transport the end product to distant markets, the construction of the wharf would likely trigger the need for an environmental assessment under either or both the Fisheries Act and the Navigable Waters Protection Act. We are legislated to follow the Canadian Environmental Assessment Act. Under that piece of legislation, project splitting for review purposes is not permitted. The wharf would be required by the quarry. The quarry would be part of the review."

<sup>144</sup> Affidavit of Neil Bellefontaine, para. 34; First Expert Report of Lawrence Smith, para. 110.

<sup>145</sup> See, e.g., Memorial, paras. 108-109; E-mail from Brian Jollymore to Bob Petrie, dated 26 April 2002, Exhibit C-41; E-mail from Brian Jollymore to Bob Petrie, dated 24 April 2002, Exhibit C-40; E-mail from Brian Jollymore to Bob Petrie, dated 26 April 2002, Exhibit C-42.

<sup>146</sup> Counter-Memorial, para. 121, n.266; Affidavit of Neil Bellefontaine, para. 34.

Agency received 148 public submissions. On 31 March 2005, the JRP issued the final EIS guidelines (the “EIS Guidelines”).

186. On 26 April 2006, thirteen months after the issuance of the EIS Guidelines, Bilcon submitted its EIS to the JRP. A day later, the JRP invited the public and the governments of Canada and Nova Scotia to comment on Bilcon’s EIS. Between June and July 2006, the JRP issued two sets of comments and information requests to Bilcon in relation to the EIS. By 11 August 2006, the closing date for comments by the public on Bilcon’s EIS, the JRP had received about 250 comments.
187. Between August 2006 and April 2007, Bilcon submitted its responses to the JRP’s information requests and public comments. On 1 May 2007, the JRP announced two weeks of public hearings in Digby, Nova Scotia, commencing on 16 June 2007.
188. The JRP held public hearings between 16 and 30 June 2007. On 22 October 2007, the JRP submitted its report to the federal Minister of the Environment and the Minister of the NSDEL, recommending that the Whites Point project not be permitted to proceed (the “JRP Report”). Specifically, the JRP concluded and recommended:

1. The Panel recommends that the Minister of Environment and Labour (Nova Scotia) reject the proposal made by Bilcon of Nova Scotia to create the Whites Point Quarry and Marine Terminal and recommends to the Government of Canada that the Project is likely to cause significant adverse environmental effects that, in the opinion of the Panel, cannot be justified in the circumstances.
2. The Panel recommends that the Province of Nova Scotia develop and implement a comprehensive coastal zone management policy or plan for the Province.
3. Because of the special issues associated with coastal quarries, the Panel recommends a moratorium on new approvals for development along the North Mountain until the Province of Nova Scotia has thoroughly reviewed this type of initiative within the context of a comprehensive provincial coastal zone management policy and established appropriate guidelines to facilitate decision-making.
4. The Panel recommends that the Province of Nova Scotia develop and implement more effective mechanisms than those currently in place for consultation with local governments, communities and proponents in considering applications for quarry developments.
5. The Panel recommends that the Province of Nova Scotia modify its regulations to require an environmental assessment of quarry projects of any size.
6. The Panel recommends that the Canadian Environmental Assessment Agency develop a guidance document on the application of adaptive management in environmental assessments and in environmental management following approvals.
7. The Panel recommends that Transport Canada revise its ballast water regulations to ensure that ships transporting goods from waters with known risks take appropriate measures to significantly reduce the risk of transmission of unwanted species.<sup>147</sup>

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<sup>147</sup> Executive Summary, JRP Report, 22 October 2007, pp. 4-5, Exhibit C-71.

189. On 23 October 2007,<sup>148</sup> the Governments of Canada and Nova Scotia released the JRP Report to the public.

## 2. Disputed Facts

190. The Parties disagree on the following issues: when the Investors were notified of the referral of the Whites Point project to a JRP; whether the appointment of the JRP members was fair; whether the Scoping Meetings, the EIS Guidelines and the JRP's considerations conformed to statutory requirements and the TOR; whether the Investors were unresponsive and acted unprofessionally in responding to requests for information, drawing out the EA; whether the hearing held before the JRP was conducted fairly and impartially; whether the JRP unlawfully recommended rejection of the project under the *CEAA*; and whether the local community support for the Whites Point project was indeed extensive.

### (a) When the Investors Were Notified of the Referral to the JRP

#### i. The Investors' Position

191. The Investors take issue with being formally notified of the decision to refer the project to a JRP only on 10 September 2004,<sup>149</sup> a month after the federal Minister of the Environment had taken it.

192. According to the Investors, Bilcon only learned about the referral to a JRP when Mr. Buxton read about it in the *Halifax Chronicle Herald* on 7 July 2003. On 28 August 2003, Mr. Buxton met with representatives of the CEA Agency, the DFO and the NSDEL. When Bilcon asked why it had not been informed about the referral of the project to a JRP, Mr. Chapman, the CEA Agency Project Manager, told him that the recommendation process was not public.<sup>150</sup>

193. The Investors maintain that, when the federal Ministry of the Environment and the NSDEL released the draft JRP Agreement and the draft TOR for public comments on 11 August 2003,

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<sup>148</sup> The Investors state in their Memorial that this release to the public occurred on 26 October (Memorial, para. 239) but the Reply refers to 23 October (Reply, para. 129, referring to News Article, headed Governments of Canada and Nova Scotia Release Findings of the Joint Review Panel for the Whites Point Quarry and Marine Terminal Project, dated 23 October 2007, Exhibit C-651), which is the same date stated in the Respondent's Timeline of Relevant Facts, dated 17 May 2013, p. 9.

<sup>149</sup> Reply, para. 65; *see also* Memorial, paras. 139, 142. The Investors' Timeline of Relevant Facts (dated 17 May 2013) mistakenly refers to 10 September 2003.

<sup>150</sup> Memorial, para. 140; Letter from Stephen Chapman to Paul Buxton, regarding the environmental assessment process, dated 10 September 2003, Exhibit C-75. The Respondent states that this meeting occurred on 29 August 2003; *see* Respondent's Timeline of Relevant Facts, p. 6.



Bilcon had yet to be: a) officially informed that the Project had been referred to a JRP; b) told of why the project had been elevated from a Comprehensive Study to a JRP; and c) told how it could comply with conditions that DFO itself had laid down for a separate quarry and that, without consultation, was being merged into the larger quarry.<sup>151</sup>

194. The Investors also maintain that “despite its repeated requests, Bilcon was never informed of when, how, or why, the referral was accepted by the Minister of Environment”.<sup>152</sup>

ii. The Respondent’s Position

195. The Respondent maintains that GQP was officially informed of the JRP Agreement and the TOR on 29 August 2003, when federal and provincial officials met with GQP “to discuss the JRP process and to invite comments on the draft JRP Agreement and Terms of Reference”. Having received no comments, the Agency on 10 September 2003 asked the GQP again for input. Yet GQP once again remained silent.<sup>153</sup> On 11 November 2003, “Mr. Buxton advised NSDEL that GQP ‘regarded the Draft Memorandum of Understanding as a reasonable document and hence did not feel the need for comment.’ Mr. Buxton added that ‘[t]he fact that we did not comment should not be construed as a blanket endorsement of the document or of the fact that a Panel Review is required for this project.’”<sup>154</sup>

**(b) Whether the Appointment of the JRP Members was Fair**

i. The Investors’ Position

196. The Investors allege that the JRP lacked diversity, as all three members were “environmental activists, all from the same university”.<sup>155</sup> The CEA Agency “was aware that Robert Fournier and Gunter Muecke had both been Board Members of the Ecology Action Centre, a self-described environmental activist organization”.<sup>156</sup> According to the Investors, “it was a

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<sup>151</sup> Reply, para. 79.

<sup>152</sup> Memorial, para. 142; Letter from Stephen Chapman to Paul Buxton, dated 10 September 2003, Exhibit C-75.

<sup>153</sup> Counter-Memorial, para. 155; Letter from Stephen Chapman to Paul Buxton, dated 10 September 2003, Exhibit R-228; First Affidavit of Stephen Chapman, para. 32.

<sup>154</sup> Counter-Memorial, para. 156 (referring to a Letter from Paul Buxton to Christopher Daly, dated 11 November 2003, Exhibit R-229, and stating at n.349 that “[a]lthough Mr. Buxton erroneously refers to a ‘Draft Memorandum of Understanding,’ it is clear his comment concerns the draft JRP Agreement and Terms of Reference.”).

<sup>155</sup> Memorial, para. 157.

<sup>156</sup> Memorial, para. 151; Résumé of Robert Fournier, Exhibit C-285; Résumé of Gunter Muecke, Exhibit C-286.

notorious public fact that the Ecology Action Centre was an active and vocal opponent of the quarry”.<sup>157</sup> The Investors further refer to the following facts:

In 2002, the Faculty of Planning and Architecture of Dalhousie University, where Jill Grant was employed, together with the same Ecology Action Centre, organized a three-day conference that advocated for the “greening” of Nova Scotia. Jill Grant was a moderator at the Conference.

Question 8 of the CEA Agency’s Panel Interview Questions, specifically asked potential panelists to address real, potential or perceived conflicts of interest. The candidates’ answers have not been disclosed.<sup>158</sup>

197. The Investors further submit that the CEA Agency rejected another candidate who was a professional engineer in Nova Scotia with over thirty years of professional experience with natural resource management and environmental planning.<sup>159</sup> According to the Investors, in “internal e-mails the CEA Agency concluded that [this other candidate] was ‘bright and had a wealth of experience’, ‘but may be too much in favor of industry’”.<sup>160</sup>

ii. The Respondent’s Position

198. The Respondent stresses that JRP members were selected in accordance with the *CEAA*. JRP members must be “unbiased and free from any conflict of interest relative to the project and... have knowledge or experience relative to the anticipated environmental effects of the project”.<sup>161</sup> According to the Respondent, “[g]iven the nature of the Whites Point project, officials sought individuals with expertise in marine sciences, geology, mining operations, mineral engineering, and socio-economic studies”.<sup>162</sup>

199. The Respondent highlights the credentials of Drs. Fournier, Muecke and Grant and the reasons they were considered suitable for a position as JRP members.<sup>163</sup> According to the Respondent,

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<sup>157</sup> Memorial, para. 152; JRP Hearing Transcript, Vol. 10, dated 27 June 2007, p. 2459, Exhibit C-109.

<sup>158</sup> Memorial, paras. 153-154; Whites Point Quarry: Panel Members—Interviews, dated 20 August 2004, Exhibit C-110.

<sup>159</sup> Memorial, para. 155; Curriculum Vitae of John Amirault, Exhibit C-390.

<sup>160</sup> Memorial, para. 156 (citing an E-mail from Bill Coulter to Jean Crepault, providing opinions on the suitability of John Amirault and Anne Fouillard, dated 19 January 2004, Exhibit C-112).

<sup>161</sup> Counter-Memorial, para. 161, referring to *CEAA*, s. 41(b), and stating that “[t]he JRP Agreement, which was being negotiated at the time between the Agency and NSDEL, contains an identical requirement at Article 3.3...”

<sup>162</sup> Counter-Memorial, para. 161; First Affidavit of Stephen Chapman, para. 39.

<sup>163</sup> Counter-Memorial, paras. 162-165; Affidavit of Christopher Daly, paras. 49, 51; Backgrounder—Whites Point Quarry and Marine Terminal Project Joint Review Panel Members Biographical Notes, Exhibit R-313; Curriculum vitae of Dr. Gunter Muecke, Exhibit R-379; Curriculum vitae of Dr. Robert

not only did Bilcon not raise any objection to the appointment of the JRP members when informed of their selection before the public announcement, but Mr. Buxton approved of the appointment of those members.<sup>164</sup>

**(c) Whether the JRP's Work Conformed to Statutory Requirements and its TOR**

i. The Investors' Position

200. The Investors argue that the draft EIS Guidelines and the final EIS Guidelines exceeded the JRP's TOR,<sup>165</sup> as well as the legislative framework for the EA, and imposed "onerous requirements" on them.<sup>166</sup> Specifically, the Investors contend that the scoping meetings conducted by the JRP also focused on issues that were outside the TOR.<sup>167</sup>

201. The Investors maintain that the final EIS Guidelines "departed substantially from the expected scientific and technical focus of an EIS, and also required Bilcon to address non-scientific and non-technical questions".<sup>168</sup> These requirements included a distorted precautionary principle,<sup>169</sup> "the influence of the *NAFTA* and the *Kyoto Protocol* on the Whites Point Quarry",<sup>170</sup> the need to consider traditional knowledge,<sup>171</sup> a strong emphasis on sustainable development,<sup>172</sup> a more

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Fournier, Exhibit R-380; Curriculum vitae of Dr. Jill Grant, Exhibit R-381; Questions for Interviewing Review Panel Candidates, Exhibit R-206.

<sup>164</sup> Counter-Memorial, para. 167; Letter from Minister of the Environment Stéphane Dion to Dr. Robert Fournier, dated 3 November 2004, Exhibit R-208.

<sup>165</sup> Memorial, para. 163.

<sup>166</sup> Memorial, para. 167; News Release, Whites Point Quarry and Marine Terminal Project Joint Review Panel issues final Environmental Impact Statement Guidelines, dated 31 March 2005, Exhibit C-442.

<sup>167</sup> Memorial, paras. 165-166; Part II, para. 2 of the Appendix to Agreement concerning the Establishment of a Joint Review Panel, dated 3 November 2004, Exhibit C-363; Transcript of Scoping Meeting #1 in Sandy Cove, dated 6 January 2005, Exhibit C-116; Transcript of Scoping Meeting #2 in Digby, dated 7 January 2005, Exhibit C-117; Transcript of Scoping Meeting #3 in Wolfville, dated 8 January 2005, Exhibit C-118; E-mail from Phil Zamora to Derek McDonald, regarding the topics and issues discussed by residents of Digby Neck at the Joint Review Panel Scoping Meetings, undated, Exhibit C-441.

<sup>168</sup> Reply, para. 95; Letter from Robert Fournier to Paul Buxton, dated 31 March 2005, ss. 9.3.1., 9.3.8., Exhibit C-120.

<sup>169</sup> Memorial, para. 168; Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, dated March 2005, s. 3.5, Exhibit C-168.

<sup>170</sup> Memorial, para. 169; Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, dated March 2005, s. 6.6, Exhibit C-168.

<sup>171</sup> Memorial, para. 170; Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, dated March 2005, s. 3.1, Exhibit C-168.

<sup>172</sup> Memorial, paras. 171-172.

stringent ecosystem analysis approach,<sup>173</sup> cumulative effects,<sup>174</sup> as well as other improper considerations that influenced the JRP's recommendations,<sup>175</sup> such as the precedential impact of approving the Whites Point project on access to the Canadian market under the NAFTA in relation to similar future projects.<sup>176</sup>

ii. The Respondent's Position

202. The Respondent argues that the harmonized EA and the EIS Guidelines met the statutory requirements under federal and Nova Scotia law.<sup>177</sup> Moreover, the Respondent submits that the "draft JRP Agreement and Terms of Reference were based on similar agreements and Terms of Reference prepared in other EAs and were consistent with the Agency's 1997 *Procedures for an Assessment by a Review Panel*".<sup>178</sup> Because the purpose of a JRP is to carry out the necessary review for both jurisdictions (federal and provincial), the Whites Point JRP was, according to the Respondent, necessarily mandated to review and assess information pertaining to any and all environmental effects under both the *CEAA* and the *NSEA*.<sup>179</sup>
203. The Respondent emphasizes in particular that federal law required the EA to evaluate "any change that the project may cause in the environment" including 'any effect of any change [in the environment] ... on health and socio-economic conditions', and 'physical and cultural heritage'.<sup>180</sup> Similarly, Nova Scotia law required the EA to take into account "any change, whether positive or negative, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing".<sup>181</sup> The Respondent comments that the Investors' Expert, Mr. Estrin, acknowledged that as part of an EA in Nova Scotia, the necessary inquiry may

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<sup>173</sup> Memorial, para. 173; Exhibit C-169, s. 8.0.

<sup>174</sup> Memorial, para. 173; Exhibit C-168, s. 11.

<sup>175</sup> See, e.g., Reply, paras. 95-96; Letter from Robert Fournier to Paul Buxton, dated 31 March 2005, ss. 9.3.1., 9.3.8., 10, Exhibit C-120.

<sup>176</sup> Memorial, paras. 215-223.

<sup>177</sup> Counter-Memorial, paras. 152-153; Expert Report of Robert Connelly, paras. 102-105; see also *CEAA*, s. 2. See also Rejoinder, paras. 33-37.

<sup>178</sup> Counter-Memorial, para. 152; *Procedures for an Assessment by a Review Panel*, dated November 1997, Exhibit R-26.

<sup>179</sup> Rejoinder, para. 33; Expert Report of Robert Connelly, paras. 102-104; First Expert Report of Lawrence Smith, paras. 132, 230-246.

<sup>180</sup> Rejoinder, para. 34; *CEAA*, s. 2. See also Expert Report of Robert Connelly, para. 73 and First Expert Report of Lawrence Smith, para. 284.

<sup>181</sup> *NSEA*, s. 3 (v). See also First Affidavit of Christopher Daly, para. 5.

include consideration of whether the effects of the project would be consistent with the community's core values.<sup>182</sup>

204. As a result of these statutory requirements, the JRP Agreement signed between Canada and Nova Scotia made reference to the requirements of both the *CEAA* and the *NSEA*, that is, both environmental and socio-economic effects. Likewise the EIS Guidelines sought information on the "Existing Human Environment" and on "Social and Cultural Patterns".<sup>183</sup> The Respondent also submits that GQP and Bilcon raised the respective concerns for the first time in this arbitration, noting again that GQP did not avail itself of the opportunity to comment on the JRP Agreement and the TOR at a meeting held on 29 August 2003 (*see* para. 195 above).
205. The Respondent adds that, although the JRP released the draft EIS Guidelines for public comment on 10 November 2004, Bilcon provided no comments on the draft EIS Guidelines at the time.<sup>184</sup> On 15 December 2004, the JRP requested Bilcon to review the draft EIS Guidelines and to provide comments. According to the Respondent, Bilcon provided "cursory" comments of two-and-a-half pages on the draft EIS Guidelines on 16 January 2005.<sup>185</sup> Bilcon's principal comment was a request that the concept of "adaptive management" be included in the EIS Guidelines.<sup>186</sup> The Respondent emphasizes that Bilcon never registered "a concern that the draft EIS Guidelines went beyond the scope of the JRP's Terms of Reference"<sup>187</sup> and that Bilcon failed to object to the scope or content of the draft EIS Guidelines.<sup>188</sup>

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<sup>182</sup> First Expert Report of David Estrin, para. 230 ("inconsistency with community core values ... is a pure socio-economic effect").

<sup>183</sup> JRP Agreement, para. 6.3; Appendix to the JRP Agreement (Terms of Reference for the JRP, Part III), Exhibit R-27; EIS Guidelines, p. 45, Exhibit R-210.

<sup>184</sup> Counter-Memorial, para. 171; Letter from Robert Fournier to Paul Buxton, dated 15 December 2004, Exhibit R-242.

<sup>185</sup> Counter-Memorial, paras. 171-173; Letter from Paul Buxton to Stephen Chapman, dated 16 January 2005, Exhibit R-243.

<sup>186</sup> Counter-Memorial, para. 173.

<sup>187</sup> Counter-Memorial, para. 173; First Affidavit of Stephen Chapman, para. 46.

<sup>188</sup> Counter-Memorial, para. 176. *See also* Letter from Robert Fournier to Paul Buxton, dated 31 March 2005, Exhibit R-210.

**(d) Whether the Investors Delayed the Review Process**

i. The Investors' Position

206. The Investors submit that they responded to all information requests made by provincial and federal government agencies and the JRP in a professional and timely manner.<sup>189</sup> They underscore the quantity of documentation they submitted, and the cost and time incurred by GQP and Bilcon in putting together the extensive documentation required by the JRP.<sup>190</sup> The Investors state that their EIS was over three thousand pages long, took 35 months to assemble, and involved 48 experts and 35 studies of the Whites Point project's environmental, social and economic impact.<sup>191</sup>

ii. The Respondent's Position

207. In relation to the establishment of the JRP, the Respondent submits that the final JRP Agreement was ready for implementation by February 2004, but that a request by Bilcon, seemingly made without Nova Stone's knowledge, to stay the execution of the agreement pending the restructuring of the GQP partnership caused substantial delay.<sup>192</sup> Once the GQP partnership had been dissolved, Bilcon was left as the sole proponent of the Whites Point project.<sup>193</sup> As explained in more detail in the arguments on jurisdiction, the Respondent takes the view that under Canadian law, the conditional, and non-transferable industrial approval for the 3.9 ha quarry became null and void as of the date of GQP's dissolution. Thus, in the Respondent's view, any measures involving the 3.9 ha quarry would have no bearing on the

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<sup>189</sup> Memorial, paras. 187-194; Witness Statement of Paul Buxton, paras. 62, 64; Letter from Paul Buxton to Robert Fournier, regarding the revised project description, dated 5 October 2006, Exhibit C-146; E-mail from Josephine Lowry, Bilcon of Nova Scotia, to Debra Myles, enclosing the revised White Points Quarry and Marine Terminal Project Description, dated 28 November 2006, Exhibit C-147. *See also* Reply, paras. 97-109; Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, dated March 2006, Exhibit C-1.

<sup>190</sup> Reply, paras. 108-109. For the list of response documents, *see* Reply, para. 108, n.108.

<sup>191</sup> Memorial, paras. 185-186. *See also* Witness Statement of Paul Buxton, para. 70.

<sup>192</sup> Memorial, paras. 157-159; E-mail from Jean Crépault to Brian Torrie, dated 27 February 2004, wherein Mr. Crépault states that GQP's lawyer contacted him to advise "that his clients would prefer to sort out this issue of two projects [the 3.9 ha quarry and the larger quarry and marine terminal] and two proponents [Nova Stone and GQP] first before signing the joint review agreement," Exhibit R-230; E-mail from Boris de Jonge to Jean Crépault, dated 1 March 2004, Exhibit R-203.

<sup>193</sup> Counter-Memorial, para. 159; Letter from Paul Buxton to Jean Crépault, dated 13 August 2004, Exhibit R-93.

present case for that reason, and also because the permit for the quarry terminated on 1 May 2004, which predates this Tribunal's jurisdiction.<sup>194</sup> Bilcon did not apply for a new permit.<sup>195</sup>

208. According to the Respondent, the EIS was finally submitted on 26 April 2006, six months after the date (24 November 2005) indicated by Bilcon.<sup>196</sup> According to the Respondent, the delay caused by Bilcon reflects its cavalier approach to the preparation of the EIS and the EA.<sup>197</sup> For most of the EA, Bilcon did not retain the services of an expert consulting firm.<sup>198</sup> In reviewing the EIS, the JRP discovered "significant deficiencies" in substance and form, including Bilcon's failure to follow the EIS Guidelines, as well as "apparent contradictions".<sup>199</sup>
209. As a result, the JRP requested additional information from Bilcon on 28 June and 28 July 2006. Bilcon again missed its self-imposed deadline, and filed what were, in the Respondent's view, "piecemeal responses" up until 12 February 2007.<sup>200</sup> The Respondent alleges that Bilcon did not take the EA seriously, regarding it merely as "hoops to jump through" and "a mere licensing process"<sup>201</sup> as reflected in the internal e-mail sent by Mr. Buxton to a colleague stating that they "need to cobble something together to satisfy the system".<sup>202</sup> Insofar as the Investors now contend that they were misled into thinking it was a purely scientific exercise, the Respondent maintains they were poorly advised by Mr. Buxton, since the legislation expressly lists additional criteria for which they should have been prepared, including socioeconomic considerations. Bilcon's unprofessional behaviour during the course of the EA had a serious impact on the JRP's view of the Whites Point project. In sum, Bilcon's EA was "ill-prepared",

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<sup>194</sup> Hearing Transcript, 25 October 2013, pp. 228-229, lines 16-25, 1-15 and pp. 233-234, lines 11-25, 1-12.

<sup>195</sup> Counter-Memorial, para. 160.

<sup>196</sup> Counter-Memorial, para. 180.

<sup>197</sup> Counter-Memorial, paras. 177-178.

<sup>198</sup> Counter-Memorial, para. 178; Letter from Phil Zamora to Paul Buxton, dated 14 April 2003, Exhibit R-54.

<sup>199</sup> Counter-Memorial, para. 181; Information Request No. 1 from the JRP to Bilcon, dated 28 June 2006, Exhibit R-250; Letter from Robert Fournier to Paul Buxton, dated 28 July 2006, attaching EIS Information Request of 28 July 2006, Exhibit R-219. *See also* Counter-Memorial, paras. 182-188.

<sup>200</sup> Counter-Memorial, para. 186; E-mail from Josephine Lowry to Debra Myles, dated 12 February 2007, Exhibit R-256. *See also* letter from Robert Fournier to Paul Buxton, dated 27 February 2007, Exhibit R-252.

<sup>201</sup> Counter-Memorial, para. 206; CLC Minutes, dated 24 November 2003, p. 234, Exhibit R-299; Presentation of Bilcon to Various Ministers of the Government of Nova Scotia, dated 10 January 2007, p. 12, para. 6, Exhibit R-330.

<sup>202</sup> Counter-Memorial, para. 187; E-mail from Paul Buxton to Uwe Wittkugel, dated 26 March 2007, Exhibit R-318.

“incomplete”, “raised more questions than answers” and “eroded the JRP’s confidence ‘in the conceptual design and associated quantitative underpinnings’”.<sup>203</sup>

**(e) Whether the Hearing Held before the JRP was Conducted Fairly and Impartially**

i. The Investors’ Position

210. The Investors allege that they were not given a fair and impartial hearing by the JRP because: (i) Bilcon was not allowed sufficient time to present information;<sup>204</sup> (ii) Bilcon’s experts were examined only superficially;<sup>205</sup> (iii) some of the supporters of the Whites Point project were denied the opportunity to speak;<sup>206</sup> and (iv) the JRP “welcomed” biased, inflammatory and anti-American comments made against Bilcon.<sup>207</sup>
211. More generally, the Investors allege that the hearing’s atmosphere was hostile toward Bilcon.<sup>208</sup> The hearing lacked any “significant consideration of the science”, and “turned into a soap opera” for activist groups opposed to the quarry.<sup>209</sup> The Investors point to the role played by former DFO Minister Thibault,<sup>210</sup> and, more generally, Canadian and Nova Scotian politics in creating an inhospitable climate for Bilcon throughout the EA.<sup>211</sup>

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<sup>203</sup> Counter-Memorial, para. 188; JRP Report, dated October 2007, p. 87, Exhibit C-34/R-212.

<sup>204</sup> Memorial, para. 206; JRP Hearing Transcripts, Volumes 1-13, dated 16 June-30 June 2007, Exhibits C-154—C-165; Letter from Bilcon’s consultant, Carlos Johansen, to the Hon. John Baird, Minister of Environment, dated 29 October 2007, stating the decision of the panel to not ask questions of him at the public hearings, Exhibit C-166. *See also* Memorial, para. 207; Letter from Carlos Johansen, Seabulk Systems Inc., to the Hon. John Baird and the Hon. Mark Parent, dated 29 October 2007, Exhibit C-153.

<sup>205</sup> Memorial, para. 212; Exhibit C-158; Witness Statement of Paul Buxton, para. 74.

<sup>206</sup> Reply, para. 112; Supplemental Witness Statement of Paul Buxton, paras. 49-50.

<sup>207</sup> Memorial, paras. 209-214; Witness Statement of Hugh Fraser, para. 17; JRP Hearing Transcript, Vol. 3, dated 19 June 2007, p. 612, line 22, Exhibit C-156; JRP Hearing Transcript, Vol. 7, dated 23 June 2007, pp. 1521, 1525, Exhibit C-160; JRP Hearing Transcript, Vol. 13, dated 30 June 2007, p. 3146, line 16 and p. 3177, line 10, Exhibit C-165; Witness Statement of Paul Buxton, para. 74; JRP Hearing Transcript, Vol. 5, dated 21 June 2007, pp. 1103, 1123, 1144, 1151, Exhibit C-158. Reply, paras. 121-128; Witness Statement of Hugh Fraser, paras. 22, 29-37.

<sup>208</sup> *See especially* Memorial, paras. 205, 213; Letter from Carlos Johansen to the Hon. John Baird, regarding the hostile attitude towards the proponent at the public hearings, dated 29 October 2007, Exhibit C-153.

<sup>209</sup> Reply, paras. 115-117; Supplemental Witness Statement of Paul Buxton, para. 46.

<sup>210</sup> Memorial, paras. 232-233; JRP Hearing Transcript, Vol. 11, dated 28 June 2007, p. 2661 and p. 2663, line 22, Exhibit C-163. On the alleged role of former Minister Thibault, *see* Memorial, paras. 126-132; Journal note by Bruce Hood, disclosing a statement made by Minister Robert Thibault evidencing his use of powers to lengthen the environmental assessment of the Whites Point Quarry, undated, p. 801619, Exhibit C-370; E-mail from Richard Nadeau to Kaye Love, discussing DFO Ministerial considerations, dated 26 June 2003, Exhibit C-63; E-mail from Bruce Young to Paul Bernier, discussing the Ministerial



ii. The Respondent's Position

212. The Respondent takes the view that Bilcon had a “full opportunity, through its representatives and experts”, to be heard and to challenge any presenter at the JRP’s hearing.<sup>212</sup> It is the Respondent’s position that Dr. Fournier, the JRP’s chair, “maintained order and efficiency [of the hearing], while doing what he was supposed to do—allow the public to provide their comments on the project”.<sup>213</sup> Bilcon was “ill-prepared” for the hearing, and thus unable to take full advantage of the opportunity offered by this process to engage with the JRP and the public.<sup>214</sup>

**(f) Whether the JRP Unlawfully Recommended Rejection of the Project**

i. The Investors' Position

213. According to the Investors, the JRP Report was “based on the Panel’s subjective views of the Whites Point Quarry” and not on “objective environmental factors”.<sup>215</sup> The JRP’s recommendations included what were, in the Investors’ view, six flawed public policy recommendations that exceeded the JRP remit.<sup>216</sup> These six recommendations were also “in themselves fundamentally flawed”.<sup>217</sup> The Investors allege that the JRP was bound to base its recommendation exclusively on the “factors set out in s. 16 of the *CEAA*, and Part IV of the *Nova Scotia Environment Act*”.<sup>218</sup> It was impermissible for the JRP to consider the public interest beyond the requirements explicitly set out in the Act.<sup>219</sup> The applicable test was whether the project has a “major or catastrophic” adverse environmental effect.<sup>220</sup>

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considerations, dated 25 July 2003, Exhibit C-64; Journal note by Bruce Hood, undated, p. 801641, Exhibit C-381; Journal note by Bruce Hood, undated, p. 801639, Exhibit C-382.

<sup>211</sup> Memorial, para. 233.

<sup>212</sup> Counter-Memorial, para. 192.

<sup>213</sup> Counter-Memorial, para. 193.

<sup>214</sup> Counter-Memorial, para. 194; JRP Hearing Transcript, Vol. 1, dated 16 June 2007, pp. 75-90, Exhibit R-327.

<sup>215</sup> Memorial, para. 242; First Expert Report of David Estrin, paras. 484, 492, 501-502.

<sup>216</sup> Memorial, para. 241; JRP Report, dated October 2007, pp. 104-107, Exhibit C-34/R-212.

<sup>217</sup> Reply, para. 135.

<sup>218</sup> Memorial, para. 248; *CEAA*, s. 34; Cl. 6.3 of the Agreement concerning the Establishment of a Joint Review Panel, dated 3 November 2004, p. 5, Exhibit C-114.

<sup>219</sup> Reply, para. 142; JRP Report, dated October 2007, p. 4, Exhibit C-34/R-212.

<sup>220</sup> Reply, para. 130; SAEE Reference Guide, November 1994, p. 188, Exhibit C-384.

214. In failing to address the prerequisite mitigation measures, criticizing Bilcon's adaptive management approach,<sup>221</sup> and relying on outside factors (such as public involvement, ecosystem approach, sustainable development, an improperly expansive precautionary principle, community core values and effects on future similar projects under the NAFTA),<sup>222</sup> the JRP exceeded its TOR and effectively "advance[d] its own view of environmental law reform".<sup>223</sup> The Investors take the view that the JRP's report contained numerous errors<sup>224</sup> and was aimed at setting environmental policy.<sup>225</sup>

ii. The Respondent's Position

215. The Respondent submits that the JRP's report complied with the requirement under the *CEAA* and the *NSEA* to assess any information that shed light on all possible environmental effects of the Whites Point project.<sup>226</sup> The JRP determined, on the basis of the applicable federal and Nova Scotia law, that the project would lead to significant adverse environmental effects. The JRP was mandated under Part IV of the *NSEA* to consider the socio-economic effects of a project in particular, an inquiry that can include whether the proposed project goes against the community's core values.<sup>227</sup> These requirements for the JRP to go beyond the impact of a project on the physical environment were also reflected in the EIS Guidelines, in particular the requirement for the proponent to provide information on the "Existing Human Environment" and on "Social and Cultural Patterns".<sup>228</sup>

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<sup>221</sup> Memorial, paras. 244 and 252; First Expert Report of David Estrin, paras. 241, 321, 364-365, 381, 408.

<sup>222</sup> Memorial, paras. 246, 250-261; JRP Report, dated October 2007, pp. 14, 20, 83, 92-93, 128, Exhibit C-34/R-212; First Expert Report of David Estrin paras. 321, 408; Transcription of CBC radio interview of Robert Fournier (JRP), dated 20 December 2007; Exhibit C-180.

<sup>223</sup> Reply, para. 132.

<sup>224</sup> Memorial, para. 269; JRP Hearing Transcript, Vol. 1, dated 16 June 2007, p. 149, line 18, where Paul Buxton noted: "If that situation stays as it is, then of course we will live with it and we have designed around it, and we feel that we can accommodate it.", Exhibit C-153. Reply, para. 129; Supplemental Witness Statement of Paul Buxton, para. 54.

<sup>225</sup> Reply, para. 134; CBC News, "Digby quarry rejection on environmental grounds could set precedent panel chair", Exhibit C-652.

<sup>226</sup> Rejoinder, paras. 33-37; First Expert Report of Lawrence Smith, paras. 282-291.

<sup>227</sup> Rejoinder, para. 35 (referring to First Expert Report of David Estrin, para. 230 and Second Expert Report of David Estrin, paras. 306, 311); *NSEA*, s. 3; First Affidavit of Christopher Daly, para. 5.

<sup>228</sup> Rejoinder, para. 36; JRP Agreement, paras. 4.1, 6.3, Exhibit R-27; EIS Guidelines, p. 45, Exhibit R-210; First Expert Report of Lawrence Smith, paras. 262-275.

216. Moreover, the Respondent observes that the JRP makes only a recommendation and does not constitute in itself a legally binding determination on the Investors of which they can complain in this setting.<sup>229</sup>

**(g) Whether the Local Community Support for the Whites Point Project was Extensive**

i. The Investors' Position

217. The Investors submit that there was strong community support for their project.<sup>230</sup> Job creation would have been a significant benefit to the Digby Neck area flowing from the Whites Point project.<sup>231</sup> According to the Investors, the high level of public support was reflected in the 316 signatures of a petition to the federal Ministry for the Environment, the NSDEL and the Chair of the JRP stating that the petitioners were of the opinion that jobs created by the project would be "vital to the economic future of this area".<sup>232</sup>

ii. The Respondent's Position

218. The Respondent argues that the project lacked public support.<sup>233</sup> At the 14 meetings of the Community Liaison Committee between July 2002 and October 2003, a "high level of public concern over the larger project proposal" emerged.<sup>234</sup>

219. The Respondent highlights that most of the submissions received by the JRP were critical. The chief concerns expressed by many members of the community was the project's adverse impact on the marine environment, groundwater, tourism and the community's well-being.<sup>235</sup>

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<sup>229</sup> Hearing Transcript, 31 October 2013, p. 175.

<sup>230</sup> Memorial, paras. 195-203.

<sup>231</sup> Memorial, para. 196.

<sup>232</sup> Petition, dated 26 June 2007, Exhibit C-182.

<sup>233</sup> Counter-Memorial, paras. 445 and 461; Excerpt from Focus Report Touquoy Gold Project Moose River Gold Mines, Nova Scotia, Executive Summary, p. 168, Exhibit R-345; First Expert Report of David Estrin, Appendix F, p. 5; Belleoram Marine Terminal Project Comprehensive Study Report, dated August 2007, pp. 1-2, Exhibit R-357.

<sup>234</sup> Counter-Memorial, para. 80; Brad Langille note to file re: conversation with Mary Linyak, dated 27 March 2002, Exhibit R-88. *See also* Brad Langille note to file re: conversation with Jim Thurber, dated 2 April 2002, Exhibit R-89; Brad Langille note to file re: conversation with Tonya Wimmer, dated 3 April 2002, Exhibit R-90. *See also* E-mail from Brad Langille to Bob Petrie advising of inquiry from Chronicle Herald newspaper on quarry information, dated 9 April 2002, Exhibit R-91; Briefing Note by Brad Langille of 1 May 2002 that notes "there is a high degree of public concern over this project and inquiries have been received from the public, media and the NDP caucus", Exhibit R-92. *See also* First Affidavit of Bob Petrie, para. 14.

## **D. THE WHITES POINT EA GOVERNMENT DECISIONS**

### **1. Undisputed Facts**

220. On 22 October 2007, the JRP submitted its report to the federal Minister of the Environment and the Nova Scotia Minister of Environment and Labour, recommending rejection of the proposal.<sup>236</sup> Between 29 October and 16 November 2007, Bilcon requested in writing that the government of Nova Scotia dismiss the JRP's recommendations.<sup>237</sup> Nevertheless, on 20 November 2007, Nova Scotia adopted the JRP's recommendations to reject the Whites Point project.<sup>238</sup> The next month, the Canadian Government also accepted the JRP's recommendation and announced its decision not to issue the permits and authorizations that Bilcon had requested in connection with the Whites Point project.<sup>239</sup>

### **2. Disputed Facts**

221. The Parties differ on the following points: whether the decision of Nova Scotia and the involved federal departments to adopt the JRP's recommendations endorsed the JRP's recommendations and reasoning without reflection and consideration; and whether Nova Scotia's decision was independent of the federal Government's decision.

#### **(a) Whether the Governments' Adoptions of the JRP's Recommendations were Appropriately Reasoned**

##### **i. The Investors' Position**

222. The Investors allege that the Nova Scotia Minister of Environment and Labour "blindly endorsed" the JRP Report, without giving Bilcon an opportunity to respond or to meet with the Minister.<sup>240</sup> The Investors point to what they call a "failure" on the part of the Respondent to

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<sup>235</sup> Counter-Memorial, para. 184; First Affidavit of Stephen Chapman, para. 50.

<sup>236</sup> JRP Report, Environmental Assessment of the Whites Point Quarry and Marine Terminal Project, October 2007.

<sup>237</sup> Letter from Paul Buxton to Minister Mark Parent, dated 29 October 2007, Exhibit C-195; Letter from Paul Buxton to Minister Mark Parent, dated 8 November 2007, Exhibit C-196; Letter from Paul Buxton to Minister Mark Parent, dated 16 November 2007, Exhibit C-2.

<sup>238</sup> Letter from Minister Mark Parent to Paul Buxton, dated 20 November 2007, Exhibit C-541.

<sup>239</sup> Order in Council re Approval of the Government of Canada's response to the Environmental Assessment Report of the Review Panel, dated 13 December 2007, Exhibit C-205.

<sup>240</sup> Memorial, paras. 270-276; Letter from Paul Buxton to Nancy Vanstone, regarding a meeting that was scheduled with Bilcon, dated 9 January 2008, Exhibit C-199; Witness Statement of Paul Buxton, para. 84; Reply, para. 161.

arrange for a face-to-face meeting between the Minister and the Investors during his decision-making.

223. The Investors mount similar allegations in respect to the federal Minister for the Environment. According to the Investors, both tiers of government “failed to exercise the discretion they were obligated by law to exercise”, a violation of the principles of natural justice.<sup>241</sup> The Investors assert that the Respondent was obliged to provide detailed reasons as to why the project could not be justified.<sup>242</sup>

ii. The Respondent’s Position

224. The Respondent agrees with the Investors that a thorough consideration of the JRP’s recommendations and independent decision-making was required of both levels of government,<sup>243</sup> but submits that this standard was met.<sup>244</sup> The Respondent distinguishes the EA process under the auspices of the JRP, which is focused on information gathering, from the decision-making involving the federal and Nova Scotia governments, which accepted the JRP’s recommendation. While the JRP could only make recommendations,<sup>245</sup> the second part of the process involved the two levels of governments making autonomous decisions in light of their respective legislative regimes.<sup>246</sup> Still, the Respondent contends that accepting the JRP’s recommendation is not akin to acknowledging and adopting the JRP’s conduct in reaching that recommendation.<sup>247</sup>

225. In respect of the Investors’ concern regarding the absence of a face-to-face meeting, the Respondent maintains that Canadian law and natural justice “require one hearing, not two”.<sup>248</sup>

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<sup>241</sup> Memorial, paras. 277-282; Witness Statement of Paul Buxton, paras. 83, 85; First Expert Report of David Estrin, para. 534; Reply, paras. 161-165.

<sup>242</sup> Memorial, para. 281.

<sup>243</sup> Rejoinder, para. 38; Expert Report of Robert Connelly, para. 131.

<sup>244</sup> Counter-Memorial, paras. 207-212.

<sup>245</sup> Rejoinder, para. 38.

<sup>246</sup> Counter-Memorial, para. 205.

<sup>247</sup> Hearing Transcript, 30 October 2013, p. 180, lines 6-12.

<sup>248</sup> Hearing Transcript, 31 October 2013, p. 275.

**(b) Whether the Federal and Provincial Governments Considered the JRP's Recommendations Independently**

i. The Investors' Position

226. The Investors contend that Nova Scotia and the federal Government did not independently adopt the JRP's recommendations. The Investors maintain that "Canada and Nova Scotia did not formulate their respective responses in isolation".<sup>249</sup> The Investors conclude that the "fact that Nova Scotia happened to announce its decision first does not obviate Canada's responsibility for its decision".<sup>250</sup>

ii. The Respondent's Position

227. The Respondent maintains that the federal and provincial governments decided independently,<sup>251</sup> even though they agreed on a joint EA and were in regular communication throughout the EA process. Dual approval was required; Nova Scotia's decision to follow the JRP's recommendation "rendered any decision that could be made by the federal government moot, as the project could not proceed under Nova Scotia law".<sup>252</sup>

**V. THE JURISDICTION OF THE TRIBUNAL**

228. In international arbitration, it is for the applicant to establish that a tribunal has jurisdiction to hear and decide a matter. A Chapter Eleven tribunal only has authority to the extent that is provided by Chapter Eleven itself.

229. In Chapter Eleven, the NAFTA Parties, in the interest of ensuring "a predictable commercial framework for business planning and investment"<sup>253</sup> established protections for investors. They also enabled investors to bring a host state directly to arbitration for a legally binding decision. These remedial mechanisms mean that investors possessing the nationality of another NAFTA Party do not have to depend on their home state to espouse their grievances, as would be the case in general international law. Instead, investors can proceed directly to arbitration on their own. General international law also provides that a state is not automatically subject to the

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<sup>249</sup> Reply, para. 776, citing Second Expert Report of David Estrin, para. 346.

<sup>250</sup> Reply, para. 776.

<sup>251</sup> Rejoinder, para. 42.

<sup>252</sup> Counter-Memorial, para. 210; Rejoinder, paras. 38-43. Expert Report of Robert Connelly, para. 131. Hearing Transcript, 22 October 2013, p. 164.

<sup>253</sup> NAFTA, Preamble.

jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors. The Parties to NAFTA chose to go as far, but only as far, as they stipulate in Chapter Eleven towards enhancing the international legal rights of investors.

230. The Respondent advances five objections to the Tribunal's jurisdiction. First, the Respondent contends that the Investors' claims regarding the industrial approval for the 3.9 ha quarry do not "relate to" the Investors or their investment, as required by NAFTA Article 1101. Secondly, the Respondent maintains that some of the Investors' claims regarding the industrial approval for the 3.9 ha quarry are time-barred by NAFTA Chapter Eleven's limitation period. Thirdly, the Respondent submits that the JRP is not an organ of Canada and that, therefore, its actions cannot be attributed to the Respondent. Fourthly, the Respondent alleges that the Investors' claims concern measures that could not have caused them any loss. Fifthly, the Respondent raises an objection to the inclusion of William Ralph Clayton as a claimant in these proceedings on the basis that he maintains no ownership or direct financial interest in Bilcon of Delaware. This last objection was made on the fourth day of the hearing on jurisdiction and merits, and the Investors oppose it as untimely pursuant to Article 21(3) of the UNCITRAL Rules.

231. These defences will be addressed in sequence.

## **A. WHETHER THE INVESTORS' CLAIM 'RELATES TO' THE INVESTORS AND THEIR INVESTMENT**

### **1. The Respondent's Position**

232. The Respondent's first jurisdictional objection arises from NAFTA Article 1101(1), which reads:

This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;
- (b) investments of investors of another Party in the territory of the Party; and
- (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

233. The Respondent argues that the Investors' claim regarding the decisions and actions of the DFO in respect of the 3.9 ha quarry relate to Nova Stone only<sup>254</sup> rather than to the Investors as required by NAFTA Article 1101. Nova Stone, not Bilcon, obtained the industrial approval for the 3.9 ha quarry from the NSDEL on 30 April 2002; Bilcon joined Nova Stone in partnership thereafter but it never had any rights over the 3.9 ha quarry.<sup>255</sup>
234. The Respondent relies on the interpretation by the *Methanex* tribunal,<sup>256</sup> according to which, Canada contends, the phrase "relating to" in Article 1101(1) requires a "legally significant connection between the measure and the investor".<sup>257</sup> Thus, according to the Respondent, the *Methanex* tribunal plainly rejected the Investors' proposition that "NAFTA tribunals have interpreted Article 1101 . . . by deciding that a measure 'relates to' an investor or investment if it affects the investor or investment".<sup>258</sup>
235. As the *Methanex* tribunal did not define "legally significant connection", the question whether a legally significant connection exists between an impugned measure and an investor or investment must be decided on a case-by-case basis.<sup>259</sup> Here, the Respondent emphasizes that "the industrial approval was issued to Nova Stone and, as a matter of Nova Scotia law, neither the Claimants nor their investment had any rights or obligations under that approval."<sup>260</sup> Moreover, the *NSEA* provided that Nova Stone was prohibited from transferring, selling, leasing, assigning or otherwise disposing of the approval without the written consent of the Nova Scotia Minister of Environment and Labour. Nor could the execution of the partnership agreement between Bilcon and Nova Stone, entered into on 2 May 2002, extend the protection of the treaty to Bilcon in respect of the 3.9 ha quarry, after the issuance of the industrial approval.<sup>261</sup> In the Respondent's view, the industrial approval could not, therefore, have any "legally significant connection" to the Investors.

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<sup>254</sup> Counter-Memorial, para. 221.

<sup>255</sup> Counter-Memorial, para. 216 (referring to Memorial, paras. 459-460).

<sup>256</sup> Counter-Memorial, paras. 217-218.

<sup>257</sup> Counter-Memorial, para. 218 (referring to *Methanex Corporation v. United States of America*, UNCITRAL Arbitration Rules, First Partial Award, 7 August 2002, para. 147).

<sup>258</sup> Counter-Memorial, para. 218, n.466 (referring to Memorial, para. 748).

<sup>259</sup> Counter-Memorial, para. 218; Hearing Transcript, 22 October 2013, p. 173.

<sup>260</sup> Counter-Memorial, paras. 219-220; First Affidavit of Bob Petrie, paras. 15-17.

<sup>261</sup> Rejoinder, para. 50; First Affidavit of Bob Petrie, para. 15; *NSEA*, s. 59(1).



236. On this basis, the Respondent concludes that the Investors lack standing since, under international law, a claimant does not have standing to bring a claim on behalf of or for losses or damages suffered by one of its partners.<sup>262</sup>

## 2. The Investors' Position

237. The Investors argue, first, that the Respondent's measures fit the definition of "measures" in NAFTA Article 201(1), which defines measures as "any law, regulation, procedure, requirement or practice".<sup>263</sup> The Investors then argue that "there is a direct and significant connection" between the Respondent's measures and their impact on the Investors and the investment:<sup>264</sup>

The failure to grant the license to operate a 3.9 quarry to Nova Stone on April 30, 2002 constitutes a measure which directly relates to the Investor and its Investment. The joint-venture agreement called for the initial operation of a 10 acre quarry. This direct inclusion in the agreement satisfies the test for a "legally significant connection" between the Investors and measure established in *Methanex*. Furthermore, the industrial approvals to operate a quarry were the contribution that Nova Stone was making to the joint venture. The failure to obtain licenses hence directly and specifically relates to the Investment the Investor was seeking to make. Bilcon was directly involved in this project from the beginning.<sup>265</sup>

238. In any event, the Investors argue that "the drafters of NAFTA did not limit 'relating to' with prefixes like 'directly' or 'substantially'".<sup>266</sup> The Investors further argue that "Canada's *Statement on Implementation* supports the interpretation that NAFTA Article 1101 was intended to broadly bring foreign Investors and investments within Chapter 11's protection".<sup>267</sup> The Investors refer to decisions in the *Pope & Talbot* and *GAMI Investments* cases, in which the tribunals accepted that a measure need not have a direct link to the investor or investment to be "relating to" it; "it is also a measure relating to investment insofar as it might affect an enterprise owned by an investor of a Party".<sup>268</sup> The Investors submit that the NAFTA practice is

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<sup>262</sup> Rejoinder, para. 51 (referring to *Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paras. 154-155).

<sup>263</sup> Memorial, para. 742. NAFTA Article 201(1) provides: "For purposes of this Agreement, unless otherwise specified:...measure includes any law, regulation, procedure, requirement or practice."

<sup>264</sup> Memorial, para. 747.

<sup>265</sup> Reply, para. 711 (referring also to *Methanex Corporation v. United States of America*, UNCITRAL Arbitration Rules, First Partial Award, 7 August 2002, para. 147).

<sup>266</sup> Memorial, para. 743; Black's Law Dictionary, 5th ed. (St Paul: West Publishing Co, 1979), p. 1158, Exhibit CA-92.

<sup>267</sup> Memorial, para. 743; Canadian Statement on Implementation, NAFTA, p. 148, Exhibit CA-45.

<sup>268</sup> Memorial, paras. 748-749 (referring to *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL Arbitration Rules, Award Concerning "Measures Relating to Investment" Motion, 26 January 2000, paras. 33-34).

consistent with jurisprudence from international dispute resolution bodies considering other international treaties.<sup>269</sup>

239. The partnership agreement states that the partners agree to carry on a quarry and terminal business, that Nova Stone will transfer its lease over the property to the partnership as well as all necessary or desirable licenses or permits. Under the agreement, Bilcon would pay Nova Stone several hundred thousand dollars at an initial stage—until a mining license and dock permit were obtained—and then millions more, in stages, as the project progressed.<sup>270</sup>

### 3. The Tribunal's Analysis

240. The Tribunal recalls the holding of the *Methanex* tribunal that, to relate to investors of another Party, it was not enough for a measure to have an economic impact on an investor. Such an approach would expose host states to claims not only from an investor affected directly by a government measure, but also for example, the investor's suppliers, the suppliers to the investor's suppliers, and so on. Rather, the *Methanex* tribunal found that there must be a "legally significant connection" between a state measure and an investor. The *Methanex* tribunal acknowledged that "whilst the exact line may remain undrawn, it should still be possible to determine which side of the divide a particular claim must lie".<sup>271</sup> The present Tribunal considers the *Methanex* approach to be a sound basis for deliberation on this case.
241. In the view of the Tribunal, Bilcon had a significant legal connection with the proposed 3.9 ha quarry—and with the larger quarry and terminal project—as a result of its partnership agreement with Nova Stone. At this point Bilcon qualified as an investor for the purposes of Chapter Eleven of NAFTA. Bilcon had standing to raise challenges under Chapter Eleven in respect to government measures addressing matters such as industrial permits sought by Nova Stone, transfers of such permits to the partnership, approvals sought by Nova Stone, and applications by Nova Stone or the partnership for environmental licenses.

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<sup>269</sup> Memorial, paras. 744, 750-751 (referring to *Indonesia—Certain Measures Affecting the Automobile Industry*, Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, para. 14.82, and citing the WTO Appellate Body: "We agree with the Panel that the word 'affecting' refers primarily to 'the way in which [measures] relate to a covered agreement.' As the Appellate Body stated in *EC—Bananas III*, '[t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on' something else." *United States—Subsidies on Upland Cotton*, Report of the Appellate Body, WT/DS267/AB/R, 3 March 2005, para. 261).

<sup>270</sup> Partnership Agreement, Nova Stone and Bilcon, Exhibit R-293.

<sup>271</sup> Counter-Memorial, para. 218, citing *Methanex Corporation v. United States of America*, UNCITRAL Arbitration Rules, First Partial Award, 7 August 2002, para. 147.

## B. TIMELINESS OF THE INVESTORS' CLAIMS

### 1. The Respondent's Position

242. The Respondent's second jurisdictional objection arises from NAFTA Article 1116(2), which reads:

An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

243. The Respondent argues that the Investors' claims are time-barred, referring to the NAFTA provision just quoted, which it asserts "requires an investor to challenge a measure within three years of its first acquiring actual or constructive knowledge: (1) of the measure giving rise to the breach; and (2) that it has incurred loss or damage as a result of the breach".<sup>272</sup>

244. In the Respondent's view, the Investors, through Mr. Buxton, had actual knowledge of the measures upon which the Investors rely and of the alleged losses suffered at least five years before submitting their claim to arbitration on 17 June 2008.<sup>273</sup> It is undisputed that the industrial approval for the 3.9 ha quarry was null and void as of 1 May 2004.<sup>274</sup>

245. According to the Respondent, the Investors' interpretation of Article 1116(2), requiring a demonstration that a claimant had "concrete knowledge of actual loss",<sup>275</sup> is contrary to the ordinary meaning as affirmed by other NAFTA tribunals. Concrete knowledge of the actual amount of loss or damage is not a pre-requisite to the running of the time period under Article 1116(2). In support of its interpretation, the Respondent relies on the NAFTA awards in *Grand River*, *Mondev* and *UPS*.<sup>276</sup>

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<sup>272</sup> Rejoinder, para. 54. *See also* Counter-Memorial, para. 225; Letter from Meg Kinnear to Barry Appleton, dated 18 June 2008, Exhibit R-501; Letter from Barry Appleton to Meg Kinnear, dated 5 August 2008, Exhibit R-502.

<sup>273</sup> Rejoinder, para. 60; Letter from Paul Buxton to NSDEL, dated 25 June 2003, Exhibit R-382; Excerpt from 2003 Journal of Derek McDonald, dated 10 June 2003, Exhibit R-551.

<sup>274</sup> Counter-Memorial, para. 222; First Affidavit of Bob Petrie, para. 17. *See also* Counter Memorial, paras. 223-258; Rejoinder, paras. 54-60; Hearing Transcript, 25 October 2013, p. 228, lines 16-25.

<sup>275</sup> Rejoinder, para. 59 (referring to Reply, para. 727).

<sup>276</sup> Rejoinder, para. 59 (referring to *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL Arbitration Rules, Decision on Objections to Jurisdiction, 20 July 2006, para. 77 ("A party is said to incur losses, expenses, debts or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time."); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 87 ("a claimant may know that it has suffered

246. In the Respondent’s view, a textual interpretation of the word “first” in NAFTA Article 1116(2) confirms that the word identifies the start of a period or event.<sup>277</sup> While the NAFTA Contracting Parties contemplated that investors could challenge “continuing measures” under Chapter Eleven, the Respondent asserts that they “nonetheless addressed the precise moment at which the time bar applicable to such claims would apply. The running of the time bar is to be calculated from the ‘first’ acquisition of relevant knowledge, not subsequent, repeated or ultimate acquisition of such knowledge”.<sup>278</sup> Thus, “[w]hether a measure continues or ends is irrelevant to the operation of the NAFTA time bar because calculation of the three-year period is triggered by ‘first’ knowledge of breach and loss”.<sup>279</sup> The Respondent submits that all three NAFTA Contracting Parties support this interpretation of Article 1116(2), which also amounts to subsequent practice under Article 31(3)(b) of the Vienna Convention on the Law of Treaties.<sup>280</sup>
247. The Respondent denies that the measures that pre-date 17 June 2005 were “continuing” and argues that the continuing “effects” of a measure do not transform it into a “continuing measure”.<sup>281</sup> The industrial approval and the Blasting Conditions contained therein were null and void by 1 May 2004 when Nova Stone withdrew from the project and ceased to control the 3.9 ha parcel.<sup>282</sup> According to the Respondent, any loss or damage incurred from that measure had to be known by that date, as can be seen in a letter from Mr. Buxton to NSDEL of 25 June 2003.<sup>283</sup> Mr. Buxton’s letter states that:

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loss or damage even if the extent or quantification of the loss or damage is still unclear”); *United Parcel Service of America Inc. (UPS) v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits, 24 May 2007, para. 29 (“The fact that the exact magnitude of the loss was not yet finally determined would not have been enough... to avoid the time bar if the time bar otherwise would have applied.”)).

<sup>277</sup> Counter-Memorial, para. 226; Shorter Oxford Dictionary, 5th ed. (Oxford University Press, 2002), p. 965, Exhibit RA-69.

<sup>278</sup> Counter-Memorial, para. 240.

<sup>279</sup> Counter-Memorial, para. 246; *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL Arbitration Rules, ICSID Administered Case, Counter Memorial, paras. 236-238; *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL Arbitration Rules, ICSID Administered Case, Submission of the United States, paras. 11-13; *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL Arbitration Rules, ICSID Administered Case, Submission of Mexico.

<sup>280</sup> Counter-Memorial, paras. 229-230. The Respondent argues that *United Parcel Service of America Inc. (UPS) v. Government of Canada*, UNCITRAL Arbitration Rules, on which the Investors rely was wrongly decided on this point—a view shared by all three NAFTA parties.

<sup>281</sup> Counter-Memorial, para. 238.

<sup>282</sup> Counter-Memorial, para. 255; First Affidavit of Bob Petrie, para. 17; Rejoinder, para. 57.

<sup>283</sup> Letter from Mr. Paul Buxton to Nova Scotia Department of Environment and Labour, dated 25 June 2003, Exhibit R-382. See also Hearing Transcript, 25 October 2013, p. 228, lines 16-25.

*There are serious financial consequences which arise from our inability to operate in accordance with the Permit, and we are imploring the Province to stand behind the authority and enforce the conditions of the Permit.*

The Company has suffered significant costs due to the delay and the jurisdictional machinations employed by DFO. This Company has acted in good faith and we expect the same of the Province in interpreting and enforcing the Permit. We feel we have satisfied all conditions and we ask that you confirm that for us so that we may proceed with the work contemplated by the Permit. To do otherwise will make the Province complicit in the DFO conduct.

*Failure to act will cause severe economic hardship to the Company and the project. It will also send a clear message on the excessive difficulty and high level of uncertainty that companies face when they seek to invest in Nova Scotia.*<sup>284</sup>

Further, Bilcon entered into a new lease agreement with the owners of the land containing the 3.9 ha parcel that was subject to the industrial approval. It was thus Nova Stone and the Investors themselves who invalidated the industrial approval.<sup>285</sup>

248. The Respondent also rejects the Investors' contentions that the Blasting Conditions allowed the DFO to refuse permission to Bilcon to carry out test blasting during the EA or prevented Bilcon from accumulating the necessary data.<sup>286</sup> The Respondent submits that the Blasting Conditions had no impact on Bilcon's ability to gather the necessary data for its EA;<sup>287</sup> as Mr. Buxton testified, the Investors did not attempt to carry out test blasting during the EA process, though they could have done so.<sup>288</sup> Further, the "lack of test blasting" was not relied upon by the JRP as a reason to recommend against approval of the Whites Point project.<sup>289</sup>

249. Finally, the Respondent argues that the DFO decisions to which the Investors refer for their claims in this case had no continuing aspect. The scoping decision was made with immediate effect on 14 April 2003; the decision that at least a comprehensive study would be needed was made also on 14 April 2003; the referral to a JRP occurred on 26 June 2003.<sup>290</sup> To the extent

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<sup>284</sup> Letter from Mr. Paul Buxton to Nova Scotia Department of Environment and Labour, dated 25 June 2003, Exhibit R-382 (cited in Counter-Memorial, para. 251) (emphasis added).

<sup>285</sup> Counter-Memorial, para. 256.

<sup>286</sup> Rejoinder, para. 56 (referring to Reply, para. 700).

<sup>287</sup> Hearing Transcript, 23 October 2013, p. 136, lines 10-18.

<sup>288</sup> Hearing Transcript, 23 October 2013, p. 137, lines 10-16.

<sup>289</sup> Rejoinder, para. 58; Hearing Transcript, 31 October 2013, p. 153, lines 8-14; JRP Report, dated October 2007, pp. 14, 101-107, Exhibit C-34/R-212.

<sup>290</sup> Counter-Memorial, paras. 259-266; Rejoinder paras. 61-62; Hearing Transcript, 31 October 2013, p. 148, lines 16-21.

that these decisions entailed additional cost or expense as alleged by the Investors, those were known or should have been known before 17 June 2005.<sup>291</sup>

## 2. The Investors' Position

250. It is the Investors' position that there are two prerequisite conditions for the timing to commence on the three-year limitation period in NAFTA Article 1116(2). First, the investor must have acquired actual or constructive knowledge of the breach at issue. Secondly, the investor must have acquired knowledge that it has incurred loss or damage as a result of that breach. Only then does the period begin to run.<sup>292</sup>

251. The Investors assert that they suffered numerous continuous breaches with ongoing and direct effect until the ministerial decision on 17 December 2007.<sup>293</sup> Those breaches include:

- a) The conduct of the federal Department of Fisheries and Oceans, the Nova Scotia Department of Environment and Labour, jointly and separately, in relation to Bilcon's attempt to operate a quarry at Whites Point, which was set in motion by the industrial approval of its application on April 30, 2002. This measure includes:
  - i) The ongoing effect of the imposition, interpretation and application of blasting conditions on the Investment such that they were never able to be satisfied;
  - ii) The taking of jurisdiction by the Department of Fisheries and Oceans to address questions outside of the purported marine issues when it lacked said jurisdiction;
  - ii. The ongoing effect of the requirement to subject the Investment to a Comprehensive Study.
- b) The actions of the federal government and government of Nova Scotia, jointly and separately, to compel the Investors and the Investment to seek approval from the Joint Review Panel, which resulted in ongoing harm and damage to the Investors beginning on September 10, 2003 and continued through the Joint Review Panel process until the final Ministerial decisions. This measure includes:
  - i) Continuous unlawful and unilateral actions of the Department of Fisheries and Oceans
  - ii) The ongoing impact of the requirement that the Investment be referred to the Joint Review Panel;
  - iii) The application of the relevant domestic rules by failing to apply the binding transitional provisions of the Canadian Environmental Assessment Act to the Investment's permit application.<sup>294</sup>

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<sup>291</sup> Rejoinder, para. 62; Counter-Memorial, paras. 259-266.

<sup>292</sup> Reply, para. 717.

<sup>293</sup> Reply, para. 699 (but compare with the Memorial, para. 754, where the Investors stated that "[t]he effects of the loss of the Whites Point Quarry upon the Investment and its Investors continue to this day").

<sup>294</sup> Reply, para. 698.

252. At the hearing on jurisdiction and merits, the Investors emphasized how their inability to carry out test blasting at the 3.9 ha site prevented them from gathering “valuable scientific data that [they] could use for the purpose of developing the larger parcel”<sup>295</sup> as was seen in the JRP’s criticism of the absence of appropriate data.<sup>296</sup> The Investors likewise argued at the hearing that there was an “intimate link” between the smaller and larger quarries, contributing to their theory of a continuing act.<sup>297</sup>
253. The Investors argue that in international law continuing measures are well recognized<sup>298</sup> and “time limit rules do not prohibit claims challenging acts that are still continuing, because time limits only begin at the end of a continuing act”.<sup>299</sup> Referring to case law arising under the European Convention on Human Rights, such as *De Becker*, the Investors submit that “[i]nternational tribunals have consistently refused to bar claims challenging acts that are still continuing”.<sup>300</sup>
254. Moreover, the Investors maintain that NAFTA Article 1116(2) does not bar claims challenging continuing acts, pointing to the decisions in *Feldman* and *UPS*<sup>301</sup> in which, they assert, the tribunals found that repeated action constitutes a separate breach each day it is repeated.<sup>302</sup> In the Investors’ view, the drafters intended for the NAFTA agreement to apply to continuing measures, which, in the context of the present dispute, are those that were brought into existence before 27 December 2003, but that the Respondent maintained beyond that date.<sup>303</sup>

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<sup>295</sup> Hearing Transcript, 31 October 2013, p. 280, lines 13-15; *see also* p. 284, lines 20-23, elaborating on the continuous effect of the “original prevention of Bilcon being able to conduct a test blast going right through the piece all the way to the end of the JRP Report.”

<sup>296</sup> Hearing Transcript, 31 October 2013, p. 284, lines 5-19.

<sup>297</sup> Hearing Transcript, 31 October 2013, p. 290, lines 6-9.

<sup>298</sup> Reply, para. 713, referring to Article 14(2) of the International Law Commission’s Articles on State Responsibility for Internationally Wrongful Acts (“ILC Articles”).

<sup>299</sup> Memorial, para. 725, referring to *Report of the International Law Commission on the Work of its Thirtieth Session: 8 May-28 July 1978*, Document A/33/10, 1978 Yearbook of the International Law Commission, p. 91, n.437, Exhibit CA-77: “. . . in the case of a ‘continuing’ wrongful act, however, this *dies [a quo]* of the time limit] can be established only *after* the end of the time of commission of the wrongful act itself.”

<sup>300</sup> Memorial, para. 729, citing *De Becker v. Belgium*, European Court of Human Rights Application No. 214/56, 9 June 1958, Yearbook of the European Convention on Human Rights (1958-1959), p. 214, Exhibit CA-79.

<sup>301</sup> Memorial, paras. 734-737; Reply, para. 725.

<sup>302</sup> Memorial, para. 734.

<sup>303</sup> Reply, para. 714.

255. Referring to other NAFTA cases and Article 31(1) of the Vienna Convention on the Law of Treaties,<sup>304</sup> the Investors submit:

It is precisely at this point where the concept of continuing breach dovetails with that of non-continuing breach. Bilcon could not know of the loss it incurred from Canada's continuing measures until those measures were actually applied to it in concrete situations. That is, the time-bar on continuing measures could not possibly start to run until those measures were applied to Bilcon in particular circumstances.<sup>305</sup>

The Investors differentiate the *Grand River* case on which the Respondent relies, on its facts.<sup>306</sup>

256. In the alternative, the Investors submit that they only acquired knowledge that they incurred loss or damage at the moment in which they learned of the federal Minister's acceptance of the JRP Report.<sup>307</sup> The DFO's refusal to authorize blasting did not cause any loss or damage and therefore did not trigger the limitation period to run.<sup>308</sup> The Investors state that it was not until December 2007 that "it became official that the federal and provincial governments accepted the Joint Review Panel's recommendation to reject Bilcon's application; thereby, making it official, for the first time, that Bilcon would not be able to move forward in its planned investment".<sup>309</sup>

257. The Investors argue that their interpretation of "loss or damage" under NAFTA is supported by decisions of NAFTA tribunals which require that the breach of NAFTA be the cause for the "loss or damage" suffered by the investor.<sup>310</sup>

### 3. The Tribunal's Analysis

258. The Tribunal agrees that the general rules of international law on time-limits and their consequences are applicable to the question before it, but is also aware that specific terms of NAFTA might enjoy priority as *leges speciales*. Thus, case law must be viewed in the context of the particulars of the laws at play and the factual situations in each case.

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<sup>304</sup> Reply, para. 729.

<sup>305</sup> Reply, para. 730.

<sup>306</sup> Reply, para. 719; *see also* Investors' interpretation of this decision in paras. 720-724.

<sup>307</sup> Reply, para. 737.

<sup>308</sup> Reply, para. 739.

<sup>309</sup> Reply, para. 740.

<sup>310</sup> Reply, para. 741, referring to *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 87, and *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Arbitration Rules, Second Partial Award, 21 October 2002, para. 140.



259. The Investors begin their review of general international law by citing the *De Becker* case.<sup>311</sup> In that case, in 1947 a Belgian Military Tribunal had confirmed a conviction of the applicant for wartime collaboration and modified his death sentence to life imprisonment. By operation of statute law various disabilities attached to the conviction, including a ban from practising De Becker’s profession of journalism. In 1955, the European Convention on Human Rights entered into force. Basing himself on the Convention, De Becker filed a complaint against the ban over a year later. The Convention precluded recourse to the European Commission on Human Rights *ratione temporis* until domestic remedies were exhausted, further a complaint had to be made within six months of “the final decision”. The Commission found that the six-month bar was not applicable. The disabilities were an ongoing state of affairs. The applicant was not challenging the 1947 conviction, but rather the ongoing operation of law for which there was no domestic legal remedy. The Commission found that under international law, restrictive provisions concerning timeliness were not to be given a “broad interpretation”, and that this was especially the case when human rights were at issue.
260. To indicate the complications that can arise in trying to applying case law in one area to other contexts, *De Becker* differs from the case before the Tribunal in respects that include the following: the issue here does not involve human rights; there is here no question of the applicability of new domestic law to events that began before its inception; and the challenge here concerning timeliness is to decisions (such as the referral to a JRP) that interpret and apply a law in specific relation to Bilcon, rather than to a law itself.
261. The most relevant case law concerns timeliness in the NAFTA context. In the *UPS* case, the core issue was the maintenance of the monopoly of Canada Post, embodied in statute law, over small parcel deliveries, to the exclusion of the investor, a state of affairs which had been in place for more than three years before the filing of the investor’s claim. Bilcon refers to the passage of the award already quoted by the Tribunal above, in which the view is expressed that continuing courses of conduct constitute continuing breaches and renew the limitation period accordingly.<sup>312</sup> However, the tribunal in *UPS* clarified that in the case of a continuing breach the claimant can only obtain compensation in respect of the loss occurring within the three years prior to the filing of the NAFTA claim:

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<sup>311</sup> *De Becker v. Belgium*, European Court of Human Rights Application No. 214/56, 9 June 1958, Yearbook of the European Convention on Human Rights (1958-1959), p. 214, Exhibit CA-79.

<sup>312</sup> Memorial, para. 735 (citing *United Parcel Service of America Inc. (UPS) v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits, 24 May 2007, para. 28).

Although we find that there is no time bar to the claims, the limitation period does have a particular application to a continuing course of conduct. If a violation of NAFTA is established with respect to any particular claim, any obligation associated with losses arising with respect to that claim can be based only on losses incurred within three years of the date when the claim was filed. A continuing course of conduct might generate losses of a different dimension at different times. It is incumbent on claimants to establish the damages associated with asserted breaches, and for continuing conduct that must include a showing of damages not from the inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2). This is not, however, a matter we need to address further at this point apart from the specific claims.<sup>313</sup>

The *UPS* tribunal dismissed the NAFTA claim on the merits.

262. In the *Mondev* case, on which Canada relies heavily, the issue was whether liability for certain state actions attributable to the United States was barred because these actions had occurred prior to the entering into force of NAFTA in 1994. The tribunal excluded from eligibility various actions that had taken place prior to NAFTA's entering into force, and considered on the merits a court decision that had been rendered after that date. With respect to the pre-1994 actions, the tribunal stated that, as they did not trigger NAFTA liability in the first place, they could not be the subject of ongoing duties by state authorities to remedy NAFTA breaches that remained virulent after NAFTA had entered into force. With respect to the investor's theory of continuing breaches, the tribunal stated as follows:

Since the claims within the Tribunal's jurisdiction are limited to those under Article 1105 which challenge the decisions of the United States courts, no question arises as to the time bar. The present proceedings were commenced within three years from the final court decisions. If it had mattered, however, the Tribunal would not have accepted *Mondev's* argument that it could not have had 'knowledge of...loss or damage' arising from the actions of the City and BRA prior to the United States court decisions. *A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear. It must have been known to Mondev, at the latest by 1 January 1994, that not all its losses would be met by the proceedings LPA had commenced in Massachusetts.* In any event, the words 'loss or damage' refer to the loss or damage suffered by the investor as a result of the breach. Courts award compensation because loss or damage has been suffered, and this is the normal sense of the term 'loss or damage' in Articles 1116 and 1117. Thus if *Mondev's* claims concerning the conduct of the City and BRA had been continuing NAFTA claims as at 1 January 1994, they would now be time-barred. This is a further reason for limiting the Tribunal's consideration of the substantive claims to those concerning the decisions of the United States' courts.<sup>314</sup>

Canada places strong emphasis on the italicized passage.

263. The *Feldman* case involved taxation of the investor in respect of its cigarette sales. The facts included a complicated series of legislative acts, administrative decisions and court challenges

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<sup>313</sup> *United Parcel Service of America Inc. (UPS) v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits, 24 May 2007, para. 30.

<sup>314</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 87 (emphasis added).

that unfolded over a number of years, many of them before the three-year period began. The tribunal considered, and upheld on the merits, claims concerning the denial of a set of specific requests for tax rebates, each request having been filed within the three years.<sup>315</sup>

264. In the *Grand River* case, federal and state authorities within the United States had enacted a series of laws in connection with a Master Settlement Agreement reached between a group of U.S. states and a group of tobacco manufacturers. The tribunal held that claims in respect of enactments at the federal and state level, including requirements for producers to make payments based on a percentage of their sales into escrow funds, were barred by the three-year rule. The tribunal allowed claims to be considered on the merits, however, in respect of later enactments to strengthen the scheme established by the Master Settlement Agreement and to pressure other manufacturers into joining that agreement. The tribunal's reasoning was as follows:

In the circumstances here, the Tribunal has difficulty seeing how NAFTA Articles 1116(2) and 1117(2) can be interpreted to bar consideration of the merits of properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events. As the Permanent Court observed, while "a dispute may presuppose the existence of some prior situation or fact...it does not follow that the dispute arises in regard to the situation or fact." The *Mondev* and *Feldman* tribunals both considered the merits of claims regarding events occurring during the three-year limitations period, even though they were linked to, and required consideration of, events prior to the limitations period or to NAFTA's entry into force. In *Mondev*, the Tribunal considered (and rejected) the Claimant's claim that it had suffered a denial of justice in connection with state court proceedings occurring after NAFTA entered into force, although the dispute underlying the litigation arose years before. In *Feldman*, the Tribunal awarded damages in respect of discrimination occurring during the three-year limitations period, but its analysis of this and other claims again required consideration of earlier events.<sup>316</sup>

265. While the Parties to the present case have sharply different views on whether *UPS* was correct or not in its handling of the three-year rule, the Tribunal does not find it necessary to decide the matter. *UPS* involved its own set of facts, including some measures that predated NAFTA or were of wide application rather than being specifically directed at the investor only.
266. In the present case, the Tribunal finds it possible and appropriate, as did the tribunals in *Feldman*, *Mondev* and *Grand River*, to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits.

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<sup>315</sup> *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 203.

<sup>316</sup> *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL Arbitration Rules, Decision on Objections to Jurisdiction, 20 July 2006, para. 86 (internal citations omitted).

267. The essential acts and omissions concerning governmental approval of Nova Stone's 3.9 ha quarry application and the referral of the environmental assessment to a JRP were completed before 17 June 2005. Nova Stone's application expired on 1 May 2004, before the three year period began to run.<sup>317</sup> The referral to the JRP was made by the Minister on 7 August 2003. The *effects* of various decisions concerning the attaching of conditions to the Department of Fisheries and Oceans permit or the refusal to issue it and the referral of the case to a JRP might have extended into the three-year period and beyond, but that is not sufficient to turn them into ongoing acts for the purposes of the three-year limitation period. The key decisions with respect to the Nova Stone permit and the referral to the JRP were made in respect of the specific project of concern to the Investors and relayed to the Investors several years before the three-year period even began.
268. The Tribunal's position that an act can be complete even if it has continuing ongoing effects, is in line with the view of the tribunal in *Mondev*, and further consistent with Article 14(1) of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, according to which:
- The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
269. The Investors refer in their submissions to the ongoing effect of imposing blasting conditions, the ongoing effect of requiring (initially) a comprehensive study of the investment and the ongoing impact of the referral of the project to the JRP.<sup>318</sup> These ongoing impacts, however, do not establish that there were ongoing acts.
270. The task of the JRP, in the Tribunal's understanding, was not to sit as a reviewing or appellate body with respect to earlier decisions by officials belonging to the executives of Nova Scotia and Canada. The Investors might have had various domestic remedies with respect to these earlier decisions, considered in their own right, including perhaps judicial review. If they had been of a sufficiently serious character, some of these acts might in themselves or in combination have constituted the basis for a NAFTA claim.
271. Even if a distinct act has been completed, however, the three-year period does not begin to run until that investor "first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage".

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<sup>317</sup> As explained in Counter-Memorial, para. 160, n.363, relying on First Affidavit of Bob Petrie, para. 17.

<sup>318</sup> Memorial, para. 753.

272. With respect to the issuing of the permit for the 3.9 ha quarry, which would have allowed blasting, the conditional permit expired long before the three-year period began to run. Compliance with federal Canada's Blasting Guidelines was one of the conditions attached to industrial approval issued by the Nova Scotia Department of Environment and Labour on 30 April 2002.<sup>319</sup> The permit expired two years later. The Investors were informed on 12 November 2004, that officials had earlier provided mistaken information concerning the need for a 500 meter setback in order to comply with federal fisheries guidelines.<sup>320</sup> On 10 September 2003, Bilcon received notice that the project had been referred to a JRP.
273. In order to fulfill the requirements of Article 1116(2), it is necessary, however, that the investor has actual or constructive knowledge not only of an "alleged breach" of Chapter Eleven, but also that the investor has incurred "loss or damage". In this regard Bilcon argues that the time limitation in Article 1116(2) should not be interpreted and applied in a way that effectively requires an investor to already file a claim when it has "incurred loss in some abstract sense" rather than having a "concrete knowledge of the actual loss it has incurred as a result".<sup>321</sup>
274. As against this, Canada submits that the "overwhelming weight of authority" from the case law of NAFTA tribunals is to the effect that "*concrete* knowledge of the *actual* amount of loss or damage is *not* a prerequisite to the running of the time period under Article 1116(2)".<sup>322</sup> The Tribunal recalls that Canada cites to this effect the following NAFTA decisions: (i) *Grand River*: "A party is said to incur losses, expenses, debts or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time".<sup>323</sup> (ii) *Mondev*: "[A] claimant knows that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear".<sup>324</sup> (iii) *UPS*: "The fact that the exact

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<sup>319</sup> Letter from Bob Petrie to Paul Buxton, with approval attached, dated 30 April 2002, Exhibit R-87.

<sup>320</sup> E-mail from Phil Zamora to Paul Buxton, dated 12 November 2004, Exhibit R-531.

<sup>321</sup> Reply, para. 727.

<sup>322</sup> Rejoinder, para. 59.

<sup>323</sup> *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL Arbitration Rules, Decision on Objections to Jurisdiction, 20 July 2006, para. 77.

<sup>324</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 87.

magnitude of the loss was not yet finally determined would not have been enough to avoid the time bar if the time bar otherwise would have been applied”.<sup>325</sup>

275. The Tribunal agrees with the reasoning of its predecessors on this point. The plain language of Article 1116(2) does not require full or precise knowledge of loss or damage. It might be that some qualification can be read into the plain language, such as a requirement that the loss be material. To require a reasonably specific knowledge of the amount of loss would, however, involve reading into Article 1116(2) a requirement that might prolong greatly the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue; it would have to be determined in each case not only whether there is actual or constructive knowledge of loss or damage, but whether the investor has knowledge that is sufficiently “actual” or “concrete”.
276. There might be some practical advantages resulting from a decision by an investor to forego bringing a claim until the investor is reasonably certain in its own mind about the precise nature and amount of loss or damage. The investor would be in a better position to gauge the potential gains from successful litigation in comparison to its cost. The host state would be in a better position to assess its financial exposure, and make decisions about whether to settle and how much to invest in defending the claim.
277. However, pragmatic observations like the ones just mentioned are not all on the side of interpreting Article 1116(2) in a manner that expands the timing options open to an investor. A host state can be prejudiced by a loss of institutional memory or documents on its part concerning the alleged breaches. Delay in bringing a claim might result in a situation where a host state is unknowingly carrying on acts or omissions for which it might be ordered to pay compensation.
278. With respect to knowledge of damage or loss concerning the 3.9 ha quarry, Canada submits to the Tribunal’s attention a letter dated 25 June 2003, from Mr. Buxton, the lead Nova Stone representative in dealing with the authorities involved, to Mr. Petrie, an official at the NSDEL.<sup>326</sup> The letter states that Nova Stone was in a position to begin the production of aggregate and that it has complied with all the terms of its Nova Scotia permit, including compliance with the DFO Blasting Guidelines. It expresses concern about the failure to that

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<sup>325</sup> *United Parcel Service of America Inc. (UPS) v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits, 24 May 2007, para. 29.

<sup>326</sup> Letter from Paul Buxton to Bob Petrie, dated 25 June 2003, Exhibit R-382.

point of the DFO to confirm compliance. It urges Nova Scotia to not permit the DFO to effectively override provincial jurisdiction.

279. With respect to loss and damage from decisions by federal Canada and Nova Scotia to refer the matter to a JRP, an expert report by Mr. David Estrin, submitted by Bilcon, explains how rare it is to conduct an assessment at this most demanding of levels, and explains that:

the use of a Review Panel process clearly can, as is demonstrated in the WPQ case, be prejudicial to a project proponent, in terms of burden, cost, time as well as outcome. The following terms describe important negative aspects of a Review Panel process compared to a screening or even a comprehensive study EA for a project proponent: ‘time-consuming’, ‘complex’, ‘expensive’ as well as ‘less predictable as to outcome’.<sup>327</sup>

280. The Investors must have known of the expense and delay associated with participating in a JRP process long before 17 June 2005. A massive EIS was submitted by the Investors on 24 April 2006. According to Paul Buxton, he had worked on it for three and a half years.<sup>328</sup>
281. The Tribunal takes the view, therefore, that as regards the breaches identified by the Investors that arose prior to the beginning of the three-year period starting on 17 June 2005, the corresponding claims must be considered time-barred. They were distinct and completed events, specifically brought about by executive officials in relation to the project rather than of general application, and the Investors had actual or constructive knowledge that these breaches would cause significant loss or damage, even if the full extent of their ongoing adverse effects was not known.
282. The Tribunal appreciates the thorough effort both sides in this dispute have made to investigate, document, present witnesses and argue regarding the events which the Tribunal has found to be time-barred. Some of these efforts provide necessary context to the consideration of the merits in respect of the rest of the case. While Article 1116(2) bars breaches in respect of events that took place more than three years before the claim was made, events prior to the three-year bar, however, are by no means irrelevant. They can provide necessary background or context for determining whether breaches occurred during the time-eligible period. Whether a party is an investor, or has made an investment, can depend in a case on activities that took place before the three-year clock began to run. The legitimate expectations of an investor—a factor that may be part of an overall analysis of whether treatment has breached the minimum standard of fairness—may depend crucially on contracts, assurances or the legal landscape, including existing statutes and judicial and administrative precedents, that existed before an alleged

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<sup>327</sup> First Expert Report of David Estrin, para. 28.

<sup>328</sup> Witness Statement of Paul Buxton, para. 70.

breach took place. The Tribunal is supported in this respect by the following passage from the *Mondev* award:

On the other hand, it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force. To the extent that the last sentence of the passage from the Feldman decision, quoted, appears to say the contrary, it seems to the present Tribunal to be too categorical, as indeed the United States conceded in argument.

Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.<sup>329</sup>

## C. ATTRIBUTION OF THE ACTS OF THE JRP TO THE RESPONDENT

### 1. The Respondent's Position

283. The Respondent accepts that it is responsible for the acts of the following entities: the DFO, the Agency and NSDEL. There is also no dispute that Canada is responsible as a matter of international law for the acts of the Minister of Fisheries and Oceans, the Minister of the Environment or the Nova Scotia Minister of Environment and Labour when they act in their Ministerial capacities. Finally, there is no dispute between the Parties that Canada is responsible for the acts of Nova Scotia, one of its constituent political subdivisions.<sup>330</sup>

284. However, in respect of the Investors' claim concerning the JRP, the Respondent advances four main arguments, referring to NAFTA Articles 1101 and 1116. First, the Respondent argues that the JRP is not an organ of the Government of Canada nor are the members of the JRP agents of the CEA Agency.<sup>331</sup> Secondly, the JRP was not acting in a governmental authority in its role vis a vis the Investors' project.<sup>332</sup> Thirdly, the JRP was not acting under the instructions or effective control of Canada when it committed the complained-of acts. Fourthly, Respondent has not acknowledged or adopted any of the complained-of acts as its own.

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<sup>329</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paras. 69-70 (internal citations omitted).

<sup>330</sup> Rejoinder, para. 63, n.112. *See also* Rejoinder, para. 65.

<sup>331</sup> Counter-Memorial, para. 269.

<sup>332</sup> Counter-Memorial, para. 269.



**(a) The JRP is Not an Organ of Canada**

285. Referring to Article 4(2) of the ILC Articles and to the *Genocide Convention* case decided in 2007 by the International Court of Justice, the Respondent maintains that “a person or entity is an organ of a State at international law if it has the status of an organ in a State’s internal law.”<sup>333</sup> The Respondent contends that neither JRPs as entities, nor the individual members of those panels, have that status in Canadian law nor do they meet the test articulated in the *Genocide Convention* case and adopted by certain NAFTA tribunals requiring that the entity act in “complete dependence” on the State.<sup>334</sup> In its interpretation of the ILC Articles, the Respondent relies on the investment arbitration case *Jan de Nul v. Arab Republic of Egypt*.<sup>335</sup>
286. The Respondent further submits that none of the key statutes of relevance in Canadian administrative law apply to a JRP or its members and that, therefore, they cannot be considered organs of the Government.<sup>336</sup> At Canadian law, the Supreme Court has recognized that merely because an entity is subject to judicial review in Canada does not mean that it is a governmental entity.<sup>337</sup>
287. The Respondent argues that not one of the instances of Canadian case law referred to by the Investors supports the proposition that a JRP is an organ of Canada.<sup>338</sup> Moreover, the Respondent argues that in Canada, “judicial review is, in theory, available with respect to any entity that is a creature of statute. Thus, the mere fact that an entity is subject to judicial review in Canada does not mean that it is an organ of the government”.<sup>339</sup> The Respondent also relies on the Supreme Court of Canada decision in *McKinney v. University of Guelph* to argue that

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<sup>333</sup> Counter-Memorial, para. 273.

<sup>334</sup> Counter-Memorial, paras. 280-281 (referring to *Fireman’s Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 14 July 2006, paras. 149-150; and to *GAMI Investments Inc. v. United Mexican States*, UNCITRAL Arbitration Rules, Final Award, 15 November 2004, para. 110).

<sup>335</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008; Counter-Memorial, paras. 288, 295; Rejoinder, paras 69-70.

<sup>336</sup> Counter-Memorial, para. 274. The Respondent refers to the Financial Administration Act, Library and Archives Act, Information Act and the Privacy Act as examples of such key statutes (Counter-Memorial, paras. 275-277).

<sup>337</sup> Hearing Transcript, 31 October 2013, p. 170, lines 19-22, citing Counter-Memorial, paras. 277-279.

<sup>338</sup> Counter-Memorial, para. 278.

<sup>339</sup> Counter-Memorial, para. 278.

“the fact that an entity is a statutory body performing a public service and thus subject to judicial review ‘does not in itself make [it] part of government’”.<sup>340</sup>

288. The Respondent argues that, “while JRPs are created by government, they govern their own process from the time of their constitution until the time they finish their report. In particular, once the review panel is constituted, it takes no instruction from government, and operates completely independently”.<sup>341</sup> According to Respondent, “when a government organ offers evidence to the JRP on a topic within its expertise, it is treated as offering merely an expert opinion, not direction”.<sup>342</sup>

**(b) The JRP was Not Exercising Elements of Governmental Authority**

289. The Respondent submits that, “when a person or entity that is not an organ is empowered to exercise certain government authority, only actions that occur during the exercise of that authority are attributable to the State”.<sup>343</sup> Canada refers to Article 5 of the ILC Articles which summarizes this rule of customary law<sup>344</sup> and to the *Jan de Nul v. Egypt* case in which the tribunal established a relevant two-part test: “first, the act must be performed by an entity empowered to exercise elements of governmental authority [and] second, the act itself must be performed in the exercise of governmental authority”.<sup>345</sup> The Respondent submits that a distinction should be drawn between public service and governmental authority as was done by the *Jan de Nul* tribunal. By evaluating information and making a recommendation to the government,<sup>346</sup> the JRP was not exercising governmental authority in the exercise of public power, though it may have performed a public service.<sup>347</sup> Thus, in the Respondent’s view,

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<sup>340</sup> Rejoinder, para. 67 (referring to *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, p. 48, Exhibit R-384). See also Counter-Memorial, para. 278.

<sup>341</sup> Counter-Memorial, para. 283; Expert Report of Robert Connelly, para. 63.

<sup>342</sup> Counter-Memorial, para. 284; Expert Report of Robert Connelly, para. 63.

<sup>343</sup> Counter-Memorial, para. 286.

<sup>344</sup> Counter-Memorial, para. 287.

<sup>345</sup> Counter-Memorial, para. 288 (citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 163, and referring to *Hamester GmbH and Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 175 (expressly applying the same two part test)). See also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 121-122, (explaining that the “general” empowerment of an entity to exercise elements of governmental authority is insufficient in itself for purposes of attribution).

<sup>346</sup> Hearing Transcript, 23 October 2013, p. 673, lines 2-4.

<sup>347</sup> Hearing Transcript, 31 October 2013, pp. 174-175.

applying the *Jan de Nul* test to this case shows that “none of the alleged wrongful acts committed by the JRP can be attributed to Canada”.<sup>348</sup>

290. The Respondent acknowledges that s. 35 of the *CEAA*, “invests JRPs with certain elements of governmental authority” to facilitate the collection and the control of the relevant evidence.<sup>349</sup> Nevertheless, the governmental authority granted to the JRP is limited to the phase of information gathering. The Respondent further submits that during the Whites Point EA, the JRP did not exercise any of those functions.<sup>350</sup> The fact that the JRP’s “organization and conduct of the public hearings in the Whites Point EA were done in the general fulfillment of both the public and government interest in environmental assessment... is not enough to show that these actions are governmental in nature”.<sup>351</sup> The Respondent emphasizes that the decision on the EA, and whether to allow the project to proceed, remains exclusively with government organs.<sup>352</sup>
291. With regard to the Investors’ reliance on the decisions of Canadian courts to argue that the JRP is an organ of Canada, the Respondent submits that this point is irrelevant because “[t]he question here is whether, as a matter of international law, which the Tribunal is bound to apply, the JRP could be deemed to be exercising delegated governmental authority”.<sup>353</sup> The Respondent further submits that, even if Canadian law were considered, the factors to determine whether an entity is performing a governmental function stated in *Godbout v. Longueuil* show that the JRP did not perform a governmental function.<sup>354</sup>

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<sup>348</sup> Counter-Memorial, para. 288.

<sup>349</sup> Counter-Memorial, para. 290; *CEAA*, s. 35.

<sup>350</sup> Counter-Memorial, para. 293.

<sup>351</sup> Counter-Memorial, para. 294. The Respondent relies on the decisions of the *Jan de Nul* and *UPS* tribunals; Counter-Memorial, paras. 295-296. Rejoinder, paras. 69-70.

<sup>352</sup> Counter-Memorial, para. 291. The Respondent refers also to the Supreme Court of Canada’s *Fireman’s Fund* case in which the court considered a recommendation by a body composed of government officials not to be attributable to the government. See Hearing Transcript, 31 October 2013, p. 185, lines 1-5.

<sup>353</sup> Rejoinder, para. 71.

<sup>354</sup> Rejoinder, para. 72 (referring to Reply, para. 758).

**(c) The JRP Did Not Act Under the Instructions or Effective Control of Canada**

292. The Respondent submits that the Investors fail to set out the applicable test under international law for a determination of whether the JRP acted under the instructions or effective control of Canada, and that their argument should be dismissed on the basis of this failure alone.<sup>355</sup>

293. The Respondent refers to Article 8 of the ILC Articles and the *Genocide Convention* case in which the International Court of Justice elaborated on the notion of “effective control”.<sup>356</sup> Accordingly, the Respondent submits:

While the JRP operated within the general mandate of its Terms of Reference (which could be considered general instructions), the JRP was an autonomous body. It organized its own internal procedures, determined how it would conduct the hearing, and decided itself on what it believed to be the appropriate approach to topics such as a cumulative effects analysis, the precautionary principle, adaptive management, mitigation measures, and information requests of the Claimants.<sup>357</sup>

294. Thus, even under the appropriate and applicable test, the JRP was not in dependence on Canada nor was Canada in control of the JRP.<sup>358</sup> This conclusion is further supported by testimony that the JRP members wrote their report independent of any assistance from government liaisons.<sup>359</sup>

**(d) The Respondent has Not Adopted Any of the Complained-of Acts**

295. The Respondent submits that the Investors failed to describe and apply the relevant test in international law regarding adoption by a State of action undertaken by a non-governmental entity pursuant to Article 11 of the ILC Articles.<sup>360</sup> The Respondent refers to the commentary to Article 11, which explains that “international law requires a ‘clear and unequivocal’ acknowledgement or adoption of the ‘conduct in question’ in order for this rule to apply. It further clarifies that the ‘language of ‘adoption’ carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct.’”<sup>361</sup>

296. The Respondent refers to the Minister’s response to the JRP Report, issued on 17 December 2007, concluding that, after having “carefully considered” the report, as well as a series of

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<sup>355</sup> Rejoinder, para. 73.

<sup>356</sup> Rejoinder, paras. 74-75 (referring to the *Genocide Convention* case, Exhibit RA-12, para. 400).

<sup>357</sup> Rejoinder, para. 76.

<sup>358</sup> Hearing Transcript, 31 October 2013, p. 172, lines 12-14.

<sup>359</sup> Hearing Transcript, 29 October 2013, p. 238, lines 3-22.

<sup>360</sup> Rejoinder, para. 77.

<sup>361</sup> Rejoinder, para. 79 (referring to ILC Articles and Commentary to Article 11, p. 53, Exhibit RA-60).

letters from the Investors including their criticisms,<sup>362</sup> the Government “accepted” and “supported” the ultimate recommendations made by the JRP. According to the Respondent, “there is no acknowledgement or adoption of the JRP’s conduct.”<sup>363</sup>

## 2. The Investors’ Position

### (a) The JRP is an Organ of Canada

297. The Investors argue that the JRP is an “integral part of the government apparatus of Canada”.<sup>364</sup> The JRP is a governmental entity established under the *CEAA* from which it derives its powers, exercises an executive function, and contributes an essential step in the environmental assessment process.<sup>365</sup> The Investors also contend that the JRP is an instrument of the CEA Agency and that the “members of the Joint Review Panel were individually and collectively agents of the CEA Agency”.<sup>366</sup>
298. The Investors submit that “the Canadian judiciary has confirmed that a Joint Review Panel comes within the meaning of a ‘federal board, commission or other tribunal’ under the *Federal Courts Act* of Canada”.<sup>367</sup> This determination, according to the Investors, confirms that the JRP is “part of the executive branch of the Canadian government”,<sup>368</sup> and that it satisfies the requirements of Article 4 of the ILC Articles.<sup>369</sup> The Investors reject the Respondent’s reference to *McKinney v. University of Guelph*,<sup>370</sup> maintaining that the relevant holding from that case was reversed in a later case.<sup>371</sup> The Investors also note that the Respondent’s expert

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<sup>362</sup> Hearing Transcript, 31 October 2013, p. 187, lines 14-22.

<sup>363</sup> Rejoinder, para. 80.

<sup>364</sup> Memorial, para. 707.

<sup>365</sup> Memorial, para. 707 (referring to *Alberta Wilderness Assn. v. Canada*, p. 7 (F.C.A.), Exhibit C-261).

<sup>366</sup> Memorial, para. 706.

<sup>367</sup> Memorial, para. 709; *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(1)-(5), Exhibit C-266. See also para. 708 (referring to *Pembina Institute for Appropriate Development v. Canada* (Attorney General), 2008 FC 302, Exhibit C-260) and Reply, paras. 749-750.

<sup>368</sup> Memorial, para. 710.

<sup>369</sup> Memorial, para. 710.

<sup>370</sup> *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, referred to in Counter-Memorial, para. 278.

<sup>371</sup> Reply, para. 758; *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844, 31 October 1997, paras. 44-45, Exhibit CA-214.

“acknowledges that the Whites Point Quarry review panel was carrying out a ‘joint federal and provincial *mandate*’”.<sup>372</sup>

299. The Investors further argue that, had they been subjected to other environmental review processes under the *CEAA*, such as a screening or a comprehensive review, there would be no dispute that those reviews, which are “fully undertaken by civil servants”, are attributable to the Respondent.<sup>373</sup> Thus, the Investors submit that “[t]here is simply no basis to conclude that, because the Investor was subject to the higher standard, by decisions of the government, that the government can avoid responsibility for its actions”.<sup>374</sup>

**(b) The JRP Exercises Governmental Authority and is of a Public Character**

300. The Investors submit that the JRP “exercises government authority and is of a public character” in accordance with Article 5 of the ILC Articles.<sup>375</sup> In support, the Investors refer to *CEAA*’s requirement for JRPs to hold public hearings;<sup>376</sup> its authority with regard to witnesses and evidence;<sup>377</sup> and that the JRP report “is an ‘essential...step’ before a Minister can make a final determination”.<sup>378</sup> The Investors further argue that “each of the subject acts and omissions of the Joint Review Panel was in the purported exercise of governmental authority,” such as its control of the hearings, and cannot be appropriately characterized as commercial or non-governmental.<sup>379</sup> Thus, in the Investors’ view, to “privatize” such acts of public power would be troubling and cannot be the intention of the relevant statute. Moreover, this is precisely the type of power Article 4 of the ILC Articles is meant to capture.<sup>380</sup>

301. In addition, the Investors reject the Respondent’s interpretation of the *Jan de Nul v. Egypt* case and argue that “in *Jan de Nul*, the tribunal actually recognized that a Panel of Experts appointed

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<sup>372</sup> Reply, para. 748 (referring to First Expert Report of Lawrence Smith, para. 226).

<sup>373</sup> Reply, para. 745.

<sup>374</sup> Reply, para. 746.

<sup>375</sup> Memorial, para. 714.

<sup>376</sup> Memorial, para. 714; *CEAA*, s. 41(e).

<sup>377</sup> Memorial, para. 715; *CEAA*, s. 35. See the Investors’ further arguments on the power of the JRP according to the *CEAA* in Reply, para. 751.

<sup>378</sup> Memorial, para. 714 (referring to *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 F.C. 483 (F.C.A.) at 7, Exhibit C-261.

<sup>379</sup> Memorial, paras. 715-716. See also Reply, para. 761.

<sup>380</sup> Hearing Transcript, 31 October 2013, pages 294-295.

by a government ministry ‘to issue a report’ was either an organ of the state within the meaning of Article 4 or exercised governmental authority under Article 5.”<sup>381</sup>

**(c) The JRP was Under the Instructions of Canada**

302. The Investors submit that the process and report of the JRP were carried out under the instruction of Canada, within the meaning of Article 8 of the ILC Articles.<sup>382</sup> The Investors further argue that “the choice of JRP panel members, combined with the political interference in the regulatory process, and the rapid rubber-stamping of the JRP’s Report” create a presumption that the Respondent sought to “procure a specific result from the JRP, namely the rejection of the Investors’ proposal”.<sup>383</sup>

**(d) The Respondent Acknowledged and Adopted the Actions of the JRP**

303. The Investors also submit that, according to ILC Article 11, the actions of the JRP are attributable to the Respondent because the Canadian Cabinet adopted its Report and “[n]either Cabinet nor the Minister can issue an authorization without a Panel Report”.<sup>384</sup> According to the Investors, when Canadian Environment Minister Baird accepted the recommendation in the JRP Report, the Respondent “adopted the JRP’s flawed understanding and application of the NAFTA as its own”.<sup>385</sup>

304. The Investors also refer to a presentation made on 19 June 2007 by Mr. Gilles Gauthier, a director at the DFAIT, to the JRP on NAFTA. The Investors contend that “Canada’s presentation on the NAFTA demonstrates another example of its direct involvement in the JRP Process”.<sup>386</sup>

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<sup>381</sup> Reply, para. 762; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008.

<sup>382</sup> Article 8 provides: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.

<sup>383</sup> Reply, para. 764; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009.

<sup>384</sup> Reply, para. 765; *Alberta Wilderness Assn.*, Exhibit C-207. See also para. 766; *Gitxaala Nation v. Canada* (Transport, Infrastructure and Communities), 2012 FC 1336, Reasons for Judgment and Judgment, 19 November 2012, para 26, Exhibit CA-212.

<sup>385</sup> Reply, para. 772.

<sup>386</sup> Reply, para. 769. See also para. 768; Presentation before the Whites Point Quarry & Marine Terminal Project Hearing prepared by Department of Foreign Affairs and International Trade, dated 19 June 2007, slides #4 and #6, Exhibit C-929.

### 3. The Tribunal's Analysis

305. As a result of the Tribunal's ruling (above) to apply the time-bar to events predating 17 June 2005, the focus of the Tribunal's deliberations must necessarily shift to the JRP. Canada submits, however, that it is not responsible under NAFTA for the actions of the JRP. A party is only responsible for measures "adopted or maintained by a Party".

306. The starting point of the Tribunal's analysis is Article 105 of NAFTA, which reads:

The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.

In addition, the Tribunal has regard to relevant provisions of the ILC Articles, which provide as follows:

*Article 4: Conduct of organs of a State*

The conduct of any State organ shall be considered an act of that State under international law, whether that organ exercises 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.

An organ includes any person or entity which has that status in accordance with the internal law of the State.

*Article 5: Conduct of persons or entities exercising elements of governmental authority*

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

307. The ILC Articles quoted here are considered as statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which are applicable by analogy to the responsibility of States towards private parties.<sup>387</sup>

308. The Tribunal recalls the Investors' contention that the JRP is an "integral part of the government apparatus of Canada".<sup>388</sup> Even if it were not, the Investors submit, it is empowered to exercise elements of Canada's governmental authority. The Tribunal agrees. The JRP is not a body with an existence that precedes the assessment of a particular project or survives after its tasks are completed. Its members are appointed by the Minister of the Environment for Canada.<sup>389</sup> Panel

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<sup>387</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 156.

<sup>388</sup> Memorial, para. 707.

<sup>389</sup> CEEA, s. 33(1).



members may be appointed from a roster established by the Minister.<sup>390</sup> The members must be “unbiased and free from any conflict of interest relative to the project”. A body that exercises impartial judgment, however, can well be an organ of the state; Article 4 of the ILC Articles, just quoted, specifically includes those exercising “judicial” functions. The functions that the JRP must discharge are of a governmental nature. According to s. 34 of the *CEAA*:

34. A review panel shall, in accordance with any regulations made for that purpose and with its terms of reference,

(a) ensure that the information required for an assessment by a review panel is obtained and made available to the public;

(b) hold hearings in a manner that offers the public opportunity to participate in the assessment;

(c) prepare a report setting out

(i) the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program; and

(ii) a summary of any comments received from the public;

and

(d) submit the report to the Minister and the responsible authority.

309. The assessment referred to here must be “an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations”.<sup>391</sup> To carry out this statutory responsibility, the *CEAA* cloaks a Review Panel with the powers of a court with respect to summoning witnesses to testify and produce documents.<sup>392</sup> The members of a Review Panel are vested with immunity from “any action or other proceeding” against them during the course of or for the purposes of the assessment.

310. The report of a Review Panel is an integral part of the process of decision-making by government. S. 37 of the *CEAA* provides that a Review Panel Report must be “considered” by the “responsible authority”, that is, the part of the Canadian executive branch that makes the final decision over allowing the project to proceed. The responsible authority may issue approval if, after taking into account any mitigation measures it considers appropriate, that authority decides that:

the project is not likely to cause significant adverse environmental effects;

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<sup>390</sup> *CEAA*, s. 33(1)(ii) and 33(2).

<sup>391</sup> *CEAA*, s. 2.

<sup>392</sup> *CEAA*, s. 35.

the project is likely to cause significant adverse effects, but these are justified in the circumstances.<sup>393</sup>

311. The final decision of the responsible authority, when the assessment is made by way of a Review Panel, 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>394</sup>
312. The report of the Review Panel, while not determinative, is therefore a mandated part of the environmental deliberation process.
313. A Review Panel that is joint is similarly part of the apparatus of the Government of Canada and in any event exercising elements of Canadian governmental authority. The *CEAA* authorizes Canada to enter into agreements with authorities in other jurisdictions, including at the provincial level, to establish a JRP.<sup>395</sup> A mandate of a JRP must always include the assessment of the project in accordance with the criteria set out in s. 16 of the *CEAA*.<sup>396</sup> The chair must be appointed or approved by the Minister or else the Minister must appoint a co-chair. At least one other member of the panel must be appointed by the Minister. The Minister must fix or approve the terms of reference. The JRP has all the powers of summoning witnesses that the *CEAA* vests in ordinary review panels.<sup>397</sup>
314. In respect of the particular JRP under consideration in the present case, a Canada-Nova Scotia Agreement provided that Canada and Nova Scotia would each make nominations to the Panel and agree on the choice of a chair. The federal Canada Minister of the Environment would appoint three individuals to serve. Nova Scotia was made responsible for establishing the Secretariat for the Panel. Costs of the Panel were shared between Canada and Nova Scotia.<sup>398</sup>
315. The Respondent notes that various statutes, such as the *Financial Administration Act* and other statutes, among them the *Freedom of Information Act*, extend to a wide range of federal government entities, but do not apply to review panels.<sup>399</sup> It has not been shown, however, that

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<sup>393</sup> *CEAA*, s. 37(1).

<sup>394</sup> *CEAA*, s. 37(2).

<sup>395</sup> *CEAA*, s. 40.

<sup>396</sup> *CEAA*, s. 41.

<sup>397</sup> *CEAA*, s. 41.

<sup>398</sup> Agreement concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project between the Minister of the Environment, Canada and the Minister of Environment and Labour, Nova Scotia (Exhibit R-27; also contained in Investors' binder of Statutes, Regulations, Guidelines and Terms of Reference for Merits Phase Hearing).

<sup>399</sup> Counter-Memorial, para. 276.

any of these broadly ranging statutes—which do not in all cases apply to the same set of government institutions—are intended to incorporate an exhaustive list of all the entities that Canada considers to be organs of government for the purposes of attribution in the context of State responsibility. In any event, the decisive issue is whether the JRP is part of the Government of Canada according to international law. As the commentary to the ILC Articles observes in relation to Article 4, “a state cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law”.<sup>400</sup>

316. Canada refers to several cases in which the acts of a private entity were not attributed to a government.<sup>401</sup> In *Jan de Nul v Arab Republic of Egypt*, the tribunal found that the acts of the Suez Canal Authority were not attributable to Egypt. With respect to ILC Article 4, the same tribunal found that the Suez Canal Authority had been established in the context of a law that, in the words of the Tribunal, “expressly insists on the commercial nature of the SCA activities and its autonomous budget”.<sup>402</sup> With respect to Article 5, the tribunal concluded that the Suez Canal Authority “[i]n its dealing with the Claimants during the tender process, acted like any contractor trying to achieve the best price for the services it was seeking. It did not act as a State entity”.<sup>403</sup> In the present case, however, the JRP neither generally engaged in commercial activities nor did it display any commercial character in conducting its hearings.
317. Canada submits that in *McKinney*,<sup>404</sup> the Supreme Court of Canada decided that the fact that an entity is performing a public service and is subject to judicial review is not sufficient in itself to make it part of government for the purposes of being bound by the *Canadian Charter of Rights and Freedoms*.<sup>405</sup> The *McKinney* case concerned employment decisions of a University. The Supreme Court of Canada found that universities in Canada are not part of government, and that they are not exercising governmental functions in their employment of academic staff. Rather, they are, by tradition and law, self-governing institutions that pursue their own goals.

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<sup>400</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, adopted by the International Law Commission at its fifty-third session (2001), Report of the International Law Commission on the work of its fifty-third session, Official Records of the General Assembly, fifty-sixth session, Supplement No. 10 (A/56/10) chapter IV.E.2.

<sup>401</sup> Counter-Memorial, paras. 288, 295; Rejoinder, paras. 69-70.

<sup>402</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 161.

<sup>403</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 169.

<sup>404</sup> *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at p. 48, Exhibit R-384.

<sup>405</sup> Rejoinder, para. 67, referring to *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at p. 48.

318. A JRP by contrast is established, and its members appointed, by governmental authorities to contribute to government decision-making, rather than pursuing its own mission.
319. Canada has also drawn to the Tribunal's attention several NAFTA decisions concerning attribution of an entity's conduct to a state. In *Fireman's Fund*, however, the issue was whether Mexico had expropriated an investment. An informal working group of officials from various Mexican state agencies had been involved in consultations with stakeholders and making recommendations to the government. The tribunal agreed with the investor that regardless of how the domestic law of Mexico characterized the role of the working group, Mexico could not escape responsibility for an entity that acted on behalf of Mexico vis-à-vis third parties.<sup>406</sup> On the evidence, however, the tribunal was not able to identify any commitment to investors made by the working group on behalf of Mexico. It seems that the officials from the government and the private parties with whom they engaged in discussions regarded the process as incomplete.<sup>407</sup> In the present case, by contrast, the 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.
320. In the *Gami* case, the tribunal rejected the claim as to attribution in part because certain measures depended on consultations involving private actors as well as government, and it was not clear in this context that the treatment of the investment was directly attributable to the government.<sup>408</sup> There is no such mix of actors with respect to the JRP in the present case. The members of the JRP were all appointed by governments for the specific purpose of discharging a set of governmental duties connected with the environmental assessment of the project. The source of the claimed injury was a governmental decision-making process in which the JRP had a statutorily mandated and important role.
321. Even if the JRP were not, by its nature, a part of the apparatus of the Government of Canada, the fact would remain that federal Canada and Nova Scotia both adopted its essential findings in arriving at the conclusion that the project should be denied approval under their environmental laws. Article 11 of the ILC Articles provides as follows:

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<sup>406</sup> *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006, paras. 149-150.

<sup>407</sup> *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006, para. 154.

<sup>408</sup> *GAMI Investments Inc. v. United Mexican States*, UNCITRAL Arbitration Rules, Award, 15 November 2004, para. 110.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct 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.<sup>409</sup>

322. It is possible to imagine a case in which a government arrives at the same conclusion as a recommendatory body, but in which the government does so by pursuing investigations and reasoning that are so distinctly its own that it might not be viewed as acknowledging and adopting the conduct of the recommendatory body. On the facts of the present case, however, Article 11 would establish the international responsibility of Canada even if the JRP were not one of its organs.
323. The Government of Canada's response to the JRP Report noted that the government had studied the Report "carefully" and concluded in its next sentence that: "[t]he Government of Canada accepts the conclusion of the Joint Review Panel that the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances."<sup>410</sup> In his expert report commissioned by the Government of Canada, Mr. Smith proposed the general proposition, that "the Panel Report will provide ample analysis and reasoning for its recommendation. If accepted by the governments, the reasons for doing so are manifest on the face of the Panel Report."<sup>411</sup> Mr. Smith's general proposition is applicable in the circumstances of this case. The JRP only made a specific finding of likely significant adverse effects after mitigation in respect of "community core values", and the reasonable inference is that the Government of Canada agreed with both the recommendation and the "community core values" approach that was at its foundation. There is no indication in the evidence of a level of independent fact-finding, legal analysis or other deliberation by the Government of Canada that would be inconsistent with the view that Canada was acknowledging and adopting the essential reasoning and conclusions of the JRP.

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<sup>409</sup> Cited in Reply, para. 767.

<sup>410</sup> Quoted in First Expert Report of David Estrin, para. 532. On 13 December 2007, the federal Cabinet—or in official terms, the Governor General in Council—issued Order in Council PC 2007-1965 which stated that pursuant to s. 37(1.1)(a) of the *CEAA*, the Cabinet "hereby approves the response of the Government of Canada to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project 3."

<sup>411</sup> First Expert Report of Lawrence Smith, para. 439.

324. The Nova Scotia Minister for the Environment informed Mr. Buxton by telephone that he had accepted the first recommendation of the JRP.<sup>412</sup> In a separate letter of the same date, 20 November 2007, Minister Parent stated that the decision was ultimately for him to make as Minister, but that he had carefully considered the JRP Report and concluded that the project would have likely significant adverse effects after mitigation.<sup>413</sup> Here again, the Tribunal concludes that 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 of the ILC Articles.

#### **D. WHETHER THE FEDERAL GOVERNMENT'S DECISION CAUSED ANY DAMAGE**

##### **1. The Respondent's Position**

325. The Respondent refers to NAFTA Article 1116's requirement that an investor must have "incurred loss, or damage, by reason of, or arising out of" the alleged breach and argues that measures not capable of causing loss or damage may not be considered by the Tribunal.<sup>414</sup>

326. The Respondent argues that the decision of the federal Government to accept the JRP's recommendation on 17 December 2007 did not cause the Investors loss or damage because one month earlier, on 20 November 2007, Nova Scotia's Minister of Environment and Labour had already rejected the proposal to construct and operate the Whites Point Quarry and Marine Terminal.<sup>415</sup> According to the Respondent, once Nova Scotia decided to reject the proposal, the project was effectively terminated.<sup>416</sup> Although the federal Government had to make its own decision, "the federal decision as to whether or not to issue any requested authorizations was academic".<sup>417</sup> The Respondent also rejects the Investors' assertion that "the Federal Government decision to refuse to issue the authorizations and approvals requested by the Claimants 'caused additional damage to Bilcon'".<sup>418</sup>

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<sup>412</sup> Transcript of telephone conversation between Paul Buxton and Mark Parent, dated 20 November 2007, Exhibit R-560.

<sup>413</sup> Letter from Minister of the Environment and Labour to Paul Buxton, dated 20 November 2007, Exhibit R-331.

<sup>414</sup> Counter-Memorial, para. 299.

<sup>415</sup> Counter-Memorial, para. 300; Letter from Minister of the Environment and Labour to Paul Buxton, dated 20 November 2007, Exhibit R-331.

<sup>416</sup> Counter-Memorial, para. 300.

<sup>417</sup> Rejoinder, para. 83. *See also* First Expert Report of Lawrence Smith, para. 444.

<sup>418</sup> Rejoinder, para. 86 (referring to Reply, para. 782).

327. Finally, the Respondent denies the Investors' assertion that Nova Scotia and federal officials aligned their decisions.<sup>419</sup> It argues that this "speculation" has no support and that "Nova Scotia made and announced its decision before the federal Cabinet even met to consider the Federal Government response".<sup>420</sup>

## **2. The Investors' Position**

328. The Investors contend that the federal and provincial governments coordinated their respective responses.<sup>421</sup> It is the Investors' position that Canada's environmental legislation obliges the Respondent independently to determine the project and that therefore it cannot rely on Nova Scotia's decision to fulfill its statutory requirement.<sup>422</sup> Moreover, "Nova Scotia's acceptance of the JRP's first recommendation to reject Bilcon's application was not dispositive of the application".<sup>423</sup>

329. In the Investors' view, accepting the Respondent's argument "would deny Bilcon the opportunity to attempt to persuade the federal Minister that his provincial counterpart ought to reconsider his decision".<sup>424</sup> Accordingly, the Investors submit that "[a] review by the federal government of the irregularities and errors in the JRP report and process could have led to a reconsideration of the Nova Scotia decision."<sup>425</sup> Likewise, the Investors assert that a difference of view between the governments could have been addressed through mitigation measures.

## **3. The Tribunal's Analysis**

330. Canada contends that the Investors' case is based on the allegation that the JRP Report did not adopt an approach compatible with federal Canada law, but the fact of the matter is that federal Canada's acceptance or rejection of the case was a moot point. Article 1116(1) of NAFTA only permits claims to be made where a breach has resulted in "loss or damage" to the claimant. Nova Scotia had already disposed of the project pursuant to the recommendations of the JRP

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<sup>419</sup> Rejoinder, para. 84.

<sup>420</sup> Rejoinder, para. 85. *See also* Second Affidavit of Christopher Daly, para. 4.

<sup>421</sup> Reply, paras. 773-775; Second Expert Report of David Estrin, para. 333.

<sup>422</sup> Reply, para. 778. *See also* Reply, para. 777.

<sup>423</sup> Reply, para. 779.

<sup>424</sup> Reply, para. 777 (referring to Expert Report of Murray Rankin, para. 163).

<sup>425</sup> Reply, paras. 779-780.

which, Canada argues, were consistent with the more flexible requirements of the laws of Nova Scotia.

331. The Tribunal has taken careful note of the Respondent's jurisdictional objection pursuant to which the Investors' challenge of the decision by federal Canada fails because of the prior rejection of the Project at a provincial level. In view of the close links of this objection with the merits of the case, the Tribunal shall address this objection below, within Part VI.A.3(c)v of this Award.

## **E. WHETHER WILLIAM RALPH CLAYTON QUALIFIES AS AN INVESTOR**

### **1. The Respondent's Position**

332. Finally, the Respondent argues that Mr. William Ralph Clayton does not qualify as an "investor" because—as became apparent from the testimony of his son, Mr. William Richard Clayton, at the first day of the Hearing<sup>426</sup>—he does not maintain ownership or direct financial interest in Bilcon of Delaware.

333. Specifically, the Respondent alleges that Mr. William Richard Clayton's testimony indicated that (i) Bilcon of Nova Scotia is wholly owned and controlled by Bilcon of Delaware<sup>427</sup> and Mr. William Ralph Clayton has no ownership interest in it;<sup>428</sup> (ii) Mr. William Ralph Clayton was neither a director of Bilcon of Delaware<sup>429</sup> nor a director or officer of Bilcon of Nova Scotia;<sup>430</sup> (iii) he did not actually run the business;<sup>431</sup> and (iv) his financial interest in the quarry was "indirect, because it is a family business and it is family money".<sup>432</sup> In the Respondent's view, such involvement of Mr. William Ralph Clayton does not qualify him as an investor

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<sup>426</sup> Hearing Transcript, 25 October 2013, p. 13, lines 13-17.

<sup>427</sup> Hearing Transcript, 25 October 2013, p. 5, lines 19-23 (citing Hearing Transcript, 22 October 2013, p. 192, lines 18-21).

<sup>428</sup> Hearing Transcript, 25 October 2013, p. 6, lines 4-7 (citing Hearing Transcript, 22 October 2013, p. 192, lines 15-17).

<sup>429</sup> Hearing Transcript, 25 October 2013, p. 6, lines 11-14 (citing Hearing Transcript, 22 October 2013, p. 193, lines 1-3).

<sup>430</sup> Hearing Transcript, 25 October 2013, pp. 6-7 (citing Hearing Transcript, 22 October 2013, p. 193, lines 4-11).

<sup>431</sup> Hearing Transcript, 25 October 2013, p. 7, lines 9-16 (citing Hearing Transcript, 22 October 2013, p. 193, lines 12-17).

<sup>432</sup> Hearing Transcript, 25 October 2013, p. 8, lines 4-11 (citing Hearing Transcript, 22 October 2013, p. 243, lines 16-25).



under NAFTA, which would require direct or indirect ownership or control.<sup>433</sup> “[T]he fact that family money is involved cannot be enough under NAFTA”.<sup>434</sup>

334. The Respondent notes that it raised this objection at the earliest opportunity during the Hearing, out of fairness to the Investors,<sup>435</sup> so as to put them on notice and give them an opportunity to address the objection.<sup>436</sup> The objection “has arisen from the testimony”<sup>437</sup> of Mr. William Richard Clayton and was thus not untimely.

335. The Respondent explains that, on the fourth day of the hearing, in light of answers provided by Mr. William Richard Clayton, counsel for the Respondent stated that Canada wished to raise a “point of procedure”; Canada was going to argue that Mr. William Ralph Clayton did not qualify as an Investor under the Article 1139 definition, which requires direct or indirect ownership or control of an investment. Counsel stated that Canada was raising it now in fairness to the Investors, rather than leaving it to closing argument. The Respondent suggested that the point was of negligible significance from a practical point of view as all the other claimants would remain as Investors, but wished to raise it as a matter of principle.

## **2. The Investors’ Position**

336. The Investors allege that the objection is untimely because, pursuant to Article 21(3) of the UNCITRAL Rules, “all jurisdictional defences must be raised not later than the filing of the statement of defence”.<sup>438</sup> The Respondent filed the Statement of Defence on 18 December 2009—four years before Canada had raised this new argument.<sup>439</sup> The Investors also point out that information about Bilcon’s corporate officers and directors is a matter of public record that was always available to the Respondent.<sup>440</sup> Finally, the Investors observe that it was “entirely inappropriate” for Canada to have raised a jurisdictional issue in the middle of the witness phase of the hearing.<sup>441</sup>

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<sup>433</sup> Hearing Transcript, 25 October 2013, pp. 8-9, lines 12-25 and 1-8.

<sup>434</sup> Hearing Transcript, 25 October 2013, p. 8, lines 22-23.

<sup>435</sup> Hearing Transcript, 25 October 2013, p. 14, line 2.

<sup>436</sup> Hearing Transcript, 25 October 2013, p. 13, lines 19-20.

<sup>437</sup> Hearing Transcript, 25 October 2013, p. 13, lines 13-17.

<sup>438</sup> Hearing Transcript, 31 October 2013, p. 124, lines 22-24.

<sup>439</sup> Hearing Transcript, 31 October 2013, p. 125, lines 13-15.

<sup>440</sup> Hearing Transcript, 31 October 2013, p. 125, lines 15-19.

<sup>441</sup> Hearing Transcript, 31 October 2013, p. 127, lines 15-19.

337. The Investors submit that evidence clearly indicates that Mr. William Ralph Clayton runs a “family business... for the benefit of his children”<sup>442</sup> as well as “funded the investment in Nova Scotia and... continues funding [its] continuing operation”.<sup>443</sup> Moreover, “the government was aware that the investment was being made by the Clayton family”.<sup>444</sup> There is also evidence that Mr. William Ralph Clayton met with Minister Balsler in Nova Scotia.<sup>445</sup>

### **3. The Tribunal’s Analysis**

338. The Respondent’s fifth point was brought to the Tribunal’s attention in an unusual manner. However, the Tribunal has no doubt that Canada acted in good faith in raising the issue, including alerting the Investors to it as soon as counsel for Canada first appreciated that the issue was genuinely contentious. This was a very complex matter on the whole, and the inclusion or exclusion of one of the particular claimants might be of some formal significance, but it is far from being among the central issues.

339. It might be argued that Canada had reasonable notice of at least some aspects of the issue much earlier; for example, it is clear from the Investors’ Memorial<sup>446</sup> that the other individual claimants were investors and shareholders of Bilcon of Delaware, Inc., whereas no mention is made of Mr. William Ralph Clayton in either respect. The Memorial further mentions that Mr. William Ralph Clayton transferred his interest in the Clayton Group and reduced his workload in respect of its affairs in 2008.<sup>447</sup> On the other hand, it is for the Investors as the claimants to make sure that the Tribunal has before it all relevant facts to verify that the conditions for the exercise of its jurisdiction are met. One might have expected the Investors to set out on their own volition the circumstances that should lead the Tribunal to conclude that Mr. William Ralph Clayton qualifies as an “investor” under NAFTA.

340. While the Tribunal is mindful of Article 20 of the UNCITRAL Rules, the Tribunal is firmly of the view that it cannot avoid the question of Mr. William Ralph Clayton’s qualification as an investor on the basis that the Respondent would have been precluded from raising a jurisdictional objection. While Article 20 may operate in such a way in commercial arbitration

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<sup>442</sup> Hearing Transcript, 31 October 2013, pp. 125-126.

<sup>443</sup> Hearing Transcript, 31 October 2013, p. 126, lines 3-5.

<sup>444</sup> Hearing Transcript, 31 October 2013, p. 126, lines 7-8.

<sup>445</sup> Hearing Transcript, 31 October 2013, p. 126, lines 17-22; Affidavit of William Richard Clayton, paras. 16-17.

<sup>446</sup> Memorial, para. 4.

<sup>447</sup> Memorial, para. 34, including n.6 thereto.

proceedings, its application is problematic in proceedings under international law. The mandate of an investment tribunal is confined by the terms of the particular treaty under which the claim is brought. It is not open to the investor and the respondent in a particular case (tacitly) to rewrite these terms. In other words, the principle of preclusion cannot establish any jurisdiction where the underlying treaty confers none.

341. It is well established that tribunals constituted under international law are competent to rule on their jurisdiction even in the absence of a jurisdictional challenge. As the International Court of Justice held in the *Fisheries Jurisdiction* case, neither the claimant nor the respondent has a burden of proof in respect of jurisdictional questions. The ICJ held:

[E]stablishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it... this has no relevance for the establishment of the Court's jurisdiction, which is a "question of law to be resolved in the light of the relevant facts"... That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties...<sup>448</sup>

342. Various arbitral tribunals under international law have similarly affirmed a duty of arbitral tribunals to verify their jurisdiction.<sup>449</sup> Suffice it to refer to the award of the Iran-US Claims Tribunal in the *Burton Marks and Harry Umann* case, in which the Tribunal stated that "Claimant's argument that respondent has waived its jurisdictional objections by not raising them is unavailing. Article 21(3) of the Tribunal Rules does not purport to preclude the Tribunal from raising jurisdictional issues on its own motion."<sup>450</sup>

343. Investment tribunals have likewise considered themselves under a duty to rule *sua sponte* on their jurisdiction.<sup>451</sup> The tribunal in *Micula v. Romania* held:

The Tribunal understands its duty to determine its jurisdiction, including through examination of the jurisdictional requirements, *sua sponte*, if necessary, as it has an obligation to reject a claim if the record shows that jurisdiction is lacking. Or, put differently, a tribunal can rule on and decline its jurisdiction even where no objection to jurisdiction is raised if there are sufficient grounds to do so on the basis of the record. However, a tribunal's duty to ascertain jurisdiction *sua sponte* does not include an

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<sup>448</sup> *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, 4 December 1998, I.C.J. Reports 1998, p. 432, paras. 37-38 (internal citations omitted).

<sup>449</sup> *Rio Grande Irrigation and Land Company, Ltd. (Great Britain) v. United States*, 28 November 1923, VI UNRIAA, p. 135.

<sup>450</sup> *Burton Marks and Harry Umann v. Islamic Republic of Iran*, 29 June 1985, 8 Iran-U.S.CTR, p. 296.

<sup>451</sup> *See Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, para. 101 (although the respondent did not challenge that the project qualified as an investment, the tribunal, *sua sponte*, examined the relevant agreement in light of Article 25(1) of the Washington Convention).

obligation to re-open the evidentiary proceedings, far less to launch its own investigation, unless there are compelling reasons to do so (such as where it has been impossible for a party to have made such an investigation itself or where the other party has concealed relevant facts or evidence).<sup>452</sup>

344. In the NAFTA context, the tribunal in *UPS v. Canada* affirmed that “[it is] plain that a claimant party’s mere assertion that a dispute is within the Tribunal’s jurisdiction is not conclusive. It is the Tribunal that must decide.”<sup>453</sup> The present Tribunal therefore has no difficulty to affirm its competence to render a decision on the jurisdictional issue as to whether Mr. William Ralph Clayton qualifies as an “investor”.

345. The difficulty that the Tribunal does confront as a result of the late pleading of the issue is rather a procedural one. In the Tribunal’s view, it would only be appropriate for it to make a determination in respect of Mr. William Ralph Clayton’s quality as “investor” in the present Award if the matter were ripe for a decision. This would be the case if all relevant facts for the Tribunal’s decision formed part of the record.

346. Pursuant to Article 1139 NAFTA, an investment must be either owned by the investor or “controlled directly or indirectly” by the investor:

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;

347. There is no dispute between the Parties that Mr. William Ralph Clayton does not formally hold any equity in any relevant entities of the Bilcon group. As far as the criterion of ownership is concerned, the issue is therefore ripe for a decision. However, the same cannot be said as far as the criterion of control is concerned.

348. Having reviewed the evidentiary record, the Tribunal has doubts as to Mr. William Ralph Clayton’s exercise of “control” over the investment. He was not to be found among the directors, officers or recognized agents of Bilcon of Nova Scotia before the date of filing of the Notice of Arbitration.<sup>454</sup> Neither the Directors’ Register<sup>455</sup> nor the Officers’ Register<sup>456</sup> make a

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<sup>452</sup> *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 65.

<sup>453</sup> *United Parcel Service of America Inc. (UPS) v. Government of Canada*, UNCITRAL Arbitration Rules, Award on Jurisdiction, 22 November 2002, para. 34.

<sup>454</sup> Corporate Search for Bilcon of Nova Scotia, dated 2 October 2007, Exhibit C-12.

<sup>455</sup> Directors’ Register, undated, Exhibit C-16.

<sup>456</sup> Officers’ Register, undated, Exhibit C-17.

reference to Mr. William Ralph Clayton. His name is not on the certificate of incorporation of Bilcon of Delaware among the elected directors either; it only bears his sons' names.<sup>457</sup> The only time when Mr. William Ralph Clayton's name is present is on the letterhead of the Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., dated 28 March 2002. The letterhead reads "Ralph Clayton & Sons" but the letter predates the formation of Bilcon of Delaware. As the letter reads:

The purpose of this letter of intent ("Letter") is to set forth certain non-binding understandings and certain binding agreements between Bilcon of Delaware, Inc. ("BD") a New Jersey corporation *to be formed* and wholly owned by individuals of the Clayton family and Nova Stone Exporters, Inc., a corporation formed pursuant to the laws of Nova Scotia, Canada ("NSE")...<sup>458</sup>

349. However, the Tribunal also considers that the evidentiary record does not exclude any reasonable possibility that Mr. William Ralph Clayton exercised indirect control in other—less formal—ways, as the Investors contended at the hearing.
350. As a result, the Tribunal feels that it would benefit from further evidence before arriving at a final determination. The Tribunal therefore reserves its position as to whether Mr. William Ralph Clayton qualifies as an "investor" for purposes of NAFTA. Accordingly, since the Tribunal has not been in a position positively to affirm its jurisdiction in respect of Mr. William Ralph Clayton, the Tribunal's decisions in respect of the merits of the case, below, do not apply to him.
351. It might turn out that, in the aftermath of this Award, the Parties can settle on compensation without further proceedings before this Tribunal, or that both Parties will concur that it is not necessary or economical to further litigate the issue of the procedural status of Mr. William Ralph Clayton. Alternatively, the point could be further argued and finally adjudicated in the context of the next phase of the proceedings.

## VI. THE MERITS OF THE INVESTORS' CLAIMS

352. The following sections summarize the Parties' submissions on the legal issues that pertain to the merits of the dispute. In short, the Investors claim that the Respondent has breached its NAFTA obligations set out in Articles 1105 (Minimum Standard of Treatment); 1102 (National

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<sup>457</sup> Bilcon of Delaware Certificate of Incorporation, dated 15 April 2002, Exhibit C-4.

<sup>458</sup> Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., dated 28 March 2002, Exhibit C-5 (emphasis added).

Treatment); and 1103 (Most-Favored-Nation Treatment). The Respondent rejects the Investors' arguments and disputes the Investors' interpretation of these NAFTA obligations.

353. The Tribunal does not undertake to illustrate here all the arguments set out by the Parties. Rather, it selects the most salient arguments for purposes of its decisionmaking and the emphases put on each issue by the Parties.

#### **A. NAFTA ARTICLE 1105—MINIMUM STANDARD OF TREATMENT**

##### **1. The Investors' Position**

###### **(a) The Sources of Law that Apply to NAFTA Article 1105(1)**

354. In the Investors' view, the fair and equitable treatment protection granted in NAFTA Article 1105(1) is an autonomous standard, not limited to requiring treatment only in accordance with customary international law. The Investors also submit that the Tribunal in interpreting Article 1105(1) is not limited to customary law and must apply other sources of law, as enumerated in Article 38(1) of the Statute of the International Court of Justice.<sup>459</sup>

355. The Investors accept that according to NAFTA Article 1131(2), the Tribunal must apply the Notes of Interpretation issued by the Free Trade Commission ("FTC Notes"). The Investors argue that the FTC Notes consider customary international law as a ceiling or cap on the liability of the host state under Article 1105. According to the FTC Notes, a NAFTA tribunal must therefore "check customary international law to ensure that its interpretation of NAFTA Article 1105 as applied to the facts does not lead to liability on the part of the host state for actions or omissions that are not *also* violations of custom."<sup>460</sup>

356. It is the Investors' position, however, that the Tribunal's interpretation based on the FTC Notes still must not override or exclude the normal application of rules of interpretation.<sup>461</sup> That is, the Tribunal should rely on the customary rules of treaty interpretation enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.<sup>462</sup> Despite these views on interpretation,

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<sup>459</sup> Reply, paras. 170-195.

<sup>460</sup> Reply, para. 242.

<sup>461</sup> Reply, para. 174.

<sup>462</sup> Reply, para. 174.

the Investors submit that, in any event, the autonomous fair and equitable treatment standard and the customary international law standard have converged.<sup>463</sup>

**(b) The Content and Scope of NAFTA Article 1105(1)**

357. The Investors submit that the fair and equitable treatment standard stipulated in Article 1105(1) is guided by the principle of “good faith” and requires Respondent to:

a) Act in accordance with basic fairness and fundamental justice; b) Act in a non-arbitrary and non-discriminatory manner; c) Respect foreign investors’ legitimate expectations; d) Deal with foreign investors according to basic principles of openness and transparency; e) Ensure that it not abuse its rights in regulating foreign investors; and f) Provide foreign investors with a basic level of security of the legal and business environment.<sup>464</sup>

358. In the Investors’ view, a violation of the fair and equitable treatment does not require a breach of every element stated above. A breach of any one of the elements suffices.<sup>465</sup> The Investors further submit that undue delay can constitute a breach of international law.<sup>466</sup>

359. It is the Investors’ position that the Respondent confuses “arbitrariness” with (lack of) “fair and equitable treatment.”<sup>467</sup> Referring to the decisions of the tribunals in *Thunderbird* and *Waste Management II*, the Investors maintain that fair and equitable treatment requires the Respondent not only to act in a non-arbitrary and non-discriminatory manner but also to act reasonably.<sup>468</sup> The Investors also argue that “the fair and equitable treatment obligation includes the obligation to protect legitimate expectations”.<sup>469</sup>

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<sup>463</sup> Reply, paras. 205-209.

<sup>464</sup> Reply, para. 210. *See also* Hearing Transcript, 31 October 2013, p. 18, lines 10-19.

<sup>465</sup> Reply, para. 221.

<sup>466</sup> Reply, para. 214; Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, [1973] ICJ Reports, para 92, Exhibit CA-225; Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization, Advisory Opinion, 1 February 2012, para 30, Exhibit CA-227. *See also* Reply, paras. 215-217.

<sup>467</sup> Reply, para. 228.

<sup>468</sup> Hearing Transcript, 31 October 2013, p. 77; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL Arbitration Rules, Award, 26 January 2006; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

<sup>469</sup> Memorial, para. 340, referring to *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003; *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004; *Occidental v. Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004; and *CMS Gas v. Argentina*, ICSID Case No. ARB/01/8, Award, 25 April 2005. *See also* Memorial, paras. 341-346.

360. The Investors also refer to the requirement of full protection and security enumerated in Article 1105,<sup>470</sup> stating that, in their view, it requires a host country to exercise reasonable care to protect investments against injury by private parties.<sup>471</sup> The Investors also assert that recent tribunals have found that the obligation to provide full protection and security includes an obligation on governments to provide a stable legal and business environment to foreign investors.<sup>472</sup>

**(c) The Acts Allegedly in Breach of NAFTA Article 1105(1)**

361. The Investors refer to numerous acts of the Respondent that in their view demonstrate a lack of due process, natural justice, fairness and reasonableness, falling short of the international standard for treatment of foreign investments.<sup>473</sup> Specifically, the Investors argue that the JRP exceeded its jurisdiction as defined by its Terms of Reference and enabling legislation; and that, the ministerial decisions following the JRP Report adopted the JRP’s legal flaws as their own without giving the Investors an opportunity to make submissions.<sup>474</sup> The Tribunal will take up the arguments of each side on these allegations.

362. Moreover, the Investors argue that the Respondent acted in an unfair and unreasonable manner toward the Investors by imposing “biased, needless and unfair procedures and obligations” on the Investors and through the JRP which “ignored relevant facts and relied upon arbitrary, biased, capricious, and irrelevant considerations.”<sup>475</sup>

363. Finally, the Investors claim that the Respondent treated them in a discriminatory manner by allowing political motivations to “pervert the environmental assessment process.”<sup>476</sup> In particular, they allege that the Respondent misrepresented the “regulatory state of play” to the Investors, “not informing the Investors of regulatory decisions that had been made, and misrepresenting to the Investors that it possessed legal authority that it did not have.”<sup>477</sup>

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<sup>470</sup> Memorial, para. 357.

<sup>471</sup> Memorial, para. 357.

<sup>472</sup> Memorial, para. 364. Hearing Transcript, 31 October 2013, p. 78, citing *Eureko v. Poland*, Ad Hoc, Partial Award, 19 August 2005, and *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

<sup>473</sup> Reply, paras. 481-574.

<sup>474</sup> Reply, para. 474.

<sup>475</sup> Reply, para. 475.

<sup>476</sup> Reply, para. 476.

<sup>477</sup> Reply, para. 477.



i. Lack of Due Process, Natural Justice and Fairness and Reasonableness Prior the JRP Panel Process

364. The Investors submit that the DFO carried out the following actions on its own and in collaboration with the NSDEL in violation of due process, natural justice and fairness and reasonableness.<sup>478</sup>
365. First, the NSDEL and the DFO imposed Blasting Conditions on the Investors' project without authority to do so.<sup>479</sup> It is the Investors' position that the imposition of condition 10(h) was "superfluous"<sup>480</sup> and condition 10(i) was beyond the jurisdiction of the federal government.<sup>481</sup> The Investors refer to the similar Tiverton Harbour project where test blasting was underway without restriction.<sup>482</sup> Likewise, the Investors maintain that the Blasting Conditions imposed were impossible to meet or fulfill despite their attempts to seek guidance on amending them.<sup>483</sup> The conditions blocked the Investors' ability to blast and deprived them of an ability to seek necessary information.<sup>484</sup>
366. Thirdly, the Investors argue that the agencies imposed blast setback distances based on models they knew were inappropriate. The DFO staff acknowledged that the excessive setback distance of 500m was not suited for the Investors' project; yet, the DFO did not share this information with the Investors.<sup>485</sup> To the contrary, DFO officials, on six occasions, refused to explain or justify these setback distances.<sup>486</sup>
367. Fourthly, the Investors take issue with the NSDEL and DFO's decision to scope the quarry and the marine terminal into one project despite knowing that they lacked a legal trigger.<sup>487</sup> As counsel for the Investors argued at the hearing on jurisdiction and merits: "At the time Minister

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<sup>478</sup> Reply, para. 481. *See also* Memorial, paras. 459-463.

<sup>479</sup> Reply, paras. 482-484; NSDEL Approval to Nova Stone Exporters, Inc., Construction and operation of a Quarry, dated 30 April 2002, Exhibit C-31.

<sup>480</sup> Hearing Transcript, 31 October 2013, p. 14, lines 8-13.

<sup>481</sup> Hearing Transcript, 31 October 2013, p. 14; Reply, para. 484.

<sup>482</sup> Reply, para. 484; Expert Report of Murray Rankin, para. 84.

<sup>483</sup> Reply, paras. 481 and 485.

<sup>484</sup> Hearing Transcript, 31 October 2013, p. 80, lines 1-5.

<sup>485</sup> Reply, paras. 488 and 481; Letter from Phil Zamora to Paul Buxton, requiring the proponent to obtain authorization under s. 32 of the *Fisheries Act*, dated 29 May 2003, Exhibit C-249.

<sup>486</sup> Investors were not told until November 2004 about the truth concerning the setback calculations and DFO assessment on mitigation and whales; Hearing Transcript, 31 October 2013, p. 68.

<sup>487</sup> Reply, paras. 481, 490-493. *See also* Memorial, paras. 487-497. Hearing Transcript, 24 October 2013, pp. 22-23, lines 22-27. Letter from Phil Zamora to Paul Buxton, dated 29 May 2003, Exhibit C-129.

Anderson referred the Bilcon marine terminal and the Bilcon quarry to a JRP, federal officials in both the DFO and CEA Agency knew that no lawful basis had been established to include the quarry in a federal environmental assessment of the marine terminal.”<sup>488</sup> The Investors also submit that the decision failed to conform to the DFO standard practice from 1999 through 2004 “that the project component included in the *CEAA* assessment would be only the immediate activity for which a DFO permit was required”.<sup>489</sup> They argue that “[t]he DFO knew that a decision to scope in the quarry was contrary to environmental assessment practices across Canada, but decided to do so in order to “share the grief” with the Province of Nova Scotia”.<sup>490</sup> According to the Investors, Minister Thibault later acknowledged that “[t]he federal government had no jurisdiction over the quarry itself—only its possible impact on marine life and habitat”.<sup>491</sup> Finally, the Investors submit that the DFO should have consulted the Investors before scoping both pieces of the project.<sup>492</sup>

368. Fifthly, the agencies needlessly imposed requirements on the Investors based on purported concerns about the safety of various species of whales and salmon while contemporaneous communications among DFO staff indicate that the agency knew there were no whales in the area and that their concerns about Inner Bay of Fundy (“iBoF”) salmon were unwarranted.<sup>493</sup> The Investors note that the DFO expressed “no concern about iBoF salmon to the proponents of the nearby Tiverton quarry when approving its blasting activities directly in the water”.<sup>494</sup>
369. The Investors take issue with every aspect of the referral to the JRP, noting that a JRP is “rare in the extreme.”<sup>495</sup> Considering what the governments knew at the time of the referral, the referral

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<sup>488</sup> Hearing Transcript, 31 October 2013, p. 11, lines 16-22, citing Exhibit R-260, Exhibit R-72, and Exhibit C-657; Hearing Transcript, 31 October 2013, p. 23, lines 9-13 (referring to the lack of scientific evidence). The Investors argue that this was a clear violation of Canadian practice as set out in the *Red Hill* decision, *see* Memorial, para. 506.

<sup>489</sup> Reply, para. 492 (referring to Second Expert Report of David Estrin, para. 57).

<sup>490</sup> Memorial, para. 521 (referring to Journal note by Bruce Hood, dated Fall 2007, and arguing that Mr. Hood stated “that the CEA Agency and the NSDEL placed pressure on the DFO to include the quarry within their scoping of the Whites Point Quarry environmental assessment”, p. 801617, Exhibit C-367).

<sup>491</sup> Reply, para. 493 (referring to Robert Thibault, “Thibault rejects proposed quarry”, *Digby Courier*, 26 May 2004, Exhibit C-511).

<sup>492</sup> Reply, paras. 481, 493. Hearing Transcript, 31 October 2013, pp. 24-25.

<sup>493</sup> Reply, paras. 494, 497; E-mail from Jerry Conway to Jim Ross, dated 2 December 2002, Exhibit C-605.

<sup>494</sup> Reply, para. 500; Response to Undertaking 31 by the Department of Fisheries and Oceans, Exhibit C-417. *See also* Memorial, para. 495.

<sup>495</sup> Hearing Transcript, 30 October 2013, p. 44, line 20; First Expert Report of David Estrin, para. 8.

was, in the Investors' view, *ultra vires*. No other marine terminal or quarry had been referred to a JRP before.<sup>496</sup>

370. The Investors further submit that the Respondent's failure to ensure that appropriate persons were appointed as members of the JRP constituted a breach of natural justice. According to the Investors, the JRP "was not comprised of persons with the requisite professional credentials and experience"<sup>497</sup> and these persons were not "'comfortable' with standard environmental assessment processes and proceedings in the Province of Nova Scotia and Canada".<sup>498</sup> Moreover, the Investors argue that

the Respondent did not appoint candidates that were "unbiased and free from any conflict of interest relative to the project" but deliberately chose panel members who were manifestly biased. In this regard, the Investors recall that two of the panel members, Mr. Fournier and Mr. Muecke, had previous involvement with a provincial environmental activist group, the Ecology Action Centre, and the third member, Ms. Grant, was an advocate for greater community participation in environmental decision-making.<sup>499</sup>

ii. Lack of Due Process, Natural Justice and Fairness and Reasonableness During the JRP Process

371. The Investors argue that a number of incidents during, or features of, the JRP process indicate a lack of due process, natural justice, and fairness and reasonableness. First, the Investors maintain that the JRP misused the Draft EIS Guidelines which had been prepared by the CEA Agency and the NSDEL. The Investors argue that the JRP misused the mandatory public scoping sessions on the Draft EIS Guidelines by relying upon "the activist opinions of the public advocated to in effect dispense with the Draft EIS Guidelines entirely".<sup>500</sup> In particular, the Final EIS Guidelines imposed by the JRP required the Investors to satisfy the Panel with "perfect certainty" about issues not in the Terms of Reference.

372. According to the Investors, JRP's misuse of the public scoping sessions included disparaging the United States identity of the Investors, making misleading comments about the NAFTA, distorting the precautionary principle, discussed further below, and expanding the definition of

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<sup>496</sup> Hearing Transcript, 30 October 2013, p. 44, lines 21-25.

<sup>497</sup> Memorial, para. 461; First Expert Report of David Estrin, para. 515.

<sup>498</sup> Memorial, para. 463; First Expert Report of David Estrin, para. 514.

<sup>499</sup> Memorial, para. 462; Résumé of Robert Fournier, Exhibit C-285; Résumé of Gunter Muecke, Exhibit C-286.

<sup>500</sup> Memorial, para. 465; Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, dated March 2005, s. 6.6, Exhibit C-168; E-mail from Phil Zamora to Derek McDonald, undated, Exhibit C-441.

“traditional knowledge” issues from aboriginal issues to the current views of all residents in the area.<sup>501</sup> These errors could have been corrected by other authorities of the Respondent, but they were not.

373. In this context, the Investors also submit that the JRP: abused its discretion by altering the standard ecosystem approach analysis to compel the Investors to address factors that were functionally impossible to address at the preliminary planning stage of the project<sup>502</sup>; deviated from Canadian law and normal EIS requirements by imposing a review of “cumulative effects” that forced the Investors to examine purely hypothetical propositions and imposed a “spurious standard of ‘induced’ activities”;<sup>503</sup> insisted on specific and excessively detailed facts and thereby ignored the dynamic character of projects;<sup>504</sup> disregarded the ordinary legal standard in EAs and instead demanded “perfect certainty” from Bilcon;<sup>505</sup> gave disproportionate weight to “aboriginal traditional knowledge”;<sup>506</sup> sent “numerous, onerous ‘information requests’ to Bilcon leading to an EIS that exceeded 3000 pages”;<sup>507</sup> failed to question the Investors’ many experts; and facilitated the summary dismissal of Bilcon’s adaptive management approach.

374. The Investors also submit that the JRP violated their due process rights, natural justice, fairness and reasonableness by not sending presentations of the regulatory agencies and experts’ CVs to the Investors in advance of the hearing, thereby depriving Bilcon of the opportunity to prepare for the hearing; by conducting the hearing in a “biased and prejudicial manner” toward the Investors, evidenced by the actions set out in the preceding paragraph; by denying the Investors the opportunity to address the concept of “community core values”, despite its obvious importance to the JRP’s view of the Project; and by the JRP’s dismissive attitude toward the EIS and a series of irrelevant information requests.<sup>508</sup>

375. The Investors also criticize the JRP’s use of “cumulative effects” during the JRP proceedings and in its final report. In the Investors’ view, the Panel applied an “inappropriate and indeed

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<sup>501</sup> Memorial, para. 465; Transcript of Scoping Meeting #1 in Sandy Cove, dated 6 January 2005, pp. 77-78, 118, Exhibit C-116.

<sup>502</sup> Memorial, para. 466.

<sup>503</sup> Memorial, para. 467.

<sup>504</sup> Memorial, para. 468; First Expert Report of David Estrin, para. 357.

<sup>505</sup> Memorial, para. 469; First Expert Report of David Estrin, para. 360.

<sup>506</sup> Memorial, para. 470.

<sup>507</sup> Memorial, para. 471; JRP Report, dated October 2007, p. 16, Exhibit C-34/R-212.

<sup>508</sup> Reply, para. 501. *See also* Reply, paras. 502-507.

illegal concept of ‘cumulative effects’;<sup>509</sup> and interpreted “cumulative effects” in such a way that the Investors had to include all “past, present and reasonably foreseeable projects” in their EIS, which led to unreasonable information requests by the JRP. Still, the JRP rejected the Investors’ review of cumulative effects not on the basis of what it had covered in its EIS but what it had omitted.<sup>510</sup> Further, the Investors contend that the JRP ignored the follow-up and monitoring programs and abused its discretion by assessing how a hypothetical breakwater could “alter the local marine ecosystem”, without giving the Investors the opportunity to discuss it.<sup>511</sup>

376. At the hearing on jurisdiction and merits, the Investors highlighted that even if the Tribunal were to dismiss the actions of the JRP as not attributable to the Respondent, the events and behavior outlined above and elaborated upon below could have been corrected by authorities of the Respondent; the failure to do so is, in the Investors’ view, a violation of the obligation of full protection and security.<sup>512</sup>

iii. Lack of Due Process, Natural Justice and Fairness and Reasonableness in the JRP Report

377. According to the Investors, the content of and conclusions drawn in the JRP Report constitute violations of their due process rights, natural justice, fairness and reasonableness. First, the Investors maintain that the recommendations made by the JRP did not accord with the information including expert information provided to the JRP. Secondly, the JRP ignored important scientific and other information provided by the Investors. Thirdly, the JRP failed to apply the legal and regulatory requirements of the environmental scheme for an assessment. As a fourth point, the JRP’s conclusions were not based on science or fact. As a fifth point, the JRP used and applied unknown rules and standards, in particular the “artificially concocted” concept of “community core values”. As a sixth point, the JRP unduly focused on the reasons why the Whites Point project might not work, and showed no interest in how the project could work. As a seventh point, six out of the seven recommendations of the JRP are general policy recommendations, falling outside the scope of the Terms of Reference. As an eighth point, the JRP failed to consider and propose mitigation measures “listed in the *CEAA* as a factor to be

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<sup>509</sup> Memorial, para. 478.

<sup>510</sup> Memorial, para. 478; First Expert Report of David Estrin, para. 431.

<sup>511</sup> Memorial, para. 480; First Expert Report of David Estrin, para. 472.

<sup>512</sup> Hearing Transcript, 30 October 2013, p. 79, lines 15-17.

considered when a Panel makes recommendations”.<sup>513</sup> Lastly, the JRP brushed over strong community support, reflected in a petition by more than 30 percent of the local population.

378. In this regard, the Investors further submit that “[t]he JRP failed to assert how its conclusions conformed to the CEA Agency’s Guidelines for Reference Panels”.<sup>514</sup> The Investors also argue that the JRP had no jurisdiction or authority to recommend the rejection of the Whites Point project based on the notion of “community core values” because this notion has no basis in the Constitution of Canada, the administrative law framework, the environmental legislation or any other relevant law. Moreover, the Investors submit that they were unaware that “community core values” were distinct from general socioeconomic concerns, which they addressed at length during the hearing. The Investors maintain they could not have reasonably foreseen that the EA would turn on this irrelevant consideration. The Investors further submit that the use of “community core values” “highlight[s] the JRP’s determination to give a preferential voice to those in the community who opposed the project”.

379. The Investors argue that the “JRP manifestly misunderstood the role of a JRP”.<sup>515</sup> In the Investors’ view, the JRP should be “engaged in the planning stage of a project, not at the detailed design stage. The JRP unfairly demanded that the Investors provide detailed designs, purporting to assume the role of an industrial regulator”.<sup>516</sup>

380. The Investors also argue that the JRP incorrectly applied the two crucial concepts of adaptive management and the precautionary principle. The JRP mentioned adaptive management only in a cursory fashion.<sup>517</sup> The JRP Report criticized the Investors for its reliance on adaptive management even though the interpretation and use of this concept was correct “and had been used in environmental assessments of three other contemporaneous projects: Elmsdale, Glenholme and Lovett Road and Miller’s Creek Gypsum Mine Expansion”.<sup>518</sup> With regard to the precautionary principle, the Investors contend that

the Panel applied a patently incorrect definition notwithstanding the fact that this principle is defined in the *Nova Scotia Environment Act*, and had been correctly applied previously by Dr. Fournier when he chaired the JRP in the Sable Gas Review. The proper application

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<sup>513</sup> Reply, para. 520. *See also* Reply, para. 521.

<sup>514</sup> Reply, para. 509.

<sup>515</sup> Reply, para. 513.

<sup>516</sup> Reply, para. 513; Supplemental Witness Statement of Paul Buxton, para. 58.

<sup>517</sup> Reply, para. 515; Environmental Impact Study Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, dated 31 March 2005, p. 31491, Exhibit R-210.

<sup>518</sup> Reply, para. 515. *See also* Reply, paras. 516-517.

reflects the fact that the precautionary principle does not require scientific certainty. The Whites Point JRP did not recognize this and interpreted the principle as requiring “that a proposed action will not lead to serious or irreversible environmental damage; verifiable scientific research and high-quality information”.<sup>519</sup>

381. The Investors argue that the JRP Report ignored evidence that was before it by failing to acknowledge the Investors’ commitment to exceed regulators’ requirements to mitigate the potential for any significant adverse environmental effects.
382. The Investors contend that the Report unfairly criticized them for their use of ANFO in blasting,<sup>520</sup> even though the DFO admitted that blasting with ANFO could be permitted and that this type of blasting was not uncommon and was employed at various other industrial projects.<sup>521</sup>
383. The Investors submit that the “JRP report also ignored numerous government regulators”,<sup>522</sup> such as Natural Resources Canada and Health Canada,<sup>523</sup> “who praised Bilcon for the thoroughness and detailed nature of the evidence it provided”.<sup>524</sup> The JRP Report also ignored the Investors’ significant community outreach and agreement to “comply with lighting standards at night requested by government to protect migrating birds”.<sup>525</sup>

iv. Lack of Due Process, Natural Justice and Fairness and Reasonableness After the Issuance of the JRP Report

384. The Investors argue that they were denied due process by federal and provincial ministers vested with the authority to approve or reject their project. They maintain that the ministers refused to hear them and that such refusal is a denial of natural justice. Moreover, in the Investors’ view, the federal minister’s decision, which according to them, relied upon “community core values” by adopting the JRP recommendation, fell outside his jurisdiction and statutory mandate.<sup>526</sup> The Investors also submit that both ministers gave a “rubber stamp” to the Panel’s recommendation. “By doing so, the ministers failed to conduct their own independent

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<sup>519</sup> Reply, para. 518; Second Expert Report of David Estrin, paras. 218-219. *See also* Reply, para. 519.

<sup>520</sup> Reply, para. 523; JRP Report, dated October 2007, pp. 5, 34, Exhibit C-34/R-212.

<sup>521</sup> Reply, para. 523.

<sup>522</sup> Reply, para. 524.

<sup>523</sup> Reply, para. 524(a) and (b).

<sup>524</sup> Reply, para. 524.

<sup>525</sup> Reply, paras. 524(c) and (d).

<sup>526</sup> Reply, para. 530; Expert Report of Murray Rankin, para. 167.

analysis as required under s. 37(1)(b) of *CEAA*”.<sup>527</sup> Thus, the Investors contend that neither minister had a proper basis upon which to make his decision.

v. Two-Track Process/Lack of Full Transparency, Fairness and Honesty toward Bilcon

385. The Investors argue that their “legitimate and reasonable expectations that [they] would be dealt with transparently and honestly were not met”.<sup>528</sup> In particular, DFO and provincial regulators misled them to believe that it would be possible to conduct test blasting at the 3.9 ha quarry when this was not so; DFO continued to lead them into believing that the 3.9 ha quarry could become operational; and, DFO misled them to believe that the environmental assessment would take the form of a comprehensive study.<sup>529</sup> On the latter point, according to the Investors, regulators notified a lawyer for a citizens group that the review would be conducted by a JRP in July 2003 but only informed the Investors in September 2003.<sup>530</sup>

vi. Abuse of Process

386. The Investors submit that they were subjected to “abuses of process by regulators and the JRP, all of which failed to respect the regulatory process”.<sup>531</sup> The Investors refer to the DFO’s involvement in assessing the 3.9 ha quarry without adequate legal basis.<sup>532</sup> In particular, the Investors submit that: DFO Minister Thibault’s office “inject[ed] itself” into the regulatory process and took actions to prevent regulators from approving blasting plans;<sup>533</sup> the JRP failed to adhere to its role as an assessor of the project, rather than of EA in Nova Scotia more generally;<sup>534</sup> Dr. Fournier saw himself as a reformer who improperly saw his task as coming up

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<sup>527</sup> Memorial, para. 485.

<sup>528</sup> Reply, para. 532.

<sup>529</sup> Reply, para. 532. *See also* Reply, paras. 533-536.

<sup>530</sup> Reply, para. 535; E-mail from Stephen Chapman to Bruce Young, dated 7 July 2003, Exhibit C-678; Letter from Stephen Chapman to Paul Buxton, regarding the environmental assessment process, dated 10 September 2003, Exhibit C-75.

<sup>531</sup> Reply, para. 537.

<sup>532</sup> Reply, paras. 538-539. *See also* Memorial, paras. 487-496.

<sup>533</sup> Reply, para. 540; E-mail from Wayne Stobo to Faith Scattolon, dated 27 June 2002, pp. 801717-801718, Exhibit C-256.

<sup>534</sup> Reply, para. 541; NSDEL Power Point Presentation titled Response to Panel Report on Whites Point Quarry and Marine Terminal, dated 13 November 2007, Exhibit C-654; E-mail from Mike Murphy to Mark G. McLean, dated 14 November 2007, Exhibit C-849.



with general policy recommendations;<sup>535</sup> all seven recommendations by the JRP exceeded its TOR;<sup>536</sup> and the federal Minister of the Environment abused and exceeded his jurisdiction by rejecting the project based on the JRP's recommendation of a significant adverse environmental effect on community core values.<sup>537</sup>

vii. Arbitrariness and Discrimination

387. The Investors argue that decisions made both by regulators and the JRP were arbitrary and discriminatory and that they suffered prejudice as a result.<sup>538</sup> The Investors refer to the imposition of “impossible” conditions for the operation of the quarry “in a highly politicized process”,<sup>539</sup> and to the setting of blasting setback distances.<sup>540</sup> With regard to the latter, the Investors assert that under Canadian law the arbitrary distances would be considered inappropriately arbitrary.<sup>541</sup>
388. In addition, the Investors take issue with the involvement of Minister Thibault who, in their view, used his position to exaggerate and misconstrue the factors involved in deciding whether the project should undergo a comprehensive study or other review.<sup>542</sup> The Investors further argue that the Minister's public statements constituted an “unwarranted interference that inflamed the situation and polarized public opinion”.<sup>543</sup> Referring to Mr. Hood's journal and correspondence where it was stated that the “file is extremely important to the Minister,” that it was “such a politically hot file,” and that the Minister wants the “process dragged out as long as possible,” the Investors maintain that political motivations inappropriately directed the process.<sup>544</sup>

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<sup>535</sup> Reply, para. 542.

<sup>536</sup> Reply, para. 543; NSDEL Power Point Presentation titled Response to Panel Report on Whites Point Quarry and Marine Terminal, dated 13 November 2007, Exhibit C-654; Second Expert Report of David Estrin, para. 311.

<sup>537</sup> Reply, para. 544; Expert Report of Murray Rankin, para. 117.

<sup>538</sup> Reply, para. 545.

<sup>539</sup> Reply, para. 546.

<sup>540</sup> Reply, para. 547.

<sup>541</sup> Reply, para. 548; Expert Report of Murray Rankin, para. 97.

<sup>542</sup> Memorial, para. 500; Letter from Robert Thibault to David Anderson, dated 26 June 2003, Exhibit C-61. *See also* Memorial, paras. 501-506.

<sup>543</sup> Memorial, para. 507.

<sup>544</sup> Hearing Transcript, 31 October 2013, pp. 70-71.

389. It is the Investors' position that the JRP was wrongly antagonistic toward them during the proceedings.<sup>545</sup> The Investors argue that the values of the majority of community members who supported the project were ignored.<sup>546</sup> Moreover, the Investors submit that the JRP reasoning suggests an "undercurrent of xenophobia or anti-Americanism".<sup>547</sup>
390. The Investors contend that the anti-NAFTA and anti-American sentiment was fuelled by so called "citizen-advocates" and politicians who testified at the public hearing<sup>548</sup> and that the JRP was preoccupied with the implications of the project under the NAFTA:

The involvement of DFAIT in an environmental assessment process was novel, and together with an outside independent NAFTA expert's report, emphasizes how the Joint Review Panel members' interest in the NAFTA did not stem from their own knowledge or experiences with the implications of the NAFTA and its connection to environmental assessments for quarry projects. Thus, Bilcon was entitled to have the legal and regulatory criteria, and related jurisprudence and practice, applied to it in a manner no less favorable than to domestic investors who were proponents under the regulatory scheme as well as investors who are nationals of non-NAFTA states.<sup>549</sup>

viii. Delay

391. The Investors argue that it was clear to officials that the federal minister's desire was to delay the regulatory process as long as possible.<sup>550</sup> Moreover, they contend that the delay they experienced can be contrasted to the treatment afforded to the proponents of the Tiverton quarry "where Minister Thibault's office assured them it would do all it could to speed up the process".<sup>551</sup> There, the governments moved the project through rapidly to meet funding deadlines, according to the Investors.<sup>552</sup>

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<sup>545</sup> Memorial, para. 509; First Expert Report of David Estrin, para. 103.

<sup>546</sup> Memorial, para. 510; First Expert Report of David Estrin, para. 234; Letter from Cindy Nesbitt to Stephen Chapman, dated 7 December 2004, Exhibit C-557.

<sup>547</sup> Memorial, para. 511; First Expert Report of David Estrin, para. 436; Hearing Transcript, 31 October 2013, p. 40, lines 5-7.

<sup>548</sup> Memorial, paras. 516-517, 519-520.

<sup>549</sup> Memorial, paras. 513, 515.

<sup>550</sup> Reply, para. 550. *See also* Memorial, paras. 521-525.

<sup>551</sup> Reply, para. 552; Journal note by Bruce Hood, disclosing a statement made by Minister Robert Thibault evidencing his use of powers to lengthen the environmental assessment of the Whites Point Quarry, undated, p. 801619, Exhibit C-370.

<sup>552</sup> Hearing Transcript, 31 October 2013, p. 46, lines 5-15.

ix. Full Protection and Security and Stable Legal Environment

392. The Investors argue that the Respondent failed to accord them full protection and security by the following acts/omissions: not taking steps to protect them from discriminatory and arbitrary treatment in the environmental regulatory process;<sup>553</sup> not following its own laws with respect to governmental regulatory authority over the proposed quarry;<sup>554</sup> and failing to accord the investors a fair hearing and reasonable decision with regard to the JRP process and Report.<sup>555</sup> In this context, the Investors submit that Respondent should have been aware of the impact of the JRP's allegedly xenophobic attitude toward them on the security of their investment.<sup>556</sup> The Investors further submit that:

At no time did DFAIT ever take steps to ensure that the Joint Review Panel protected the fairness, integrity and due process rights of the Investors and the Investment, nor did it ever advise the Joint Review Panel to ensure that discriminatory or unfair evidence was not to be used.

Instead, DFAIT's participation in the Joint Review Panel's public hearings fueled the anti-Americanism that prevailed throughout Bilcon's environmental assessment...

DFAIT's participation facilitated and endorsed the Joint Review Panel's pre-occupation with the impacts of the NAFTA on Bilcon's project and amplified the obsession of the environmental activists who promoted an anti-American tone, against Bilcon's American parent company, and the export of aggregate to the United States, thus depriving Bilcon of a secure investment environment which Canada was obligated by the NAFTA to provide in its environmental assessment of Bilcon's project.<sup>557</sup>

393. Finally, the Investors submit that CEA Agency's officials were not free to express their honest opinions about the project and therefore the investment climate was "not a stable environment free from political interference".<sup>558</sup>

x. Legitimate Expectations under Article 1105

394. The Investors also argue that their legitimate expectations to operate the quarry were frustrated.<sup>559</sup> Those legitimate expectations were formed from the extensive encouragement of Nova Scotia officials to invest in a quarry in the area, but rejected by the acts reviewed above.

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<sup>553</sup> Memorial, para. 526.

<sup>554</sup> Memorial, para. 527.

<sup>555</sup> Memorial, para. 527.

<sup>556</sup> Memorial, para. 530. *See also* paras. 528-529.

<sup>557</sup> Memorial, paras. 531, 532, 535.

<sup>558</sup> Reply, para. 557; E-mail from Stephen Chapman to Derek McDonald, stating that Whites Point Quarry related issues should not be documented, dated 11 June 2003, Exhibit C-404.

<sup>559</sup> Reply, para. 563.

395. The Investors rely on the three factors stipulated in the *Mobil* award for establishing that the events elaborated above met the test for a NAFTA Article 1105 breach of the Investors' legitimate expectations.<sup>560</sup> First, according to the Investors, a "permit is a clear and explicit representation to induce investment".<sup>561</sup> They argue that a "permit grant implies political support and is an explicit representation that something will be permitted".<sup>562</sup> Thus, the Investors argue that the permit induced the investment and "[h]ad Nova Scotia not granted the Permit, they would have invested in their alternate site".<sup>563</sup>
396. Secondly, the Investors argue that an investor should be able to reasonably and objectively rely upon a permit. As the Investors observe, Nova Stone's obtaining the permit was shown to be a pre-condition for capital contributions by the Investor.<sup>564</sup>
397. Thirdly, Nova Scotia and Canada "repudiated the permit by refusing to allow its conditions to be met".<sup>565</sup> This allegedly occurred in two steps: First, the Respondent interpreted the conditions in a manner that made them impossible to fulfill. Secondly, it refused to allow the 3.9 ha quarry to operate once the project was referred to a JRP (purportedly because it had been subsumed by the larger project).<sup>566</sup>

## **2. The Respondent's Position**

### **(a) The Sources of Law that Apply to NAFTA Article 1105(1)**

398. The Respondent submits that, according to the FTC Notes, which are, in the Respondent's view, binding on and determinative for NAFTA tribunals in respect of the interpretation of Article

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<sup>560</sup> Reply, para. 566, referring to *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 152. The three factors enumerated by the tribunal are that the treatment occurs against the background of clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment; that such representations were made by reference to an objective standard, reasonably relied on by the investor; and that these representations were subsequently repudiated by the NAFTA host State.

<sup>561</sup> Reply, para. 566(i).

<sup>562</sup> Reply, para. 569.

<sup>563</sup> Reply, para. 570.

<sup>564</sup> Reply, para. 571; Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., Article 6(a) and (b), dated 28 March 2002, Exhibit C-5.

<sup>565</sup> Reply, para. 571(iii).

<sup>566</sup> Reply, para. 572. *See also* Reply, paras. 629-630.

1105(1), Article 1105(1) requires application of the customary international law minimum standard of treatment of aliens.<sup>567</sup>

**(b) The Burden of Proving Breach of NAFTA Article 1105(1)**

399. The Respondent submits that the Investors bear the burden of proving that the conduct in question breaches the treaty obligation contained in Article 1105(1) as reflected in customary international law.<sup>568</sup>

**(c) The Content and Scope of NAFTA Article 1105(1)**

400. The Respondent first submits that the threshold for a breach of the customary international law minimum standard of treatment under Article 1105(1) is high. In particular, the Respondent refers to the decision of the *Mobil* tribunal, which concluded that

Article 1105(1) ‘protects against egregious behaviour’ such as ‘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>569</sup>

401. The Respondent also argues that NAFTA Article 1105(1) does not include a stand-alone obligation protecting legitimate expectations, although legitimate expectations may be relevant to determining whether a measure amounts to the type of egregious conduct that would breach Article 1105(1).<sup>570</sup> In the Respondent’s view, the *CMS Gas*, *Rumeli*, and *Azurix* awards overstated that the minimum standard of treatment has converged with the FET standard. Rather, the *Glamis* and *Cargill* tribunals rightly stated that the jurisprudence relevant to a NAFTA Article 1105 interpretation is that which applies the customary minimum standard of treatment.<sup>571</sup> According to the Respondent, this principle should likewise be extended to the Investors’ allegations as to an obligation of transparency owed by the Respondent.

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<sup>567</sup> Rejoinder, para. 90. *See also* Rejoinder, paras. 91-105.

<sup>568</sup> Rejoinder, para. 107. *See also* Rejoinder, para. 106.

<sup>569</sup> Rejoinder, para. 108 (referring to *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, paras. 152-153); Rejoinder, paras. 109-116.

<sup>570</sup> Rejoinder, para. 156.

<sup>571</sup> Hearing Transcript, 31 October 2013, pp. 233-235.

**(d) The Alleged Breach of NAFTA Article 1105(1)**

402. The Respondent submits that the Investors have failed to establish that any of the measures about which they have complained constitutes a breach of its Article 1105(1) obligations.<sup>572</sup> The Respondent divides its response into five categories: measures taken by the DFO and the NSDEL prior to the JRP process; the joint decision of the federal Minister of the Environment and the province of Nova Scotia on the selection of members of the JRP; the acts of the JRP prior to the issuance of its Report; the approach taken by the JRP in its Report; and, the government decisions in responding to the JRP Report. In the context of these categories, the Respondent addresses the Investors' arguments regarding lack of transparency, abuse of process, arbitrariness and discrimination, and delay. The Respondent addresses separately the Investors' arguments on full protection and security and a stable legal environment.<sup>573</sup>

i. The Measures Taken by the DFO and the NSDEL Prior to the JRP Process

403. The Respondent argues that the DFO set the Blasting Conditions in accordance with the procedure in its Blasting Guidelines and its legal authority under s. 37(1) of the *Fisheries Act*.<sup>574</sup> It is the Respondent's position that the calculation of the setback for Nova Stone's quarry was based on "a *bona fide* concern over the potential impacts of Nova Stone's blasting activity on endangered iBoF salmon and whales that could be found in close proximity to the site".<sup>575</sup> The fact that DFO's opinion on this issue evolved does not, in the Respondent's view, challenge the validity of its initial concerns or suggest any breach of Article 1105(1), nor does disagreement with DFO's Blasting Conditions,<sup>576</sup> because the quarrying activities on the 3.9 ha were "tied to the advancement of the larger project", which was already under an EA.<sup>577</sup> According to the Respondent, this linkage between the 3.9 ha quarry and the larger project was also the reason

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<sup>572</sup> Rejoinder, paras. 117-160.

<sup>573</sup> Rejoinder, para. 118.

<sup>574</sup> Counter-Memorial, para. 338; Rejoinder, para. 124.

<sup>575</sup> Rejoinder, para. 125. The Respondent maintains that the minister did not know that the calculations were wrong before making the JRP referral; *see* Hearing Transcript, 31 October 2013, p. 260; Hearing Transcript, 29 October 2013, p. 211, lines 11-17.

<sup>576</sup> Rejoinder, para. 125 (citing *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Arbitration Rules, Partial Award, 13 November 2000, para. 261).

<sup>577</sup> Counter-Memorial, para. 339; First Expert Report of Lawrence Smith, para. 176.

why the DFO decided not to discuss mitigation measures with Nova Stone on its 3.9 ha quarry in the form of revised setback distances in the summer of 2003.<sup>578</sup>

404. The Respondent submits that after DFO determined the scoping of the quarry and the marine terminal on 14 April 2003, the Investors did not object to the fact that the quarry was included in the scope of the EA.<sup>579</sup> The Respondent argues that the scoping of these projects “is contemplated by s. 15 of the *CEAA* and conformed to the Agency’s *Operational Policy Statement on Scoping*”.<sup>580</sup>
405. The Respondent submits that Bruce Hood’s journal notes show that there was a policy debate within the DFO as to whether it should exercise the legislative authority granted to it under s. 15 of the *CEAA* to scope these projects.<sup>581</sup> Nevertheless, as explained by Robert Connelly in his Expert Report, once a project is referred to a JRP, the scope of the project being assessed must include the aspects of the project that each jurisdiction must assess. Thus, because Nova Scotia law required the quarry to be subject to an EA, as soon as there was an agreement to establish a JRP, any question of the scope of the EA of the Whites Point project was rendered moot.<sup>582</sup>
406. The Respondent maintains that the, referral of the project by Minister Thibault to the Minister of the Environment for submission to a JRP was based on the advice of DFO officials who concluded, in their discretion under s. 21 of the *CEAA*, that there was likelihood of significant adverse environmental effects and significant public concern.<sup>583</sup>
407. It is the Respondent’s position that it did not breach any transparency obligation by not notifying the Investors about the referral of the Whites Point project to a JRP, or because it led them to believe otherwise.<sup>584</sup> As a preliminary matter, Article 1105(1) does not include a transparency obligation.<sup>585</sup> Secondly, the Respondent argues that the Investors should have

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<sup>578</sup> Rejoinder, paras. 126-130.

<sup>579</sup> Counter-Memorial, para. 341.

<sup>580</sup> Counter-Memorial, para. 342; First Expert Report of Lawrence Smith, para. 114; Operational Policy Statement, Establishing the Scope of the Environmental Assessment, OPS-EPO/1, Canadian Environmental Assessment Agency, Exhibit R-14. *See also* Counter-Memorial, para. 345.

<sup>581</sup> Counter-Memorial, para. 344.

<sup>582</sup> Counter-Memorial, para. 346.

<sup>583</sup> Counter-Memorial, paras. 347-348, 355.

<sup>584</sup> Rejoinder, para. 132.

<sup>585</sup> Rejoinder, para. 133 (*see* relevant references of the Respondent in this para. to decisions of other tribunals that rejected the argument that Article 1105(1) includes a transparency obligation).

anticipated that Whites Point project could be referred to a JRP given that government regulators consistently noted the possibility.<sup>586</sup>

ii. The Joint Appointment of the JRP members

408. The Respondent rejects the Investors allegations that the appointments of Drs. Fournier, Muecke and Grant to the JRP constituted a violation of Article 1105 on the grounds that they lacked “requisite professional credentials and experience,”<sup>587</sup> and were “manifestly biased.”<sup>588</sup> The Respondent argues that the Investors recognized the qualifications of the JRP members upon their appointment in 2004, referring to comments made in the lead-up to the constitution of the JRP stating that all three members were “competent and are respected in their fields.”<sup>589</sup> Furthermore, the Respondent submits that “there is simply no basis to conclude now, and certainly none that would have led to a conclusion at the time, that Drs. Fournier, Muecke and Grant were in any way biased against Bilcon or the Whites Point project”.<sup>590</sup>

iii. The Acts of the JRP Prior to the Issuance of its Report

409. The Respondent argues that the Investors never voiced a concern that they were prevented from adequately preparing for the hearings, or that their experts were not afforded a fair opportunity to present their evidence.<sup>591</sup> They also never exercised their right to request additional time from the JRP.<sup>592</sup>

410. The Respondent also rejects the Investors’ assertion that Bilcon did not have an opportunity to address the concept of “community core values” and argues that the Investors’ assertion:

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<sup>586</sup> DFO specifically informed GQP, as early as 6 January 2003, that referral to a review panel was a distinct possibility in light of the project’s potential significant adverse environmental effects and the public concern that it had created. Further, in initially notifying GQP that the project would be assessed, at the very least, through a comprehensive study, DFO made expressly clear that “although the type of assessment being used for this project is a CS [comprehensive study], CEAA (Section 23) includes the provision that the project could be referred to a mediator or review panel”. Counter-Memorial, para. 354. *See also* Rejoinder, para. 133.

<sup>587</sup> Memorial, para 461.

<sup>588</sup> Memorial, para 462.

<sup>589</sup> Counter-Memorial, para. 359, referring to CLC Minutes, dated 24 November 2004, p. 235, Exhibit R-299.

<sup>590</sup> Counter-Memorial, para. 360; Questions for Interviewing Review Panel Candidates, Exhibit R-206; First Affidavit of Stephen Chapman, para. 41; First Affidavit of Christopher Daly, paras. 48-49.

<sup>591</sup> Rejoinder, para. 136.

<sup>592</sup> Rejoinder, para. 136.



ignores completely the fact that every component of what the JRP discussed as community core values was identified in detail in the 'Final EIS Guidelines' which, as the title suggests, was supposed to guide Bilcon in the preparation of its evidence.<sup>593</sup>

According to the Respondent, the Investors had several opportunities to comment on or question the EIS Guidelines but did not.<sup>594</sup>

iv. The Preparation of the JRP Report

411. As explained above (see paragraphs 283-295 of this Award), the Respondent argues that the actions and report of the JRP are not attributable to the Respondent. Even if these actions were attributable to it, it is the Respondent's position that the Investors have not established that the JRP's actions or report breached Article 1105(1).<sup>595</sup>
412. The Respondent emphasizes that the JRP's role is to gather information to make recommendations. Therefore, in the Respondent's view, the only relevant question is whether the JRP's actions in any way deprived the Claimants of a fair process during the information gathering stage of the EA. Accordingly, the Respondent submits that "the actions of the JRP were reasonable, fair, and at all times conformed to the applicable legislative and regulatory framework".<sup>596</sup>
413. The Respondent submits that the Investors were given a reasonable opportunity to be heard throughout the EA process, and that the JRP conducted the hearings impartially, duly exercising its mandate. It notes that before the JRP was constituted, the Investors elected not to comment on a draft of the JRP Agreement and Terms of Reference. In addition, although the JRP sought the Investors' comments on the draft EIS Guidelines, the Investors "chose not to speak at the scoping hearings, and submitted only brief written comments on the draft," according to the Respondent.<sup>597</sup>
414. The Respondent also rejects the Investors' argument that the JRP should have asked them and their experts more questions, arguing that the Investors bore the burden of proving that their project would not cause significant adverse environmental effects. Finally, the Respondent

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<sup>593</sup> Second Expert Report of Lawrence Smith, para. 138, cited in Rejoinder, para. 137.

<sup>594</sup> Rejoinder, para. 137, referring also to Second Expert Report of Lawrence Smith, para. 148.

<sup>595</sup> Counter-Memorial, para. 365. *See also* Counter-Memorial, paras. 267-297.

<sup>596</sup> Counter-Memorial, para. 366; Letter from Paul Buxton to Debra Myles, dated 9 July 2007, Exhibit R-259.

<sup>597</sup> Counter-Memorial, para. 368.

denies that the JRP required “an impossible standard of ‘perfect certainty’”.<sup>598</sup> The Respondent argues that, here, the problem was that the proponent failed to provide complete and deficient information.<sup>599</sup>

415. According to the Respondent, nothing in the JRP report suggests that the members of the JRP were biased against the Investors or their project. The Respondent maintains that the critical comments complained of reflect nothing more than frustration with the presentations made by the Investors.
416. The Respondent submits that the EIS Guidelines made clear that the JRP would be focusing on concepts like traditional knowledge, the precautionary principle, and the project’s socio-economic effects, such as the effects on community core values.<sup>600</sup> The JRP was entitled, under the JRP Agreement, to include some of these factors as a result of public comments, and the Investors did not object to these factors at the time that they were added.<sup>601</sup>
417. The Respondent submits that “the factors that the JRP addressed in the EA were rooted in the relevant legal and regulatory frameworks of Canada and Nova Scotia”.<sup>602</sup> Thus, the reliance on the notion of “community core values” was based on the JRP Agreement, which “directed the JRP to apply not only the *CEAA* but also Part IV of the *NSEA*, which expressly requires consideration of broad socio-economic effects”.<sup>603</sup> The Investors’ expert witness, Mr. David Estrin, acknowledged that effects on “community core values” are socioeconomic effects.<sup>604</sup>
418. Finally, the Respondent submits that all the Investors’ arguments regarding the other factors that the JRP considered or failed to consider<sup>605</sup> are not only wrong but also do not rise to the level of

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<sup>598</sup> Counter-Memorial, para. 370 (citing Memorial, para. 469).

<sup>599</sup> Counter-Memorial, para. 370.

<sup>600</sup> Counter-Memorial, para. 375. *See also* Rejoinder para. 143.

<sup>601</sup> Counter-Memorial, para. 376.

<sup>602</sup> Counter-Memorial, para. 378; First Expert Report of Lawrence Smith, para. 236.

<sup>603</sup> Counter-Memorial, para. 378; JRP Agreement, Part III, Exhibit R-27.

<sup>604</sup> Counter-Memorial, para. 379; First Expert Report of David Estrin, paras. 230, 243.

<sup>605</sup> The Respondent refers to the arguments of the Investors regarding “(1) the consideration by the JRP of the potential cumulative environmental effects of the project, (2) the review by the JRP of the traditional knowledge of the community (not just aboriginal people), the use by the JRP of the precautionary principle, (4) the rejection by the JRP of Bilcon’s overreliance on the concept of adaptive management, and (5) the consideration by the JRP of whether the project could be justified” (Counter-Memorial, para. 381). *See also* Rejoinder, paras. 146-147, for a similar reply with regard to the Investors arguments regarding the “precautionary principle, adaptive management, mitigation measures and an alleged (but unsubstantiated) failure to take note of evidence”.

egregious conduct required for a violation of Article 1105.<sup>606</sup> Even if any of the factors considered by the JRP were inconsistent with typical practice in Canadian law, or were outside of the Panel's mandate, that does not, in the Respondent's view, citing the *Cargill* case, amount to a breach of Article 1105.<sup>607</sup> The Respondent notes that the Investors did not raise any claims in the domestic courts about the JRP process and even admitted contemporaneously that "[t]he [JRP] process ran smoothly and efficiently".<sup>608</sup>

419. The Respondent submits that the JRP applied the definition of "significant adverse environmental effects" set out in the *Nova Scotia EA Regulations* which do not require that an adverse effect rise to the level of "major or catastrophic" for it to be deemed "significant". In the Respondent's view, as the JRP had to satisfy the requirements of both the federal and provincial regulatory frameworks, it was entirely reasonable for it to use the definition of "significant" that afforded the highest standard of environmental protection.<sup>609</sup>

420. Finally, the Respondent rejects the Investors' assertion that the JRP's conclusion with respect to community core values "gave a veto to those opposed to the project" and argues that the JRP effectively detailed the reasons why it concluded that the project would be inconsistent with the community's core values.<sup>610</sup>

v. The Ministerial Decisions following the JRP Report

421. The Respondent argues that the ministerial decision to adopt the recommendation of the JRP did not breach Article 1105(1). First, the Respondent observes that, under s. 37 of the *CEAA*, it was the Minister of Fisheries and Oceans, not the federal Minister of the Environment, that was required to prepare a response to the JRP report, seek the approval of the Governor-in-Council, and issue the response.<sup>611</sup> It is the Respondent's position that the Minister came to a reasoned conclusion on the basis of the JRP's recommendations as evidenced by the careful consideration given to the submissions of the Investors.<sup>612</sup> The Respondent notes that there is no requirement

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<sup>606</sup> Counter-Memorial, para. 381.

<sup>607</sup> Hearing Transcript, 31 October 2013, pp. 227-229, rejecting the Investors' arguments concerning *Mobil*, *Cargill*, and *Glamis*.

<sup>608</sup> Counter-Memorial, para. 383; Letter from Paul Buxton to Debra Myles, dated 9 July 2007, Exhibit R-259.

<sup>609</sup> Rejoinder, para. 144.

<sup>610</sup> Rejoinder, para. 145.

<sup>611</sup> Counter-Memorial, para. 362.

<sup>612</sup> Counter-Memorial, para. 363. *See also* Rejoinder, para. 150.

in Canadian law that Ministers must receive comments or hear views from the various stakeholders on a JRP's recommendations.<sup>613</sup>

vi. Full Protection & Security

422. The Respondent submits that "the obligation to provide full protection and security extends only to guaranteeing the physical security of investors and their investment".<sup>614</sup> According to the Respondent, the customary international law minimum standard of treatment of aliens "does not extend to 'regulatory security' and certainly not to the type of 'protection' the Claimants seek".<sup>615</sup> Moreover, the Respondent submits that the Investors failed to provide evidence that the customary international law minimum standard of treatment includes an obligation to provide a stable legal environment for investors.<sup>616</sup>

423. The Respondent submits that although the Investors' claim to have been denied a stable legal environment due to political interference, the evidence they have submitted does not substantiate such interference.<sup>617</sup>

vii. Legitimate Expectations

424. The Respondent argues that Article 1105(1) does not include a stand-alone obligation protecting legitimate expectations and that a breach of legitimate expectations can only be a relevant factor in considering whether a measure violated Article 1105(1).<sup>618</sup> It is the Respondent's position that the Investors must demonstrate that they had objective expectations which arose from specific assurances made by the Respondent to induce their investment at Whites Point before they can substantiate any breach thereof.<sup>619</sup>

425. The Respondent argues that all the meetings with Canadian politicians and officials to which the Investors refer do not support the Investors' contention because all these meetings occurred in

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<sup>613</sup> Rejoinder, para. 149. *See also* Counter-Memorial, para. 364.

<sup>614</sup> Counter-Memorial, para. 384. *See also* Counter-Memorial, paras. 385-386, and Rejoinder, para. 154.

<sup>615</sup> Rejoinder, para. 154. *See also* Counter-Memorial, para. 385.

<sup>616</sup> Rejoinder, para. 154. *See also* Counter-Memorial, para. 385.

<sup>617</sup> Rejoinder, para. 155.

<sup>618</sup> Counter-Memorial, paras. 389-391; Rejoinder, para. 156.

<sup>619</sup> Rejoinder, para. 156; Counter-Memorial, para. 392.

late 2002 and well into 2003, after the Investors had decided to invest in the Whites Point Quarry and Marine Terminal.<sup>620</sup>

426. The Respondent also rejects the assertion that the conditional approval to Nova Stone for a 3.9 ha quarry at the Whites Point project site created a legitimate expectation for the Investors that they would be permitted to develop a 152 ha quarry and a 170 m long marine terminal that would operate for 50 years.<sup>621</sup> According to the Respondent, a conditional approval does not give rise to an objective expectation arising from a specific assurance.<sup>622</sup>

### 3. The Tribunal's Analysis

#### (a) The International Minimum Standard

427. NAFTA Article 1105 has by now been the subject of considerable analysis and interpretation by numerous arbitral tribunals. The Tribunal in the present case is guided by these earlier cases, particularly the formulation of the international minimum standard by the *Waste Management* Tribunal.

428. Article 1105 provides:

##### Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

429. After a number of NAFTA claims had been filed, and in light of some of the early awards that had by then be rendered, the Free Trade Commission on 31 July 2001 issued the following Notes of Interpretation:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment of another Party;

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<sup>620</sup> Counter-Memorial, para. 393. *See also* Counter-Memorial, paras. 35-41.

<sup>621</sup> Rejoinder, para. 157.

<sup>622</sup> Rejoinder, paras. 158-159.

2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment to or beyond that which is required by the customary international law minimum standard of treatment;
  3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).<sup>623</sup>
430. Article 31(3)(a) of the Vienna Convention on the Law of Treaties calls on treaty interpreters to take into account “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”. Yet NAFTA Article 1131(2) contains a *lex specialis*, which goes further in providing that “[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section”. Under the general rule on interpretation set out in the Vienna Convention, a NAFTA tribunal would only need to “take into account” the subsequent agreement.<sup>624</sup> However, by virtue of NAFTA Article 1131(2), acts of authentic interpretation by the States parties to the Agreement, like the Notes just referred to, are binding and conclusive.
431. The disputants in the present case both agree that the FTC Notes are binding, although they disagree on their interpretation.<sup>625</sup> Their disagreement concerns the relationship between the minimum standard of international law and the concepts of “fair and equitable treatment” and “full protection and security”, particularly the question whether the Tribunal can look at other sources of international law beyond the FTC Notes to shed light on the meaning of Article 1105.
432. According to the Investors, the FTC Notes are only one element that the Tribunal should use,<sup>626</sup> whereas Canada took the view that the Tribunal was limited to the authentic interpretation of the fair and equitable treatment standard provided by the FTC.<sup>627</sup> The Tribunal agrees with Canada on this point. In light of the FTC Notes and in the specific context of NAFTA Chapter Eleven in which this Tribunal operates, “fair and equitable treatment” and “full protection and security” cannot be regarded as “autonomous” treaty norms that impose additional requirements above and beyond what the minimum standard requires.<sup>628</sup>

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<sup>623</sup> NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, at B, Exhibit RA-49.

<sup>624</sup> Hearing Transcript, 22 October 2013, p. 179. *See also* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT’L L. 179, 199 (2010).

<sup>625</sup> Memorial, para. 288, cited in Counter-Memorial, para. 310.

<sup>626</sup> Reply, para. 191.

<sup>627</sup> Rejoinder, paras. 102-105.

<sup>628</sup> *See* the discussion of the additive approach in *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits of Phase 2, 10 April 2001, paras. 110 et seq.

433. NAFTA Article 1105 is, then, identical to the minimum international standard. The crucial question—on which the Parties diverge—is what is the content of the contemporary international minimum standard that the tribunal is bound to apply. NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection.
434. Many tribunals have reviewed the historical development of the international minimum standard, so that the present Tribunal can focus on the aspects that are particularly important for the present case. The starting point is generally the *Neer* case. A United States-Mexico Claims Commission was considering not an investment complaint, but the alleged failure of Mexico to investigate and prosecute those responsible for the death of a United States citizen. The *Neer* Commission held that a breach of the minimum standard of treatment of aliens requires treatment that amounts to “bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency”.<sup>629</sup> The NAFTA tribunal in *Glamis* considered that the *Neer* articulation is still the standard, although notions may have changed about what in the circumstances constitutes outrageous conduct.<sup>630</sup>
435. 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. Thus, the NAFTA tribunal in *ADF Group* in 2003 held that the customary international law referred to in Article 1105(1) is not “frozen in time” and that the minimum standard of treatment does evolve.<sup>631</sup> The tribunal in *Merrill & Ring*, in 2010, referred to practice, decisions and commentary within both NAFTA and in the wider world and concluded that:

The trend towards liberalization of the standard applicable to the treatment of business, trade and investments continued unabated over several decades and has yet not stopped. The examination of claims brought by many governments for settlement by agreement is also illustrative of such open-minded standard, including all kinds of property, rights and interests. The Iran-United States Claims Tribunal has also significantly contributed to this trend.

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<sup>629</sup> *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926), 4 RIAA 60, pp. 61-62.

<sup>630</sup> *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Arbitration Rules, Award, 8 June 2009, para. 22.

<sup>631</sup> *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 113.

Conduct 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....

A requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*. In the end, the name assigned to the standard does not really matter. 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.

In conclusion, the Tribunal finds that the applicable minimum standard of treatment of investors is found in customary international law and that, except for cases of safety and due process, today's minimum standard is broader than that defined in the *Neer* case and its progeny. Specifically this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary law, as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard.<sup>632</sup>

436. In light of the FTC Notes, it is important to emphasize that the trend in the wider world outside NAFTA is only relevant to the extent that such trend has affected the international minimum standard under customary international law. There have been different abstract formulations of the kind of conduct that constitutes a breach of the international minimum standard. Yet all authorities agree that the mere breach of domestic law or any kind of unfairness does not violate the international minimum standard.
437. The Tribunal agrees that international responsibility and dispute resolution, in the investor context, is not supposed to be the continuation of domestic politics and litigation by other means. Modern regulatory and social welfare states tackle complex problems. Not all situations can be addressed in advance by the laws that are enacted. Room must be left for judgment to be used to interpret legal standards and apply them to the facts. 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.

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<sup>632</sup> *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL Arbitration Rules, ICSID Administered Case, Award, 31 March 2010, paras. 207, 208, 210 and 213 respectively; other tribunal decisions noting the evolution of the standard include *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 281, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 179, and *Mondev v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 116.



438. 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. States have concluded that the standard protects their own nationals in other countries and encourages the inflow of visitors and investment.
439. Three additional considerations are relevant in applying the international minimum standard. First, third-party adjudicators must, in applying the international minimum standard, take into account that domestic authorities may have more familiarity with the factual and domestic legal complexities of a situation. Secondly, domestic authorities may also enjoy distinctive kinds of legitimacy, such as being elected or accountable to elected authorities. Thirdly, the NAFTA parties have expressly chosen not only to provide a third-party dispute settlement machinery, but to make it directly accessible to investors. Third-party adjudicators may have their own advantages including independence and detachment from domestic pressures.
440. In order to strike an appropriate balance and taking into account the FTC Notes, a number of NAFTA tribunals have attempted to identify a “threshold of seriousness” that an alleged breach of equity, fairness or law must attain before constituting a breach of the international minimum standard. Many NAFTA tribunals have shared the emerging consensus that the *Neer* standard of indisputably outrageous misconduct is no longer applicable, but there is no consensus yet on a formulation that best suits the modern evolution of the standard. For example, the *S.D. Myers* tribunal found that the investor must have been treated in “such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective”. It also noted that a determination of a breach “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>633</sup>
441. The Tribunal in the present case agrees that there is indeed a high threshold for Article 1105 to apply.<sup>634</sup> The language of Article 1105 itself is the necessary reference point in interpreting the international minimum standard. The search is to determine whether there has been a denial of “fair and equitable treatment” and “full protection and security”. According to the FTC Notes, NAFTA tribunals are bound to interpret and apply the standard in accordance with customary international law. In interpreting the international minimum standard, the Tribunal also drew guidance from earlier NAFTA Chapter Eleven decisions.

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<sup>633</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Arbitration Rules, Partial Award, 13 November 2000, para. 263, cited in Counter-Memorial, para. 321.

<sup>634</sup> *Cf. International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL Arbitration Rules, Award, 26 January 2006, paras. 194, 197.

442. The formulation of the “general standard for Article 1105” by the *Waste Management* Tribunal is particularly influential, and a number of other tribunals have applied its formulation of the international minimum standard based on its reading of NAFTA authorities:

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.<sup>635</sup>

443. While no single arbitral formulation can definitively and exhaustively capture the meaning of Article 1105, the Tribunal finds this quote from *Waste Management* to be a particularly apt one. Acts or omissions constituting a breach must be of a serious nature. The *Waste Management* formulation applies intensifying adjectives to certain items—but by no means all of them—in its list of categories of potentially nonconforming conduct. The formulation includes “grossly” unfair, “manifest” failure of natural justice and “complete” lack of transparency.
444. The list conveys that there is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but that there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour. The formulation also recognises the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach.
445. On the facts, the *Waste Management* tribunal concluded that Mexico had not breached Article 1105. In setting out its persuasive test for breach of the international minimum standard, the tribunal noted *obiter* that the breach of reasonably relied-on expectations could be a relevant factor—but concluded that no such representations had been made by the Mexican authorities. The tribunal’s qualifier that the investor needs to have “reasonably relied” on the representations is important. The *Glamis* tribunal refers to “objective expectations *in order to*

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<sup>635</sup> *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)00/3, 30 April 2004, paras. 98 and 99, quoted in *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 141, and in *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 282.

*induce* investment and the subsequent repudiation of those expectations”.<sup>636</sup> The *ADF* tribunal suggests that only representations made by authorized officials qualify for consideration in this context.<sup>637</sup>

446. In the reasons that follow, the Tribunal will review the various aspects of the Investors’ claim that there has been a breach of the international minimum standard. Even though the Tribunal by no means sustained all of these contentions, it finds that Canada breached Article 1105. This finding rests on the following factual and legal determinations.
447. First, the Investors understood that they would only obtain environmental permission if the project satisfied the requirements of the laws of federal Canada and Nova Scotia. They expected, however, that absent any change in the federal or provincial law, the project site was not effectively zoned against development, and that their project would be assessed on the merits of its environmental soundness in accordance with the same legal standards applied to applicants generally.
448. Secondly, the Investors reasonably relied on specific encouragements, at the political and technical level, to pursue the project not only in Nova Scotia but in the specific site they chose.
449. Thirdly, these encouragements contributed to the Investors’ decision to not only proceed with their business plans, but to invest very substantive corporate resources—including several millions of dollars—in good faith to obtain and present an Environmental Impact Statement.
450. Fourthly, the JRP, by its own acknowledgment, adopted an unprecedented approach. This approach was inimical to the proponents having any real chance of success based on an assessment of their individual project on its merits in accordance with the laws in force at the time.
451. Fifthly, this “community core values” approach of the JRP was open to at least four possible interpretations. On any plausible interpretation, it was highly problematic in light of the applicable law and facts of the case. The Investors were given no reasonable notice that the JRP was going to adopt this unique approach and therefore had no opportunity to seek to clarify or contest it.

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<sup>636</sup> *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Arbitration Rules, Award, 8 June 2009, para. 22 (emphasis in original).

<sup>637</sup> *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 189.

452. Sixthly, the “community core values” approach of the JRP was the decisive and overriding consideration. The JRP did not carry out its mandate to conduct a “likely significant effects after mitigation” analysis to the whole range of potential project effects, as required by the *CEAA*. The JRP thus arrived at its conclusions under both the laws of federal Canada and Nova Scotia without having fully discharged a crucial dimension of its mandated task. The ultimate decision makers in the governments of federal Canada and Nova Scotia were not provided with all the information that could have provided a proper foundation from which to arrive at their own final conclusions.
453. In the result, the Investors were encouraged to engage in a regulatory approval process costing millions of dollars and other corporate resources that was in retrospect unwinnable from the outset, even though the Investors were specifically encouraged by government officials and the laws of federal Canada to believe that they could succeed on the basis of the individual merits of their case.
454. The approach by the JRP that constitutes a breach of Article 1105 is not merely a matter of disputed judgments interpreting grey areas of the law, weighing contested points of evidence, or exercising scientific judgment. In the end the JRP’s decision was effectively to impose a moratorium on projects of the category involved here—a kind of zoning decision.

**(b) The Encouragement of the Investment and Ensuing Expectations of the Investors**

455. The reasonable expectations of the investor are a factor to be taken into account in assessing whether the host state breached the international minimum standard of fair treatment under Article 1105 of NAFTA. In this context, the Tribunal will review what the Investors could reasonably expect in their interactions with officials of federal Canada and Nova Scotia and the legal and policy framework that existed at the time, in light of the general and specific encouragements Bilcon received to invest in a coastal quarry and marine terminal project in the Digby Neck area.
456. The official public policy of Nova Scotia has been to welcome investment in mining. This official welcome has extended to foreign investors, to tidewater developments (projects on or near the coastline taking advantage of Nova Scotia’s access to markets through ocean transport) and to the extraction of aggregate for construction purposes.
457. In 1996, the Government of Nova Scotia issued its policy statement “Minerals—A Policy for Nova Scotia”. It extols the benefits that mineral exploration and production can bring to the

Nova Scotia economy, including jobs and tax revenues.<sup>638</sup> The business environment should be “competitive at national and international levels, and supported by clear, fair and effective policies and regulations and promotion of the province’s mineral potential”.<sup>639</sup> It also notes that the strategic direction of Nova Scotia policy will lead to greater economic opportunities and higher levels of investment.<sup>640</sup> The statement specifically acknowledges that Nova Scotia’s mining history includes “building stone, sand and gravel, and crushed rock”.<sup>641</sup>

458. The Nova Scotia policy recognizes the need to “ensure protection of the environment”.<sup>642</sup> It calls for “flexible planning strategies that accommodate many different resources and conservation interests. Rational choices between multiple resource and conservation uses should be made within an integrated decision-making system, which includes high-quality data on mineral resources”.<sup>643</sup> There should be a “one-window” approach to regulatory requirements, consultation and assistance.<sup>644</sup> The provincial government “will promote the province’s mineral resource potential at the community level and encourage municipalities and local economic development groups to consider exploration and mining as positive components in local economic development. The mining industry will be encouraged to identify and consider local concerns through consultation during the planning and development stages of mining projects”.<sup>645</sup> The province will “foster more cooperative working arrangements”<sup>646</sup> among stakeholders.

459. Another official provincial publication specifically dealt with marine quarries. It stated that:

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<sup>638</sup> NSDNR, “Minerals—A Policy for Nova Scotia”, Nova Scotia Department of Natural Resources, dated 1996, Exhibit 5 to Witness Statement of John Lizak.

<sup>639</sup> NSDNR, “Minerals—A Policy for Nova Scotia”, Nova Scotia Department of Natural Resources, dated 1996, Exhibit 5 to Witness Statement of John Lizak, pp. 4-5.

<sup>640</sup> NSDNR, “Minerals—A Policy for Nova Scotia”, Nova Scotia Department of Natural Resources, dated 1996, Exhibit 5 to Witness Statement of John Lizak, p. 11.

<sup>641</sup> NSDNR, “Minerals—A Policy for Nova Scotia”, Nova Scotia Department of Natural Resources, dated 1996, Exhibit 5 to Witness Statement of John Lizak, p. 3.

<sup>642</sup> NSDNR, “Minerals—A Policy for Nova Scotia”, Nova Scotia Department of Natural Resources, dated 1996, Exhibit 5 to Witness Statement of John Lizak, p. 12.

<sup>643</sup> NSDNR, “Minerals—A Policy for Nova Scotia”, Nova Scotia Department of Natural Resources, dated 1996, Exhibit 5 to Witness Statement of John Lizak, p. 11.

<sup>644</sup> NSDNR, “Minerals—A Policy for Nova Scotia”, Nova Scotia Department of Natural Resources, dated 1996, Exhibit 5 to Witness Statement of John Lizak, p. 16.

<sup>645</sup> NSDNR, “Minerals—A Policy for Nova Scotia”, Nova Scotia Department of Natural Resources, dated 1996, Exhibit 5 to Witness Statement of John Lizak, pp. 16-17.

<sup>646</sup> NSDNR, “Minerals—A Policy for Nova Scotia”, Nova Scotia Department of Natural Resources, dated 1996, Exhibit 5 to Witness Statement of John Lizak, p. 16.

Nova Scotia is very well situated on great circle shipping routes to Europe...and on established shipping routes to the United States Eastern Seaboard and Gulf Coast. Consumption of aggregates is increasing in the United States and this trend is to continue.<sup>647</sup>

460. An accompanying map shows outward arrows from Nova Scotia to New York,<sup>648</sup> among other locations. Another map, designating “locations of potential crushed stone deposits in Nova Scotia”,<sup>649</sup> indicates the kind of rock to be found in various parts of the province. The Digby Neck area is marked as “sedimentary and minor volcanic rocks”.
461. Mr. Lizak, a geological expert retained by the Clayton Group in 2002, recalls that Nova Scotia officials specifically referred him to a document entitled “Industrial Minerals in Nova Scotia”. It contains quotes such as the following:

Nova Scotia has a rich history in industrial mineral production spanning a period of over 200 years. From the earliest extraction of aggregate for local road construction the industry has developed into a supplier of numerous industrial commodities for local, interprovincial and international markets.

In addition, over 75 aggregate producers process mineral aggregate at numerous pits and quarries throughout the province.

...[the mining] industry has also enjoyed the support and experience of several government agencies and the numerous excellent research facilities which are found here. The people and the Government of Nova Scotia are committed to the continued growth and development of industrial mineral production in our Province, ensuring a long and prosperous future for this vital industry.

*The geology of Nova Scotia offers excellent potential for the production of quality aggregate materials. ...Some of the deposits are in proximity to tidewater, opening the possibility of new marine quarry opportunities.*<sup>650</sup>

462. Mr. Lizak testified that between 2002 and 2005 he had at least ten meetings with provincial natural resources officials discussing the availability of quarrying sites. Provincial officials even took him on a helicopter tour of potential aggregate sites, although they did not specifically include Whites Point. Mr. Lizak conveyed to the Investors the following message resulting from his review of government documents and meetings: that Nova Scotia was encouraging investors

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<sup>647</sup> “Potential Crushed Stone Deposits on Tidewater in Nova Scotia”, Gordon Dickie, Nova Scotia Department of Mines and Energy, dated November 1987, p. 1, Exhibit 3 to Witness Statement of John Lizak.

<sup>648</sup> “Potential Crushed Stone Deposits on Tidewater in Nova Scotia”, Gordon Dickie, Nova Scotia Department of Mines and Energy, dated November 1987, p. 2, Figure 1, Exhibit 3 to Witness Statement of John Lizak.

<sup>649</sup> “Potential Crushed Stone Deposits on Tidewater in Nova Scotia”, Gordon Dickie, Nova Scotia Department of Mines and Energy, dated November 1987, p. 3, Figure 2, Exhibit 3 to Witness Statement of John Lizak.

<sup>650</sup> “Industrial Minerals in Nova Scotia”, Nova Scotia Department of Natural Resources, undated, pp. 10-11, Exhibit 4 to Witness Statement of John Lizak (emphasis added).

to establish marine quarries, supported mining for export markets, and had an efficient “one window” environmental assessment process.<sup>651</sup>

463. While Nova Scotia technical officials do not appear to have specifically promoted Whites Point among possible locations, once it was identified by the private developers, technical experts at Nova Scotia were highly supportive:

. . . when they became familiar with the project...there was tremendous encouragement. They wanted this to go.<sup>652</sup>

464. Mr. Daniel Kontak, a Regional Geologist at the Nova Scotia Department of Natural Resources, met with Mr. Lizak and provided encouragement and technical information:

[Mr. Daniel Kontak] visited the [Whites Point] site with me several times, overnights on the site, provided countless publications. He sampled our core. He analyzed our core. He also reviewed, you know, documents that we prepared for the Whites Point quarry. It was a very collaborative process. I mean, I didn't ask for this help. You know, had I essentially had to pay for this, it would have cost tens of thousands of dollars.<sup>653</sup>

465. Mr. William Clayton, a shareholder and senior executive with the Clayton Group of Companies, testified that Bilcon had been obtaining some of its crushed stone from a quarry in New Brunswick. The quarry was located on a tributary of the Bay of Fundy. It only partially met the company's need for crushed stone. The Clayton Group discovered, through research that the investment climate in Nova Scotia was “very encouraging to companies seeking to quarry in Nova Scotia”.<sup>654</sup> “In light of Nova Scotia's favourable stance”, the Clayton Group decided to seek approval of a quarry near Whites Point Cove.<sup>655</sup> In 2002, the Group formed a partnership with Nova Stone to develop the project and in April 2004 took over as sole proprietor.

466. Mr. Paul Buxton headed the approval process for the Group. He met with the Honourable Gordon Balser, the Nova Scotia Minister for Natural Resources and the member of the legislature for the Whites Point quarry area. Mr. Buxton reported to the Clayton Group that

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<sup>651</sup> Witness Statement of John Lizak, p. 290.

<sup>652</sup> Testimony of John Lizak, Hearing Transcript, 22 October 2013, p. 289, lines 15-17.

<sup>653</sup> Testimony of John Lizak, Hearing Transcript, 22 October 2013, p. 290, lines 5-17.

<sup>654</sup> Witness Statement of William Richard Clayton, para. 6.

<sup>655</sup> Witness Statement of William Richard Clayton, para. 9.

Minister Balser encouraged the project and “kept discussing the need for new jobs in the area”.<sup>656</sup> Mr. Clayton concluded that:

Based on these meetings between Paul Buxton and Minister Balser, I became convinced that the Government of Nova Scotia looked on our Whites Point Quarry project favorably and would allow the project to be assessed in a fair, impartial and transparent way. In sum, I became convinced that Nova Scotia was a good place to do business.<sup>657</sup>

467. Mr. Clayton first became concerned about whether the environmental assessment of the project would be proceeding fairly around the spring of 2003. A Nova Scotia election was scheduled for August. “The Whites Point Quarry project, as a result of this political tension, had become a political lightning rod in the election.”<sup>658</sup> Among other things, the Clayton Group had to learn through the media, rather than being informed directly, that the project would be referred to a JRP.<sup>659</sup> Opponents of the project, on the other hand, had become informed of the referral even before the official announcement.<sup>660</sup> Mr. Clayton wrote to the Nova Scotia Minister of the Department of Environment and Labour that “[w]e would also like to assure you that we fully intend to comply with your regulations, your process and your laws. Our only expectation is that we will receive fair and equal consideration in return.”<sup>661</sup>
468. Mr. Paul Buxton testified that in 2002 and 2003, the Province of Nova Scotia was engaged in a prominent advertising campaign proclaiming that “Nova Scotia was Open for Business”. This campaign continued throughout the environmental assessment process for Whites Point.<sup>662</sup> The Nova Scotia Minister for Natural Resources made available related publications to the public and to Mr. Buxton. Mr. Balser was “very keen to have new jobs in his constituency”.<sup>663</sup> Through 2002, Mr. Buxton “had at least fifteen meetings and discussions with Mr. Balser, who always encouraged the Claytons’ investment in the region, and kept reinforcing the positive impact the Whites Point Quarry would have on job creation and related investment in the

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<sup>656</sup> Witness Statement of William Richard Clayton, para. 13.

<sup>657</sup> Witness Statement of William Richard Clayton, para. 13.

<sup>658</sup> Witness Statement of William Richard Clayton, para. 23.

<sup>659</sup> Witness Statement of William Richard Clayton, para. 27.

<sup>660</sup> Memorial, para. 141, referring to Journal Note by Thomas Wheaton, dated 26 June 2003, Exhibit C-254.

<sup>661</sup> Letter from Mr. William Richard Clayton to Minister Morash, dated 24 October 2003, Exhibit 9 to Witness Statement of Mr. William Richard Clayton, para. 16.

<sup>662</sup> Witness Statement of Paul Buxton, para. 17.

<sup>663</sup> Witness Statement of Paul Buxton, para. 17.



area”.<sup>664</sup> Mr. Balser’s encouragement specifically extended to a project at the Whites Point area, rather than being of a more general nature:

On June 24, 2002, Bill Clayton Sr., Bill Clayton Jr., John Wall, and myself, attended a meeting with Minister Balser at his office. At that meeting, Minister Balser personally invited the Claytons to invest in a quarry at Whites Point.

Following the meeting with Minister Balser, Bilcon received a letter from Minister Balser’s office thanking the Claytons for meeting with him. Minister Balser’s letter also said: I hope that you and your company will continue to move the project forward as I feel it has the potential to benefit both you and our area. Please do not hesitate to contact me in the future if I can be of any assistance.<sup>665</sup>

469. The Nova Scotia Premier himself, Mr. Rodney MacDonald, personally told the Claytons that the Province was “open for business”. “Like Minister Balser, the Premier was supportive of the quarry investment the Claytons were considering making in Nova Scotia.”<sup>666</sup>
470. The partnership documents between Nova Stone and Bilcon suggest, and Mr. Clayton confirmed in cross-examination, that it was Bilcon’s initial plan that Nova Stone would bring to the partnership all necessary permits.<sup>667</sup> When it emerged that Nova Stone did not have them, however, Bilcon continued with the project including spending years and millions of dollars on attempting to obtain approvals under federal Canada’s and Nova Scotia’s environmental protection regimes. A series of encouragements by Nova Scotia in policy pronouncements and directly by elected officials and civil servants, some highlights of which the Tribunal has quoted, created the expectation in the Investors, on which they could reasonably rely, that an environmental impact assessment of a coastal quarry and marine terminal project in the Whites Point area would be carried out fairly and impartially within the legislative framework provided by federal Canada and Nova Scotia. The specific encouragements were critical for the Investors’ decision to continue with the project, including the commitment of significant resources to the environmental assessment process.
471. In the process leading up to the referral to the JRP, the conduct of Canada’s officials reinforced the Investors’ belief that regulators’ concerns could be addressed through a process whereby potential negative impacts would be identified in a rational and evidence-based manner and the Investors would be invited to find ways to prevent or mitigate such impacts by appropriate adjustments to project design and operation. With respect to the operation of a 3.9 ha quarry,

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<sup>664</sup> Witness Statement of Paul Buxton, para. 19.

<sup>665</sup> Witness Statement of Paul Buxton, paras. 22-23.

<sup>666</sup> Witness Statement of Paul Buxton, para. 18.

<sup>667</sup> Testimony of William Richard Clayton, Hearing Transcript, 22 October 2013, pp. 201 et seq.

regulators raised questions about impacts from blasting on marine mammals and fish, and the exchanges focused on official regulations and policies and the science of the extent of impacts and how they could be avoided.

472. In the letter from Minister Thibault to the Minister of the Environment requesting a referral to a JRP, Minister Thibault notes potential environmental impacts<sup>668</sup> as well as the desirability of harmonizing the federal review with the Nova Scotia environmental assessment process. Under the *CEAA*, a responsible authority could request a Review Panel on two possible bases: that a project may cause significant adverse environmental effects after mitigation, or public concern. The referral letter mentions only the former, environmental impact.
473. Mr. Clayton sought an explanation of the referral from federal officials. An official told him: “You’re in a Panel Review and we’re not going to tell you why”.<sup>669</sup> Mr. Clayton was rebuffed in his attempts to obtain a copy of the letter from Minister Thibault mentioned in the preceding paragraph, but it was finally revealed to him much later, by the JRP.<sup>670</sup>
474. The “reasonable expectations” analysis must take into account the regulatory framework for environmental assessments of the time and the direction provided by the JRP pursuant to its statutory mandate.
475. The *CEAA* sets out the law on environmental assessments. It includes: an overall set of objectives; a sequence of steps to be followed; an allocation of varying roles for project proponents, interveners, members of the public and regulators; a list of factors that must be considered in each and every environmental assessment, and finally a set of definitions.
476. The Act promotes the reconciliation, through assessment and planning, of economic development and protection of the environment. Its application is triggered by the involvement in projects of “responsible authorities”—federal authorities that have a role in proposing a project, providing it with financial support or the use or transfer of federal government property or issues a permit or license.<sup>671</sup> An environmental assessment should be carried out “as early as practicable in the planning stages of the project and before irrevocable decisions are made”.<sup>672</sup> The purpose of the Act is to ensure “careful consideration” of the environmental effects of

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<sup>668</sup> Letter from Robert Thibault, Minister to David Anderson, dated 26 June 2003, Exhibit C-466.

<sup>669</sup> Witness Statement of Paul Buxton, para. 54.

<sup>670</sup> Witness Statement of Paul Buxton, para. 56.

<sup>671</sup> *CEAA*, s. 5.

<sup>672</sup> *CEAA*, s. 11.

projects before responsible authorities take actions in connection with them.<sup>673</sup> Such actions should “promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy”.

477. Environmental assessments can be carried out through various means that range, in the level of public involvement among other things, from a screening, over a comprehensive study to a panel review. Whatever mechanism is used—screening, comprehensive study, panel review — “there shall be”, according to s. 16 of the *CEAA*, a consideration of factors that include:

- The environmental effects of the project. “Environment” means the “components of the Earth”.<sup>674</sup> An “environmental effect” means a change that the project may cause in the environment. There must therefore be a physical or biological pathway that connects a project with its impacts. To the extent that a project has social or economic impacts that are not caused by a biological or physical change, they are not considered environmental effects. If, however, the pathway exists, effects to be considered include “health and socio-economic conditions, physical and cultural heritage, current use of lands and resources for traditional purposes by aboriginal persons, or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance”.<sup>675</sup>
- Whether the effects are adverse: if there is a biological or physical effect in comparison to normal - “baseline” – conditions; then it must be assessed whether these will have a negative effect from a human perspective. The *CEAA* refers to impacts on “health and socioeconomic conditions” and “physical and cultural heritage”. The Reference Guide on determining likely significant adverse effects by the Canadian Environmental Assessment Agency of 1994 interprets the *CEAA* as permitting the assessment of human impacts on factors that include health, “wellbeing and quality of life” and “aesthetics”.<sup>676</sup>
- The “significance” of these adverse effects: significance is not defined by the Act itself. An expert report submitted by Canada<sup>677</sup> notes that the Canadian Environmental Assessment Agency Reference Guide provides some guidance. This document is primarily directed to advising responsible authorities and the Minister of the Environment. Significance, it explains, can be evaluated by taking into account the magnitude (severity of the effect), geographic extent, duration and frequency, reversibility and ecological context (is the area pristine or ecologically sensitive?). Official standards established by federal, provincial or municipal authorities can sometimes be used in arriving at a determination of significance; for example, the emission of a chemical into the air might be within the standard of tolerance permitted by

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<sup>673</sup> *CEAA*, s. 4(1)(a).

<sup>674</sup> *CEAA*, s. 2.

<sup>675</sup> All definitions quoted are from the *CEAA*, s. 2.

<sup>676</sup> Canadian Environmental Assessment Agency, Reference Guide: Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects, dated November 1994, p. 187, Exhibit R-20; see also discussion in Expert Report Expert Report of Robert Connelly, para. 70.

<sup>677</sup> Expert Report of Robert Connelly, para. 77; Canadian Environmental Assessment Agency, Reference Guide: Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects, dated November 1994, Table 1, p. 189, Exhibit R-20.

a legislated standard, and that might contribute to a determination that the effect is not significant.<sup>678</sup>

- The likelihood of significant adverse effects: the probability of effects should be predicted along with information about the degree of the scientific uncertainty that is connected with the prediction. “There will always be some scientific uncertainty associated with the information and methods used in EAs.”<sup>679</sup> Where numerical methods to make predictions and define uncertainty cannot be used, the assessment must be made by a responsible authority or the Minister using “best professional judgment”.
- Measures to mitigate significant adverse effects: an environmental assessment must include a consideration of “measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project”.<sup>680</sup> Mitigation measures can be restorative or compensatory as well as preventative. They consist of “the elimination, reduction or control of the adverse environmental effects of a project, and include restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means”.

478. The specific and fair-minded consideration of the issues just listed is clearly required in any environmental assessment conducted under the *CEAA*, including JRPs. The task of assessing the existence of likely significant adverse effects after mitigation cannot, under federal law, be obviated by wider considerations of the public interest that might weigh for or against the project. The lawfully required task of a JRP is to gather information, including public input, and to evaluate it in light of the core s. 16 question of whether there are “likely significant adverse effects after mitigation?” The Review Panel may be assigned additional tasks under s. 16(2), but they do not appear to include a mandate to consider whether “all the circumstances” warrant proceeding in the face of a project that does not pass muster under the irreducible s. 16 question. Even if the s. 16(2) mandate is construed in such a broad manner, it would not relieve the JRP of its duty to carry out the rest of its core s. 16(1) tasks.

479. Under the scheme of the *CEAA*, the responsible authority makes the decision of whether the public interest, in the circumstances, outweighs the existence of likely significant adverse effects after mitigation. The responsible authority exercises its own discretion. It may authorize the project to proceed taking into account mitigation measures that the responsible authority considers appropriate.<sup>681</sup> It may add to or delete mitigation measures recommended by the JRP. If after such mitigation there are still likely significant adverse effects, the responsible authority

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<sup>678</sup> Canadian Environmental Assessment Agency, Reference Guide: Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects, dated November 1994, p. 191, Exhibit R-20.

<sup>679</sup> Canadian Environmental Assessment Agency, Reference Guide: Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects, dated November 1994, p. 193, Exhibit R-20.

<sup>680</sup> *CEAA*, s. 16(1)(d).

<sup>681</sup> *CEAA*, s. 37(1)(a).

may authorize the project to proceed on the basis that the project is justified in all the circumstances.<sup>682</sup>

480. Bilcon could reasonably expect that a JRP whose mandate included s. 16 of the *CEAA* would methodically review the potential impacts in light of the core s. 16 question, including consideration of mitigation measures. The JRP was required to provide a thorough report that would enable responsible authorities—who are the ultimate decision-makers, not the JRP—to make a final determination of whether the project should proceed in all the circumstances, even in the presence of likely significant adverse effects after mitigation.

481. The expectation of a thorough assessment of the impacts of the project in light of the “likely significant effects after mitigation” standard is reinforced in the case of a JRP by the fact that it necessarily involves public input. A reasonably complete and judicious assessment not only informs the ultimate decision maker, but helps to legitimize whatever decision it makes by ensuring that public comment is recognized and acknowledged.<sup>683</sup> To the extent that the reputation, and not only the ultimate authorization, of a project and its proponent are at stake, proponents could reasonably expect that a JRP process and report would be balanced in its treatment of the s. 16 question. A report would be reasonably thorough in identifying and characterizing both the risks of a proposed project, including likelihood and significance of adverse effects, and any mitigation measures proposed by the proponent, interveners or the panel itself. Otherwise, the public may be left with an untrue or exaggerated impression that the proponent has been advancing a project in a manner that is insensitive to its environmental impact.

482. In the present case, the Agreement between federal Canada and Nova Scotia provided, in accordance with s. 41 of the *CEAA*, that:

*The Report shall include recommendations on all factors set out in section 16 of the Canadian Environmental Assessment Act and, pursuant to Part IV of the Nova Scotia Environment Act, recommend either the approval, including mitigation measures, or rejection of the Project.*<sup>684</sup>

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<sup>682</sup> *CEAA*, s. 37(1)(a)(ii).

<sup>683</sup> “A secondary, related purpose [of a review panel] is to legitimize government decisions about proposals. Opponents of a project that gets approved—and supporters of a project that gets rejected—are more likely to accept the outcome if they have been given a chance to have their say”; Second Expert Report of David Estrin, para. 193.

<sup>684</sup> Agreement concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project between the Minister of the Environment, Canada and the Minister of Environment and Labour, Nova Scotia, para. 6.3, Exhibit R-27 (emphasis added).

483. The Agreement refers to the establishment of a JRP pursuant to paragraph 40(2)(a) of the *CEAA*. The JRP was therefore obliged by the Agreement as well as by federal statute, to carry out the essential mandate of any JRP under federal law as well as carrying out the mandate of a JRP under Nova Scotia law. The dual mandate did not detract from the necessity to fulfill each individual mandate. As Canada states in its Counter-Memorial:

But while two processes can be harmonized, the criteria ultimately applied, and the decisions ultimately made, remain the unique domain of each involved government, based on their own respective legislation.<sup>685</sup>

484. Part III of the Agreement addresses the scope of the environmental assessment and factors to be considered. It includes all the additional factors listed in s. 16(2) of the *CEAA*, including purpose of the project, need for the project, alternative means of carrying it out that are technically and economically feasible, and the environmental effects of any such alternative means. With respect to the core s. 16(1) mandate, the Agreement recapitulates that the assessment must include:

- h) the environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environment effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out....
- m) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project....
- p) residual adverse effects and their significance.<sup>686</sup>

485. The JRP also had a mandate to carry out the functions of a Board under the *NSEA*, the Nova Scotia counterpart of the *CEAA*. The objectives of the provincial statute in many ways match those of the federal act. The provincial statute embodies the principle of “sustainable development”. It affirms “the linkage between economic and environmental issues, recognizing that long-term economic prosperity depends upon sound environmental management and that effective environmental protection depends on a strong economy”.<sup>687</sup> The goal of reconciling environmental protection and economic development is further embodied in the statute by the statement of “the principle of shared responsibility of all Nova Scotians to sustain the environment and the economy, both locally and globally, through individual and government

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<sup>685</sup> Counter-Memorial, para. 44.

<sup>686</sup> Agreement concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project between the Minister of the Environment, Canada and the Minister of Environment and Labour, Nova Scotia, p. 9, Exhibit R-27.

<sup>687</sup> *NSEA*, s. 2(b)(vi).

actions”.<sup>688</sup> The statute commits to the objective of providing “a responsive, effective, fair, timely and efficient administrative and regulatory system”,<sup>689</sup> recognizing that it is “essential to promote the purposes of this Act through non-regulatory measures such as cooperation, communication, education, incentives and partnerships, instead of punitive measures”.<sup>690</sup> It further affirms the goal of “providing access to information and facilitating effective public participation in the formulation of decisions affecting the environment”.<sup>691</sup>

486. The provincial statute, like the federal act, sets out options for environmental screening and assessment. A project might be rejected on a review by the Minister because “of the likelihood that it will cause adverse effects or environmental effects that cannot be mitigated”.<sup>692</sup> The Minister has the option in some cases of referring a project to a Board. The latter must conduct a public hearing or review.<sup>693</sup> The Board submits a report to the Minister to approve the undertaking, reject it, or approve it with conditions. The Minister may then approve the undertaking, reject it, or approve it with conditions that the Minister deems appropriate. The final decision, as with a federal review panel, is left with a senior politically accountable official, not the Board. The Nova Scotia statute, like the federal Canada statute, permits agreements whereby an assessment can be conducted jointly with another jurisdiction.<sup>694</sup>
487. There are several differences between federal Canada and Nova Scotia statutes. Under the federal Canada statute, there must be a biological or physical pathway to an impact before it can be assessed. Under the Nova Scotia statute, the environmental effects that must be assessed in the context of Part IV of the Act include “any change, whether negative or positive, that the undertaking may cause in the environment, *including any effect on socio-economic conditions, on environmental health, physical and cultural heritage* or on any structure, site or thing including those of historical, archeological, paleontological or architectural significance”.<sup>695</sup> Under the federal Canada statute, the mandate of a Review Panel is to assess “adverse effects”; while under the Nova Scotia statute, positive effects must be assessed as well. Under the federal Canada statute, a Review Panel is not called upon to recommend for or against proceeding with

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<sup>688</sup> NSEA, s. 2(b)(iv).

<sup>689</sup> NSEA, s. 2(i).

<sup>690</sup> NSEA, s. 2(i).

<sup>691</sup> NSEA, s. 2(h).

<sup>692</sup> NSEA, s. 34(1)(f).

<sup>693</sup> NSEA, s. 39.

<sup>694</sup> NSEA, s. 47.

<sup>695</sup> NSEA, s. 3(v)(i) (emphasis added).

the project; while under the Nova Scotia statute, the Board must recommend approval, rejection or approval with conditions.<sup>696</sup> Under the federal Canada statute, the core s. 16(1) question—of likely significant adverse effects after mitigation—is explicitly applicable to all forms of environmental assessment, including Review Panels, whereas this specific test is not expressly made applicable in the case of a Board review under the Nova Scotia statute.

**(c) The JRP Process and Governmental Reactions to It**

i. Commencement of the JRP Process and Selection of the JRP's Members

488. The Tribunal has noted the decisions of federal Canada to: (1) define the scope of the project for federal Canada purposes as including both the quarry and the marine terminal; and (2) adopt the Review Panel mode of assessment.

489. These were distinct administrative decisions made in relation to this particular Investor and investment, and completed prior to the three-year period preceding the referral of the case to international arbitration pursuant to Chapter Eleven. These decisions could have been referred to a NAFTA Panel under Chapter Eleven at the time they were made. The question then arises whether in the present proceedings the Tribunal has jurisdiction to consider the issues of scope and level of assessment in respect of the continuation of the process (such as the JRP proceedings) after 17 June 2005.

490. The JRP was appointed on 24 November 2004. On 15 December 2004, the JRP wrote to Bilcon to request that it review the draft EIS Guidelines and provide comments. On 16 January 2005, Bilcon did so.<sup>697</sup> It did not initially bring to the attention of the JRP any concerns about the scope or level of assessment at the commencement of the process. Bilcon in fact did not raise these issues at any time before the JRP or to federal Canada or Nova Scotia when they were considering the JRP Report. In these circumstances, the Tribunal takes the view that it would not be consistent with the letter and object of the timeliness provisions in Chapter Eleven to hold that the scope and level of assessment were issues that had a distinct life within the post-referral stages of this case. The eligible time to bring a claim in respect of scope and level of assessment was within three years of the referral itself. In the Tribunal's opinion, therefore, there are no issues concerning scope and level of assessment that have been brought on a timely basis.

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<sup>696</sup> *NSEA*, s. 39(1).

<sup>697</sup> These dates are taken from the timeline provided in Canada's chronology, Counter-Memorial, pp. xi-xvi.



491. Mr. Estrin, an expert retained by the Investors, testified that governments should have chosen panel members who were experienced in the assessment of industrial facilities, rather than the environment generally. He also states that:

To the extent governments appointed two panel members (Robert Fournier and Gunter Muecke) who had some previous involvement with a key Nova Scotia environmental advocacy group, the Ecology Action Centre, and also appointed a third panel member (Jill Grant) who had developed arguments for greater community participation in decision-making as part of her academic expertise, it was reasonably foreseeable that governments were expecting the Bilcon application would be evaluated with particular empathy to a position advocated by the Ecology Action Centre and/or a position advocating community control regarding new development.<sup>698</sup>

492. Mr. Estrin observes that the Ecology Action Centre in fact did oppose the Bilcon project on the basis that it was inconsistent with “community core values”, and the Panel in fact adopted this view. He testified that he had heard it said that Dr. Fournier might have been especially sensitive to the views of the Ecology Action Centre in the Whites Point context because the same group had been critical of the position of a JRP panel in an earlier case, Sable Gas, and in fact had urged on the first day of the hearings in that case that the Panel be disbanded because of alleged bias of several members apart from Dr. Fournier.

493. According to Mr. Estrin’s second expert report, the Chair of the Panel in the present case, Dr. Fournier, had also chaired the Sable Gas Panel, which addressed “community core values” in the following way:

For the Sable Gas panel (which was chaired by Robert Fournier, who also chaired the WPQ JRP), it was not enough for members of the community to voice their disapproval of the project; rather, the panel insisted on evidence of an adverse impact on the community:

The Panel appreciates the high value that rural residents place on their lifestyle, and the fear that the pipeline could undermine this lifestyle. However, the Panel is not convinced that a properly designed, constructed and maintained pipeline would have the significant adverse effects that some intervenors fear.<sup>699</sup>

The Sable Gas panel seems to be saying to the community that mere NIMBY-ism (“not in my backyard”) is not a relevant consideration. Rather, what matters is whether the evidence indicates that there are likely to be significant adverse effects on the rural way of life. Some local residents may have fears about “safety, adverse wildlife impacts, intrusions by outsiders, and the physical appearance of the right-of-way”—but those fears are not in themselves enough to ground the rejection of the project. The panel quite properly scrutinized those fears and measured them against the evidence about likely effects, and also took into account the proposed mitigation measures as well as the available rights of recourse if any of those fears were to result in actual damage.<sup>700</sup>

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<sup>698</sup> First Expert Report of David Estrin, para. 516.

<sup>699</sup> Second Expert Report of David Estrin, para. 208 (emphasis in the original).

<sup>700</sup> Second Expert Report of David Estrin, para. 209.

494. Mr. Buxton stated at a community liaison meeting in 2004 that the Investors, if asked, might have suggested the same individuals.<sup>701</sup> In his testimony at the hearing, Mr. Buxton explained that:

...we had looked into the Sable Gas project, which [Mr. Fournier] chaired, and had spoken to one of our consultants, Mr. Fader, who was with Natural Resources Canada until he retired. And he had, I think, a fair amount to do with the Sable project and assured us that if Mr. Fournier was chair of the panel, that he would insist on decisions being made on a scientific basis. And that's basically what we wanted to hear.<sup>702</sup>

495. As the Tribunal already noted, Mr. Estrin testified that he had “heard it said” that critical responses to Dr. Fournier’s involvement in the Sable Gas matter might actually have influenced Dr. Fournier to adopt a less balanced approach in the Whites Point matter. Mr. Estrin was clear, however, that he could not confirm as a matter of his own judgment that there was a link between the Ecology Action Centre’s criticisms of the Panel in the Sable matter and Dr. Fournier’s later approach concerning Bilcon.<sup>703</sup>

496. The testimony of Mr. Estrin concerning earlier organizational connections and experiences of some of the Panel members appears to have a very limited purpose: to provide a possible explanatory context for the approach that the JRP eventually adopted. Mr. Estrin himself acknowledged that prior participation in an advocacy group does not necessarily disqualify an individual from serving on an administrative panel.<sup>704</sup> The Tribunal concludes that the evidence does not demonstrate that Canada’s choice of Panel members was improper under either domestic or international standards.

ii. The JRP’s Environmental Assessment Guidelines

497. The federal Canada-Nova Scotia Agreement concerning the JRP provided that the CEA Agency would prepare draft guidelines for the scope of the EIS that the Investors would have to submit. The Panel would then conduct scoping meetings in locations in the project vicinity, take into account comments from the public and other stakeholders, and issue the final guidelines.<sup>705</sup> The Panel proceeded to carry out these steps, but replaced the draft guidelines with a much lengthier

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<sup>701</sup> Second Expert Report of Lawrence Smith, para. 216.

<sup>702</sup> Cross-examination of Paul Buxton, Hearing Transcript, 23 October 2013, p. 376.

<sup>703</sup> Cross-examination of David Estrin, Hearing Transcript, 24 October 2013, p. 215.

<sup>704</sup> Cross-examination of David Estrin, Hearing Transcript, 24 October 2013, p. 210.

<sup>705</sup> Agreement concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project, between The Minister of the Environment, Canada, and The Minister of Environment of Labour, Nova Scotia, dated 3 November 2004, Part II, arts. 2-3, Exhibit R-27.

set of its own, which included more extensive language on many matters, including “social and cultural patterns”. Thus, the Investors were instructed to address:

#### 10.3.8 Social and Cultural Patterns

Describe and evaluate the potential impacts of the Project on social and cultural patterns and social organization. Consider effects on traditional lifestyles, values and culture. Consider any effects on patterns of family and community life (such as household and community organization, including the organization of work).

Consider implications of the Project on residents’ perceptions of quality of life and sense of place. Describe and evaluate potential impacts on social relations between residents, among generations, and between seasonal and full-time residents, among those who are employed and unemployed, and among those who support and oppose the Project.

Describe and evaluate how Project-related impacts on harvested resources or economic activities such as tourism may affect social and cultural patterns.<sup>706</sup>

498. In his expert report, Mr. Estrin suggests that it was highly unusual for a Panel to be authorized to revise the guidelines issued by government agencies. Indeed, the Whites Point Quarry appears to be the only example where this was allowed after 1998.<sup>707</sup> Mr. Estrin states that the revisions by the Panel resulted in a document that was excessively lengthy, detailed and onerous.<sup>708</sup> Mr. Smith’s Expert Report notes, however, that it was not unprecedented to have a Panel revise and finalize guidelines, and that such a process of revision was contemplated by the procedures governing the Whites Point assessment.<sup>709</sup>
499. The Investors, however, did not at the time complain about the process for finalizing the EIS Guidelines or the length or onerousness of the final EIS. On the other hand, they did make several specific comments about the draft EIS. They pointed out that contrary to an implication of the draft EIS Guidelines, members of the public do not evaluate the project; they comment on it; the Panel and regulatory agencies do the evaluation.<sup>710</sup> The Investors also requested that the concept of adaptive management be mentioned in the final EIS Guidelines.<sup>711</sup> This concept involves monitoring impacts and revising mitigation measures. It could address situations where environmental harm is not likely, but where there is still uncertainty about the effectiveness of

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<sup>706</sup> Environmental Impact Statement Guidelines, for the review of the Whites Point Quarry and Marine Terminal Project, Joint Review Panel, dated March 2005, s. 10.3.8, p. 49, Exhibit R-210.

<sup>707</sup> First Expert Report of David Estrin, para. 350.

<sup>708</sup> First Expert Report of David Estrin, para. 347.

<sup>709</sup> First Expert Report of Lawrence Smith, para. 252, citing Canadian Environmental Assessment Agency, Procedures for an Assessment by a Review Panel, A Guideline issued by the Honourable Christine Stewart, dated November 1997, sections 4.8.3, 4.8.4 and 4.8.5 at pp. 14-15, Exhibit R-26.

<sup>710</sup> Letter from Paul Buxton to the Joint Review Panel, dated 16 January 2005, p. 1, Exhibit R-243.

<sup>711</sup> Letter from Paul Buxton to the Joint Review Panel, dated 16 January 2005, p. 1, Exhibit R-243.

mitigation measures.<sup>712</sup> The final EIS Guidelines did in fact make express provisions for Bilcon to propose such adaptive management measures.<sup>713</sup>

500. Mr. Estrin in his expert reports expresses concerns about the introduction of the “precautionary principle” into the final version of the EIS Guidelines. In the end, however, his concern related to the interpretation of the principle by the Panel, rather than its being considered. In Mr. Estrin’s view, the JRP later construed the precautionary principle in a manner that placed an onus on Bilcon to prove that the project would not cause any environmental damage, rather than recognizing that uncertainty may be inevitable, cannot paralyze a project, and that adaptive management can be undertaken by means that include monitoring and revised mitigation measures.<sup>714</sup>

501. The Tribunal concludes that the process and the end product of finalizing the EIS Guidelines did not in themselves constitute breaches of NAFTA.

iii. The JRP Report’s Emphasis on Community Core Values

502. Various issues concerning the way in which the JRP conducted the hearings are best understood in light of its eventual report.

503. The JRP Report concluded that the project should not be approved. The Report introduces a term not mentioned in any of the statutes, regulations, or EIS Guidelines: “community core values”. The Report expressly identifies only one effect of the project as both significant and adverse, namely “inconsistency with community core values”.<sup>715</sup> With respect to other impacts of the project, the Panel allowed that “with the effective application of appropriate mitigation measures, competent project management and appropriate regulatory oversight, most project effects should not be judged ‘significant’”.<sup>716</sup>

504. Furthermore, the JRP does not propose any mitigation measures in respect of its point-by-point review of specific effects of the project. In summarizing its overall conclusion the Report states that the project would have significant adverse effects, but does not mention the test of “after

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<sup>712</sup> First Expert Report of Lawrence Smith, paras. 356 et seq.

<sup>713</sup> Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project (final), dated March 2005, p. 52, Exhibit C-168.

<sup>714</sup> Second Expert Report of David Estrin, para. 217.

<sup>715</sup> JRP Report, dated October 2007, p. 84, Exhibit C-34/212; Second Expert Report of David Estrin, para. 207.

<sup>716</sup> JRP Report, dated October 2007, p. 84, Exhibit C-34/R-212.

mitigation”, which is an integral part of the mandate of a Panel under s. 16 of the *CEAA*.<sup>717</sup> The Chair of the Panel later explained in a radio interview:

In the past, almost always, Panels that, well, if you changed your mind or you overrule us this is what you have to do in order to let this go forward. We were so certain that this was a bad thing that it was inappropriate for that for that [sic] particular environment that we did not provide any of those mitigating recommendations at all. And I think many people pointed to that and that was a very conscious effort on our part.<sup>718</sup>

505. “Community core values” played a predominant role in the Report’s conclusion that the project should not proceed, and in its abstention from identifying mitigation measures. In addressing the dispute over whether Bilcon was ever given a fair chance to make its case that blasting would not cause adverse environmental effects, counsel for Canada reaffirmed its position<sup>719</sup>—and in the Tribunal’s view, correctly—as follows in closing argument:

First the lack of test blasting on the 3.9 hectare quarry was not relied upon by the Joint Review Panel as a reason to recommend against the approval of the Whites Point project. The project’s inconsistency with community core values was the reason underlying the panel’s recommendation. This was confirmed by both Mr. Rankin and Mr. Estrin in their testimonies, and it was conceded by Mr. Appleton in his opening statement.<sup>720</sup>

506. The meaning of “community core values” is unclear from the JRP Report. There are at least four possible interpretations of “community core values” as used by the JRP, and the Tribunal will review the legal and factual tenability of each of them. The Tribunal is satisfied that even if these four interpretations were to be viewed as less than entirely exhaustive of what the JRP had in mind, they do, individually or in combination, reflect in at least large measure the JRP’s intended meaning.

*Community core values as the majority public opinion in the community about the project*

507. The concept of “community core values” might be interpreted as referring in part to current opinion about the acceptability of the project in the local communities in the project vicinity. At one point the Chair of the Panel stated:

Mr. Thibault, in some small way this is a kind of referendum, isn’t it, in that, on one hand, you have people arguing for a traditional way of life that goes back more than a century,

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<sup>717</sup> JRP Report, dated October 2007, p. 103, Exhibit C-34/R-212.

<sup>718</sup> Transcript of Dr. Fournier’s interview with CBC Radio, dated 20 December 2007, Exhibit C-180, discussed in Second Expert Report of David Estrin, para. 296.

<sup>719</sup> Counter-Memorial, paras. 253-256; Rejoinder, para. 58; JRP Report, dated October 2007, pp. 14, 101-107, Exhibit C-34/R-212 are the references cited in Canada’s annotated closing argument, Hearing Transcript, 31 October 2013, p. 153.

<sup>720</sup> Hearing Transcript, 31 October 2013, p. 153.

and you have others arguing that the future rests with industrialization or commercialization and so forth.<sup>721</sup>

508. The JRP Report would later conclude that “[t]he proposal is not consistent with core values and community visions of the future as expressed in documents, by community leaders and *by the majority of community members appearing before the Panel.*”<sup>722</sup> To the extent that the notion of “community core values” is construed as representing the level of local support for a project, the Tribunal concludes that there is no mandate in federal Canada’s environmental assessment system or the Nova Scotia regime for a review panel to make recommendations on such a basis. The function of a review panel is to gather and evaluate scientific information and input from the community and to assess a project in accordance with the standards prescribed by law, not to conduct a plebiscite. On this point, all the experts, including Mr. Smith, concurred.<sup>723</sup>
509. As Mr. Estrin testified, “[a]n EA panel is not a forum that is meant to (or equipped to) ascertain the will of the majority”.<sup>724</sup> As a matter of fact, what the balance of opinion was at the time of the hearing is difficult to know. The detailed studies Bilcon commissioned in the context of its community health and wellness report include a 2005 survey of community attitudes. The survey indicates strong awareness that a project might proceed, but many respondents were not knowledgeable about basic issues such as the site of the project, how many jobs it would create and how long it would last. Out of the 465 responses, 30.5% of respondents thought the project was a good idea, 48.2% thought it was a bad idea, and 21.3% did not know.<sup>725</sup> At the hearing, most of the community members who spoke were opposed. Yet there were strong supporters as well, and over three hundred community members signed a petition in support that was submitted to the JRP.

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<sup>721</sup> Joint Review Panel Whites Point Quarry and Marine Terminal Project, Public Hearing, Volume 11, 28 June 2007, p. 2669, Exhibit C-163.

<sup>722</sup> JRP Report, dated October 2007, p. 70, Exhibit C-34/R-212 (emphasis added).

<sup>723</sup> Testimony of Lawrence Smith, Hearing Transcript, 30 October 2013, p. 142: “First off, let me deal with the referendum aspect. You wouldn’t have needed to have a hearing if it was a referendum. You know, there was a full, thorough, rigorous hearing fully detailed. So that would be my primary response to that one.” First Expert Report of Lawrence Smith, para. 292: “I am in agreement with Mr. Estrin that the CEAA does not grant a community ‘veto’ over proposed development. The Panel, however, did not confer such a veto upon the local community.” Mr. Smith stated that in his view instead the Panel took into account effects on the community as per the Environmental Impact Assessment Guidelines; *ibid.*, para. 294. Expert Report of Murray Rankin, in paras 123-135, rejects the “community core values” approach in its entirety.

<sup>724</sup> Second Expert Report of David Estrin, para. 193.

<sup>725</sup> Human Health and Community Wellness Assessment for the Whites Point Quarry and Marine Terminal Environmental Impact Statement, Digby Neck, Nova Scotia, Appendix B, p. 90, Exhibit C-431.

510. The petition states that the signers are “of the opinion that the jobs that will be created by this project are vital to the economic future of this area given the catastrophic decline in the fishery”.<sup>726</sup> Ms. Cindy Nesbitt testified at the hearing as follows:

...why go ahead with this Project? Because the year-round local people want it. We present to you this evening a petition signed by locals, not tourists who will be here once, or property owners who live elsewhere and visit occasionally. This is the real thing. There would be more signatures, but people are still living in the shadow of intimidation....<sup>727</sup>

[t]here are a number of people that still would have signed the petition, but for one reason or another, we didn't get a chance to speak to them or they were intimidated and didn't want to sign, and they weren't sure of where these names were going to go.<sup>728</sup>

511. Ms. Nesbitt provided examples of the actions against her because of her role as Chair of the Community Liaison Committee:

Well, at times things went quite well and at times I was treated like a pariah. My car was keyed. When I was invited back to see the sediment ponds early on, my car was keyed. Our business has been boycotted. That's not exclusive to me, though. One of our other representatives had her car keyed, and a number of people on the committee have found less than friendly responses at times from people who are opposed to the project.<sup>729</sup>

512. Ms. Nesbitt testified that the Community Liaison Committee wanted “to have an opportunity to bring transparency to the process”. She expressed the hope that the Committee would be “helping” to “bring this information to the community”, so it could “make a decision based on information instead of propaganda or fear”. However, the Community Liaison Committee eventually stopped meeting “because people were given a hard time over participating”.

513. Furthermore, the state of local opinion is not a matter that is fixed prior to or at the outset of a Review Panel hearing. The environmental process is intended to be part of the earlier stages of a planning process in which input can be used to improve the design of a project and mitigation measures in the interest of protecting the environment. Public opinion may evolve in light of the information gathered at the public hearing, by experts and members of the public, by changes to the design of the project and mitigation measures proposed by the proponent or recommended by the Review Panel or the government, and by the assessment of the likelihood and magnitude of adverse effects after mitigation contained in the review Panel's Report. What the actual state of local public opinion would have been in the end, had the JRP Report carried out its required

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<sup>726</sup> Petition to Federal Minister of the Environment, Nova Scotia Minister of Environment and Labour, in support of the Whites Point Quarry and Marine Terminal, signed by over 300 full-time residents, Exhibit C-182.

<sup>727</sup> JRP Hearing Transcript, Vol. 9, dated 26 June 2007, p. 2106, Exhibit C-162.

<sup>728</sup> JRP Hearing Transcript, Vol. 9, dated 26 June 2007, p. 2123, Exhibit C-162.

<sup>729</sup> JRP Hearing Transcript, Vol. 9, dated 26 June 2007, p. 2125, Exhibit C-162.

“likely significant adverse effects after mitigation” mandate, cannot be known. Bilcon’s EIS submitted that “since no significant adverse environmental effects were identified by the environmental assessment, the project activities (construction and operation) are not expected to have an adverse effect on social cohesion as it relates to social capital.”<sup>730</sup>

514. To put the matter in terms of the “referendum” concept: even if a referendum had been the lawfully prescribed means of deciding the fate of the project—which it was not—the referendum question might be framed very differently if the JRP Report had first carried out the prescribed assessment of project impacts and proposed a set of mitigation measures, rather than allow “community core values” to override that part of its mandate. The answer provided by voters in a hypothetical referendum following a JRP Report might have been significantly influenced by a JRP Report that evaluated the likelihood and significance of the project in the comprehensive manner contemplated by the *CEAA*. It is not consistent with the *CEAA*, and it is fundamentally unfair, in the Tribunal’s view, to subject a proponent to the very public venting of criticism at a public hearing, with all the attendant expense and reputational risk, without providing both the public and the ultimate government decision makers with a final report that includes the thorough and methodical assessment of environmental effects and consideration of mitigation measures promised by the *CEAA* based on a fair evaluation of all the evidence.

*Community core values as local values enshrined in authoritative documents including the Vision 2000 statement*

515. The JRP Report might be interpreted, however, as understanding community core values as being defined not by the majority of opinion expressed at the hearing, but by reference to values previously crystallized in various authoritative documents. The JRP refers to a variety of vision statements and federal and provincial policies and laws. These include federal Canada and Nova Scotia environmental statutes, which require a JRP to consider the extent to which economic development can be reconciled with and reinforce environmental integrity. They do not pre-emptively determine that a project like the one proposed is prohibited, but rather set out a framework to evaluate the risks and consider mitigation measures. Policy statements at the provincial level, as already canvassed, welcomed coastal mining and export projects that were consistent with the protection of the environment. At several times the JRP referred to the document “*Building Tomorrow-Vision 2000: Multi-year Community Action Plan for Annapolis and Digby Counties*”. The JRP Report states that:

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<sup>730</sup> Environment Impact Statement, Volume I, plain language summary, p. 40, Exhibit C-1.



The Western Valley Development Authority was a regional development authority forged as a partnership among the two senior levels of government, the seven municipal governments found in Digby and Annapolis counties, and the public. In 1998 and 1999 it facilitated 23 community meetings to discuss values and hopes for the region's future. Additional activities addressed the role of culture in community building, surveyed businesses to assess the needs of the private sector, and engaged the community through an on-line dialogue. The outcome of these efforts was the document *Building Tomorrow - Vision 2000: Multi-year Community Action Plan for Annapolis and Digby Counties*.

The action plan addressed eight sectors of the human and natural environments. The four most relevant to the proposed project are described here. One goal is to develop a climate which supports local business development, entrepreneurship, investment, and the attraction of new business. Also of note are objectives to accelerate opportunities for growth through an export development strategy, to provide support for local entrepreneurs and to encourage a more diversified, year-round economy. Another goal is to develop a community-based plan for natural resource management that includes processing resources in the local area. *The planning exercise recognized that opportunities exist within the region to develop primary industries, including mining, and that primary processing of natural resources can be carried out in a way that both maintains and even enhances the region's unique culture and environment.* However, the residents of the area recognized that careful, sustainable use of the region's natural resources is required to ensure economic opportunities for many generations to come. The action plan identified the need for the development and implementation of sustainable management plans for each resource use sector and for those plans to be placed in the context of the regional ecology.

The Vision exercise found that the residents of Annapolis and Digby counties wish to promote environmental stewardship practices which preserve the region's biological diversity and ecological heritage. They embrace the concept of sustainable development and see future social activity carried out in a way that preserves and promotes ecological heritage. They recognize the need for an integrated approach to environmental management.

#### **Is the Vision still valid?**

The seven partnering municipalities in the region endorsed *Vision 2000* as a policy document for future developments. Subsequently, some municipal governments withdrew their funding for the development authority and the WVDA ceased to operate. A new community economic development organization is now in place with a new planning process initiated.

The Proponent suggested that the collapse of the WVDA was related to new businesses failing to materialize. This position was not supported by community political representatives or others. Submissions to the Panel indicated that support for the policies of *Vision 2000* remain strong.

Regardless of the current status of the development authority that facilitated the creation of the Vision, the Panel accepted that the *Vision 2000* document remained a valid expression of the residents of the region on their own future.

*Vision 2000* establishes a goal of developing and promoting cultural heritage and tourism attractions. Tourism, especially eco-tourism, is singled out due to its importance to Digby Neck and the Islands. The planning document speaks to the need for great care to be taken to prevent economic growth and development from eroding the qualities that continue to draw people to the region.<sup>731</sup>

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<sup>731</sup> JRP Report, dated October 2007, pp. 119-120, Exhibit C-34/R-212 (emphasis added).

516. To the extent that the JRP views *Vision 2000* as authoritative because “support for it remains strong”, there remains the difficulty of determining majority opinion and the fact that local majority rule was not a criterion for decision in any event.
517. If the *Vision 2000* statement is examined on its own terms, however, it cannot reasonably be deployed to override and pre-empt precisely the exercise that was mandated under the applicable federal Canada and Nova Scotia environmental laws. In the passage from the *Vision 2000* statement reproduced by the JRP, there is an express statement that “[t]he planning exercise recognized that opportunities exist within the region to develop primary industries, including mining, and that primary processing of natural resources can be carried out in a way that both maintains and even enhances the region's unique culture and environment.” The *Vision 2000* does state that “great care” must be taken to preserve the qualities that attract people to the region. The carrying out of an environmental assessment by a JRP, however, ought precisely to be an exercise in taking great care in all respects concerning the environment.
518. The *Vision 2000* statement elsewhere proposes that “it seems clear to residents of the region that our carrying capacity, our ability to generate wealth from our natural resources, is greater than that currently being exploited. New opportunities in farming, fishing, mining and forestry beckon for those who can adequately reconcile the twin concerns of economic growth and resource utilization”.<sup>732</sup> The reconciliation of those concerns—economic development and environmental integrity—is, of course, precisely the objective of both federal Canada and Nova Scotia’s environment assessment statute. There is no more thorough process contemplated by these statutes, and none more engaging of public input, than the process of involving a Review Panel.
519. The proponent submitted that the project would not, after mitigation measures, likely cause significant adverse effects. Even if it is assumed for the sake of argument that many, indeed most, industrial mining projects in the Digby area would not pass muster under an environmental assessment, the issue before the JRP would still be whether *this particular project* could be designed and carried out in a way that avoided likely significant adverse effects after mitigation. The proponent contended, with the support of its EIS and all the scientific expertise and community consultation that went into it, that its particular project would address all the concerns identified under federal Canada and Nova Scotia laws, as particularized in the EIS Guidelines.

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<sup>732</sup> Building Tomorrow, *Vision 2000*, p. 29, Exhibit C-181.

*Community core values as local self-determination in planning matters*

520. The JRP Report suggests in places that community core values include local community planning and self-determination, and that proceeding with the project would damage those values. The Panel at one point states that:

The Municipality of the District of Digby has not adopted a municipal planning strategy or zoning. Given that municipalities cannot regulate mining or quarrying, a community plan would not give the municipality any ability to control land use in this case. As participants in the review process argued, the lack of a plan does not mean that the people of Digby Neck and the Islands do not have a vision for their future. The Panel accepted this position and sought direction from other planning policies.<sup>733</sup>

521. The JRP refers to community “self-determination” in a number of ways. First, “these reports [in the Vision 2000 Statement] strongly articulate the community’s desire for co-operative self-determination”.<sup>734</sup> Secondly, “the Panel concludes that the Project is generally not consistent with government or community policy about community economic development”.<sup>735</sup> Thirdly, “individuals repeatedly referred to the importance of community unity and the need for local participation in any decision process. People in Digby Neck and Islands believe strongly in self-determination and self-sufficiency”.<sup>736</sup> Finally, “[t]he imposition of a major long-term industrial site on a community that has spoken in strong terms about the need to take a different development path could transform the community with a randomness that communities seek to avoid by engaging in deliberative processes of vision and planning to identify desirable futures”.<sup>737</sup>

522. In a radio interview after the release of the JRP Report, Dr. Fournier stated:

This is a community that has defined itself before the assessment began as environmentally oriented and it defined itself in such a way as that there really was not very much room there for a quarry as was being proposed.<sup>738</sup>

523. As noted above, all three experts who testified on the point, Mr. Estrin, Mr. Rankin and Mr. Smith, however, agreed that there was no “community veto” under the law. In the Tribunal’s view, where the law of a province did not vest authority in a municipality or a

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<sup>733</sup> JRP Report, dated October 2007, p. 119, Exhibit C-34/R-212.

<sup>734</sup> JRP Report, dated October 2007, p. 93, Exhibit C-34/R-212.

<sup>735</sup> JRP Report, dated October 2007, p. 95, Exhibit C-34/R-212.

<sup>736</sup> JRP Report, dated October 2007, p. 99, Exhibit C-34/R-212.

<sup>737</sup> JRP Report, dated October 2007, p. 100, Exhibit C-34/R-212.

<sup>738</sup> Transcription by Appleton & Associates of the CBC Interview with Robert Fournier, dated 20 December 2007, Exhibit C-180.

particular group of citizens within it to decide on whether a quarry project should proceed, it could not have been within the authority of the JRP to effectively confer such authority. Neither did the provincial laws in place effectively place a moratorium on quarry applications being approved until a local community planning process was in place.

524. Looking at the specific facts of this case, it is difficult to see how “community core values” that emphasized local planning could be elevated to an overriding factor that militated against the Bilcon project—one that pre-empted the usual “likely adverse significant effects after mitigation analysis” to the whole range of effects—given the fact that the local government had not adopted a planning strategy or zoning. The *Vision 2000* Statement had suggested that many in the local community were indeed interested in local planning, and the Tribunal accepts the JRP’s finding that many still were, but the planning process established by binding provincial law and administrative decisions at the time included a JRP, with all the opportunities for community input prior to and at the hearings.
525. A general observation on “community core values”, no matter which interpretation is adopted of the JRP’s approach to them, concerns the compatibility of the concept with the *CEAA* requirement that there be a biophysical pathway to effects that are assessed. The Tribunal agrees with Mr. Estrin’s analysis that incompatibility with “community core values” absent some ecological impact is not within the scope of what is assessable under the terms of the *CEAA*.<sup>739</sup>
526. Mr. Estrin testified that there was a constitutional, and not merely statutory, limitation on importing “community core values” concept into an environmental assessment under the terms of the *CEAA*:

Even Robert Thibault, the former federal Fisheries Minister (and then still the local Member of Parliament), acknowledged as much in his appearance before the JRP:

The Federal Government’s responsibility is on the environmental side and protection of the water and protection of marine habitat. When you get to the quality of life side, what do you want in your community, then that’s a provincial responsibility. And in most areas within that, it’s delegated to the municipalities where you can have zoning by-laws and you can regulate what is happening in your communities.

The Federal Government simply had no jurisdiction to consider such purely local questions in making its decision about whether or not to allow the project to proceed.<sup>740</sup>

Mr. Rankin, when asked, took no position on the constitutional issue.<sup>741</sup> Mr. Smith took the view that the review was a joint federal-provincial exercise, and that whatever the scope of

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<sup>739</sup> First Expert Report of David Estrin, paras. 257-268.

<sup>740</sup> Second Expert Report of David Estrin, paras. 306-307 (emphasis added in Mr. Estrin’s Report).

<sup>741</sup> Hearing Transcript, 23 October 2013, p. 645.

federal Canada's authority was, Nova Scotia did have a constitutional authority over local matters.<sup>742</sup> The Tribunal recognizes that constitutional doctrine can be complex, controversial and shifting, and that none of the three experts were specialists in constitutional law. The Tribunal is not convinced on the basis of that evidence or the materials submitted as a whole that the constitutional objection identified by Mr. Estrin is sufficiently clear to be a factor in the Tribunal's decision that there was a breach of the international minimum standard.

527. Mr. Smith suggested that socio-economic impacts unmediated by biophysical pathways are contemplated by the Nova Scotia legislation. Even if this is so, it would not relieve the JRP and ultimately federal Canada authorities of their duty to identify whether the project passed muster under a thorough review of potential effects under the *CEAA* standard of likely significant adverse effects after mitigation.
528. Mr. Estrin and Mr. Rankin both testified<sup>743</sup>, however, that "community core values" as used by the JRP were not within the scope of environmental assessment contemplated by the Nova Scotia as well as federal Canada statute. They were matters of philosophical belief, not effects that could be assessed and mitigated. Although the point about the Nova Scotia statute is not decisive in the present case, the Tribunal agrees. The statutes are concerned with effects on actual biophysical and socioeconomic conditions rather than with matters of political or philosophical belief, such as that a local community should have a veto over a project even if the law does not so provide. Mr. Smith himself appeared to be referring to not only the federal Canada statute, but rather Nova Scotia's as well, when he confirmed his agreement that there was no "community veto" under the law.

*Community core values as "community DNA"*

529. The JRP Report attempted to explain and defend its "community core values" concept by way of analogy:

The following analogy, although not perfect, provides a perspective on the potential impact of the proposed quarry and marine terminal on the communities of Digby Neck and Islands.

DNA occurring in all living cells can be thought of as the cell's "core values" in that it is a repository of information acquired through evolution that ultimately defines the form and function of that cell. The information contained in the DNA is transferred through the "expression" of specific protein molecules that eventually confer unique characteristics to that cell, thereby defining it relative to other cells. A community's core values are also

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<sup>742</sup> Second Expert Report of Lawrence Smith, para. 205.

<sup>743</sup> Testimony of David Estrin, Hearing Transcript, 22 October 2013, p. 247; Testimony of Murray Rankin, Hearing Transcript, 23 October 2013, p. 642.

acquired through time and interaction; they represent information that governs the uniqueness of the community. The information contained in a community's core values is "expressed" in the community through specific outcomes such as: the elaboration of a common community vision; an understanding as to the role of environment in economic development; or general acknowledgment of the importance of traditional values. These outcomes are characteristics that define and distinguish one community from another.

Unwanted changes often occur in DNA, resulting from chance mutations during cell division or as a result of some long-term environmental impact, e.g., exposure to toxic chemicals or excessive ultraviolet light. The changed DNA then produces altered protein molecules that irrevocably alter the cell's defining characteristics. In a similar way, unwanted long-term impacts on a community can bring about transformation of its core values, resulting in altered outcomes that irrevocably change the community.

Change is a natural and often welcomed occurrence in both cells and communities. In biology, it is the fundamental underpinning of the process of natural selection, a random process in which success is measured, over very long time spans, by an organism's "fitness" in its environment. Many mutations result in changes that create organisms totally unfit for their surroundings, and those organisms are unsuccessful; mutations that make an organism better adapted will be reproduced, contributing to evolutionary change.

With communities the analogy breaks down at this point because humans exercise reason and free will. People are free to take stock and they are free to make changes in concert with accepted community standards. In other words, community change need not be a random process. Deciding on development directions typically involves a process of thoughtful deliberation, community introspection and conscious decision-making. Such a participatory community development approach has been reinforced by higher levels of government and recognized nationally and internationally as integral to a model of sustainable community development.

The imposition of a major long-term industrial site on a community that has spoken in strong terms about its intention to take a different developmental path could transform the community with a randomness that communities seek to avoid by engaging in deliberative processes of visioning and planning to identify desirable futures.

The Panel considers the community's core values to be a Valued Environmental Component, as important to the broader ecosystem as any other part of the environment. From the body of accumulated evidence, the Panel concludes that the implementation of the proposed Whites Point Quarry and Marine Terminal complex would introduce a significant and dramatic change to Digby Neck and Islands, resulting in sufficiently important changes to that community's core values that warrant the Panel describing them collectively as a Significant Adverse Environmental Effect that cannot be mitigated.<sup>744</sup>

530. The Tribunal's understanding is that the whole purpose of a JRP process was not to submit to "randomness" but precisely to engage in a thorough, methodical, evidence-based, consultative and deliberate planning exercise, and thereby address the risks of the project, assess their magnitude and likelihood and help find ways to mitigate them. Bilcon's position, supported by its scientific submissions and some community members, was not simply that it would take the community on a different development path. Rather, Bilcon's position was that the development would provide job opportunities that would help to sustain a community that was losing its young people to outmigration, and could be carried out in a way that would not have the likely effect of significantly damaging other valued components of the ecosystem. Bilcon, in response

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<sup>744</sup> JRP Report, dated October 2007, p. 100, Exhibit C-34/R-212.

to the final EIS Guidelines, had submitted a volume on impacts on the various social issues therein identified.

531. To avoid any possible misunderstanding, the Tribunal has absolutely no doubt that the extent to which community members value various assessable components can be an entirely legitimate part of an environmental assessment. If some or all members of a community place a significant value on auditory quiet or a view of nature unmarred by development, or the ability to continue engaging in traditional economic or recreational activities, or community cohesion, these effects might be included in an assessment under the laws of Canada, and in fact in appropriate cases could lead to a finding of likely significant adverse effects after mitigation. A wide range of potential social effects were in fact mandated for study by the EIS Guidelines in our case, and Bilcon devoted considerable resources to commissioning and presenting studies on them. The Tribunal takes issue with the “community core values” approach as presented and applied by the JRP, not with the notion that the valuation placed on assessable components can be an integral part of conducting a proper assessment, including the assessment of social effects.
532. To sum up so far, “community core values” as used by the JRP might have meant any or some combination of: majority opinion in the community on the project at the time of the hearings; the existence of earlier community statements such as *Vision 2000* that supposedly crystallized community values and determined against locating an industrial mine and quarry project in the area; an implicit requirement that a local community planning process has authorized the project; and the protection of the “community DNA” from random mutations.
533. It might be that the JRP intended that various facets of its “community core values” approach should be combined in some fashion to produce its overall meaning. The end product, however, would be at least as problematic as the parts considered individually. It would not be consistent with what the JRP actually said and did to subtract all of these facets and insist instead that “community core values” is merely a compendious term for a certain set of environmental effects that were assessed in the ordinary and expected manner.
534. Whatever interpretation is taken of the “community core values” approach by the JRP, it was at the very least a highly problematic basis for the Tribunal to rest its recommendations. Moreover, it was a serious breach of the law on procedural fairness that Bilcon was denied reasonable notice of the “community core values” approach as taken by the Tribunal, and the opportunity to seek clarification and respond to it.

535. While it is not strictly necessary to decide the point in order to resolve this case, the Tribunal's respectful view is that the "community core values" approach actually went beyond being just problematic and that on any of its plausible interpretations it does not by itself warrant a finding of "likely significant adverse effects after mitigation". In any event, it appears certain to the Tribunal that the JRP was, regardless of its "community core values" approach, still required to conduct a proper "likely significant effects after mitigation" analysis on the rest of the project effects. By not doing so, the JRP, to the prejudice of the Investors, denied the ultimate decision makers in government information which they should have been provided.

536. With respect to the issue of reasonable notice, Mr. Buxton states in his witness statement:

Never, during the entire environmental assessment process, was I or any of Bilcon's experts required to address the concept of "core values". "Core Values" was never mentioned in the EIS Guidelines or the Terms of Reference.<sup>745</sup>

537. In his oral testimony, Mr. Buxton confirmed that he "never heard the term during the entire process, including at the hearings"<sup>746</sup> and that "it was not mentioned anywhere in the document, and I even have a problem now reading the definitions in the panel report and trying to discern exactly what the panel was getting at by core values".<sup>747</sup>

538. When asked at the hearing whether Dr. Fournier's reference to a "bit of a referendum" gave him a "head's up" that the community core values approach was in play, Mr. Clayton responded:

I wouldn't have attached community values or core values, or whatever they were, to that statement, but it certainly shocked me that, in any way, shape or form, the panel should think that it was there to do a head count of who was for and who was against the quarry.

That really, really shook me.<sup>748</sup>

539. Mr. Rankin in his expert report states that Bilcon was denied its right under public administrative law to have fair notice of the case to be met. He specifically addresses the expert opinion of Mr. Smith that the EIS Guidelines, although not using the term "community core values", provided sufficient notice in respect of the JRP's eventual application of that concept. Mr. Rankin notes that the JRP, in elaborating on its "community core values" concept, says that some might refer to the area as a "sacred landscape". Mr. Rankin observes:

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<sup>745</sup> Witness Statement of Paul Buxton, para. 76.

<sup>746</sup> Testimony of Paul Buxton, Hearing Transcript, 23 October 2013, p. 471, lines 3-5.

<sup>747</sup> Testimony of Paul Buxton, Hearing Transcript, 23 October 2013, p. 471, lines 22-24.

<sup>748</sup> Testimony of William Richard Clayton, Hearing Transcript, 23 October 2013, p. 507, lines 21-25; p. 508, lines 1-3.



The question must be posed: how could any proponent effectively participate in an environmental review where the notion of operating in a “sacred landscape” is raised? As a matter of procedural fairness, absolutely no notice was provided that this was the “case to meet” for Bilcon. This standard is even more unattainable when one considers the fact that other quarries, such as the Tiverton Quarry—presumably likewise located in a closely neighboring “sacred landscape”—did not even require a panel review.<sup>749</sup>

540. Mr. Rankin further expresses the opinion that various references in the EIS to specific items such as “community health” did not amount to adequate forewarning of the JRP’s adoption of its much more wide-ranging “community core values” concept.<sup>750</sup>

541. Mr. Estrin arrived at the same conclusion as Mr. Rankin concerning the lack of fair notice concerning “community core values”. He states:

Mr. Smith points to certain vague terms that were included in the Guidelines, such as the “social and cultural health” of local communities. But he does not refute my essential point, which is that the Guidelines did not speak of “community core values” per se, and did not “give any hint, except perhaps in hindsight, that the Panel considered community core values to be, in and of themselves, a ‘valued environmental component’ that must be protected.” I disagree with Mr. Smith’s assertion that Bilcon had “clear and detailed instructions from the Panel about what would be required to fulfil the requirements of the Final EIS Guidelines.”

Bilcon clearly felt blindsided by the Panel’s reliance on this notion. In a letter to the Nova Scotia Minister of Environment and Labour shortly after the Panel Report was released, Mr. Buxton wrote on behalf of Bilcon:

The Panel made up the notion it called the “core values” of the community.... We had no indication the Panel was going to do this. We have had no opportunity to respond.<sup>751</sup>

In his Affidavit, Mr. Buxton states:

Never, during the entire environmental assessment process, was I or any of Bilcon’s experts required to address the concept of “core values”. “Core Values” was never mentioned in the EIS Guidelines or the Terms of Reference.”<sup>752</sup>

I stand by the view I expressed in my First Report that Bilcon’s frustration was reasonable, and that the Panel’s reliance on the novel concept of community core values was a breach of the duty of fairness.<sup>753</sup>

542. Mr. Rankin quotes in support of his analysis an on-line commentary by a trio of environmental lawyers in response to the Whites Point JRP Report. The commentary concludes:

While a consideration of “core values” could potentially fit within a significance determination structure, by making sustainability a separate, stand-alone consideration, the

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<sup>749</sup> Expert Report of Murray Rankin, para. 134.

<sup>750</sup> Expert Report of Murray Rankin, paras. 129-132.

<sup>751</sup> Second Expert Report of David Estrin, paras. 212-213.

<sup>752</sup> Cited in Second Expert Report of David Estrin, para. 214.

<sup>753</sup> Second Expert Report of David Estrin, para. 215.

Panel's analysis is inconsistent with the significant effects analysis upon which a panel must base its recommendations.

There is no question that sustainable development remains a noble aim and a fundamental objective of environmental assessment. The two decisions discussed above illustrate that review panels, on their own initiative and inappropriately, are moving towards expanding the role of sustainable development in their analysis and decision making within environmental impact reviews. The problem with this development is that it is not consistent with, nor is it supported by, existing environmental assessment legislation. It therefore presents a risk to project proponents presently bringing forward their projects within the current legal framework.

Environmental assessment is a legal process and the express direction articulated in environmental assessment legislation must be respected and adhered to. If policy-makers wish to see sustainable development take on a more prominent role in the process, those legislative changes should be pursued.<sup>754</sup>

543. The Tribunal concludes that Bilcon lacked reasonable notice of the “community core values” approach. The opinions of two eminent experts support the objective reasonableness of its surprise in this respect, as does the reaction of several independent commentators at the time. On its own review of all of the evidence, the Tribunal concurs that Bilcon had been denied a fair opportunity to know the case it had to meet and to address it.

544. With respect to the failure of the JRP to carry out the legally mandated analysis, Dr. Fournier in a radio interview made it clear that the Panel was very deliberate in its decision not to provide governments with recommendations as to possible mitigation measures:

In the past, almost always, Panels that, well, if you changed your mind or if you overrule us this is what you have to do in order to let this go forward. We were so certain that this was a bad thing that it was inappropriate for that particular environment that we did not provide any of those mitigating recommendations at all.<sup>755</sup>

545. Mr. Estrin comments:

This statement is of particular concern. It demonstrates not only that the Panel considered the WPQ a “bad thing” but also indicates that the Panel refused to address possible mitigation measures in a deliberate effort to tie the hands of the governments whose statutory role was to decide whether to approve the project or not. In other words, the Panel structured its Report so that, even if Canada or Nova Scotia disagreed with the Panel's

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<sup>754</sup> Expert Report of Murray Rankin, para. 135, quoting from S. Denstedt et al, “Joint Review Panels Exceed Mandate with use of Sustainability Framework”, dated March 2008, Exhibit C-834. The Denstedt commentary also identifies the decision of the *Kemess Mines* JRP as also adopting an approach that was outside of its legal mandate. Whether that criticism of *Kemess* is valid the Tribunal need not itself decide. The *Kemess* JRP Report was issued after the Bilcon hearings were concluded, and only very shortly before the Bilcon JRP Report. The latter makes no mention of the former. Mr. Smith notes that the *Kemess* Report refers to concerns over matters such as “spiritual values” of a community in the project area, but that community is an Aboriginal one, and as Mr. Estrin points out, Aboriginal peoples have a distinctive, constitutionally protected position in the Canadian legal system.

<sup>755</sup> Transcription by Appleton & Associates of the CBC Interview with Robert Fournier, dated 20 December 2007, Exhibit C-180.

analysis of the environmental effects, it would be exceedingly difficult for either government to approve the project. This in my view was improper.<sup>756</sup>

546. The Tribunal agrees that the Whites Point Quarry JRP was legally obliged under s. 16 of the *CEAA* to report on all factors mentioned there, including mitigation measures,<sup>757</sup> The JRP could not “take a pass” on this part of its mandate. Mr. Estrin in fact concluded that “the WPQ Panel was, as far as I can tell, the only panel under *CEAA* or a joint review process to have recommended the outright rejection of a project, without providing recommendations regarding mitigation should the government decision makers decide to approve it. Indeed the WPQ Panel chair, Robert Fournier, acknowledged to the press that this was unprecedented”.<sup>758</sup> Even when all other JRPs recommended against a project, or abstained from making a recommendation, their standard practice, as required by applicable law, was to present possible mitigation measures.<sup>759</sup>
547. The JRP acknowledges that mitigation measures were possible in respect of many project effects of the WPQ project, although it does not choose to provide them. It does not explain why no mitigation measures at all were possible in respect of the “community core values”, even if in the view of the JRP they would not have been entirely sufficient.

#### iv. Further Characteristics of the JRP Process and Report

548. A more detailed examination of how some of the specifics of the project were dealt with will further illustrate the Tribunal’s concerns about the JRP’s failure to fulfil its mandate under federal Canada’s environment laws to conduct a rigorous analysis of the specifics of a project, including careful and comprehensive information-gathering, estimation of risks, and identification and evaluation of means of preventing or mitigating adverse effects.
549. The case law in Canada has affirmed that environmental assessment “must be conducted as early as practicable in the planning stages of a project. By its very nature, the proceedings are

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<sup>756</sup> Second Expert Report of David Estrin, para. 297.

<sup>757</sup> Second Expert Report of David Estrin, para. 286.

<sup>758</sup> Second Expert Report of David Estrin, para. 295.

<sup>759</sup> Second Expert Report of David Estrin, paras. 290-294, citing the examples of *Kemess North Copper-Gold Mine* Project (where 32 mitigation measures were proposed in case Canada proceeded notwithstanding the Panel’s recommendation against the project), Exhibit R-411; *Prosperity Gold-Copper Mine* Project (24 such recommendations), Exhibit R-429; and *Lower Churchill Hydroelectric Generation* Project (dozens of such recommendations), Exhibit R-414.

subject to some uncertainty”.<sup>760</sup> Project details may evolve during and after a Panel hearing. “Since projects are submitted for environmental assessment at an early stage of their development, final determination of and amendment to project design and construction will continue well beyond the assessment stage.”<sup>761</sup> Given the early role of the environmental assessment process, environmental assessment panels in many cases attach conditions that will be enforced by licensing authorities, some of them cast in general terms that identify a goal or standard, rather than providing exhaustive detail as to how to achieve it.

550. JRPs have a positive duty by the end of the process to make sure there is sufficient information to make an assessment. S. 34 of the *CEAA* provides:

34. A review panel shall, in accordance with any regulations made for that purpose and with its term of reference,

(a) ensure that the information required for an assessment by a review panel is obtained and made available to the public.

551. A JRP is cloaked with the authority to summon witnesses, including those not requested by the proponent intervener, and may retain its own experts. Panels are inquisitorial finders of fact, with a responsibility and the authority to obtain information where the submissions of participants in the process are otherwise insufficient to permit it to carry out its statutory mandate.<sup>762</sup> The Terms of Reference for the Whites Point Quarry Panel provided that public hearings should only begin “once the Panel is satisfied that sufficient information has been provided”.<sup>763</sup>

552. Bilcon submitted a 17-volume EIS, which had been compiled over three and a half years, and included 48 experts’ reports and 35 studies commissioned for the proposed project. In at least one respect, its analysis of impacts on biological organisms, a Nova Scotia official described the Statement as “among the best I’ve seen”.<sup>764</sup> The response of the JRP, however, was not consistent with the view that there was sufficient information to commence the public hearing

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<sup>760</sup> *Inverhuron & District Ratepayers Association v. Canada (Minister of the Environment)*, 201 FCA 2013, para. 55, quoted in First Expert Report of David Estrin, para. 355.

<sup>761</sup> *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, [2008] FCJ NO 324, para. 23, quoted in First Expert Report of David Estrin, para. 356.

<sup>762</sup> Second Expert Report of David Estrin, para. 264.

<sup>763</sup> Agreement Concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project, between The Minister of the Environment, Canada and the Minister of Environment and Labour, Nova Scotia, Terms of Reference, Part II, para. 8, p. 8, Exhibit C-363.

<sup>764</sup> First Expert Report of David Estrin, referring to testimony of Mark Elderkin from the Nova Scotia Department of Natural Resources, para. 361.

processes. Mr. Hugh Fraser, an experienced journalist who attended the hearings as a public relations consultant to Bilcon, stated in his witness statement that:

As a professional observer, it appeared to me throughout that the Panel was taking sides, and showed little respect to Bilcon and its experts. The demeanour and conduct of Dr. Fournier, in particular, surprised me. Dr. Fournier is a well-regarded, popular weekly science columnist on CBC Radio on mainland Nova Scotia. His performance on radio is invariably scholarly, friendly, good humoured, educative, and professional. Dr. Fournier's performance at the Joint Review Panel hearings was far different. I recall observing at the hearings that he appeared more like a professor committed to embarrassing an unpopular student, while showing the entire class who was in charge and who had the right answers to all of the questions he was asking. *For example, at one point, Dr. Fournier inquired if any member of Bilcon's presentation team knew what "the scientific method" was.* The team, of course, consisted of experienced and qualified engineers and scientists.<sup>765</sup>

553. The JRP made many information requests to Bilcon; its doing so, of course, is a reasonable part of a Panel's diligently carrying out its task. The JRP, however, barely questioned the experts assembled by Bilcon who were in attendance. As Mr. Estrin states in his expert report:

Bilcon had 19 experts in attendance at various points of the hearing. It would appear from a review of the transcripts that many of them were never asked a single question by the Panel, including experts in:

- Accidents and malfunctions
- Noise and air quality
- Marine biology
- Marine geology
- Marine acoustics
- Fisheries compensation
- Bathymetry-Hydrogeology

Others were asked only cursory questions, including Carlos Johansen, a marine terminal engineer who flew in from Vancouver for the hearings. Following the hearings, Mr. Johansen wrote to the Federal Minister of the Environment and the Provincial Minister of Environment and Labour:

I am a consultant to Bilcon of Nova Scotia and have been providing engineering services related to the shipping facilities for the proposed Whites Point Quarry. I have now been advised that the panel has recommended against the project proceeding. At great expense to Bilcon, I was asked to fly across Canada and be available on the first day of the Joint Panel hearings (June 16, 2007). I must express my disappointment at the proceedings. After sitting almost all day, I was finally asked one simple question related to the ship loading facilities. I was prepared to answer many more questions, but for whatever reason the panel chose not to question me further. I have not yet read every word in the panel's report, but I note reference to unanswered questions about ship loading and shipping. I wish I had been asked about some of them.<sup>766</sup>

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<sup>765</sup> Witness Statement of Hugh Fraser, para. 13 (emphasis added).

<sup>766</sup> First Expert Report of David Estrin, paras. 417-418.

554. As noted in Mr. Fraser's Witness Statement, and quoted in Mr. Rankin's Expert Report the fact is:

Over the 90 hours of hearings, Bilcon's experts testified for only 90 minutes or so.<sup>767</sup>

555. The JRP's Report on the specific issues is reflective of the overriding importance attached to "community core values" rather than the methodical examination of the specifics in the prescribed manner.

556. Addressing potential concerns about the environmental impact of blasting was an objective of Bilcon from the early days of its involvement in the project. Its predecessor and then Bilcon itself had attempted to obtain a 3.9 ha quarry permit for purposes that included conducting test blasts. Bilcon claims it was unfairly and unlawfully frustrated in its attempts to obtain the permit years before the JRP commenced.

557. The JRP Report criticized Bilcon for submitting varying estimates of the amount of explosive material, Ammonium Nitrate-Fuel Oil, needed per tonne of basalt. The record demonstrates that Bilcon's evidence, provided by a blasting expert, was in fact consistent throughout the hearing. While Bilcon's EIS had originally estimated 0.4 kg per tonne, its expert explained at the hearing that that figure was based on a generic and typical value for the industry, but that the basalt material at the Whites Point site required only 0.23 kg of Ammonium Nitrate-Fuel Oil per tonne. He also conveyed this figure as one pound of explosive for two tonnes of rock. The JRP was mistaken to recall this estimate as one pound for one tonne of rock.<sup>768</sup> The JRP ended up concluding that an estimate of 0.23 kg of Ammonium Nitrate-Fuel Oil per tonne was not "credible". The JRP's only basis for this conclusion, apart from its own misunderstanding of Bilcon's plainly stated evidence, was that a "retired mining engineer" had questioned Bilcon's blasting and noted inconsistencies in Bilcon's estimates.<sup>769</sup> The "retired mining engineer" in question, however, was neither independent nor an expert in the relevant area. He was a leading opponent of the Whites Point Quarry from its outset. He had an education and experience in mining, but acknowledged at the hearing that he was "not a blaster" and had "not been involved

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<sup>767</sup> Witness Statement of Hugh Fraser, para. 14, quoted in Expert Report of Murray Rankin, para. 102.

<sup>768</sup> First Expert Report of David Estrin, paras. 445-446, referring to John Melick's testimony at the public hearing (27 June 2007) and to the JRP Report, p. 28.

<sup>769</sup> First Expert Report of David Estrin, para. 448, referring to the JRP Report, pp. 28-29.

in blasting”.<sup>770</sup> The JRP did not itself obtain an independent expert opinion, although it was dissatisfied with Bilcon’s evidence and had the authority to do so.

558. In citing concerns about blasting, the JRP did not invoke the language of “likely” or “significant” and did not provide analysis and conclusions that were equivalent to making such findings.
559. The JRP did not suggest any possible mitigation measures. Its failure to provide any such recommendations was inconsistent with the earlier history of government consideration of Bilcon’s blasting. When attempts were made to obtain a 3.9 ha quarry permit, officials at the Department of Fisheries and Oceans had suggested such measures to prevent harm as requiring blasts to be a minimum distance from shore (a “setback”)—initially calculated by the Department of Fisheries and Oceans at 500 metres, and later modified to 100 meters<sup>771</sup>—and monitoring the presence of whales and refraining from blasting if they were observed.
560. The Tiverton project on the Digby Peninsula was only ten kilometres away from the Whites Point area. It involved blasting on the seabed itself of 65,000 tonnes of rock to produce material for a new breakwater. This notwithstanding, the Tiverton project, which was carried out by the government of federal Canada and supported by Mr. Thibault, was approved after a screening, rather than a comprehensive study or JRP. Concerns about blasting were resolved by requiring mitigation measures. These included installing shock wave padding to minimize blast transmissions through the water. Adaptive management was part of the scheme. Monitoring of impacts, such as turbidity, was required, and if problems were detected, the work would be stopped and a federal official would be contacted to determine if additional mitigation measures were required.<sup>772</sup> Blasting was permitted if it was in accordance with an existing plan approved by the Department of Fisheries and Oceans, but the proponent was allowed flexibility in arriving at a final plan to carry out the project; if changes to the blasting plan were required, they would again be subject to approval by the Department of Fisheries and Oceans.
561. Canada argues that the Tiverton project was different from Whites Point in a number of respects, such as the fact that blasting would only occur during construction rather than being an ongoing part of a long-term project. The Tribunal has no hesitation in acknowledging that such differences existed. It is certainly conceivable that the factual differences could justify different

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<sup>770</sup> First Expert Report of David Estrin, para. 450.

<sup>771</sup> First Expert Report of David Estrin, para. 150, citing Letter from Phil Zamora to Stephen Chapman, dated 17 September 2003, Exhibit C-188.

<sup>772</sup> First Expert Report of David Estrin, Appendix G, p. 4.

recommendations from an environmental assessment process. Federal Canada law, however, required consistency in the methodology of the assessments, including the need to thoroughly and objectively evaluate the impacts of the projects in terms of likelihood of adverse effects, their significance and possible mitigation.

562. The JRP cast doubt on various potential mitigation measures on the basis that they would not leave the project economically viable. Yet Bilcon itself had testified that it could still proceed with the project if mitigation measures were taken such as expanding the proposed coastal buffer zone from 30 metres to 100 metres. The JRP had no evidentiary basis to reject Bilcon's own estimates of economic viability in this respect.<sup>773</sup>
563. The JRP at times used another rationale, closely related to its emphasis on community core values, for steering away from the lawfully prescribed and generally practiced approach to assessment methodology under the federal Canada system. The JRP focused at times on the relative extent to which project benefits and risks were local, regional, national and international. Thus, the JRP Report stresses the extent to which, in its view, the benefits of the project would be international and the burdens local, regional or national.
564. Such accounting is arguably somewhat skewed. Nowhere is it mentioned in the burden list, for example, that in return for whatever benefits would ensue, it was Bilcon that was taking on the very substantial investment risk. The litany of "burdens" does, however, list the fact that local governments do not impose a royalty tax on mineral extraction. It is not clear that this should be counted as a negative factor; whether it is a missed opportunity for a positive would depend in part on whether increasing the overall tax burden on investors might discourage out-of-province investors that Nova Scotia was seeking for its mining sector.
565. In any event, in the case of the Rabaska project a JRP<sup>774</sup> identified the risks in unduly emphasizing the relative distribution of benefits and risks as between a local community and society in general. It noted that deferring to the objections of the community at the project site—which community might bear a disproportionate share of the environmental risk—might at first sight seem fair. To apply this principle, however, on a society-wide basis would make "the conduct of public affairs difficult, if not impossible".<sup>775</sup> A project that is in the general interest could not, in the end, actually be sited anywhere in particular. Mr. Estrin submits that it was in

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<sup>773</sup> First Expert Report of David Estrin, para. 469.

<sup>774</sup> Rabaska Project—Implementation of an LNG Terminal and Related Infrastructure, Joint Review Panel, Main Report, dated May 2007, Exhibit R-432.

<sup>775</sup> First Expert Report of David Estrin, para. 489, quoting from Rabaska JRP Report, pp. 174-175.



no way part of the mandate of a JRP under the *CEAA* to engage in balancing the social equities; it must evaluate environmental impacts that are likely to be caused by the project after mitigation through biophysical pathways, and “public interest” balancing is a concern for responsible authorities only where a project might have likely significant adverse effects after mitigation.<sup>776</sup>

566. In Mr. Estrin’s view, the focus on the international benefits of the project was “a useful subterfuge” for an undercurrent of anti-Americanism. Mr. Estrin concludes that “the very strong theme conveyed by the Whites Point Quarry Panel is that the Project is not worthy of approval because it will benefit U.S. corporations and consumers rather than the local citizens of Digby Neck”.<sup>777</sup> The Tribunal is not convinced that it should adopt a characterization of the JRP’s approach that is as stark as Mr. Estrin’s. The JRP does acknowledge that the project would produce at least some local benefit as well as burdens, and it does not adopt the kind of overt anti-American rhetoric used by some participants. At the same time, the Tribunal notes that the JRP Report is candid that its analysis of issues such as the “significance” of effects is strongly influenced by its perception of the relative distribution of benefits and burdens between the local and international communities:

Given the limited economic and social benefits of the Project to the local communities, the province, and the country, the Panel found the Project should not proceed in a situation where endangered species and a local way of life would be at risk due to project effects.<sup>778</sup>

Even if it is assumed that the JRP had the authority under the *CEAA* to engage in a balancing of social equities, such public interest analysis could not relieve the JRP to also discharge its mandate of carefully investigating and evaluating specific project impacts in accordance with the prescribed methodology, including reporting on likely significant adverse effects after mitigation.

567. Another example of the JRP’s approach to specific issues, referred to earlier, concerns the release of ballast water by ships arriving from other areas, which raises concerns about introducing invasive species. Bilcon committed to complying with federal Canada’s Ballast Water Control and Management Regulations. The JRP, however, noted that these only require removal of 95%, rather than 100% and so does not eliminate risk altogether. The Panel does not provide an assessment of the likelihood and significance of the incremental risk caused by the

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<sup>776</sup> First Expert Report of David Estrin, para. 506.

<sup>777</sup> First Expert Report of David Estrin, para. 505.

<sup>778</sup> JRP Report, dated October 2007, p. 103, Exhibit C-34/R-212.

project in comparison to that posed by traffic that would occur apart from the project. The JRP finds that Bilcon's proposed monitoring concerning invasive species for five years would not be sufficient to address situations where an unwanted organism has already been dispersed. The JRP does not indicate either what standard Bilcon should meet or what specific measures Bilcon should take to attain that standard. Rather, the JRP recommended in a general way that the applicable federal Canada regulations be rewritten—a proposal not acted upon by federal officials. The treatment of the issue by the JRP stands in sharp contrast to the environmental assessment of the *Belleoram Quarry* and *Marine Terminal* project—which was also sited in an environmentally sensitive coastal area and close to a community, and involved larger volumes of production of stone. The proponent in that case was a Canadian-controlled company. Federal Canada officials accepted as sufficient the proponent's undertaking to comply with federal Canada's regulations on ballast and to carry out other measures such as not releasing ballast water at the terminal site.<sup>779</sup> The contrast is rendered even sharper by the fact that federal officials had recognized the similarity of the Belleoram and Whites Point projects, and many of the same offices and officials were involved with both.<sup>780</sup>

568. The objective and rigorous evaluation of mitigation measures was further undermined by the JRP's unwarranted seizing on some proposed mitigation measures as themselves carrying environmental risks. Mr. Estrin's Expert Report notes the following:

The WPQ Panel questioned the proponent's purchase of additional buffer lands during the hearing process:

And the buffer, what are called buffer properties that have been purchased by Bilcon of Delaware in the vicinity of the Project, there are a number of different kinds of uses that are suggested for those properties in the EIS buffer habitat areas. What prevents that from eventually becoming added to the quarry project site?

The proponent assured the WPQ Panel that the acquisition of such "buffer properties" was for the purposes of maintaining a buffer strip around the quarry, and that it was willing to consider proposals for conservation easement-type status for buffer lands to address the concern that these lands would be used for expansion:

We have no intention of employing that land other than as buffer strips. We have made the statement that if the local community wants to come to us and approach us for perhaps other uses of the lands, we would contemplate that.

The WPQ Panel appears to reject Bilcon's evidence in relation to the buffer lands, and to substitute its own view of Bilcon's plans for these lands. After reading in an intention to expand the quarry in the face of the proponent's explicit evidence to the contrary, the Panel then criticizes the proponent for failing to consider this "expansion" in the assessment of cumulative effects:

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<sup>779</sup> First Expert Report of David Estrin, para. 44.

<sup>780</sup> First Expert Report of David Estrin, para. 46, referring to E-mail from Barry Jeffrey to Steven Zwicker, dated 5 May 2006, Exhibit C-454.

Ownership of adjacent properties provides the Proponent with the potential opportunity of expansion. The Panel believes that expansion of the present Project and the development of an additional quarry or quarries is reasonably foreseeable, and that scenarios such as that should have been evaluated in the cumulative effects assessment.<sup>781</sup>

569. Mr. Estrin testified that:

Given that the “expansion” at issue existed only in the minds of the WPQ Panelists—and was explicitly denied by the proponent during the WPQ Panel hearings—this critique of the proponent is at the least bewildering, but also consistent with bias against the project proceeding.<sup>782</sup>

570. The JRP in the end recommended that “coastal quarries should be viewed as special cases, warranting special consideration, especially within the context of a coastal management policy that defines principles relating to coastal land use”.<sup>783</sup> The JRP Report further states that “because of the special issues associated with coastal quarries, the Panel recommends a moratorium on new approvals for development along the North Mountain until the Province of Nova Scotia has thoroughly reviewed this type of initiative within the context of a comprehensive provincial coastal zone management policy, and established appropriate guidelines to facilitate decision-making”.<sup>784</sup>

571. Bilcon however could reasonably expect that its project would be considered within the context of the laws of the day. There was no provincial zoning policy in place that declared the Whites Point area a “no go” zone for quarries. There was in fact strong general encouragement from a number of politicians and technical officials and various policy statements for mining enterprises to pursue coastal opportunities, and there were very specific expressions of support from some elected politicians, including the representative for the area, and some technical officials to pursue a project in the Whites Point area. Bilcon was not told by Minister Thibault or officials of federal Canada or Nova Scotia at any time prior to the JRP’s decision that the area was off-limits to quarry development, rather than having to be considered in the context of existing laws, policies and processes. The JRP, in its EIS Guidelines, did not indicate that a moratorium should be observed or the area should in effect be viewed as having a zoning plan in place that precluded major quarries.

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<sup>781</sup> First Expert Report of David Estrin, paras. 303-305.

<sup>782</sup> First Expert Report of David Estrin, para. 306.

<sup>783</sup> JRP Report, dated October 2007, p. 104, Exhibit C-34/R-212.

<sup>784</sup> JRP Report, dated October 2007, pp.104-105, Exhibit C-34/R-212.

572. This case would be more difficult if the issue were a duly enacted change by authorized law-making authorities to the zoning status of the Whites Point area while the Bilcon environmental assessment was already in progress, and substantial expenditures had taken place. NAFTA cases, such as *Mobil*<sup>785</sup> and *Waste Management*,<sup>786</sup> express a cautious approach about using investor expectations to stifle legislative or policy changes by state entities that have the authority to revise the law or policy. As lessons of experience are learned, as new policy ideas are advanced, as governments change in response to democratic choice, state authorities with the power to change law or policy must have reasonable freedom to proceed without being tasked with having breached the minimum standard under international law. That freedom is not absolute; breaches of the international minimum standard might arise in some special circumstances—such as changes in a legal or policy framework that have retroactive effect, are not preceded by reasonable notice, are aimed or applied in a discriminatory basis or are contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor.
573. The reality confronting Bilcon, however, is not that it was contending with a change in law or policy concerning the zoning of Whites Point by authorized authorities. It was faced with a fundamentally novel and adverse approach by an administrative body, the JRP, that had a mandate to apply existing federal Canada and Nova Scotia laws rather than to amend them.
574. Finally, Bilcon submitted a witness statement from Mr. Hugh Fraser, an experienced journalist who attended the hearings as a consultant to Bilcon. His statement includes concerns about what might be called the “atmospherics” of the hearing. These include matters such as the allegedly scolding tone of the Chair’s approach to Bilcon, the failure of the JRP on some (but not all) occasions to direct that those in attendance refrain from applauding denunciations of Bilcon or the project, and the Panel’s tolerance of inflammatory statements from members of the public or politicians, including references to “outsiders” who wanted to “rape and pillage” the landscape.<sup>787</sup> Mr. Fraser was not called for cross-examination, and no one who actually attended the hearing offered contrary evidence. The Tribunal has considered Mr. Fraser’s evidence carefully, and reviewed the entire transcript to see the extent to which it finds support in the transcript. The Tribunal acknowledges that cold print does not always convey matters that can

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<sup>785</sup> *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and on Principles of Quantum, 22 May 2012.

<sup>786</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

<sup>787</sup> Witness Statement of Hugh Fraser, p. 9.

be felt by participants arising from such matters as the tone of voice and body language of those presiding at a hearing, making oral statements, or demonstrating on the sidelines.

575. Fairness requires that a JRP conduct itself in a way that makes principals, advocates and witnesses for different sides all feel that their voices are being listened to by the Panel, and that they should not feel under emotional duress to refrain from providing their sincerely held points of view, and that the Panel has not closed its mind before all the submissions are in and duly considered. Those conducting a public hearing must have reasonable latitude, however, to express their thoughts and feelings as they go along, and give the participant the opportunity to respond and potentially change initial thoughts and sentiments. It can be important as well that participants and the public be able to draw assurance from the conduct of those presiding that they are engaged in a searching examination of the risks of a project, rather than accepting at face value the proponent's position and evidence. It is to be expected that members of the public, even politicians, addressing the audience at a public hearing on a controversial issue on which there is a division of thought and emotion in the community, will in some cases express themselves in a manner that reveals strong feelings about general issues, the project, or its proponent.

576. In the end, the Tribunal is not convinced from all the evidence that it should find a breach of NAFTA arising from the emotional environment at the JRP hearing.

v. Governmental Acceptance of the JRP Report

577. As both Parties agree, it was ultimately a set of decisions taken by the Governments of federal Canada and Nova Scotia, not the JRP Report itself, that led to the rejection of the Investors' project. The Tribunal shall accordingly deal with two related issues discussed by the Parties—the relationship of the decisions at both levels of Government and the level of independent scrutiny that these Governments were required to exercise in reviewing the JRP's recommendations.

*Could the other part of the JRP's mandate, under the laws of Nova Scotia, justify or render moot conduct that would ordinarily be contrary to federal Canada law?*

578. As noted earlier, Canada itself agrees that the dual mandate of the JRP required it to carry out its role under both federal Canada and Nova Scotia law; the existence of a second mandate does not justify failure to carry out a first one.

579. Canada argues, however, that *NSEA* provides a broader or more flexible mandate than does its federal Canada counterpart, and that some contested aspects of the JRP's conduct are in fact justified by the Nova Scotia statute; and that in any event, if the Nova Scotia track, including environmental assessment and ultimate government decision-making, led to rejection of the project, any mistakes on the federal track were moot.
580. The Tribunal has already identified many problems with the adoption of the "community core values" approach, including lack of fair notice in this particular case, that extend to its adoption under the laws of Nova Scotia as well as federal Canada. Let it be supposed, however, for the sake of argument, that the JRP would and could still have recommended against the project under Nova Scotia law pursuant to a "community core values" approach supposedly permitted under Nova Scotia law. The fact would remain that the JRP might still have concluded that the project, at least with mitigation measures recommended by the JRP, passed muster under the federal Canada environmental law framework. With the benefit of a report compliant with the *CEAA* requirements, and a positive recommendation from the JRP on the federal Canada track, Nova Scotia decision-makers might have ultimately exercised their own discretion in favor of approving the project. Federal Canada officials might have concurred with the proponent in trying to persuade Nova Scotia officials of the merits of approving the project, even in the face of a negative recommendation from the JRP based on "community core values". Mr. Estrin testified that federal and provincial officials generally try to coordinate the content as well as the timing of their responses to a JRP,<sup>788</sup> and the evidence in this case is that federal Canada and Nova Scotia officials were indeed in contact with each other shortly after the release of the JRP Report to discuss the likely response at each level.
581. A positive decision on the federal Canada track could have simplified and reduced Bilcon's challenges in other ways. In some scenarios, Bilcon might have successfully sought judicial review to achieve success on the Nova Scotia track, and thereby achieved the overall ability to proceed with its project.
582. Indeed, even if the JRP had recommended against the project under both federal Canada and Nova Scotia mandates, a variety of scenarios remained possible whereby the project could still have been authorized. At the federal Canada level, decision makers could have decided to disagree with the JRP recommendation against the project, and approved it. The same could have occurred at the Nova Scotia level. At each level, decision-makers could have decided that

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<sup>788</sup> Second Expert Report of David Estrin, para. 332, referring to E-mail from Peter Geddes to Stephen Chapman, dated 13 September 2007, Exhibit C-781, and E-mail from Paul Bernier to Nicole Gagnier, Exhibit C-782.

conditions, possibly including ones not earlier recommended by the JRP, attached to their approval would ensure that adverse environmental impacts would now be satisfactorily addressed. At each level, decision-makers could in the alternative have determined that the broad public interest in all the circumstances warranted proceeding even if some significant adverse effects would likely still occur even if all conditions concerning mitigation were observed.

583. With respect to Bilcon's application, however, the decision-makers at both levels were hampered in carrying out their mandate by the fact that the JRP did not provide the comprehensive investigation, information-gathering and analysis, including identification of feasible mitigation measures, contemplated under the *CEAA*. Instead, among other deficits, the JRP made the deliberate decision not to identify mitigation measures—many of which, it acknowledged, were actually possible. The JRP was so convinced, on the basis of its own “community core values” approach, that the project was unacceptable that it did not want to provide ideas that the governmental decision-makers might incorporate into an ultimate approval. This approach amounted to an unauthorized pre-emption, by the role of a body charged with gathering information and making recommendations, of the discretion of those who were vested with the ultimate authority to decide.

*Did Canada and Nova Scotia fail to give the JRP Report sufficient independent scrutiny, including providing Bilcon an opportunity to voice its objections and as governments to provide reasons for rejecting Bilcon's application?*

584. The Tribunal finds that the decision-makers in Nova Scotia and federal Canada had the authority and duty to make their own decision about the future of the Bilcon project. If they had considered the methodology report flawed, they could have sent it back to the JRP for clarification or further work. They could have provided for different or additional mitigation provisions. They could have agreed that the project likely had significant adverse effects after mitigation, but still approved it on public interest considerations in all the circumstances. Both Nova Scotia and then federal Canada, however, accepted the conclusion of the JRP that the project likely would have significant adverse effects on “community core values” and rejected it.

585. Bilcon asked for the opportunity to meet with the Ministers of Nova Scotia and federal Canada to explain their objections. In both cases, Bilcon's request was refused. The Tribunal can readily understand that an in-person meeting might be considered objectionable, inasmuch as it would potentially follow up a public hearing process with one which was less transparent and which

might in practice exclude many stakeholders who would also want to directly speak to the ultimate decision-makers. The Tribunal agrees, however, with the evidence of Mr. Rankin that the decision-makers did have a duty to give Bilcon an opportunity to voice its objection to the JRP's Report, even if the format was a written submission. The fact of the matter is that Bilcon did send a concise outline of its objections, including its comments and objections on "community core values", to the responsible Nova Scotia Minister, and included that correspondence in its communications with the federal Canada Minister.<sup>789</sup> The Nova Scotia Minister stated that he had reviewed the submissions from Bilcon "very, very carefully".<sup>790</sup>

586. The federal Canada official response states that the JRP Report was carefully considered by officials of Fisheries and Oceans and Transport Canada.<sup>791</sup> There does not appear to be a comparable statement to that of the Nova Scotia Minister to the effect that the competent authorities actually considered the Investors' criticisms of the JRP Report. At the same time, there is no affirmative evidence that federal Canada failed to consider the written submission of Bilcon that was passed on to it by Nova Scotia. While there are grounds for concern, supported by both the Estrin and Rankin expert reports, that federal Canada did not open its mind to at least considering that the methodology of the JRP was mistaken, in the end, the Tribunal is not convinced that it has a sufficient basis in evidence to arrive at a definitive finding adverse to Canada in this respect.

587. The common law version of public administrative law in Canada, and a specific statutory requirement under the *NSEA*, require that decision-makers provide reasons for their decisions. Neither Canada nor Nova Scotia provided detailed explanations for their adoption of the recommendations of the JRP. It is clear, however, that both adopted the essential finding of the JRP, which on its part had provided a lengthy explanation of its findings and analysis. In all the circumstances, the Tribunal does not find that there was a failure to provide reasons that constitutes a breach of the international minimum standard. There was on the public record an explanation by federal Canada and Nova Scotia which gave the Investors a basic appreciation of the foundation of the decisions made.

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<sup>789</sup> Second Expert Report of Lawrence Smith, para. 223, referring at n.337 to Bilcon Letter to The Honourable John Baird, dated 21 November 2007, Bilcon Letter to The Honourable Mark Parent, dated 8 November 2007, Bilcon Letter to The Honourable Mark Parent, dated 16 November 2007 and Fax Cover Sheet and Transmission Verification Report, dated 28 November 2007 (Exhibit C-204).

<sup>790</sup> Second Expert Report of Lawrence Smith, para. 223, referring to Transcript of telephone conversation between Paul Buxton and Mark Parent, dated 20 November 2007, Exhibit R-560.

<sup>791</sup> The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project, issued on 17 December 2007, quoted in Memorial, para. 281, cited in First Expert Report of David Estrin, para. 535.



**(d) Conclusions Regarding the International Minimum Standard**

588. The Tribunal has referred to the *Waste Management* epitome of the minimum standard, and will now specifically apply it to the facts of this case.

589. The *Waste Management* standard calls for a consideration of representations made by the host state which an investor relied on to its detriment. What is needed are specific representations, rather than abstract references to the general legal framework in relation to an investment or general statements about the attractiveness of an investment destination. In the present case, they were very clear, repeated encouragements by authorities of Nova Scotia that Bilcon was welcome to pursue its coastal quarry and marine terminal project, including at the specific Whites Point location. All the relevant encouragement was in the context of Bilcon being required to present a project that would comply with federal and provincial laws concerning the environment. There was no indication in either the encouragements from government or in the laws themselves that the Whites Point area was a “no go” zone for projects of the kind Bilcon was pursuing, regardless of their individual environmental merits, carefully and methodically assessed.

590. The *Waste Management* standard calls for a consideration of procedural as well as substantive fairness. Bilcon was denied a fair opportunity to know the case it had to meet. It had no reason to expect, under the law or any notice provided by the JRP, that “community core values” would be an overriding factor; that this factor would pre-empt a thorough “likely significant adverse effects after mitigation” analysis of the whole range of project effects; and that this factor would contain elements that would effectively preclude any real possibility that an application could succeed, even if Bilcon showed in each and every respect mentioned in the EIS Guidelines that the project would, after mitigation, likely have no significant adverse effects on environmental, social and economic conditions. Bilcon in fact submitted extensive expert evidence to address the issues raised in the EIS Guidelines, including social effects. Bilcon could not be faulted for failing in its initial submissions to anticipate the unprecedented approach that the JRP articulated in its final report. As for the JRP hearings themselves, the Tribunal has noted the relative lack of interest displayed by the JRP in hearing from the experts Bilcon had assembled—devoting to Bilcon’s experts only 90 minutes out of 90 hours of the hearing (less than 2 percent of the total hearing time).

591. The *Waste Management* test mentions arbitrariness. The Tribunal finds that the conduct of the joint review was arbitrary. The JRP effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate defined by the

applicable law, including the requirement under the *CEAA* to carry out a thorough “likely significant adverse effects after mitigation” analysis.

592. Viewing the actions of Canada as a whole, it was unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, have other officials effectively determine that the area was a “no go” zone for this kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits.
593. Canada is one entity for the purposes of NAFTA responsibility. There is a saying that sometimes “the left hand does not know what the right hand is doing”. For the purposes of state responsibility the combined impact of its left hand and right hand can be determinative even if the actions of either in isolation do not rise to the level of a breach. In this case there were opportunities for federal Canada to harmonize its deliberations. Federal Canada as well as Nova Scotia were able to provide input to the JRP. Both had the later opportunity to address its problematic aspects of the JRP Report.
594. The *Waste Management* standard involves a high threshold before conduct will be considered as rising to the level of international responsibility under NAFTA. From the Tribunal’s perspective, mere error in legal or factual analysis, is by no means sufficient to rise to that threshold. However, the Tribunal considers the breach here to rise to that threshold, in light of: the Investors’ reasonable expectations and major consequent investment of resources and reputation in a process that is the most rigorous, public and extensive kind provided under the laws of Canada; the fact that the JRP’s distinctive approach in adopting the concept of community core values was not preceded by reasonable notice; and the fact that the approach of the JRP departed in fundamental ways from the standard of evaluation required by the laws of Canada rather than merely being controversial in matters of detailed application.
595. The Tribunal notes that this case involves environmental regulation, and that there is substantial concern among the public and state authorities that investor-state treaty provisions not be used as obstacles to the maintenance and implementation of high standards of protection of environmental integrity. The Tribunal therefore wishes to make several points very clear.
596. The Tribunal notes the statement in the Preamble of NAFTA according to which the Parties are resolved to “ensure a predictable commercial framework for business planning and investment”, but the same Preamble also refers to a resolve to “strengthen the development and enforcement

of environmental law”. NAFTA places no inherent limits on how demanding the standards of a domestic statute may be. The concepts of promoting both economic development and environmental integrity are integrated into the Preamble’s endorsement of the principle of sustainable development.

597. Environmental regulations, including assessments, will inevitably be of great relevance for many kinds of major investments in modern times. The mere fact that environmental regulation is involved does not make investor protection inapplicable. Were such an approach to be adopted—and States Parties could have chosen to do so—there would be a very major gap in the scope of the protection given to investors. The Laws of Canada and Nova Scotia, as well as the NAFTA itself, expressly acknowledge that economic development and environmental integrity can not only be reconciled, but can be mutually reinforcing.
598. In arriving at its conclusion in this case, the Tribunal is not suggesting that there is the slightest issue with the level of protection for the environment provided in the laws of Canada and Nova Scotia. Each is free under NAFTA to adopt laws that are as demanding as they choose in exercising their sovereign authority. Canada and Nova Scotia have both adopted high standards. There can be absolutely no issue with that under Chapter Eleven of NAFTA. The Tribunal’s concern is actually that the rigorous and comprehensive evaluation defined and prescribed by the laws of Canada was not in fact carried out.
599. It was open under NAFTA for legislatures to adopt different environmental assessment standards and processes than they had in place at the time of the Bilcon Project. Nova Scotia lawmakers could, for example, have provided that local governments must approve the project or that it could not proceed without support in a local referendum. Federal Canada could by legislation have relaxed its requirement that to be assessable, an effect must have a biophysical pathway.
600. The problem in this case is whether the Investors’ application was assessed in a manner that complied with the laws that Canada and Nova Scotia actually chose to adopt. The Tribunal has considered all the evidence from participants and experts on both sides, and concluded, based on the reports of two highly experienced and respected experts in Canadian environmental law that there was in fact a fundamental departure from the methodology required by Canadian and Nova Scotia law.
601. The Tribunal would further reiterate that under the laws of Canada and Nova Scotia, social impacts can be within the scope of a valid assessment. Furthermore, the value placed by

members of a community on distinctive components of an ecosystem can be taken into account in an assessment under the laws of Canada and Nova Scotia. The Tribunal has respectfully taken issue with only the distinct, unprecedented and unexpected approach taken by the JRP to “community core values” in this particular case.

602. This Tribunal also wishes to be very clear that it has not purported in these reasons to conduct its own environmental assessment, in substitution for that of the JRP. The Tribunal at this stage simply holds that the applicant was not treated in a manner consistent with Canada’s own laws, including the core evaluative standard under the *CEAA* and the standards of fair notice required by Canadian public administrative law. The Tribunal is not here deciding what the actual outcome should have been, including what mitigation measures should have been prescribed if the JRP had carried out the mandate contained in applicable laws.
603. The Investors’ position is that, properly considered, their application would have led to a project that would have promoted the economic and social vitality of a local community; that would have helped to diversify the economy at a time when some traditional industries were suffering; and that it was designed to be carried out in a manner that would not be deleterious in areas such as human safety, the protection of animal and plant life, the continuation of traditional economic activities and the aesthetics of the area. The basis of liability under Chapter Eleven is that, after all the specific encouragement the Investors and their investment had received from government to pursue the project, and after all the resources placed in preparing and presenting their environmental assessment case, the Investors and their investment were not afforded a fair *opportunity* to have the specifics of that case considered, assessed and decided in accordance with applicable laws.
604. For the reasons given, the Tribunal concludes that the approach to the environmental assessment taken by the JRP and adopted by Canada resulted in a breach of Article 1105.

**B. NAFTA ARTICLE 1102 (NATIONAL TREATMENT) AND ARTICLE 1103 (MOST-FAVORED-NATION TREATMENT)**

**1. The Investors' Position**

605. The Investors argue that an investor of another NAFTA party is entitled to claim the benefit of the best standard of treatment afforded to a Party's own nationals under NAFTA Article 1102, as well as that afforded to another Party or a non-Party under Article 1103.<sup>792</sup>

606. In the Investors' view, the non-discrimination obligations set out in Articles 1102 and 1103 contain parallel elements which impose a similar analytical approach. The inclusion of certain phrases common to both Articles suggests, according to the Investors, that the interpretation of both articles requires a comparison between different treatment and between the two "circumstances", the comparators, to which different treatment is accorded. Moreover, in the Investors' view, they are entitled to the benefit of the "better treatment" by virtue of NAFTA Article 1104 without having to allege and prove breach under Articles 1102 and 1103.<sup>793</sup> Despite the similarities in language, as the Tribunal sets out below, the Investors make distinct arguments about Article 1102 and Article 1103

**(a) The Interpretation of NAFTA Article 1102**

607. The Investors submit that GATT/WTO experience with national treatment is useful to the Tribunal's interpretation of the content and scope of NAFTA Article 1102.<sup>794</sup> The Investors argue that a successful claim based on Article 1102 must satisfy the following three elements: first, the Respondent "must accord foreign investors and/or their investments treatment that is 'no less favorable' than that which it accords to its own investors and investments".<sup>795</sup> Secondly, "the differential treatment must be accorded with respect to investors and/or investments 'in like circumstances'".<sup>796</sup> Thirdly, "the differential treatment" must be extended to "the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments".<sup>797</sup> In the Investors' view, the analysis begins with an evaluation of like

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<sup>792</sup> Reply, para. 419.

<sup>793</sup> Reply, para. 420; Canada's Statement of Implementation, p. 149, Exhibit CA-45.

<sup>794</sup> Reply, para. 262. *See also* Reply, paras. 255-261.

<sup>795</sup> Reply, para. 264.

<sup>796</sup> Reply, para. 264.

<sup>797</sup> Reply, para. 264.

circumstances.<sup>798</sup>

i. Like Circumstances

608. It is the Investors' position that the element of like circumstances requires a comparison between the Investor and domestic investors engaged in similar economic activities and/or regulated by the same general legal framework.<sup>799</sup> When carrying out the likeness analysis under NAFTA Article 1102, the Investors suggest that the analysis should focus on the competitive relationship between investors.<sup>800</sup> This element does not, in the Investors' view, require "identical" or "most like" circumstances.<sup>801</sup>

609. The Investors contend that, because of the shared federal-provincial jurisdiction over the EA in Canada,<sup>802</sup> the comparators for the purpose of like circumstances are the general class of applicants applying for consideration under the EA scheme. All applicants come before the governmental authorities in similar situations seeking the same treatment, and in relation to this treatment, must be considered to be in like circumstances.<sup>803</sup>

ii. Less Favorable Treatment

610. The Investors submit that, under the "less favorable treatment" protection, "a party cannot modify the 'competitive opportunities' to the detriment of another parties' investors and its investments".<sup>804</sup> According to the Investors, this is an objective test. The Investors further maintain that differences in treatment between firms in the same economic sector shift the burden to the respondents to show that the treatment is no less favorable.<sup>805</sup>

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<sup>798</sup> Reply, para. 265, referring to Memorial, para. 373.

<sup>799</sup> Reply, para. 271. *See also* Reply, paras. 272-291.

<sup>800</sup> Reply, para. 297. *See also* Reply, paras. 331-350.

<sup>801</sup> Reply, paras. 292-297.

<sup>802</sup> Reply, para. 353; *The Constitution Act, 1867*, s. 92A, Exhibit CA-217; Expert Report of Murray Rankin, paras. 46, 49; Rejoinder, para. 166.

<sup>803</sup> Reply, para. 357; *Occidental v. Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, paras. 168, 173, 176; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL Arbitration Rules, Decision on Objections to Jurisdiction, 20 July 2006, para. 167.

<sup>804</sup> Reply, para. 361. *See also* Memorial, paras. 415-426.

<sup>805</sup> Reply, para. 324; Appellate Body Report in EC-Asbestos, Exhibit CA-50; Appellate Body Report in US-Cloves Cigarettes, Exhibit CA-196.

611. The Investors reject the Respondent’s argument that in order to establish a breach of NAFTA, what is required is a showing of discriminatory intent based on nationality.<sup>806</sup> NAFTA tribunals have not adopted this approach. In any event, the Investors contend that the treatment that was afforded to Bilcon “establish[es] a strong presumption of nationality-based discrimination”.<sup>807</sup>
612. The Investors rely also on NAFTA Article 201(1) to argue that the Agreement takes a very broad view of what qualifies as a measure.<sup>808</sup> According to the Investors, “[d]uration [of the environmental assessment process] is clearly a measure and this constitutes a form of treatment to the Investors and their Investment”.<sup>809</sup>

iii. The Establishment, Acquisition, ... or other Disposition of Investments

613. With regard to the third element—the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments—the Investors argue that “[i]n the context of environmental regulatory measures, the aspects of an investment affected by NAFTA Article 1103 would by definition have to address the establishment, expansion, conduct or operation of economic activity proposed by the investor”.<sup>810</sup> The Investors further submit that the treatment in question concerned the operation of the investment.<sup>811</sup>

**(b) The Alleged Breach of NAFTA Article 1102**

614. The Investors argue that all proponents and their projects seeking regulatory approval under Canada’s environmental assessment scheme are in like circumstances with the Investors and the Whites Point project.<sup>812</sup> The Investors further submit that some Canadian investors received better treatment in other EAs. In particular, the Investors suggest that Canadian-owned projects and Canadian investors received better treatment in respect of the assessment of cumulative effects, the precautionary principle, adaptive management and mitigation measures, information requests, blasting and the scoping and level of EAs.<sup>813</sup> The Investors maintain that, as a result of

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<sup>806</sup> Reply, paras. 369-376.

<sup>807</sup> Reply, para. 388.

<sup>808</sup> Reply, para. 395.

<sup>809</sup> Reply, para. 397; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Arbitration Rules, Award, 8 June 2009, para. 774.

<sup>810</sup> Reply, para. 409.

<sup>811</sup> Reply, para. 363.

<sup>812</sup> Reply, para. 576; Memorial, paras. 538-545.

<sup>813</sup> Reply, para. 577.

the Respondent's failure to meet its national treatment obligation, they and their investment have been harmed.<sup>814</sup>

i. Cumulative Effects

615. The Investors submit that EAs in Canada must factor in the cumulative environmental effects of other projects that have been or will be carried out.<sup>815</sup> According to the Investors, "the imposition of a more stringent, and incorrect, cumulative effects standard compared to other projects going through the same regulatory process constitutes less favorable treatment".<sup>816</sup>

616. The Investors submit that the JRP for the Whites Point project applied an "incorrect and prejudicial standard", which led the JRP to view the Investors' cumulative effects assessment as inadequate.<sup>817</sup> The Investors maintain that, in contrast to their treatment by the JRP, the cumulative effects standard that was applied in the EAs of the projects at Voisey's Bay, Eider Rock LNG, Deltaport Third Berth Project, and Belleoram Coastal Quarry was the appropriate standard under Canadian law, not requiring any speculation about future, speculative projects.<sup>818</sup>

ii. Precautionary Principle

617. The Investors argue that the Whites Point project was also not afforded like treatment in the application of the precautionary principle because, in contrast to the Voisey's Bay and Sable Gas projects, the JRP in the Whites Point project applied "a definition of the precautionary principle that failed to recognize the absence of full-scientific certainty".<sup>819</sup> The Investors further contend that while the Whites Point Quarry was subject to the same legislative regime as several other pre-2003 projects for which a precautionary principle was not employed, the precautionary principle was applied for the Whites Point project EA.<sup>820</sup>

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<sup>814</sup> Memorial, para. 603; Witness Statement of William Richard Clayton, paras. 31-33.

<sup>815</sup> Reply, para. 578 (citing First Expert Report of David Estrin, para. 423).

<sup>816</sup> Reply, para. 580.

<sup>817</sup> Reply, para. 580.

<sup>818</sup> Reply, para. 582. For the description of the different projects and the standard of cumulative effects that they were subject to *see also* Memorial, paras. 573-576 (Voisey's Bay), 592-593 (Eider Rock LNG Project), 558-559, 594-596 (Belleoram Coastal Quarry), 584-586 (Deltaport).

<sup>819</sup> Reply, para. 589. *See also* paras. 588-592. *See also* Memorial, para. 577 (regarding the precautionary principle and the Voisey's Bay project) and para. 684 (for general description of the Sable Gas project).

<sup>820</sup> Memorial, para. 557. *See also* para. 556 (for description of the Aguathuna Quarry project).



iii. Mitigation Measures and Contingent Approval

618. The Investors object to the JRP's consideration, or lack thereof, of their proposed mitigation measures. For one, it is the Investors' view that, in contrast to the treatment afforded to the projects of Canadian companies,<sup>821</sup> the JRP in Bilcon's case did not view adaptive management as an effective mitigation tool and dismissed it in the assessment process.<sup>822</sup> The Investors maintain that their presentation of adaptive management for mitigation purposes should have been considered as in those Canadian cases.

619. According to the Investors, the Canadian proponents for Lower Churchill, Keltic, Rabaska and Kemess received better treatment than the Investors in the course of their review processes because each of those panels considered mitigation measures before making a determination on significant adverse environmental effects, unlike the Whites Point JRP.<sup>823</sup> In particular, the Investors state that despite the fact that the Kemess JRP recommended outright rejection of that project, the panel identified 32 mitigation measures in the event that the project was approved.<sup>824</sup> Likewise, the Deltaport Third Berth project's comprehensive study report benefited from mitigation measures.<sup>825</sup>

iv. Information Requests

620. The Investors submit that they were subject to "unreasonable, arbitrary and highly burdensome information requests" after the submission of their EIS,<sup>826</sup> in contrast to the treatment afforded to the GSX Pipeline project where a JRP ruled out unduly burdensome information requests submitted by the public.

v. Blasting

621. According to the Investors, they were prevented from carrying out test blasts that would have assisted their presentation to the JRP due to the imposition of unachievable and inappropriate Blasting Conditions set by the DFO, as well as the DFO's subsequent refusal to provide

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<sup>821</sup> Reply, paras. 596-599.

<sup>822</sup> Reply, para. 600; JRP Hearing Transcript, Vol. 1, dated 16 June 2007, p. 120, Exhibit C-154.

<sup>823</sup> Reply, para. 614. *See also* paras. 601-613. *See also* Memorial, paras. 570-572 (for discussion regarding the Keltic Project).

<sup>824</sup> Reply, para. 602; Second Expert Report of David Estrin, para. 292.

<sup>825</sup> Reply, para. 603. *See also* Memorial, para. 563.

<sup>826</sup> Reply, para. 615; Letter from Robert Fournier to Paul Buxton, dated 28 June 2006, Exhibit C-150.

information regarding blasting setback calculations”.<sup>827</sup> Based on the figures showing the blasting charge and minimum setback of the Whites Point project as compared to those for Tiverton Harbour, Tiverton Quarry and Belleoram, the Investors conclude that proponents for those projects received better treatment than the Investors did with regards to blasting.<sup>828</sup>

622. In particular, the Investors refer to Tiverton Harbour, which is owned by a Canadian government agency, and is located 10 km away from the Whites Point Quarry on the same body of water. The Investors submit that, since the blasting at Tiverton Harbour was in the water, there was far greater potential for disruption and destruction of fish and fish habitat than at the Whites Point Quarry.<sup>829</sup> Nevertheless, despite the fact that iBoF salmon was already raised as an issue in the assessment of the Whites Point Quarry in May 2003, the Tiverton Harbour habitat study that the DFO conducted in September 2003 did not mention iBoF salmon. Only in October 2003, as a result of questions Bilcon raised, did the DFO engage in a consideration of iBoF salmon in relation to Tiverton.<sup>830</sup> The Investors argue that despite concerns regarding the negative effects of this project on oceanography raised by the DFO,<sup>831</sup> the project received HADD authorization just one month later due to, according to the Investors, inappropriate intervention by DFO’s Habitat Management Division in the drafting of the Tiverton Screening Report.<sup>832</sup>
623. The Investors submit that the preferential treatment afforded to Tiverton Harbour and its proponent, a Nova Scotia company, also included the restrictions in respect of effects of blasting on whales.<sup>833</sup> In Tiverton Harbour, DFO’s Science Sector provided a one-page memo regarding the effects of blasting at Tiverton on marine mammals,<sup>834</sup> while for the Whites Point project, DFO-Science produced a 17-page report. Moreover, the Investors submit that at

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<sup>827</sup> Reply, para. 618.

<sup>828</sup> Reply, para. 619. *See also* Memorial, paras. 547-550 (for more details on Tiverton Quarry), paras. 553-555 (for more details on Tiverton Harbour), paras. 559-560 (for more details on Belleoram).

<sup>829</sup> Reply, para. 621; Expert Report of Murray Rankin, paras. 83-84.

<sup>830</sup> Reply, paras. 622-623; Letter from Phil Zamora to Paul Buxton, dated 29 May 2003, Exhibit C-687. *See also* Memorial, para. 555.

<sup>831</sup> Reply, para. 624; Fax from Faith Scattolon to Neil Bellefontaine, and Briefing Note, dated 7 January 2004, Exhibit C-692.

<sup>832</sup> Reply, paras. 625-626.

<sup>833</sup> Reply, para. 627. Hearing Transcript, 31 October 2013, p. 45.

<sup>834</sup> Reply, para. 627; DFO Science Response to Habitat Request RE: Environmental Screening for Harbour Development (Breakwater, Floating Docks, Dredging And Service Area) at Tiverton, Digby County, Nova Scotia, dated 4 June 2004, Exhibit C-660.

Tiverton, the “blasting, not just to build an access road, was allowed to occur even before an actual [a]pproval had been given”.<sup>835</sup>

624. The Investors also refer to the Belleoram Quarry and, noting the similar features with Whites Point such as the quarry with marine terminal design, slated to operate for 50 years,<sup>836</sup> argue that it involved many of the same issues as the Whites Point Quarry, including blasting impacts on marine life, ballast water pollution, dust control and ammonia-based explosives.<sup>837</sup> Blasting at Belleoram was set to occur closer to water than at the Whites Point Quarry, according to the Investors.<sup>838</sup> At Belleoram, however, the proponent needed only to undertake “video and photographic surveys” and “visual inspections”, prior to blasting, something that the JRP did not view as sufficient for the Whites Point Quarry.<sup>839</sup>
625. The North Head Harbour project, too, received better treatment than the Whites Point project, say the Investors, because there a procedure was identified in order to allow blasting in the water to occur despite a potential impact on marine life.<sup>840</sup>
626. The Investors submit that the Miller’s Creek Gypsum Mine, located in the Bay of Fundy, also uses ANFO for blasting and “was located in highly unique biosphere, with many rare plant species present”.<sup>841</sup> The Investors maintain that the project received significant opposition from the public and demand for a panel review of the entire Annapolis River Basin.<sup>842</sup> Despite those demands, the NSDEL required the proponent to employ an adaptive management plan and thereafter approved the project.<sup>843</sup>

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<sup>835</sup> Reply, para. 634; Note by Bob Petrie, discussing policy and procedures for pit and quarry guidelines. May be a useful document, needs to be deciphered. Nova Stone representatives even contacted NSDEL to voice that blasting in order to construct the access road was very close to water, dated 3 November 2003, Exhibit C-931; Note prepared by unknown, dated 26 March 2003, Exhibit C-688.

<sup>836</sup> Hearing Transcript, 31 October 2013, p. 49, lines 5-8.

<sup>837</sup> Hearing Transcript, 31 October 2013, p. 49, lines 11-18.

<sup>838</sup> Reply, para. 640. *See also* Reply, para. 641.

<sup>839</sup> Reply, para. 642. *See also* Memorial, paras. 559-560 (for further discussion the treatment that Belleoram Quarry received regarding assessment of blasting effects).

<sup>840</sup> Reply, para. 645.

<sup>841</sup> Reply, para. 647; Memorandum from Sarah MacKay to Helen MacPhail, dated 23 November 2009, Exhibit C-717. *See also* para. 646.

<sup>842</sup> Reply, para. 647; E-mail from Sonja Wood to David Morse, dated 10 March 2009, Exhibit C-666.

<sup>843</sup> Reply, para. 648.

vi. Scoping

627. The Investors submit that the Canadian proponents for the Tiverton Quarry, Belleoram, Bear Head LNG, and Keltic projects also received better treatment than the Investors in respect of the scope of their assessments. For those projects, DFO did not scope in the land-based aspects of these projects, resulting in a far less onerous environmental assessment process, according to the Investors.<sup>844</sup>
628. The Investors reject the Respondent's assertion "that the Belleoram super coastal quarry is not an appropriate comparator because Placentia Bay in Newfoundland 'is populated with heavy industrial activity' 'unlike Digby Neck'"<sup>845</sup> and argue that the Bay of Fundy area is industrialized and highly trafficked with coastal quarries, LNG terminals, and a nuclear power facility.<sup>846</sup>

vii. Level of Assessment<sup>847</sup>

629. The Investors point out that the Whites Point project is the only quarry in Nova Scotia "of the 33 proposed quarries assessed under the 2000 Nova Scotia Environment Act to have been sent to a panel review".<sup>848</sup> In particular, the Investors refer to the Prosperity Gold-Copper Project, proposed by a Canadian company<sup>849</sup> and argue that on that occasion the proponent was able to put pressure on provincial and federal regulators to avoid a JRP process.<sup>850</sup>

viii. Other Forms of Preferential Treatment

630. The Investors also argue that the following projects received other forms of preferential treatment, such as a shorter and less stringent EA: Tiverton Quarry;<sup>851</sup> Tiverton Harbour;<sup>852</sup>

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<sup>844</sup> Reply, para. 651. *See also* paras. 652-662. *See also* Memorial, para. 551 (regarding Tiverton Quarry) paras. 559-560 (regarding Belleoram), paras. 571-572 (regarding the Keltic project). E-mail from Bruce Hood, dated 9 December 2003, Exhibit C-62.

<sup>845</sup> Reply, para. 657.

<sup>846</sup> Reply, para. 657.

<sup>847</sup> In the introduction to the arguments on the violation of Article 1102 in the Reply, the Investors do not list this as an independent treatment but as part of scoping (item (g) in para. 577). However, they do refer to it as an independent item (h) in their arguments (*see* title between paras. 662 and 663).

<sup>848</sup> Reply, para. 664; Second Expert Report of David Estrin, para. 145.

<sup>849</sup> Reply, para. 665.

<sup>850</sup> Reply, para. 666.

<sup>851</sup> Memorial, paras. 551-552.

Aguathuna Quarry;<sup>853</sup> the Belleoram Quarry Project;<sup>854</sup> the Deltaport Third Berth Project,<sup>855</sup> the Bear Head LNG Project;<sup>856</sup> the Keltic Project;<sup>857</sup> and Voisey's Bay.<sup>858</sup>

**(c) The Interpretation of NAFTA Article 1103**

631. The Investors submit that a NAFTA Party breaches Article 1103 when it fails to provide equality of competitive opportunities to investors and investments.<sup>859</sup>

632. The Investors submit that the likeness tests under NAFTA Articles 1102 and 1103 differ:

Notwithstanding the similar legal elements of NAFTA Article 1102 and 1103, the Investors submitted separate claims to acknowledge that these provisions involve two distinct comparisons that coexist in the NAFTA non-discrimination obligations.<sup>860</sup>

633. In the Investors' view, despite the similarities between Articles 1102 and 1103, a likeness test under Article 1103 differs from that under Article 1102 in that 1103 requires a comparison between the "like circumstances" of investors and their investment and the general class of applicants from any other NAFTA party or non-party.<sup>861</sup> The Investors argue that:

a meaning of likeness has to be related to the aspect of the economic activity that has been regulated. Moreover, ... [NAFTA] tribunals have emphasized the fact that when the same legal regime is applicable to both a domestic investor and the foreign investor, this is an indication of the investors being in like circumstances.<sup>862</sup>

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<sup>852</sup> Memorial, paras. 554-555.

<sup>853</sup> Memorial, paras. 556-557.

<sup>854</sup> Memorial, paras. 559-560.

<sup>855</sup> Memorial, para. 563.

<sup>856</sup> Memorial, paras. 566-569.

<sup>857</sup> Memorial, paras. 571-572.

<sup>858</sup> Memorial, para. 574.

<sup>859</sup> Reply, para. 416; United Nations Conference on Trade and Development (UNCTAD), Most-Favoured-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements 1999, p. 8, Exhibit CA-238.

<sup>860</sup> Reply, paras. 422, 424. *See also* Memorial, paras. 374, 434.

<sup>861</sup> Reply, para. 448.

<sup>862</sup> Reply, para. 451 (referring to *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL Arbitration Rules, Award, 12 January 2011, paras. 166-167). *See also* Memorial, paras. 607-613.

634. The Investors also argue that intent is not required to establish a breach of NAFTA Article 1103<sup>863</sup> nor are public policy considerations relevant for carrying out the likeness analysis.<sup>864</sup>

**(d) The Alleged Breach of NAFTA Article 1103**

635. The Investors argue that the JRP recommendation and the ministers' adoption of the recommendation constitute "treatment" under the NAFTA.<sup>865</sup> The Investors submit that the Respondent treated other investors more favorably than Bilcon with regard to the type of assessment they were afforded, the content of the analysis to which they were subjected, including the cumulative effects analysis they were required to present and the application of the precautionary principle, as well as the long duration of their EA.<sup>866</sup> The Investors submit that they have been harmed as a result of what is, in its view, the Respondent's failure to meet its most favored nation treatment obligation.<sup>867</sup>

636. The Investors refer to six projects that they contend received treatment more favorable than Bilcon: Victor Diamond Mine; Diavik Diamond Project; Surface Gold Mine; NWT Diamonds Project; Sechelt Carbonate Project; and Southern Head Project.<sup>868</sup>

637. According to the Investors, the proponent of the Victor Diamond Mine in Ontario was DeBeers Canada, a wholly owned subsidiary of the Luxembourg-based DeBeers companies. The mine faced significant public opposition, but was only assessed by a comprehensive study lasting a little over two years and not a review panel despite various social and environmental concerns.<sup>869</sup> It is the Investors' position that the Respondent failed to explain why this project was subject to a comprehensive study, and they submit that the Respondent's explanation that the project site was isolated, lacking an eco-tourism industry, is contrary to the facts.<sup>870</sup> Moreover, the Investors reject the Respondent's assertion "that the post-2003 CEAA amendments made a Joint Review Panel unnecessary for the Victor Diamond Mine project", and argue that "the Comprehensive Study Report for the Victor Diamond Project expressly

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<sup>863</sup> Reply, paras. 457-469.

<sup>864</sup> Reply, para. 471.

<sup>865</sup> Reply, para. 423. *See also* Memorial, paras. 607-613.

<sup>866</sup> Reply, paras. 667-668.

<sup>867</sup> Memorial, para. 644; Witness Statement of William Richard Clayton, paras. 31-33.

<sup>868</sup> Reply, para. 680.

<sup>869</sup> Reply, para. 669. *See also* Memorial, para. 622.

<sup>870</sup> Reply, para. 672 (citing Counter-Memorial, para. 470).

notes that the post-2003 *CEAA* amendments did not apply”.<sup>871</sup> Lastly, the Investors submit that despite the likelihood of future projects in the area, the comprehensive study of the Victor Diamond Mine only required inclusion of cumulative effects related to known projects, unlike the requirements placed on the Whites Point Project.<sup>872</sup>

638. The Investors argue that significant industrial activity at the Diavik Diamond project site, a joint venture between a UK mining company and a Canadian mining company,<sup>873</sup> was even more pronounced than at the site of the Whites Point project.<sup>874</sup> Despite public calls for a review panel, it was nevertheless only subjected to a comprehensive study.<sup>875</sup> Likewise, according to the Investors, in contrast to the analysis of cumulative effects of hypothetical projects that the JRP required Bilcon to conduct, the scope of cumulative effects analysis that the Diavik Diamond project needed to provide was limited to “[a]ll activities in operation up to and including 1996, the year the project was proposed; and... All projects in operation or proposed as of August 26, 1998, a date defined in that project’s Guidelines”.<sup>876</sup>
639. Finally, the Investors note that the EA for the Diavik Diamond Mine project took one year and eight months<sup>877</sup> and that the review panel did not consider the precautionary principle in its analysis of the project, since the post-2003 *CEAA* amendments did not apply.
640. According to the Investors, the Surface Gold Mine project, also located in Nova Scotia but proposed by an Australian resource company, involved the construction and operation of an open-pit mine and processing facilities, in the vicinity of two protected wilderness areas.<sup>878</sup>
641. The Investors observe that the Surface Gold Mine was assessed in 14 months,<sup>879</sup> through a screening review process.<sup>880</sup> The Investors further note that, for Surface Gold Mine, the NSDEL

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<sup>871</sup> Reply, para. 673.

<sup>872</sup> Reply, para. 669 (citing Comprehensive Study Report for Victor Diamond Project, Undated, Exhibit C-803). *See also* Memorial, para. 623; Victor Diamond Project Draft Comprehensive Study Guidelines, dated 17 November 2003, Exhibit C-191.

<sup>873</sup> Memorial, para. 634; Comprehensive Study Report: Diavik Diamonds Project, dated June 1999, p. 28, Exhibit C-352.

<sup>874</sup> Reply, para. 675. *See also* Memorial, para. 635.

<sup>875</sup> Reply, paras. 675-676. *See also* Memorial, para. 635.

<sup>876</sup> Memorial, para. 636. *See also* Memorial, para. 637.

<sup>877</sup> Memorial, para. 635.

<sup>878</sup> Memorial, paras. 627, 628; Letter from Denise Saulnier to Wally Bucknell, dated 5 January 2006, C-600.

<sup>879</sup> Memorial, para. 628.

<sup>880</sup> Reply, para. 677. *See also* Memorial, para. 628.

did not require the DFO to approve the proponent's blasting plan, nor was any condition placed on blasting in general.<sup>881</sup> There was no analysis of cumulative effects or any mention of the precautionary principle in the EA of the Gold Mine project.<sup>882</sup>

642. Finally, the Investors argue that the Respondent's explanation that the Gold Mine project "did not require a review panel because the area had been the site of 'historical gold mining operations'",<sup>883</sup> cannot justify the different treatment that it received in comparison to the Whites Point project, since the "Whites Cove was the site of historical quarry activities".<sup>884</sup>

643. The Investors note that the proponent for the NWT Diamonds Project was an Australian corporation.<sup>885</sup> This project was assessed by a JRP over 14 months.<sup>886</sup> With regard to cumulative effects, according to the Investors, the NWT Diamonds review panel did not consider hypothetical mining developments that could occur.<sup>887</sup> The Investors further submit that the NWT Diamonds Project was not subject to the post-2003 *CEAA* amendments; as a result, contrary to the Whites Point assessment, the NWT Diamonds JRP did not consider the precautionary principle in its analysis of the project.<sup>888</sup>

644. The Investors highlight the Sechelt Carbonate project, proposed by a Canadian subsidiary of a UK corporation.<sup>889</sup> According to the Investors, "[t]he Sechelt Carbonate Project was an open-pit mine that involved the construction and operation of a marine terminal, with very similar processing infrastructure to the Whites Point Quarry".<sup>890</sup> The Investors argue that in the face of public opposition, the Sechelt Carbonate Project was still subject only to a comprehensive study. In further contrast to the Whites Point project, the responsible authority chose to narrowly scope the project to include only the marine terminal and the nearby waterways. Last, the Respondent contends that the cumulative effects in the Sechelt Carbonate project were

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<sup>881</sup> Memorial, para. 628.

<sup>882</sup> Memorial, para. 628.

<sup>883</sup> Reply, para. 678 (citing Counter-Memorial, para. 444).

<sup>884</sup> Reply para. 679. *See also* Reply, para. 680 and Memorial, para. 4.

<sup>885</sup> Memorial, para. 630; Focus Report—Touquoy Gold Mines, Moose River Gold Mines, Nova Scotia, dated November 2007, Exhibit C-346.

<sup>886</sup> Memorial, para. 631; NWT Diamonds Project, Report of the Environmental Assessment Panel, dated June 1996, p. 17, Exhibit C-351.

<sup>887</sup> Memorial, para. 632; Report of the Environmental Assessment Panel for the NWT Diamonds Project, dated June 1996, p. 73, Exhibit C-351.

<sup>888</sup> Memorial, para. 633.

<sup>889</sup> Memorial, para. 624; About Pan Pacific Aggregates, Exhibit C-584.

<sup>890</sup> Memorial, para. 625; Sechelt Carbonate Project Description, dated 9 June 2006, Exhibit C-337.



limited to “effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out” unlike at Whites Point.<sup>891</sup>

645. According to the Investors, the Southern Head project included investors of different nationalities and origins, and involved the construction and operation of a refinery and marine terminal.<sup>892</sup> The Investors submit that the assessment of the Southern Head project took less than 19 months, was limited to the marine terminal, and was conducted as a comprehensive study.<sup>893</sup> The Investors also argue that the Responsible Authority for the Southern Head project relied upon the applicable exemption in s. 28(c) of the *Comprehensive Study List Regulations* to remove the processing facilities from the scope of the comprehensive study, while the Whites Point Quarry was not afforded the same exemption.<sup>894</sup>
646. With regard to cumulative effects, the Investors submit that the analysis of cumulative effects for this project was limited to future projects that met specific conditions.<sup>895</sup> The Investors also submit that although consideration of the precautionary principle was required according to the *CEAA*, the principle was not mentioned in the comprehensive study of the Southern Head project.<sup>896</sup>

## 2. The Respondent’s Position

647. The Respondent analyzes NAFTA Articles 1102 and 1103 jointly as, in its view, Article 1103 prescribes a similar obligation to the one prescribed in Article 1102 but on a most-favored-nation basis.<sup>897</sup> The Respondent asserts that, for the Investors to be successful on their Article 1102 and 1103 claims, they must demonstrate that:

(1) a government accorded them “treatment” during the EA of the Whites Point project and that the same government accorded treatment to other domestic or foreign investors or investments; (2) the treatment this government accorded to the Claimants or their

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<sup>891</sup> Memorial, paras. 625-626.

<sup>892</sup> Memorial, para. 618; Project Registration for Newfoundland & Labrador Refinery Project at Southern Head at the Head of Placentia Bay, NL, dated 16 October 2006, Exhibit C-332. *See also* Memorial, para. 617.

<sup>893</sup> Memorial, para. 618.

<sup>894</sup> Memorial, para. 618.

<sup>895</sup> Memorial, para. 619; Comprehensive Study Report for the Southern Head Marine Terminal, dated 27 September 2007, p. 187, Exhibit C-336. *See also* Memorial, para. 620.

<sup>896</sup> Memorial, para. 621; Comprehensive Study Report for the Southern Head Marine Terminal, dated 27 September 2007, Exhibit C-336.

<sup>897</sup> Counter-Memorial, paras. 398-399.

investment was “less favourable” than that which it accorded to these other domestic or foreign EA proponents; and (3) the government accorded the allegedly discriminatory treatment in question “in like circumstances”.<sup>898</sup>

648. The Respondent adds that this analysis has to be conducted in light of the object and purpose of Articles 1102 and 1103, which is to prevent discriminatory treatment based on the nationality of an investor or its investment.<sup>899</sup>

**(a) Treatment**

649. The Respondent relies on *Merrill & Ring* in support of the proposition that “treatment accorded to foreign investors by the national government needs to be compared to that accorded by the same government to domestic investors . . . just as the treatment accorded by a province ought to be compared to the treatment of that province in respect of like investments”.<sup>900</sup> The Respondent contends that the same logic applies when treatment is accorded concurrently by two jurisdictions.<sup>901</sup> The Respondent further submits that one cannot compare EAs conducted on behalf of different state entities. For the same reasons, the Respondent rejects the Investors’ comparison of the JRP’s approach to conducting the EA under terms of reference based on federal and Nova Scotia law, with the approach employed by government authorities or review panels operating in or under different provincial jurisdictions.<sup>902</sup>

650. The Respondent also argues that a breach of NAFTA Articles 1102 or 1103 requires discriminatory treatment on the basis of nationality. This requirement has two elements that the Investors must prove, according to the Respondent:<sup>903</sup> First, they must show that the treatment they were accorded was, in fact, less favorable than that accorded to domestic investors. Secondly, the Investors must show that the less favorable treatment was accorded to them on the

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<sup>898</sup> Hearing Transcript, 31 October 2013, pp. 192-93.

<sup>899</sup> Counter-Memorial, paras. 400-401.

<sup>900</sup> *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL Arbitration Rules, ICSID Administered Case, Award, 31 March 2010, para. 82, cited in Counter-Memorial, para. 409.

<sup>901</sup> Rejoinder, para. 164 (referring to *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL Arbitration Rules, ICSID Administered Case, Award, 31 March 2010, para. 82). *See also* paras. 165-168 and Counter-Memorial, paras. 409-410.

<sup>902</sup> Rejoinder, paras. 167-168.

<sup>903</sup> Rejoinder, para. 169.

basis of their nationality.<sup>904</sup> According to the Respondent, the second element requires objective evidence that the Investors have been discriminated against by reason of nationality.<sup>905</sup>

651. Finally, the Respondent rejects the Investors' assertion that duration of the process constitutes treatment that can cause a breach of NAFTA Articles 1102 or 1103.<sup>906</sup> According to the Respondent, "it is the 'acts' of a State during a regulatory process, not the amount of time the process takes, that constitute 'treatment' under NAFTA".<sup>907</sup>

**(b) Less Favorable**

652. The Respondent submits that the Investors have failed to demonstrate any difference in the way they were treated as compared to the treatment accorded to other EAs. It is the Respondent's position that even if or where the Investors have identified different treatment, they have failed to show that the different treatment was less favorable.<sup>908</sup>

**(c) Nationality-Based Discrimination**

653. According to the Respondent, even if the Investors were to demonstrate that the treatment they were accorded was objectively less favorable than that accorded to other domestic or foreign investors, they have failed to demonstrate that they were accorded this treatment because of their nationality as required by Articles 1102 and 1103.<sup>909</sup> The Respondent rejects the Investors' interpretation of Articles 1102 and 1103 that, it argues, require the contracting parties to provide the "'best' treatment, i.e. treatment no less favorable than every single domestic investor".<sup>910</sup>

**(d) In Like Circumstances**

654. The Respondent argues that the Investors fail to demonstrate the treatment they challenge was accorded "in like circumstances" to the treatment accorded to other EA proponents. Specifically, the Respondent submits that the Investors' analysis is conducted irrespective of the specific factors at play in the EA process for the other projects. According to the Respondent,

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<sup>904</sup> Rejoinder, para. 170.

<sup>905</sup> Hearing Transcript, 31 October 2013, p. 191, lines 4-12, citing the *Loewen* and *Feldman* cases.

<sup>906</sup> Rejoinder, para. 163.

<sup>907</sup> Rejoinder, para. 163.

<sup>908</sup> Rejoinder, paras. 172 and 174.

<sup>909</sup> Rejoinder, para. 178. *See also* Counter-Memorial, paras. 417-420.

<sup>910</sup> Rejoinder, para. 179, referring to Reply, paras. 367-368.

the Investors' analysis also "ignores how the quality of the information and evidence a proponent supplies can affect the administration of the EA process".<sup>911</sup>

655. The Respondent clarifies that, in its view, "in like circumstances" does not require identical or most like circumstance.<sup>912</sup> Rather, "it is the circumstances *underlying* the way in which Canada treats two investors that are determinative of whether or not treatment was accorded in like circumstances . . . including consideration of a State's policy objectives in according the treatment in question".<sup>913</sup> The Respondent elaborates that "treatment needs to be compared to that accorded by the same government to domestic investors."<sup>914</sup> No NAFTA tribunal has found to the contrary.

**(e) The Treatment in the EA Processes Identified by the Investors Was Not Accorded in Like Circumstances**

656. The Respondent argues that the Investors fail to show that any of the alleged instances of treatment in the Whites Point EA were accorded in like circumstances to those accorded in the comparator EAs.<sup>915</sup> It is the Respondent's position that decisions taken in the EA process are based upon the professional judgment of officials and experts, as informed by the unique facts of each case, and as long as they are rational, in light of these facts, they are not to be second-guessed by a NAFTA tribunal.<sup>916</sup>

657. The Respondent also takes issue with the Investors' characterization of the Whites Point EA which it contends is misleading. For example, where the Investors complain of an inability to carry out test blasting, the Respondent notes that they never made any request to the JRP to do so.<sup>917</sup> These misleading allegations further detract from any comparisons the Investors attempt to carry out.

658. In respect of the marine terminal at the Bear Head project, the Respondent submits that this marine terminal required only a screening assessment because the Bear Head site had been zoned "Port Industrial", suitable for "fuel bunkering, marine terminals and other heavy

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<sup>911</sup> Rejoinder, paras. 181-182.

<sup>912</sup> Rejoinder, para. 185.

<sup>913</sup> Rejoinder, para. 185 (emphasis in the original). *See also* Rejoinder, paras. 186-187.

<sup>914</sup> Hearing Transcript, 31 October 2013, p. 196, lines 7-15.

<sup>915</sup> Rejoinder, para. 192; Counter-Memorial, paras. 432.

<sup>916</sup> Rejoinder, para. 192. *See also* paras. 193-214.

<sup>917</sup> Counter-Memorial, para. 132. *See also* paras. 99, 112-113.

industrial or port activities as required” in a municipal planning strategy. According to the Respondent, the zoning statutorily exempted the marine terminal at that site from an EA as a “comprehensive study” pursuant to the *Comprehensive Study List Regulations*, whereas the Whites Point project could not, as a matter of law, be granted the same exemption.<sup>918</sup> Furthermore, the Respondent argues that “[i]n light of the nature of the surrounding environment, the type of activity involved, and the lack of public opposition, there was no need to elevate the EA of the Bear Head project from a screening to a review panel”.<sup>919</sup>

659. The Respondent submits that it was not necessary to refer the Keltic LNG Terminal project to a review panel because of the industrialized setting of the proposed project, the more minimal impacts of a liquid natural gas terminal, and the lack of public opposition.<sup>920</sup> The Respondent asserts that to the extent there was public concern, an EA by way of a comprehensive study in the post-amendment era provided an effective forum for addressing public concerns. The October 2003 amendments did not apply to the Whites Point EA, and thus, in contrast to the situation with Keltic, the best way to ensure effective public participation there was, in the Respondent’s view, an assessment by a review panel.<sup>921</sup>

660. The Respondent argues that the site proposed for the Surface Gold Mine<sup>922</sup> was located far inland from the coast of Nova Scotia. As a result, DFO scientists determined that the proposed project would not require any *Fisheries Act* authorizations. Thus, unlike the Investors’ project, there was no federal jurisdiction over the Surface Gold project, and it could not be referred to a joint federal-provincial review panel.<sup>923</sup>

661. The Respondent further contends that the proposed site for the Surface Gold Mine project was a historical site for gold mining. Moreover, the project was operationally quite limited. The open pit mine was to be operational for just 5 to 7 years (not 50 years like Whites Point), and it was

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<sup>918</sup> Counter-Memorial, para. 434.

<sup>919</sup> Counter-Memorial, para. 435. *See also* Counter-Memorial, paras. 436-437.

<sup>920</sup> Counter-Memorial, para. 440.

<sup>921</sup> Counter-Memorial, para. 441.

<sup>922</sup> Also referred to as the Torquoy Gold Project.

<sup>923</sup> Counter-Memorial, para. 443; Letter from Mark McLean to Sue Belford, dated 7 March 2008, Exhibit R-347.

not reliant on marine transportation.<sup>924</sup> Finally, the Respondent argues that the project received “broad public support”.<sup>925</sup>

662. According to the Respondent’s view on the Tiverton project, Nova Scotia did not have jurisdiction to require an EA since the Tiverton Quarry was less than 4 ha in size and “did not qualify as either a Class I or Class II undertaking pursuant to the Nova Scotia *Environmental Assessment Regulations*”.<sup>926</sup> The Respondent further submits that there was no federal jurisdiction over the project that would have allowed an EA under the *CEAA*. The blasting at the Tiverton site was infrequent and occurred no closer than 400 meters from the Bay of Fundy. As a result, DFO scientists determined that the blasting would not require the *Fisheries Act* authorizations.<sup>927</sup>

663. The Respondent highlights several differences between the Nova Stone and Tiverton projects and argues that these differences explain “the initial blasting conditions to which Nova Stone and the Tiverton Quarry proponent were subjected when they received their industrial approvals”.<sup>928</sup> These differences also explain why the Investors’ request that the conditional approval issued to Nova Stone should “be amended to reflect the terms and conditions of the nearby Tiverton Quarry was never granted”, according to the Respondent.<sup>929</sup> In contrast to the Whites Point project, the Respondent submits that the Tiverton Quarry never engaged a concern with regard to iBoF salmon and was not in like circumstances.<sup>930</sup> But in any event, once iBoF salmon became an issue for DFO at Whites Point, no blasting took place before DFO conducted a review of the blasting design and setback distances at the Tiverton Quarry and determined that there would be no adverse impacts on iBoF salmon or other endangered species.<sup>931</sup>

664. The Respondent also submits that since Tiverton Quarry was not subject to an EA, blasting on Tiverton Quarry was only subject to consent of the local residents. The Respondent maintains that, in contrast to the Whites Point project, there was no public opposition to Tiverton Quarry

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<sup>924</sup> Counter-Memorial, para. 444.

<sup>925</sup> Counter-Memorial, para. 445.

<sup>926</sup> Counter-Memorial, para. 446.

<sup>927</sup> Counter-Memorial, para. 447.

<sup>928</sup> Rejoinder, para. 207. *See also* Rejoinder, para. 206.

<sup>929</sup> Rejoinder, para. 207 (citing Reply, para. 84).

<sup>930</sup> Rejoinder, para. 204, n.382.

<sup>931</sup> Rejoinder, para. 209.

and the proponent obtained the required consent of the local residents.<sup>932</sup> In short, Tiverton received the same treatment as Whites Point, but a different outcome was reached.<sup>933</sup>

665. The Respondent argues that it was reasonable to assess the Tiverton Harbour as a screening due to limited potential environmental effects from this harbour and the fact that there were no public concerns or opposition to the project.<sup>934</sup> The Respondent also submits that the Tiverton Harbour blasting plan, which included blasting under water, was subject to several mitigation measures to address potential impacts to iBoF Atlantic salmon and North Atlantic Right Whales. The primary mitigation measure was that no blasting would take place between July and late December, which is the period during which these species could be present in the area. A similar mitigation measure could not be applied to the proposed Whites Point project, as it required consistent and large-scale blasting adjacent to the Bay of Fundy every two weeks in order to maintain a steady supply of rock for a project scheduled to operate over 50 years.<sup>935</sup>
666. The Respondent submits that a separate federal EA of the marine terminal was completed for the Eider Rock project because the provincial and federal processes were not harmonized. Because of the marine terminal's size, the federal EA was done as a comprehensive study".<sup>936</sup> The Respondent argues that Investors have not proven that they were accorded less favorable treatment as compared to Eider Rock because they refer only to the analysis of cumulative effects which did not affect the outcome in the Whites Point project.<sup>937</sup>
667. The Respondent argues that the EA in respect of the Voisey's Bay project resembled the EA for the Whites Point project, and if anything, was more burdensome. That JRP followed nearly the same process as did the Whites Point JRP, including: the issuance of draft EIS Guidelines, the holding of scoping meetings, the issuance of final EIS Guidelines, the submission of an EIS by the proponent, a period of time during which the public could review and comment on the EIS, an information request phase, an additional period of time to review responses to information requests, and a public hearing.

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<sup>932</sup> Counter-Memorial, para. 448.

<sup>933</sup> Hearing Transcript, 25 October 2013, p. 261; Hearing Transcript, 31 October 2013, pp. 212-213.

<sup>934</sup> Counter-Memorial, paras. 450-452.

<sup>935</sup> Counter-Memorial, para. 451.

<sup>936</sup> Counter-Memorial, para. 453; Eider Rock Comprehensive Study Report, September 2009, pp. 7-10, Exhibit R-364.

<sup>937</sup> Counter-Memorial, para. 454.

668. As a second point, according to the Respondent, scoping meetings for Voisey’s Bay were more extensive than in the Whites Point EA as they were held over 17 days at 10 different locations. Thirdly, the Voisey’s Bay public hearings were held over 32 days at 11 different locations, and the panel reviewed the project’s anticipated effects on a wide range of socio-economic factors such as “aboriginal land use”, “employment and business”, and “family and community life, and public services”. The Respondent maintains that these details indicate that Voisey’s Bay did not receive more favorable “scope and level of assessment” treatment.<sup>938</sup>
669. In respect of the Aguathuna Quarry and Marine Terminal, the Respondent explains that the project was subjected to a screening assessment under the Newfoundland and Labrador’s *Environmental Protection Act* and related regulations. Newfoundland and Labrador did not take steps to coordinate and harmonize provincial and federal EA processes, and in fact completed its EA prior to federal officials even becoming involved. As a result, a separate federal comprehensive study assessment was conducted. According to the Respondent, like the Whites Point EA, this assessment considered both the quarry and the marine terminal.<sup>939</sup>
670. The Respondent argues that the Aguathuna project did not warrant a referral to a review panel because the proposed site had already operated as a limestone quarry and shipping facility for a period of more than 50 years (1913-1964);<sup>940</sup> the quarrying at Aguathuna was to take place farther back from the water than at Whites Point; the proponent managed to address the major fisheries concern regarding this project;<sup>941</sup> and, the Aguathuna project enjoyed public support, which the Respondent claims the Investors admit.<sup>942</sup>
671. The Respondent submits that a separate federal EA was carried out for the Belleoram project because the province did not reach out to the federal government to coordinate processes. The federal EA considered only the marine terminal aspect of the project because, according to the Respondent, scientists at DFO determined that the blasting at the Belleoram quarry would not require the *Fisheries Act* authorizations that were required at Whites Point (*i.e.* an authorization to destroy fish habitat under s. 35(2) and to kill fish by means other than fishing under s. 32).<sup>943</sup>

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<sup>938</sup> Counter-Memorial, paras. 456-457.

<sup>939</sup> Counter-Memorial, para. 458.

<sup>940</sup> Counter-Memorial, para. 459.

<sup>941</sup> Counter-Memorial, para. 460.

<sup>942</sup> Counter-Memorial, para. 461 (citing First Expert Report of David Estrin, Appendix F, p. 5).

<sup>943</sup> Counter-Memorial, para. 462.



672. The Respondent also argues that there was no reason to refer the assessment of the Belleoram project to a review panel in light of the nature of the area proposed for the project and the lack of public opposition to it.<sup>944</sup> Finally, in response to the Investors' complaint of the differences in approach taken to assessing cumulative environmental effects in the Belleoram and Whites Point EAs,<sup>945</sup> the Respondent argues that the Investors neglect to acknowledge that *CEAA* policy and practice afford responsible authorities full discretion to consider hypothetical projects in a cumulative effects assessment.<sup>946</sup>
673. The Respondent differentiates the projects further, arguing that in the Belleoram Marine Terminal EA, there was no active fishery in the vicinity of the proposed blasting, no evidence that blasting would have an adverse impact upon species at risk such as Right Whales, no local whale watching and ecotourism industry, and an absence of public concern. There was therefore no need for blasting conditions at Belleoram similar to those included in Nova Stone's conditional permit.<sup>947</sup>
674. The Respondent submits that the federal assessment of the Southern Head Oil Refinery and Marine Terminal project was carried out as a comprehensive study and not by a review panel due to the size of the proposed marine terminal,<sup>948</sup> the industrial nature of the proposed site (Placentia Bay) of this project,<sup>949</sup> the different considerations taken into account when assessing oil refineries,<sup>950</sup> and the minimal public opposition.<sup>951</sup>
675. The Respondent submits that the Deltaport project did not require a review panel despite being located in a busy industrial area and was only an expansion of an existing port facility.<sup>952</sup> Secondly, "unlike the Whites Point project, the Deltaport project did not involve large-scale blasting, extraction and shipment of a resource".<sup>953</sup> Thirdly, while there was some public opposition to this project, the EA addressed all of the substantive comments of the public.

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<sup>944</sup> Hearing Transcript, 31 October 2013, pp. 205-206.

<sup>945</sup> Counter-Memorial, para. 463, n.933 (referring to Memorial, paras. 594-596).

<sup>946</sup> Counter-Memorial, para. 463, n.933 (referring to First Expert Report of Lawrence Smith, paras. 369-389).

<sup>947</sup> Rejoinder, para. 211.

<sup>948</sup> Counter-Memorial, para. 465.

<sup>949</sup> Counter-Memorial, para. 465.

<sup>950</sup> Counter-Memorial, para. 465.

<sup>951</sup> Counter-Memorial, para. 465.

<sup>952</sup> Counter-Memorial, para. 467.

<sup>953</sup> Counter-Memorial, para. 467.

Moreover, like the Keltic project, the Deltaport project was subject to the post-October 2003 version of the *CEAA*. Thus, the public concerns could be addressed in a comprehensive study.<sup>954</sup>

676. The Respondent submits that the Sechelt Carbonate Mine in British Columbia required an *NWPA* approval and a *Fisheries Act* s. 35(2) authorization. The federal and provincial governments agreed that they would harmonize their respective EAs. Thus, the Respondent states, “[l]ike the Whites Point EA, this harmonization meant that the entire project, including the mine and the marine terminal, would be included in the EA.”<sup>955</sup>
677. The Respondent also argues that in light of public concern, the proponent made significant revisions including moving the proposed marine terminal from the originally proposed area (Sechelt Inlet) to a location closer to a larger and more industrial area (Georgia Strait).<sup>956</sup> According to the Respondent, a comprehensive study would have been required due to the increased size of the relocated marine terminal.<sup>957</sup> In June 2007, however, the proponent postponed the project indefinitely.<sup>958</sup>
678. The Respondent submits that unlike at Whites Point, there were no grounds to refer the assessment of the Victor Diamond Mine to a review panel.<sup>959</sup> First, the project was located in an isolated area with no ecotourism.<sup>960</sup> Secondly, the Victor Diamond Mine was scheduled to operate for only 12 years, according to the Respondent, as contrasted with the Whites Point’s 50 years. Last, there was, according to the Respondent, some public concern, but, as explained above in respect of the Keltic project, “an EA by way of comprehensive study in this post-amendment [of the *CEAA*] era provided an effective forum for addressing these concerns”.<sup>961</sup>
679. The Respondent submits that the NWT Diamond Mine received the same treatment as the Investors did.<sup>962</sup> Like the Whites Point project, because of the potentially adverse environmental effects and public concern associated with NWT Diamond Mine, it was referred to a review

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<sup>954</sup> Counter-Memorial, para. 467.

<sup>955</sup> Counter-Memorial, para. 468.

<sup>956</sup> Counter-Memorial, para. 469.

<sup>957</sup> Counter-Memorial, para. 469.

<sup>958</sup> Counter-Memorial, para. 469.

<sup>959</sup> Counter-Memorial, para. 471.

<sup>960</sup> Counter-Memorial, para. 471.

<sup>961</sup> Counter-Memorial, para. 472.

<sup>962</sup> Counter-Memorial, para. 474.

panel.<sup>963</sup> This review panel also held a scoping meeting and public hearings during the EA of the project.<sup>964</sup>

680. The Respondent explains that the Diavik project was referred to a comprehensive study under the *CEAA* because of the construction of an airstrip. By contrast, there was no need to conduct a panel review, largely because such a review had already been completed for the adjacent NWT Diamonds project in June 1996.<sup>965</sup> In addition, the Respondent notes that “the project also had to be considered by the Mackenzie Valley Environmental Impact Review Board before the Minister of the Environment could make a decision on the project. This nine-member Review Board participated in all phases of the *CEAA*-initiated comprehensive study of Diavik”.<sup>966</sup>
681. The Respondent submits that the Whites Point and Sable Gas JRPs reached two different conclusions because they had different impacts.<sup>967</sup> With regard to the Investors’ complaint as to alleged preferential treatment that the North Head Harbour project received, the Respondent maintains that the Investors’ project was rejected by the JRP on grounds that were simply not engaged by the North Head Harbour project.<sup>968</sup> The Respondent also submits that blasting in the Miller’s Creek Gypsum Mine Extension did not give rise to the same concerns as the blasting at Whites Point because it only was an extension of an existing gypsum mine that already occupied 477 ha of land and that had been in operation since the 1950s, far from the Bay.<sup>969</sup>

**(f) Additional Arguments on Like Circumstances**

682. In addition to the specific arguments regarding each of the comparators identified by the Investors, the Respondent also submits that the cumulative environmental effects analysis of the Whites Point JRP was entirely consistent with Agency policy, and was based upon specific evidence before the JRP that led it to conclude that the establishment of additional quarries on the Digby Neck was reasonably foreseeable.<sup>970</sup> By contrast, the entities responsible for the EA

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<sup>963</sup> Counter-Memorial, para. 474.

<sup>964</sup> Counter-Memorial, para. 474.

<sup>965</sup> Counter-Memorial, para. 476.

<sup>966</sup> Counter-Memorial, para. 477.

<sup>967</sup> Rejoinder, para. 195 (citing Second Expert Report of Lawrence Smith, para. 137).

<sup>968</sup> Rejoinder, para. 212.

<sup>969</sup> Rejoinder, para. 213.

<sup>970</sup> Rejoinder, para. 196.

of other projects, such as Victor Diamond Mine, Belleoram Marine and Terminal and the Voisey's Bay, had no such evidence before them.<sup>971</sup>

683. The Respondent also argues that the Investors' comparison of the JRP's decision not to consider mitigation measures with decisions in other projects ignores "the relevant legal frameworks of these different JRPs".<sup>972</sup> Unlike the terms of reference of the EA of the Kemess, Prosperity Mine and Lower Churchill projects, the TOR of the Whites Point project did not mandate the JRP to suggest potential mitigation measures in case the JRP concluded that the project should be rejected.<sup>973</sup> With regard to the Investors' complaint that unlike in the Whites Point EA, mitigation measures were identified in the Deltaport, Keltic and Rabaska EAs, the Respondent submits that in each of these EAs the recommendation was made that the project should be approved. Had the Whites Point JRP similarly recommended approval, its TOR would have also required it to include mitigation measures with its recommendation.<sup>974</sup>

684. In contrast to the Investors' arguments, the Respondent also submits that: the JRP "was actually very interested in the issue of adaptive management", rather than "hostile" to it;<sup>975</sup> the JRP "considered mitigation measures throughout its report in assessing the significance of the environmental effects of the Whites Point project";<sup>976</sup> in light of Bilcon's lack of responsiveness to relevant information requests and the poor quality of the information presented by it during the EA, the JRP noted that "the accumulation of concerns about adequacy leads the Panel to question the Project";<sup>977</sup> and the JRP "was not satisfied that Bilcon had proven itself capable of using either adaptive management or mitigation as effective tools for monitoring and responding to unforeseen environmental effects";<sup>978</sup> and the lack of quality and responsive information provided by the Investors "was one of the most important circumstances governing how the Whites Point JRP managed the process . . . . By contrast, there is no evidence in the

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<sup>971</sup> Rejoinder, para. 197.

<sup>972</sup> Rejoinder, para. 198.

<sup>973</sup> Rejoinder, para. 198; JRP Agreement, para. 6.3, Exhibit R-27.

<sup>974</sup> Rejoinder, para. 198, n.367.

<sup>975</sup> Rejoinder, para. 200.

<sup>976</sup> Rejoinder, para. 200.

<sup>977</sup> Rejoinder, para. 201 (citing JRP Report, dated October 2007, p. 84, Exhibit C-34/R-212).

<sup>978</sup> Rejoinder, para. 201.

record of such similar overriding concerns regarding the quality and responsiveness of the information provided by the proponents in respect of the Investors claims”.<sup>979</sup>

### 3. The Tribunal’s Analysis

685. Bilcon submits that its application was evaluated not only according to criteria that departed from the core standards of the *CEAA*, but that this valuation was less favorable than the treatment accorded to a number of Canadian investors in like circumstances.

686. NAFTA Article 1102 reads:

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.

687. Bilcon refers to a number of projects involving quarries and marine terminals in ecologically sensitive zones where the project was evaluated on a more favorable basis than Bilcon’s. Bilcon emphasizes that the issue is not whether the outcome of the review was different, but rather whether Canada provided less favorable treatment concerning the mode of review (JRP) and the evaluative standard, including the application of the usual *CEAA* standard of likely significant adverse effects after mitigation.

688. With respect to the mode of review, the evidence is clear that subjecting the Bilcon project to a Review Panel at either the federal Canada or joint level, was unusual. The Expert Report of Mr. Estrin shows that only about 0.3% of environmental assessments under the *CEAA* take the form of a panel review or mediation. About 98.8% are carried out by screenings, and 0.9% by

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<sup>979</sup> Rejoinder, para. 202.

comprehensive study.<sup>980</sup> None of these projects involved a quarry.<sup>981</sup> The areas of projects that were assessed by review panels were generally much larger than the Whites Point Quarry,<sup>982</sup> and sometimes involved novel or inherently dangerous activities such as the handling of liquified natural gas or radioactive materials.<sup>983</sup> The Tribunal has already determined, however, that Bilcon is barred by limitation periods in Chapter Eleven from challenging whether the referral to a JRP was itself a breach of NAFTA.

689. The Tribunal, therefore, will focus its analysis on the application of the “likely significant adverse effects after mitigation” standard rather than the choice of the mode of review.
690. Canada suggests that the only projects that should be compared to Bilcon’s are those where there was a joint federal Canada-provincial review panel.<sup>984</sup> Canada has also suggested that a comparator is only in “like circumstances” if the JRP had to deal with significant opposition within a local community.
691. The Tribunal does not agree that it should confine an Article 1102 analysis in this case to such a narrow range of possible comparators.
692. Article 1102 refers to situations where investors or investments find themselves in “like circumstances”. The language is not restricted as it is in some other trade-liberalizing agreements, such as those that refer to “like products”. Article 1102 refers to the way in which either the investor or investment is treated, rather than confining concerns over discrimination to comparisons between similar articles of trade.<sup>985</sup> Moreover, the operative word in Article 1102 is “similar”, not “identical”. In addition to giving the reasonably broad language of Article 1102 its due, a Tribunal must also take into account the objects of NAFTA, which include according to Article 102(1)(c) “to increase substantially investment opportunities in the territories of the Parties”.
693. The Investors note that in the *Occidental* case, a violation of national treatment was alleged under a bilateral investment treaty that stipulated national treatment for investors in “like

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<sup>980</sup> First Expert Report of David Estrin, para. 8, citing the lists of assessment maintained by the CEA Agency.

<sup>981</sup> First Expert Report of David Estrin, para. 29.

<sup>982</sup> First Expert Report of David Estrin, para. 29.

<sup>983</sup> First Expert Report of David Estrin, para. 19.

<sup>984</sup> Counter-Memorial, para. 411.

<sup>985</sup> *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 175.

situations” to domestic investors. The investor complained of unfavorable treatment of an oil producer compared to other exporters. Ecuador argued that comparators must be confined to oil exporters. The *Occidental* tribunal disagreed. It observed that “the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which the particular activity is conducted”.<sup>986</sup> The tribunal found that there was a denial of national treatment when a scheme for calculating the VAT taxes on an oil exporter was more burdensome than that applied to domestic exporters of other products, such as those selling flowers or mining products.

694. Cases of alleged denial of national treatment must be decided in their own factual and regulatory context. In the present case, what is at issue is whether the Investor was treated less favorably for the purpose of an environmental assessment. The federal Canada law in question, the *CEAA*, is one of very general application. It applies the “likely significant adverse effects after mitigation” standard of assessment as a necessary component of environmental review across a wide range of modes and industries, including any marine terminals or quarries that are assessed under its provisions.
695. The Investors argue that “the NAFTA Tribunal should consider all enterprises affected by the environmental assessment regulatory process to be in like circumstances with Bilcon”.<sup>987</sup> While that broad proposition might be correct, adopting it would commit this Tribunal to a more abstract and sweeping proposition than is necessary to decide this case. The Tribunal finds, that on examination of their particular facts, many of the comparison cases brought forward by the Investors qualify as “sufficiently” similar to sustain an Article 1102 comparison for the purposes of this case.
696. The actual comparison cases brought forward by the Investors in the present case generally involve federal Canada or JRP assessments of mining projects, including oil and gas exploration, accompanied by exports that involve sea routes. A number of them specifically involved quarry and marine terminal export projects that had the potential to affect a local community. At least three of them involved assessments that included the marine terminal component of a project that was connected to a quarry and took place in an ecologically sensitive coastal area. The fact that assessments in these cases were carried out in accordance with the usual “likely significant adverse effects after mitigation” analysis is sufficient to

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<sup>986</sup> *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, para. 173.

<sup>987</sup> Memorial, para. 407.

conclude that they received more favorable treatment than did the Investors in like circumstances. The Tribunal finds that these three cases, *Belleoram*, *Aguathuna* and *Tiverton*, are definitely among those in which domestic investors were accorded more favorable treatment than Bilcon in circumstances that are sufficiently “like” to sustain a comparison under Article 1102.

697. The *Belleoram* Project involved developing a quarry and terminal project that would have covered six times the area and produced up to 300% more rock annually than the proposed project at Whites Point.<sup>988</sup> An official of Canada itself noted that the Whites Point Quarry and Belleoram Projects were “very similar.”<sup>989</sup> The Belleoram Project was to be carried out by a Canadian controlled company with the financial support of federal Canada. The Belleoram Project was located one kilometre away from populated areas. It was geared to the export market. It was not subjected to a JRP process. Only the marine terminal was assessed for the purposes of the laws of federal Canada. Many of the issues considered in the review were similar to those at Whites Point. Indeed, federal officials recognized early on in the Bilcon process that “many of the environmental concerns will be similar” to Belleoram.<sup>990</sup> The comprehensive study route was adopted for the purposes of the laws of Canada and completed in only a year and a half. The report identified a variety of likely significant adverse effects and considered that all of them would be mitigated to a satisfactory extent by the adoption of mitigation measures that could reasonably be applied.<sup>991</sup> The Tribunal emphasizes again that it does not preclude the possibility that different outcomes could still have been reasonably obtained in Whites Point and Belleoram if the same standard had been applied. What is of critical importance here is that the Whites Point project did not receive the expected and legally mandated application, for the purposes of federal Canada environmental assessment, of the essential evaluative standard under the *CEAA*.

698. The Tribunal would adopt a similar analysis with respect to another quarry and marine terminal project in Newfoundland and Labrador, the *Aguathuna Quarry and Marine Terminal*.<sup>992</sup>

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<sup>988</sup> First Expert Report of David Estrin, Appendix E, p. 2.

<sup>989</sup> Internal Environment Canada E-mail from Kevin Blair to Jeanette Goulet, Exhibit C-189.

<sup>990</sup> First Expert Report of David Estrin, Appendix A, p. 3, referring to e-mail from Barry Jeffrey to Steven Zwicker, dated 5 May 2006.

<sup>991</sup> First Expert Report of David Estrin, Appendix E, p. 14.

<sup>992</sup> First Expert Report of David Estrin, Appendix F (*Aguathuna Quarry and Marine Terminal Project*).



699. Another Canadian-owned comparator invoked by Bilcon is the *Tiverton Harbour* project in Nova Scotia. The proponent was federal Canada. Tiverton involved the construction of a new harbour facility, which was “just down the road” from the Whites Point Quarry location.<sup>993</sup> Construction involved producing approximately 65,000 tonnes of rock and stone to create a new breakwater.<sup>994</sup> Some of the blasting had to be carried out underwater, with potentially much greater destruction of fish habitat than would have resulted from blasting on land at some set-back from the water, as in Bilcon’s proposed project.<sup>995</sup> Fish habitat might also have been affected by construction of a break-water, installation of floating docks, dredging the basin and constructing the wharf. The potential for damage to fish habitat was greater at Tiverton because there was underwater blasting and the deposit of a large volume of rock on the harbor floor.<sup>996</sup>
700. The Tiverton Harbor project was subjected, at the federal Canada level, only to a screening and not a comprehensive study or panel review, which took about a year. Potential adverse effects were identified and addressed, to the satisfaction of authorities in Canada, by various mitigation measures, including the replacement of fish habitat. It appears that the standard *CEAA* analysis was carried out; mitigation measures were identified in respect of potential effects and it was determined that there would be no likely significant adverse effects after mitigation measures with respect to specific identified components of the environment.<sup>997</sup> Canada contends that Tiverton involved a quarry that would only be operated for several months to provide material for the terminal. Furthermore, there was no significant public opposition.<sup>998</sup> These points might weigh both on whether it was reasonable to conduct a lower-level of environmental assessment (a comprehensive assessment or screening rather than review panel) of the quarry or even of the terminal, notwithstanding that the environmental impacts might have been as serious, even potentially more serious in some respects, than the Bilcon project. They might provide a basis for explaining why the analysis by the JRP in this case could focus considerable attention on reporting and analyzing concerns raised by members of the local community. These points do not explain, however, why the Bilcon project was not, as part of the analysis, subjected in all of its likely adverse effects to the same thorough application of the approach—including identifying mitigation measures—required by s. 16 of the *CEAA*.

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<sup>993</sup> First Expert Report of David Estrin, Appendix G, p. 1.

<sup>994</sup> First Expert Report of David Estrin, Appendix G, p. 1.

<sup>995</sup> Memorial, para. 553, citing First Expert Report of David Estrin, para. 63.

<sup>996</sup> First Expert Report of David Estrin, Appendix G, p. 1.

<sup>997</sup> First Expert Report of David Estrin, Appendix G, p. 7.

<sup>998</sup> Counter-Memorial, paras. 449-452.

701. To summarize the possible points of distinction, and why the Tribunal rejects them, the following observations need to be made. First, it is true that with respect to the projects—Belleoram, Agathuna and Tiverton—federal Canada did not refer the marine terminal to a review panel. A “likely significant adverse effects analysis” under the *CEAA* must be at least part of the analysis carried out by an environmental assessment, regardless of whether the mode of review is a screening, a comprehensive study, a federal Canada review panel, or a joint review panel. Confining the choice of comparators to review panels or joint review panels appears to unreasonably limit the examination of comparisons that are relevant in light of the objects of Chapter Eleven.
702. Secondly, it is also true that in this trio of cases, there was no joint federal-provincial panel. As Canada itself has conceded, a JRP must carry out both its federal Canada and provincial mandates. It is a real point of departure from the standard of host state conduct required by Article 1102 if a foreign investor is treated less favorably than domestic investors in like circumstances for the purposes of the laws of its central government.
703. A further potential point of distinction is that the quarry was not subjected to a federal Canada review in all three comparison cases. Again, such a distinction cannot be dispositive. Discrimination in respect of the assessment of a major component of a project can amount to a material breach of Article 1102.
704. One more potential point of distinction is that these cases, while potentially having effects on local communities, did not produce strong local community opposition.<sup>999</sup> Such a distinction might justify a different approach to commissioning a review panel rather than a comprehensive study or screening, thereby ensuring a more thorough and transparent canvassing of public concerns. Furthermore, the concerns raised by a local community must be fully considered and potential effects on the community assessed in accordance with the federal Canada legal framework. The distinction does not, however, under the laws of federal Canada, warrant an environmental assessment that fails to properly carry out, as at least a component, “a likely significant adverse effects after mitigation” analysis.
705. Finally, Canada argues that the outcomes of different reviews of projects involving quarries and marine terminals might be legitimately different based on the facts. The Tribunal agrees. Bilcon argues, however, that it is part of the analysis of “treatment” whether a less favorable evaluative standard applied. The Tribunal again agrees. When a quarry project is combined with a marine

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<sup>999</sup> Counter-Memorial, para. 463.

terminal, and one or both components are assessed under the laws of federal Canada or Nova Scotia, it can be a denial of national treatment to apply a harsher standard to the non-Canadian project in like circumstances.

706. The JRP in *Rabaska*, a case mentioned earlier in this Award,<sup>1000</sup> provides a particularly telling comparator. Similar circumstances included: the assessment was carried out by a JRP; the assessment concerned resource processing and export—a liquefied natural gas terminal connected to a pipeline; the export was to the United States, and concerns were expressed about the balance of local benefits and burdens compared to those applying outside of Canada; the project was in a bucolic rural area where many residents cherished the peace and natural beauty of the area; the project was to be located near the St. Lawrence River, with attendant concerns about the consequences of ice, high density of shipping and collisions; there was a nearby community that was divided over the project, with many of the residents expressing opposition and the local government challenging the project under local zoning laws.<sup>1001</sup>
707. The Rabaska JRP fully acknowledged in its final report the reviews of both supporters and opponents, including reporting in plain language the fear and anxiety of some local residents about the dangers associated with the plant. The Rabaska JRP, however, did not take one side or the other in the local community debate, or allow local opposition to pre-empt the carrying out of a “likely significant effects after mitigation” assessment of the environmental effects of the project. The JRP proposed a number of mitigation measures to specifically address the concerns of local residents, including providing a program of financial compensation for residents located near the project who wished to relocate, a compensation program for those who might sustain losses in their property values and compensation for residents whose insurance premiums might rise due to the project. The Rabaska JRP further proposed ongoing requirements on the proponent to inform and meet with the public.
708. The Rabaska JRP in the end found that the project, after mitigation, would have no likely significant adverse effects. It is not the particular outcome on the facts, however, that is the basis for a finding in this Award of less favorable treatment for Bilcon’s project; it is the fact that the Rabaska JRP followed the legally required standard in carrying out and reporting its assessment.

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<sup>1000</sup> See para. 565 above.

<sup>1001</sup> A detailed comparison is set out in the First Expert Report of David Estrin, paras 288-300.

709. Another relevant comparator is the *Cacouna Energy LNG Terminal Project*. As noted in the first expert report of Mr. Estrin:

Like the WPQ project, the Cacouna project was located next to a sensitive marine environment, and involved a marine terminal component. In both cases there was significant community opposition, including concerns about the impact on tourism. In both cases, the RAs were DFO and Transport Canada.

The Cacouna hearings revealed that, like in the case of the WPQ project, there were two competing visions for the community. The Cacouna Panel noted that there were “two visions of development in the area: on one hand industrial, and on the other hand development based on the natural environmental and heritage resources.” Unlike the WPQ Panel, however, the Cacouna Panel did not select which of these two visions was representative of the community’s ‘core values’. And the Cacouna Panel certainly did not determine that any effects of the proposal on the community’s values constituted a significant adverse environmental effect. The Cacouna Panel ultimately recommended that the project could proceed.

Like the Rabaska Panel—but unlike the WPQ Panel—the Cacouna Panel recommended measures that could facilitate community acceptance of the project. Specifically, the Cacouna Panel stated:

The Panel is of the opinion that Health Canada and the Centre de santé et de services sociaux de Rivière-du-Loup, in collaboration with the community and the proponent, should participate in determining the need for follow-up on the social impacts on the community of Cacouna. The Panel invites the concerned parties to look at existing public participation techniques in order to determine the best tool for achieving this objective.<sup>1002</sup>

710. The first expert report of Mr. Estrin observes more generally that:

The WPQ Panel was the first and only Panel established under *CEAA* to recommend the rejection of a project on the basis of “community core values” or any similar concept.

None of the 29 reports ever issued by a review panel or a joint review panel under *CEAA*, except for the WPQ Panel Report, refers to “community cores values”. Indeed, other projects that were highly divisive in their community have been recommended for approval, such as the Rabaska Liquefied Natural Gas Terminal in Quebec, discussed above...<sup>1003</sup>

711. The Chair of the JRP in the present case, Mr. Fournier, in his radio interview cited previously, compares the JRP’s approach to that of other panels.

Yes, there were people who said this was inappropriate, but I think it was only inappropriate if you judged it against previous reports, because previous reports hadn’t done this. What we are saying is those previous reports could have done this or perhaps should have done this looking at the social component, you see.<sup>1004</sup>

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<sup>1002</sup> First Expert Report of David Estrin, paras. 337-339.

<sup>1003</sup> First Expert Report of David Estrin, paras. 334-335.

<sup>1004</sup> Transcription by Appleton & Associates of the CBC Interview with Robert Fournier, dated 20 December 2007, Exhibit C-180.

712. From his own perspective, then, the distinctive approach of the JRP was not merely due to unique circumstances, but due to the Panel's innovative understanding of the general way in which assessments should be carried out.
713. There is another aspect of the JRP's approach that requires examination in the context of an Article 1102 analysis: the JRP's emphasis on a local/regional/national/international matrix to analyze the potential benefits and burdens of the project.
714. The EIS Guidelines for the Bilcon's project did not specifically refer to a mandate to compare the relative distribution of benefits and burdens along international, as opposed to local, regional or national lines. As noted earlier, the JRP's actual characterization of benefits and burdens appears in some respects to be skewed against the Investors: for example, the fact that the Investors would be risking millions of dollars to fund the project is not seen as a "burden" to counterbalance its potential benefits by way of access to construction material. The fact that governments will not gain from the investment by way of royalty taxes is portrayed as a burden; the fact that local governments are not required to invest in the project is not portrayed as a benefit.
715. The emphasis on the comparative balance of burdens and benefits, and the emphasis on "community core values," raises the serious question of whether the project would have received more favorable treatment if the investor had not been foreign. Had the investor been local, for example, would the JRP have considered the impact on "community core values" to be decisive, without examining mitigating effects?
716. The Tribunal has concluded, quite apart from considering the impact and implications of the local/national/regional/international matrix, that the JRP's approach amounted to unequal and unfavorable treatment of Bilcon. It is not necessary, therefore, for the Tribunal to arrive at a definitive conclusion about the extent to which the use of the matrix may have contributed to a breach of Article 1102.
717. Canada submits that according to the *UPS* award the burden of proof is on Bilcon to show: that a government accorded Bilcon or its investment "treatment" during the environmental assessment and "that the same government accorded treatment to other domestic or foreign investors or investments"; that the treatment was "less favorable" than that accorded other

domestic or foreign proponents; and “the government accorded the allegedly discriminatory treatment in question ‘in like circumstances’”.<sup>1005</sup>

718. The Tribunal agrees that Bilcon had the affirmative burden of proving these three points, but finds that it has done so.

719. It should be noted that the *UPS* test does not require a demonstration of discriminatory intent. The *Feldman* tribunal explained:

It is clear that the concept of national treatment as embodied in NAFTA and similar agreements are designed to prevent discrimination on the basis of nationality, or “by reason of nationality”. (U.S. Statement of Administrative Action, Article 1102.) However, it is not self-evident, as the Respondent argues that any departure from national treatment must be *explicitly* shown to be a result of the investor’s nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances. In this instance, the evidence on the record demonstrates that there is only one U.S. citizen/investor, the Claimant, that alleges a violation of national treatment under NAFTA Article 1102 (transcript, July 13, 2001, p. 178), and at least one domestic investor (Mr. Poblano) who has been treated more favorably. For practical as well as legal reasons, the Tribunal is prepared to assume that the differential treatment is a result of the Claimant’s nationality, at least in the absence of any evidence to the contrary.<sup>1006</sup>

720. If a *prima facie* case is made under the three-part *UPS* test, can a host state still show that there is no breach because the discriminatory treatment identified is somehow justified, or that the discriminatory treatment is not sufficiently linked to nationality, but merely an incidental effect of the reasonable pursuit of domestic policy objectives?

721. Article 1102 is not attached to any “justification” clause, such as Article XX of GATT, 1947, which permits an exception to its norms in cases where a state has adopted reasonable measures to pursuing certain domestic policy objectives. Article XX reads in part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...

(b) necessary to protect human, animal or plant life or health.

722. The Tribunal in *Pope & Talbot*, however, held that:

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<sup>1005</sup> Counter-Memorial, para. 400, citing *United Parcel Service of America Inc. (UPS) v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits, 24 May 2007, paras. 83-84.

<sup>1006</sup> *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 181.

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>1007</sup>

723. 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.
724. In the present case the Tribunal is unable to discern any justification for the differential and adverse treatment accorded to Bilcon that would satisfy the *Pope & Talbot* test with respect to the standard of evaluation under the laws of federal Canada. The “community core values” approach adopted by the JRP was not a “rational government policy”; it was at odds with the law and policy of the *CEAA*. The approach of the JRP was not consistent with the investment liberalizing objectives of NAFTA; indeed the Tribunal has found it to be incompatible with Article 1105.
725. The Tribunal finds that Canada has denied national treatment to the Investment of the Investors. That decided, the Tribunal does not find it necessary to determine whether there was a distinct denial of national treatment to the Investors rather than to the Investment.
726. The Investor submits that Canada is also in breach of NAFTA Article 1103, the text of which is as follows:

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

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<sup>1007</sup> *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits of Phase 2, 10 April 2001, para. 78.

727. Bilcon cites a series of projects in which the proponent was a foreign company or a Canadian subsidiary of a foreign company. All of them involved activities in which some form of land-based project (such as a refinery or mine) was involved as well as a marine terminal. The alleged better treatment in every case includes being subjected to a review of smaller scope (such as terminal only) at the federal level and using a screening or comprehensive study rather than a review panel. The Tribunal has, however, decided that challenges concerning the scope and level of review are barred by the timing provisions of NAFTA, thereby rendering a major component of every comparison irrelevant for the purposes of deciding this case. Thus a major dimension of the comparisons drops away.
728. The Investors also complain that issues such as “cumulative effects” and the precautionary principle were handled differently and more favorably in the comparison cases with respect to Article 1103. Whereas a set of detailed appendices provide in-depth analyses of some of the comparator projects that the Investors have invoked in the contest of its Article 1102 argument, there is no similarly detailed analysis in respect of the projects compared for the purposes of Article 1103. In the course of elaborating its Article 1103 argument the Investors do, however, devote several pages to describing various comparator projects and refer to some of the related documents.
729. It is understandable that neither side devoted a large part of its submissions to the Article 1103 issue. The comparisons in respect of Article 1103 are far closer (they all involve quarry and marine projects), and if a breach is found in respect of Article 1102, a further finding of liability under Article 1103 would not, in any plausible scenario, effect the measure of damages.
730. In view of the limited information provided, the immateriality of any finding in any plausible scenario, and the relative lack of attention to the issue by both sides, the Tribunal does not consider it necessary or prudent to decide the Article 1103 allegation.
731. For the reasons given, the Tribunal concludes that the approach taken by the JRP and adopted by Canada resulted in a breach of Article 1102.

## **VII. CONCLUDING OBSERVATIONS**

### **A. NEXT PROCEDURAL STEPS**

732. The Tribunal in Procedural Order No. 3 accepted Canada’s position that this proceeding should be divided into a merits phase and a damages phase. The Tribunal has found that Bilcon has established breaches of Article 1102 and 1105 of Chapter Eleven of NAFTA. To the extent that



there is any possible legal requirement at the merits phase to make a *prima facie* case for the existence of at least some loss or damage, Bilcon has done so. The Tribunal makes no prejudgment whatsoever about the ultimate outcome on compensation if the Parties do not settle this case by agreement. Both Parties will have the opportunity, if they do not resolve the matter through a settlement, to submit evidence and argument to this Tribunal concerning the quantum of a compensation award for loss or damage and concerning the allocation of the costs of this arbitration.

## **B. ADDITIONAL OBSERVATIONS**

733. Since a draft of this Award was prepared, the majority of the Tribunal has had the privilege and benefit of reviewing the opinion of our distinguished colleague, who in the end agrees with many parts of the Award but dissents from its finding with respect to a breach of Article 1105. Our colleague's thoughtful critique on some aspects contributed to some refinements to the final draft above.
734. The majority would add only a few observations that are intended primarily to address concerns raised by our colleague about possible wider implications of this Award.
735. The finding in this Award is not based on any view that environmental assessors should be wary of robustly and fully carrying out their assigned mandates. The concern here is that the JRP, whatever else it was assigned or volunteered to do, was required to implement the part of its mandate that involved a proper analysis of "likely significant adverse effects after mitigation".
736. An analysis of "likely significant adverse effects after mitigation" does not place economics or technology above human concerns. Rather, it seeks to assess potential impacts on the environment, and to determine whether these effects can be mitigated in their own right, rather than being overborne by economic or public interest considerations. While political preferences or values are not environmental effects in and of themselves, the value that human beings place on potentially affected components of the ecosystem is indeed integral to the analysis. Scientific and technical concerns, along with public input, inform an assessment of potential effects and the exploration of options for reducing or eliminating them.
737. The express objectives of NAFTA do include the encouragement of investment. Chapter Eleven does seek to avoid "investor chill" that might result from the prospect of certain kinds of discrimination or unfair treatment. In interpreting and applying these provisions, however, the majority of the present Tribunal agrees with the concern of our colleague that a NAFTA tribunal

must be sensitive to the need to avoid “regulatory chill”, including with respect to protection of the environment.

738. It may bear reiterating, therefore, the Tribunal’s view that under NAFTA, lawmakers in Canada and the other NAFTA parties can set environmental standards as demanding and broad as they wish and can vest in various administrative bodies whatever mandates they wish. Errors, even substantial errors, in applying national laws do not generally, let alone automatically, rise to the level of international responsibility vis-à-vis foreign investors. The trigger for international responsibility in this particular case was the very specific set of facts that were presented, tested and established through an extensive litigation process.

739. In the present case the evidence shows that some of the individual factual elements were highly unusual in their own right. The unprecedented nature of the JRP’s approach is confirmed by remarks of the Chair of the Panel. Extensive and detailed expert testimony confirmed that the approach was not only at variance with the existing legal framework, but also with the actual treatment provided in comparable cases. The comparators included situations involving coastal mining and marine terminals as well as situations where a local community was politically divided over the project.

740. The distinctive and exceptional overall set of facts that came together to produce a finding of liability in this particular case include:

- representations from state officials that welcomed investors to pursue coastal quarry and marine terminal projects, and to these investors specifically to do so at the particular site;
- reliance by the Investors on those encouragements to devote very substantial resources to engaging in the statutorily mandated environmental assessments, including the attempt to design the project to meet all legal requirements concerning environmental protection;
- an approach to the assessment by the JRP that effectively found the area to be a “no go” zone for projects of this kind, rather than including, as at least a major part of its work, a proper assessment of likely significant adverse effects on the environment and of the means by which these effects might have been mitigated;
- lack of prior notice to the investor of the unprecedented approach the JRP was going to adopt, thereby denying the investor a fair opportunity to seek clarification and respond;
- the role of the JRP in the overall system as legislated includes providing in its report an impartial and thorough assessment of facts and of mitigation options that can be used by the ultimate decision makers in government and that can inform public opinion.

741. The *CEAA* prescribes finding ways to promote both dimensions of sustainable development, that is to say, environmental protection and economic growth. The *NSEA* acknowledges that protection of the environment requires a strong economy. The regional *Vision 2000* statement

observes that activities of primary industries, including mining, can be carried out in a way that maintains and even enhances the region's culture and environment. Whether or not their case would have prevailed if appropriately evaluated, the Investors' case was that this particular project could in fact be constructed and operated in a way that would satisfy both economic and environmental concerns. It would, in the Investors' submission, have diversified the local economy, which was stressed by limitations on harvesting the living resources of the sea, and encouraged community residents to remain in the community while at the same time it would have preserved an environment that supports traditional industries and modern ecotourism and that is valued for its beauty and tranquility. The Tribunal's respectful conclusion is that in all the particular and unusual circumstances of this case, the Investors were denied an expected and just opportunity to have their case considered on its individual merits.

## VIII. DISPOSITIF

742. In light of the foregoing, and having considered carefully the Parties' arguments and the evidence before it, the Tribunal,

a) In respect of Mr. William Richard Clayton, Mr. Douglas Clayton, Mr. Daniel Clayton and Bilcon of Delaware, Inc.,

i. *Unanimously* decides that the Tribunal has jurisdiction insofar as these Investors base their claims on events occurring on or after 17 June 2005; the Respondent's jurisdictional objection is upheld insofar as the Investors base their claims on events occurring prior to that date;

ii. *By majority vote* decides that the Respondent has failed to accord to investments of these Investors treatment in accordance with international law, including fair and equitable treatment and full protection and security, in breach of Article 1105 (Minimum Standard of Treatment);

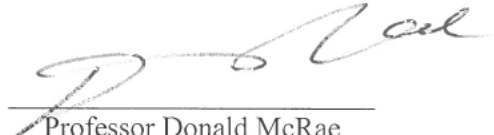
iii. *By majority vote* decides that the Respondent has failed to accord to investments of these Investors treatment no less favorable than that it has accorded, in like circumstances, to investments of its own investors, in breach of Article 1102 (National Treatment);

b) In respect of Mr. William Ralph Clayton, *unanimously* reserves its position as to whether Mr. William Ralph Clayton qualifies as an "investor" for purposes of NAFTA; accordingly, the Tribunal makes no decision in respect of the merits of the case in relation to him;

c) *Unanimously* defers any decision on the quantum of compensation owed to the Investors as well as any decision on costs to a later stage of these proceedings.

Done at the place of arbitration, Toronto, Ontario, Canada, on 17 March 2015

  
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Professor Bryan Schwartz  
Co-arbitrator

  
\_\_\_\_\_  
Professor Donald McRae  
Co-arbitrator

(Subject to the attached dissenting opinion)



\_\_\_\_\_  
Judge Bruno Simma  
President