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

- between -

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

(the "Investors")

- and -

THE GOVERNMENT OF CANADA

(the "Respondent" and, together with the Investors, the "Parties")

AWARD ON DAMAGES

Concurring Opinion of Professor Bryan P. Schwartz

ARBITRAL TRIBUNAL:

Judge Bruno Simma (President)

Professor Donald McRae

Professor Bryan P. Schwartz

SECRETARY:

Dr. Dirk Pulkowski

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

I. INTRODUCTION

1. I concur with the compensation figure reached by the Tribunal in its Award on Damages. In my respectful view the Tribunal's Award presents a thorough account of the Parties' submissions and a well-articulated analysis of the legal principles and their application to the facts of this case.

2. The Tribunal's view is that the Investors did not satisfy the burden of showing that they would have obtained regulatory approval had the environmental assessment been conducted in a NAFTA-compliant manner. I agree that the evidence does not support an approach in which regulatory approval risk is essentially disregarded, and compensation is then awarded on the basis of estimates of future profitability of a project over the long life of the project's fully-expected operation.

3. In this separate concurring opinion, I wish to consider an approach to valuing the Investors' compensation based on viewing its losses as a lost *chance* – not a certainty – of obtaining regulatory approval and then operating the project profitably. The value of the chance would be based on the expert evidence of jurists on the likelihood of success at a judicial review and a regulatory do-over and on the expert evidence of specialists in business projections concerning future profitability.

4. My route to the same compensation figure outcome as the Tribunal takes into account the following two considerations:

- that in my understanding, in an appropriate case, an investor might be able to recover compensation where it is able to demonstrate a substantial probability that an investment would have received regulatory approval to proceed had it been considered in a manner consistent with the applicable international law on investor protection. In appropriate factual circumstances, in my view, the just measure of compensation will be for a lost opportunity. The best measure of compensation in some circumstances might take into account an estimate of the probability of obtaining a permit and an estimate of the likely profits if a permit was granted.

- the evidence shows, in my respectful view, that the Investors actually had a high probability of obtaining a permit on economically viable terms had the environmental assessment been carried out in a NAFTA-compliant manner in the first place. It would similarly have had a high probability of eventual success had a judicial review been pursued of the initial regulatory determinations and a "do-over" of the permitting process had been ordered and carried out.

5. Based on these considerations, I support the Tribunal's determination of quantum of damages for the following reasons:

- as a primary reason, *the Investors had a duty to mitigate their damages.* Assuming a high likelihood of success in eventually obtaining a permit, the Investors cannot reasonably claim all of its lost profits after abandoning the investment rather than pursuing it. The more powerful the case is that the Investors could have succeeded on a judicial review in the courts of Canada and a "do-over" of the regulatory approval process, the more powerful the case is that they reasonably should have sought to mitigate their damages by pursuing those avenues.

- as a secondary and supporting reason, there is a substantial measure of uncertainty about what the profits would have been had Canadian authorities granted the permit. The Tribunal heard from two experts who impressed me as doing their best to be impartial, and who exhibited a sophisticated understanding of the general principles of estimating damages, and of the facts of this particular case. Yet their estimates were radically different. The approach adopted by the Tribunal by contrast, has the advantage of fixing damages based largely, although not exclusively, on evidence of actual past expenditures. This consideration about the uncertainty of lost profits is not by itself decisive for me. If justice otherwise clearly required, I might have been prepared to make a reasonable estimate of lost profits, multiply it by a reasonable estimate of the likelihood of obtaining a permit on a NAFTA-compliant basis, and award compensation on that basis.

6. These considerations reinforce each other on the facts of this case. By pursuing mitigation measures, the Investors could have potentially eliminated much of the uncertainty about their losses. They could have pursued judicial review, sought a do-over of the permitting processes, and potentially proceeded with the project and realized the actual profits. They might still have recovered losses under NAFTA – e.g., for the extra costs of going through these processes and the delays in commencing profitable operations compared to obtaining regulatory approval on the first go-round – but there would be no need for the Tribunal to weigh drastically different expert reports on future long-term profits.

II. THE GENERAL PRINCIPLES ON DAMAGES IN INTERNATIONAL LAW

7. Before elaborating these concrete points further, I will review the basic principles concerning damages.

8. The general principle under international law is that a wronged party should receive compensation that fully offsets the losses that result from an internationally wrongful act. Under NAFTA there is no specific formula provided for a breach of Articles 1102 and 1105. (By contrast, there is a particular damages formula in the case of expropriations; Article 1110.) International law does, however, provide guidance on the considerations that are involved in interpreting and applying the general principle to the facts of a particular case. These guiding principles include:

- the onus of proof is on the claimant;

- the standard of proof is similar or identical to that used in civil proceedings in many domestic legal systems, rather than the exceptionally high standard used in criminal cases, such as beyond a reasonable doubt. "In all probability" is the phrase used in the *Chorzów Factory* case, but modern tribunals in investment law cases have deployed language that might be interpreted as still demanding, but perhaps not quite as high. In *United Parcel Service of America Inc. v. Government of Canada,* ICSID Case No. UNCT/02/1 (2014), at paragraph 38, the tribunal refers to "persuasive evidence of damages from actions alleged to constitute breaches of NAFTA obligations". In *Gold Reserve Inc. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1 (2014), paragraph 385, the tribunal states, after reviewing all the authorities submitted by the parties in that case, that "balance of probabilities" is the standard of proof at both the liability and quantum stages. I tend to agree with the *Gold Reserve* formulation;

- damages may not be awarded to the extent that they flow from an unlawful act, but were not within the range of adverse outcomes that could be reasonably expected; for a general discussion of requirements of proximate cause, see the Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Article 31, footnote 10;

- the claimant has a duty to mitigate its losses; see International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Article 31, footnote 11;

- the mere difficulty of arriving at precise figures should not necessarily preclude a claimant from receiving a reasonable measure of compensation. "[I]t is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science"; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v.* Argentine Republic, ICSID Case No. ARB/97/3 (formerly *Compañiá de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic).* A tribunal should, however, avoid arriving at figures that are wholly speculative.

III. APPLYING THE GENERAL PRINCIPLES TO THE FACTS OF THIS CASE

9. In my view, international law supports the proposition that the determination of compensation can, depending on the facts, be based on several different approaches that include:

- "sunk costs". The investor is compensated for the investment costs it expended before the project ceased;

- "lost profits from an expected successful project". The Investors in this case proposed compensation based on "discounted cash flow" for the life of a project that, in its submission, was "virtually certain" to have obtained regulatory approval had it been considered in a NAFTA-compliant manner;

- an in-between approach, in which the investor is compensated for a lost opportunity – not a certainty – of obtaining regulatory approval and otherwise being able to proceed with the project, absent the internationally wrongful act.

10. An analogy in domestic law to the third option might be a case in a domestic legal system where a lawyer negligently misses a limitation period for bringing a complex action. Damages against the lawyer might be based on expert estimates of the likelihood of success and the likely damages in the event of success. A plaintiff might not be denied recovery merely because of the inevitable uncertainties associated with litigating a complex case. Experts might provide informed estimates based on their own experience with similar litigation and statistics about success rates in other cases. There might be various market indicators of the value of the opportunity to proceed with the litigation – e.g., the stock market price of shares in a publicly traded company might drop a certain amount on disclosure that its lawyer missed a filing deadline. There might also be evidence about whether any lawyers did or would have taken on the case on a contingency fee basis.

11. Regulatory approval risk, it seems to me, can be built into damages under international investment law in other contexts. For example, where a business is expropriated, compensation might be based on fair market value – which could include the market's assessment of the likelihood of various regulatory approvals. With a publicly-traded company, the value of shares might often incorporate probabilities (as assessed by stock market traders) of various regulatory outcomes. A fair market value award to an expropriated business, therefore, would compensate an investor in circumstances where regulatory approval is a substantial possibility, but considerably far from certain.

12. There are international investment case law precedents and academic commentary that directly acknowledge that damages to an investor can represent the value of a lost opportunity. These developments are reviewed in an article submitted by Canada, Borzu Sabahi and Lukáš Hoder, "*Certainty in Recovery of Damages for Losses to New or Incomplete Businesses - Three Paradigms: Biloune v. Ghana, Gemplus v. Mexico, and Siag v. Egypt";* The Journal of Damages in International Arbitration Law. The authors point out, on pages 103-4, that:

> "Some legal systems allow recovery for 'loss of opportunity' or 'loss of chance'. Article 7.4.3(2) of the UNIDROIT Principles of International Commercial Contracts, which draws upon domestic legal systems, for example, provides that:
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> > 'Article 7.4.3 – *Certainty of Harm*
> >
> > (1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.
> >
> > (2) *Compensation may be due for the loss of a chance in proportion to the probability of its occurrence*.
> >
> > (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court'. (emphasis added)
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> Ripinsky and Williams [Damages in International Investment Law] in this connection note that:
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> > 'Where a tribunal cannot accept a claim for lost profits as not sufficiently certain, it may choose to award, instead, a compensation for the loss of business (commercial) opportunity, or for the loss of a chance. This head of

> damage appears to be a sub-species of lost profits, which is resorted to when the available data does not allow making a more precise calculation of lost profits. … It is suggested that a chance of making a profit is an asset with a value of its own, and that compensation for the loss of a chance is an alternative to the award of lost profits proper in cases where the claimant has failed to prove the amount of the alleged loss of profit with the required degree of certainty, but where the tribunal was satisfied that the loss in fact occurred.
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> Loss of a chance can thus be used as a tool allowing the injured party to receive some form of compensation for the loss of a chance to make a profit. In theory, the loss of a chance is assessed by reference to the degree of probability of the chance turning out in the plaintiff's favour, although in practice the amount awarded on this account is often discretionary.'"

13. The authors then point out that the "lost opportunity" approach was applied in *Sapphire v. National Iranian Oil Company*, [March 15, 1963], 35ILR136 (1967) and, under modern investment treaty arbitration practice, in *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. and Talsud S.A. v. The United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4 Award (June 16, 2010), IIC 488 (2010). In that case, an enterprise in its early stages of development was expropriated. The tribunal there adopted an approach between lost investment costs and discounted future cash flow of a successful business. "The concept of certainty is both relative and reasonable in its application, to be adjusted to the circumstances of the particular case." Instead, it adopted the "lost opportunity" approach, based on its finding that there was no certainty of profitability as the project was originally envisaged, but that there was nonetheless a reasonable opportunity for success.

14. If it were not for the application of the mitigation of damages principle, I might have adopted a particular way of valuing the lost opportunity. Damages would have been based on multiplying two estimates: first, the probability of obtaining regulatory approval based on the evidence of legal experts, and second, the likely future profits in the event of regulatory approval based on the evidence of the experts on business projections. (The estimates of likely profits would take into account estimates of the cost of environmental mitigation measures that a NAFTA-compliant JRP would recommend and that governments would adopt or that governments would impose on their own). Judgment would have to be exercised in arriving at those figures; precise calculation would not be possible in this particular case. As the onus of proof is on the claimant, estimates of probabilities would have to avoid being unduly optimistic about the prospects of the project. At

the same time, given the expert evidence on both regulatory approval risk and future profits, it might have been appropriate to make an award to the Investors in this case that was considerably higher than this Tribunal's actual result.

IV. MITIGATION OF DAMAGES

15. The principle of mitigation of damages is that a claimant is required to make reasonable efforts to reduce the extent of its losses. The causal connection between the wrongful act and a loss is diminished or eliminated to the extent that the claimant could have avoided it. By taking positive steps to reduce its own losses, a claimant may also benefit the community as a whole. A project like that of the Investors has the potential, on eventually receiving permits from government, to benefit not only its investors but also its employees, its suppliers, and the general public in the form of tax revenues.

16. The principle of mitigation in this case must be applied in the context of what measure of damages is sought.

17. The Investors chose to walk away from its investment after it was denied permits in the initial go-round. It brought this NAFTA claim. The Investors could have, however, pursued in parallel a claim for judicial review in the courts of Canada.

18. If the issue is framed as "should the Investors recover some amount reasonably close to their investment costs in the project" then the Investors did not fail to take reasonable measures to mitigate their losses. (The quantum of the Tribunal's Award is equivalent in amount to investment costs plus a modest return on them). Rather, the Investors made a reasonable judgment in not pursuing judicial review. It might have taken a number of years to instead seek judicial review of the rejection of its applications for government approval. A judicial review might have taken several years to complete. If successful, it would likely have resulted in a Joint Review Panel ("JRP"), differently constituted, conducting an assessment. The Investors might have then found it necessary to participate in a further environmental assessment process, again with no certain assurance of obtaining regulatory approval, and no certainty as to the terms and conditions for permits that governments would have attached. The Investors might have had to spend millions of dollars along the way in further process costs and on maintaining the property.

19. If the issue is instead framed as "should the Investors recover all of their estimated profits for over a half century of mining operations" then, the Investors' claim that they took reasonable steps to mitigate their damages is not sustainable. The Investors would reap all the benefits of an operation

they never actually carried out – without having attempted a process that might have enabled them to do so, and which had a high chance of success. An additional expenditure of perhaps five or six more years and several million dollars in process costs to pursue judicial review and then a regulatory "do-over", if successful, could have netted – relying on the Investors' own estimates in this case – a fifty year profitable operation that would have generated hundreds of millions of dollars in profits.

20. The Investors have presented testimony that they felt no confidence in the Canadian processes after the initial rejection. The issue of an investor's duty to mitigate, however, has to be looked at more objectively. The requirement is of reasonable efforts to mitigate. The evidence is that looking at the matter in an informed and dispassionate manner, the Investors actually had strong prospects had they pursued Canadian domestic remedies, including a judicial review and a do-over of the environmental permitting process.

21. At the liability stage, the Investors produced two eminent experts on Canadian environmental law who presented detailed and cogently reasoned and documented analysis that the approach of the JRP was contrary to Canadian law. The Tribunal's Award on Jurisdiction and Liability accepted their essential conclusions about non-compliance with Canadian law in the course of the Tribunal's arriving at the wider and crucial conclusion about a breach of international obligations under NAFTA.

22. At the quantum of damages stage, Canada submitted a report from the Honourable John M. Evans with respect to the potential effectiveness for the Investors of pursuing judicial review in Canada. Mr. Evans served on the Federal Court of Appeal for over a decade, is a widely published and award-winning scholar, and is acknowledged by the Supreme Court of Canada as a leading expert in the area of judicial review of administrative tribunals. The Investors chose not to cross-examine him. I find his testimony persuasive on these points, among others:

- even if the application had been contested all the way to the Supreme Court of Canada - which only grants leave in a minority of cases – a judicial review could likely have been completed in no more than five years[1]; a review of up to and including the Federal Court of Appeal could likely have been completed within three years;[2]

1 John M. Evans, First Expert Report, para. 49.

2 John M. Evans, First Expert Report, para. 44.

- the fact that the governments of federal Canada and Nova Scotia rejected the Investors' application would not have precluded the courts from directly reviewing the prior report of the JRP;

- the legal errors in the JRP Report that were identified by this Tribunal at the liability stage would have warranted a grant of relief by the courts of Canada. "[T]he courts would likely have found the JRP's interpretation of CEAA and the NSEA to be unreasonable, and thus erroneous in law."[3]

- the courts would also likely have identified as an error the JRP's failure to identify reasonable measures to minimize adverse effects.[4]

- "It is thus clear, in my opinion, that if the Claimants had made applications for judicial review of the JRP Report, the legal errors that the Tribunal identified in the JRP Report and recommendations would have warranted the grant of relief."[5]

- the reviewing courts would have remitted the matter back for redetermination in accordance with the courts reasons.[6]

- "In order to avoid an appearance of bias as a result of a pre-judgment of the dispute, the reviewing courts would also have been likely to accede to a request from the Claimants that the JRP should be differently constituted for the redetermination, despite the additional costs and delays inherent in a remittal to new panel members."[7]

23. The parties submitted different estimates of the costs of a judicial review and subsequent second JRP hearing. Canada proposes an overall figure of about one million dollars.[8] The Investors submit it would have cost more, based on the assumption that only a small fraction of the material from the first JRP hearing could have been resubmitted.[9] In light of the costs of the original JRP proceedings, and the relatively low costs of judicial review itself, it is clear that the overall costs

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[3] John M. Evans, First Expert Report, para. 73.

[4] John M. Evans, First Expert Report, para. 74.

[5] John M. Evans, First Expert Report, para. 76.

[6] John M. Evans, First Expert Report, para. 77.

[7] John M. Evans, First Expert Report, para. 78.

[8] John M. Evans, First Expert Report, para. 79.

[9] Paul Buxton, Second Witness Statement, August 18, 2017, paras. 46-47.

of a judicial review and a regulatory do-over would not have been more than about three or four million dollars.

24. The cost of pursuing a judicial review and second hearing, therefore, was only at worst about one per cent of the profits that the Investors say they would have achieved over the life of the project.

25. The Investors could reasonably take into account, however, not only the costs of a judicial review and second JRP, but also the likelihood that this path would lead to a favourable outcome for the Investors.

26. Based on the evidence of the Investors' experts in environmental law, and that of Mr. Evans, there was a strong likelihood that a court would have ordered a second hearing in front of a newly populated JRP.

27. True, it is not possible to say with both precision and certainty what the outcome of a second environmental assessment process would have been. The original JRP Report did not express an opinion on some important issues, and a new JRP might have come to different conclusions on some other issues where the original JRP did opine. Participants at the new JRP could have submitted new evidence. It is not certain what mitigation measures that the new JRP would have proposed had it carried out its mandate of not only identifying potential adverse effects, but reasonable mitigation measures. The Governments of Nova Scotia and Canada might have considered additional information, and proposed different or supplemental measures to lessen environmental impact.

28. The law of Canada, however, is that administrative discretion must be exercised reasonably. The fact that the first environmental process went awry does not mean that there would have been departures from lawfulness and reasonableness on the part of a second JRP or by the governments of federal Canada and Nova Scotia after a second JRP Report.

29. The Investors' witnesses made it clear that after the treatment received in Nova Scotia, they had no confidence that a lawful and reasonable consideration would ensue if they pursued judicial review and a do-over of the permitting process. However disillusioned the directing minds of the Investors may have been with their treatment on the initial attempt to secure project approval, there were objectively many reasons for it to believe it had a reasonable prospect for success if it had pursued judicial review and a regulatory redetermination. These factors include:

- according to the evidence of Mr. Evans, "in my experience as a Judge of the Federal Court of Appeal, a second judicial review is rarely needed to correct legal errors in a fresh administrative process conducted following a successful challenge to a first decision. Nor am I aware that the administrative law literature has questioned the practical utility of court-ordered re-determinations. The Claimants provide no evidence to support their assertion that a second environmental assessment in this case would have been legally flawed";[10]

- the Investors had already prepared an extensive environmental impact statement;
- even the JRP acknowledged that most of the environmental impacts that the JRP identified could be mitigated;
- the policy of the Government of Nova Scotia was to encourage mining development;
- as noted at length in the Tribunal's ruling on Article 1102 – concerning discriminatory treatment of the Investors – the legal approach taken by the JRP was exceptional compared to previous projects. The chair of the JRP in this case acknowledged the innovative nature of the approach it adopted. As the Investors demonstrated at the liability stage, particularly through evidence from Mr. Estrin, the legally mandated approach taken in reasonably comparable cases was for regulators to project impacts and propose mitigation measures. Even in cases where an area was environmentally sensitive and local communities were split in their initial view on the matter, environmental reviews and government decision makers identified ways to lessen or eliminate adverse effects and allowed the project to proceed.
- in the context of arguing for "lost profits over the lifetime of the project", the Investors submitted evidence that if the JRP had not made the errors identified by the Tribunal, it was a virtual certainty that the project would have been approved on the first attempt. Mr. Estrin's submitted evidence, with his usual painstaking thoroughness and rigour of analysis, that include the following:

> "First, it is standard practice in maritime Canada, and Nova Scotia in particular, for quarry and marine terminal environmental assessments to be approved, and not be rejected. Many such projects have been evaluated and the appropriate mitigation measures required to prevent likely SAEE are well known. In the period 2000-2016, no complete quarry or marine terminal EA application in Nova Scotia has been rejected, other than WPQ. All were

[10] John M. Evans, Second Expert Report, para. 22.

approved with the use of essentially standard types of terms and conditions – including BPQ, a project much larger than WPQ. BPQ features an active quarry area more than twice the size of WPQ; has 4 times WPQ's rock reserves; will generate 4 times WPQ's annual aggregate production; will require blasting at full production on average about 4 days a week, compared to WPQ's full production blasting average of less than one blast every two weeks; and requires the use of nearly twice as many aggregate ships per year passing through commercial and indigenous fishery areas as WPQ. Also notable is that BPQ will require the irreversible destruction of a large area of wetland habitat, approximately 33 hectares (81 acres), an undoubtedly significant adverse environmental effect.

Second, no federal or provincial government agency or official took the position before the JRP that the WPQ should not be approved, nor did any assert that, considering mitigation, it would cause likely significant adverse environmental effects. The WPQ's predicted environmental effects were typical of similar projects which were approved. There was no reasonable basis to determine that WPQ would have different or more significant environmental effects with mitigation than other comparator projects.

Third, the 2016 approval of the BPQ under CEAA and the Nova Scotia Environment Act (NSEA), importantly substantiates that even a mega quarry is approvable under the standard EA approach by Nova Scotia and Canada to these projects. The BPQ approval especially supports the conclusion that there would be no reasonable basis for the WPQ not to have been accepted. The WPQ EIS used similar EA methodology as that applied in BPQ and was even broader in content than the BPQ EIS. The types of potential environmental effects considered were similar in each case, although for BPQ, some effects would be more intensive and affect larger areas (e.g. noise, destruction of significant wetland areas and fish habitat). Strikingly, despite the differences in magnitude of effects, the EIS for each project predicted that residual effects on valued environmental components (VECs) after mitigation would be "not significant", and in some cases positive. The BPQ EIS arrived at its findings by applying similar mitigation measures as those proposed in the WPQ EIS.

Fourth, the JRP had no legitimate basis to recommend the project not proceed. The JRP did not find any residual SAEE likely to result within the definition and proper ambit of the CEAA. As this Arbitral Tribunal has found, community values and beliefs – CCV to the JRP – are not an "environmental effect" under NSEA or CEAA.

Fifth, there was no reasonable basis for either government to lawfully deny approval of WPQ.

Considering:

(i) that no federal or provincial official or agency took the position that WPQ should not be approved;

(ii) that no federal or provincial official or agency told the JRP that the WPQ would likely cause significant adverse "environmental effects" as defined in CEAA that could not be mitigated; nor did any of these officials state that WPQ would cause "adverse effects" or "environmental effects" as defined by the Nova Scotia Environment Act (NSEA) that cannot be mitigated;

(iii) that the sole basis on which WPQ was referred by Canada to a JRP was potential environmental effects (i.e., fisheries), not public concern;

(iv) the unequivocal standard Nova Scotia EA practice since at least 2000, being to issue approval under the NSEA for every complete EA application for a quarry or marine terminal; and

(v) the unequivocal standard practice of the Governor General in Council (GIC) under CEAA in the period 2000-2013, being to approve every project that had received a positive recommendation from a CEAA or JRP,

the 2007 decisions by the GIC and Nova Scotia to deny approval of WPQ in these circumstances were unreasonable, arbitrary and discriminatory."[11]

[11] David Estrin, First Expert Report, paras. 7-11.

30. Mr. Estrin's evidence supports the view that after a successful judicial review, the Investors would also have had good grounds for optimism about the outcome of a "do-over" of the environmental assessment process. In light of the high probability of success in pursuing judicial review and in a do-over of the environmental permitting process, in my respectful view, the Investors cannot reasonably abandon the project and then claim all the potential massive profits from its long-term operation.

31. As noted in the Tribunal's Award on Jurisdiction and Liability, NAFTA damages and domestic remedies – when warranted by their own corpus of substantive law – can each play their own distinct role in securing justice for an investor. Judicial review in Canada might have mandated a do-over of the regulatory application process, but not have awarded damages. A Chapter 11 Tribunal can award damages, but not a do-over.

32. The Investors could have pursued both their domestic and NAFTA remedies. After their initial applications were rejected, had already sustained losses compensable under NAFTA – including millions of dollars spent participating in regulatory process that were not NAFTA compliant. If necessary to avoid missing the three-year deadline for filing a NAFTA claim, the Investors could have filed a notice under Chapter 11 even while still pursuing domestic remedies that included judicial review and a pursuant do-over of the regulatory approval process. Under Article 1121 of NAFTA, the Investors would have been required to waive any claim for damages under Canadian law. Judicial review in Canada, however, is in the nature of "declaratory, injunctive or other extraordinary" proceedings rather than a claim for monetary compensation.

33. A NAFTA tribunal could then have managed its own deliberations and proceedings, including the timing of various steps, to take into account the proceedings in Canada. The Investors or Canada or both, might have requested the Tribunal at various points to wait, if practicable, for the outcome of various stages in Canada.

34. Even if the Investors had eventually obtained regulatory approvals, the Investors might have still recovered damages under NAFTA. A compensatory award could have offset not only some unnecessary process costs in Canada but also lost profits due to delays in starting operations due to an initial regulatory assessment that was not NAFTA-compliant. If recourse in Canada had instead failed, the NAFTA tribunal could have been satisfied that the Investors had taken all reasonable steps to mitigate their losses. Then, depending on all the circumstances – including whether the regulatory do-over was itself non-compliant with NAFTA – the tribunal might have made a very large damage award involving projections of decades of lost profits.

35. If the Investors had pursued both the domestic and internal tracks for redress, the remedies provided in Canadian domestic proceedings under Canadian law would have been distinct and complementary to the remedies provided in NAFTA proceedings under international law. There would have been no unnecessary proliferation or duplication of proceedings at various levels. Rather, they would have instead worked together constructively.

36. The Investors chose to abandon the project rather than pursue domestic as well as NAFTA remedies. In that light, it is just that the Investors should recover the quantum of compensation that this Tribunal has awarded. It would not, however, be just that the Investors would obtain potentially tens of millions of dollars, even hundreds of millions of dollars for a project they did not further pursue.

V. CONCLUSION

37. My opinion here is intended to complement the Tribunal's analysis by exploring a particular "middle ground" approach to damages. This approach would potentially have produced a different outcome than both the lost future profits proposal of the Investors and the lost investment costs proposal that Canada favoured in the event that any damages were awarded.

38. The Tribunal has arrived at a compensation figure that is itself a "middle ground". Conceptually, it places a value on a lost opportunity, rather than confining compensation strictly to the investment costs in this case. The particular approach I have explored might have provided for far greater compensation. The mitigation of damages concern, however, places an upper bound on quantum in the context of my approach that is essentially the same as the figure determined by the Tribunal. In all the circumstances, I respectfully conclude that the Tribunal's result is both just and in accordance with the applicable principles of international law.

Done on 10 January 2019.

Bryan P Schwartz

Professor Bryan P. Schwartz

Co-arbitrator