

**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**

**10 January 2019**

---

**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

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION</b>	<b>1</b>
<b>II.</b>	<b>PROCEDURAL HISTORY</b>	<b>2</b>
<b>A.</b>	<b>COMMENCEMENT OF THE ARBITRATION</b>	<b>2</b>
<b>B.</b>	<b>AWARD ON JURISDICTION AND LIABILITY</b>	<b>3</b>
<b>C.</b>	<b>DETERMINATION OF THE PROCEDURAL TIMETABLE ON DAMAGES</b>	<b>4</b>
<b>D.</b>	<b>WRITTEN PLEADINGS ON DAMAGES</b>	<b>6</b>
<b>E.</b>	<b>SUBMISSIONS OF THE NAFTA NON-DISPUTING PARTIES</b>	<b>7</b>
<b>F.</b>	<b>CONFIDENTIALITY DESIGNATIONS TO THE PARTIES' WRITTEN SUBMISSIONS</b>	<b>8</b>
<b>G.</b>	<b>ARRANGEMENTS FOR THE HEARING ON DAMAGES</b>	<b>9</b>
<b>H.</b>	<b>HEARING ON DAMAGES</b>	<b>14</b>
<b>III.</b>	<b>THE PARTIES' REQUESTS</b>	<b>18</b>
<b>A.</b>	<b>THE INVESTORS' REQUESTS</b>	<b>18</b>
<b>B.</b>	<b>THE RESPONDENT'S REQUESTS</b>	<b>18</b>
<b>IV.</b>	<b>REPARATION FOR THE INJURY CAUSED BY THE INTERNATIONALLY WRONGFUL ACT</b>	<b>19</b>
<b>A.</b>	<b>LEGAL STANDARD OF REPARATION</b>	<b>19</b>
1.	<b>The Investors' Position</b>	<b>19</b>
2.	<b>The Respondent's Position</b>	<b>20</b>
3.	<b>The United States' Article 1128 Submission</b>	<b>24</b>
4.	<b>The Tribunal's Analysis</b>	<b>24</b>
<b>B.</b>	<b>THE NAFTA BREACHES FOUND BY THE TRIBUNAL IN ITS AWARD ON JURISDICTION AND LIABILITY</b>	<b>26</b>
1.	<b>The Investors' Position</b>	<b>26</b>
2.	<b>The Respondent's Position</b>	<b>28</b>
3.	<b>The Tribunal's Analysis</b>	<b>30</b>
a.	<b>The JRP's Unprecedented Approach in respect of "Community Core Values"</b>	<b>30</b>
b.	<b>The JRP's Failure to Analyze "Likely Significant Effects after Mitigation"</b>	<b>31</b>
c.	<b>No Prejudgment by the Tribunal as to Approval or Approvability of Project</b>	<b>31</b>
<b>C.</b>	<b>INJURY PROVEN TO BE CAUSED BY CANADA'S NAFTA BREACHES</b>	<b>32</b>
1.	<b>The Investors' Position</b>	<b>33</b>
2.	<b>The Respondent's Position</b>	<b>36</b>
3.	<b>The Tribunal's Analysis</b>	<b>43</b>
<b>V.</b>	<b>MITIGATION OF LOSS</b>	<b>46</b>
<b>A.</b>	<b>THE RESPONDENT'S POSITION</b>	<b>47</b>



<b>B.</b>	<b>THE INVESTORS' POSITION</b>	<b>50</b>
<b>C.</b>	<b>THE TRIBUNAL'S ANALYSIS</b>	<b>52</b>
	<b>1. Existence of Duty of Mitigation in International Law</b>	<b>52</b>
	<b>2. Content of Duty of Mitigation in the Present Case</b>	<b>55</b>
<b>VI.</b>	<b>CALCULATION OF DAMAGES</b>	<b>60</b>
<b>A.</b>	<b>THE PARTIES' VALUATION UNDER VARIOUS CAUSATION AND MITIGATION SCENARIOS</b>	<b>61</b>
	<b>1. Mitigation Costs</b>	<b>61</b>
	<b>a. The Respondent's Position</b>	<b>61</b>
	<b>b. The Investors' Position</b>	<b>62</b>
	<b>2. JRP Process Costs</b>	<b>62</b>
	<b>a. The Respondent's Position</b>	<b>62</b>
	<b>b. The Investors' Position</b>	<b>63</b>
	<b>3. Actual Investment Costs or Projected Lost Profits</b>	<b>63</b>
	<b>a. Actual Investment Costs</b>	<b>63</b>
	i. The Respondent's Position	64
	ii. The Investors' Position	67
	<b>b. Projected Lost Profits</b>	<b>68</b>
	i. Valuation Date in respect of Future Earnings	68
	(a) <i>The Investors' Position</i>	68
	(b) <i>The Respondent's Position</i>	69
	(c) <i>The United States' Article 1128 Submission</i>	70
	ii. Market Conditions and Associated Risks	70
	(a) <i>The Investors' Position</i>	71
	(b) <i>The Respondent's Position</i>	72
	iii. Projected Production Costs	73
	(a) <i>The Investors' Position</i>	73
	(b) <i>The Respondent's Position</i>	75
	iv. Projected Shipping Costs	75
	(a) <i>The Investors' Position</i>	76
	(b) <i>The Respondent's Position</i>	76
	v. Discount Rate	77
	(a) <i>The Investors' Position</i>	77
	(b) <i>The Respondent's Position</i>	78
	vi. Past Transactions and Other Comparable Transactions in the Market	78
	(a) <i>The Investors' Position</i>	78

(b) <i>The Respondent's Position</i>	79
4. The Tribunal's Comments on the Valuation Approaches Proposed by the Parties	79
B. THE TRIBUNAL'S VALUATION OF THE OPPORTUNITY LOST BY THE INVESTORS	80
1. Primary Indicator of Value: Amounts Expended by the Investors	80
2. Secondary Indicators of Value: Past Transactions Regarding the Quarry Site	82
3. Conclusions in Respect of Valuation	87
VII. THE REQUESTED TAX GROSS-UP	87
A. THE INVESTORS' POSITION	87
B. THE RESPONDENT'S POSITION	89
C. THE TRIBUNAL'S ANALYSIS	90
VIII. INTEREST	91
IX. PERMISSIBILITY OF COMPENSATION TO BE AWARDED UNDER NAFTA ARTICLE 1116	92
A. THE RESPONDENT'S POSITION	94
B. THE INVESTORS' POSITION	105
C. THE UNITED STATES' ARTICLE 1128 SUBMISSION	109
D. THE TRIBUNAL'S ANALYSIS	111
1. Article 31 of the Vienna Convention on the Law of Treaties	111
2. Subsequent Practice	112
3. NAFTA Chapter Eleven Jurisprudence	113
4. The Relief Awarded in the Present Case	117
X. COSTS	119
XI. DISPOSITIF	120

## DEFINED TERMS

<b>2002 GQP Formation</b>	Formation in 2002 of GQP as a result of a partnership agreement between Bilcon of Nova Scotia and Nova Stone
<b>2004 GQP Buyout</b>	Sale by Nova Stone of its [REDACTED] in Global Quarry Products to Bilcon of Nova Scotia
<b>2007 [REDACTED]</b>	[REDACTED] to purchase the Whites Point Project from the Investors
<b>Bickford Reply Statement</b>	Reply Witness Statement of Mr. George Bickford, dated 8 August 2017
<b>Blouin Report</b>	Expert Report of Dr. Tony Blouin, dated 9 June 2017
<b>Brattle Group Rejoinder Report</b>	Expert Rejoinder Report of Mr. Darrell B. Chodorow of The Brattle Group, dated 6 November 2017
<b>Brattle Group Report</b>	Expert Report of Mr. Darrell B. Chodorow of The Brattle Group, dated 9 June 2017
<b>Buxton Reply Statement</b>	Reply Witness Statement of Mr. Paul Buxton, dated 18 August 2017
<b>Buxton Statement</b>	Witness Statement of Mr. Paul Buxton, dated 13 December 2016
<b>CEAA</b>	Canadian Environmental Assessment Act, S.C. 1992, c. 37 (in force until 6 July 2012)
<b>Clayton Group</b>	Clayton Group of Companies
<b>Clayton Reply Statement</b>	Reply Witness Statement of Mr. William Richard Clayton, dated 21 August 2017
<b>Connelly Rejoinder Report</b>	Expert Rejoinder Report of Mr. Robert G. Connelly, dated 6 November 2017
<b>Connelly Report</b>	Expert Report of Mr. Robert G. Connelly, dated 9 June 2017
<b>Consulting Experts</b>	Individuals and firms hired by the Investors to contribute to the Whites Point Project's EA
<b>Counter-Memorial</b>	Respondent's Damages Counter-Memorial, dated 9 June 2017
<b>Cromwell Report</b>	Expert Report of the Hon. Thomas Cromwell, dated 6 November 2017
<b>CSL</b>	Canada Steamship Line
<b>DCF</b>	Discounted Cash Flow

<b>Dooley Statement</b>	Witness Statement of Mr. Tom Dooley, dated 9 December 2016
<b>EA</b>	Environmental Assessment
<b>Estrin Reply Report</b>	Expert Reply Report of Mr. David Estrin, 20 August 2017
<b>Evans Rejoinder Report</b>	Expert Rejoinder Report of the Hon. John M. Evans, dated 6 November 2017
<b>Evans Report</b>	Expert Report of the Hon. John M. Evans, dated 9 June 2017
<b>Fougere Reply Statement</b>	Reply Witness Statement of Mr. Dan Fougere, dated 18 August 2017
<b>Fougere Statement</b>	Witness Statement of Mr. Dan Fougere, dated 12 December 2016
<b>FTC</b>	Free Trade Commission
<b>Geddes Report</b>	Expert Report of Mr. Peter Geddes, dated 9 June 2017
<b>GHD Report</b>	Expert Report of Mr. Peter Oram of GHD Limited, dated 6 December 2016
<b>GQP</b>	Global Quarry Products
<b>Griffiths Report</b>	Expert Report of Ms. Lesley Griffiths, dated 9 June 2017
<b>ICJ</b>	International Court of Justice
<b>ILC</b>	International Law Commission
<b>ILC Articles</b>	Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001
<b>ILC Articles Commentary</b>	Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission
<b>Investment Costs</b>	The investment costs incurred by the Investors
<b>Investors</b>	Messrs. William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc.
<b>JRP</b>	Joint Review Panel
<b>JRP Process</b>	Review process of the Joint Review Panel
<b>JRP Process Costs</b>	The Investors' costs related to the Joint Review Panel Process
<b>JRP Report</b>	Report on the Whites Point Project issued by the Joint Review Panel, dated October 2007

<b>LB&amp;W Report</b>	Expert Report of Mr. Michael G. Washer of LB&W Engineering, Inc., dated 8 December 2016
<b>Lizak Report</b>	Expert Report of Mr. John Lizak of Mineral Valuation & Capital, Inc., dated 3 November 2016
<b>Marsoft Rejoinder Report</b>	Expert Rejoinder Report of Dr. Arlie G. Sterling of Marsoft, Inc., dated 6 November 2017
<b>Marsoft Report</b>	Expert Report of Dr. Arlie G. Sterling of Marsoft, Inc., dated 9 June 2017
<b>McLean Statement</b>	Witness Statement of Mr. Mark McLean, dated 6 November 2017
<b>Memorial</b>	Investors' Damages Memorial, dated 10 March 2017
<b>Mitigation Costs</b>	Costs that the Investors would have incurred to mitigate their losses, including through recourse to judicial review
<b>NAFTA</b>	North American Free Trade Agreement, concluded on 17 December 1992, entered into force on 1 January 1994
<b>NAFTA Parties</b>	Parties to the North American Free Trade Agreement
<b>New Estrin Report</b>	New Expert Report of Mr. David Estrin, dated 15 January 2017
<b>New Expert Reports</b>	The New Estrin Report and the New Sossin Report
<b>New Sossin Report</b>	New Expert Report of Prof. Lorne Sossin, dated 17 January 2017
<b>Notice of Intent</b>	Notice of Intent to submit a Claim to Arbitration, served on 5 February 2008
<b>Nova Stone</b>	Nova Stone Exporter, Inc.
<b>NSEA</b>	Nova Scotia Environment Act, S.N.S. 1994-95, c. 1
<b>Office &amp; Operations</b>	Payments for office and operational expenses
	
<b>Panel Costs</b>	Fees for the JRP Process, and costs incurred in connection with that Process
<b>PCA</b>	Permanent Court of Arbitration
<b>PCIJ</b>	Permanent Court of International Justice
<b>Projected Lost Profit</b>	Lost profits calculated on the basis of a Discounted Cash Flow method
<b>Rejoinder</b>	Respondent's Damages Rejoinder Memorial, dated 6 November 2017
<b>Reply</b>	Investors' Reply Damages Memorial, dated 23 August 2017

<b>Rosen Reply Report</b>	Expert Reply Report of Mr. Howard Rosen of FTI Consulting Inc., dated 23 August 2017
<b>Rosen Report</b>	Expert Report of Mr. Howard Rosen of FTI Consulting Inc., dated 15 December 2016
<b>SCMA Rejoinder Report</b>	Expert Rejoinder Report of SC Market Analytics, dated 6 November 2017
<b>Set-Aside Application</b>	Application to set aside the Award on Jurisdiction and Liability filed by the Respondent in the Federal Court of Canada on 16 June 2015
<b>Shay Report</b>	Expert Report of Mr. Stephen Shay, dated 19 August 2017
<b>SNC Reply Report</b>	Expert Reply Report of Mr. Bill Collins of SNC-Lavalin, dated 14 August 2017
<b>SNC Report</b>	Expert Report of Mr. Christopher Fudge and Mr. Ryan MacPherson of SNC-Lavalin, Inc., dated 16 November 2016
<b>Sossin Reply Report</b>	Expert Reply Report of Prof. Lorne Sossin, dated 3 August 2017
<b>Tamarack Report</b>	Expert Report of Mr. Wayne Morrison of Tamarack Coal & Resources, Inc., dated 9 December 2016
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law of 1976
<b>United States' Submission</b>	Submission of the United States of America pursuant to NAFTA Article 1128, dated 31 December 2017
<b>VCLT</b>	Vienna Convention on the Law of Treaties, adopted at Vienna on 23 May 1969
<b>Wall Statement</b>	Witness Statement of Mr. John Wall, dated 8 December 2016
<b>Whites Point Project</b>	Whites Point Quarry and Marine Facility Project
<b>Wick Report</b>	Expert Report of Mr. Michael Wick of John T. Boyd Company, dated 5 December 2016



## I. INTRODUCTION

1. The claimants in the present arbitration are Messrs. 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, United States of America (together, the “Investors”). The Investors’ addresses for service are as follows:

Mr. William Richard Clayton  
Mr. Douglas Clayton  
Mr. Daniel Clayton  
PO Box 3015  
Lakewood, New Jersey 08701  
United States of America

Bilcon of Delaware, Inc.  
1355 Campus Parkway  
Monmouth Shores Corporate Park  
Neptune, New Jersey 07753  
United States of America

2. The Investors are represented in the present phase of these proceedings by the following counsel from Nash Johnston LLP, Three Bentall Centre, Suite 3013, 595 Burrard Street, Vancouver, BC V7X 1C4, Canada:

Mr. Gregory Nash  
Mr. Brent Johnston  
Mr. Alex Little

3. In addition to the claimants named in paragraph 1, the proceedings had been commenced by Mr. William Ralph Clayton, the father of the individual claimants. In view of the fact that Mr. William Ralph Clayton was no longer a shareholder of Bilcon of Delaware, he withdrew his claim on 28 February 2018.<sup>1</sup>

4. The Respondent in the present arbitration is the Government of Canada. Its address for service is Trade Law Bureau (JLT), Global Affairs Canada, 125 Sussex Drive, Ottawa, Ontario, K1A 0G2, Canada.

5. The Respondent is represented in the present phase of these proceedings by the following counsel and paralegal staff at the Trade Law Bureau:

Mr. Scott Little  
Mr. Shane Spelliscy  
Ms. Susanna Kam  
Ms. Krista Zeman  
Mr. Mark Klaver  
Mr. Rodney Neufeld  
Ms. Darian Bakelaar  
Mr. Benjamin Tait

---

<sup>1</sup> Hearing Transcript, 28 February 2018, p. 2438, lines 4-6.

## **II. PROCEDURAL HISTORY**

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

6. 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 Articles 1116 and 1119 of the North America Free Trade Agreement (“NAFTA”), alleging violations by the Respondent of its obligations under Section A of NAFTA Chapter Eleven.
7. On 26 May 2008, the Investors filed a Notice of Arbitration pursuant to Article 3 of the United Nations Commission on International Trade Law Arbitration Rules of 1976 (“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.
8. The Investors appointed Professor Bryan P. Schwartz as the first arbitrator. The Respondent appointed Professor Donald McRae as the second arbitrator. Following an invitation from the Parties, Judge Bruno Simma accepted to act as President of the Tribunal on 29 January 2009. 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.
9. On 30 January 2009, the Investors filed their Statement of Claim.
10. On 9 April 2009, following a first procedural meeting with the Parties, the Tribunal issued Procedural Order No. 1, in which it 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.
11. On 4 May 2009, the Respondent filed its Statement of Defense.
12. On the same day, following a joint proposal by the Parties, the Tribunal issued Procedural Order No. 2 providing 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.
13. 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 between jurisdiction/liability, on the one hand, and quantum, on the other hand. In the same Procedural

Order, the Tribunal established principles for the taking of evidence in the present arbitration, including by making provisions for document production.

**B. AWARD ON JURISDICTION AND LIABILITY**

14. On 25 July 2011, the Investors submitted their Memorial on Jurisdiction and Liability.<sup>2</sup>
15. On 9 December 2011, the Respondent submitted its Counter-Memorial on Jurisdiction and Liability.<sup>3</sup>
16. On 21 December 2012, the Investors submitted their Reply Memorial on Jurisdiction and Liability.<sup>4</sup>
17. On 21 March 2013, the Respondent submitted its Rejoinder on Jurisdiction and Liability.<sup>5</sup>
18. 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 Hearing was live-streamed on the website of the PCA, and the recordings remain available on the PCA's Case Repository.<sup>6</sup>
19. On 17 March 2015, the Tribunal rendered an Award on Jurisdiction and Liability, the dispositive part of which provides:

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);

---

<sup>2</sup> Entitled "Memorial of the Investors".

<sup>3</sup> Entitled "Government of Canada Counter-Memorial".

<sup>4</sup> Entitled "Reply Memorial of the Investors".

<sup>5</sup> Entitled "Government of Canada Rejoinder".

<sup>6</sup> Available at: <https://www.pccases.com/web/view/50>.

- 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.
20. Professor McRae disagreed with some of the Tribunal’s findings and conclusions, and appended a dissenting opinion to the Award on Jurisdiction and Liability.

**C. DETERMINATION OF THE PROCEDURAL TIMETABLE ON DAMAGES**

21. On 29 May 2015, the Investors requested that a hearing be scheduled to establish the procedural calendar for the damages or quantum phase.
22. On 16 June 2015, the Respondent filed an application to set aside the Award on Jurisdiction and Liability (“Set-Aside Application”) in the Federal Court of Canada. On 17 June 2015, the Respondent requested that the Tribunal stay the proceedings pending a decision of the Federal Court of Canada on the Set-Aside Application.
23. Having considered two rounds of submissions by the Parties regarding the Respondent’s application for a stay, on 10 August 2015, the Tribunal issued Procedural Order No. 19 denying the application.
24. On the same day, the Tribunal advised that the Parties confer and provide their views on a possible pleading schedule for the quantum phase, the need for document production, and the likely duration of a hearing.
25. On 4 September 2015, in a joint letter, the Parties informed the Tribunal that they had agreed on a provisional pleading schedule, and considered that the required duration of the hearing would be between five and ten days.
26. On 15 September 2015, the Respondent submitted a motion requesting the Tribunal to consider the principles relevant to the quantification of damages and the scope of issues to be addressed in the damages phase as preliminary matters. The Tribunal’s treatment of this subject as a preliminary matter, the Respondent contended, would serve to enhance the efficiency of the

damages phase. The Investors requested that the Tribunal deny the motion, arguing that, should the motion be granted, they would be deprived of a full opportunity to present their case.

27. On 5 January 2016, having considered the Parties' views, the Tribunal issued Procedural Order No. 20 ruling that the Arbitration shall proceed with a single, undivided quantum phase. Consequently, the Tribunal set out a procedural timetable, which was based on the Parties' agreed schedule contained in their joint letter dated 4 September 2015.
28. On 26 January 2016, for the avoidance of doubt, the Tribunal recalled the due dates for the document production phase at the quantum stage of the arbitration as they stood after the modifications of the procedural calendar in Procedural Order No. 20. According to the Tribunal's letter, the Parties were to exchange (i) document requests by 10 February 2016, (ii) objections to any document requests by 25 February 2016, (iii) responses to such objections by 11 March 2016, and (iv) replies to such responses by 21 March 2016.
29. On 16 March 2016, the Respondent requested an extension for the filing of replies to 29 March 2016, to which the Investors consented. On the same day, the Tribunal granted the Respondent's request.
30. On 29 March 2016, having considered the Parties' view that further time was required to discuss outstanding objections, the Tribunal granted the Parties' request for a further extension to 11 April 2016.
31. Following the Parties' correspondence regarding the steps to follow in the document production phase, on 28 April 2016, the Tribunal requested that the Investors submit by 11 May 2016 additional comments on the Respondent's objections provided in the Redfern Schedule dated 11 April 2016. On 3 May 2016, the Tribunal informed the Parties that the Respondent was allowed to revise its replies taking into account the Investors' comments by 18 May 2016.
32. On 6 June 2016, the Tribunal issued Procedural Order No. 21, in which it decided on the Investors' requests for the production of documents to which the Respondent maintained its objections.
33. On 4 July 2016, the Tribunal invited the Parties to confer and comment on the expected duration and the dates of the hearing.
34. On 18 July 2016, the Parties submitted their responses to the Tribunal's letter dated 4 July 2016. The Parties disagreed on the expected duration of the hearing. The Investors proposed that ten

days be reserved for the hearing, whereas the Respondent suggested that five days should be sufficient.

35. On 4 August 2016, the Tribunal requested that the Parties hold two time periods in early 2018 in reserve, during which the hearing could be held.

**D. WRITTEN PLEADINGS ON DAMAGES**

36. On 7 November 2016, the Tribunal approved the Parties' agreement on the extension of the due dates for the first round of submissions on quantum. Accordingly, the time for the filing of the Investors' Damages Memorial and supporting materials was extended to 16 December 2016.
37. On 17 December 2016, the Investors' submitted their Damages Memorial. The Investors informed the Tribunal, however, that one further expert report would be submitted at a later stage. In addition, the Investors designated the Damages Memorial as confidential in its entirety.
38. On 12 January 2017, the Respondent requested that the Tribunal bar the Investors from filing the delayed expert report. Alternatively, should the Tribunal admit the report, the Respondent contended that the Tribunal should deem the Investors' Damages Memorial incomplete and suspend the subsequent deadline for the submission of the Respondent's Damages Counter-Memorial.
39. On the same day, in a separate letter to the Investors, the Respondent contested the Investors' designation of the entire Memorial as confidential. The Respondent proposed that the whole document be deemed public should the Investors fail to provide a redacted version of the Damages Memorial. In addition, the Respondent asserted that the Investors had failed to provide all of the sources and evidence upon which their experts and witnesses relied in their reports and statements, and requested that such missing sources be provided.
40. On 14 February 2017, having considered the Parties' comments in relation to the delay in the Investors' filing of the expert report, the designation of the Investors' Damages Memorial as confidential, and the obligation to produce evidence relied upon in the submission, expert reports, and witness statements, the Tribunal issued Procedural Order No. 22 resolving these procedural disputes. As for the first matter, the Tribunal requested that the Investors choose to either treat their submitted Damages Memorial as complete as it stood or, resubmit their Damages Memorial with the expert report. Should the Investors pursue the second option, the time period for the Respondent's submission of its Damages Counter-Memorial would be adjusted accordingly. As regards the second matter, the Tribunal ordered that the Investors provide a redacted version of

the Damages Memorial by 6 March 2017. As to the third matter, the Tribunal ordered that the Investors provide the Respondent and the Tribunal with certain additional sources upon which their experts and witnesses had relied in their written reports and statements.

41. On 20 February 2017, the Investors informed the Tribunal that they had decided to resubmit the Memorial.
42. On 10 March 2017, the Investors resubmitted the Investors' Damages Memorial ("Memorial").
43. On 26 April 2017, the Tribunal issued Procedural Order No. 23, in which it addressed the Parties' disagreement on the Respondent's request for the production of additional source documents relied upon by the Investors' experts and witnesses.
44. On 9 June 2017, the Respondent submitted the Government of Canada's Damages Counter-Memorial ("Counter-Memorial").
45. On 14 August 2017, the Tribunal issued Procedural Order No. 24 addressing the Parties' disagreement on the production of additional source documents relied upon by the Respondent's experts and witnesses in their reports and statements.
46. On 23 August 2017, the Investors submitted the Investors' Reply Damages Memorial ("Reply").
47. On 6 November 2017, the Respondent submitted the Government of Canada's Damages Rejoinder Memorial ("Rejoinder").
48. On 30 and 31 January 2018, pursuant to Section 7.2 of Procedural Order No. 25 and the Tribunal's direction of 17 November 2017, the Parties submitted electronic copies of confidential and public (redacted) versions of every pleading, witness statement, expert report, and exhibit to the other disputing Party, the Members of the Tribunal, and the PCA. The PCA subsequently made the redacted version available to the public on its Case Repository.

#### **E. SUBMISSIONS OF THE NAFTA NON-DISPUTING PARTIES**

49. On 9 November 2017, following the receipt of the Respondent's Rejoinder, the Tribunal invited the NAFTA non-disputing parties to make any submissions pursuant to NAFTA Article 1128 by 21 December 2017.

50. On 18 December 2017, the Tribunal informed the Parties that their request to extend the deadline to 15 January 2018 for their responses to any submissions from the NAFTA non-disputing parties had been granted.
51. On 21 December 2017, the United States of America requested an extension to file its observations pursuant to NAFTA Article 1128 on or before 31 December 2017. On 22 December 2017, the Tribunal granted the request.
52. On 31 December 2017, the United States of America filed its submissions pursuant to NAFTA Article 1128 (“United States’ Submission”), which notably addressed the application of NAFTA Articles 1116(1) and 1117(1); questions of causation; and the appropriate valuation date for compensation of NAFTA breaches.
53. On 15 January 2018, the Investors submitted their Response to the United States’ Submission. The Respondent did not avail itself of the opportunity to submit any comments.

**F. CONFIDENTIALITY DESIGNATIONS TO THE PARTIES’ WRITTEN SUBMISSIONS**

54. On 31 October 2017, the Respondent submitted its objections to the Investors’ confidentiality designations of their Memorial, Reply, expert reports and witness statements, and proposed a schedule according to which the Parties’ disputes on confidentiality designations would be resolved.
55. On 6 November 2017, the Investors replied to the Respondent’s letter of dated 31 October 2017, requesting the Tribunal to reject the Respondent’s proposed schedule.
56. On 17 November 2017, the Tribunal established a schedule for the Parties to file objections to the confidentiality designations submitted by the other Party.
57. On 1 December 2017, the Investors submitted their reply to the Respondent’s objections to the Investors’ confidentiality designations of their Memorial, Reply, expert reports and witness statements.
58. On 8 December 2017, the Tribunal issued Procedural Order No. 26, in which it identified the confidentiality designations of the Investors that it considered justified, and ordered that the Investors submit revised redacted versions of materials that were subject to blanket confidentiality designations.



59. On 13 December 2017, the Investors submitted revised redacted versions of all the materials that had been subject to blanket confidentiality designations.
60. On 15 December 2017, the Respondent submitted its proposed confidentiality designations to its Counter-Memorial, Rejoinder, expert reports, witness statements, and exhibits.
61. On 5 January 2018, the Investors submitted their objections to the Respondent's confidentiality designations.
62. On 19 January 2018, the Respondent filed its response to the Investors' objections to the Respondent's confidentiality designations.
63. On 26 January 2018, the Tribunal issued its decision on the confidentiality designations to the Respondent's Counter-Memorial, Rejoinder, expert reports, witness statements and exhibits.

**G. ARRANGEMENTS FOR THE HEARING ON DAMAGES**

64. On 24 August 2017, following the filing of the Investors' Reply, the Tribunal invited the Parties to confer and advise the Tribunal on their preferred time period for the hearing, the number of hearing days that was required, and the location and venue of the hearing.
65. On 8 September 2017, the Parties informed the Tribunal about points on which they agreed and points on which disagreement remained.
66. On 3 October 2017, in preparation for the hearing on damages, the Tribunal invited the Parties to confer and provide their views on a draft Procedural Order No. 25, addressing logistical and procedural aspects of the hearing.
67. On 20 October 2017, the Investors submitted a revised draft of Procedural Order No. 25 agreed by both sides, and in a separate letter the Respondent identified three points on which the Parties continued to hold different views, namely the amount of time to be reserved for rebuttal statements during the closing statements, the treatment of the Parties' presentation of new documents and the procedure for addressing potential disputes between the Parties concerning confidentiality during the hearing.
68. On 17 November 2017, having considered the Parties' further comments, the Tribunal issued Procedural Order No. 25 addressing procedural aspects of the hearing, including those on which the Parties had been unable to reach agreement.

69. On 1 December 2017, pursuant to Procedural Order No. 25, the Parties sent the Tribunal a list of witnesses and experts they wished to cross-examine at the damages hearing.
70. On 17 January 2018, the Investors submitted a new Expert Report of Prof. Lorne Sossin (“New Sossin Report”) and a new Expert Report of Mr. David Estrin (“New Estrin Report”, and together with the New Sossin Report, “New Expert Reports”), which, according to the Investors, responded to the Expert Report of the Hon. Thomas Cromwell (“Cromwell Report”) and the Witness Statement of Mr. Mark McLean (“McLean Statement”),<sup>7</sup> both submitted with the Respondent’s Rejoinder.
71. On 18 January 2018, the Respondent objected to the filing of the documents, as it was contrary to the procedure established in Procedural Order No. 20. The Respondent requested that the Tribunal reject the purported filing or, in the alternative, allow the Respondent the same amount of time in order to respond to the submissions, which would result in a postponement of the hearing.
72. On the same day, the Tribunal invited the Investors to provide any comments on the Respondent’s objection and stated that, while this issue was not resolved, the New Expert Reports would not form part of the record and the Tribunal would refrain from reading them.
73. On 22 January 2018, the Investors made available for download a number of additional authorities and fact exhibits that they wished to include in the evidentiary record. On the same day, the Respondent objected to the filing, noting that several of those documents appeared to be annexes to the disputed New Expert Reports and reiterating its arguments in opposition to the admission of any new evidence shortly before the hearing. The Respondent requested the Tribunal not to open, review, or give any consideration to the documents until the question of their admissibility had been resolved.
74. On 24 January 2018, the Respondent submitted its response to the question of admissibility of the Investors’ New Expert Reports and the additional documentary evidence. The Respondent objected to the admission of any new evidence on the basis that it would contravene the procedural rules established by the Tribunal and the due process rights of the Respondent. Therefore, the Respondent requested that the Tribunal deny the admission of such new evidence. If the Tribunal

---

<sup>7</sup> Expert Report of the Hon. Thomas Cromwell, 6 November 2017 (“Cromwell Report”) (**Ex. RE-17**); Witness Statement of Mr. Mark McLean, 6 November 2017 (“McLean Statement”) (**Ex. RW-1**).

were to decide to admit it, the Respondent requested at least 60 days to submit further evidence in response to the New Expert Reports.

75. On 25 January 2015, the Investors replied to the Respondent's letter, arguing that, as a matter of procedural fairness, the Tribunal should consider all the relevant evidence. The Investors suggested that the Respondent's experts should be in a position to respond to the Investors' New Expert Reports within 21 days, such that the hearing dates could be maintained.
76. On 26 January 2018, the Tribunal denied the Investors' request for leave to file New Expert Reports, additional facts exhibits and additional authorities. Accordingly, those documents would not form part of the record. The Tribunal noted that it remained open to the Investors to critique the Cromwell Report and the McLean Statement at the forthcoming hearing in their opening and closing statements, and probe the strength of the McLean Statement during cross-examination. The Tribunal also decided that it remained open to the Investors to submit, by 29 January 2018, an application to the Tribunal to exclude specific statements in the Cromwell Report and the McLean Statement on the basis that they are unresponsive to the Investors' Reply Memorial.
77. Also on 26 January 2018, pursuant to Section 9.1 of Procedural Order No. 25, the Tribunal identified several issues and questions to which the Parties should give consideration during the hearing. Specifically, the Tribunal invited the Parties to consider the following points (footnotes omitted):

### **Jurisdiction**

1. The Tribunal recalls its decision in the 2015 Award to "reserve[] 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". Noting that no specific submissions have been made since the 2015 Award as to Mr. William Ralph Clayton's status as an investor, the Investors are invited briefly to confirm whether Mr. William Ralph Clayton continues to pursue any claim in the present arbitration.

### **NAFTA Articles 1116 and 1117**

2. Could Canada clarify the nature of its objection that the Investors' claim is "impermissible" (Counter-Memorial, para. 29) pursuant to NAFTA Articles 1116 and 1117? Does Canada consider that the Tribunal lacks jurisdiction over the claim as brought; does Canada consider the claim inadmissible; or does Canada regard NAFTA Articles 1116 and 1117 as imposing substantive limitations as to the types of losses that the Investors can claim (and the Tribunal can award)?

3. In light of the Parties' answers to Question No. 2, what is the relevance of pleadings or awards in previous NAFTA Chapter Eleven proceedings for the current proceeding, in which the Tribunal is to determine the amount of compensation due to the Investors following a finding of liability?

4. Could the Parties please comment on the argument that "barring the Investors' Article 1116 claim at this late stage, ten years later, would be grossly unfair to the Investors. Canada has raised this argument for the first time in its Counter-Memorial on Damages. Having failed to raise it in any way in the Jurisdiction and Liability phase of these proceedings, let alone at the outset, Canada ought now to be estopped from even raising the argument." Similarly, could the Parties please elaborate on the merits of the argument that the distinction between Articles 1116 and 1117 is, at least in cases where the investment is wholly owned and controlled by the investors, a "formality".

5. In light of the foregoing questions, do the Parties have any further comment on the appropriateness of permitting the Investors to amend their claim to ensure that the NAFTA Articles 1116/1117 issue is moot?

### **Causation**

6. Considering the role of a NAFTA Chapter Eleven tribunal, including vis-à-vis domestic courts, what is the appropriate approach of this Tribunal in assessing the likelihood that (i) an expert panel would have recommended approval of the Whites Point quarry and (ii) Ministers of the Canadian Government would have approved the project, in the event that the Respondent had acted in compliance with its legal obligations under NAFTA?

7. What is the consequence under NAFTA and/or general international law of factual uncertainty as to whether the damage would have occurred in the absence of a breach of international law? The Parties are invited to consider, in this regard, the holding of the Permanent Court of International Justice ("PCIJ") in the *Factory at Chorzów* case, referred to by the Parties:

The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.

and the holding of the International Court of Justice ("ICJ") in the *Genocide* case, referred to by the United States:

The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act... and the injury suffered... Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the [injury] would in fact have been averted if the Respondent had acted in compliance with its legal obligations.

8. Assuming a different (hypothetical) JRP process for the Whites Point project that was conducted on a basis which was compliant with NAFTA, what is the degree of certainty that such a JRP would have recommended the approval of the project? What hypothetical JRP recommendations, or government licensing conditions, should the Tribunal assume with respect to the mitigation of potential adverse effects of the project on the environment? Does this analysis lead to a conclusion that is different from the Investors' approach of focusing on the *existing* JRP Report with a deemed deletion of findings on community core values?

### **Mitigation**

9. As a matter of international law, can the duty to mitigate damage extend to the pursuit of judicial review and renewed administrative proceedings in a situation where conduct in the same type of administrative proceedings has given rise to the breach of international law? How does the duty of reparation by "re-establish[ing] the situation which would, in all probability, have existed if [the unlawful] act had not been committed" relate to such a duty of mitigation?

10. Assuming that a duty of mitigation through judicial review and administrative proceedings exists, what is the specific evidence on the record of bias on the part of the "political, administrative and bureaucratic environment within which the Whites Point Quarry was considered", which would render mitigation measures futile?

### **Valuation**

11. In the event that the Tribunal were to conclude that the injury caused by the Respondent's NAFTA breaches is the loss of an opportunity, how should the value of such an opportunity be determined? What case law under public international law, if any, should guide the Tribunal in determining such value? What evidentiary standards should apply?

12. The Tribunal notes that the Investors submit their valuation of damages exclusively on the assumption that the Tribunal will award lost profits, without presenting any calculations in the alternative. Should the Tribunal rule that lost profits are not recoverable in this case, what is the approach to be taken by the Tribunal? To what extent do the Investors disagree with the Respondent's valuation of mitigation costs, process costs, or investment costs set out in its written submissions?

13. In the event that the Tribunal were to assume hypothetical JRP recommendations, or government licensing conditions, with respect to mitigating potential adverse effects of the project (*see* Question 8), how would such recommendations/conditions impact the costs, viability or profitability of the project?

## H. HEARING ON DAMAGES

78. A hearing on damages was held in Toronto from 19 February to 28 February 2018. The following persons attended the hearing:

### **For the Investors:**

#### Counsel and Advisors

Mr. Gregory Nash  
Mr. Brent Johnston  
Mr. Chris Elrick  
Mr. Alex Baer  
Mr. Alex Little  
*Nash Johnston LLP*

Mr. Frank Borowicz  
*Frank Borowicz QC Law Corp.*

Mr. Randy Sutton  
*Norton Rose Fulbright LLP*

#### Paralegals and Support Staff

Ms. Lorinda Edmunds  
Ms. Alison Burns  
Ms. Raman Bath  
Ms. Chelsea MacDonald  
Ms. Annie Ronen  
Mr. Tyler Lalande, *BMC Networks, Inc.*

#### Party Representatives

Mr. William Richard Clayton  
Mr. Joe Forestieri  
*Clayton Group of Companies*

#### Witnesses and Experts

Mr. Howard Rosen  
Mr. Greig Taylor  
Mr. Alexander Lee  
*FTI Consulting*

Mr. David Estrin  
Ms. Liane Langstaff  
Ms. Anne Jones  
*Gowling WLG*

Prof. Lorne Sossin  
*Dean, Osgoode Hall Law School, York University*

Mr. Michael Wick  
*John T. Boyd Company*

Mr. John Lizak  
*Mineral Valuation & Capital, Inc.*

Mr. Wayne Morrison  
*Tamarack Resources, Inc.*

Mr. George Bickford  
*LB&W Engineering, Inc.*

Mr. Dan Fougere  
*CPA, CA/Formerly of Martin Marietta Materials Canada Ltd.*

Mr. Paul Buxton  
*Bilcon of Nova Scotia*

Mr. Tom Dooley  
*New York Sand & Stone (1999-2015)*

**For the Respondent:**

Counsel and Advisors

Mr. Scott Little  
Mr. Shane Spelliscy  
Mr. Rodney Neufeld  
Ms. Krista Zeman  
Ms. Susanna Kam  
Mr. Mark Klaver  
*Trade Law Bureau, Government of Canada*

Paralegals and Support Staff

Mr. Darian Parsons  
Mr. Benjamin Tait  
Mr. Derek Hehn (trial graphics/technical expert)  
Ms. Katherine Kulow (graphics support)

Party Representatives

Ms. Julie Boisvert  
Ms. Evelyn Bolduc  
*Global Affairs Canada, Government of Canada*

Mr. Andrew Weatherbee  
*Department of Justice, Government of Nova Scotia*

Witnesses and Experts

Mr. Darrell Chodorow  
Mr. Sujay Dave  
*The Brattle Group*

Dr. Arlie Sterling  
Ms. Julia Zhan  
*Marsoft, Inc.*

Mr. Colin Sutherland  
Dr. David Chereb  
*SC Market Analytics*

Mr. James Ward

Mr. Michael Power

Mr. Robert Connelly  
*Connelly Environmental Assessment Consulting, Inc.*

Ms. Lesley Griffiths

Dr. Tony Blouin

Mr. Peter Geddes  
*Nova Scotia Department of Natural Resources*

Mr. Mark McLean  
*Fisheries and Oceans Canada*

The Honorable John M. Evans  
*Goldblatt Partners LLP*

The Honorable Thomas A. Cromwell  
*Borden Ladner Gervais LLP*

**Representatives of Non-Disputing Parties:**

Mr. Matthew Olmsted  
*Government of the United States of America*

**The Arbitral Tribunal:**

Judge Bruno Simma  
Professor Donald McRae  
Professor Bryan P. Schwartz



**For the Registry:**

Dr. Dirk Pulkowski

79. In accordance with Procedural Order No. 2, the hearing was open to the public. A viewing room, separate from the hearing room, to which the oral proceedings were live-streamed, was set up for the public.
80. Following the examination of the Parties' witnesses and experts, pursuant to Section 9.2 of Procedural Order No. 25, the Tribunal indicated to the Parties that it did not see the need to identify any further issues and questions that the Parties should consider addressing in their closing statements, in addition to the issues and questions already put to the Parties in writing on 26 January 2018.
81. On 28 February 2018, the Investors informed the Tribunal that "[w]ith regard to William Ralph Clayton, he withdraws his claim and does not continue to pursue any claim in the arbitration."<sup>8</sup>
82. At the end of the hearing, the Tribunal and the Parties agreed on modalities for implementing corrections to the transcript of the hearing and corrections to the scope of the portions of the transcript which one or both Parties had designated as confidential. On 1 May 2018, the Tribunal granted the Parties' request for an extension of the deadlines for such corrections to 11 May 2018.
83. On 11 May 2018, the Parties provided their list of corrections to the hearing transcripts, the majority of which were agreed upon. On 15 May 2018, the Tribunal confirmed the corrections agreed between the Parties and issued a decision in respect of one proposed amendment to the transcript that remained disputed between the Parties.
84. On 4 June 2018, the court reporter provided a corrected version of the transcript on the basis of the corrections agreed between the Parties and ordered by the Tribunal.
85. Following further exchanges between the Parties, the Tribunal, and the PCA, on 22 June 2018, the Parties provided the Tribunal with a final version of the transcript containing annotations to their opening and closing statements.
86. On 28 June 2018, the Parties provided the PCA with a public (*i.e.* redacted) version of the hearing transcript. The public version of the hearing transcript has been published on the PCA's Case Repository.

---

<sup>8</sup> Hearing Transcript, 28 February 2018, p. 2438, lines 4-6.

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

#### **A. THE INVESTORS' REQUESTS**

87. In their Memorial, the Investors requested:

- a) an order that Canada pay the Investors full reparation damages of US\$ 443,350,772;
- b) all legal fees and disbursements, and the costs of this arbitration.<sup>9</sup>

88. No formal request was contained in the Investors' Reply.

89. At the hearing, the Investors requested "an award in the amount of the proven loss, with the tax equity adjustment needed to achieve full reparation."<sup>10</sup>

#### **B. THE RESPONDENT'S REQUESTS**

90. In its Counter-Memorial, the Respondent requested an order:

- a) dismissing the Claimants' damages claim in its entirety;
- b) awarding Canada its costs, with applicable interest, pursuant to NAFTA Article 1135(1) and Article 40 of the UNCITRAL Rules; and
- c) granting any other relief that may seem just.<sup>11</sup>

91. In its Rejoinder, the Respondent requested an order:

- a) dismissing the Claimants' damages claim in its entirety;
- b) awarding Canada its costs, with applicable interest, pursuant to NAFTA Article 1135(1) and Article 40 of the UNCITRAL Rules; and
- c) granting any other relief that may seem just.<sup>12</sup>

92. At the hearing, the Respondent requested that the Tribunal "dismiss the case."<sup>13</sup>

---

<sup>9</sup> Investors' Memorial, para. 255.

<sup>10</sup> Hearing Transcript, 28 February 2018, p. 2447, lines 7-10.

<sup>11</sup> Respondent's Counter-Memorial, para. 163.

<sup>12</sup> Respondent's Rejoinder, para. 184.

<sup>13</sup> Hearing Transcript, 28 February 2018, p. 2598, line 8.

#### IV. REPARATION FOR THE INJURY CAUSED BY THE INTERNATIONALLY WRONGFUL ACT

93. In the present Award, the Tribunal considers the content of the Respondent's obligation to make full reparation for the injury caused by its internationally wrongful acts, *i.e.* the Respondent's breaches of NAFTA Articles 1105 and 1102.
94. The Tribunal shall briefly address the legal standard of reparation under international law, including the applicable test for causation. The Tribunal shall then recall the breaches of NAFTA Articles 1105 and 1102 that it had determined in its Award on Jurisdiction and Liability. On that basis, the Tribunal shall examine which injury, if any, of the Investors was caused by the Respondent's breaches of NAFTA. It falls to the Tribunal to determine which situation would have prevailed in the absence of the NAFTA breaches found in the Award on Jurisdiction and Liability—in other words, the applicable “but for” scenario. The Tribunal recalls that pursuant to NAFTA Article 1116, an investor is entitled to recover only damage incurred “by reason of, or arising out of” a breach.

##### A. LEGAL STANDARD OF REPARATION

###### 1. The Investors' Position

95. The Investors submit that the principle that “the state must make ‘full reparation’ to compensate for the loss caused by its conduct”, set out by the PCIJ's judgment in the *Case Concerning the Factory at Chorzów*, is applicable in determining the compensation that is due for the Respondent's violation of NAFTA Articles 1105 and 1102.<sup>14</sup> The relevant part of the PCIJ's judgment reads:

The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to

---

<sup>14</sup> Investors' Memorial, paras. 232-234, referring to *Case Concerning the Factory at Chorzów* (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17 (13 September 1928) (“*Chorzów*”) (**Ex. CA-327**); *S.D. Myers, Inc v. Government of Canada*, UNCITRAL, First Partial Award, 13 November 2000, paras. 311-313 (“*SD Myers I*”) (**Ex. CA-313**); Meg N. Kinnear, Andrea K. Bjorklund, et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, Supplement No. 1, March 2008 (Kluwer Law International 2006), pp. 1135-1136 (**Ex. CA-311**); Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013), p. 300 (**Ex. CA-312**); Hearing Transcript, 19 February 2018, p. 15, lines 7-10.

determine the amount of compensation for an act contrary to international law.<sup>15</sup>  
(Investors' emphasis)

96. This principle of reparation set out in *Chorzów* was later codified as Article 31 of the International Law Commission's ("ILC") Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles"),<sup>16</sup> and adopted by several NAFTA arbitration tribunals.<sup>17</sup>
97. The Investors recognize that reparation is due only insofar as causation is proven. There must be a sufficient link between the treaty violation and the damage suffered, and the damage must not be considered too indirect or remote from the violation.<sup>18</sup> More specifically, the Investors refer to the ruling of the tribunal in the *Lemire v. Ukraine* arbitration to the effect that "[p]roof of causation requires that (A) cause, (B) effect, and (C) a logical link between the two be established."<sup>19</sup> On this basis, the Investors acknowledge that the burden is on them to establish, on the balance of probabilities, this causal link.<sup>20</sup>
98. In addition, the Investors argue that they are entitled to claim for damages as long as it is proven that the Respondent's conduct is "the efficient and proximate cause" of their loss, regardless of "an intervening chain of events between the breaches and the loss." Proximity can be established by proving that the Respondent could have foreseen that its violations of NAFTA would result in the damage to the Investors.<sup>21</sup>

## 2. The Respondent's Position

99. The Respondent recognizes that "under customary international law, Canada has to make full reparation for the injury caused by its wrongful acts".<sup>22</sup> The Respondent emphasizes, however,

---

<sup>15</sup> Investors' Memorial, para. 234; Investors' Reply, para. 24, quoting from *Chorzów*, p. 47 (Ex. CA-327).

<sup>16</sup> Investors' Memorial, para. 235; Investors' Reply, para. 26, citing the ILC Articles; Hearing Transcript, 19 February 2018, p. 16, lines 1-3.

<sup>17</sup> Investors' Memorial, para. 236, referring to *S.D. Myers I*, para. 331 (Ex. CA-313); *ADF Affiliate Ltd. v. Republic of Hungary* (ICSID Case No. ARB/03/16), 27 September 2006, para. 493 (Ex. CA-323).

<sup>18</sup> Investors' Reply, para. 283, quoting from *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, para. 785 ("*Biwater Gauff*") (Ex. CA-344).

<sup>19</sup> Investors' Reply, para. 284, citing *Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011, para. 157 ("*Lemire*") (Ex. CA-325).

<sup>20</sup> Hearing Transcript, 28 February 2018, p. 2373, lines 5-9.

<sup>21</sup> Investors' Reply, para. 285, quoting from *Lemire*, para. 166 (Ex. CA-325).

<sup>22</sup> Hearing Transcript, 19 February 2018, p. 167, lines 13-16.

that “[t]he principle of causation is an essential element of the obligation to make full reparation.”<sup>23</sup>

100. The Respondent refers to the pronouncement in *Chorzów* that “reparation must as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” as a general rule of international law.<sup>24</sup> The implication of this test is that the Tribunal is “by necessity engaged in a hypothetical exercise, not some alleged ordinary course exercise”<sup>25</sup> as alleged by the Investors. The Respondent emphasizes that the obligation to make full reparation applies only for losses caused by the specific breach or internationally wrongful act of a State<sup>26</sup>—in the present case, the breach of NAFTA as identified by the Tribunal in the Award on Jurisdiction and Liability.
101. The Respondent submits that causation is a key element of the Investors’ claim for compensation.<sup>27</sup> According to the Respondent, it is “a principle of customary international law that the claimant bears the burden of proving both the fact of the injury that it says it suffered as a result of a wrongful act, as well as the compensation to which it thinks it’s entitled.”<sup>28</sup> Pursuant to Article 1116(1), it is the Investors’ burden to prove that they have incurred loss “by reason of, or arising out of” the breach, *i.e.* that there is a “sufficient causal link” or an “adequate connection”

---

<sup>23</sup> Hearing Transcript, 19 February 2018, p. 167, lines 16-17.

<sup>24</sup> Respondent’s Counter-Memorial, para. 42.

<sup>25</sup> Hearing Transcript, 28 February 2018, p. 2468, lines 21-23.

<sup>26</sup> Respondent’s Counter-Memorial, para. 42, referring to the Commentary to the ILC Articles, Article 31, para. 9 (“ILC Articles Commentary”) (**Ex. RA-60**).

<sup>27</sup> Respondent’s Counter-Memorial, para. 36, citing *Biwater Gauff*, para. 778 (**Ex. RA-9**).

<sup>28</sup> Hearing Transcript, 19 February 2018, p. 155, lines 17-22.

between the breach and the loss as determined by several investment treaty tribunals.<sup>29</sup> In other words, the damage must not be too indirect or remote *vis-à-vis* the breach.<sup>30</sup>

102. In support of its position, the Respondent also refers to Article 31 of the ILC Articles.<sup>31</sup> The ILC Articles Commentary to Article 31 explains that “the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.”<sup>32</sup> The Respondent argues that an approach that is consistent with the ILC Articles Commentary was adopted in *Biwater Gauff v. United Republic of Tanzania* and *Nordzucker AG v. Republic of Poland*. In particular, the tribunal in *Biwater Gauff* noted that “‘causing injury’ must mean more than simply the wrongful act itself [...], otherwise the element of causation would have to be taken as present in every case,”<sup>33</sup> (Emphasis in original) and the tribunal in *Nordzucker* dismissed the claimant’s claim for lost profits as it failed to prove that its loss was caused by the respondent’s breach.<sup>34</sup>
103. As regards the *Lemire* award, the Respondent argues that it “offers no relevant guidance to this Tribunal” considering the difference between the breaches found in *Lemire* and in this arbitration.<sup>35</sup> The *Lemire* tribunal held that the respondent in that case not only deprived the

---

<sup>29</sup> Respondent’s Counter-Memorial, paras. 5, 40-41, referring to NAFTA Article 1116(1) (**Ex. RA-47**); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, para. 140 (“*S.D. Myers II*”) (**Ex. CA-205**); *Biwater Gauff*, para. 779 (**Ex. RA-9**); *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award and Dissenting Opinion, 16 December 2002, para. 194 (**Ex. RA-35**); *Pope & Talbot, Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, para. 80 (“*Pope & Talbot*”) (**Ex. CA-39**); *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, para. 38 (“*UPS*”) (**Ex. RA-79**); UNCITRAL Arbitration Rules (2010), Article 27(1); M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International, 1996), p. 222 (**Ex. RA-124**); M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International, 2008), pp. 105-106 (**Ex. RA-123**); see also Respondent’s Rejoinder, para. 55.

<sup>30</sup> Respondent’s Counter-Memorial, para. 45, referring to *Biwater Gauff*, para. 785 (**Ex. RA-9**); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, para. 468 (**Ex. RA-22**); *S.D. Myers II*, para. 140 (**Ex. CA-205**).

<sup>31</sup> Respondent’s Counter-Memorial, para. 42, citing *Chorzów*, p. 47 (**Ex. CA-327**); ILC Articles Commentary, Article 31 (**Ex. RA-60**); T. W. Walde & B. Sabahi, *Compensation, Damages and Valuation in the Oxford Handbook of International Investment Law* (OUP 2008), p. 1057 (**Ex. RA-144**).

<sup>32</sup> Respondent’s Counter-Memorial, para. 42, quoting from ILC Articles Commentary, Article 31, para. 9 (**Ex. RA-60**).

<sup>33</sup> Respondent’s Counter-Memorial, para. 43, citing *Biwater Gauff*, para. 803 (**Ex. RA-9**).

<sup>34</sup> Respondent’s Counter-Memorial, para. 44, citing *Nordzucker AG v. The Republic of Poland*, UNCITRAL, Third Partial and Final Award, 23 November 2009, para. 60 (“*Nordzucker*”) (**Ex. RA-130**).

<sup>35</sup> Respondent’s Rejoinder Memorial, para. 56; Hearing Transcript, 28 February 2018, p. 2582, referring to *Lemire* (**Ex. CA-325**); *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010 (“*Lemire – Decision on Liability*”) (**Ex. RA-153**).

claimant of “some chance to win” a radio license<sup>36</sup> but “actually prevented the claimant from owning a radio license” after it had won a tender.<sup>37</sup> In contrast, the present Tribunal ruled that the Investors merely lost a fair opportunity to have their case considered and assessed.<sup>38</sup>

104. In addition, the Respondent argues, the *Crystallex* award does not support the Investors’ case. The tribunal in *Crystallex* held that, for Crystallex’s claim for lost profits to be successful, it must prove that (i) “it had engaged or *would have engaged* in a profitmaking activity but for the respondent’s wrongful act, and that such activity would have indeed been profitable” (Emphasis in original); and (ii) there is “a reasonable basis to assess such loss of profits.”<sup>39</sup>
105. In summary, the Respondent submits that “even where it can be established that an identified breach was a “but for” cause in the chain of causation, recovery of damages sought is not permitted unless the claimant can prove that “the wrongful conduct was a *sufficient, proximate, adequate, foreseeable, or direct* cause of the injury.”<sup>40</sup> (Respondent’s emphasis) Put differently, “a claimant cannot be compensated ‘for the deprivation of a right that it never possessed.’”<sup>41</sup> The Respondent adds that it is the Investors’ burden to prove this causal link between the damage claimed by them and the breach of NAFTA obligations held in the Jurisdiction and Liability Award.<sup>42</sup> According to the Respondent, the Investors have to prove “not only causality and fact or factual causation but also what is often referred to as legal or proximate causation.”<sup>43</sup>

---

<sup>36</sup> Respondent’s Rejoinder Memorial, para. 56, referring to *Lemire*, para. 252 (**Ex. CA-325**).

<sup>37</sup> Respondent’s Rejoinder Memorial, para. 56, referring to *Lemire*, paras. 243, 253 (**Ex. CA-325**); *Lemire – Decision on Liability*, paras. 420, 451 (**Ex. RA-153**).

<sup>38</sup> Respondent’s Rejoinder Memorial, para. 56.

<sup>39</sup> Respondent’s Counter-Memorial, para. 113, quoting from *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), 4 April 2016, paras. 875-876 (“*Crystallex*”) (**Ex. CA-317**).

<sup>40</sup> Respondent’s Counter-Memorial, paras. 45-46, citing S. Ripinsky, *Damages in International Investment Law* (London, British Institute of International and Comparative Law: 2008), p. 135 (**Ex. RA-133**); T. Weiler & L.M. Diaz, *Causation and Damage in NAFTA Investor-State Arbitration in NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, (T. Weiler, ed.) (Transnational Publisher: 2004), pp. 194-195 (**Ex. RA-145**); *see also* Respondent’s Rejoinder, para. 58.

<sup>41</sup> Respondent’s Rejoinder, para. 55, quoting from *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), 22 September 2014, para. 829 (“*Gold Reserve*”) (**Ex. CA-316**).

<sup>42</sup> Hearing Transcript, 19 February 2018, p. 169, line 15 – p. 170, line 14, referring to *SD Myers I*, para. 316 (**Ex. RA-65**); *UPS*, para. 38 (**Ex. RA-79**); Investors’ Response to Respondent’s Motion on Scope of Damages, para. 2.

<sup>43</sup> Hearing Transcript, 19 February 2018, p. 171, lines 21-24.

### 3. The United States' Article 1128 Submission

106. The United States suggests that, as Articles 1116 and 1117 allow the recovery of loss “by reason of, or arising out of” a breach, the investor is required to demonstrate “proximate causation” between the loss and the breach.<sup>44</sup>
107. In elaborating on the standard of proximate causation, which is “an applicable rule of international law”<sup>45</sup> and has been endorsed by several NAFTA investment tribunals,<sup>46</sup> the United States cites the ICJ decision in *Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The ICJ held:

The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act [...] and the injury suffered [...] Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the [injury] would in fact have been averted if the Respondent had acted in compliance with its legal obligations.<sup>47</sup>

### 4. The Tribunal's Analysis

108. There is no substantive disagreement between the Parties as to the applicability, under NAFTA Chapter Eleven and in the present case, of the standard of full reparation set out by the PCIJ in its 1928 judgment in *Chorzów*. The same standard has been laid down in Article 31 of the ILC Articles and adopted by NAFTA tribunals.<sup>48</sup> Therefore, Article 31 is the starting point of the Tribunal's analysis:

#### *Article 31 Reparation*

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

---

<sup>44</sup> The United States' Submission, para. 23.

<sup>45</sup> The United States' Submission, para. 25.

<sup>46</sup> The United States' Submission, para. 26, referring to *S.D. Myers I*, para. 316 (**Ex. RA-65**); *S.D. Myers II*, para. 140 (**Ex. CA-205**); *Pope & Talbot*, para. 80 (**Ex. CA-39**); *Archer Daniels Midland Co. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007, para. 282 (**Ex. RA-3**).

<sup>47</sup> The United States' Submission, para. 24, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (ICJ Reports 2007), Judgment, 26 February 2007, para. 462 (“*Genocide*”) (**Ex. RA-12**).

<sup>48</sup> *S.D. Myers I*, paras. 309-312 (**Ex. CA-313 / RA-65**); *Archer Daniels Midland Co. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007, paras. 278-282 (**Ex. RA-3**); *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB (AF)/97/1) Award, 30 August 2000 (“*Metalclad*”), para. 122 (**Ex. RA-41**). See Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013), p. 301 (“[NAFTA] tribunals have generally turned to customary international law [...] to determine appropriate compensation in cases not involving expropriation. The starting point of their analysis is [...] the *Chorzow Factory* case and the relevant provisions of the ILC Articles on State Responsibility.”) (**Ex. CA-312**).



2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

109. The Parties however focus on different elements of that standard. While the Investors emphasize the content of the duty of reparation, namely that “reparation must undo the harm caused by the breach and make the wronged party whole to the extent possible”,<sup>49</sup> the Respondent underlines the requirement of causation, namely that any liability is limited to injury resulting from the NAFTA breaches identified by the Tribunal in the Award on Jurisdiction and Liability.<sup>50</sup>
110. Authorities in public international law require a high standard of factual certainty to prove a causal link between breach and injury: the alleged injury must “in all probability” have been caused by the breach (as in *Chorzów*), or a conclusion with a “sufficient degree of certainty” is required that, absent a breach, the injury would have been avoided (as in *Genocide*). While the facts of the *Genocide* case were of course markedly different from those underlying the present arbitration, there is an important similarity: the ICJ, as the Tribunal in the present case, was confronted with a situation of factual uncertainty, where in the view of one of the parties, the same injury would have occurred even in the absence of unlawful conduct.
111. An even stricter approach was established in *Nordzucker*, where the tribunal enquired whether the State’s conduct “necessarily” led the investor to act in ways that harmed its profitability.
112. The case law also suggests that a distinction must be drawn between two aspects of quantum: first, whether causation between the unlawful act and the alleged injury has been established; and, secondly, assuming that such causation has been established, what the precise amount of the loss suffered is. As the *Crystallex* tribunal held:

862. [...] [I]n this arbitration, the actual issue is [...] a matter of proof of *the causal link* and of *the quantum* of the damage sustained [...].<sup>51</sup> (Emphasis added)

113. Similarly, the *Lemire* tribunal ruled:

Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.<sup>52</sup>

---

<sup>49</sup> Investors’ Reply, para. 25.

<sup>50</sup> Respondent’s Counter-Memorial, para. 42.

<sup>51</sup> *Crystallex*, para. 862 (Ex. CA-317).

<sup>52</sup> *Lemire*, para. 246 (Ex. CA-325).

114. As a threshold question, the Tribunal must first consider whether a causal link between the Respondent's breach of international law and any injury of the Investors has been established at all. In this regard, the test is whether the Tribunal is "able to conclude from the case as a whole and with a sufficient degree of certainty" that the damage or losses of the Investors "would in fact have been averted if the Respondent had acted in compliance with its legal obligations" under NAFTA.<sup>53</sup> Alternatively, the Tribunal must be convinced that the Investors' alleged injury would, "in all probability", not have occurred if the NAFTA violation had not been committed.<sup>54</sup>
115. Based on the above, the Tribunal's analysis of causation in the specific circumstances of this case will proceed in two steps: it will, in a first step, identify the NAFTA violation by the Respondent, as determined by the Tribunal in its Award on Jurisdiction and Liability, before considering, in a second step, which injury (if any) suffered by the Investors ensued from this violation.

**B. THE NAFTA BREACHES FOUND BY THE TRIBUNAL IN ITS AWARD ON JURISDICTION AND LIABILITY**

116. The Parties emphasize different aspects of the Tribunal's reasoning and disagree as to the scope of issues of fact and law that are to be considered *res judicata*. It is therefore incumbent upon the Tribunal to clarify the basis of the Respondent's liability before considering how the Investors would have stood in the absence of the NAFTA breaches by the Respondent.

**1. The Investors' Position**

117. According to the Investors, the Tribunal has already decided that the federal and Nova Scotia Ministers, relying upon the Joint Review Panel Report ("JRP Report"), disapproved the Whites Point quarry and marine facility project ("Whites Point Project") on the basis of "community core values", which is beyond the scope of the reviewing mandate of the Joint Review Panel ("JRP", and its reviewing process, "JRP Process") under the Canadian Environmental Assessment Act ("CEAA") and the Nova Scotia Environment Act ("NSEA").<sup>55</sup> As a result, despite the Tribunal's ruling that "the Ministers could have denied approval of the [q]uarry independently from the JRP's recommendation,"<sup>56</sup> the Investors argue that the Respondent is now precluded from raising in this quantum phase the argument that "the Government decisions to reject the Whites Point

---

<sup>53</sup> *Genocide*, para. 462 (Ex. RA-012).

<sup>54</sup> *Chorzów*, p. 47 (Ex. CA-327).

<sup>55</sup> Investors' Reply, para. 305.

<sup>56</sup> Investors' Reply, para. 307.

project, not the JRP's acts that breached NAFTA, were the reason that the Whites Point project did not proceed".<sup>57</sup>

118. Relying upon the Expert Reply Report of Mr. David Estrin ("Estrin Reply Report"), the Investors assert that "[t]his Arbitral Tribunal previously found that the only 'significant adverse environmental effect' (SAEE) likely to arise from the [Whites Point Project] identified by the JRP was community core values – a factor with no legal relevance under applicable legislation," and that "the JRP did not make any other findings of [significant adverse environmental effect], even though they referenced other potential environmental effects."<sup>58</sup> In this respect, Mr. Estrin refers to part of the Award on Jurisdiction and Liability which states:

The [JRP] Report expressly identifies only one effect of the project as both significant and adverse, namely "inconsistency with community core values". 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>59</sup>

119. Accordingly, the Investors submit that, "in the absence of significant adverse environmental effects that could not be mitigated, there was no lawful basis for the JRP not to recommend approval of the [q]uarry." Thus, "but for Canada's breaches of the NAFTA, the Whites Point [q]uarry would have been approved and permitted."<sup>60</sup>
120. Further, the Investors argue that the Tribunal's factual findings and legal conclusions are *res judicata*, and as such cannot be reargued.<sup>61</sup> In this regard, the present case is no different from other arbitrations in which tribunals have made findings and conclusions in an earlier bifurcated phase of an arbitration.<sup>62</sup> In respect of such findings and conclusions, the Tribunal is *functus officio*,<sup>63</sup> and the principle of estoppel, which requires that the Parties be precluded from

---

<sup>57</sup> Investors' Reply, para. 309, referring to Respondent's Counter-Memorial, para. 59.

<sup>58</sup> Investors' Reply, para. 291, quoting from Expert Reply Report of Mr. David Estrin, 20 August 2017, paras. 7-9 ("Estrin Reply Report").

<sup>59</sup> Investors' Reply, para. 291, quoting from Estrin Reply Report, para. 7, which in turn cites Award on Jurisdiction and Liability, para. 503.

<sup>60</sup> Investors' Reply, para. 287.

<sup>61</sup> Investors' Reply, paras. 306, 316.

<sup>62</sup> Investors' Reply, para. 329, citing Gaillard and Savage, eds, Fouchard, Gaillard, Goldman on International Commercial Arbitration, p. 741 (Wolter Kluwers 1999) (**Ex. CA-360**); *ConocoPhillips Petrozuata BV v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), para. 20 (**Ex. CA-361**).

<sup>63</sup> Investors' Reply, paras. 313-315, citing *Gold Reserve v. Bolivarian Republic of Venezuela*, Decision Regarding the Claimant's and the Respondent's Requests for Corrections, 15 December 2014 (**Ex. CA-346**); *Five Oceans Salvage Ltd. v. Wenzhou Timber Group Company*, [2011] EWHC 3282 (Comm), para. 24 (**Ex. CA-347**);

relitigating issues of fact and law already decided, applies.<sup>64</sup> The Investors contend that allowing the Respondent to relitigate matters already decided would result in an abuse of process, as it would be contrary to the true purpose of bifurcation.<sup>65</sup> In addition, it could lead to contradictory reasons and findings, which would consequently undermine the integrity of this arbitration.<sup>66</sup>

## 2. The Respondent's Position

121. The Respondent agrees with the Investors' assertion that the Award on Jurisdiction and Liability has *res judicata* effect but objects to "the erroneous characterization by the Claimants and Mr. Estrin of the issues actually decided in the Award."<sup>67</sup> In this regard, the Respondent criticizes

---

International Law Association (ILA), "Interim Report: Res Judicata and Arbitration" (Berlin Conference 2004), pp. 3-4, 11 (**Ex. CA-359**).

<sup>64</sup> Investors' Reply, paras. 317-330, referring to *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Decision on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, para. 39 (**Ex. CA-349**); Chester Brown, A Common Law of International Adjudication, p. 155 (2007) (**Ex. CA-350**); Kinnear, Finality and Enforcement of an Award, March 2008 Supplement, at p. 1136.3 (**Ex. CA-351**); *Company General of the Orinoco Case*, Award, 31 July 1905, 10 UNRIAA 184, p. 276 (**Ex. CA-352**); *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (ICJ Reports 2002), Judgement, 10 October 2002 (**Ex. CA-379**); *United Kingdom v. France*, (1977, 1978) 18 R.I.A.A. 3, p. 271 (**Ex. CA-132**); *Amco v. Republic of Indonesia*: Resubmitted Case, Decision on Jurisdiction, ICSID Review, vol. 3 iss. 1, p. 166 (**Ex. CA-353**); *Grynberg v. Grenada* (ICSID Case No. ARB/10/7), Award, paras. 4.6.4, 7.1.2 (**Ex. CA-355**); Vaughan Lowe, *Res Judicata* and the Rule of Law in International Arbitration, 8 Afr. J. Int'l & Comp. L. 38, 1996 (**Ex. CA-354**); *The Pious Fund of Californias, United States v. Mexico*, Award, (1902), IX RIAA 1, ICGJ 409 (PCA 1902), 14 October 1902 (**Ex. CA-356**); *Apotex v. United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, paras. 7.42, 7.58 (**Ex. CA-357**); *Interpretation of Judgments Nos. 7 & 8 Concerning the Case at the Factory of Chorzów*, 1927 PCIJ (Ser. A) No. 11, p. 23 (dissenting opinion of Judge Anzilotti) (**Ex. CA-327**); Brooks Allen, Tommaso Soave, Chapter 3: Jurisdiction in WTO Dispute Settlement and Investment Arbitration, in Jorge A Huerta-Goldman, Antoine Romanetti, et al (eds) (**Ex. CA-358**); International Law Association (ILA), "Interim Report: Res Judicata and Arbitration" (Berlin Conference 2004), paras. 56-57 (**Ex. CA-359**); D. Howell, Issue Estoppel Arising out of Foreign Interlocutory Court Proceedings in International Arbitration, *Journal of International Arbitration*, 2003, Volume 20 Issue 2b 153, at p. 154 (**Ex. CA-382**); *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, Legal Opinion by Prof. Christoph Schreuer and Prof. August Reinisch, 20 June 2002, p. 24 (**Ex. CA-362**).

<sup>65</sup> Investors' Reply, paras. 331-335, referring to Zimmerman et al, the Statute of International Court of Justice: A Commentary, p. 831 (Oxford University Press 2006) (**Ex. CA-363**); Emmanuel Gaillard, Abuse of Process in International Arbitration, ICSID Review 2017, pp. 1-21 (**Ex. CA-364**); Michael Byers, Abuse of Rights: An Old Principle, A New Age, 47 McGill L. J. 389, p. 397 (2000) (**Ex. CA-365**); *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, para. 646 (**Ex. CA-366**).

<sup>66</sup> Investors' Reply, paras. 336-338, referring to Waincymer, Part III: The Award, Chapter 16: The Award, in Jeffrey Waincymer, Procedure and Evidence in International Arbitration (Kluwer Law International 2012), pp. 1263-1348 (**Ex. CA-367**); Landau, Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration, in Albert Jan van den Berg (ed), 50 Years of the New York Convention: ICCA International Arbitration Conference (Kluwer International 2009), ICCA Congress Series, Volume 14, pp. 187-205 (**Ex. CA-368**); *Malicorp Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Decision on the Application for Annulment of Malicorp Limited, 3 July 2013, para. 41 (**Ex. CA-369**).

<sup>67</sup> Respondent's Rejoinder, para. 64.

that the Investors seek to rely upon Mr. Estrin, an expert in Canadian environmental law, in support of their argument on the effect of *res judicata* under international law; Mr. Estrin's interpretation of the Tribunal's Award on Jurisdiction and Liability actually "ha[s] nothing to do" with his qualification as an independent expert on Canadian environmental assessment law.<sup>68</sup>

122. According to the Respondent's reading of the Award on Jurisdiction and Liability, the Tribunal made two key findings.<sup>69</sup> First, the Tribunal held that it was the JRP's approach in concluding the JRP Report that constituted breaches of NAFTA obligations.<sup>70</sup> In other words, the JRP's "failure to conduct the 'likely significant adverse environmental effects after mitigation'" analysis and, instead, its resort to the consideration of community core values in excess of its mandate, were the basis of the Respondent's liability.<sup>71</sup> Secondly, the Tribunal held that these violations resulted in the Investors' loss of a fair opportunity to have their Project justly assessed in accordance with domestic law.<sup>72</sup> The Respondent highlights that, "in finding fault with the JRP, the award made no determination as to what the outcome of the EA should have been and, again, nor could it have."<sup>73</sup>
123. Based on such understanding, the Respondent argues that "what is *res judicata* between the parties is that the JRP Report was incomplete and did not contain the information required by Canadian law."<sup>74</sup> Accordingly, the Respondent submits that, in the Tribunal's causation or "but for" analysis, the Tribunal should consider "(1) whether, in the but-for world, after analyzing 'the whole range of potential project effects', the JRP might have found other likely significant adverse environmental effects that could not be mitigated, or that might otherwise warrant a recommendation for rejection; and (2) with the JRP's mandate having been properly and fully discharged, how government decision-makers might have decided on the Whites Point Project."<sup>75</sup>

---

<sup>68</sup> Respondent's Rejoinder, para. 62.

<sup>69</sup> Hearing Transcript, 19 February 2018, p. 166, lines 3-6.

<sup>70</sup> Hearing Transcript, 19 February 2018, p. 159, lines 16 *et seq.*

<sup>71</sup> Respondent's Counter-Memorial, paras. 50-55; Hearing Transcript, 19 February 2018, p. 166, lines 7-12.

<sup>72</sup> Hearing Transcript, 19 February 2018, p. 166, lines 13-17.

<sup>73</sup> Hearing Transcript, 19 February 2018, p. 165, lines 14-17.

<sup>74</sup> Respondent's Rejoinder, para. 68. *See also*, Hearing Transcript, 19 February 2018, pp. 183 *et seq.*

<sup>75</sup> Respondent's Rejoinder, para. 69.

### 3. The Tribunal's Analysis

124. In the Award on Jurisdiction and Liability, the Tribunal held that the approach taken by the JRP breached Articles 1105 and 1102 of the NAFTA. In this second phase of the arbitral proceedings, the Parties have however characterized the Tribunal's analysis differently. The Tribunal will accordingly recall its findings in the Award on Jurisdiction and Liability, which in the Tribunal's view leave no doubt as to the basis of the Respondent's liability.

#### a. The JRP's Unprecedented Approach in respect of "Community Core Values"

125. First, the Tribunal concluded that the Whites Point Project was assessed in a manner that involved "a fundamental departure from the methodology required by Canadian and Nova Scotia law."<sup>76</sup> The reliance on "community core values" was a "distinct, unprecedented and unexpected approach taken by the JRP".<sup>77</sup> The Investors were "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".<sup>78</sup>

126. As a result, the Tribunal concluded that "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" in the context of the environmental assessment ("EA").<sup>79</sup> "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."<sup>80</sup>

127. In taking issue with the unprecedented approach of the JRP, the Tribunal however recognized that socio-economic considerations may in principle be included within the scope of any valid assessment: "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."<sup>81</sup>

---

<sup>76</sup> Award on Jurisdiction and Liability, para. 600.

<sup>77</sup> Award on Jurisdiction and Liability, para. 601.

<sup>78</sup> Award on Jurisdiction and Liability, para. 602.

<sup>79</sup> Award on Jurisdiction and Liability, para. 603.

<sup>80</sup> Award on Jurisdiction and Liability, para. 741.

<sup>81</sup> Award on Jurisdiction and Liability, para. 601.

**b. The JRP's Failure to Analyze "Likely Significant Effects after Mitigation"**

128. The Tribunal also found that, pursuant to section 16 of the CEAA, the JRP was legally obliged to report on all factors mentioned there, including mitigation measures.<sup>82</sup> The Tribunal concluded:

[T]he 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.<sup>83</sup>

129. The Tribunal reviewed other projects that were similar to the Whites Point Project in some or several aspects and were subject to an EA by a JRP. The JRP reports of all these other projects complied with the legal standard of the CEAA in identifying likely significant adverse effects and proposing mitigation measures. Unlike the JRP for the Whites Point Project, all other JRPs addressed the "likely significant adverse effects after mitigation" of the project under assessment.<sup>84</sup>

**c. No Prejudgment by the Tribunal as to Approval or Approvability of Project**

130. The Tribunal finally made it clear that it was not conducting, in the present proceedings, "its own environmental assessment, in substitution for that of the JRP."<sup>85</sup> Therefore, it was not for the Tribunal to decide "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".<sup>86</sup>
131. Similarly, the Tribunal did not prejudge the decision that should have been adopted by the decision-makers in Nova Scotia and federal Canada on the basis of the JRP Report. The Tribunal limited itself to the finding 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."<sup>87</sup>
132. The Tribunal concluded that "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

---

<sup>82</sup> Award on Jurisdiction and Liability, para. 546.

<sup>83</sup> Award on Jurisdiction and Liability, para. 535.

<sup>84</sup> Award on Jurisdiction and Liability, paras. 697, 708.

<sup>85</sup> Award on Jurisdiction and Liability, para. 602.

<sup>86</sup> Award on Jurisdiction and Liability, para. 602.

<sup>87</sup> Award on Jurisdiction and Liability, para. 584.

applicable laws”.<sup>88</sup> This was again emphasized in the Tribunal’s concluding statement at the very end of its Award: “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”.<sup>89</sup>

**C. INJURY PROVEN TO BE CAUSED BY CANADA’S NAFTA BREACHES**

133. The Tribunal shall now turn to the situation that would have prevailed “in all probability” or “with a sufficient degree of certainty” had these breaches of NAFTA not occurred. Based on the Tribunal’s findings in its Award on Jurisdiction and Liability, there is no disagreement between the Parties that the Investors, as a result of the NAFTA breaches identified by the Tribunal in that Award, lost a fair opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner. The Parties disagree, however, as to whether the Investors have proven any injury beyond that with the required degree of certainty.
134. In this regard, the Tribunal will briefly review the “but for” scenarios discussed by the Parties. The principal bone of contention between the Parties is the likelihood that, but for the NAFTA breaches, the Whites Point Project would have obtained all relevant regulatory approvals. The Investors assert that “but for Canada’s breaches of the NAFTA, the Whites Point [q]uarry would have been approved and permitted and would have produced and shipped stone.”<sup>90</sup> In contrast, the Respondent argues that there was no certainty that the Whites Point Project would have been approved but for the breach.<sup>91</sup> In other words, it is entirely possible that the same outcome would have obtained even in the event that an EA had been conducted on a basis that was consistent with NAFTA.
135. According to the Tribunal, the following stages of project approval can be distinguished: (i) assessment of the Whites Point Project by a JRP; (ii) assessment of and approval decision with regard to the Whites Point Project by Ministers at the federal and Nova Scotia levels on the basis of the report of the JRP; and (iii) subsequent industrial approvals. It is only after completion of these steps that the Investors’ Whites Point Project could have been built and operated.

---

<sup>88</sup> Award on Jurisdiction and Liability, para. 603 (Emphasis in original).

<sup>89</sup> Award on Jurisdiction and Liability, para. 741.

<sup>90</sup> Investors’ Reply, para. 287.

<sup>91</sup> Respondent’s Counter-Memorial, para. 38.



## 1. The Investors' Position

136. According to the Investors, but for the Respondent's breaches of NAFTA Articles 1105 and 1102, the Whites Point Project "would have been approved and permitted and would have produced and shipped stone."<sup>92</sup>
137. The Investors rely on the Estrin Reply Report to explain that the JRP Report identified the Whites Point Project's inconsistency with community core values as the only significant adverse environmental effect.<sup>93</sup> As a result, given the Tribunal's ruling that the JRP's consideration of community core values was beyond the scope of the JRP's mandate under Canadian law, according to the Investors, the Tribunal should treat the JRP Report as if no assessment of community core values had been made. In other words, the Investors suggest, the Tribunal should assume "that the JRP report satisfied the requirements of CEAA and that additional information was not required in order to make a decision."<sup>94</sup> Since the JRP Report "offered no other reason to reject the project, the JRP would otherwise have logically been compelled to recommend approval of the Whites Point [q]uarry."<sup>95</sup> Contrary to the Respondent's argument, the Investors contend that leaving the concept of community core values out of the JRP Report would not have rendered the Report incomplete, as the JRP itself noted in its Report that "it did have sufficient information to fulfill its mandate."<sup>96</sup>
138. Against this backdrop, the Investors add that the Whites Point Project complied with all the relevant requirements of the federal and Nova Scotia EA processes, particularly since "with ordinary mitigation there would have been no significant adverse environmental impact."<sup>97</sup> To explain the compliance of the Whites Point Project with relevant Canadian environmental law in detail, the Investors refer to the Estrin Reply Report, in which Mr. Estrin argues that "[t]his Arbitration Tribunal previously found that the only 'significant adverse environmental effect' (SAEE) likely to arise from the [Whites Point Project] identified by the JRP was community core values."<sup>98</sup> He thus concludes that "it is irrelevant for the Tribunal in this phase of the proceedings

---

<sup>92</sup> Investors' Memorial, para. 215; Investors' Reply, para. 287.

<sup>93</sup> Investors' Reply, para. 291, referring to Estrin Reply Report, para. 7; Investors' Memorial, para. 215, citing Award on Jurisdiction and Liability, para. 535.

<sup>94</sup> Investors' Reply, para. 292, referring to Estrin Reply Report, paras. 18-19.

<sup>95</sup> Investors' Memorial, para. 217.

<sup>96</sup> Investors' Reply, para. 292.

<sup>97</sup> Investors' Memorial, para. 218; Hearing Transcript, 19 February 2018, p. 109, lines 18-21.

<sup>98</sup> Investors' Reply, para. 291, referring to Estrin Reply Report, para. 7.

to now consider possible further reasons as to why the project might cause [significant adverse environmental effects].”<sup>99</sup> Therefore, if community core values had been “excluded as a relevant criterion, there would have been no reasonable basis to conclude that all EA requirements had not been satisfied.”<sup>100</sup>

139. In comparison to other precedents involving environmental approval in Nova Scotia, the Investors note that “before the Whites Point [q]uarry, there was no project of any kind assessed by a CEAA review panel that was not ultimately approved.”<sup>101</sup> In this regard, the Investors cite Mr. Estrin’s testimony during the hearing:

[The mitigation measures of] Whites Point, Black Point, Aguathuna, [...] were essentially similar. That’s another reason why it can be objectively determined that there isn’t really anything unique about Whites Point that would stand in the way of some approvability except politics. The Black Point Quarry is a much larger quarry than Whites Point, would be much more blasting, much larger, much more shipping, all of those things. In the result, [the decision-makers] came up with mitigation measures that were ones that Bilcon itself had anticipated were required ten years ago because of all the expertise that they had involved.<sup>102</sup>

140. As for the decision-making at the government level, the Investors explain that the federal Minister of Environment and the Nova Scotia Minister of Environment are responsible of approving the Whites Point Project, pursuant to the CEAA and the NSEA, respectively. However, neither can exercise its authority without legal constraints, such as the rule of law.<sup>103</sup> That is, any exercise of discretion must be carried out in accordance with the legislative purpose, which in this case “is to balance environmental protection and economic development.”<sup>104</sup> Given the absence of any other significant adverse environmental effects found in the JRP Report, the Investors argue that the Ministers at the federal and provincial levels would have had no reasonable basis for refusing the

---

<sup>99</sup> Estrin Reply Report, para. 10.

<sup>100</sup> Investors’ Memorial, para. 218.

<sup>101</sup> Hearing Transcript, 19 February 2018, p. 91 line 14 – p. 92, line. 13.

<sup>102</sup> Hearing Transcript, 28 February 2018, p. 2394, line 17 – p. 2395, line. 20.

<sup>103</sup> Investors’ Memorial, para. 219, 220; Investors’ Reply, para. 294, citing *Reference re Secession of Quebec*, [1998] 2 SCR 217, paras 70-71 (**Ex. CA-816**).

<sup>104</sup> Hearing Transcript, 19 February 2018, p. 98, line 25 – p. 99, line 2; Hearing Transcript, 28 February 2018, p. 2409, line 22 – p. 2410, line 9, referring to the Purpose section and Section 2 of the NSEA.

approval of the Whites Point Project.<sup>105</sup> On this point, the Investors refer to the Expert Reply Report of Prof. Sossin (“Sossin Reply Report”), in which Prof. Sossin takes the following view:

[W]here there is no evidence of such significant adverse environmental effects, a Minister does not retain discretion to nevertheless deny approval to a project. There is no corresponding phrase in section 37(1)(b) of CEEA that says something along the following lines: “if a project will not have significant adverse environmental effects, a refusal can nonetheless be justified in the circumstances...”. If the project does not give rise to significant adverse environmental effects, in other words, there is no provision in CEEA that would allow the Responsible Authority (“RA”) (or GIC [Governor in Council]) to turn it down for reasons of political expediency, policy preference, economic reasons, or in response to public opposition.<sup>106</sup>

141. The Investors refer to Canadian administrative jurisprudence on the rule of law to assert that, for their exercise of power to be lawful, the public authorities have an obligation to consider all relevant factors and discard all irrelevant ones.<sup>107</sup> Accordingly, there was “no lawful basis in the circumstances on which Ministers could lawfully deny environment approval.”<sup>108</sup> Relying on the Expert Report of Prof. Sossin and the Sossin Reply Report, the Investors submit that, in the present case, “there was no basis on which the [M]inisters, acting reasonably, could have lawfully denied regulatory approval of the Whites Point [q]uarry.”<sup>109</sup> As such, the Investors conclude that the Ministers could only have approved the Whites Point Project.<sup>110</sup>
142. The Investors also highlight stipulations made by the Respondent in the document production phase of the present Arbitration and in an earlier undertaking made by the Government of Nova Scotia during the JRP hearings to the effect that there are no records of projects that did not receive the granting of industrial permits after having obtained environmental approval. In particular, the undertaking states that the Government of Nova Scotia had “no record of any project that had received an Environmental Assessment approval, but was subsequently denied approval under

---

<sup>105</sup> Investors’ Reply, paras. 297-299, citing Expert Reply Report of Prof. Lorne Sossin, 3 August 2017, paras 22-23, 62 (“Sossin Reply Report”); Investors’ Memorial, para. 218; Hearing Transcript, 28 February 2018, p. 2402, line 24 – p. 2403, line 5.

<sup>106</sup> Investors’ Reply, para. 298, quoting from Sossin Reply Report, para. 22.

<sup>107</sup> Investors’ Memorial, para. 224.

<sup>108</sup> Investors’ Memorial, para. 225.

<sup>109</sup> Hearing Transcript, 19 February 2018, p. 97 lines 9-13, referring to the Expert Report of Prof. Sossin, 10 December 2016; and Sossin Reply Report.

<sup>110</sup> Investors’ Reply, paras. 298-99.

Part V [Industrial Permits] of the Environment Act.”<sup>111</sup> The relevant stipulations submitted by the Respondent in this arbitration are:

**Request 37:** Canada stipulates that it has no examples where a proponent of a project which received environmental assessment approval from the Government of Canada (under the version of the Canadian Environmental Assessment Act applicable to the Whites Point EA), and applied to the Department of Fisheries and Oceans, Transport Canada, or Natural Resources Canada for any permits, licences or authorizations required for the operation of the project, was denied those permits, licenses or authorizations.

**Request 38:** Canada stipulates that it has no examples where a proponent of a project which received Nova Scotia environmental assessment approval, and completed applications for Part V approval and/or other relevant permits, licences or authorizations required for the operation of the project, was denied that approval or those permits, licences or authorizations.<sup>112</sup>

143. The Investors therefore conclude that, in the ordinary course, after obtaining environmental approval, Bilcon of Nova Scotia’s applications for all necessary permits to build and operate the Whites Point Project would have been granted by the Nova Scotia Ministry of the Environment.<sup>113</sup>
144. Summarizing their case on causation, the Investors conclude that “[b]ut for Canada’s breach, the JRP would, in the ordinary course, have recommended approval. The Ministers would, in the ordinary course, have granted approval. And the industrial permits necessary for operation would, in the ordinary course, have been issued. The evidence proves beyond the required – far beyond the required – balance of probabilities a direct causal link between the breach and the [I]nvestors’ loss of the Whites Point project.”<sup>114</sup>

## 2. The Respondent’s Position

145. The Respondent submits that the breach of NAFTA found by a majority of the Tribunal did not cause the damages sought by the Investors.<sup>115</sup> In particular, the Respondent argues that it was the

---

<sup>111</sup> Investors’ Memorial, para. 228, quoting from List of Undertakings, Public Hearings of 16 June to 30 June 2007 (Ex. C-550); Expert Report of GHD Limited (Peter Oram), 6 December 2016, p. 5 (“GHD Report”).

<sup>112</sup> Investors’ Memorial, para. 228.

<sup>113</sup> Investors’ Memorial, paras. 227-231; Investors’ Reply, paras. 300-303, referring to Estrin Reply Report, paras. 265, 300-301, 320-322; GHD Report, p. 4; Reply Witness Statement of Mr. Paul Buxton, 18 August 2017, para. 9 (“Buxton Reply Statement”); Expert Reply Report of SNC-Lavalin (Bill Collins), 14 August 2017, pp. 1-2 (“SNC Reply Report”); Hearing Transcript, 19 February 2018, p. 121, lines 3-12.

<sup>114</sup> Hearing Transcript, 28 February 2018, p. 2391, lines 12-21.

<sup>115</sup> Respondent’s Counter-Memorial, para. 58.

Governments' decisions, not the JRP's acts constituting the NAFTA breach, which "were the reason that the Whites Point project did not proceed."<sup>116</sup>

146. The Respondent adds that it is not the function of this Tribunal to determine what the Governments' decisions should have been but for the breach,<sup>117</sup> *i.e.* whether they should have issued all necessary approvals and permits so that the Whites Point Project could proceed.<sup>118</sup> In this regard, the Respondent cites the Award on Jurisdiction and Liability, in which the Tribunal stated:

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 CEEA 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.<sup>119</sup>

147. In the Award on Jurisdiction and Liability, the Respondent notes, the Tribunal clearly determined that the Investors merely lost the fair opportunity to have their Project considered, assessed and decided in accordance with applicable laws.<sup>120</sup> In other words, the Investors "never had an approved and operating project. Nor did they have the right to one, even absent the NAFTA breach,"<sup>121</sup> given that the Tribunal ruled in the Award on Jurisdiction and Liability:

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.<sup>122</sup> (Respondent's emphasis)

148. The Respondent criticizes the Investors for asking the Tribunal to "reverse the majority's circumscribed decision in the jurisdiction and liability phase, and to now act as the JRP, the Nova Scotia government, and the federal government in order to issue the approvals and permits that

---

<sup>116</sup> Respondent's Counter-Memorial, para. 59.

<sup>117</sup> Respondent's Counter-Memorial, para. 60.

<sup>118</sup> Respondent's Counter-Memorial, para. 61.

<sup>119</sup> Respondent's Counter-Memorial, para. 60, referring to Award on Jurisdiction and Liability, para. 602.

<sup>120</sup> Respondent's Counter-Memorial, para. 61.

<sup>121</sup> Respondent's Rejoinder, para. 54.

<sup>122</sup> Respondent's Counter-Memorial, para. 61, referring to the Award on Jurisdiction and Liability, para. 603.

would have been necessary for the Whites Point project to proceed.”<sup>123</sup> According to the Respondent, “[t]o award the Claimants lost profits on the basis that the project was permitted and operating would be simply inconsistent with the findings in the Award and would compensate the Claimants for the deprivation of a right that they never possessed.”<sup>124</sup>

149. The Respondent affirms that a NAFTA tribunal “is not equipped to assume the role of both the JRP and government decision-makers.”<sup>125</sup> It adds that if domestic courts are not allowed to assess the possibility of a certain outcome in a flawed regulatory review, there is no reason why a NAFTA tribunal should have that power.<sup>126</sup>
150. Having emphasized that it is inappropriate for the Tribunal to speculate about possible government decisions that would have been taken but for the breaches,<sup>127</sup> the Respondent subsequently analyzes the Investors proposed “but for” scenario and contends that the following assumptions on which it is based are flawed: (i) that the JRP would have submitted a report with findings and recommendations in favour of approving the Whites Point Project; and (ii) that the government decision-makers would have approved the Whites Point Project.<sup>128</sup>
151. In considering these two assumptions, the Respondent asserts that the Tribunal must follow “the guidance of authorities” such as the PCIJ’s judgment in *Chorzów* (*i.e.* “in all probability”) and the ICJ’s judgment in *Genocide* (*i.e.* “sufficient degree of certainty”).<sup>129</sup> These authorities thus establish a test that requires a conclusion with a sufficient degree of certainty; according to the Respondent it is up to the Investors to show that this certainty exists.<sup>130</sup> In applying these standards, the Respondent argues that the Tribunal will find “the injury alleged by the [Investors] far too remote to serve as the basis for Canada’s reparation obligation, and any one of the [steps, hurdles and events in play here] could also break an alleged chain of factual causation.”<sup>131</sup>

---

<sup>123</sup> Respondent’s Counter-Memorial, para. 61.

<sup>124</sup> Respondent’s Counter-Memorial, para. 61.

<sup>125</sup> Hearing Transcript, 19 February 2018, p. 176, lines 19-21.

<sup>126</sup> Hearing Transcript, 19 February 2018, p. 178, lines 15-23.

<sup>127</sup> Hearing Transcript, 19 February 2018, p. 179, lines 1-10.

<sup>128</sup> Respondent’s Counter-Memorial, para. 62.

<sup>129</sup> Hearing Transcript, 19 February 2018, p. 180, line 3 – p. 181, line 24; *see* Section IV(A)(2) above.

<sup>130</sup> Hearing Transcript, 19 February 2018, p. 181, lines 22-24.

<sup>131</sup> Hearing Transcript, 19 February 2018, p. 182, lines 9-15.

152. Regarding the first assumption (that the JRP would have submitted a report with findings and recommendations in favour of approving the Whites Point Project), the Respondent states that the Investors' expert, Mr. Estrin, "overlooks the requirements of the Nova Scotia EA regime" and "ignores the evidence in the JRP's public EA record and the many findings and conclusions in the JRP Report which provided a reasonable basis for the JRP to have made recommendations that would not be supportive of project approval."<sup>132</sup>
153. The Respondent disagrees with Mr. Estrin's assessment that the Whites Point Project should have been approved given the lack of input from government officials that the Whites Point Project would cause significant adverse environmental effects. Government submissions, the Respondent contends, are only part of the whole information needed to be considered by the JRP.<sup>133</sup> Particularly, the JRP works independently and its resolution does not hinge exclusively upon information or opinions submitted by the Government.<sup>134</sup>
154. Moreover, the Respondent argues that Mr. Estrin's approach of comparing findings in different review processes is inappropriate, as each review is context-specific.<sup>135</sup> In any case, should the JRP be compelled to consider the findings of other projects, the Respondent contends that none of them would be appropriate comparators "due to the differences in the predicted environmental effects of each project."<sup>136</sup> This is particularly so in this case due to the uniqueness of the Whites Point Project, as "its proposed site was in a highly sensitive area, which included the presence of an endangered population of North Atlantic right whales and a highly valued lobster fishery."<sup>137</sup>
155. Instead, the Respondent refers to the Expert Report of Dr. Tony Blouin ("Blouin Report") and the Expert Report of Ms. Lesley Griffiths ("Griffiths Report") in support of its position that the JRP's findings on bio-physical and socio-economic effects of the Whites Point Project would have reasonably resulted in an inclusion of adverse, or likely or potential adverse, environmental effects

---

<sup>132</sup> Respondent's Counter-Memorial, para. 63.

<sup>133</sup> Respondent's Rejoinder, paras. 72-74.

<sup>134</sup> Respondent's Rejoinder, paras. 73-74.

<sup>135</sup> Respondent's Rejoinder, paras. 75-78.

<sup>136</sup> Respondent's Rejoinder, para. 82.

<sup>137</sup> Respondent's Rejoinder, para. 79.

in the JRP Report.<sup>138</sup> Dr. Blouin focused on the precepts of the NSEA, while Ms. Griffiths focused on the approach under the CEAA.

156. With regard to the CEAA, the Respondent relies on the testimony of Ms. Griffith for the proposition that “but for” the NAFTA breach it does not follow that the JRP Report would have provided findings and results, supportive of the Whites Point Project’s approval. In fact, “the JRP could have reasonably concluded that the project would have likely resulted in significant adverse environmental effects on the right whale and the lobster, taking into account proposed mitigation.”<sup>139</sup>
157. With regard to the NSEA, the Respondent refers to the observation of Dr. Blouin that the JRP Report had found that the Whites Point Project would have an adverse environmental effect or likely or potential adverse environmental effect on several valued ecosystem components. These results could have led to a recommendation not to approve the Whites Point Project. Thus, but for the NAFTA breach, the Whites Point Project may not have been approved pursuant to the NSEA.<sup>140</sup>
158. Both experts discuss the effect of the Whites Point Project on endangered marine mammals, such as the North Atlantic right whale and the American lobster, and on the coastal wetland.<sup>141</sup> On the basis of this expert evidence, the Respondent contends that “it would be impossible to conclude with confidence that absent the NAFTA breach, a review panel would find no likely significant adverse environmental effects from the Whites Point Project.”<sup>142</sup>
159. Regarding the second assumption (that the government decision-makers would have approved the Whites Point Project), the Respondent contends that provincial and federal decision-makers have discretionary authority to decide on the approval of the Whites Point Project.<sup>143</sup> They make decisions by taking into account a broad range of environmental effects, especially socio-

---

<sup>138</sup> Respondent’s Counter-Memorial, paras. 63-67, referring to Expert Report of Dr. Tony Blouin, 9 June 2017 (“Blouin Report”) (**Ex. RE-2**); Expert Report of Ms. Lesley Griffiths, 9 June 2017 (“Griffiths Report”) (**Ex. RE-1**); Respondent’s Rejoinder, paras. 70, 82.

<sup>139</sup> Hearing Transcript, 19 February 2018, p. 192, lines 14-18.

<sup>140</sup> Hearing Transcript, 19 February 2018, p. 192, line 19 – p. 193, line 8.

<sup>141</sup> Respondent’s Counter-Memorial, paras. 68-71, referring to Blouin Report (**Ex. RE-2**) and Griffiths Report (**Ex. RE-1**); Respondent’s Rejoinder, para. 79.

<sup>142</sup> Respondent’s Counter-Memorial, para. 71.

<sup>143</sup> Respondent’s Counter-Memorial, para. 83; Respondent’s Rejoinder, para. 83.



economic conditions,<sup>144</sup> and the JRP Report is but one of the sources on which these decision-makers rely, besides staff assessments and public comments.<sup>145</sup>

160. The Respondent argues that the Sossin Reply Report is flawed on several grounds. First, it is based on the incorrect premise that, if findings on community core values had been excluded, the JRP would not have found any other significant adverse environmental effects. Rather, the JRP Report should be deemed deficient, as the JRP did not properly carry out its mandate, and a new evaluation must be made.<sup>146</sup>
161. Secondly, relying on the Cromwell Report and Expert Rejoinder Report of the Hon. John M. Evans (“Evans Rejoinder Report”), both written by former Canadian judges, the Respondent argues that Prof. Sossin fails to acknowledge the broad discretion the Government has as long as its decision is based on a reasonable ground in the applicable law.<sup>147</sup> Moreover, the Respondent concludes from the oral testimony of Mr. Robert G. Connelly that, pursuant to the CEAA, “it was very clear no department, no minister wanted to give an environmental assessment panel the authority to make decisions. They wanted these panels to be advisory.”<sup>148</sup>
162. Lastly, absent the JRP’s findings on community core values, the JRP Report would be incomplete, and “the Ministers would likely seek additional information from the JRP, or ask it to reconvene and complete its mandate.”<sup>149</sup>
163. On the basis of this expert evidence, the Respondent concludes that there is no “but for” scenario under which the Government would be legally required to approve the Whites Point Project: in the event that “references to ‘community core values’ are simply excised from the JRP Report and that the rest of the report remains unchanged,”<sup>150</sup> as the Investors suggest, the government decision-makers would send the Report back for clarification or would request additional information, because it would lack a conclusion regarding possible significant adverse

---

<sup>144</sup> Respondent’s Counter-Memorial, para. 77.

<sup>145</sup> Respondent’s Counter-Memorial, para. 74, referring to Report of Mr. Peter Geddes, 9 June 2017, para. 24 (“Geddes Report”) (**Ex. RE-4**); Respondent’s Rejoinder, para. 87.

<sup>146</sup> Respondent’s Rejoinder, paras. 84-85.

<sup>147</sup> Respondent’s Rejoinder, paras. 87-88, referring to Cromwell Report; Expert Rejoinder Report of the Hon. John M. Evans, 6 November 2017, paras. 62-65 (“Evans Rejoinder Report”) (**Ex. RE-14**).

<sup>148</sup> Hearing Transcript, 28 February 2018, p. 2478, lines 19-24.

<sup>149</sup> Respondent’s Rejoinder, para. 89, citing Cromwell Report, paras. 61-62 (**Ex. RE-17**); Expert Rejoinder Report of Mr. Robert G. Connelly, 6 November 2017, para. 15 (“Connelly Rejoinder Report”) (**Ex. RE-11**).

<sup>150</sup> Respondent’s Counter-Memorial, para. 81.

environmental effects as mandated by the CEAA.<sup>151</sup> If the JRP were subsequently to conclude that “certain project effects were likely significant adverse environmental effects,” it would be reasonable for the Government to reject the approval of the Whites Point Project.<sup>152</sup> Alternatively, if the JRP found no likely significant adverse environmental effects, the “JRP report [would not be] binding on the [Government]”, and the CEAA “imposes no restrictions’ on the [Government’s] exercise of its discretion.” The Government can thus “reject a panel’s findings and recommendations.”<sup>153</sup>

164. The Respondent, relying upon the Expert Report of Mr. Robert G. Connelly (“Connelly Report”), argues that, pursuant to CEAA, the Governor in Council (the ultimate decision-maker at the federal level) “could still have reasonably denied approval to the Whites Point Project” and that with the conclusions on community core values excised, the JRP Report would lack conclusions on significant adverse environmental effects and accordingly become deficient.<sup>154</sup> In any case, the Respondent argues the Governor in Council is not legally bound to follow the JRP’s findings, as the JRP’s role is merely to gather information. Rather, the Governor in Council has to take into account various policy considerations and can consider additional material not addressed by the JRP.<sup>155</sup> Therefore, it is uncertain that, but for the NAFTA breaches, the Governor in Council would have approved the Whites Point Project.
165. As regards decision-making at the Nova Scotia level under the NSEA, the Respondent asserts that the Nova Scotia Minister of the Environment as the ultimate decision-maker “can take into account a wide range of considerations so long as they are relevant, having regard to the purposes of the NSEA,”<sup>156</sup> and the JRP Report is only one element in such considerations.<sup>157</sup> In exercising this decision-making function, the Respondent notes that the Minister has broad discretion in

---

<sup>151</sup> Respondent’s Counter-Memorial, para. 81; Respondent’s Rejoinder, para. 89; Hearing Transcript, 19 February 2018, p. 198 lines 1-6, citing Expert Report of Mr. Robert G. Connelly, 9 June 2017, para. 89 (“Connelly Report”) (**Ex. RE-3**).

<sup>152</sup> Respondent’s Counter-Memorial, para. 82; Respondent’s Rejoinder, para. 90.

<sup>153</sup> Respondent’s Rejoinder, para. 88.

<sup>154</sup> Hearing Transcript, 19 February 2018, p. 196, line 21 – p. 198, line 6, referring to Connelly Report, paras. 88-89 (**Ex. RE-3**).

<sup>155</sup> Hearing Transcript, 19 February 2018, p. 199, line 14 – p. 201, line 14, referring to Evans Rejoinder Report, paras. 62-65 (**Ex. RE-14**); Hearing Transcript, 28 February 2018, p. 2472, line 9 – p. 2473, line 9.

<sup>156</sup> Hearing Transcript, 19 February 2018, p. 201, line 14 – p. 202, line 6.

<sup>157</sup> Hearing Transcript, 19 February 2018, p. 202, line 18 – p. 203, line 7, referring to Geddes Report, para. 52 (**Ex. RE-4**).

evaluating the environmental effects of a project under review.<sup>158</sup> Referring to the Expert Report of Mr. Peter Geddes (“Geddes Report”), the Respondent explains that there is no standard EA practice. As such, “[g]overnment reviewers, may raise issues, identify means of mitigation, or suggest that there is inadequate information.”<sup>159</sup> “[T]he minister must look at the entire picture, which includes the definition of environmental effect, the overall principle of balancing economic development with environmental sustainability and the positive or adverse effects of a project. And at the end of the day, the minister is the final decision maker regardless of the recommendation that’s put before him or her.”<sup>160</sup> In addition, should the Minister find a JRP Report incomplete, the Minister could “direct the JRP to fulfil its mandate.”<sup>161</sup>

166. For these reasons, the Respondent submits that “the degree of certainty that such a [NAFTA-compliant] process would result in [a JRP’s] positive recommendations and positive [government] decisions is [zero],”<sup>162</sup> and therefore the NAFTA breach previously found by the majority did not cause the loss of profits claimed by the Investors.

167. Given the Investors’ refusal to present other alternative claims, the Respondent thus requests that the Tribunal award the Investors no damages.<sup>163</sup> This approach, the Respondent argues, was adopted by the tribunal in *Nordzucker*.<sup>164</sup>

### 3. The Tribunal’s Analysis

168. Applying the standards articulated by the PCIJ in *Chorzów* and the ICJ in *Genocide*, set out above, the Tribunal must conclude that the causal link between the NAFTA breach and the injury alleged by the Investors has not been established. While the Tribunal has no doubt that there is a realistic possibility that the Whites Point Project would have been approved as a result of a hypothetical NAFTA-compliant JRP Process, it cannot be said that this outcome would have occurred “in all probability” or with “a sufficient degree of certainty”.

---

<sup>158</sup> Hearing Transcript, 19 February 2018, p. 205, line 9 – p. 206, line 11, citing Cromwell Report, para. 50 (**Ex. RE-17**).

<sup>159</sup> Respondent’s Counter-Memorial, para. 76.

<sup>160</sup> Hearing Transcript, 28 February 2018, p. 2479, line 20 – p. 2480, line 4.

<sup>161</sup> Hearing Transcript, 19 February 2018, p. 206, lines 12-21, citing Cromwell Report, para. 60 (**Ex. RE-17**).

<sup>162</sup> Hearing Transcript, 19 February 2018 p. 208, lines 11-14. *See* Slide 95 of the Respondent’s Opening PowerPoint Presentation.

<sup>163</sup> Respondent’s Counter-Memorial, para. 84; Hearing Transcript, 19 February 2018, p. 155, line 23 – p. 156, line 17, p. 212, line 7-10.

<sup>164</sup> Respondent’s Counter-Memorial, paras. 84-85, referring to *Nordzucker*, paras. 65-66 (**Ex. RA-130**).

169. In the Tribunal's view, various outcomes of a NAFTA-compliant JRP Process are reasonably conceivable. First, a different, NAFTA-compliant process could have reasonably concluded that the Whites Point Project would have serious adverse effects on right whale and lobster habitats, which are not capable of mitigation. In this regard, a JRP could have relied on the assessment of the Committee on the Status of Endangered Wildlife in Canada's report on the North Atlantic right whale in Canada,<sup>165</sup> and the recovery plans for the North Atlantic right whale recommended to the Canadian Government.<sup>166</sup> While the Tribunal does not consider that such a conclusion was necessarily the most likely one, given the approval, albeit with conditions, of other Canadian quarry projects,<sup>167</sup> it would certainly be a possible conclusion on the basis of the record before this Tribunal.
170. Secondly, a different, NAFTA-compliant process could have reasonably concluded that, on balance, serious socio-economic adverse effects, which are not capable of mitigation, persist. While the Tribunal took issue with the manner in which the JRP relied on community core values, it did not call into question the relevance of socio-economic effects in the EA process. The record shows that the Whites Point Project was assessed to have both positive and negative socio-economic effects. As discussed by the Tribunal in its Award on Jurisdiction and Liability, the prospect that the Whites Point Project would create employment opportunities, notably for younger people who might otherwise have to leave the region as a result of the decline of fishery, was put to the JRP by members of the local community as an expected positive effect.<sup>168</sup> Other members of the community suggested negative effects on tourism and the community's well-being.<sup>169</sup> This Tribunal cannot speculate as to whether the expected negative socio-economic effects, once properly assessed by a JRP, could have outweighed the expected positive effects and justified the rejection of the Whites Point Project.
171. Thirdly, a different, NAFTA-compliant JRP Process could have reasonably recommended that the Whites Point Project be approved with conditions that would render it economically unviable.<sup>170</sup>

---

<sup>165</sup> Committee on the Status of Endangered Wildlife in Canada, Assessment and Update Status Report on the North Atlantic Right Whale *Eubalaena Glacialis* in Canada, 2003 (**Ex. R-591**).

<sup>166</sup> The Right Whale Recovery Team, Canadian North Atlantic Right Whale Recovery Plan, September 2000 (**Ex. R-595**).

<sup>167</sup> As noted by Mr. Estrin, the Aguathuna Quarry and Marine Terminal (1999) and Belleoram Quarry and Marine Terminal (2006-2007) were approved with conditions, *see* Estrin Report, paras. 20-22.

<sup>168</sup> Investors' Memorial, para. 196; Petition, dated 26 June 2007, (**Ex. C-182**); Witness Statement of William Richard Clayton, para. 13.

<sup>169</sup> Counter-Memorial, para. 184; First Affidavit of Stephen Chapman, para. 50.

<sup>170</sup> Article 40(1)(b) of the NSEA; Article 53 of the CEAA.

Such conditions might notably have included provisions for the protection of human health or animal health (*e.g.*, to reduce noise pollution). It would be pure speculation were this Tribunal to attempt to predict what conditions regulators might deem appropriate now or over the 50-year duration of the Whites Point Project, and what their economic effect on it might be. It suffices to note that it does not seem impossible that such conditions could render the Whites Point Project economically unviable.

172. Fourthly, even in the event of a positive recommendation by a JRP in a NAFTA-compliant JRP Process, it is not impossible, though perhaps less likely, that the federal Minister or the Nova Scotia Minister would subsequently have denied approval or approved the Whites Point Project with conditions that would render it economically unviable. The factors that were brought to the federal Cabinet's attention in 2007, in a federal Cabinet Briefing Document, included environmental effects, impacts on the tourism and fishing industries, the aesthetics of the landscape, and the way of life of the local population.<sup>171</sup> It cannot be excluded that some of these grounds that were ostensibly considered by the Governor-in-Council in its decision to deny project approval in 2007 would also have been given weight in the event that the JRP Process had been conducted in a NAFTA-compliant fashion. Similarly, the denial of approval of an expansion of the Bayside quarry<sup>172</sup> supports a finding that environmental approval of quarry projects, at least in the Inner Bay of Fundy, was uncertain. The Tribunal is not prepared to assume, on the basis of the evidence before it, that ministerial approval was beyond question once the JRP Process had led to a positive recommendation.
173. As an alternative argument, the Investors' EA expert, Mr. Estrin, sought to point out that all other comparable projects in Nova Scotia were approved.<sup>173</sup> However, while Mr. Estrin's general point that Nova Scotia has overall been a welcoming environment for quarry projects stands, the Tribunal does not believe that it should draw any specific conclusions for the approvability of the Whites Point Project from this practice.
174. Nor is the Tribunal convinced that the recent approval of a (substantially larger) quarry at Black Point, Nova Scotia,<sup>174</sup> is a reliable indicator of the approvability of the Whites Point Project. Black

---

<sup>171</sup> Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, 27 November 2007 (**Ex. R-620**).

<sup>172</sup> Testimony of Mr. Tom Dooley, Hearing Transcript, 23 February 2018, p. 1526, line 8 – p. 1527, line 4; Testimony of Dan Fougere, Hearing Transcript, 23 February 2018, p. 1574, lines 16-23.

<sup>173</sup> Testimony of David Estrin, Hearing Transcript, 20 February 2018, p. 519, lines 11-21.

<sup>174</sup> Investors' Memorial, paras. 52-54.

Point is located on the Atlantic Ocean side of Nova Scotia, while Whites Point is on the Bay of Fundy. The ecology in both areas is evidently different, as is exemplified, to cite only one element, by the substantial difference in the number of whale sightings in each area. While the Digby Neck area of the Bay of Fundy shows a particularly high concentration of whale sightings, very few such sightings occur on the Atlantic side.<sup>175</sup>

175. The Tribunal must accordingly conclude that no further injury has been proven beyond the injury that is substantially uncontroversial between the Parties on the basis of the majority's finding in the Award on Jurisdiction and Liability, namely that the Investors were deprived of an opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner. In particular, the Investors have not proven that "in all probability" or "with a sufficient degree of certainty" the Whites Point Project would have obtained all necessary approvals and would be operating profitably.
176. The Investors are thus only entitled to compensation equivalent to the value of the opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner.

## **V. MITIGATION OF LOSS**

177. According to the Respondent, the Investors should have mitigated their loss by seeking domestic judicial review, "which would have expeditiously restored the Claimants' lost opportunity."<sup>176</sup> Accordingly, the Respondent argues that the Investors should only be compensated for the costs of judicial proceedings in Canadian courts and the costs of a new environmental assessment process.<sup>177</sup>
178. The Investors deny that they were under a duty to mitigate their damages in the circumstances of the present case, as judicial review could not guarantee that their losses would be effectively remedied.

---

<sup>175</sup> Whalesitings Database, Population Ecology Division, Fisheries and Oceans Canada, Dartmouth, NS, 11 October 2017 (**Ex. R-769**).

<sup>176</sup> Respondent's Counter-Memorial, para. 96.

<sup>177</sup> Respondent's Counter-Memorial, para. 96; Respondent's Rejoinder, para. 113.

**A. THE RESPONDENT'S POSITION**

179. The Respondent acknowledges that, should the Tribunal consider that a causal link between the Investors' damages claimed and the Respondent's violations of NAFTA is established, "[the Tribunal] must start by determining the value of what the Claimants actually lost when they were denied the opportunity to have the project considered in accordance with Canadian law."<sup>178</sup> In assessing the compensation that is due to the Investors, however, the Respondent submits that the Investors' duty to mitigate their loss must be taken into account. Since "mitigation was reasonably available to the Claimants and Bilcon of Nova Scotia in the form of judicial review in the Canadian courts,"<sup>179</sup> the Respondent argues that the Investors should only be compensated for the costs of judicial proceedings in the Canadian courts and the costs of a new environmental assessment process.<sup>180</sup>
180. The Respondent asserts that a duty to mitigate is a general principle of international law applicable in the present proceedings. The principle is recognized in the ILC Articles Commentary to Article 31, which states that "[e]ven the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury" and that "failure to mitigate by the injured party may preclude recovery to that extent."<sup>181</sup> In the *Case Concerning the Gabčíkovo-Nagymaros Project*, the ICJ noted Slovakia's argument that the mitigation of damages was a general principle of international law, but stated that:

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.<sup>182</sup>

---

<sup>178</sup> Respondent's Counter-Memorial, para. 87.

<sup>179</sup> Respondent's Counter-Memorial, para. 87. *See also*, Hearing Transcript, 19 February 2018, p. 281, line 23 – p. 282, line 2.

<sup>180</sup> Respondent's Counter-Memorial, para. 96; Respondent's Rejoinder, para. 113.

<sup>181</sup> Respondent's Counter-Memorial, para. 88, quoting from ILC Articles Commentary, Article 31, para. 11 (**Ex. RA-60**); Hearing Transcript, 19 February 2018, p. 282, line 23 – p. 283, line 6.

<sup>182</sup> Respondent's Counter-Memorial, para. 88, quoting from *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) (ICJ Reports 1997) Judgment, 25 September 1997 ("*Gabčíkovo-Nagymaros*"), para. 80 (**Ex. RA-116**).

181. Likewise, according to the Respondent, investor-State arbitral tribunals have frequently applied this rule,<sup>183</sup> the objective of which is “to avoid the aggrieved party passively sitting back and waiting to be compensated for harm which it could have avoided or reduced.”<sup>184</sup>
182. As regards the relationship between the duty to mitigate loss and the conventional requirement to exhaust local remedies, the Respondent advises that, while there is no requirement to exhaust local remedies under NAFTA, the Investors are not exempt from the duty to mitigate.<sup>185</sup> The two rules are separate and distinct: “While the exhaustion rule relates to jurisdiction, the duty to mitigate is a damages issue.”<sup>186</sup> According to the Respondent, the fact that the Investors had recourse to Chapter Eleven of NAFTA does not override their duty to mitigate damages.<sup>187</sup> In support of this position, the Respondent cites the award in *Dunkeld International Investment Limited v. The Government of Belize*, which provides:

[R]ecourse to local remedies is not strictly linked to the mitigation of losses, such that any duty to mitigate should require the exhaustion of local remedies or require a party to prefer a local remedy to one that may be available to it through international arbitration. Nevertheless, it may be the case that local administrative procedures may offer a remedy that appears more rapid or certain than that of an international claim, such that a party would be derelict in failing to attempt the local process.<sup>188</sup>

183. The Respondent further argues that “judicial review was also an effective remedy that would have fully restored the claimants’ lost opportunity to have [their] project considered, assessed, and decided in accordance with applicable laws.”<sup>189</sup> Specifically, since the JRP Report was not in

---

<sup>183</sup> Respondent’s Counter-Memorial, para. 88; Respondent’s Rejoinder, para. 95, referring to *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6) Award, 12 April 2002, para. 167 (“*Middle East Cement*”) (**Ex. CA-322**); *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia* (ICSID Case No. ARB/05/24) Award, 17 December 2015, para. 215 (**Ex. RA-122**); *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan* (ICSID Case No. ARB/01/06) Award, 7 October 2003, para. 10.6.4(1) (**Ex. RA-108**); *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Final Award, 16 September 2003, para. 20.30 (**Ex. RA-121**); *EDF International S.A., SAUR International S.S. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23) Award, 11 June 2012, paras. 1301-1317 (**Ex. RA-135**).

<sup>184</sup> Respondent’s Counter-Memorial, para. 89, quoting from UNIDROIT, International Institute for the Unification of Private Law, UNIDROIT Principles for International Commercial Contracts 2010, Article 7.4.8, Comment 1 (**Ex. RA-141**).

<sup>185</sup> Hearing Transcript, 19 February 2018, p. 290, lines 4-22.

<sup>186</sup> Respondent’s Rejoinder, paras. 98-99, referring to *Interhandel Case (Switzerland v. United States of America)* Preliminary Objections (ICJ Reports 1959) Judgment, 21 March 1959, p. 27 (**Ex. RA-155**).

<sup>187</sup> Hearing Transcript, 28 February 2018, p. 2588, lines 5-17.

<sup>188</sup> Respondent’s Counter-Memorial, para. 90, quoting from *Dunkeld International Investment Ltd. v. Government of Belize* (UNCITRAL) Award, 28 June 2016, para. 197 (“*Dunkeld*”) (**Ex. RA-115**).

<sup>189</sup> Hearing Transcript, 28 February 2018, p. 2589, lines 9-13.



compliance with the legal standards set forth in the CEEA and the NSEA, the courts would “have remitted the matter back for redetermination in accordance with the Court’s reasons,” and/or ordered that the JRP be constituted with new members. These measures “would have *fully* restored [the Investors’] opportunity to have” their Whites Point Project assessed in accordance with Canadian laws.<sup>190</sup> (Emphasis in original)

184. Regarding the Investors’ argument that judicial review would not provide them with effective remedies equivalent to the ones available under NAFTA Chapter Eleven, particularly regarding damages, the Respondent points out that, while Article 1135 only allows tribunals to award monetary damages, restitution of property, and any applicable interest, judicial review would have allowed for a redetermination by a new JRP, effectively remedying the NAFTA breach, and allowing the Whites Point Project to proceed. The Respondent adds that there is no basis for the Investors to believe that a new JRP would have been unfair, unreasonable or unlawful.<sup>191</sup>
185. In addition, the Respondent contends that Article 1121 of NAFTA does not prevent the Investors from seeking judicial review before Canadian courts. This is because, whereas Article 1121(1) and 1121(2) order that an investor and its enterprise first waive its right to pursue their claims in domestic courts of a host State before embarking on NAFTA arbitral proceedings, the provision does not prevent them from launching “proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages” in parallel.<sup>192</sup>
186. In response to the Investors’ argument that Canadian courts, if faced with a damages claim, would not require a claimant to mitigate loss through judicial review, the Respondent argues that Canadian domestic law is not applicable here since NAFTA Article 1131 expressly provides that the dispute shall be decided in accordance with NAFTA and the applicable rules of international law.<sup>193</sup> In any case, even if Canadian law were relevant, the Respondent submits that a recent Supreme Court of Canada case, *Ernst v. Alberta Energy Regulator*, supports its assertion that judicial review is an appropriate mitigation tool.<sup>194</sup> It also rejects the Investors’ reliance upon

---

<sup>190</sup> Respondent’s Counter-Memorial, paras. 92-95, referring to Expert Report of the Hon. John M. Evans, 9 June 2017, paras. 64-66, 74-78 (“Evans Report”) (**Ex. RE-6**), Hearing Transcript, 19 February 2018, pp. 283 *et seq.*

<sup>191</sup> Hearing Transcript, 28 February 2018, pp. 2590-2591.

<sup>192</sup> Hearing Transcript, 28 February 2018, p. 2589, lines 18-24.

<sup>193</sup> Respondent’s Rejoinder, para. 94, Hearing Transcript, 28 February 2018, p. 2587, line 23 – p. 2588, line 4.

<sup>194</sup> Respondent’s Rejoinder, para. 97, referring to *Ernst v. Albert Energy Regulator*, 2017 SCC 13, [2017] 1 S.C.R. 3, paras. 36-37 (**Ex. R-672**); Evans Rejoinder Report, paras. 39-50 (**Ex. RE-14**).

another Supreme Court of Canada case, *Attorney General v. TeleZone*, by noting that the case did not involve a ruling on liability or damages.<sup>195</sup>

## **B. THE INVESTORS' POSITION**

187. The Investors submit that domestic judicial review is not an adequate remedy in the present circumstances. This is, they argue, because the Investors have been subjected to misconduct by officials of the Canadian Government for several years, and requiring them to go through additional years of judicial proceedings and another JRP Process could not guarantee that their losses would be effectively remedied.<sup>196</sup> In particular, the Investors note that what they had encountered was not “a mere misapplication of Canadian law that could have been rectified through judicial review.” Rather, “[t]he political, administrative and bureaucratic environment within which the Whites Point [q]uarry was considered was biased against the Investors from the start and throughout.”<sup>197</sup>
188. For this reason, the Investors argue that a possibility that a second JRP Process might be commenced as a result of judicial review would lead to “a hopeless cycle between a biased administrative process and a court system ill-equipped to correct it,” as the process is likely to be conducted in “the same poisoned environment.”<sup>198</sup> Relying on the Respondent’s expert, the Hon. John Evans, the Investors argue that even in their likely best outcome, they would have had to go through lengthy judicial review proceedings, as a result of which their case would have been referred back to another JRP, without any assurances that the Whites Point Project would eventually be approved.<sup>199</sup> In any event, the Investors assert that, notwithstanding various obstacles, they had always been actively engaged in alleviating the losses suffered from the Respondent’s conduct by trying their best to navigate through the JRP Process in good faith.<sup>200</sup>
189. Consequently, the Investors should not be required to pursue local remedies in this case. As the tribunal in *Dunkeld* observed, the duty to mitigate through domestic means would be required

---

<sup>195</sup> Respondent’s Rejoinder, para. 96, referring to *Canada (Attorney General) v. Telezone Inc.*, [2010] 3 S.C.R. 585, paras. 2, 81 (“*TeleZone*”) (**Ex. CA-445**).

<sup>196</sup> Investors’ Reply, paras. 234, 242.

<sup>197</sup> Investors’ Reply, para. 240.

<sup>198</sup> Investors’ Reply, paras. 12-15, 246.

<sup>199</sup> Hearing Transcript, 28 February 2018, p. 2435, lines 3-10.

<sup>200</sup> Investors’ Reply, para. 249.

only when such means could provide a more rapid and certain remedy than an international claim.<sup>201</sup>

190. The Investors also argue that the passage in the ICJ's judgment in *Gabčíkovo-Nagymaros* quoted by the Respondent did not reflect the ICJ's own understanding of the duty to mitigate, but merely paraphrased an argument made by the Slovak Republic. Ultimately, the Investors suggest that the ICJ did not examine the question of mitigating losses at all.<sup>202</sup>

191. Furthermore, the Investors observe that if this were a dispute in a Canadian court, there would not have been an obligation to mitigate loss by first seeking judicial review before seeking damages.<sup>203</sup> To support their case, they cite the Supreme Court of Canada decision in *Attorney General v. TeleZone*, which states:

If the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.<sup>204</sup>

192. In any case, there is no guarantee that, had the Investors pursued judicial review, the Canadian courts would have ordered a sufficient remedy given the broad scope of discretion available to them on judicial review cases.<sup>205</sup>

193. In addition, the Investors argue that imposing upon them a duty to mitigate their losses through judicial review is effectively tantamount to requiring them to exhaust local remedies, an obligation which does not exist under NAFTA.<sup>206</sup> As such, "[i]f Canada cannot bar a NAFTA claim [directly] because a prospective claimant has not exhausted local remedies, it should not be able to eviscerate the NAFTA claim by [indirectly] raising the [argument] at the damages

---

<sup>201</sup> Investors' Reply, para. 244, citing *Dunkeld*, para. 197 (Ex. RA-115).

<sup>202</sup> Investors' Reply, para. 277, referring to *Gabčíkovo-Nagymaros*, paras. 80-81 (Ex. RA-15).

<sup>203</sup> Investors' Reply, para. 250, referring to Expert Report of Professor John McCamus, 14 August 2017, para. 26.

<sup>204</sup> Investors' Reply, paras. 251-258, quoting from *TeleZone*, para. 19 (Ex. CA-445).

<sup>205</sup> Investors' Reply, para. 257, referring to *TeleZone*, para. 56 (Ex. CA-445).

<sup>206</sup> Investors' Reply, paras. 259-261, 269-270.

phase.”<sup>207</sup> Under NAFTA, the Investors assert, they had a right to choose their remedy, and they chose the option to go through the NAFTA process.<sup>208</sup>

194. Alternatively, should the Tribunal decide that the duty to mitigate applies in this case, the Investors argue that such duty is nonetheless governed by the standard of reasonableness<sup>209</sup> (*i.e.* “the Investors only need to take reasonable steps to mitigate”), and it should not be applied in a manner that unduly favours the wrongdoer.<sup>210</sup> In this regard, the question as to what mitigation measure is reasonable is a factual matter, and the burden of proof is on the Respondent, having raised the mitigation defence.<sup>211</sup>

## C. THE TRIBUNAL’S ANALYSIS

### 1. Existence of Duty of Mitigation in International Law

195. The Tribunal finds that there are no reasons why the duty to mitigate, as an important aspect of the law on State responsibility, and as elaborated by various international courts and tribunals, should not also apply in a NAFTA context.
196. Under international law, a failure by an injured State to take reasonable steps to limit the losses it incurred as a result of an internationally wrongful act by another State may result in a reduction of recovery to the extent of the damage that could have been avoided. This principle has been affirmed by the ILC<sup>212</sup> and applied by international tribunals.<sup>213</sup>

---

<sup>207</sup> Investors’ Reply, para. 262.

<sup>208</sup> Hearing Transcript, 28 February 2018, p. 2435, lines 18-20.

<sup>209</sup> Investors’ Reply, para. 271.

<sup>210</sup> Investors’ Reply, para. 275, referring to *Irmgard Marboe*, Calculation of Compensation and Damages in International Investment Law (Oxford University Press 2017), paras. 3.256-3.257 (**Ex. CA-468**).

<sup>211</sup> Investors’ Reply, paras. 278-280, citing *AIG Capital Partners, INC. and CJSC Tema Real Estate Company v. Republic of Kazakhstan* (ICSID Case No. ARB/01/06) Award, 7 October 2003, paras. 10.6.4-10.6.5 (**Ex. CA-342**); *Middle East Cement*, para. 170 (**Ex. CA-322**); *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia* (ICSID Case No. ARB/05/24) Award, 17 December 2015, para. 215 (**Ex. CA-343**).

<sup>212</sup> ILC Articles Commentary, Article 31, para. 11 (“Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a ‘duty to mitigate,’ this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.”) (**Ex. RA-60**).

<sup>213</sup> See *Gabčíkovo-Nagymaros*, para. 80 (“[A]n injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided.”) (**Ex. RA-15**); U.N. Compensation Commission, Governing Council decision 15, *Compensation for Business Losses Resulting from Iraq’s Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause*, 8<sup>th</sup> sess., 14-18 Dec. 1992, U.N. Doc. S/AC.26/1992/15 (1992), para. 9 (IV) (“The total amount of compensable losses will be reduced to the extent

197. The ILC Articles Commentary bases the duty to mitigate in public international law on the ICJ's judgment in *Gabčíkovo-Nagymaros* and the UNCC decision on the *Well Blowout Control Claim*.<sup>214</sup> On one view, and as the Investors in this case maintain,<sup>215</sup> the ICJ in the *Gabčíkovo-Nagymaros* judgment at paragraph 80 merely summarized Slovakia's argument that when Slovakia carried out Variant C, it was mitigating damages and that this duty amounted to a general principle of law.<sup>216</sup> In paragraph 81, the ICJ went on to hold that there was no need for it to further examine such duty, given that Slovakia's operationalization of Variant C amounted to an internationally wrongful act. Thus, arguably, the ICJ made no conclusive finding on the duty to mitigate.<sup>217</sup>
198. On another view, however, the ICJ in *Gabčíkovo-Nagymaros* implicitly endorsed a duty to mitigate when it stated that "*while [the mitigation] principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.*"<sup>218</sup> (Emphasis added) This reading appears to be shared by ILC Special Rapporteur Crawford<sup>219</sup> and Judge Higgins<sup>220</sup> in their commentaries on the ILC Articles.

---

that those losses could reasonably have been avoided."); U.N. Compensation Commission, Governing Council, *Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim*, 15 Nov. 1996, U.N. Doc. S/AC.26/1996/5/Annex (18 Dec. 1996), para. 54 ("[U]nder the general principles of international law relating to mitigation of damages [...] the Claimant was not only permitted but indeed obligated to take reasonable steps to [...] mitigate the loss, damage or injury being caused") ("*Well Blowout Control Claim*"). Investment tribunals have also recognized the principle of mitigation of damages. See, e.g., *Middle East Cement*, para. 167 (**Ex. CA-322**); *Tza Yap Shum v. The Republic of Peru* (ICSID Case No. ARB/07/6), Award, 7 July 2011, paras. 246, 250-251.

<sup>214</sup> ILC Articles Commentary, Article 31, para. 11, fns. 467-468 (**Ex. RA-60**).

<sup>215</sup> Investors' Reply, para. 277, referring to *Gabčíkovo-Nagymaros*, paras. 80-81 (**Ex. RA-15**).

<sup>216</sup> *Gabčíkovo-Nagymaros*, para. 80 (**Ex. RA-15**).

<sup>217</sup> Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (BIICL 2008), p. 320 (**Ex. RA-133 / CA-381**).

<sup>218</sup> *Gabčíkovo-Nagymaros*, para. 80 (**Ex. RA-15**).

<sup>219</sup> James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), p. 495 ("the Court can be seen to have accepted that the failure of an injured party to mitigate damage may preclude recovery to that extent").

<sup>220</sup> Rosalyn Higgins, 'Overview of Part Two of the Articles on State Responsibility', in Crawford, J., Pellet, A. and Olleson, S. (eds.), *The Law of International Responsibility* (Oxford University Press) 537, p. 540 ("[I]t would seem that here the Court was making a slightly different point from that which is cited. While implicitly approving the principle of mitigation as articulated by Slovakia, which it had cited immediately before (and which is also reproduced in the Commentary), the Court was stating that measures taken to mitigate could not be those which themselves were wrongful in terms of the legal relationship between the parties. Put differently, wrongfulness in State responsibility is not precluded by the act in question being in mitigation of damages potentially due from the other party for a prior breach of an obligation.")

199. This last mentioned view is also supported by a second case that the ILC cited in support of the existence of the duty to mitigate in the law of State responsibility, the *Well Blowout Control Claim*. The UNCC Panel considered that “under the general principles of international law relating to mitigation of damages [...] the Claimant was not only permitted but indeed obligated to take reasonable steps to [...] mitigate the loss, damage or injury being caused.”<sup>221</sup> Many international commissions and tribunals have endorsed this same position.<sup>222</sup>
200. In addition, various investment law tribunals have affirmed that a duty to mitigate exists. In *Middle East Cement v. Egypt*, the tribunal considered that the “duty to mitigate damages is not expressly mentioned in the BIT. However, this duty can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute.”<sup>223</sup> The *Hrvatska v. Slovenia* tribunal also affirmed a duty to mitigate, stating that “general principles of international law applicable in this case require an innocent party to act reasonably in attempting to mitigate its losses.”<sup>224</sup> Likewise, the *AIG v. Kazakhstan* tribunal affirmed that “[m]itigation of damages, as a principle, is applicable in a wide range of situations. It has been adopted in common law and in civil law countries, as well as in International Conventions and other international instruments.”<sup>225</sup> The *EDF v. Argentina* tribunal considered that “the duty to mitigate damages is a well-established principle in investment arbitration.”<sup>226</sup> In

---

<sup>221</sup> *Well Blowout Control Claim* (Report of 15 November 1996 (S/AC.26/1994/5); 92 AJIL 287, 290. The guidelines of the Governing Council of the United Nations Compensation Commission mention the duty to mitigate, see Governing Council of the United Nations Compensation Commission, Decision of 6 March 1992, S/AC.26/1992/9, ‘Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation’, §6 and Governing Council of the United Nations Compensation Commission, Decision of 4 January 1993, S/AC.26/1992/15, ‘Compensation for Business Losses Resulting from Iraq’s Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause’, § 9(IV)(i).

<sup>222</sup> *Execution of German-Portuguese Arbitral* (Germany, Portugal), Award, 30 June 1930, reprinted in III RIAA 1371-1386; *Eritrea’s Damages Claims*, Eritrea-Ethiopia Claims Commission, Final Award, 17 August 2009, reprinted in 26 RIAA 505, 554; *Alan Craig v. Ministry of Energy of Iran*, Award, 2 September 1983, reprinted in 3 Iran-US Claims Tribunal Reports 280, 289; *Ram International Industries v. Iran and the Islamic Republic of Iran Air Force*, Award, 9 May 1991, reprinted in 26 Iran-US Claims Tribunal Reports 228; *World Farmers Trading v. Government Trading Corporation et al*, Award, 7 July 1989, reprinted in 22 Iran-US Claims Tribunal Reports 204, 212.

<sup>223</sup> *Middle East Cement*, para. 167 (**Ex. CA-322**).

<sup>224</sup> *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Award (17 December 2015), para. 215.

<sup>225</sup> *AIG Capital Partners, Inc. & CJSC Tema Real Estate Co. v. Republic of Kazakhstan* (ICSID Case No. ARB/01/6), Award (7 October 2003), para. §10.6.4(1)). See also *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration Proceeding, Final Award, 14 March 2003, para. 482 (“One of the established general principles in arbitral case law is the duty of the party to mitigate its losses.”) (**Ex. RA-108**).

<sup>226</sup> *EDF International SA and Other v Argentine Republic* (ICSID Case No ARB/03/23), Award, 11 June 2012, paras. 1301-1305 (**Ex. RA-135**).

*Dunkeld*, the tribunal premised the requirement to resort to a domestic compensation process in certain circumstances on the existence of duty to mitigate.<sup>227</sup>

201. As well as being recognized as a principle, several investment tribunals have applied the duty to mitigate. For instance, the *BRIDAS v. Turkmenistan* tribunal reduced compensation of US\$ 495 million by US\$ 50 million due to the claimant's failure to mitigate.<sup>228</sup> In *Achmea v. Slovak Republic*, the tribunal held that the suspension of operations was "a reasonable defensive measure, intended to minimize the risk of further losses," and accordingly rejected the respondent's argument that the claimant failed to mitigate loss.<sup>229</sup>
202. NAFTA contains no express *lex specialis* with respect to the duty to mitigate. As a result, the general rules of State responsibility apply.
203. Having established that, in principle, a duty of mitigation of damages can arise in public international law, including in the context of NAFTA Chapter Eleven, the Tribunal shall now turn to the content of such a duty.
204. By its nature, the duty to mitigate is a restriction on compensatory damages. The rationale of the duty to mitigate damages is to encourage efficiency and to minimize the consequences of unlawful conduct (such as a breach of treaty). The duty to mitigate applies if: (i) a claimant is unreasonably inactive following a breach of treaty; or (ii) a claimant engages in unreasonable conduct following a breach of treaty.
205. The first limb of the mitigation principle concerns the unreasonable failure by the claimant to act subsequent to a breach of treaty, where it could have reduced the damages arising (including by incurring certain additional expenses). The second limb, conversely, concerns the unreasonable incurring of expenses by the claimant subsequent to a treaty breach, which results in increasing the size of its claim.

## **2. Content of Duty of Mitigation in the Present Case**

206. In the present case, there is no suggestion that the Investors have incurred unreasonable expenses after the NAFTA breach, for which they now seek compensation from the Respondent (the second

---

<sup>227</sup> *Dunkeld*, paras. 193-200 (**Ex. RA-115**).

<sup>228</sup> *BRIDAS S.A.P.I.C. et al. v. Government of Turkmenistan et al.*, (ICC Case No. 9058/FMS/KGA), Third Partial Award and Dissent, 2 September 2000, p. 13.

<sup>229</sup> *Achmea BV v. The Slovak Republic* (UNCITRAL, PCA Case No 2008-13 (formerly *Eureko BV v. The Slovak Republic*)), Final Award, 7 December 2012, para. 320.

limb of the mitigation principle). In fact, any expenses incurred in the weeks after the adoption of the JRP Report in 2007 appear to be minimal, and ostensibly directed at influencing or reversing the subsequent decisions of the federal and Nova Scotia Governments. Rather, the Respondent's mitigation argument is focused on the first limb of the mitigation principle. The Respondent contends that the Investors were unreasonably inactive following the NAFTA breach, by failing to have recourse to judicial review of the decisions of the federal and Nova Scotia Government where that could be expected of them.

207. The Tribunal notes that what the Respondent considers judicial review could achieve is not so much the mitigation of the damages incurred by the Investors, but a reversal of the Investors' injury. The Tribunal has doubts, however, that the Investors' duty to mitigate extends so far as to undo the injury (rather than limiting the consequent financial damages).
208. Moreover, the Tribunal observes that it has not found, in the Award on Jurisdiction and Liability or the present Award, that the Investors would have had an automatic right to another JRP process if only they had resorted to judicial review. Rather, as the Respondent and its principal expert on this point, Justice Evans, appear to acknowledge, judicial review would only have offered the Investors the opportunity to try to obtain the right to another JRP process.<sup>230</sup> While Justice Evans regards the granting of such remedy to be likely, "in view of the errors of domestic law identified by the Tribunal",<sup>231</sup> it remains the case that "[t]he grant of relief is in the discretion of the reviewing court".<sup>232</sup>
209. In any event, in the Tribunal's view, judicial review could not have reversed entirely the injury incurred by the Investors in this case (*i.e.* the loss of the opportunity to be subject to a process that was consistent with NAFTA requirements). In its Award on Jurisdiction and Liability, the Tribunal concluded that the conduct of organs of the Canadian Government was inconsistent with NAFTA Chapter Eleven (rather than with Canadian law); whether or not a Canadian court in domestic judicial review proceedings would and could have remedied that specific violation of international law is an open question, on which the Parties have not briefed the Tribunal. Conceptually, however, the loss of an opportunity to have one's project assessed consistently with Canadian law

---

<sup>230</sup> Hearing Transcript, 28 February 2018, p. 2590, lines 7-12 ("In judicial review, the Courts determine the legality, rationality, and procedural fairness of administrative action and will normally provide a remedy when the action under review does not meet these standards."); Hearing Transcript, 28 February 2018, p. 2592, lines 14-17 ("If there are concerns regarding the unfairness or bias against the claimants, the Court could have remitted the EA back to a new panel.").

<sup>231</sup> Evans Report, para. 77 (**Ex. RE-6**); Evans Rejoinder Report, para. 2 (**Ex. RE-14**).

<sup>232</sup> Evans Report, para. 31 (**Ex. RE-6**).



is distinct from the loss of an opportunity to have one's project assessed consistently with an international treaty. It is the loss of the latter opportunity that constitutes the Investors' injury in the present case.

210. Furthermore, in the Tribunal's view it cannot be said that judicial review followed by a new EA would have restored to the Investors the same opportunity that they have lost. Judicial review would have offered a different remedy, with its own advantages and disadvantages, but it could not have fully mitigated the specific injury caused in this case. The qualitative difference of administrative or judicial review and damages claims is recognized NAFTA Article 1121, as the Respondent has rightly pointed out in another context.<sup>233</sup>
211. It is correct that the duty of mitigation under public international law may in principle include recourse to administrative remedies and/or judicial review. In *Dunkeld*, an arbitration arising out of a shareholder challenge of Belize's compulsory acquisition of shares, the tribunal found that Dunkeld was obliged in the specific circumstances to mitigate its loss, and did so on the facts by availing itself of the domestic compensation process in Belize.<sup>234</sup> The paragraph of the *Dunkeld* award which the Respondent cited in its Counter-Memorial underscores that the duty to mitigate may require that the claimant attempt local remedies,<sup>235</sup> especially in circumstances where domestic administrative procedures offer a "more rapid or certain" remedy.<sup>236</sup> However, the *Dunkeld* tribunal emphasized that this duty was limited to *reasonable* steps in the specific circumstances of each case,<sup>237</sup> and that such duty could not lead to the claimant having to forego international remedies.
212. The present case differs in an important respect from *Dunkeld*. *Dunkeld* was concerned with the narrow question of compensation for the direct expropriation of shares for which the Government of Belize established a dedicated domestic valuation process. It was common ground that the Government of Belize had acquired the shares. In the present case, by contrast, the questions that Canadian courts would have considered on judicial review, and that this Tribunal has considered, are the main complex of questions concerning the Respondent's compliance with applicable

---

<sup>233</sup> Hearing Transcript, 28 February 2018, p. 2589, lines 14-24.

<sup>234</sup> *Dunkeld*, para. 196 (**Ex. RA-115**).

<sup>235</sup> Respondent's Counter-Memorial, para. 90, quoting from *Dunkeld*, para. 197 (**Ex. RA-115**).

<sup>236</sup> Investors' Reply, para. 244, citing *Dunkeld*, para. 197 (**Ex. RA-115**).

<sup>237</sup> Respondent's Counter-Memorial, para. 90, quoting from *Dunkeld*, para. 199 (**Ex. RA-115**). The tribunal applies the reasonableness criterion in section 2 below.

Canadian laws and, insofar as this Tribunal is concerned, with NAFTA Chapter Eleven in conducting an EA.

213. Finally, it would seem to this Tribunal that, in assessing what remedies a claimant may be expected to have recourse to in a given case in fulfilment of a duty of mitigation, a court or tribunal should take account of the procedural rights granted to that claimant under the underlying treaty. In particular, the mitigation requirement must not lead to the imposition of a requirement of exhausting local remedies where there is none provided for in the treaty. Many forms of injury for which NAFTA Chapter Eleven provides a forum for damages claims might in theory be mitigated by pursuing local remedies, possibly involving several layers of court review. The NAFTA drafters did not intend to require claimants to systematically pursue local remedies before recovering their losses in international proceedings. The Tribunal must give effect to that judgment of the parties to NAFTA (“NAFTA Parties”) and avoid introducing a local remedies requirement through the backdoor of mitigation.<sup>238</sup>
214. For all these reasons, the Tribunal finds that in the present case the duty of mitigation of damages did not entail a duty to challenge the JRP Report through local judicial review.

### **3. Reasonableness of Non-Pursuit of Judicial Review after the Treaty Breach**

215. In any event, even if one considered that the duty of mitigation of damages in the present case did extend to judicial review, the Tribunal finds that it was not unreasonable for the Investors to refrain from seeking to re-establish the lost opportunity of having their project assessed consistently with NAFTA through judicial review proceedings.
216. After the JRP Process had proceeded the way it did, it was not unreasonable for the Investors to assume that it would be difficult to rebuild the relationship with the local population around Whites Point. Following the JRP Process, a significant proportion of the local population was opposed to the Investors and their project.<sup>239</sup> The Tribunal recalls that, in the first phase of these proceedings, it was presented with evidence of vandalism against the Investors’ property and

---

<sup>238</sup> *Dunkeld*, para. 197 (**Ex. RA-115**) (There is no strict link between the duty to mitigate and the requirement to exhaust local remedies); *see also* Thomas Wälde and Borzu Sabahi, ‘Compensation, Damages and Valuation’ in Peter T. Muchlinski, Federico Ortino, Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (OUP 2008) 1097 (“...reasonable, practically and easily available domestic remedies do have to be used to mitigate damages, but that should be within a relatively wide ‘margin of appreciation’ for the claimant. The mitigation principle should also not be used to bring in through the back door the principle of exhaustion of domestic remedies when the treaties have clearly excluded it”).

<sup>239</sup> Award on Jurisdiction and Liability, paras 507-14.

threats against them and their supporters while the EA process was ongoing.<sup>240</sup> The point here is not, as the Investors have argued, that there was an environment of systematic bias against the Investors within the Canada's federal or provincial Governments (a proposition that the Tribunal does not regard as established);<sup>241</sup> rather, the Tribunal accepts that there was a reasonable basis for the Investors to judge that, even if they succeeded in judicial review, such legal remedy would not necessarily undo the loss of their opportunity. Successful judicial review may not have returned to them the opportunity they lost, given the persisting effects of the NAFTA breach on the ground.

217. The Tribunal also considers that it was not unreasonable for the Investors to conclude, as they did, that a do-over of the environmental assessment would have been costly. As Mr. Buxton has testified, the data submitted during the original EA was unlikely to be current enough to be resubmitted to a new JRP.<sup>242</sup> The Tribunal tends to regard Mr. Buxton's view as more plausible than the Respondent's suggestion, based on Justice Evans' report, that the same expert reports could have been resubmitted in essentially the same form.<sup>243</sup> In any event, the Tribunal has no doubt that the Investors were reasonably advised by their technical consultant, Mr. Buxton, that the costs of a new EA would be significant.
218. Accordingly, the Tribunal finds that it was not unreasonable for the Investors in the specific circumstances of the case to refrain from engaging in judicial review.
219. In reaching this conclusion, the Tribunal expressly leaves open the question whether mitigation measures might have been reasonably expected of the Investors to minimize the size of a claim for lost profits. One might have expected the Investors actively to have identified other quarry projects, in Canada or elsewhere, that could have met the Investors' needs for the five decades to come. One might equally contemplate whether, in a "but for" scenario where the profitable operation of a quarry at Whites Point for five decades was virtually certain, the Investors would have been expected to seek approval of a redesigned quarry project through a new EA application. Given its conclusion above that the Investors have not established causation in respect of lost

---

<sup>240</sup> Memorial of the Investors, para. 201, citing Joint Review Panel Public Hearing Transcript, Vol. 9, 26 June 2007, at 5:2125, 6:2125, 8:2125, 10:2125, 11:2125, and 16:2125 (**Ex. C-162**).

<sup>241</sup> Investors' Reply, para. 240.

<sup>242</sup> Buxton Reply Statement, para. 46.

<sup>243</sup> Respondent's Counter-Memorial, para. 98, citing Evans Report, para. 79 (**Ex. RE-6**).

profits, however, the Tribunal is not required to make any findings with regard to such a “but for” scenario.

## VI. CALCULATION OF DAMAGES

220. Having determined the heads of damages to which the Investors are entitled, the Tribunal shall now turn to the quantification of such damages. It is evident that the amount of damages to be awarded is closely related to questions of causation and mitigation. The Parties have presented arguments on quantum in respect of different, mutually exclusive causation and mitigation scenarios:

- Were the Tribunal to find that the Respondent’s NAFTA breaches could have been mitigated easily, the Respondent argues that the Investors should be entitled only to the costs they would have incurred to mitigate their losses (“Mitigation Costs”).
- Were the Tribunal to find that the Respondent’s NAFTA breaches cannot be proven to have affected the ultimate result of the permit application, the Respondent argues that the Investors should be entitled only to the reimbursement of the costs of the faulty JRP Process, having lost a fair opportunity to have their application considered but no more (“JRP Process Costs”).
- Were the Tribunal to conclude that, but for the breach, the permit would have been granted and the Whites Point Project would have proceeded, the types of damages to be awarded by the Tribunal would be different. Under this scenario, the Investors argue that they should be awarded lost profits on the basis of a discounted cash flow (“DCF”) method (“Projected Lost Profit”).<sup>244</sup> The Respondent, on the other hand, argues that, since the investment was never in operation and its future profitability is uncertain, the Investors are only entitled to damages equivalent to their actual investment costs (“Investment Costs”).<sup>245</sup>

221. The Tribunal has already determined that the Investors are entitled to compensation equivalent to the value of the opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner. In its analysis below, the Tribunal will thus address only the

---

<sup>244</sup> Investors’ Reply, paras. 174-204.

<sup>245</sup> Respondent’s Counter-Memorial, paras. 107-115.

quantification of that opportunity. Before doing so, however, the Tribunal will briefly restate the Parties' positions in respect of the various causation and mitigation scenarios discussed by them.

**A. THE PARTIES' VALUATION UNDER VARIOUS CAUSATION AND MITIGATION SCENARIOS**

222. As noted above, the Respondent's primary case is that the Tribunal should award no damages to the Investors.<sup>246</sup> In the alternative, the Respondent suggests that the Investors might be entitled to Mitigation Costs; in the further alternative, the Respondent considers that the Investors might be entitled to JRP Process Costs; and in the further alternative, the Respondent argues that the Investors should at most be entitled to sunk Investment Costs. The Respondent's three alternative approaches to valuation are summarized below. The Tribunal will finally summarize the Investors' case for Projected Lost Profit.

**1. Mitigation Costs**

223. Under the first scenario, the assumption is that it would have been possible for the Investors to mitigate all their losses suffered as a result of the NAFTA breaches by the Respondent by means of domestic judicial review, which would have been followed by a fresh and untainted JRP Process.

**a. The Respondent's Position**

224. As noted above, the Respondent submits that, pursuant to the Investors' obligation to mitigate their losses, the damage incurred by the Respondent's NAFTA breaches would have been easily and effectively cured, had the Investors pursued their remedies before Canadian domestic courts. Accordingly, the Investors would be entitled to total costs of C\$ 1,150,644.<sup>247</sup> The amount proposed by the Respondent is based on the Expert Report of Mr. Darrell B. Chodorow of the Brattle Group ("Brattle Group Report") which. The mitigation costs include: (i) legal costs in the judicial review process: C\$ 77,982;<sup>248</sup> and (ii) costs of remitting the assessment back to a newly constituted JRP: C\$ 1,072,662.<sup>249</sup>

---

<sup>246</sup> Respondent's Counter-Memorial, para. 84; Hearing Transcript, 19 February 2018, p. 155, line 23 – p. 156, line 17, p. 212, line 7-10.

<sup>247</sup> Respondent's Counter-Memorial, paras. 97-98, referring to Evans Report (**Ex. RE-6**); Expert Report of The Brattle Group (Mr. Darrell B. Chodorow), 9 June 2017 ("Brattle Group Report") (**Ex. RE-5**).

<sup>248</sup> Respondent's Counter-Memorial, para. 97, citing Brattle Group Report, Table E.16 (**Ex. RE-5**).

<sup>249</sup> Respondent's Counter-Memorial, para. 98, citing Brattle Group Report, Table C.3 (**Ex. RE-5**).

**b. The Investors' Position**

225. The Investors do not expressly dispute the Respondent's calculation, since they exclusively argue that they are entitled to recover lost profits and focus their valuation of damages on that presumption.

**2. JRP Process Costs**

226. Under the second scenario, the assumption is that a different JRP Process conducted on a basis that was consistent with NAFTA might still have led to the rejection of the Whites Point Project, either as a result of the recommendation of the JRP or as a result of the Government's exercise of its discretion in deciding on the approval of the Whites Point Project.

**a. The Respondent's Position**

227. In this scenario, the Respondent submits that the Investors can only recover the costs incurred by Bilcon of Nova Scotia in the JRP Process which, first, can be substantiated, and, secondly, occurred when the JRP Process was ongoing, *i.e.* between 3 November 2004 (the date when the JRP was established) and 22 October 2007 (the date when the JRP issued its Report),<sup>250</sup> as this is the period during which the Tribunal found that the Respondent's violations of NAFTA took place: "The JRP could not have taken any actions either before it was constituted or after it submitted its Report."<sup>251</sup>
228. The Respondent submits that the amount of damages has to be proven by the Investors and can by no means exceed C\$ [REDACTED]. In arriving at this number, the Respondent refers to the Brattle Group Report, pursuant to which the following estimates are made: (i) payment to individuals and firms contributing to the EA ("Consulting Experts"): C\$ [REDACTED] (ii) payments to government entities for the JRP itself and related costs ("Panel Costs"): C\$ [REDACTED] and (iii) payments for office and operational expenses ("Office & Operations"): C\$ [REDACTED]. Yet,

---

<sup>250</sup> Respondent's Counter-Memorial, para. 102.

<sup>251</sup> Respondent's Rejoinder, para. 119.

<sup>252</sup> Respondent's Counter-Memorial, paras. 103-105.

<sup>253</sup> Respondent's Counter-Memorial, para. 105, citing Brattle Group Report, para. 52 (**Ex. RE-5**).

according to the Respondent, as of the date of the submission of the Respondent's Rejoinder, only C\$ [REDACTED] of said amount had been substantiated.<sup>254</sup>

**b. The Investors' Position**

229. In their written submissions, the Investors do not expressly dispute the Respondent's calculation, since they exclusively argue that they are entitled to recover lost profits and focus their valuation of damages on that presumption.
230. However, some objections to the Respondent's assumptions are found in the Reply Witness Statement of Mr. Paul Buxton ("Buxton Reply Statement"), in which Mr. Buxton notes that "all of the costs incurred by the Investors in relation to the environmental assessment should be included in the calculation of historic costs,"<sup>255</sup> and the calculation should cover the period from the end of May 2002 (the moment when Mr. Buxton started preparing a study on the Whites Point Project) to 17 December 2007 (the date when the Whites Point Project was formally rejected by the Respondent).<sup>256</sup>

**3. Actual Investment Costs or Projected Lost Profits**

231. Under the third scenario, the assumption is that, had there been no breach, the permit to operate the Whites Point Project would have been granted, and the Whites Point Project would have been brought to profitable operation. Assuming such a "but for" scenario, the Parties disagree on the type of compensation/damages to which the Investors are entitled. The Investors contend that they are entitled to compensation of their lost profits, to be calculated on the basis of a DCF approach. The Respondent submits that the Investors are entitled at most to a reimbursement of their actual investment costs. Moreover, even assuming that the Investors should be compensated for lost profits, the Parties disagree as to the methodology for quantifying such lost profits.

**a. Actual Investment Costs**

232. The Respondent contends that the Investors are entitled at most to a reimbursement of the actual investment costs, because the Whites Point Project "is not a going concern, does not have a

---

<sup>254</sup> Respondent's Rejoinder, para. 124, citing Expert Rejoinder Report of The Brattle Group (Mr. Darrell B. Chodorow), 6 November 2017, para. 41, Table 3 ("Brattle Group Rejoinder Report") (**Ex. RE-13**).

<sup>255</sup> Buxton Reply Statement, para. 79.

<sup>256</sup> Buxton Reply Statement, paras. 70-78.

sufficient history of dealings, or has no legal right to exploit the project site.”<sup>257</sup> The Investors, on the other hand, object to compensation assessed on the basis of investment costs.

i. The Respondent’s Position

233. Should the Tribunal conclude that the Investors’ Whites Point Project would have been approved, the Respondent argues that the Tribunal should award compensation only for the actual amount invested by the Investors.<sup>258</sup>
234. In support of its position, the Respondent cites the awards in *Metalclad*,<sup>259</sup> *Siemens A.G. v. The Argentine Republic*,<sup>260</sup> *PSEG Global Inc. et al v. Republic of Turkey*,<sup>261</sup> *Wena Hotels v. Egypt*,<sup>262</sup> *Windstream Energy v. Canada*,<sup>263</sup> *Vivendi Universal et al v. Argentine Republic*,<sup>264</sup> *Caratube International Oil Company LLP v. Republic of Kazakhstan*,<sup>265</sup> and *Copper Mesa Mining Corporation v. Republic of Ecuador*.<sup>266</sup> The Respondent submits that, in these cases, the tribunals denied the claimants’ claims for lost profits and instead awarded investment or sunk costs principally because the investments were not going concerns, as they were still in planning or early development stages.

---

<sup>257</sup> Respondent’s Counter-Memorial, para. 115; Hearing Transcript, 19 February 2018, pp. 253-257.

<sup>258</sup> Respondent’s Counter-Memorial, para. 107, referring to ILC Articles Commentary, Article 36, commentary (27) (**Ex. RA-60**); B. Sabahi and L. 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*, *Journal of Damages in International Arbitration*, Vol. 3, No. 2, September 2016, p. 97 (**Ex. RA-135**).

<sup>259</sup> Respondent’s Counter-Memorial, para. 108, citing *Metalclad*, para. 120 (**Ex. RA-41**).

<sup>260</sup> Respondent’s Counter-Memorial, para. 109, citing *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007, paras. 362-389 (**Ex. RA-136**).

<sup>261</sup> Respondent’s Counter-Memorial, para. 109, citing *PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award, 17 January 2007, paras. 313-315 (**Ex. RA-59**).

<sup>262</sup> Respondent’s Counter-Memorial, para. 110, citing *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Award, 8 December 2000, paras. 119, 123 (**Ex. RA-83**).

<sup>263</sup> Respondent’s Counter-Memorial, para. 111, citing *Windstream Energy LLC v. Canada* (PCA Case No. 2013-22), Award, 27 September 2016, para. 475 (“*Windstream*”) (**Ex. RA-146**).

<sup>264</sup> Respondent’s Counter-Memorial, para. 112, citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Award, 20 August 2007, paras. 8.3.5-8.3.11 (“*Vivendi*”) (**Ex. RA-143**).

<sup>265</sup> Respondent’s Rejoinder, para. 132-33, citing *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13), Award, 27 September 2017, paras. 1102, 1105-1118, 1164 (**Ex. RA-157**).

<sup>266</sup> Respondent’s Rejoinder, para. 132-33, citing *Copper Mesa Mining Corporation v. Republic of Ecuador* (UNCITRAL), Award, 15 March 2016, paras. 7.24, 7.27, 11.4 (**Ex. RA-158**).



235. The situation is the same in the present case, as “the Whites Point project was not a going concern, had no proven track record of profitability, and was never even constructed,”<sup>267</sup> and a contemporaneous detailed business plan was lacking.<sup>268</sup> In addition, “there is an apparent disconnect between the Claimants’ production and sales plan,” which demonstrates how the Whites Point Project was in the early stage of development.<sup>269</sup>
236. Moreover, the Respondent submits that “Bilcon of Nova Scotia was never supposed to be a profit engine.”<sup>270</sup> Rather, Bilcon of Nova Scotia was established to [REDACTED]  
[REDACTED]  
[REDACTED]
237. The Respondent also points to several cases in which arbitral tribunals, [REDACTED]  
[REDACTED] expressed concerns over the uncertainties surrounding the calculation of loss by the use of DCF and ultimately rejected this valuation methodology.<sup>272</sup> Therefore, as Bilcon of Nova Scotia [REDACTED]  
[REDACTED] there is strong reason for the Tribunal to reject the DCF valuation.<sup>273</sup>
238. As regards the *Crystallex* and *Gold Reserve* awards (relied upon by the Investors), the Respondent acknowledges that the tribunals in question awarded lost profits as compensation to the claimants notwithstanding the incipient state of their investments. Nevertheless, the Respondent argues that the facts in those two cases are different from the present one. Namely, in *Crystallex*, the Respondent asserts that the claimant in that case satisfied its burden to prove that Bolivia had deprived the profits the claimant would have actually earned “given the “breath of activities” undertaken by the claimant to bring the mine to a “shovel-ready” state, and the

---

<sup>267</sup> Respondent’s Rejoinder, para. 133.

<sup>268</sup> Respondent’s Rejoinder, paras. 135-137, referring to *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016, para. 759 (“*Rusoro*”) (**Ex. CA-345**); *Crystallex*, para. 878 (**Ex. CA-317**).

<sup>269</sup> Respondent’s Rejoinder, para. 138.

<sup>270</sup> Hearing Transcript, 28 February 2018, p. 2574, lines 19-20.

<sup>271</sup> Hearing Transcript, 28 February 2018, p. 2574, line 25 – p. 2575, line 3.

<sup>272</sup> Respondent’s Counter-Memorial, para. 111; Respondent’s Rejoinder, para. 141, referring to *Windstream*, para. 475 (**Ex. RA-146**); *Waguilh Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15), Award, 1 June 2009, paras. 510, 567-570 (**Ex. CA-335**).

<sup>273</sup> Respondent’s Rejoinder, para. 142.

contemporaneously prepared feasibility studies establishing the size of the deposits.”<sup>274</sup> Similarly, in *Gold Reserve*, the claimant “had vested mining rights”;<sup>275</sup> it was granted required permits, undertook substantial mining work, and established contemporaneous feasibility studies.<sup>276</sup> Yet, the tribunal did not award lost profits in relation to the “North Parcel” to which the claimant had no rights.<sup>277</sup> Likewise, in *Rosoro*, the claimant held a number of concessions and contracts, some of which were in the production stage. Nonetheless, the tribunal rejected the DCF approach, elaborating that it is not a panacea.<sup>278</sup>

239. As a consequence, given the Investors’ lack of a vested right<sup>279</sup> and the “very early stage of project development” of the Whites Point Project (*i.e.* the absence of operating permits and the lack of feasibility study on the deposits),<sup>280</sup> the Respondent submits that the use of DCF is “too remote, uncertain, and speculative.”<sup>281</sup> Instead, “the only appropriate way to value the Whites Point project at the date of the breach would be to examine the amounts Bilcon of Nova Scotia had invested in the project” from 24 April 2002 (the date when Bilcon of Nova Scotia was incorporated) to 22 October 2007 (the date of the breach),<sup>282</sup> amounts that would have to be substantiated by evidence and should not be higher than C\$ [REDACTED]. In arriving at this amount, the Respondent refers to the Brattle Group Report, which lists costs under the following categories: (i) Consulting Experts: C\$ [REDACTED] (ii) Panel Costs: C\$ [REDACTED] (iii) Office & Operations: C\$ [REDACTED] and (iv) payments to buy Nova Stone Exporter Inc.’s (“Nova Stone”) stake in Global Quarry Products (“GQP”, the joint venture between Bilcon of Nova Scotia and Nova Stone): C\$ [REDACTED]

---

<sup>274</sup> Respondent’s Counter-Memorial, para. 113; Respondent’s Rejoinder, para. 130, citing *Crystallex*, paras. 664, 875-876, 880, 945 (**Ex. CA-317**).

<sup>275</sup> Respondent’s Rejoinder, para. 129.

<sup>276</sup> Respondent’s Counter-Memorial, para. 114, citing *Gold Reserve*, paras. 11-12, 578-579 (**Ex. CA-316**).

<sup>277</sup> Respondent’s Counter-Memorial, para. 114; Respondent’s Rejoinder, para. 129, citing *Gold Reserve*, paras. 492, 682, 829 (**Ex. CA-316**).

<sup>278</sup> Respondent’s Rejoinder, para. 130, referring to *Rusoro*, paras. 75, 760, 785 (**Ex. CA-345**).

<sup>279</sup> Respondent’s Rejoinder, para. 131.

<sup>280</sup> Respondent’s Counter-Memorial, para. 116.

<sup>281</sup> Respondent’s Rejoinder, para. 131.

<sup>282</sup> Respondent’s Counter-Memorial, paras. 117-118.

<sup>283</sup> Respondent’s Counter-Memorial, paras. 120-123, citing Brattle Group Report, para. 53 (**Ex. RE-5**); Respondent’s Rejoinder, paras. 145-147, referring to Brattle Group Rejoinder Report, para. 41, Table 2 (**Ex. RE-13**).

<sup>284</sup> Respondent’s Counter-Memorial, para. 123, citing Brattle Group Report, para. 53 (**Ex. RE-5**).

240. The Respondent adds that, for the Investors to be entitled to this amount of damages, they have to first prove that it “is supported by invoice evidence and is therefore verifiable.”<sup>285</sup> As of 6 November 2017 (the date on which the Respondent submitted its Rejoinder), the Respondent argues, the proven amount of the investment costs was C\$ [REDACTED]. That said, since the Investors have not claimed this type of loss, the Tribunal should consider awarding no damages at all to them.<sup>287</sup> Indeed, the Respondent argues that the Investors have not requested a sunk costs award but a lost profits award. Thus, the Tribunal cannot award damages that the Investors have not requested.<sup>288</sup>

ii. The Investors’ Position

241. The Investors elaborate that the principle of full reparation requires that tribunals “[examine] the investor’s actual financial situation and [compare] it with ‘the one that would have prevailed had the act not been committed’”. In other words, the comparison is made with the situation which would have hypothetically prevailed using a ‘but for’ scenario,”<sup>289</sup> *i.e.* the “differential method”. In this respect, the DCF valuation method is used to calculate loss of future profits,<sup>290</sup> where on a balance of probabilities basis<sup>291</sup> “the future cash flow is reasonably ascertainable and not purely speculative,”<sup>292</sup> even if the investment has not yet been operational.<sup>293</sup> For these reasons, the Investors contend that the Tribunal should award them compensation based on the calculation of lost profits.<sup>294</sup> The Investors accordingly decline to specifically address the Respondent’s calculation of their sunk investment costs.

---

<sup>285</sup> Respondent’s Counter-Memorial, para. 123, citing Brattle Group Report, para. 53 (**Ex. RE-5**).

<sup>286</sup> Respondent’s Rejoinder, para. 146, citing Brattle Group Rejoinder Report, para. 41, Table 2 (**Ex. RE-13**).

<sup>287</sup> Respondent’s Rejoinder, para. 144.

<sup>288</sup> Hearing Transcript, 28 February 2018, p. 2503, lines 19-24.

<sup>289</sup> Investors’ Memorial, para. 237, quoting from Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013), pp. 300-301 (**Ex. CA-312**).

<sup>290</sup> Investors’ Memorial, para. 238.

<sup>291</sup> Investors’ Reply, para. 187.

<sup>292</sup> Investors’ Memorial, para. 240, referring to *Crystallex*, para. 874 (**Ex. CA-317**); *Vivendi* (**Ex. CA-320**).

<sup>293</sup> Investors’ Memorial, paras. 241-242, referring to *Crystallex*, paras. 879-880 (**Ex. CA-317**); *Gold Reserve*, paras. 690-691, 863 (**Ex. CA-316**).

<sup>294</sup> Investors’ Memorial, paras. 243-250.

**b. Projected Lost Profits**

242. Assuming that the Investors are entitled to compensation of their lost profits, there remain numerous points of disagreement between the Parties as regards the methodology for quantifying such lost profits, including the valuation date, the assessment of market conditions and associated risks, the projection of future revenue, the projection of costs, and the discount rate to be applied to the projected net cash flow.<sup>295</sup> Moreover, the Parties disagree on the relevance of past transactions and buy-out proposals in connection with the investment.<sup>296</sup> The Investors submit that they are entitled to compensation in the form of lost profits, to be quantified in accordance with a DCF approach. By contrast, the Respondent asserts that a DCF approach should not be relied upon to calculate lost profits, and that at any rate the Investors' DCF model "is rife with flaws that result in a gross overvaluation of the project's potential profits."<sup>297</sup>

i. Valuation Date in respect of Future Earnings

243. The Parties disagree as to whether the valuation of damages (lost profits) should be made based on information available at the date of the breach or the date of the award. While the Investors argue that, for them to be fully compensated, the valuation must be made on the date of award, taking recent developments up to such date into consideration,<sup>298</sup> the Respondent asserts that the date of the breach (22 October 2007) is the appropriate valuation date.<sup>299</sup>

(a) *The Investors' Position*

244. The Investors argue that, to "reestablish the situation which would, in all probability, have existed if that [wrongdoing] had not been committed,"<sup>300</sup> "the appropriate date to value the Investors' investment is the date of the arbitration Award."<sup>301</sup> This will "ensure that the Investors will be properly compensated, by taking into account the events and conditions which have actually

---

<sup>295</sup> Investors' Reply, Part II(B); *cf.* Respondent's Counter-Memorial, Part VII.

<sup>296</sup> Investors' Reply, paras. 205-206; *cf.* Respondent's Counter-Memorial, paras. 135-136.

<sup>297</sup> Respondent's Rejoinder, para. 148.

<sup>298</sup> Investors' Reply, paras. 23-41.

<sup>299</sup> Respondent's Counter-Memorial, para. 107.

<sup>300</sup> *Chorzów*, p. 47 (Ex. CA-327).

<sup>301</sup> Investors' Reply, para. 29.

transpired in the ten years since Canada's wrongdoing."<sup>302</sup> Otherwise, the Tribunal would have to "artificially create a proxy for the market outlook as of the breach date."<sup>303</sup>

245. In support of its position, the Investors refer to the awards in *ADC Affiliate Limited v. Republic of Hungary*, *El Paso Energy International Company v. The Argentine Republic*, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, and *Bernhard von Pezold and Others v. Republic of Zimbabwe*.<sup>304</sup> The different tribunals in these cases essentially ruled that, "where the valuation date was in dispute, compensation for [a] State's illegal conduct (whether it is an expropriation or [a] breach of another treaty provision) should be based on the higher value of the investment at the date of the award" so that the principle of full reparation is respected.<sup>305</sup>

(b) *The Respondent's Position*

246. While the Respondent agrees with the Investors that the principle of full reparation is applicable, it disagrees with the Investors' application of that principle. The Respondent contends that the subject of valuation in this case is the Investors' loss of opportunity to have their Whites Point Project fairly assessed by the Government, and "if the loss of that opportunity is best valued by calculating the lost profits of the Project, then those profits must be calculated as of the date the opportunity was lost," which was 22 October 2007, *i.e.* the date when the JRP issued its Report.<sup>306</sup>
247. Particularly, the Respondent argues that using the date of the Award as the valuation date does not put the Investors back in a position as if the breach had not occurred. Rather, it is the valuation based on "the date immediately prior to the breach" that will result in full reparation.<sup>307</sup> In addition, the Respondent argues that a valuation at the date of the award, as requested by the Investors, would "[enhance] the problem of hindsight."<sup>308</sup> This is because the ability to "choose

---

<sup>302</sup> Investors' Reply, para. 29.

<sup>303</sup> Investors' Reply, para. 30, quoting from Expert Reply Report of Mr. Howard Rosen (FTI Consulting), 23 August 2017, para. 3.8 ("Rosen Reply Report").

<sup>304</sup> Investors' Reply, paras. 34-39, citing *ADC Affiliate Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16) ("*ADC*") (**Ex. CA-323**); *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011, para. 706 ("*El Paso*") (**Ex. CA-330**); *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL, PCA Case No. AA227), 18 July 2014, para. 1763 ("*Yukos*") (**Ex. CA-331**); and *Bernhard von Pezold and Others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15), Award, 28 July 2015 ("*von Pezold*") (**Ex. CA-332**).

<sup>305</sup> Investors' Reply, para. 36.

<sup>306</sup> Respondent's Counter-Memorial, para. 139.

<sup>307</sup> Respondent's Rejoinder, para. 159.

<sup>308</sup> Respondent's Rejoinder, para. 161.

between the ‘better’ of two valuation dates” would allow the Investors “to select, after-the-fact, which valuation date best resolves the risk they faced.”<sup>309</sup> Accordingly, such approach would result in more speculation and allow the Investors to adjust their business plan solely for the objectives of calculating damages.<sup>310</sup> Moreover, the Respondent contends that calculating damages at the date of the Award means that “none of [the Investors’] profits were subject to any risk prior to [that date].”<sup>311</sup>

248. The Respondent submits that the cases cited by the Investors to support their proposition that the valuation be made at the date of the award, should not have any influence on the Tribunal’s consideration for different reasons. First, the *Yukos* award has been set aside.<sup>312</sup> Secondly, the awards in *ADC* and *Von Pezold* cannot be applied to this case because both awards concern unlawful expropriation cases where the value of the expropriated investments significantly increased after the expropriation took place.<sup>313</sup> Lastly, the Respondent points out that all of the cases cited by the Investors involve investments that were going concerns,<sup>314</sup> unlike the Whites Point Project, which was in its early development stage.

(c) *The United States’ Article 1128 Submission*

249. Given the requirement that compensation must be causally related to the breach, the United States suggests that the Tribunal should be cautious when valuing damages at the date of an award instead of at the date of the NAFTA breach in question, as events occurring after the breach may lack “sufficient causal connection to the breach.”<sup>315</sup>

ii. Market Conditions and Associated Risks

250. There is disagreement between the Parties in respect of the market conditions in the New Jersey and New York aggregates markets in the years following the Respondent’s breach, the risk

---

<sup>309</sup> Respondent’s Rejoinder, para. 161, referring to Brattle Group Rejoinder Report, para. 166 (Ex. RE-13).

<sup>310</sup> Respondent’s Rejoinder, para. 161.

<sup>311</sup> Hearing Transcript, 19 February 2018, p. 259, lines 9-10.

<sup>312</sup> Respondent’s Rejoinder, para. 159.

<sup>313</sup> Respondent’s Rejoinder, para. 160, referring to *ADC*, paras. 496-497 (Ex. CA-323); *Von Pezold*, para. 763 (Ex. CA-332).

<sup>314</sup> Respondent’s Rejoinder, para. 160, referring to *ADC*, paras. 164-170 (Ex. CA-323); *El Paso*, paras. 7-14 (Ex. CA-330); *Von Pezold*, paras 118-139 (Ex. CA-332).

<sup>315</sup> The United States’ Submission, para. 27.

associated with the Whites Point Project, and the relevance of such factors for the purposes of determining the Investors' compensation for lost profits.

(a) *The Investors' Position*

251. As a general matter, the Investors emphasize that “the fact of a loss” and “the quantum of that loss” are two different elements. That is, while a claimant is obliged to prove on a balance of possibilities that the fact of a loss is certain, it is not required to prove the exact amount of loss with the same degree of certainty, as such quantification is inherently speculative and difficult to prove, and always involves some degree of estimation.
252. Bearing that in mind, the Investors view the market conditions in which they would have operated but for the breach as very favourable ones. They submit that construction spending in New York City and New Jersey “reached record levels in recent years”<sup>316</sup> and, overall, “stone imports [in the United States] have been growing at an average annual rate of roughly 8% since 1993.”<sup>317</sup> Similarly, the aggregate production in Nova Scotia has consistently risen since 1925.<sup>318</sup> While the Investors admit that the 2008 economic crisis led to difficult years thereafter, they contend that “the market was rebounding” by 2012.<sup>319</sup> Further, they argue that the market entry of products from the Whites Point Project would not have driven down the overall market price, [REDACTED]  
[REDACTED]  
[REDACTED] Lastly, the Investors argue that given their strong record of success and their expertise in the industry, the Whites Point Project would not have encountered project development and permitting risks as asserted by the Respondent (provided that their investment had received “fair, honest, and non-discriminatory treatment” from the Government at the permitting stage).<sup>321</sup>

---

<sup>316</sup> Investors' Memorial, para. 30, citing Expert Report of Mineral Valuation & Capital, Inc. (Mr. John Lizak), 3 November 2016, p. 15 (“Lizak Report”); Expert Report of John T. Boyd Company (Mr. Michael Wick), 5 December 2016, p. 5-1 (“Wick Report”).

<sup>317</sup> Investors' Memorial, para. 31, citing Lizak Report, p. 17.

<sup>318</sup> Investors' Memorial, para. 36.

<sup>319</sup> Investors' Memorial, para. 191, referring to Witness Statement of Mr. Tom Dooley, 9 December 2016, paras. 85-90 (“Dooley Statement”).

<sup>320</sup> Investors' Reply, paras. 49-59, referring to Reply Witness Statement of Mr. Tom Dooley, 18 August 2017, paras. 6-16.

<sup>321</sup> Investors' Reply, paras. 6-16

253. In sum, citing the Expert Reports of Mr. Michael Wick (“Wick Report”) and of Mr. John Lizak (“Lizak Report”), the Investors argue that the regional market has always been robust and that it would have absorbed their aggregates produced at the Whites Point Project.<sup>322</sup> As such, the Investors’ market share in New York City would have [REDACTED]

*(b) The Respondent’s Position*

254. The Respondent emphasizes the negative effect of the 2008 economic crisis. It notes that “market conditions leading up to the global financial crisis were uncertain and that prospects for the aggregates markets were negative,”<sup>324</sup> and that “[i]n particular, construction spending in the United States was in decline, shipments of aggregate had dropped, and the last quarter of 2007 was the seventh sequential downturn in aggregates demand.”<sup>325</sup> According to the Respondent, this assessment is supported by another operators’ decision not to proceed because of the “Financial Meltdown”, despite its project being released from environmental review in 2007.<sup>326</sup> Specifically, citing the Brattle Group Report, the Respondent asserts that “[s]hipments [of] aggregates had dropped by nearly 20% between 2006 and 2007, and the last quarter of 2007, when the alleged breach occurred, was the seventh sequential downturn for aggregates markets.”<sup>327</sup> The Respondent notes that due to this negative market development the proponents of the Belleoram project decided not to proceed notwithstanding the project approval.<sup>328</sup>

255. As regards the supply side, the Respondent contends that the increase in competition due to the market entry of aggregates from the Whites Point Project, equivalent to roughly 2 million tons, would have [REDACTED]

---

<sup>322</sup> Hearing Transcript, 19 February 2018, pp. 83-86, referring to Wick Report; Lizak Report.

<sup>323</sup> Hearing Transcript, 19 February 2018, pp. 83-84, referring to Wick Report.

<sup>324</sup> Respondent’s Counter-Memorial, para. 128, referring to Brattle Group Report, para. 160 (**Ex. RE-5**).

<sup>325</sup> Respondent’s Rejoinder, para. 150, referring to Brattle Group Report, para. 160 (**Ex. RE-5**).

<sup>326</sup> Respondent’s Counter-Memorial, para. 129, citing E-mail from Robert Rose, Continental Stone to Randy Decker, Transport Canada, 3 November 2008 (**Ex. R-360**).

<sup>327</sup> Hearing Transcript, 19 February 2018, p. 270, lines 1-6.

<sup>328</sup> Hearing Transcript, 19 February 2018, pp. 270-271.

<sup>329</sup> Respondent’s Rejoinder, para. 164, citing SCMA Report, para. 80 (**Ex. RE-8**); SCMA Rejoinder Report, para. 53 (**Ex. RE-16**); Hearing Transcript, 19 February 2018, pp. 260-262.



256. In any case, the Respondent rejects the Investors' focus on New York City as its market destination. According to the Respondent, prior to the NAFTA breaches, the Investors had never had the intention to ship the aggregates to New York. The Investors' original business plan in 2004, their environmental impact statement, their information provided to the JRP, Mr. Buxton's testimony, and Mr. Lizak's testimony, always mentioned New Jersey as the primary market destination of the aggregates from the Whites Point Project.<sup>330</sup> In the Respondent's view, the Investors later included New York as its market because "the prices are 45, 50% lower in New Jersey."<sup>331</sup> Therefore, Messrs. Lizak, Wick, and Rosen wrongly focus on the prices of the aggregates in New York in their analyses.<sup>332</sup>
257. Lastly, given the early stage of development of the Whites Point Project when the breach occurred, the valuation has to take into consideration development and permitting risks.<sup>333</sup>

iii. Projected Production Costs

258. The Parties disagree significantly as to the projected amount of the costs of the Whites Point Project. While there are various points to note (as summarized below), the principal difference appears to lie in the estimated yield rate of the aggregate production at the Whites Point Project. Whereas the Investors believe that their facilities [REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED]

(a) *The Investors' Position*

259. Relying upon the Expert Report of LB&W Engineering Inc. ("LB&W Report"), the Investors submit that the total cost for plant and infrastructure was to be US\$ [REDACTED] and the total mobile equipment required for operating the Whites Point Project cost was to be

<sup>330</sup> Hearing Transcript, 28 February 2018, pp. 2539-2572.

<sup>331</sup> Hearing Transcript, 28 February 2018, p. 2573, lines 7-13.

<sup>332</sup> Hearing Transcript, 28 February 2018, p. 2573, line 14 - p. 2574, line 1.

<sup>333</sup> Respondent's Rejoinder, paras. 151-157.

<sup>334</sup> Investors' Reply, para. 99, referring to Reply Witness Statement of Mr. George Bickford, 8 August 2017, paras. 4, 6 ("Bickford Reply Statement").

<sup>335</sup> Respondent's Counter-Memorial, para. 151, citing SCMA Report, paras. 16(3), 92-95, Appendix IV (Ex. RE-8).

<sup>336</sup> Investors' Memorial, para. 162, citing Expert Report of LB&W Engineering Inc. (Michael G. Washer), 8 December 2016, para. 11 ("LB&W Report"); LB&W Report Exhibit 1 (Ex. C-1011).

US\$ [REDACTED] LB&W's calculation is fundamentally based on quarry design information gathered from Messrs. Bickford and Wall.<sup>338</sup> The Investors assert that the total costs of running the Whites Point Project can also be found in Exhibit 11 to the Witness Statement of Mr. Dan Fougere ("Fougere Statement").<sup>339</sup>

260. The Investors dispute the accuracy of the SCMA Report in respect of the calculation of capital and operating costs. In their view, the SCMA Report miscalculates the yield of marketable aggregate and the number of personnel required to operate the plant, and wrongly uses other quarries as comparators to the automated Whites Point Project. Such miscalculations subsequently result in the overestimation of associated costs.<sup>340</sup> Relying upon the Reply Witness Statement of Mr. George Bickford ("Bickford Reply Statement"), the Respondent explains how the plant [REDACTED]

261. The operating costs of the Whites Point Project, which include personnel costs and the maintenance and repair costs over the 50-year lifetime of the Whites Point Project, are specified in tables attached to the Witness Statement of John Wall ("Wall Statement"), the Witness Statement of Mr. Paul Buxton ("Buxton Statement"), the LB&W Report, and the Expert Report of SNC-Lavalin ("SNC Report").<sup>343</sup>

262. The Investors refer to the SNC Report and assert that, for the construction cost of the marine terminal, the estimate provided by Seabulk<sup>344</sup> is reasonable, as it is [REDACTED]

---

<sup>337</sup> Investors' Memorial, para. 164, citing LB&W Report, para. 21; LB&W Report Exhibit 2 (**Ex. C-1012**).

<sup>338</sup> Investors' Memorial, paras. 162, 164, referring to LB&W Report, paras. 1, 4, 10, 12; Witness Statement of John Wall, 8 December 2016, para. 62 ("Wall Statement").

<sup>339</sup> Hearing Transcript, 28 February 2018, pp. 2426-2427, citing Witness Statement of Mr. Dan Fougere, 12 December 2016, Exhibit 11 ("Fougere Statement").

<sup>340</sup> Investors' Reply, paras. 119-122, referring to SCMA Report.

<sup>341</sup> Hearing Transcript, 19 February 2018, p. 71, lines 13-15, referring to Bickford Reply Statement, Exhibit A.

<sup>342</sup> Hearing Transcript, 19 February 2018, p. 78, lines 6-12.

<sup>343</sup> Investors' Memorial, para. 169-72, referring to Wall Statement, paras. 79-80; Wall Statement, Exhibit 8 (**Ex. C-1009**); Wall Statement, Exhibit 9 (**Ex. C-1010**); Witness Statement of Mr. Paul Buxton, 13 December 2016, para. 40 ("Buxton Statement"); Buxton Statement, Exhibit 5 (**Ex. C-1010**); LB&W Report, para. 13; LB&W Report Exhibit 4 (**Ex. C-1013**); Expert Report of SNC-Lavalin Inc. (Christopher Fudge and Ryan MacPherson), 16 November 2016 ("SNC Report").

<sup>344</sup> Investors' Memorial, para. 150.

[REDACTED]

(b) *The Respondent's Position*

263. The Respondent submits that the costs projected by the Investors are “significantly understated” and are different from the ones presented by Bilcon of Nova Scotia to the JRP.<sup>348</sup>

264. Concerning labor and other operating costs, the Respondent argues that the Investors’ estimation is based on a wrong premise, as the Investors [REDACTED]  
[REDACTED] Moreover, some relevant operating costs are missing from Mr. Rosen’s DCF model. As a result, the Respondent submits that additional capital and operating costs resulting from the increasing number of operating hours and labor must be incorporated into the DCF calculation.<sup>350</sup> In particular, the Respondent argues that approximate costs of C\$ [REDACTED] must be added into the calculation.<sup>351</sup>

iv. Projected Shipping Costs

265. The Parties disagree as to the projected costs for shipping aggregate to the New Jersey/New York market. The Investors calculate shipping costs on the basis of estimated freight rates, fuel rates, shipment volumes and average speed. The Respondent argues that the Investors’ calculation is

<sup>345</sup> Investors’ Memorial, paras. 165-166, referring to SNC Report.

<sup>346</sup> Hearing Transcript, 19 February 2018, p. 82, lines 2-6.

<sup>347</sup> Investors’ Memorial, para. 167, citing Witness Statement of William Richard Clayton, 15 December 2016, para. 25.

<sup>348</sup> Respondent’s Counter-Memorial, para. 147.

<sup>349</sup> Respondent’s Counter-Memorial, para. 151, citing SCMA Report, para. 16(3); Respondent’s Rejoinder, para. 169, citing Expert Rejoinder Report of SC Market Analytics, 6 November 2017, para. 46 (“SCMA Rejoinder Report”) (**Ex. RE-16**).

<sup>350</sup> Respondent’s Counter-Memorial, para. 152-53, citing Brattle Group Report, paras. 151-153 (**Ex. RE-5**); Respondent’s Rejoinder, para. 170, citing SCMA Rejoinder Report, para. 50 (**Ex. RE-16**).

<sup>351</sup> Hearing Transcript, 19 February 2018, p. 263, lines 6-9.

based on estimations that are most favourable to the Investors, and provides alternative estimations of the relevant variables.

*(a) The Investors' Position*

266. According to the Investors, they planned to ship the aggregate to New York City and New Jersey [REDACTED] In this regard, Mr. Morrison of Tamarack Resource, Director of Marketing & Customer Service at CSL for approximately 20 years, submitted a report [REDACTED]

267. In addition, the Investors contend that the Expert Report of Dr. Arlie G. Sterling of Marsoft, Inc. ("Marsoft Report") relied upon by the Respondent, is based on faulty assumptions [REDACTED]

*(b) The Respondent's Position*

268. As for the freight cost, the Respondent, referring to the Marsoft Report, argues that Mr. Morrison [REDACTED]

---

<sup>352</sup> Investors' Memorial, paras. 173-175, referring to Wall Statement, para. 56; Dooley Statement, paras. 53-54; Expert Report of Tamarack Coal & Resources Inc. (Mr. Wayne Morrison), 9 December 2016, pp. 2, 9-12, 15 ("Tamarack Report").

<sup>353</sup> Hearing Transcript, 19 February 2018, p. 83, lines 10-12, referring to Fougere Statement; Reply Witness Statement of Mr. Dan Fougere, 18 August 2017 ("Fougere Reply Statement").

<sup>354</sup> Investors' Reply, paras. 123-139, referring to Expert Report of Marsoft, Inc. (Dr. Arlie G. Sterling), 9 June 2017 ("Marsoft Report") (**Ex. RE-7**).

<sup>355</sup> Hearing Transcript, 28 February 2018, p. 2422, lines 5-8.

<sup>356</sup> Hearing Transcript, 28 February 2018, p. 2420, lines 14-18.

<sup>357</sup> Hearing Transcript, 28 February 2018, pp. 2420-2421.

[REDACTED]  
[REDACTED]  
[REDACTED]  
As such, the Respondent submits that the Tribunal should rely on the Marsoft Report in its decision on the correct estimation freight costs.<sup>360</sup>

269. Specifically, the Respondent argues that the Investors would have [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

v. Discount Rate

270. The Parties disagree on the discount rate to be used in the context of a DCF valuation. While the Respondent argues that there are numerous mistakes in the Investors' calculation of the discount rate, the Investors dispute that differences in their approach to discount rates lead to any methodological flaws.

(a) *The Investors' Position*

271. The Investors argue that while the FTI Valuation and the Brattle Group Report adopt different approaches in designating the discount rate, this does not lead to "methodological flaws".<sup>364</sup> In

<sup>358</sup> Respondent's Counter-Memorial, para. 148, referring to Marsoft Report (**Ex. RE-7**).

<sup>359</sup> Respondent's Counter-Memorial, para. 149, referring to Expert Report of Mr. Howard Rosen (FTI Consulting), 15 December 2016 ("Rosen Report").

<sup>360</sup> Respondent's Counter-Memorial, para. 150.

<sup>361</sup> Hearing Transcript, 19 February 2018, p. 264, lines 15-16.

<sup>362</sup> Respondent's Rejoinder, para. 168, citing Expert Rejoinder Report of Marsoft Inc. (Dr. Arlie G. Sterling), 6 November 2017, paras. 49-51 ("Marsoft Rejoinder Report") (**Ex. RE-15**); McLean Statement, para. 24 (**Ex. RW-1**); Respondent's Counter-Memorial, para. 147, citing Digby Neck/Islands Economic Profile, Gardner Pinfold Report (February 2006), p. 4 (**Ex. R-279**).

<sup>363</sup> Hearing Transcript, 19 February 2018, p. 264, lines 22-25.

<sup>364</sup> Investors' Reply, para. 140, citing Rosen Reply Report, para. 5.72.

fact, Mr. Rosen has agreed with the Brattle Group Report's approach in one respect—regarding the “unlevered betas”, which results in a reduction of Mr. Rosen's discount rate from 5.78% to 5.41%. Ultimately, Mr. Rosen submits that, by adopting all the adjustments that the Brattle Group Report points out, the discount rate would decrease from 5.78% to 5.10%.<sup>365</sup>

*(b) The Respondent's Position*

272. The Respondent contends that Mr. Rosen made four mistakes when he calculated the discount rate. First, he relied on a backward-looking cost of debt input in calculating forward-looking cash flows. Secondly, he incorrectly calculated the “unlevered betas” underlying his own discount rate. Thirdly, he applied a wrong formula to convert his own nominal discount rate to a real discount rate. Lastly, he used only the 2017 and 2018 inflation rates “when longer-term rates would have been more appropriate.”<sup>366</sup>

vi. Past Transactions and Other Comparable Transactions in the Market

273. The Parties disagree over the use of pre-breach transactions or proposed transactions as “market indicators” of the value of the Whites Point Project for the purposes of determining the Investors' compensation for lost profits.

*(a) The Investors' Position*

274. The Investors assert that these transactions are in no way relevant to their lost profits. They refer to the Expert Reply Report of Mr. Howard Rosen (“Rosen Reply Report”), in which Mr. Rosen notes that “[f]ull reparations are ultimately concerned with the perspective of the Investors rather than the views of the general market.”<sup>367</sup> In any case, according to the Investors, these past transactions referred to by the Respondent do not represent accurate market indicators as they either took place at the time when the Whites Point Project was still at its very early stage or were not in the Investors' interest.<sup>368</sup>

---

<sup>365</sup> Investors' Reply, para. 141, citing Rosen Reply Report, paras. 5.72, A2.4-A2.5, A2.17; 5.73, A2.18.

<sup>366</sup> Respondent's Counter-Memorial, para. 154, citing Brattle Group Report, paras. 124-127 (Ex. RE-5).

<sup>367</sup> Investors' Reply, para. 206-207, citing Rosen Reply Report, paras. 4.4-4.5, 4.7.

<sup>368</sup> Investors' Reply, para. 208, citing Buxton Reply Statement, paras. 83-84, 88-90, 92-94; Reply Witness Statement of William Richard Clayton, 21 August 2017, paras. 4-5, 7-9, 13-15 (“Clayton Reply Statement”).

*(b) The Respondent's Position*

275. Conversely, the Respondent argues that the Investors' DCF valuation "is exponentially higher than their past behavior and other market indicators."<sup>369</sup> Thus, "[t]hese transactions illustrate the excessive results that the Investors' DCF calculation of lost profits produces."<sup>370</sup>

**4. The Tribunal's Comments on the Valuation Approaches Proposed by the Parties**

276. As the Tribunal has noted above, the Investors have failed to prove, to the standard applicable under international law, that the Whites Point Project would have obtained environmental approval. The Tribunal's analysis of the Investors' lost profits claim ends here, as, without a high degree of certainty as to regulatory approval, it goes without saying that no damages based on the profitable operation of the quarry can be awarded.

277. In view of the volume of the evidence exchanged by the Parties regarding the business plan for the Whites Point Project's operation, which the Tribunal has carefully reviewed, the Tribunal would nonetheless add that, even in the event of an approval, the long-term future profitability of the Whites Point Project must be regarded as uncertain. This is notably due to (i) possible changes in the Bay of Fundy ecology; (ii) possible new environmental regulations affecting quarry operation and/or shipping; (iii) possible market changes affecting the need for basalt over time; and (iv) possible macro-economic changes that may occur over the five decades of the projected life of the quarry.

278. While uncertainty may in principle be reflected in DCF valuations, many tribunals have declined to resort to DCF valuations of future profits where the investment is not yet a going concern, which has not generated any historic cash flows. In the present case, the uncertainty affecting future income streams is particularly pronounced. Not only was the quarry not a going concern so that future cash flows, positive and negative, are difficult to predict; more significantly, the evidence before the Tribunal is such that the Tribunal cannot, with a sufficient degree of confidence, conclude that the Whites Point Project could have generated long-term profits.

279. The Tribunal therefore concludes that, even if it had found (contrary to its determination above) that environmental approval for the Whites Point Project would have been a virtual certainty, it

---

<sup>369</sup> Respondent's Rejoinder, para. 172, citing Brattle Group Rejoinder Report, para. 140, Figure 8 (Ex. RE-13).

<sup>370</sup> Respondent's Rejoinder, para. 173, citing Brattle Group Rejoinder Report, para. 122 (Ex. RE-13).

would nonetheless have declined to award the Investors lost profits/compensation valued in terms of future earnings.

**B. THE TRIBUNAL'S VALUATION OF THE OPPORTUNITY LOST BY THE INVESTORS**

280. The Tribunal must now address the value of the opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner, which it has found the Investors have lost as a result of the Respondent's breach of NAFTA. There are several indicators of value in the evidence on the record, to which the Tribunal will have regard.

**1. Primary Indicator of Value: Amounts Expended by the Investors**

281. As a first and significant indicator of the value of the lost opportunity, the Tribunal has regard to the expenditures incurred by the Claytons in pursuing the opportunity of developing a quarry site at Digby Neck. From an economic perspective, the value of the opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner is broadly equivalent to the value of the opportunity to develop the quarry site subject to the EA, as the EA was a significant milestone on the path toward building the quarry, and there was no other reason to undertake the EA than the intended quarry development. In the Tribunal's view, it is appropriate to take account of all expenses reasonably incurred by the Claytons (i) in the preparation for the environmental assessment, (ii) during the JRP Process, and (iii) immediately after the JRP Process to prevent and react to negative decisions from the Nova Scotia and federal Ministers.

282. The rationale for this approach is simple: based on the evidence presented to it, the Tribunal has no doubt that the Claytons have generally conducted their business operations like rational business people. The Tribunal finds that this is also true in respect of their engagement in Nova Scotia. Accordingly, the expenditures incurred by the Claytons, while not conclusive proof of the value of their investment, may be presumed to stand in an objective relationship to the value of the opportunity pursued. The expenditures are, in other words, an indicator for the value that a rational business person would have seen in the opportunity presented by the Whites Point Project in its pre-approval stage.

283. The expenditures made by the Claytons in pursuance of the opportunity of the development of a quarry at Digby Neck are not substantially disputed between the Parties. While the Investors' representative in Nova Scotia, Mr. Buxton, estimates the expenditures to amount to



C\$ [REDACTED] the Respondent's expert arrives at a slightly lower global figure of C\$ [REDACTED]. The latter figure was confirmed by the CFO of the Clayton Group of Companies (the "Clayton Group"), Mr. Forestieri, at the hearing. The Tribunal, having reviewed the compilation of expenditures in Annex C to the Brattle Group Report, adopts the figure of C\$ [REDACTED] as a starting point.

284. The Tribunal notes, however, that it would be appropriate to take account of additional expenditures that would have been generated in the immediate aftermath of the negative recommendations of the JRP. Following years of engagement with government entities at the federal and provincial level, it was reasonable for the Investors to seek to protect or restore their opportunity by engaging with government officials and ministers in the face of the negative JRP recommendations. In contrast, expenditures that relate to the preparation of a legal case against the Respondent, as they appear to have been occurred as of 2008, are not relevant indicators of the value of the Investors' opportunity. The Tribunal considers that expenditures incurred up to December 2007 should be taken into account in establishing the value of the Investors' lost opportunity.
285. The Tribunal is inclined to make a deduction in respect of the remaining value of Nova Stone's share in GQP, which was ultimately absorbed by Bilcon of Nova Scotia. In the Tribunal's view, there is no reason to assume that the value of that stake would have completely disappeared after the JRP's negative recommendations, although one may certainly expect that its value would have declined. The Tribunal understands that nothing would have precluded another company from taking over the lease over the quarry site with a view to developing a quarry itself, at a price that would have reflected the opportunities presented by the site as well as the (by then confirmed) permitting risks.
286. The fact that the Investors have not submitted payment slips or receipts in respect of all invoices making up the amount referred to above is not relevant here.<sup>373</sup> The Tribunal recalls that it is not seeking to establish the amounts invested by the Claytons with a view to ordering their reimbursement to the entity that paid them. Rather it is seeking to establish the expenditures that were necessary to generate the opportunity lost by the Investors in the present case. Invoices are suitable documentation for the expenditures that were necessary.

---

<sup>371</sup> Buxton Statement, para. 33; Buxton Reply Statement, para. 65.

<sup>372</sup> Brattle Group Report, Table 2 (**Ex. RE-5**). *See also* Brattle Group Report, Annex C, Table C.1 (**Ex. RE-5**).

<sup>373</sup> Brattle Group Rejoinder Report, Appendix C, Table C.1 (**Ex. RE-13**).

287. In conclusion, the Tribunal finds that the minimum value of the opportunity lost by the Investors must have been in the order of C\$ [REDACTED] (or US\$ [REDACTED]) corresponding approximately to the amount expended by the Claytons in pursuing the investment in Nova Scotia until it had become apparent in late-2007 that the federal and provincial decisions denying the EA approval would not be reversed.

## 2. Secondary Indicators of Value: Past Transactions Regarding the Quarry Site

288. The amount of C\$ [REDACTED] however, does not reflect any prospect that return on the investment might have been generated in the event of the successful permitting, construction and operation of the Whites Point Project. No reasonable business person would spend over US\$ [REDACTED] on an opportunity whose value does not exceed that amount by some reasonable margin. As the *Gemplus* tribunal has noted, even where income-based approaches are inappropriate in view of the uncertainty of future income streams, the prospect of future earnings must not be disregarded entirely. Such prospects inform the value of the opportunity that a claimant has lost.<sup>375</sup>

289. In establishing the value of the opportunity lost by the Investors in the present case, the Tribunal need not rely solely on an “exercise of its arbitral discretion”,<sup>376</sup> as the *Gemplus* tribunal appears to have done. Rather, the Tribunal has the benefit of being able to refer to certain past transactions made in relation to the Whites Point Project site, which allow it to establish an implied value range of the investment opportunity presented by the Whites Point Project, as it was seen by economic operators at different points in time. Three transactions in particular have been discussed by the Parties.

290. First, in 2002, Bilcon of Nova Scotia paid US\$ [REDACTED] to acquire a [REDACTED] from Nova Stone. Against this backdrop, Bilcon of Nova Scotia and Nova Stone entered into a [REDACTED] pursuant to which the partnership named GQP was formed (“2002 GQP Formation”). The Respondent’s expert, Mr. Chodorow, asserts that the total value of the whole business of GQP contingent upon permitting would be US\$ [REDACTED] at the

---

<sup>374</sup> C\$ 1 : US\$ 1.0259; average closing exchange rate during the month of October 2007, as indicated by the Bank of Canada (<https://www.bankofcanada.ca/rates/exchange/legacy-noon-and-closing-rates/>) (accessed on 1 October 2018).

<sup>375</sup> *Gemplus S.A., SLP S.A., and Gemplus Industrial S.A. de C.V. v. The United Mexican States* (ICSID Cases No. ARB(AF)/04/3), Award, 16 June 2010, paras. 13-70 (“*Gemplus*”) (Ex. CA-321).

<sup>376</sup> *Id.*, paras. 13-100.

time of the transaction in 2002.<sup>377</sup> On the other hand, the Investors argue that the purchase price did not reflect the true value of the Whites Point Project as it failed to take into account “the unique circumstances and qualities of buyers and sellers”, [REDACTED]

291. Second, in 2004, GQP decided to dissolve its partnership. To complete the dissolution, Nova Stone agreed to sell its [REDACTED] in GQP to Bilcon of Nova Scotia for US\$ [REDACTED] (“2004 GQP Buyout”). Consequently, according to Mr. Chodorow, the value of the Whites Point Project absent relevant permits in 2004 was roughly US\$ [REDACTED]. Mr. Buxton however contends that this amount did not reflect the true value of the Whites Point Project [REDACTED]

292. Thirdly, [REDACTED]

---

<sup>377</sup> Brattle Group Report, para. 75 (Ex. RE-5).

<sup>378</sup> FTI Reply Report, para. 4.20.

<sup>379</sup> Brattle Group Report, paras. 78-79 (Ex. RE-5).

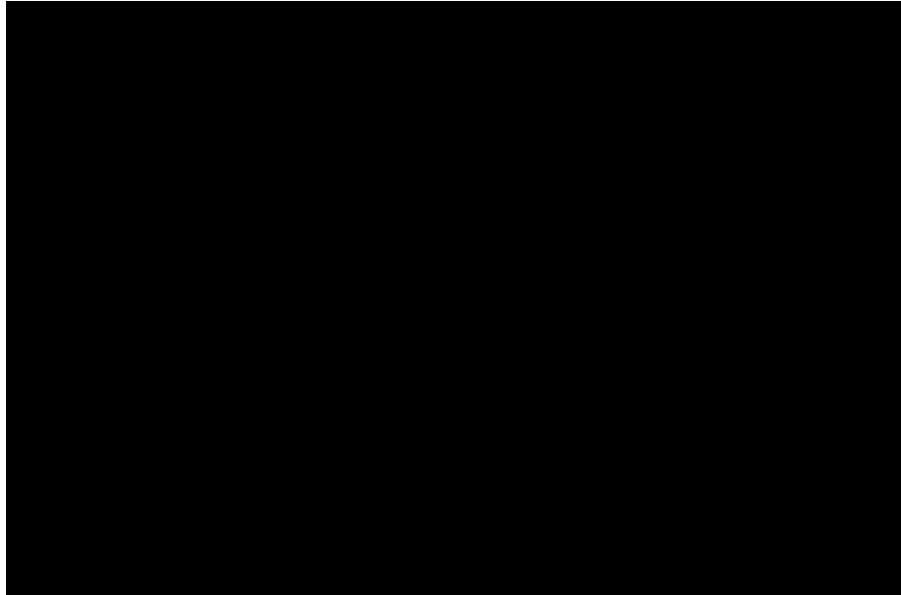
<sup>380</sup> Buxton Reply Statement, para. 92.

<sup>381</sup> Brattle Group Report, para. 80 (Ex. RE-5).

<sup>382</sup> Brattle Group Report, para. 80 (Ex. RE-5); FTI Reply Report, para. 4.25.

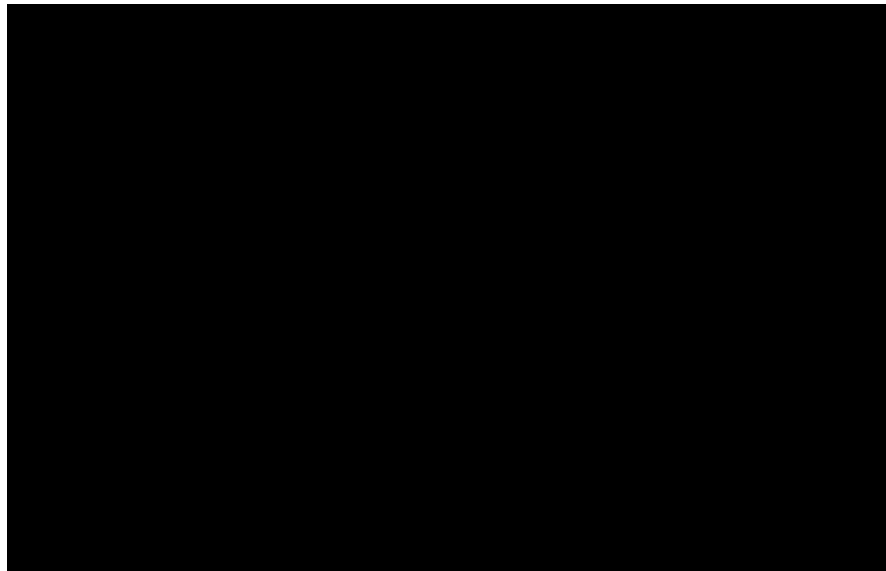
<sup>383</sup> Clayton Reply Statement, para. 11.

293. Mr. Chodorow has provided the following graphical representation of the value implied by each of these transactions. The dark blue column represents the implied value as indexed to the valuation date contended by the Respondent, 22 October 2007:



*(Source: Brattle Group Report, Figure 14)*

294. In an alternative calculation, Mr. Chodorow has indexed these same indicators of implied value to the valuation date used by the Investors' expert, Mr. Rosen, which is 31 December 2016:



*(Source: Brattle Group Rejoinder Report, Figure 8)*

295. The Tribunal's task is to establish the value of the Investors' opportunity when they lost it, *i.e.* in late-2007. Accordingly, the Tribunal finds the figures set out in the first graph above, submitted

by Mr. Chodorow with his first report, to be more significant for its present purposes. Since the damages awarded to the Investors are subject to interest, which begins to run on 22 October 2007 (*see* paragraphs 316 *et seq.* below), the appreciation of the value of the Investors' opportunity between 2007 and 2018 is, at least partly, accounted for by the award of interest.<sup>384</sup>

296. As noted by Mr. Chodorow, the three transactions at issue – [REDACTED]

[REDACTED]

are not directly comparable to each other, or to the condition of the Project just before the breach, because they reflect different stages of development and assumptions about permitting. The offers, in particular, must be analyzed with care because they do not reflect completed transactions.<sup>385</sup>

297. In considering the three transactions at issue, the Tribunal stresses that the 2004 GQP Buyout is the only transaction in which a price was fixed expressly based on an unpermitted quarry. It therefore encompasses fully the permitting risks that were attached to the investment opportunity pursued by the Investors. Moreover, by 2004, the Investors and its joint-venture partner had conducted various geological studies, and could thus be expected to have formed a realistic view of the site's economic potential.<sup>386</sup> At the same time the EA process before the JRP, elements of which the Tribunal has found to be inconsistent with NAFTA, was still in its early stages; accordingly, there was little risk that the purchase price would have reflected elements of the JRP's conduct with which the Tribunal has taken issue.

298. However, the Tribunal also accepts the Investors' argument that the Claytons may have paid less than the market value of the [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] As Mr. Buxton explains, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

---

<sup>384</sup> The Tribunal feels that it should not rely on a value indexed to 2018 *and* award interest starting to run as of 2007, as this might compensate the Investors twice for inflation in the eleven years between the date of the breach and the issuance of the present Award.

<sup>385</sup> Brattle Group Report, para. 63 (Ex. RE-5).

<sup>386</sup> Brattle Group Report, para. 79 (Ex. RE-5).

<sup>387</sup> Buxton Reply Statement, para. 92.

<sup>388</sup> Buxton Reply Statement, para. 91.

[REDACTED]

299. The implied value of the 2002 GQP Formation, of US\$ [REDACTED] was contingent on permitting. Bilcon of Nova Scotia protected itself against permitting risks by limiting the amount of capital it would have to contribute prior to the issuances of permits, and it [REDACTED]
- [REDACTED]
- [REDACTED] Through these contractual mechanisms, Bilcon of Nova Scotia essentially avoided the economic risks of the permitting process. The purchase price it paid is therefore not a reliable indicator of the value of a mere opportunity to participate in a NAFTA-compliant EA process with an uncertain outcome. Moreover, as noted by Mr. Buxton, [REDACTED]
- [REDACTED] “the environmental approval process would take the form of a Comprehensive Study”.<sup>390</sup> To the extent that the 2002 GQP Formation reflects permitting risks at all, such risks would thus have been underestimated. Finally, the Tribunal must bear in mind that, in 2002, the exploration of the quarry site was less advanced than in 2004. Given the more limited knowledge of the parties to the 2002 transaction, it is thus possible that that transaction understates or overstates the value of the Whites Point Project.

[REDACTED]

<sup>389</sup> Clayton Reply Statement, para. 7.

<sup>390</sup> Buxton Reply Statement, para. 89.

<sup>391</sup> Respondent’s Counter-Memorial, para. 136.

### 3. Conclusions in Respect of Valuation

301. Having regard to the evidential record of the case, the comments by the Parties on it in their written and oral pleadings, and the analysis of Messrs. Chodorow and Rosen, the Tribunal finds, on the balance of probabilities, that the value of the opportunity lost by the Investors exceeded the amount of C\$ [REDACTED] by a reasonable margin.
302. The Tribunal also considers, on the balance of probabilities, that the value of the opportunity lost by the Investors remained below US\$ [REDACTED] in light of the early stage of the Whites Point Project's development and permitting risks. While the extent of the permitting risks is difficult to measure, it is telling that market players other than the Claytons, on two occasions in 2002 and 2007, appeared to have been unwilling to absorb permitting risks. This suggests to the Tribunal that such risks were considered significant. The implied values of the two transactions that do not "price in" permitting risks must therefore be adjusted downward to serve as indicators of the value of the opportunity pursued by the Claytons.
303. Based on the above, the Tribunal determines the value of the opportunity lost by the Investors in respect of the Whites Point Project to be US\$ 7 million.

## VII. THE REQUESTED TAX GROSS-UP

304. The Tribunal must finally address the Investors' request to gross up the amount of any damages for lost profits awarded to them to offset the expected tax treatment of the damages in the United States. The Investors submit that, in order to achieve full reparation, the Tribunal should take into account the tax treatment of lump sum damages in its calculation of the Investors' loss. The Respondent objects to the requested gross-up on grounds of both law and fact. For the reasons set out below, the Tribunal does not consider that a tax gross-up is called for in this case.

### A. THE INVESTORS' POSITION

305. Specifically, the Investors submit that, in order to achieve full reparation, the Tribunal should take into account the tax treatment of lump sum damages in its calculation of the Investors' loss.<sup>392</sup> As the damages will be paid to the Investors, not to Bilcon of Nova Scotia, the Investors add that these damages "would be considered income of the Bilcon Delaware shareholders either directly

---

<sup>392</sup> Investors' Memorial, para. 251, citing Rosen Report, para. 8.1; Investors' Reply, paras. 149-150, citing Expert Report of Stephen Shay, 19 August 2017, paras. 2.5, 6.4.1-6.4.2 ("Shay Report").

or indirectly through Bilcon Delaware,”<sup>393</sup> which will be subject to U.S. tax laws.<sup>394</sup> Particularly, the Investors contend that they will not gain any foreign tax credit from the receipt of damages.<sup>395</sup> For this reason, the overall effective rate taxable on damages is higher than the overall effective rate of tax payable on profits, which is the direct outcome of the Respondent’s breach.<sup>396</sup> Thus, the Tribunal should allow a tax equity adjustment so that the Investors are fully compensated.<sup>397</sup>

306. As for the Respondent’s contention that the Investors’ tax claim is based on the U.S. law that has recently been repealed, the Investors assert that this adjustment does not have “any effect on the tax equity adjustment as calculated by Professor Shay”.<sup>398</sup> In any case, the Respondent asserts that, as a common practice, the valuation of damages must take into account the legislation in place at the time of valuation. Should there be any significant legal development thereafter, the Tribunal should order the expert to modify its calculation in response to the change.<sup>399</sup>
307. The Investors cite the award in *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* to support their position. In this case, the tribunal ruled that a consideration of taxation is needed to make the claimants whole, provided that the taxes are certain.<sup>400</sup> Given that “in this case, the applicable taxes have been established with certainty, including with regard to the established practice between Canada and the United States under the Canada-U.S. Tax Convention,” the Investors should be entitled to tax equity adjustment.<sup>401</sup> In contrast, the Investors contend that the Respondent’s opposition based on the awards in *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* and *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic* is unfounded, as the claimants in those two cases failed to prove the actual tax consequences of the tribunals’ awards of damages.<sup>402</sup>

---

<sup>393</sup> Investors’ Reply, para. 152, quoting from Shay Report, para. 6.3.1.

<sup>394</sup> Investors’ Reply, para. 153.

<sup>395</sup> Investors’ Reply, para. 154, citing Shay Report, para. 6.4.1.

<sup>396</sup> Investors’ Reply, paras. 157-158.

<sup>397</sup> Investors’ Reply, para. 155, citing Shay Report, paras. 2.5, 6.4.2.

<sup>398</sup> Hearing Transcript, 28 February 2018, p. 2428, lines 7-8.

<sup>399</sup> Hearing Transcript, 28 February 2018, p. 2428, lines 9-23.

<sup>400</sup> Investors’ Reply, para. 163, referring to *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 2009-23), Final Award, 31 August 2011, paras. 306, 311 (“*Chevron*”) (**Ex. CA-377**).

<sup>401</sup> Investors’ Reply, paras. 161, 164-165.

<sup>402</sup> Investors’ Reply, paras. 159-162, referring to *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4), Decision on Liability and on Principles of Quantum, 22 May 2012 (“*Mobil Investments*”) para. 485 (**Ex. CA-326 / RA-89**); *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic*.



**B. THE RESPONDENT'S POSITION**

308. The Respondent submits that the Investors' argument is based on the flawed assumption that the damages awarded to Bilcon of Nova Scotia will subsequently be paid as dividends to its shareholder, Bilcon of Delaware, and in turn be transferred to the other Investors.<sup>403</sup> In fact, there is no guarantee that the damages paid to Bilcon of Nova Scotia will be definitely transferred as dividends to the Investors in the United States, and consequently be subject to United States tax as claimed by the Investors.<sup>404</sup> In any event, the Respondent argues that the Investors are not entitled to compensation for damage incurred by Bilcon of Nova Scotia under NAFTA Article 1116.<sup>405</sup>
309. The Respondent adds that even if the Tribunal were to accept the Investors' argument that the damages owed to Bilcon of Nova Scotia will be transferred as dividends to the Investors, past investment arbitration awards do not support the Investors' request for a tax gross-up.<sup>406</sup> The Respondent cites the awards in *Mobil Investments, Ceskoslovenska*, and *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela* in support of its position.<sup>407</sup> According to the Respondent, in those cases the tribunals consistently held that "tax consequences in a foreign jurisdiction are not relevant to determining the level of compensation."<sup>408</sup> As for the award in *Chevron* cited by the Investors,<sup>409</sup> the Respondent contends that the situations in these cases were not comparable, and the Respondent should not be responsible for another sovereign State's income taxation of damages awarded.<sup>410</sup>

---

*Republic* (ICSID Case No. ARB/97/4), Award, 29 December 2004, para. 367 ("*Ceskoslovenska*") (**Ex. RA-112**).

<sup>403</sup> Respondent's Counter-Memorial, para. 157.

<sup>404</sup> Respondent's Counter-Memorial, para. 158.

<sup>405</sup> Respondent's Counter-Memorial, para. 157; Respondent's Rejoinder, para. 178.

<sup>406</sup> Respondent's Counter-Memorial, para. 159.

<sup>407</sup> Respondent's Counter-Memorial, para. 159; citing *Mobil Investments*, para. 485 (**Ex. RA-127**); *Ceskoslovenska*, para. 367 (**Ex. RA-112**); Respondent's Rejoinder, paras. 179-180, citing *Rusoro*, para. 854 (**Ex. CA-345**).

<sup>408</sup> Respondent's Rejoinder, para. 179.

<sup>409</sup> *Chevron*, paras. 306, 311 (**Ex. CA-377**).

<sup>410</sup> Respondent's Rejoinder, para. 181.

310. At the hearing on damages in February 2018, the Respondent added that the tax code upon which the Investors rely had been repealed.<sup>411</sup> The Respondent added that the possibility that foreign tax legislation can change is another reason why it objects to the Investors' tax gross-up claim.<sup>412</sup>

### C. THE TRIBUNAL'S ANALYSIS

311. In considering the Investors' request for a gross-up of the amount of damages on account of the expected tax treatment of compensation for lost profits, the Tribunal recalls, first, that it has declined to award to the Investors damages based on lost profits, and has instead awarded an amount reflecting the value of the opportunity the Investors have lost.<sup>413</sup> Thus, the Parties' analysis of the tax treatment afforded under United States tax law to profits of Bilcon of Nova Scotia has only limited relevance, since no compensation equivalent to lost profits has in fact been granted.
312. Secondly, in *Chevron*, the only award relied upon by the Investors in which a tax gross-up was granted,<sup>414</sup> the tribunal grossed up the damages award taking into account the tax law of the *host State*, and not, as requested by the Investors here, the tax law of the *investor's home State*.<sup>415</sup> The Tribunal recalls in this context that the Investors concede that no tax issues arise under Canadian tax law. The Shay Report submitted by the Investors confirms that Canadian tax law will not tax a damages award made by the present Tribunal:

[T]he fact that Canada does not tax damages means the amount of "residual" U.S. tax will be different if Operating Profits are paid after Canadian tax compared with the same cash amount of (as the after-tax Operating Profits) paid as damages not subject to Canadian tax.<sup>416</sup> (Emphasis added)

313. To the extent that tribunals have considered the tax situation in the investor's home State,<sup>417</sup> they appear to have concluded that there is no legal requirement on the part of a host country to compensate an investor for taxes incurred there. For instance, the *Ceskoslovenska* tribunal held that "[i]ncome taxes [...] are unrelated to the obligation of one party to fully compensate the other

---

<sup>411</sup> Hearing Transcript, 19 February 2018, p. 221, lines 23-24.

<sup>412</sup> Hearing Transcript, 28 February 2018, pp. 2578-2579.

<sup>413</sup> See paras. 276-279 above.

<sup>414</sup> Investors' Reply, para. 163.

<sup>415</sup> *Chevron*, para. 306 (Ex. CA-377).

<sup>416</sup> Shay Report, para. 4.2.3.2.

<sup>417</sup> *Mobil Investments*, para. 485 (Ex. CA-326 / RA-89); *Ceskoslovenska*, para. 367 (Ex. RA-112); *Rusoro*, para. 854 (Ex. CA-345).

party”,<sup>418</sup> and the *Rusoro* tribunal similarly held that “[a]ny tax liability arising under [the investor’s home country’s] tax laws [...], does not qualify as consequential loss”.<sup>419</sup> The Tribunal therefore observes that there is no relevant precedent in support of the Investors’ claim.

314. Lastly, the Tribunal does not consider that it would have before it all the necessary information to calculate the amount of applicable taxes. The most current expert reports in respect of this issue, submitted by the Investors, are dated August 2017, and they analyze the Investors’ tax liability under the tax system then in force in the United States. The tax system in the United States has since undergone changes,<sup>420</sup> as was recognized by Mr. Forestieri, Bilcon’s CFO, at the hearing.<sup>421</sup> The amounts of the Investors’ U.S. tax liabilities for the present Award, if any, are thus uncertain.
315. Accordingly, the Investors’ request to indemnify them for any taxes that may apply to the present Award in the United States is denied.

## VIII. INTEREST

316. The Tribunal shall finally address the question as to the suitable interest rate and how such interest rate should be applied to the amount of compensation quantified in the preceding Section.
317. The Parties disagree as to whether the Investors are entitled to pre-award interest.<sup>422</sup> The Investors have also made submissions on post-award interest,<sup>423</sup> which were neither specifically addressed nor contested by the Respondent.
318. Both sides agree that the Investors’ proposed interest rate, the one-year U.S. Treasury bill yield, is appropriate.<sup>424</sup> In addition, while the question of whether simple or compound interest should be applied has not been addressed by the Parties themselves, the Parties’ experts concur that the yearly compounding of interest would be a reasonable or standard practice.<sup>425</sup>

---

<sup>418</sup> *Ceskoslovenska*, para. 367 (**Ex. RA-112**).

<sup>419</sup> *Rusoro*, para. 854 (**Ex. CA-345**).

<sup>420</sup> Notably as a result of the United States’ Tax Cuts and Jobs Act of 2017 (Public Law No. 115–97), 22 December 2017.

<sup>421</sup> Hearing Transcript, 20 February 2018, p. 401 line 23 – p. 405, line 6.

<sup>422</sup> Investors’ Reply, paras 147-148; *cf.* Respondent’s Counter-Memorial, para. 161.

<sup>423</sup> Investors’ Memorial para. 252; Investors’ Reply, para. 148.

<sup>424</sup> Investors’ Memorial, para. 252; Respondent’s Counter-Memorial, para. 161.

<sup>425</sup> Rosen Reply Report, para. 7.2; Brattle Group Rejoinder Report, para. 180, fn. 243 (**Ex. RE-13**).

319. In relying on the reports prepared by the Parties' experts, the Tribunal is conscious that the experts have considered the appropriateness of pre-award interest in respect of a remedy that is different from the one ultimately ordered by the Tribunal, namely in respect of compensation for future positive cash flows to be generated by the Whites Point Project. Given that, as Messrs. Chodorow and Rosen agree, positive cash flows could not have been generated prior to 2015, any interest on the Whites Point Project's net cash flows can only be calculated from 2015 on.<sup>426</sup>
320. As described above, however, the Tribunal has decided to award compensation for the loss of the value of the Investors' opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner. The Tribunal has already noted that it considers that opportunity to have been lost on 22 October 2007.<sup>427</sup> Accordingly, any interest must begin to accrue as of that date. In the Tribunal's view, the experts' positions in respect of the rate of interest, and its compounding, nonetheless offer helpful guidance to the Tribunal in determining the appropriate interest in this case.
321. Based on the foregoing, the Tribunal determines that the Respondent shall pay to the Investors interest on the principal amount of US\$ 7 million,<sup>428</sup> at the rate of the average one-year U.S. Treasury bill yield for each corresponding calendar year. Such interest shall begin to accrue on 22 October 2007, and shall run until full payment of the present award has been made. Such interest shall be compounded annually on the first business day of each calendar year.

#### **IX. PERMISSIBILITY OF COMPENSATION TO BE AWARDED UNDER NAFTA ARTICLE 1116**

322. The Respondent has argued that the relief requested by the Investors in the damages phase of the present arbitration is impermissible under NAFTA Article 1116. In the present case, various possible heads of damage were pleaded, ranging from mitigation costs to process costs, to "sunk" investment costs, to lost profit. The Tribunal need not address the permissibility of all these claims under NAFTA Article 1116. Rather, it will focus on the permissibility under Article 1116 of the relief that it has decided to award—namely compensation in an amount equivalent to the value of the opportunity lost by the Investors.

---

<sup>426</sup> Rosen Report, para. 7.7; Brattle Group Report, Table 5 (**Ex. RE-5**).

<sup>427</sup> See paras. 293 and 295 above.

<sup>428</sup> See para. 305 above.

323. NAFTA Article 1116 provides:

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. 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.

324. NAFTA Article 1117 reads:

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

325. The Tribunal recalls that the Investors had originally brought their claim pursuant to NAFTA Article 1116. Specifically, the Investors' Notice of Arbitration, which marks the formal commencement of the arbitration proceedings pursuant to Article 3(2) of the UNCITRAL Rules, provides as follows:

Pursuant to Article 3 of the United Nations Commission on International Trade Law ("UNCITRAL") Rules of Arbitration and Articles 1116 and 1120 of the North

American Free Trade Agreement (“NAFTA”), the Investors, **WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON, DANIEL CLAYTON and BILCON OF DELAWARE**, initiate recourse to arbitration under the UNCITRAL Rules of Arbitration.<sup>429</sup> (Investors’ emphasis)

326. At that time, the loss alleged consisted in the higher prices of aggregates to be paid by Bilcon of Delaware as a result of the failure of the Whites Point Project—an injury of the Investors. There is no question (and the Respondent does not dispute) that the original claim was correctly brought under Article 1116.<sup>430</sup> In the Memorial, however, the Investors focused on losses to Bilcon of Nova Scotia to establish the amount of compensation owed to the Investors. This has raised the question whether the new damages theory alters the nature of the Investors claim, such that it could only be brought under Article 1117.
327. While the Respondent argues that the Investors “are precluded from personally recovering damages in respect of wrongs done to the corporation [reflective loss]” pursuant to Article 1116,<sup>431</sup> the Investors argue that they actually request damages for their own injury, *i.e.* “the loss in value of their interest in Bilcon of Nova Scotia.”<sup>432</sup> (Investors’ emphasis)

#### A. THE RESPONDENT’S POSITION

328. The Respondent submits that Article 1116 does not entitle an investor to recover losses incurred by its enterprise, *i.e.* reflective loss. First, as the Investors’ claim for damages is based fundamentally on their expert’s calculation of losses incurred by Bilcon of Nova Scotia, *i.e.* reflective loss, the Respondent asserts that the Investors have no standing under Article 1116 and that their claim is “impermissible” under Article 1116.<sup>433</sup> The Respondent adds that it is irrelevant that Bilcon of Nova Scotia is in effect wholly owned by the Investors, as shareholders are not the only relevant stakeholders in this instance.<sup>434</sup> Secondly, according to the Respondent, it follows that the Investors have no standing to seek the lost profits of Bilcon of Nova Scotia, nor can they

---

<sup>429</sup> Notice of Arbitration, 26 May 2008, para. 1.

<sup>430</sup> Hearing Transcript, 19 February 2018, p. 217, line 12 – p. 218, line 11; Hearing Transcript, 19 February 2018, p. 236, lines 4-13; Hearing Transcript, 28 February 2018, p. 2499, lines 22 *et seq.*

<sup>431</sup> Respondent’s Counter-Memorial, para. 15.

<sup>432</sup> Investors’ Reply, para. 340.

<sup>433</sup> Respondent’s Counter-Memorial, paras. 29-31, referring to Investors’ Memorial; Rosen Report; Hearing Transcript, 19 February 2018, pp. 217 *et seq.*; Hearing Transcript, 28 February 2018, p. 2491, lines 18-22.

<sup>434</sup> Respondent’s Counter-Memorial, para. 32, citing *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo) (ICJ Reports 2010) Judgement, 30 November 2010, para. 155 (“*Diallo 2010*”) (**Ex. RA-114**).

recover the costs paid by Bilcon of Nova Scotia, as they were the enterprise's losses.<sup>435</sup> Thirdly, although it recognizes that the Investors had standing under Article 1116 for their original claim, the Respondent argues that as the Investors abandoned this path at a later stage of the proceedings and never provided evidence to substantiate that original claim, they no longer have standing.<sup>436</sup> Fourthly, as regards to the Investors' contention that, should its Article 1116 claim fail, the Tribunal should treat their claim as if it were submitted under Article 1117, the Respondent argues that the erroneous framing of their claim is no one's but the Investors' fault. Consequently, the Tribunal should not act as counsel and revise the Investors' pleadings at this late stage of the Arbitration.<sup>437</sup> If the Tribunal would allow the Investors to amend and refile their claim under Article 1117, it would be considered "unduly delayed, time barred and prejudicial to Canada."<sup>438</sup> For these reasons, the Investors' claim for damages based on their experts' calculation of the amount of loss incurred by Bilcon of Nova Scotia must fail.<sup>439</sup> Also, the Respondent argues that the Tribunal cannot grant an award on sunk costs.

329. The Respondent's first argument is that the Investors have no standing under Article 1116 to claim damages for loss incurred by Bilcon of Nova Scotia. The Respondent argues that Articles 1116 and 1117 deal with distinct matters, which the Tribunal should not conflate. While Article 1116 concerns losses of the investors' (shareholders') interest in relation to the enterprise, Article 1117 concerns losses incurred by the enterprise itself.<sup>440</sup> Specifically, the Respondent asserts that: (i) Article 1116 must be read together with Article 1117 as they collectively implement the same principle of corporate law; (ii) Article 1121, if correctly interpreted, supports the Respondent's position; (iii) the distinctive treatment of Articles 1116 and 1117 is consistent with the object and purpose of NAFTA; and (iv) the NAFTA Parties' subsequent agreement and practice are in line with this proposition.

330. First, the Respondent suggests that "Article 1116 must be interpreted in the context of Article 1117," which derogates from the fundamental corporate legal principle of separate legal personality: Article 1117 allows investors to bring claims on behalf of their enterprises for damages suffered by the latter, and the damages awarded shall be paid directly to the enterprises

---

<sup>435</sup> Hearing Transcript, 28 February 2018, p. 2492, lines 1-3.

<sup>436</sup> Hearing Transcript, 28 February 2018, p. 2492, lines 24 *et seq.*

<sup>437</sup> Respondent's Rejoinder, para. 49.

<sup>438</sup> Hearing Transcript, 28 February 2018, p. 2492, lines 7-8.

<sup>439</sup> Respondent's Counter-Memorial, para. 11.

<sup>440</sup> Hearing Transcript, 19 February 2018, p. 223, lines 4 *et seq.*; Hearing Transcript, 28 February 2018, pp. 2493 *et seq.*

under Article 1135(2).<sup>441</sup> Under Article 1116, an investor may recover damages caused by a loss of, *inter alia*, the right to receive dividends, of the right to vote, of an ability to transfer ownership. Under Article 1117, the damages that may be recovered are lost profits or loss of an asset of an enterprise.<sup>442</sup> “Permitting investors to use Article 1116 to recover damages for losses incurred by their enterprise,” the Respondent notes, would inaptly render Article 1117 “redundant” or of “inutility”.<sup>443</sup>

331. Furthermore, the Respondent contends that Article 1117(3) only creates a presumption that Article 1116 and Article 1117 claims arising out of the same events should be consolidated;<sup>444</sup> it cannot be interpreted to support the Investors’ argument that a claim for reflective loss is permitted, and certainly does not guarantee that, should the claims be consolidated, “monies paid to the investment should flow through to the investor,” as contended by the Investors.<sup>445</sup>

332. Secondly, the Respondent rejects the Investors’ argument that the interpretation of Article 1116 in the context of Article 1121, entitled “Conditions Precedent to Submission of a Claim to Arbitration”,<sup>446</sup> suggests that claims for reflective loss are permissible. Rather, the Respondent

---

<sup>441</sup> Respondent’s Counter-Memorial, para. 18, referring to M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer, 2006), pp. 1116.4–1116.5 (**Ex. RA-125**).

<sup>442</sup> Hearing Transcript, 28 February 2018, pp. 2493 *et seq.*

<sup>443</sup> Respondent’s Counter-Memorial, para. 21, referring to World Trade Organization, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 23 (**Ex. CA-125**); Hearing Transcript, p. 228, lines 10-16.

<sup>444</sup> Respondent’s Rejoinder, para. 31, referring to *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05), Decision on the Requests for Correction, Supplementary Decision and Interpretation, 10 July 2008, para. 21 (**Ex. RA-147**).

<sup>445</sup> Respondent’s Rejoinder, paras. 30-31.

<sup>446</sup> Article 1121 provides:

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
  - (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
  - (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
  - (a) consent to arbitration in accordance with the procedures set out in this Agreement; and
  - (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.



argues, Articles 1121(1) and 1121(2) set out conditions precedent for claims brought under Articles 1116 and 1117 respectively.<sup>447</sup> Moreover, the Respondent submits that the phrase “loss or damage to an interest in an enterprise” (Respondent’s emphasis) pursuant to Article 1121(1)(b) does not refer to “the enterprise’s own interests.” An “interest in an enterprise,” as stipulated in Articles 1121(1)(b), 1139(e) and 1139(f),<sup>448</sup> the Respondent adds, means “the entitlement or right to certain benefits regarding the enterprise” (such as legal entitlements to receive dividends, vote, ownership, or transfer ownership),<sup>449</sup> and does not cover “fluctuating frequency or amount of dividends” paid to the enterprise’s investors or reflective loss.<sup>450</sup> In this case, as Bilcon of Nova Scotia is still in existence, despite being non-operational, the Investors still retain all the legal entitlements in relation to the enterprise. Therefore, they have no standing under Article 1116.<sup>451</sup>

333. According to the Respondent, the Investors cannot argue that the distinction between Articles 1116 and 1117 is a mere formality when it comes to an investment “wholly owned and controlled by the investors.”<sup>452</sup> Article 1116 does not contain an exception for these kind of investments and so, the tribunal cannot rely on an interpretation that expands its jurisdiction beyond the consent given by the NAFTA Parties, pursuant to Article 1122.<sup>453</sup>
334. In addition, such interpretation would adversely affect other stakeholders (*i.e.* secured and non-secured creditors, and non-claimant shareholders) of the enterprise. As an example, the Respondent cites Article 1135(2), which provides that any award granted under Article 1117 shall be paid to the enterprise. NAFTA Article 1135(2) protects the interests of others, such as the minority shareholders and the creditors.<sup>454</sup> If shareholders were allowed to directly recover their

---

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

4. Only where a disputing Party has deprived a disputing investor of control of an enterprise:  
(a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and  
(b) Annex 1120.1(b) shall not apply.

<sup>447</sup> Hearing Transcript, 19 February 2018, p. 225, lines 8-16; Hearing Transcript, 28 February 2018, p. 2494, lines 12-19.

<sup>448</sup> Article 1139(e) defines investment as “an interest in an enterprise that entitles the owner to share in income or profits of the enterprise”. Article 1139(f) defines investment as “an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d)”.

<sup>449</sup> Respondent’s Rejoinder, para. 27; Hearing Transcript, 19 February 2018, pp. 225-226.

<sup>450</sup> Respondent’s Rejoinder, para. 26.

<sup>451</sup> Respondent’s Rejoinder, paras. 28-29.

<sup>452</sup> Hearing Transcript, 19 February 2018, p. 226, lines 13-17.

<sup>453</sup> Hearing Transcript, 19 February 2018, p. 226, line 18 – p. 227, line 1.

<sup>454</sup> Hearing Transcript, 19 February 2018, p. 227, line 9 – p. 228, line 2.

reflective losses, it would introduce “different priority rankings over corporate assets,” which in turn would particularly harm creditors as well as minority shareholders<sup>455</sup> and unsettle predictability;<sup>456</sup> it would also alter tax treatments of the damages paid.<sup>457</sup>

335. The Respondent submits that the object and purpose of NAFTA of ensuring a predictable commercial framework, promoting conditions of fair competition, and increasing investment opportunities require that the Tribunal maintain a clear distinction between Articles 1116 and 1117. Awarding damages to shareholders for reflective loss—in the present case to the Investors for losses incurred by Bilcon of Nova Scotia—“will weaken the corporation’s separate legal personality, create unpredictability [for stakeholders], create unfair conditions of competition among these different sorts of investors, and hence inevitably decrease the opportunities for investment in the NAFTA Parties.”<sup>458</sup> In addition, it would “reduce the assets available to creditors and non-claimant shareholders,” and lessen the possibility that a settlement be reached between an enterprise and its counterpart, for the settlement would not prevent shareholders from individually pursuing their claims.<sup>459</sup>
336. The Respondent additionally points out that the situation of multiple and overlapping claims by minority shareholders is another concern, as this might lead to difficulties in the quantification of damages, risks of double recovery, and inconsistency of awards.<sup>460</sup> Lastly, allowing shareholders to claim reflective loss would disturb the corporate management structure, as a shareholder’s move might harm the enterprise’s interests when its management is of the view that bringing a claim against the State would not be an appropriate strategy.<sup>461</sup>

<sup>455</sup> Respondent’s Rejoinder, para. 33, referring to D. Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency*, OECD Working Papers on International Investment, No. 2013/3, p. 44 (“*Gaukrodger 2013*”) (**Ex. RA-118**). *See also* Hearing Transcript, 19 February 2018, pp. 227 *et seq.*

<sup>456</sup> Respondent’s Counter-Memorial, para. 21, referring to *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, paras. 84, 86 (“*Mondev*”) (**Ex. RA-46 / Ex. CA-40**).

<sup>457</sup> Respondent’s Counter-Memorial, para. 21, referring to *Mondev*, para. 84 (**Ex. RA-46**).

<sup>458</sup> Respondent’s Counter-Memorial, para. 26, referring to NAFTA Article 102(1)(b) - (c) (**Ex. RA-47**).

<sup>459</sup> Respondent’s Rejoinder, paras. 37-38.

<sup>460</sup> Respondent’s Counter-Memorial, para. 23, citing *GAMI Investments Inc. v. United Mexican States* (UNCITRAL) Final Award, 15 November 2004, paras. 116-121 (“*GAMI*”) (**Ex. RA-27 / CA-15**); *see also* Respondent’s Counter-Memorial, para. 33, referring to *UPS*, para. 35 (**Ex. RA-79 / CA-89**).

<sup>461</sup> Respondent’s Counter-Memorial, para. 24, referring to *Gaukrodger 2013*, pp. 9-10 (**Ex. RA-118**); D. Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment, No. 2014/2, p. 16 (“*Gaukrodger 2014*”) (**Ex. RA-119**).

337. Thirdly, pursuant to Article 31(3)(a) and 31(3)(b) of the Vienna Convention on the Law of Treaties (“VCLT”), the Respondent asserts that subsequent agreement and practice in the application of NAFTA by the NAFTA Parties must be taken into account.<sup>462</sup> In this respect, the Respondent suggests that all three NAFTA Parties treat Articles 1116 and 1117 as distinct provisions and acknowledge that investors can only recover direct damage, not reflective loss, under Article 1116.<sup>463</sup> In this respect, the Respondent submits that an interpretation of the Free Trade Commission (“FTC”) is not the only mechanism from which subsequent agreement and practice of States parties can be inferred.<sup>464</sup>
338. Applying Article 31 of the VCLT, the Respondent submits that the ordinary meaning of the text of Article 1116 is clear, namely that “the claim is for losses incurred by the investor, not for losses of an enterprise owned and controlled by the investor.”<sup>465</sup> Thus, the provision bars shareholders from bringing claims for “reflective loss,” which the Respondent defines as “a loss of the individual shareholders that is inseparable from the general loss of the corporation for wrongs done to it”<sup>466</sup> or a shareholder’s loss that “would be made good if the company’s assets were replenished through action against the party responsible for the loss.”<sup>467</sup> This reading of the provision is consistent with the core principle of corporate law of separate legal personality

---

<sup>462</sup> Respondent’s Counter-Memorial, para. 27, citing A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2004), p. 191, 195 (**Ex. RA-109**); Hearing Transcript, 19 February 2018, p. 229, lines 2-6.

<sup>463</sup> Respondent’s Counter-Memorial, para. 28, referring to M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, (Kluwer, 2006), pp. 1116.6-1116.7 (**Ex. RA-125**); *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Counter-Memorial on Competence and Liability of Respondent United States of America, 1 June 2001, p. 76 (**Ex. RA-128**); *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Rejoinder on Competence and Liability of Respondent United States of America, 1 October 2001, p. 60 (**Ex. RA-129**); *GAMI Investments Inc. v. United Mexican States*, Submission of the United States, paras. 11-12, 14 (**Ex. RA-117**); *GAMI Investments Inc. v. United Mexican States*, Statement of Defence, p. 59 n.158, and para. 167(h) (**Ex. RA-28**); *Pope & Talbot, Inc. Government of Canada*, (UNCITRAL) Canada’s Counter-Memorial, 29 March 2000, paras. 329-332 (**Ex. RA-56**); *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Canada’s Counter-Memorial (Merits Phase, 22 June 2005, paras. 12, 523-525 (**Ex. RA-81**); *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Canada’s Counter Memorial (Damages Phase), 7 June 2001, paras. 106-109 (**Ex. RA-134**); see also Respondent’s Counter-Memorial, para. 20, citing The North American Free Trade Agreement Implementation Act, United States Statement of Administrative Action, Chapter Eleven, November 1993, p. 146 (**Ex. RA-140**).

<sup>464</sup> Respondent’s Rejoinder, para. 39.

<sup>465</sup> Respondent’s Counter-Memorial, paras. 12, 14.

<sup>466</sup> Respondent’s Counter-Memorial, para. 15.

<sup>467</sup> Respondent’s Counter-Memorial, para. 15, quoting from *Johnson v. Gore Wood & Co.* [2001] 1 All ER 481, p. 26, 35F (**Ex. R-582**).

recognized by domestic legal systems<sup>468</sup> and customary international law.<sup>469</sup> Had Article 1116 been intended to derogate from this important principle, the Respondent argues, it would have expressly stated so.<sup>470</sup>

339. In any event, the Respondent submits that no NAFTA tribunal has ever established a general rule that an investor's claim for reflective loss is permissible under Article 1116.<sup>471</sup> Nonetheless, should the Tribunal take the view that these cases permit an investor to recover reflective loss under Article 1116, the Respondent argues that they are wrongly decided and should be disregarded, since they are in conflict with the NAFTA Parties' subsequent practice and interpretation, and do not take into account problems resulting from such a permissive interpretation.<sup>472</sup> In addition, such a decision would affect the consent of the NAFTA Parties to arbitrate. In accordance with Article 1122, the NAFTA Parties "only consent to arbitrate claims submitted in accordance with the procedures of the agreement."<sup>473</sup> In this case, the tribunal does not have any jurisdiction to hear a claim that the Respondent, the NAFTA Party, has not consented to arbitrate under Article 1116.<sup>474</sup>
340. As for the arbitral decisions cited by the Investors as alleged sources of a settled interpretation of Article 1116, the Respondent argues that they "cannot 'settle' the interpretation of any provision of NAFTA," as *stare decisis* has no place in investor-State arbitration.<sup>475</sup> According to the

---

<sup>468</sup> Respondent's Counter-Memorial, para. 15, discussing the legal systems of the United States, Canada, and Germany.

<sup>469</sup> Respondent's Counter-Memorial, paras. 15-17, referring to *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) (ICJ Reports 1970) Second Phase, Judgment, 5 February 1970, paras. 38, 46 ("*Barcelona Traction*") (**Ex. RA-110**); *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo) Judgment on Preliminary Objections, 24 May 2007, paras. 61-64 (**Ex. CA-282**); *Diallo 2010*, para. 105 (**Ex. RA-114**).

<sup>470</sup> Respondent's Counter-Memorial, para. 18, citing *Loewen Group Inc. v. United States* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, paras. 160, 162 ("*Loewen*") (**Ex. RA-75**); *Case Concerning Elettronica Sicula SpA* (United States of America v. Italy) (ICJ Reports 1989), p. 42 ("*ELSI*") (**Ex. CA-105**).

<sup>471</sup> Respondent's Rejoinder, paras. 42-43, citing *Pope & Talbot*, para. 80 (**Ex. CA-39**); *UPS*, paras. 32-35 (**Ex. RA-79**).

<sup>472</sup> Respondent's Rejoinder, para. 43, referring to M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer, 2006), pp. 1116-1118 (**Ex. RA-148**); Hearing Transcript, 19 February 2018, p. 230, lines 3-11.

<sup>473</sup> Hearing Transcript, 28 February 2018, p. 2493, lines 8-11.

<sup>474</sup> Hearing Transcript, 28 February 2018, p. 2493, lines 12-18.

<sup>475</sup> Respondent's Rejoinder, paras. 17, 41, 48.

Respondent, the VCLT does not make any reference to the possibility of previous jurisprudence settling the interpretation of a treaty provision.<sup>476</sup>

341. In particular, the Respondent notes that in *Pope & Talbot, Inc. v. Government of Canada* the tribunal awarded damages for the investor's own out of pocket expenses.<sup>477</sup> It also criticizes the *United Parcel Service of America Inc. v. Government of Canada* tribunal's treatment of distinction between Articles 1116 and 1117 as "almost entirely formal"<sup>478</sup> when these legal provisions on standing are actually concerned with "what rights ought to be protected and how those rights should be defined"<sup>479</sup> and therefore are not "trifling technicalities".<sup>480</sup> The Respondent noted that in this case the tribunal never granted an award on damages and "to the extent that it allowed standing to claim indirect loss, it was wrong, and need not be followed."<sup>481</sup> By contrast, the Respondent asserts that the *Mondev International Ltd. v. United States of America* tribunal treated the distinction between the two provisions seriously, when it stated that "a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor," and that claimants should "consider carefully whether to bring proceedings under Articles 1116 and 1117."<sup>482</sup> These statements show, according to the Respondent, that "if a claim can be brought under Article 1117 for the enterprise's losses, then it must not be brought under Article 1116".<sup>483</sup> As for the *GAMI Investments Inc. v. United Mexican States* award, the Respondent notes that the tribunal warned that permitting an award on reflective loss could lead to several insoluble challenges, like quantifying the amount a minority shareholder could recover, the risk of double recovery and the possibility of inconsistent decisions for the same loss to an enterprise.<sup>484</sup>

---

<sup>476</sup> Hearing Transcript, 19 February 2018, p. 229, lines 14-23.

<sup>477</sup> Hearing Transcript, 28 February 2018, p. 2496, lines 3-5, referring to *Pope & Talbot*, para. 85 (**Ex. CA-39**).

<sup>478</sup> Respondent's Rejoinder, para. 44, quoting from *UPS*, para. 35 (**Ex. RA-79**).

<sup>479</sup> Respondent's Rejoinder, para. 44, quoting from T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), p. 34 n.5 (**Ex. RA-149**); see also *South Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase (ICJ Reports 1966), Judgment, 18 July 1966, para. 44 (**Ex. RA-150**).

<sup>480</sup> Respondent's Rejoinder, para. 44, referring to M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer, 2006), pp. 1116-1117 (**Ex. RA-125**).

<sup>481</sup> Hearing Transcript, 28 February 2018, p. 2496, lines 6-9, referring to *UPS*, paras. 32, 35 (**Ex. CA-89**).

<sup>482</sup> Respondent's Rejoinder, para. 45, quoting from *Mondev*, para. 86 (**Ex. RA-46**).

<sup>483</sup> Respondent's Rejoinder, para. 46, citing Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), paras. 835-836 (**Ex. RA-152**).

<sup>484</sup> Respondent's Rejoinder, para. 47, referring to *GAMI*, paras. 116-121 (**Ex. RA-27**); Hearing Transcript, 28 February 2018, p. 2496, lines 10-16.

342. The Respondent's second argument is that it follows that the Investors have no standing to seek the lost profits of Bilcon of Nova Scotia. The Investors have submitted a damages claim for the lost profits of the Whites Point Project, which are the loss of Bilcon of Nova Scotia, but not for any losses they incurred directly. As the Respondent explains, "any dividends that they never gained are indirect losses based entirely on losses of Bilcon of Nova Scotia."<sup>485</sup> Consequently, it recognizes that such a claim could have been made under Article 1117, but it is "impermissible" under Article 1116.<sup>486</sup>
343. For the Respondent it is irrelevant whether the losses of Bilcon of Nova Scotia were reflected in the Investors' tax returns. It is not determinative of whether the damage is direct or indirect. What is determinative is "whether the right that has been infringed belongs to the shareholder or the corporation."<sup>487</sup> As the Respondent states "a foreign jurisdiction's tax treatment for shareholders does not change the fact that the enterprise incurred the loss when it lost the profits."<sup>488</sup> While the Investors have not gained any dividends from Bilcon of Nova Scotia, they still have retained all their rights and interest in it. Thus, their claim is simply one of indirect loss resulting from the loss incurred by Bilcon of Nova Scotia and so, they have no standing under Article 1116.<sup>489</sup>
344. The Respondent's third argument is that this claim could have been brought under Article 1117, but the decision not to do so was intentional, as the Investors revealed in their response to the United States' Submission.<sup>490</sup> Therefore, the Tribunal should not amend the claim.
345. The Respondent further explains that, contrary to the Investors' assertion that the Respondent should be estopped from raising this objection to jurisdiction at this late stage in the proceedings, the objection is not preliminary but was brought when the Respondent had its earliest opportunity.<sup>491</sup> The Tribunal does not have jurisdiction to "hear this claim for compensation as brought by the claimants in the damages phase of the arbitration."<sup>492</sup>

---

<sup>485</sup> Hearing Transcript, 28 February 2018, p. 2497, lines 15-17.

<sup>486</sup> Hearing Transcript, 28 February 2018, p. 2497, lines 1-20.

<sup>487</sup> Hearing Transcript, 28 February 2018, p. 2498, lines 8-12, referring to *Barcelona Traction (Ex. RA-110)* and *Diallo 2010 (Ex. RA-114)*.

<sup>488</sup> Hearing Transcript, 28 February 2018, p. 2498, lines 13-16.

<sup>489</sup> Hearing Transcript, 28 February 2018, p. 2498, line 13 – p. 2499, line 12.

<sup>490</sup> Investors' Response to the United States' Submission, para. 9.

<sup>491</sup> Hearing Transcript, 19 February 2018, p. 237, lines 6-12; Hearing Transcript, 28 February 2018, pp. 2501 *et seq.*

<sup>492</sup> Hearing Transcript, 19 February 2018, p. 237, lines 14-16.

346. According to the Respondent, the claim presents a new theory of damages, which is different from the one first submitted by the Investors.<sup>493</sup> In paragraph 39 of the Amended Statement of Claim, for example, the Investors stated underneath their “Damages” section:

The effects of these measures on the Investors include, but are not limited to, the following:

- a. The Investors have suffered in excess of US [REDACTED] in connection with expenses incurred over more than five years on their application for a permit to build and operate the quarry and marine terminal at Whites Point;
- b. The Investors have been deprived of a vital source of basalt aggregate to supply their business operations in the United States. Due to the resulting loss of the supply of basalt, the Investors have experienced a major strategic disadvantage, as the supply of aggregate in the Investors’ markets has become consolidated in ever-fewer hands over the course of the environmental assessment process. As a result of this strategic disadvantage, Bilcon may be forced to satisfy market demand at much greater cost.<sup>494</sup>

347. The Respondent relies on the Investors’ Memorial in the Jurisdiction and Liability Phase to presume that the Investors came to the conclusion that investing in the Whites Point Project to obtain a stable and secure supply of aggregate, would be much cheaper – even if it had to be shipped to New Jersey – than acquiring aggregate to supply their operations at market price.<sup>495</sup> So the damages they were originally claiming were

[t]heir alleged loss in their Statement of Claim, their sunk costs as investors and the difference between the cost to supply their operations of New Jersey from Whites Point and the cost to supply their operations from purchasing on the open market.<sup>496</sup>

348. Thus, the Respondent concludes that this was the reason why the claim was brought under Article 1116. The Respondent recognizes that the original claim could have been appropriate under Article 1116.<sup>497</sup> In order to defend the claim, the Investors would have had to provide evidence of sunk costs paid by the Investors, of actual purchases of aggregate made by the Investors at market prices in New Jersey, and evidence showing how much it would have cost to quarry and ship the same volume of aggregate from Nova Scotia to New Jersey. However, they

---

<sup>493</sup> Hearing Transcript, 19 February 2018, p. 237, lines 17-25.

<sup>494</sup> Investors’ Amended Statement of Claim, para. 39.

<sup>495</sup> Investors’ Memorial, para. 770; Witness Statement of William Richard Clayton in the Jurisdiction and Liability Phase, at paras. 4, 31; Hearing Transcript, 19 February 2018, p. 237, line 19 – p. 242, line 8.

<sup>496</sup> Hearing Transcript, 19 February 2018, p. 242, lines 3-8.

<sup>497</sup> Hearing Transcript, 28 February 2018, p. 2499, lines 24 *et seq.*

did not.<sup>498</sup> According to the Respondent, the Investors decided to “trump up a phony business plan solely for the damages phase of this arbitration and make a claim for the lost profits of Bilcon of Nova Scotia.”<sup>499</sup>

349. The Respondent nonetheless contends that the claim cannot be amended. The Respondent relies on Article 20 of the UNCITRAL Rules,<sup>500</sup> which provides that

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

350. The Respondent concedes that amendments have been generally allowed if there was no undue delay or prejudice to the other party. Nevertheless, it argues that in this case, there has been an undue delay because the Investors knew about the distinction between Articles 1116 and 1117, “professed to have understood, and specifically and intentionally chose to file under Article 1116.”<sup>501</sup> As a result, this claim is “impermissible” under Article 1116 and “it would be entirely unacceptable and prejudicial to Canada to allow the claimants to amend it now and advance a theory of damages that they never before had.”<sup>502</sup>

351. Additionally, the second sentence of Article 20 of the UNCITRAL Rules would not allow the amendment either. According to the Respondent, the scope of the arbitration clause is Article 1116 and 1117. Both include a time limitation for the submission of claims of three years as of the alleged measures. Since the JRP Report, *i.e.* the breaching measure, was published in 2007, the amended claim would have had to be submitted before 2010. The Tribunal cannot allow to bring a claim to be amended under Article 1117, as it considers it time-barred and outside “Canada’s time-limited consent.”<sup>503</sup>

---

<sup>498</sup> Hearing Transcript, 19 February 2018, p. 242, lines 9-21; Hearing Transcript, 28 February 2018, pp. 2505 *et seq.*

<sup>499</sup> Hearing Transcript, 19 February 2018, p. 243, lines 3-7.

<sup>500</sup> Hearing Transcript, 19 February 2018, pp. 243 *et seq.*; Hearing Transcript, 28 February 2018, p. 2500, lines 8-14.

<sup>501</sup> Hearing Transcript, 19 February 2018, p. 244, lines 13-14.

<sup>502</sup> Hearing Transcript, 19 February 2018, p. 244, lines 22-25.

<sup>503</sup> Hearing Transcript, 19 February 2018, p. 245, line 12 – p. 246, line 7.



352. Lastly, the Respondent explains why an award on sunk costs in the JRP Process is not appropriate under NAFTA Article 1116. First, because the vast majority of the expenditures on the Whites Point Project were paid by Bilcon of Nova Scotia, constituting the losses of the enterprise. The appropriate standing for awarding these damages would be Article 1117. As a result, the Investors do not have any standing to recover through Article 1116 the losses resulting from the costs paid by Bilcon of Nova Scotia.<sup>504</sup> Secondly, even if Bilcon of Nova Scotia had standing under Article 1116 for the Whites Point Project's expenditures it had directly paid for, the Investors have not been able to establish an appropriate amount for Bilcon of Nova Scotia's sunk costs. While Mr. Forestieri agreed with the estimates of the amount invested in the Whites Point Project calculated by the Brattle Group, there is no distinction between the costs paid by the Investors and those paid by Bilcon of Nova Scotia. The costs which the Investors, instead of the enterprise, paid for some consultants, for example, would not be included in the sunk costs award to Bilcon of Nova Scotia; nor would many of the receipts provided by the Investors which came from Ralph Clayton and Sons Materials LP, a legal entity different from Bilcon of Nova Scotia, be so included.<sup>505</sup>

353. Another problem for any recovery under Article 1116 noted by the Respondent concerns tax deductions. Since the Investors deducted the losses of Bilcon of Nova Scotia and Bilcon of Delaware in their own tax returns, any damage award would have to be offset by the benefits they gained.<sup>506</sup>

## **B. THE INVESTORS' POSITION**

354. The Investors complain that the Respondent has raised this submission on the "threshold jurisdictional question of the [I]nvestors' standing under Articles 1116 and 1117 of the NAFTA" for the very first time in the damages phase of this arbitration, instead of the jurisdictional and liability phase. Therefore, the Respondent should be estopped from pleading this argument ten years after the arbitration commenced.<sup>507</sup>

355. Nonetheless, the Investors' submission on this issue is based on two main arguments: that they seek damages for their own loss, *i.e.* "the loss in value of their interest in Bilcon of Nova

---

<sup>504</sup> Hearing Transcript, 28 February 2018, p. 2503, lines 5-18.

<sup>505</sup> Hearing Transcript, 28 February 2018, p. 2504, line 11 – p. 2505, line 3.

<sup>506</sup> Hearing Transcript, 28 February 2018, p. 2506, lines 13-22.

<sup>507</sup> Hearing Transcript, 19 February 2018, p. 125, lines 7-18.

Scotia,”<sup>508</sup> (Investors’ emphasis) and that, in any event, Article 1116 allows the Investors to claim for loss to their interest in an enterprise, *i.e.* reflective loss.<sup>509</sup> In the alternative, should the Tribunal not accept these arguments, the Investors argue that the Tribunal should disregard a mere “procedural defect” and treat the claim as made under Article 1117.<sup>510</sup>

356. First, the Investors assert that their aim is to seek damages for losses incurred by the Investors themselves. In support of their position, the Investors rely on the Expert Report of Mr. Howard Rosen (“Rosen Report”). While the Investors admit that Mr. Rosen’s valuation is first based on the calculation of Bilcon of Nova Scotia’s lost profits, they contend that it subsequently determines “the money that the Investors would have received from the quarry operations, and the loss of foreign tax credits that would have otherwise been available to the Investors.”<sup>511</sup>

[REDACTED]

357. Secondly, the Investors submit that Article 1116 permits recovery of reflective loss. Like the Respondent, the Investors regard their reading of Article 1116 as consistent with Article 31 of the VCLT.<sup>515</sup> As regards the ordinary meaning of the terms of Article 1116, in light of the context of the provision, the Investors argue that Article 1116 “does not limit or qualify the concept of loss or damage in any way.”<sup>516</sup> According to the Investors, reading Article 1116 in conjunction with Article 1121(1) confirms this position, because Article 1121(1)(b) stipulates that an investor’s claim under Article 1116 can include a claim “for loss or damage to an interest in an enterprise that the investor owns or controls directly or indirectly”, although it specifies further that, in order

---

<sup>508</sup> Investors’ Reply, para. 340.

<sup>509</sup> Investors’ Reply, para. 341.

<sup>510</sup> Investors’ Reply, para. 342.

<sup>511</sup> Investors’ Reply, paras. 343-347, referring to Rosen Report, paras. 2.5-2.6.

<sup>512</sup> Hearing Transcript, 28 February 2018, p. 2441, lines 6-15.

<sup>513</sup> Investors’ Reply, para. 348.

<sup>514</sup> Investors’ Reply, para. 386.

<sup>515</sup> Investors’ Reply, para. 349.

<sup>516</sup> Investors’ Reply, para. 350.

to bring a claim under Article 1116, both the investor and the enterprise must waive their rights to bring another claim concerning the same impugned measure.<sup>517</sup> The reading of Article 1117(3) also supports the Investors' argument in their view, since it envisages that the same disputed government measure may bring about a claim under both Article 1116 (for reflective loss incurred by the investor) and Article 1117 (for loss incurred by the enterprise).<sup>518</sup> Consequently, the Investors suggest that whether a claim should be brought under either Article 1116 or Article 1117, or both, depends on the context and is subject to the Investors' choice.<sup>519</sup>

358. In response to the Respondent's argument that the Investors' interpretation would render Article 1117 redundant, the Investors argue that this would be the case only when claims are brought under both Articles 1116 and 1117.<sup>520</sup> In addition, the Investors submit that Articles 1116 and 1117 serve a distinct purpose.<sup>521</sup> In particular, Article 1117 grants a national enterprise standing in international arbitration, provided that the claim is brought by foreign investors on its behalf. Additionally, bringing a claim under Article 1117 could be a more suitable option, compared to Article 1116, should the enterprise be a going concern, as damages can be awarded directly to the enterprise.<sup>522</sup> By contrast, if the enterprise is no longer operational, a claim under Article 1116 may be perceived as more practical.<sup>523</sup>
359. With regard to the object and purpose of NAFTA, relying on the *Canadian Cattlemen for Fair Trade v. United States* case, the Investors submit that "Chapter 11 of NAFTA need not bear 'the whole weight of the diverse purposes set out in Article 102'".<sup>524</sup> Allowing recovery for reflective loss, the Investors argue, serves the purpose of encouraging better protection of foreign investment.<sup>525</sup> Moreover, given that the Investors' interpretation of Article 1116 is in line with its

---

<sup>517</sup> Investors' Reply, paras. 351-352.

<sup>518</sup> Investors' Reply, para. 353.

<sup>519</sup> Investors' Reply, para. 355.

<sup>520</sup> Investors' Reply, para. 356.

<sup>521</sup> Investors' Reply, para. 357.

<sup>522</sup> Investors' Reply, para. 358.

<sup>523</sup> Investors' Reply, para. 359.

<sup>524</sup> Investors' Reply, para. 360, quoting from *Canadian Cattlemen for Fair Trade v. United States*, UNCITRAL, Award on Jurisdiction, IIC 316 (2008), 28 January 2008, para. 166 ("Canadian Cattlemen") (**Ex. CA-371**).

<sup>525</sup> Investors' Reply, para. 361, referring to *Canadian Cattlemen*, para. 168 (**Ex. CA-371**); *Gaukrodger* 2013 (**Ex. RA-118**).

“settled meaning” as endorsed by previous arbitral tribunals, applying the provision in this manner would preserve “a predictable commercial framework”.<sup>526</sup>

360. In support of its position, the Investors additionally rely on three NAFTA proceedings in which Canada served as respondent and raised a similar argument in relation to the recovery of reflective loss: (i) *Pope & Talbot*; (ii) *SD Myers Inc v. Government of Canada*; and (iii) *UPS*.<sup>527</sup> The Investors submit that in these cases, the tribunals rejected Canada’s argument.<sup>528</sup> In addition, the Investors refer to two other NAFTA arbitrations in which the same issue was raised by the respondents but was likewise rejected by the tribunals: (i) *Mondev*, and (ii) *GAMI*.<sup>529</sup> The Investors thus conclude “that tribunals have developed a consistent interpretation of Article 1116 that supports the recoverability of reflective loss,”<sup>530</sup> and that this Tribunal should follow this approach to promote consistency, predictability, certainty, and credibility of investment arbitration.<sup>531</sup>
361. As to the Respondent’s argument that there is subsequent agreement and practice of the NAFTA Parties, the Investors argue that NAFTA Article 2001 specifically provides that, should there be any disputes regarding interpretation of NAFTA provisions among the three States, they shall be resolved by the FTC. Since there is no relevant FTC decision on the issue, the Tribunal should apply the settled interpretation put forward by the Investors.<sup>532</sup>
362. Addressing the policy considerations adduced by the Respondent, the Investors assert that investment tribunals have generally interpreted investment treaties in a way that allow

---

<sup>526</sup> Investors’ Reply, paras. 362, 376.

<sup>527</sup> Investors’ Reply, paras. 364-366, referring to *Pope & Talbot Inc. v. Government of Canada*, Canada’s Counter-Memorial, submitted with Canada’s Statement of Defence, 18 August 2001, paras. 49-54 (**Ex. CA-279**); *SD Myers Inc v. Government of Canada*, Counter-Memorial (Damages Phase), 7 June 2001, paras. 106-110 (**Ex. CA-384**); *SD Myers Inc v. Government of Canada*, Submission of the United States of America, dated 18 September 2001 (**Ex. CA-385**); *SD Myers II*, paras. 143-152 (**Ex. CA-205**); *UPS*, paras. 32, 35 (**Ex. CA-89**); Hearing Transcript, 28 February 2018, pp. 2442 *et seq.*

<sup>528</sup> Investors’ Reply, paras. 364-366.

<sup>529</sup> Investors’ Reply, paras 367-375, citing *Mondev*, paras. 79-86 (**Ex. CA-40**); *GAMI*, paras. 29-30, 33 (**Ex. CA-15**).

<sup>530</sup> Investors’ Reply, para. 376.

<sup>531</sup> Investors’ Reply, paras. 376-377, referring to Dolores Bentolila, Arbitrators as Lawmakers, Chapter 4: Arbitrators’ Constraints in Arbitral Decision-Making, paras. 406, 460 (Kluwer Law International, 2017) (**Ex. CA-375**); G. Kaufman-Kohler, Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture (**Ex. CA-376**); Charles H. Brower II, in *Glamis Gold, Ltd. v. United States*, Award, 8 June 2009: A Contribution by the ITA Board of Reporters (**Ex. RA-29**).

<sup>532</sup> Investors’ Reply, paras. 378-380.

shareholders to recover reflective loss,<sup>533</sup> and that allowing claims for reflective loss is “particularly important” where the enterprise is no longer operational.<sup>534</sup> That said, even if the Respondent’s concerns were valid, the Investors submit that the text of Article 1116 is clear. Accordingly, should the Respondent feel the need to prevent shareholders from claiming for reflective loss, it must do so through amendment of the relevant NAFTA provisions.<sup>535</sup>

363. Alternatively, should this Tribunal decide that Article 1116 precludes shareholders’ recovery of reflective loss, the Investors request that the Tribunal treat their claim as if it were brought under Article 1117.<sup>536</sup> This option, the Investors argue, would prejudice neither the Respondent nor third parties, for the substance of the claim has been clear from the beginning.<sup>537</sup> In addition, since the Investors brought this claim under Article 1116 pursuant to the settled interpretation of the provision, it would be “manifestly unfair” if the Tribunal decided otherwise and left the Investors uncompensated. Particularly, given that this matter is merely a “procedural defect”, the Investors’ claim should not be dismissed based solely on this ground.<sup>538</sup>

#### C. THE UNITED STATES’ ARTICLE 1128 SUBMISSION

364. Pursuant to NAFTA Article 1128, the United States takes the view that Articles 1116 and 1117 are concerned with “discrete and non-overlapping types of injury”:

Where the investor seeks to recover loss or damage that it incurred *directly*, it may bring a claim under Article 1116. However, where the alleged loss or damage is only to an enterprise that the investor owns or controls, the investor’s injury is only *indirect*, and therefore, the investor must bring a derivative claim under Article 1117.<sup>539</sup> (United States’ emphasis)

---

<sup>533</sup> Investors’ Reply, paras. 381-383, citing D. Gaukrodger, Chapter 8, The Impact of Investment Treaties on Companies, Shareholders and Creditors, OECD Business and Finance Outlook 2016, p. 229 (“*Gaukrodger 2016*”) (Ex. RA-120); *Gaukrodger 2013*, pp. 8, 11 (Ex. RA-118); *Gaukrodger 2014*, p. 8 n.11 (Ex. RA-119).

<sup>534</sup> Investors’ Reply, para. 384, citing *Gaukrodger 2013*, p. 10 (Ex. RA-118).

<sup>535</sup> Investors’ Reply, para. 385.

<sup>536</sup> Hearing Transcript, 28 February 2018, p. 2445, lines 3 *et seq.*

<sup>537</sup> Investors’ Reply, para. 387.

<sup>538</sup> Investors’ Reply, paras. 388-389, referring to *Mondev*, para. 86 (Ex. RA-46 / Ex. CA-40).

<sup>539</sup> The United States’ Submission, para. 4.

365. The United States asserts that all three NAFTA Parties have consistently adopted this position. As a result, pursuant to Article 31(3)(a)-(b) of the VCLT, the Tribunal shall take account of this subsequent agreement or practice of the NAFTA Parties in interpreting Articles 1116 and 1117.<sup>540</sup>
366. Further, the United States advises that these provisions were specifically drafted to address two principles of customary international law: (i) that shareholders cannot bring claim for their corporation's loss<sup>541</sup> and (ii) that a State's own national cannot bring an international claim against the State.<sup>542</sup> In this regard, Article 1117 establishes an unconventional legal regime under which controlling foreign shareholders of a national enterprise of the host State are entitled to submit a claim on behalf of the enterprise for loss incurred by the enterprise.<sup>543</sup> Conversely, Article 1116 "adheres to the principle of customary international law that shareholders may assert claims only for *direct* injuries to their rights."<sup>544</sup>
367. In addition, the United States argues that the reference to an investor's "interest in an enterprise" under Article 1121(1)(b) is limited to "legal entitlements or rights belonging to the investor (not the enterprise)."<sup>545</sup> The United States notes that this position also serves various policy objectives, such as the preservation of the separate legal identity of a corporation, the promotion of judicial economy, and the protection of other stakeholders.<sup>546</sup> To support its position, the United States particularly cites the awards in *Mondev* and *GAMI*, which adopted a cautious approach in determining the shareholders' claims for losses incurred by their enterprises.<sup>547</sup>
368. Lastly, the United States emphasizes that a decision to file a claim under either Article 1116 or 1117 is a serious choice to be made by an investor. It substantially affects subsequent litigation strategies and a NAFTA Party's consent to arbitrate, which hinges upon the different procedural

---

<sup>540</sup> The United States' Submission, para. 5.

<sup>541</sup> The United States' Submission, paras. 6-8, citing *Barcelona Traction* (Ex. RA-110) and *Diallo 2010* (Ex. RA-114).

<sup>542</sup> The United States' Submission, paras. 9 -10, citing Jennings & Watts, *Oppenheim's International Law* (9<sup>th</sup> ed., 1992), pp. 512-513 (Ex. CA-270).

<sup>543</sup> The United States' Submission, para. 11.

<sup>544</sup> The United States' Submission, para. 12.

<sup>545</sup> The United States' Submission, para. 13, referring to the definition of "investment" in Article 1139, which includes "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise" and "an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution" within the definition of investment.

<sup>546</sup> The United States' Submission, paras. 15-20.

<sup>547</sup> The United States' Submission, para. 21, referring to *Mondev*, paras. 84, 86 (Ex. CA-40); *GAMI*, paras. 116-121 (Ex. CA-15).

requirements specified under each provision. In particular, such consent “is limited to a claim for loss or damage available under the specific article(s) pled.”<sup>548</sup>

**D. THE TRIBUNAL’S ANALYSIS**

369. The issue before the Tribunal is whether damages can be claimed in this case under NAFTA Article 1116. While the Investors initially brought their claim under Article 1116 in respect of their loss resulting from having to pay higher costs for aggregates as a result of the failure of the Whites Point Project, their claim in their Memorial focused on loss to Bilcon of Nova Scotia. This has led the Respondent to characterize the claim as one for “reflective loss” claimable only under Article 1117.

370. NAFTA Article 1116 permits claims by an investor where there has been a breach of NAFTA and “the investor has incurred loss or damage by reason of, or arising out of, that breach”. NAFTA Article 1117 permits claims by an investor in respect of an enterprise that it controls directly or indirectly where there has been a breach of NAFTA and “the enterprise has incurred loss or damage by reason of, or arising out of, that breach”.

**1. Article 31 of the Vienna Convention on the Law of Treaties**

371. The starting point for the interpretation of Articles 1116 is Article 31(1) of the VCLT under which treaties are to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The critical question in this case is the meaning of “the investor has incurred loss or damage” arising out of the breach. The terms of Article 1116 do not make clear whether they are limited to direct loss or they can include indirect loss that is, reflective loss.

372. However, if the words of Article 1116 are to be read “in their context” then Article 1117 has to be considered. This provision allows an investor to claim for loss to an enterprise thus providing for the recovery of reflective loss. As a result, to permit reflective loss to be recovered under Article 1116 would raise questions about the relationship between the two provisions perhaps rendering Article 1117 inutile. This is the point made by the Respondent. The Investors argue that the potential for conflict only arises when claims are brought under both Article 1116 and

---

<sup>548</sup> The United States’ Submission, para. 22.

Article 1117, but this only reinforces the question of why Article 1117 was included into NAFTA if claims can be brought for reflective loss under Article 1116.

373. Both the Respondent and the United States in their submissions argue that the inclusion of separate provisions in Article 1116 and Article 1117 was deliberate. Article 1116 gave effect to the traditional rule of customary international law that a party can sue for its losses arising out of the breach of an international obligation. Article 1117 was designed to permit claims by an investor on behalf of its investment, thus permitting a claim for reflective loss. In the absence of that provision a claim for reflective loss would otherwise be barred under customary international law by virtue of the ICJ judgment in *Barcelona Traction*, which rejected the right of shareholders to bring claims in place of the corporation.
374. The Tribunal finds this to be a plausible explanation for the existence of the two separate provisions in NAFTA Chapter Eleven, which would argue against overlap between them and would mean that reflective loss could not be recovered under Article 1116.
375. Both Parties invoke the object and purpose of NAFTA in support of their position. The Respondent claims that ensuring a predictable commercial framework, promoting conditions of fair competition, and increasing investment opportunities all point to making a clear distinction between Article 1116 and Article 1117. However, the Investors argue that allowing recovery for reflective loss serves the purpose of encouraging better protection of investment. The Tribunal considers neither approach particularly helpful in the interpretation of Article 1116.

## 2. Subsequent Practice

376. The Respondent and the United States reinforce their position on the interpretation of Article 1116 by arguing that it is confirmed by the consistent subsequent practice of the NAFTA Parties in their submissions to investor-State tribunals.<sup>549</sup> The Tribunal agrees with the Respondent and the United States in this regard, notwithstanding the fact that subsequent practice is only one of several elements established by Article 31 of the VCLT to consider when interpreting a treaty.
377. Indeed, the Tribunal is not convinced by the Investors' argument<sup>550</sup> that the power of the FTC to make authoritative interpretations of NAFTA replaces the rule in Article 31(3)(b) of the VCLT that "subsequent practice in the application of the treaty which establishes the agreement of the

---

<sup>549</sup> The Government of the United Mexican States has chosen not to make any Article 1128 Submission to this Tribunal, having been duly invited to do so by the Tribunal on 9 November 2017.

<sup>550</sup> Investors' Reply, paras. 378-379.



parties regarding its interpretation” shall be taken into account “together with the context”. The NAFTA Parties have an option to make a binding interpretation under Article 1131(2) but the fact they have not done so means that treaty interpretation simply follows the normal interpretative rules, which include taking account of subsequent agreements and subsequent practice of the parties.

378. In this regard, the Tribunal notes that the commentary to the ILC draft conclusions on “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” includes “statements in the course of a legal dispute” as potentially relevant subsequent practice of States for the purposes of interpretation.<sup>551</sup>
379. On this basis, the consistent practice of the NAFTA Parties in their submissions before Chapter Eleven tribunals in making a clear distinction between the application of Article 1116 and Article 1117 can be taken into account in interpreting the provisions of NAFTA. Thus, the NAFTA Parties’ subsequent practice militates in favour of adopting the Respondent’s position on this issue, although only analyzing subsequent practices does not replace the primary rule of interpretation of Article 31(1).

### 3. NAFTA Chapter Eleven Jurisprudence

380. As the Parties have pointed out, the distinction between Article 1116 and Article 1117 has been discussed by a number of NAFTA Chapter Eleven tribunals.
381. In *Pope & Talbot*, a U.S. company (Pope & Talbot Inc.), having a subsidiary in Canada (Pope & Talbot Ltd.), claimed for losses caused by Canada’s export control regime for softwood lumber, which implemented the 1996 Softwood Lumber Agreement between Canada and the United States. Canada, the respondent in that case, argued that, since the investor had brought its claim under Article 1116, it could not recover damages incurred by its Canadian subsidiary.<sup>552</sup> The tribunal found Canada’s argument unconvincing for two reasons. First, the language of Article 1117 was permissive: it only provides that an investor, on behalf of its enterprise in the host State, “may submit to arbitration.”<sup>553</sup> Secondly, the wording of Article 1121(1) did not support Canada’s case. The tribunal concluded:

---

<sup>551</sup> Report of the ILC, Seventieth Session, UN Doc. A/73/10, Chapter VI, para. 18.

<sup>552</sup> *Pope & Talbot*, paras. 75-78 (Ex. CA-39).

<sup>553</sup> *Pope & Talbot*, para. 79 (Ex. CA-39).

It could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise, which is a juridical person that the investor owns. In the present case, therefore, where the investor is the sole owner of the enterprise..., it is plain that a claim for loss or damage to its interest in that enterprise/investment may be brought under Article 1116. It remains of course for the Investor to prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of. But for immediate purposes the important point is that the existence of Article 1117 does not bar bringing a claim under Article 1116.<sup>554</sup>

382. The dispute in *Mondev* concerned the claim of a Canadian investor, Mondev International Ltd, for losses caused by the City of Boston in the context of a land development project operated by Mondev's U.S. subsidiary. The claim was brought pursuant to Article 1116. Objecting to the tribunal's jurisdiction, the United States argued that the claim should instead have been brought under Article 1117. The United States emphasized "the importance of the distinction between claims brought by an investor of a Party on its own behalf under Article 1116 and claims brought by an investor of a Party on behalf of an enterprise under Article 1117. The principal difference relates to the treatment of any damages recovered."<sup>555</sup>

383. In this regard, the *Mondev* tribunal stated, "a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor."<sup>556</sup> The tribunal however noted that, even if the claim was brought under Article 1116 in such circumstances the same objective could easily be achieved and the tribunal was prepared to do so, by treating the claimant's claim under Article 1116 as if it were brought in the alternative under Article 1117. In other words, the tribunal appeared to treat the difference between Articles 1116 and 1117 as a mere formality, stating that "[i]nternational law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved."<sup>557</sup> While the tribunal advised that it "would have been prepared, if necessary, to treat Mondev's claim as brought in the alternative under Article 1117," it cautioned that prospective claimants should take account of the distinction between Articles 1116 and 1117:

It is clearly desirable in future NAFTA cases that claimants consider carefully whether to bring proceedings under Articles 1116 and 1117, either concurrently or in

---

<sup>554</sup> *Pope & Talbot*, para. 80 (Ex. CA-39).

<sup>555</sup> *Mondev*, para. 84 (Ex. CA-40).

<sup>556</sup> *Mondev*, para. 86 (Ex. CA-40).

<sup>557</sup> *Mondev*, para. 86 (Ex. CA-40).

the alternative, and that they fully comply with the procedural requirements under Articles 1117 and 1121 if they are suing on behalf of an enterprise.<sup>558</sup>

384. In *S.D. Myers*, a U.S. investor, S.D. Myers Inc. (“SDMI”), set up a subsidiary in Canada (*i.e.* Myers Canada Ltd.) to import Polychlorinated biphenyl (“PCB”) waste from Canada for treatment in the United States. SDMI commenced arbitration pursuant to Article 1116, claiming for losses resulting from Canada’s interim prohibition of the export of PCB waste to the United States. The tribunal in *S.D. Myers* briefly addressed the relationship of Articles 1116 and 1117 under the heading of causation:

Article 1116 is relevant to the scope of recovery. It states that an investor can claim for: *...loss or damage by reason of, or arising out of...* a breach of Section A of Chapter 11. Article 1117, which is not in issue in this arbitration, provides the same remedy when an investor claims on behalf of its investment.<sup>559</sup> (Emphasis in original)

385. By contrast, the matter of derivative claims was at the heart of the parties’ dispute in *GAMI*. A U.S. minority shareholder, GAMI Investments Inc. (“GAMI”), claimed for losses of the value of its shares in Grupo Azucarero Mexico SA de CV (“GAM”), a Mexican company, due to Mexico’s expropriation of mills owned by GAM. The tribunal first addressed Article 1116 in the context of jurisdiction, holding that “the fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment.”<sup>560</sup> The tribunal decided that it had jurisdiction over GAMI’s claim for its losses.<sup>561</sup> The tribunal returned to the issue of derivative claims in addressing GAMI’s expropriation claim. In this regard, it identified certain difficulties attributable to the derivative nature of shareholder claims. First, the tribunal was concerned about the allocation of compensation between a shareholder and its subsidiary, especially in a situation where “unsynchronised resolution” of the same dispute by national and international jurisdictions was a “practically certain scenario.”<sup>562</sup> Second, given that no dividend had ever been paid by GAM to its shareholders, it was not clear why “GAMI’s recovery [should] be debited on account

---

<sup>558</sup> *Mondev*, para. 86 (Ex. CA-40).

<sup>559</sup> *S.D. Myers II*, para. 143 (Ex. CA-205).

<sup>560</sup> *GAMI*, para. 33 (Ex. CA-15).

<sup>561</sup> *GAMI*, para. 43 (Ex. CA-15).

<sup>562</sup> *GAMI*, paras. 116-121 (Ex. CA-15).

of a payment to GAM.”<sup>563</sup> Ultimately, the tribunal did not have to decide these issues, as it held that the claimant had failed to prove that Mexico breached its NAFTA obligations.<sup>564</sup>

386. In *UPS*, a U.S. company, United Parcel Service of America Inc. (“UPS”), operating through two subsidiaries in Canada (United Parcel Service Canada Ltd. (“UPS Canada”), and Fritz Starber Inc.), brought a case under Article 1116 claiming for losses resulting from Canada’s measures in relation to UPS Canada. Canada objected to jurisdiction on the ground that UPS should have brought its case pursuant to Article 1117 as the conduct complained of “primarily affects UPS Canada rather than UPS.”<sup>565</sup> The tribunal disagreed. Having made the observation that “UPS is the sole owner of UPS Canada,” it held that, at least in this case, the distinction between Articles 1116 and 1117 was a purely formal one:

[The distinction] is without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada. If there were multiple owners and divided ownership shares for UPS Canada, the question of how much of UPS Canada’s losses flow through to UPS – the question posed by Canada here – may have very different purchase. Whether the damage is directly to UPS or directly to UPS Canada and only indirectly to UPS is irrelevant to our jurisdiction over these claims.<sup>566</sup>

387. The Tribunal concludes from the above that no consistent position on the distinction in the scope of application of Article 1116 and Article 1117 has emerged in the Chapter Eleven cases. In neither *Pope & Talbot* nor *UPS* was a claim to reflective loss seen as precluded under Article 1116. Yet, in both *Mondev* and *GAMI* the distinction between the two provisions was seen as important. However, in both *Pope & Talbot* and *UPS*, the tribunals emphasized the fact that the claimants were the sole investors in the subsidiary. And, in *Mondev*, the tribunal warned against allowing any recovery being paid to the investor where the claim had been brought under Article 1116.
388. The tribunal’s warning in the *Mondev* award not to allow payment of compensation to the investor in the context of a claim made under Article 1117 shows the importance of distinguishing claims for reflective loss under Article 1117 from claims under Article 1116. As the Respondent points out, to allow an investor to recover under Article 1116 damages that belong to its investment could have an impact on other stakeholders, including other investors in the investment. That is the reason why recovery of monetary damages in respect of claims made under Article 1117 are to be

---

<sup>563</sup> *GAMI*, para. 118 (Ex. CA-15).

<sup>564</sup> *GAMI*, para. 137 (Ex. CA-15).

<sup>565</sup> *UPS*, para. 32 (Ex. CA-89).

<sup>566</sup> *UPS*, para. 35 (Ex. CA-89).

paid to the investment vehicle and not to the investor pursuant to Article 1135(2)(b). The lack of any equivalent provision in relation to Article 1116 carries the implication that reflective loss was not contemplated under Article 1116.

389. In light of the above, the Tribunal is persuaded that the Respondent and the United States are in principle correct. Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116. This follows from the wording of Article 1116 in its context, which includes Articles 1121 and 1135. Moreover, the Tribunal takes account of the common position of the NAFTA Parties in their submissions to Chapter Eleven tribunals.

#### **4. The Relief Awarded in the Present Case**

390. The question arises whether the relief requested by the Investors in the damages phase of the present arbitration is impermissible under NAFTA Article 1116.<sup>567</sup> As already noted above, various possible heads of damage were pleaded, ranging from mitigation costs to process costs, to sunk investment costs, to lost profit. The Tribunal need not address the permissibility of all these claims under NAFTA Article 1116. Rather, it will focus on the permissibility under Article 1116 of granting the relief that it has decided to award—namely compensation in an amount equivalent to the value of the opportunity lost by the Investors.
391. Would the award of compensation in an amount equivalent to the value of the opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner be an award of reflective loss? In the circumstances of the present case, the Tribunal does not consider that to be so.
392. First, it is clear that the opportunity to develop and submit the Whites Point Project for approval was entirely an opportunity of the Clayton Group in New Jersey, which is owned and run by the individual claimants in this case. They prospected quarry sites and invested their money in the opportunity.

---

<sup>567</sup> In the Notice of Arbitration, the claim was brought pursuant to Article 1116. At that time, the loss alleged consisted of the higher prices of aggregates to be paid by Bilcon of Delaware as a result of the failure of the Whites Point Project – an injury of the Investors. There is no question (and the Respondent does not dispute) that the original claim was correctly brought under Article 1116. In the Memorial, however, the Investors focused on losses to Bilcon of Nova Scotia to establish the amount of compensation owed to the Investors. This has raised the question whether the new damages theory alters the nature of the Investors claim, such that it could only be brought under Article 1117.

393. Secondly, all of the dealings between the Canadian and Nova Scotia authorities considering the location of, and establishing the necessary approvals for, the investment were conducted by or on behalf of the Clayton Group.

394. Thirdly, while for largely administrative reasons, the Investors conducted some of their dealings through Bilcon of Nova Scotia, the sole purpose of Bilcon of Nova Scotia was to build and operate a quarry, a role that it never got to fulfill. It was not an entity set up to establish and manage an investment in a quarry and a marine terminal with the Claytons just as passive investors. The fact that the Claytons used a local enterprise as an instrument for pursuing their opportunity, however, does not turn that opportunity into Bilcon of Nova Scotia's opportunity. Bilcon of Nova Scotia was no more than a conduit to facilitate the Claytons' operations.

395. Fourthly, to regard Bilcon of Nova Scotia as a separate entity in every respect would not be consistent with the facts of the case. As far as the Tribunal is concerned, the Clayton Group was not structured that way, nor did the Clayton brothers organize their involvement in the Clayton Group in such manner. [REDACTED]

396. [REDACTED]  
[REDACTED]  
[REDACTED] The opportunity to invest in a quarry and a marine terminal, which was denied by the Respondent's unlawful conduct, was an opportunity of the Investors and not an opportunity of Bilcon of Nova Scotia. Accordingly, compensation is owed directly to the Investors pursuant to Article 1116. It is not precluded by the prohibition against awarding "reflective loss".

---

<sup>568</sup> Hearing Transcript, 20 February 2018, pp. 398 *et seq*; Hearing Transcript, 22 February 2018, pp. 1299 *et seq*.

<sup>569</sup> Hearing Transcript, 20 February 2018, pp. 414 *et seq*.

<sup>570</sup> Hearing Transcript, 20 February 2018, pp. 398 *et seq*.

397. In light of these conclusions, the Tribunal sees no need to address the Investors' contentions that the Respondent's argument that the damages claim under Article 1116 has been brought too late, or that the Tribunal should treat the claim as one made under Article 1117.

## **X. COSTS**

398. Article 40 of the UNCITRAL Rules provides, in relevant parts:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

399. Having consulted with the Parties at the hearing on damages, the Tribunal has decided to fix the costs of arbitration, and to determine their allocation, in a separate, final award on costs. The Parties will be invited to file specific briefs regarding the costs of arbitration, taking into consideration the Tribunal's rulings in the Award on Jurisdiction and Liability and the Award on Damages and any other circumstances that they regard as relevant.

[Remainder of page left blank.]

**XI. DISPOSITIF**

400. **In light of the foregoing, and having considered the Parties' arguments and the evidence before it, the Tribunal unanimously decides:**

- a) The Respondent shall pay to Mr. William Richard Clayton, Mr. Douglas Clayton, Mr. Daniel Clayton, and Bilcon of Delaware, Inc. the amount of US\$ 7 million as compensation for the Respondent's breaches of NAFTA established in the Tribunal's Award on Jurisdiction and Liability dated 17 March 2015;**
- b) The Respondent shall pay interest on this amount at a rate of the average one-year U.S. Treasury bill yield for the corresponding calendar year, accruing annually on a compounded basis, starting on 22 October 2007 and until full payment has been made;**
- c) All other claims are dismissed;**
- d) Any decision on the costs of arbitration is deferred to a final award on costs.**



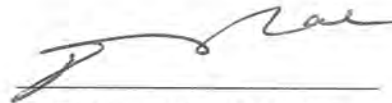
Done at the place of arbitration, Toronto, Ontario, Canada, on 10 January 2019.



**Professor Bryan Schwartz**


Co-arbitrator

(Professor Schwartz appends a  
concurring opinion to the present Award)



**Professor Donald McRae**

Co-arbitrator



**Judge Bruno Simma**

President