

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES**

**BETWEEN:**

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

**Claimants**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent**

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**GOVERNMENT OF CANADA  
COUNTER-MEMORIAL ON DAMAGES**

**June 9, 2017**

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## I. INTRODUCTION

### A. Overview of Canada's Damages Counter-Memorial

1. In the Award on Jurisdiction and Liability,<sup>1</sup> a majority of this Tribunal found that Canada breached its NAFTA Chapter Eleven obligations on one ground—the Whites Point Joint Review Panel's ("JRP's") "fundamental departure from the methodology required by Canadian and Nova Scotia law"<sup>2</sup> in its review of the Claimants' proposed Whites Point project. The majority held that as a consequence of the NAFTA breach, the Claimants and their investment "were not afforded a fair *opportunity* to have the specifics of [their proposal] considered, assessed and decided in accordance with applicable laws."<sup>3</sup> However, in finding fault with the acts of the Whites Point JRP, the majority made clear that it was not "deciding what the actual outcome should have been"<sup>4</sup> of the Whites Point environmental assessment ("EA") process. Nor could it. As the JRP served in an advisory role to government, government decision-makers "had the authority and duty to make their own decision about the future of the Bilcon project."<sup>5</sup> A variety of outcomes remained possible notwithstanding the NAFTA breach, including the rejection of the project by the Nova Scotia government, the federal government, or both.

2. In claiming damages for the NAFTA violation found by the majority, the Claimants bear the burden of establishing a causal link between the NAFTA breach and the resultant injury and loss that they claim.<sup>6</sup> The Claimants' case in this regard is simple and clear—"their loss is the loss of the profits they would have earned over the 50-year life of the Whites Point Quarry," a sum of US\$443,350,772.<sup>7</sup> Yet, simple and clear as the Claimants' case is, there is a disconnect

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<sup>1</sup> Award on Jurisdiction and Liability, March 17, 2015 ("Award").

<sup>2</sup> Award, ¶ 600.

<sup>3</sup> Award, ¶ 603.

<sup>4</sup> Award, ¶ 602.

<sup>5</sup> Award, ¶ 584.

<sup>6</sup> RA-47, *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, 32 I.L.M.289 (entered into force 1 January 1994), ("NAFTA"), Article 1116(1).

<sup>7</sup> Claimants' Damages Memorial, March 10, 2017 ("Claimants' Damages Memorial"), ¶¶ 12-13. This damages amount is comprised of the project's alleged profits, a tax gross-up, and pre-award interest.

between it and the majority's articulation of the NAFTA breach in the Award. Indeed, the Claimants ignore that a variety of scenarios for the outcome of the EA of the proposed project remained possible, and instead ask the Tribunal to now conclude that there was only one possible outcome of a lawfully conducted EA of the project—approval. The Tribunal must refuse this request. The NAFTA violation found by the majority did not cause the Claimants to lose 50 years of profits from the Whites Point project. As explained below, the Claimants' approach leaves the Tribunal with but one option and outcome in this phase of the arbitration—dismissal of the Claimants' damages claim in its entirety.

3. As a preliminary matter, the Tribunal must be satisfied the Claimants have standing to make the damages claim that they do. The Claimants submitted their claim to arbitration under NAFTA Article 1116 and, pursuant to this provision, they are entitled to claim the losses they allegedly suffered as investors, as a result of the NAFTA breach. Yet the claim they have advanced makes clear that the alleged losses they seek to recover are those of their investment, Bilcon of Nova Scotia. A claim for the losses suffered by an investment may only be advanced under NAFTA Article 1117. A simple application of the general rule of treaty interpretation and the core tenets of corporate law recognized by advanced legal systems throughout the world, including all three NAFTA Parties, demonstrates that the Claimants' claim for the losses allegedly suffered by Bilcon of Nova Scotia must be dismissed. As explained by Canada in Part II, the Claimants have no standing to make this claim under Article 1116.

4. In the interest of judicial economy, the Tribunal's inquiry should stop once it determines the Claimants do not have standing under Article 1116 to seek losses suffered by Bilcon of Nova Scotia. But even if the Tribunal were to continue, the Claimants have also failed to demonstrate the existence of a causal link between the NAFTA breach and the damages they claim. This failure also warrants a dismissal of their case. As Canada explains in Part III, the damages model the Claimants have advanced is one that might typically be seen in an investment arbitration award addressing an uncompensated expropriation of a going concern with a history of profitable operations. In this case, the NAFTA breach found by the majority denied the Claimants neither a going concern, nor even a right to develop a going concern. All that the Claimants were denied was the opportunity to have the project proposal considered, assessed and decided in accordance

with applicable Canadian laws. As a tribunal “simply cannot compensate [a c]laimant for the deprivation of a right that it never possessed,”<sup>8</sup> the Claimants’ claim for the lost profits of a fully permitted Whites Point project, operating over the course of 50 years, must be rejected outright for their failure to demonstrate causation. As a result, the Claimants should be awarded no damages.

5. It is neither the Tribunal’s nor Canada’s role to do the Claimants’ job of pleading a viable theory of causation. However, if the Tribunal were to do so, the appropriate exercise involves establishing the value of the injury caused by the NAFTA breach—specifically, the value of the lost “*opportunity* to have the specifics of [their proposal] considered, assessed and decided in accordance with applicable laws.”<sup>9</sup> As Canada explains in Part IV, in determining this value the Tribunal must take into account the duty to take reasonable steps to mitigate losses. The Claimants and Bilcon of Nova Scotia had available an effective means of mitigation—judicial review of the Whites Point JRP Report in Canada’s domestic courts. Such a review would have entirely restored the lost opportunity. Accordingly, the Claimants are not entitled to recover any more in damages than it would have cost them to fully restore what was lost through the timely and cost-effective remedy of domestic judicial review.

6. If the Tribunal disagrees and finds that the Claimants were not under a duty to mitigate, then it must determine the appropriate measure for valuing the lost opportunity to have the Whites Point project considered and assessed in accordance with Canadian law. As Canada explains in Part V, the most that could possibly be awarded for that opportunity are the actual costs Bilcon of Nova Scotia invested in the Whites Point JRP process. The breach in question did not destroy the value of the entire investment. Compensating the Claimants based on the costs that Bilcon of Nova Scotia invested in the JRP process that was found to breach NAFTA would restore them to the position they were in prior to the breach.

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<sup>8</sup> CA-316, *Gold Reserve Inc. v. Venezuela* (ICSID Case No. ARB (AF)/09/1) Award, 22 September 2014 (“*Gold Reserve – Award*”), ¶ 829.

<sup>9</sup> Award, ¶ 603 (emphasis in original).

7. While for the reasons above Canada believes it is clear that the Claimants' loss of opportunity should not be valued on the basis of the entire project, in Part VI Canada explains why, if the Tribunal disagrees, the Claimants' attempt to value their lost opportunity on the basis of the project's alleged lost profits is entirely inappropriate. The Whites Point project was not developed at the time of the NAFTA breach, and Bilcon of Nova Scotia *never* had the right to develop the project. At most, the value to the Claimants could be represented by nothing more than Bilcon of Nova Scotia's investment costs in the project.

8. In the final alternative, even if the Tribunal were to consider the project's alleged future lost profits in valuing the opportunity it found the Claimants were denied, Canada explains in Part VII why the model underlying the Claimants' lost profits claim is flawed, unreliable, and must be rejected. Canada also explains how a corrected calculation of the speculative potential lost profits of Bilcon of Nova Scotia produces a significantly lower valuation than the Claimants'.

9. The Claimants assert that "[t]he law is ... simple and clear: the Investors are entitled to full reparation to wipe out all of the consequences of the wrong done to them."<sup>10</sup> In the end, Canada takes issue not with the Claimants' statement of this general legal principle, but with their application of it. The Claimants have failed to prove that the alleged loss of profits they claim is actually a consequence of the specific wrong done to them. It is the Claimants' burden to make out their damages claim, and they have failed. Accordingly, the result of this phase of the arbitration should also be simple and clear—a complete dismissal of the Claimants' claim, with a full award of costs to the Government of Canada.

## **B. Materials Filed by Canada**

10. Canada's Counter-Memorial is accompanied by 172 new exhibits and 39 new authorities, in addition to those exhibits and authorities filed in the liability phase of the arbitration. Canada has also filed Reports by the following experts in support of its Counter-Memorial:

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<sup>10</sup> Claimants' Damages Memorial, ¶ 12.

- **TONY BLOUIN, Ph.D** is the former Chair of the Nova Scotia Environmental Assessment Board and has served as the appointed chair of several review panels established under the Nova Scotia *Environment Act* (“*NSEA*”). In his Expert Report, Dr. Blouin examines the Whites Point JRP Report and public record and provides his opinion on the recommendation that the JRP could have reasonably made to the Nova Scotia Minister of Environment in discharging its mandate under the Nova Scotia EA regime had it not committed the NAFTA breach.
- **LESLEY GRIFFITHS** has served as the appointed chair of five JRPs constituted under the *Canadian Environmental Assessment Act* (“*CEAA*”), and was also a member of a federal-provincial EA panel constituted under the *NSEA* and the federal Environmental Assessment and Review Process (“*EARP*”). Ms. Griffiths has examined the Whites Point JRP Report and public record and, on the basis of her past expertise as a *CEAA* review panel member, she provides her opinion on the recommendations that the Whites Point JRP could have reasonably made to federal decision-makers in discharging its mandate under the *CEAA* had it not committed the NAFTA breach.
- **PETER GEDDES** is a past Manager of Environmental Assessment, past Director of Policy, Planning and Environmental Assessment, and past Environmental Assessment Administrator with the Nova Scotia Department of Environment. He has been responsible for reviewing EA panel reports with the Nova Scotia Minister of Environment and providing the additional advice and analysis necessary for the Minister to make his or her decision on projects. In his Report, Mr. Geddes discusses how the Ministerial decision-making process in an EA is carried out in Nova Scotia, the factors that are considered, and the possible decisions available to the Minister with respect to a project like the Whites Point project.
- **ROBERT G. CONNELLY** is a former Vice President, Policy, and a former Acting President of the Canadian Environmental Assessment Agency. Mr. Connelly has over 38 years’ experience in the EA field, was involved in the design and enactment of the *CEAA*, and has served as a member or the appointed chair of two *CEAA* review panels.

In his Expert Report, Mr. Connelly explains the process typically followed by the federal government in responding to a JRP report, describes the possible responses that could be made to a JRP report, and provides his opinion as to how the federal government's decision-making might have unfolded in the case of the Whites Point project had the JRP not committed the NAFTA breach.

- **THE HONOURABLE JOHN M. EVANS** was appointed to the Federal Court of Canada in 1998 and to the Federal Court of Appeal in 1999, where he served until his retirement in 2013. He has substantial experience with the judicial review of administrative action by the Government of Canada and its agencies, having presided over hundreds of judicial review applications and co-authored the treatise *Judicial Review of Administrative Action in Canada*. He has been described by the Supreme Court of Canada as “a leading scholar in the field of administrative law.”<sup>11</sup> In his Expert Report, Justice Evans explains the Canadian law and procedure of judicial review of administrative action both at the federal level and in the Province of Nova Scotia. He also provides his opinion as to how the Claimants could have restored their lost opportunity in the Whites Point JRP process by commencing applications for the judicial review of the JRP Report in Canada's domestic courts.
- **SC MARKET ANALYTICS** combines Mr. Colin Sutherland's experience working in the construction materials sector, primarily in cement, aggregates, and concrete products for over 30 years, with Dr. David Chereb's experience in forecasting North American construction materials markets for over 30 years. Working together with Mr. Michael Power, who has over 40 years' experience in aggregates sales and marketing, and Mr. James Ward, who has over 40 years' experience in the heavy building materials and construction products industries, SC Market Analytics provides an opinion on the effect that an increased supply of aggregates from Whites Point would have had on the price of aggregate in the New York market, where the Claimants proposed to sell the majority of the Whites Point project's aggregate products. SC

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<sup>11</sup> **RE-6**, Expert Report of the Honourable John M. Evans, June 9, 2017 (“Evans Report”), ¶ 2.

Market Analytics also provides an opinion on the operating costs and capital expenditures that would have been required to meet the Claimants' proposed sales plan proposed by the Claimants in this arbitration.

- **ARLIE G. STERLING, MARSOFT, INC.** is the President and co-founder of Marsoft Incorporated, the world's largest independent advisory group focusing solely on the maritime industry. Dr. Sterling advises ship-owners, investors, and financial institutions on the development and execution of effective investment, chartering, and risk management strategies. In his Expert Report, Dr. Sterling provides an opinion on the freight rates calculated and relied upon by the Claimants for the shipping component of the Whites Point project. In addition to providing an opinion on the reliability of the methodology used by the Claimants to calculate Bilcon of Nova Scotia's freight costs, Dr. Sterling provides an alternative methodology to calculate freight costs for the project based on the [REDACTED]  
[REDACTED]
- **DARRELL B. CHODOROW, THE BRATTLE GROUP** is a Principal of the Brattle Group, an international economics consultancy, and has over 20 years' experience in analyzing and advising on the quantification of economic damages and valuation in a wide range of litigation and advisory matters. In his Expert Report, Mr. Chodorow provides a valuation of the loss due to the NAFTA breach, considering the effects of potential mitigation through the remedy of judicial review. He also evaluates the historical investment costs related to the JRP process and the Whites Point project, including the reliability of the Claimants' estimate of "Net Damages" based on historical costs presented in the December 13, 2016 Witness Statement of Paul Buxton. Finally, Mr. Chodorow provides his opinion on the reliability of the findings of the Claimants' damages expert, Howard Rosen, regarding the Claimants' alleged lost profits. He offers an alternative discounted cash flow ("DCF") valuation of the Whites Point project's potential profits immediately prior to the NAFTA breach, and finds that the value of the project as of the breach date was significantly lower than the amount claimed by the Claimants.

## **II. THE CLAIMANTS HAVE NO STANDING UNDER ARTICLE 1116 TO RECOVER THE DAMAGES THEY SEEK**

11. The Claimants submitted their claim to arbitration solely under Article 1116.<sup>12</sup> That Article permits an investor to bring a claim on its own behalf on the grounds that it has incurred loss or damage as a result of an alleged breach of NAFTA. A proper *Vienna Convention on the Law of Treaties* (“*VCLT*”) analysis demonstrates that Article 1116 does not allow an investor to recover the loss or damage incurred by its enterprise. Yet this is exactly what the Claimants seek to do here. Indeed, they are clear throughout their Memorial and in their Expert Reports that the damages they have calculated and seek to recover were incurred by Bilcon of Nova Scotia. This is clearly impermissible under Article 1116. The Claimants’ argument reads out the clear distinction between claims under Articles 1116 and 1117.

12. It was, of course, the Claimants’ choice to submit their claim solely under Article 1116. When they initiated this arbitration in 2008, they certainly could have brought a claim under Article 1117 on behalf of their enterprise for losses suffered by Bilcon of Nova Scotia. They chose not to do so, and by so doing they restricted themselves to claiming damages that they suffered as investors. Accordingly, based on a proper *VCLT* analysis, and on the facts of this case, the Claimants have failed to articulate an acceptable claim for damages. For this reason, the claim in their Memorial must be rejected. It is, of course, open to the Claimants to restate their claim so that it clearly falls within the scope of Article 1116—that is, a claim for damages that the Claimants have suffered as investors. However, in the absence of such a properly framed claim, as a matter of law, the Tribunal has no choice but to deny the Claimants’ claim for damages.

### **A. Under Article 1116, Investors May Only Recover Losses They Incur, Not Losses Their Investments Incur**

13. Under Article 31 of the *VCLT*, NAFTA is 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

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<sup>12</sup> Claimants’ Notice of Arbitration, May 26, 2008, ¶ 1; Claimants’ Amended Statement of Claim, December 3, 2009, ¶ 1.

its object and purpose.”<sup>13</sup> The application of this rule of treaty interpretation shows why the claim for damages made by the Claimants is impermissible under Article 1116.

**1. The Ordinary Meaning of Article 1116 Does Not Allow Investors to Recover Losses Suffered by Their Investments**

14. Article 1116 provides a right for an investor of a Party to bring a claim on its own behalf on the grounds that “the investor has incurred loss or damage.” As the text clearly states, the claim is for losses incurred by the investor, not for losses of an enterprise owned and controlled by the investor. No qualifying clauses (e.g., “including” or “such as”) suggest that the enumeration of eligible claims in Article 1116 is merely illustrative. The *expressio unius est exclusio alterius* interpretive rule precludes supplementing the list in Article 1116 with other NAFTA obligations.

15. The ordinary meaning of Article 1116 reflects one of the core principles of corporate law recognized by advanced domestic legal systems and customary international law.<sup>14</sup> Advanced legal systems in both common law and civil law jurisdictions recognize that a corporation has a separate legal personality from its shareholders and that, as a result, shareholders are precluded from personally recovering damages in respect of wrongs done to the corporation. Advanced legal systems thus apply a simple rule that prohibits claims being brought by shareholders for “reflective loss”—that is, a loss of the individual shareholders that is inseparable from the general loss of the corporation for wrongs done to it. Put simply, a shareholder’s loss is merely “reflective” of the company’s loss when it “would be made good if the company’s assets were replenished through action against the party responsible for the loss.”<sup>15</sup> For example, under United States law, shareholders have no standing to claim damages on their own behalf for “a wrongful act that depletes corporate assets and thereby injures shareholders only indirectly, by

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<sup>13</sup> CA-44, *Vienna Convention on the Law of Treaties* (1969), Article 31(1).

<sup>14</sup> RA-118, D. Gaukrodger, *Investment treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis*, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division (“Gaukrodger, 2013”), p. 53.

<sup>15</sup> R-582, *Johnson v. Gore Wood & Co.* [2001] 1 All ER 481, p. 26, 35F.

reason of the prior injury to the corporation.”<sup>16</sup> Canadian law also prohibits reflective loss claims in order to uphold the corporation's separate legal personality,<sup>17</sup> which has been described as the single most important rule in corporate law.<sup>18</sup> The German Supreme Civil Court has similarly noted that the shareholder can claim for any separate, direct damage, but not for reflective loss.<sup>19</sup>

16. Customary international law also bars claims for reflective loss. In *Barcelona Traction*, the International Court of Justice (“ICJ”) acknowledged the corporation's separate legal personality as established by municipal law,<sup>20</sup> and held that:

Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.<sup>21</sup>

17. In the *Diallo* case, the ICJ cited *Barcelona Traction* approvingly and reaffirmed that international law does not permit claims of reflective injury to shareholders.<sup>22</sup>

18. Nothing in the text of Article 1116 supports an argument that the NAFTA Parties intended to derogate from the general rule against reflective loss at domestic and customary international law. It is well recognized that “[a]n important principle of international law should not be held to

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<sup>16</sup> **RA-118**, *Gaukrodger*, 2013, p. 13; **R-583**, *Hometown Financial, Inc. v. United States*, 56 Fed. Cl. 477, 486 (2003), p. 12.

<sup>17</sup> **R-584**, *Meditrust HealthCare Inc. v. Shoppers Drug Mart*, 61 O.R. (3d) 786 (Ont. Ct. App. 2002), ¶¶ 12-14.

<sup>18</sup> **RA-120**, D. Gaukrodger, Chapter 8, *The impact of investment treaties on companies, shareholders and creditors*, OECD Business and Finance Outlook 2016 (“*Gaukrodger*, 2016”), p. 235.

<sup>19</sup> **RA-118**, *Gaukrodger*, 2013, p. 17.

<sup>20</sup> **RA-110**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (I.C.J. Reports 1970) Second Phase, Judgment, 5 February 1970 (“*Barcelona Traction 1970*”), ¶ 38.

<sup>21</sup> **RA-110**, *Barcelona Traction 1970*, ¶ 46.

<sup>22</sup> **CA-282**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* Judgment on Preliminary Objections, 24 May 2007, ¶¶ 61-64 (distinguishing between admissible claims based on direct rights as shareholder and inadmissible claims based on reflective loss); **RA-114**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (I.C.J. Reports 2010) Judgment, 30 November 2010 (“*Diallo 2010*”), ¶ 105 (reaffirming the distinction).

have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so.”<sup>23</sup>

## 2. The Context of Article 1116 Confirms that NAFTA Does Not Permit an Investor to Recover Losses Suffered by Its Investment

19. Article 1116 must be interpreted in the context of Article 1117. The two provisions identify who has standing to bring a claim for which damages under NAFTA Chapter Eleven.<sup>24</sup> Article 1117 derogates from the general laws of advanced legal systems and from customary international law by creating a right for investors to bring claims on behalf of an enterprise for damages suffered by the enterprise.<sup>25</sup> Under this provision, an investor may bring a claim on the grounds that “the enterprise has incurred loss or damage.”<sup>26</sup> An enterprise is defined for the purposes of this provision as “a juridical person that the investor owns or controls directly or indirectly.”<sup>27</sup> Importantly, pursuant to Article 1135(2), any damages awarded under Article 1117 are paid to the enterprise, not to the investor.<sup>28</sup>

20. As is clear from the text, NAFTA creates a strict separation between Articles 1116 and 1117 based on which entity incurred loss or damage—the investor or the enterprise, respectively. In its *Statement of Administrative Action* of 1993 implementing NAFTA, the United States confirmed the distinction between claims for losses incurred by the investor (direct injuries) and losses incurred by the enterprise (indirect injuries):

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<sup>23</sup> **RA-75**, *Loewen Group Inc. v. United States* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003 (“*Loewen – Award*”), ¶ 160 (citing **CA-105**, *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v. Italy)* (I.C.J. Reports 1989), p. 42). See also **RA-75**, *Loewen – Award*, 26 June 2003, ¶ 162: (“It would be strange indeed if sub silentio the international rule were to be swept away.”)

<sup>24</sup> **RA-125**, 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.

<sup>25</sup> **RA-119**, 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, OECD Publishing, (“*Gaukrodger*, 2014”), p. 23.

<sup>26</sup> **RA-47**, NAFTA Article 1117(1)(b).

<sup>27</sup> **RA-47**, NAFTA Article 1117(1).

<sup>28</sup> **RA-47**, NAFTA Article 1135(2) states in part: “where a claim is made under Article 1117(1): [...] an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise.”

Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by the investor.<sup>29</sup>

21. Ignoring this distinction would render Article 1117 redundant. A corollary of the “general rule of interpretation” in the *VCLT* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that reduces whole treaty clauses to inutility.<sup>30</sup> Permitting investors to use Article 1116 to recover damages for losses incurred by their enterprise would eliminate the distinction between Articles 1116 and 1117.

22. The elimination of this distinction would also have serious negative real world consequences. In corporate law, company creditors have a priority claim over shareholders for corporate assets.<sup>31</sup> The distinction between Articles 1116 and 1117 is critical to ensuring that creditors’ rights are respected by ensuring that damages suffered by a corporation due to a NAFTA breach are paid to the corporation, not to its shareholders.<sup>32</sup> Allowing investor claims for reflective loss can strip assets from the company to the detriment of creditors and non-claimant shareholders.<sup>33</sup> The *Mondev* tribunal recognized that awarding damages to the enterprise for its losses, rather than to the investors, could be important to creditors with security interests in the damages paid.<sup>34</sup> The tribunal also noted that paying an award to the investor for losses of the enterprise “could also make a difference in terms of the tax treatment of those

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<sup>29</sup> **RA-140**, The North American Free Trade Agreement Implementation Act, *United States Statement of Administrative Action*, Chapter Eleven, November 1993, p. 146.

<sup>30</sup> **CA-125**, World Trade Organization, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 23.

<sup>31</sup> **RA-120**, *Gaukrodger*, 2016, p. 235.

<sup>32</sup> See, e.g., **RA-117**, *GAMI Investments Inc. v. United Mexican States* (UNCITRAL) Submission of the United States, 30 June 2003 (“*GAMI – Submission of the United States*”), ¶ 17; **RA-28**, *GAMI Investments Inc. v. United Mexican States* (UNCITRAL) Mexico’s Statement of Defence, 24 November 2003 (“*GAMI – Statement of Defence*”), ¶¶ 166-167 (agreeing with and quoting US submission); **R-585**, *Alford v. Frontier Enterprises, Inc.*, 599 F. 2d 483 (1st. Cir. 1979), p. 2: (“[the shareholder] is attempting to use the corporate form both as shield and sword at his will [...T]he corporate form ... effectively shielded [him] from liability”, but the shareholder contended that he “can disregard the corporate entity and recover damages for himself. Of course, this is impermissible.”)

<sup>33</sup> **RA-120**, *Gaukrodger*, 2016, p. 239.

<sup>34</sup> **RA-46**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 (“*Mondev – Award*”), ¶¶ 84, 86.

damages.”<sup>35</sup> Introducing different priority rankings over corporate assets unsettles the predictability of the corporate form as a structure for investment.<sup>36</sup>

23. In addition, numerous complications arise if shareholders are permitted to raise reflective loss claims under Article 1116. The waiver in Article 1121(1) does not prevent multiple claims by minority shareholders. As the *GAMI* tribunal noted, resolution of multiple and overlapping claims for the same loss is practically certain to be uncoordinated.<sup>37</sup> It cautioned that awarding damages for reflective loss would produce insurmountable difficulties with respect to quantification of any loss to a particular investor.<sup>38</sup> Moreover, the risks of double recovery and inconsistent decisions arise,<sup>39</sup> and concerns for judicial economy grow, as the number of cases brought to address the same harm increases.<sup>40</sup> In contrast, recognizing the distinction between Articles 1116 and 1117 maintains the well-established rule against reflective loss.

24. Finally, like separate legal personality, delegated management is a core characteristic of the corporation.<sup>41</sup> The corporation's directors and officers make most business decisions, including whether to commence or settle litigation. They have a fiduciary duty to act in the corporation's best interests, by considering diverse corporate constituents including minority shareholders. The directors and officers may not consider commencing or continuing arbitration against the host state to be in the corporation's long-term interest.<sup>42</sup> If shareholders can claim autonomously for reflective loss under Article 1116, they can disregard such concerns.

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<sup>35</sup> **RA-46**, *Mondev – Award*, ¶ 84.

<sup>36</sup> **RA-119**, *Gaukrodger*, 2014, p. 18.

<sup>37</sup> **RA-27**, *GAMI Investments Inc. v. United Mexican States* (UNCITRAL) Final Award, 15 November 2004 (“*GAMI – Final Award*”), ¶ 119.

<sup>38</sup> **RA-27**, *GAMI – Final Award*, ¶¶ 116-121.

<sup>39</sup> **RA-27**, *GAMI – Final Award*, ¶¶ 120-121.

<sup>40</sup> **RA-118**, *Gaukrodger*, 2013, p. 9: (“national courts have frequently underlined that the no reflective loss principle serves the societal interest in “judicial economy” by reducing the number of cases needed to address the harm.”)

<sup>41</sup> **RA-119**, *Gaukrodger*, 2014, p. 16.

<sup>42</sup> **RA-118**, *Gaukrodger*, 2013, p. 10.

Moreover, the respondent government may see little value in settling with the company when new shareholders might raise claims over the same events.<sup>43</sup>

25. It is for reasons such as the above that the distinction between Articles 1116 and 1117 must be respected. A basic tenet of corporate law is that a corporation has a separate legal status from its shareholders. As a consequence of this, the shareholders are shielded from liability for the actions of the corporation. It would be inappropriate for a shareholder to take advantage of the separate legal status of a corporation to shield itself from potential liability, but then disregard that legal status for the purpose of making claims for reflective loss. Indeed, the *Mondev* tribunal urged NAFTA tribunals to “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>44</sup>

### **3. A Strict Separation of Articles 1116 and 1117 is Required to Achieve the Object and Purpose of NAFTA**

26. A proper *VCLT* analysis requires interpreting a provision in light of the treaty's object and purpose. Maintaining the clear distinction between Articles 1116 and 1117 is the only way to respect the object and purpose of NAFTA. For example, NAFTA's Preamble reflects the Parties' desire to ensure a predictable commercial framework for business planning and investment. Further, in Article 102(1), the NAFTA Parties made clear that their objectives included “promot[ing] conditions of fair competition in the free trade area”<sup>45</sup> and “increas[ing] substantially investment opportunities in the territories of the Parties.”<sup>46</sup> Awarding damages to shareholders for losses incurred by enterprises undermines one of the most fundamental rules of corporate law in all three NAFTA Parties. Allowing shareholders to recover reflective losses under Article 1116 will weaken the corporation's separate legal personality, create unpredictability for investors, creditors, banks, and others who participate in the foreign direct investment market, create unfair conditions of competition among these different sorts of investors, and hence, inevitably decrease the opportunities for investment in the NAFTA Parties.

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<sup>43</sup> **RA-118**, *Gaukrodger*, 2013, p. 9: (“where shareholders can claim autonomously for reflective loss, a settlement with the company may be of little value to the government (and thus to the company and its creditors).”)

<sup>44</sup> **RA-46**, *Mondev - Award*, ¶ 86.

<sup>45</sup> **RA-47**, NAFTA Article 102(1)(b).

<sup>46</sup> **RA-47**, NAFTA Article 102(1)(c).

#### 4. Subsequent Agreement and Practice Also Confirm that the NAFTA Parties Did Not Intend for Article 1116 to Encompass Reflective Loss

27. Article 31(3)(a) of the *VCLT* requires any subsequent agreement between the parties to be taken into account when interpreting the treaty or the application of its provisions. Such agreement can take various forms, provided the purpose is clear.<sup>47</sup> Similarly, *VCLT* Article 31(3)(b) provides that any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is to be considered. Consistent practice by all parties is a strong indication of what they understand a provision to mean.<sup>48</sup>

28. All three NAFTA Parties consistently interpret Articles 1116 and 1117 as distinct provisions, pursuant to which indirect losses can only be claimed through Article 1117.<sup>49</sup> The NAFTA Parties agree that investors must allege direct damage, not reflective losses, to recover under Article 1116.<sup>50</sup> The consistent positions of the NAFTA Parties establish an agreement on the proper interpretation of Articles 1116 and 1117. This agreement constitutes an authentic

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<sup>47</sup> **RA-109**, A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2004), p. 191.

<sup>48</sup> **RA-109**, A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2004), p. 195.

<sup>49</sup> **RA-125**, 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.

<sup>50</sup> For example, in *Mondev v. USA*, the United States argued that Article 1116 provided no basis for the investor to submit a claim for injuries allegedly suffered by its investment (**RA-128**, *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; **RA-129**, *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). In *GAMI v. Mexico*, the United States stated in its Article 1128 Submission that covered shareholders cannot bring reflective loss claims on their own behalf under Article 1116 (**RA-117**, *GAMI – Submission of the United States*, ¶¶ 11-12, 14). The United States maintained that claims arising from injury to the enterprise can only be brought on behalf of the enterprise, with recovery for the enterprise, under Article 1117.

Mexico takes the exact same position. In *GAMI*, Mexico quoted and agreed with the Article 1128 Submission of the United States (**RA-28**, *GAMI – Statement of Defence*, p. 59 n.158). Both countries agreed that the interests of shareholders must not be confused with those of the enterprise. Mexico also argued in its Statement of Defence that “[a] shareholder cannot bring a claim in accordance with Article 1116 for damages or losses suffered directly by an enterprise” (**RA-28**, *GAMI – Statement of Defence*, ¶ 167(h)).

Finally, Canada has also taken the same position concerning the correct interpretation of Article 1116. Through Article 1128 Submissions and as Respondent in *Pope & Talbot* and *UPS*, amongst other cases, Canada has maintained that investors cannot bring claims under Article 1116 without alleging direct injury, rather than derivative injury from damage to their investment (**RA-56**, *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial, 29 March 2000, ¶¶ 329-332; **RA-81**, *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial (Merits Phase), 22 June 2005, ¶¶ 12, 523-525; **RA-134**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial (Damages Phase), 7 June 2001, ¶¶ 106-109).

interpretation which, pursuant to Article 31(3) of the *VCLT*, “shall be taken into account” in interpreting these provisions. Accordingly, the common, concordant, and consistent views of the NAFTA Parties on the interpretation of NAFTA Chapter Eleven must be given considerable weight by this Tribunal.

**B. The Claimants May Not Recover the Damages They Seek in This Arbitration Because Those Damages Have Been Incurred by Bilcon of Nova Scotia**

29. In their Damages Memorial, the Claimants take the position that they are entitled to recover under Article 1116 the lost profits and pre-award interest of Bilcon of Nova Scotia.<sup>51</sup> Indeed, in reaching a figure for their lost profits claim, the Claimants rely on Mr. Rosen’s calculations of discretionary after-tax cash flows that allegedly would have been generated from the Whites Point project but for the NAFTA breach.<sup>52</sup> Mr. Rosen expressly admits that “[t]hese cash flows represent the “lost profits” of Bilcon of Nova Scotia.”<sup>53</sup> He then articulates how the direct losses of the enterprise have reflective consequences for the Claimants by stating “[t]he lost profits of Bilcon of Nova Scotia represent money available for distribution to the Investors.”<sup>54</sup> In essence, the Claimants’ own expert has expressly characterized this claim as a claim for reflective loss.

30. In identifying the inputs into Mr. Rosen’s analysis of the lost profits of Bilcon of Nova Scotia, the Claimants also make clear that they are quantifying losses incurred not by the Claimants, but by their enterprise. For example, the Claimants assert in their Damages Memorial that “[REDACTED]

[REDACTED]<sup>55</sup> [REDACTED].<sup>56</sup> Mr. Wick, the Claimants’ market expert, also made conclusions on the market share that [REDACTED]

<sup>51</sup> Claimants’ Damages Memorial, ¶ 252.

<sup>52</sup> Expert Report of Howard Rosen (FTI Consulting), December 15, 2016 (“Rosen Report”), ¶ 2.2.

<sup>53</sup> Rosen Report, ¶ 2.2 (emphasis added).

<sup>54</sup> Rosen Report, ¶ 2.5.

<sup>55</sup> Claimants’ Damages Memorial, ¶ 194 (emphasis added).

<sup>56</sup> Claimants’ Damages Memorial, ¶ 194-6.

[REDACTED], absent the NAFTA breach.<sup>57</sup> He referred to the volumes of grit that Bilcon of Nova Scotia would have sold.<sup>58</sup> Beyond New York, the Claimants allege that Bilcon of Nova Scotia would have shipped and sold Whites Point aggregate into the Atlantic and Gulf Coast markets.<sup>59</sup> The Claimants also provide 150 exhibits listing expenses Bilcon of Nova Scotia allegedly incurred between [REDACTED].<sup>60</sup> These inputs all relate to Bilcon of Nova Scotia.

31. In short, not once do the Claimants even attempt to calculate the damages that they allegedly suffered directly as investors arising out of the NAFTA breach. Instead, they calculate the damages allegedly suffered by their enterprise, Bilcon of Nova Scotia, and seek to recover their reflective losses under Article 1116. As explained above, this is impermissible. The Claimants cannot recover under Article 1116 for loss or damage that is merely reflective of loss or damage allegedly incurred by their enterprise, Bilcon of Nova Scotia.

32. The fact that Bilcon of Nova Scotia is wholly-owned by Bilcon of Delaware, which is in turn owned by some of the individual Claimants, is irrelevant. The reason for a rule barring recovery for reflective losses is not simply that the rights of other shareholders might be prejudiced. It is also to ensure that shareholders cannot strip their enterprises of assets and thereby avoid paying any creditors. As the ICJ explained in *Diallo*, while the distinction between the rights of the businesses and the direct rights of an investor “could appear artificial” in the case of a sole shareholder, tribunals must be “careful” to maintain the distinction because “the rights and assets of a company must be distinguished from the rights and assets of an *associé*. In this respect, it is legally untenable to consider [...] that the property of the corporation merges with the property of the shareholder.”<sup>61</sup>

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<sup>57</sup> Claimants' Damages Memorial, ¶ 204.

<sup>58</sup> Claimants' Damages Memorial, ¶ 206.

<sup>59</sup> Claimants' Damages Memorial, ¶ 207.

<sup>60</sup> See **C-1169** through **C-1318**; **C-1342**, Letter from Greg Nash to the Tribunal (Mar. 3, 2017), p. 8.

<sup>61</sup> **RA-114**, *Diallo 2010*, ¶ 155.

33. Further, respecting the distinction between Article 1116 and Article 1117 claims protects against the possibility of inconsistent decisions and double recovery. In this regard, the facts of this case provide good context for why any claim for reflective loss must be denied as a matter of law under NAFTA. As the tribunal in *UPS* explained, blurring the line between Articles 1116 and 1117 raises issues if an enterprise has many owners.<sup>62</sup> In this case, there are numerous investors seeking to recover the reflective losses of the corporation, Bilcon of Nova Scotia. They have brought their claim together in this instance, but were not legally obligated to do so under Article 1116. If the Tribunal permits the Claimants to recover their reflective loss, it would be endorsing a principle that would allow minority shareholders and multiple shareholders in indirect chains of ownership to bring separate claims. The State would be forced to defend the exact same claim for damages multiple times. This will increase the risk of inconsistent decisions<sup>63</sup> and double recovery, and threaten the legitimacy of the investment dispute settlement system.<sup>64</sup>

### C. Conclusions

34. Articles 1116 and 1117 provide separate causes of action for losses suffered by the investor and for losses suffered by an enterprise. The distinction is designed to prevent exactly what the Claimants seek here—to derive the benefits of separate corporate personality without accepting the burdens. As the *Mondev* tribunal explained years before the Claimants submitted their claims solely under Article 1116, in an Award the Claimants cite,<sup>65</sup> “it is clearly desirable in future NAFTA cases that claimants consider carefully whether to bring proceedings under Articles

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<sup>62</sup> **RA-79**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007 (“*UPS – Award on the Merits*”), ¶ 35.

<sup>63</sup> For example, contrast **CA-17**, *Ronald S. Lauder v. The Czech Republic* (UNCITRAL) Final Award, 3 September 2001 with **RA-113**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 13 September 2001 and **CA-102**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL) Final Award, 14 March 2003. In addition, contrast **RA-102**, *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Award, 12 May 2005 with **CA-260**, *Total, S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1) Decision on Liability, 27 December 2010.

<sup>64</sup> For example, see **RA-142**, United Nations Commission on International Trade Law, Forty-eighth session, Concurrent proceedings in investment arbitration, Note by the Secretariat, A/CN.9/848, 17 April 2015, ¶¶ 13-14.

<sup>65</sup> For example, see Claimants’ Memorial on Jurisdiction and Liability, July 25, 2011 (“Claimant’s Liability Phase Memorial”), ¶¶ 291-295, 367, 453, 813.

1116 and 1117, either concurrently or in the alternative....”<sup>66</sup> The Claimants chose to bring their claim only under Article 1116, and are now bound by that choice. Canada has not consented to the submission of a claim to arbitration under Article 1116 by the investors for loss or damage allegedly incurred by their investment. The Claimants have not met their burden under Article 1116 to demonstrate the loss or damage they incurred as investors, separate and distinct from the alleged losses of their enterprise, Bilcon of Nova Scotia. As such, their claim for compensation in their Memorial must be dismissed. Further, Canada should be awarded its full costs for having to respond to a legally groundless case.

**III. THE CLAIMANTS ARE NOT ENTITLED TO ANY DAMAGES AS THEY HAVE FAILED TO MEET THEIR BURDEN TO PROVE THAT THE IDENTIFIED NAFTA BREACH CAUSED THE DAMAGES THEY CLAIM**

35. Even if this Tribunal were to ignore the clear distinction between Articles 1116 and 1117 and allow the Claimants to recover reflective losses, their claim for the alleged lost profits of Bilcon of Nova Scotia must still fail. In order to obtain damages in this phase of the arbitration, the Claimants bear the burden of proving that the NAFTA breach identified by this Tribunal was, in fact and in law, the cause of the damages that they seek to recover. They have not attempted to do so. And had they tried, they would have failed.

36. The Claimants seek damages solely on the basis of the lost profits that Bilcon of Nova Scotia would have allegedly earned had it operated the proposed project.<sup>67</sup> As the tribunal in *Biwater* stated, “it is well settled that one key requirement of any claim for compensation (whether for unlawful expropriation or any other breach of Treaty) is the element of causation.”<sup>68</sup> Thus, in order to seek lost profits, the Claimants would have to establish that the breach identified by the Tribunal prevented Bilcon of Nova Scotia from operating the project and earning profits.

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<sup>66</sup> RA-46, *Mondev - Award*, ¶ 86.

<sup>67</sup> Claimants' Damages Memorial, ¶ 13, 239, 243.

<sup>68</sup> RA-9, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008 (“*Biwater Gauff - Award*”), ¶ 778.

37. The majority found that the sole breach in this case was the “approach to the environmental assessment taken by the JRP and adopted by Canada,”<sup>69</sup> an approach which denied Bilcon “a fair opportunity to know the case it had to meet, and to address it.”<sup>70</sup> As the Tribunal found, and as the Claimants themselves acknowledged,<sup>71</sup> the approach adopted by the JRP was not the reason the proposed project did not proceed. The project did not proceed because of the Government decisions to reject it. Yet, the Tribunal did not find those Government decisions to reject the project to be a breach of NAFTA. For this reason alone, the Claimants cannot establish that the breach identified by the Tribunal was the factual or legal cause of the damages they seek.

38. The Claimants never address this issue in their submissions. In fact, they fail to explain their theory of either legal or factual causation. The reason for this failure is apparent—they have no viable theory. Implicitly, they seem to be suggesting the Tribunal accept an incredibly simplistic causal analysis. They appear to take the position that a different approach by the JRP would have, with one hundred percent certainty, led to a recommendation from the JRP to approve the project, which would have in turn, also with one hundred percent certainty, led to government decisions to permit the project to proceed. This theory is absurdly speculative. Indeed, as is shown in the opinions and reports submitted by Canada from experienced EA review panel members and current and former senior federal and provincial government officials, if the approach of the JRP had been different, the outcome for the project could have been the same—i.e., a finding of likely significant adverse environmental effects after mitigation by the JRP, and ultimate rejection by government decision-makers based on that recommendation or on other considerations.

39. Thus, even if the Claimants had made an effort to prove their causal theory, they would have failed. It is neither Canada's nor the Tribunal's role to substitute themselves for the Claimants and their counsel in order to construct a claim for compensation that meets the

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<sup>69</sup> Award, ¶¶ 604 and 731.

<sup>70</sup> Award, ¶ 543.

<sup>71</sup> Claimants' Reply on Jurisdiction and Liability, December 21, 2011 (“Claimants' Liability Phase Reply”), ¶¶ 767, 779 .

causation requirements of international law. As such, the Claimants' claim for compensation should be dismissed in its entirety.

**A. The Claimants Bear the Burden of Showing that the Identified NAFTA Breach Factually and Legally Caused the Specific Losses They Seek to Recover**

40. Article 1116(1) requires that the Claimants demonstrate that they “ha[ve] incurred loss or damage, by reason of, or arising out of” a breach of NAFTA.<sup>72</sup> As explained by several NAFTA tribunals, this language requires a “sufficient causal link”<sup>73</sup> or an “adequate[] connect[ion]”<sup>74</sup> between the alleged breach of NAFTA and the loss sustained by the investor.

41. It is the Claimants' burden to prove the existence of such a causal link or connection.<sup>75</sup> For example, as the *S.D. Myers* tribunal explained, “compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached; the economic losses claimed by [the investor] must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes.”<sup>76</sup> Similarly, in *Pope & Talbot*, the tribunal held that an investor bringing a claim under Article 1116 bears the burden to “prove that loss or damage was caused to its interest, and that it was causally connected to the breach

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<sup>72</sup> **RA-47**, NAFTA Article 1116(1) (emphasis added).

<sup>73</sup> **CA-205**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002, ¶ 140. See also **RA-9**, *Biwater Gauff – Award*, ¶ 779: (“Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the Enterprise].”)

<sup>74</sup> **RA-35**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award and Dissenting Opinion, 16 December 2002, ¶ 194.

<sup>75</sup> UNCITRAL Arbitration Rules (2010), Article 27(1). See also **RA-124**, M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International, 1996), p. 222: (“As a general principle, however, it is necessary for the party who alleges a fact to prove the truth of its claim, if not accepted by the other party, before the authority which is charged with the duty to adjudicate the dispute. This rule is so well-founded in municipal law that it could easily be concluded to be a generally accepted principle of municipal law which, in accordance with Article 38 of the Statute of the International Court of Justice, is a source of international law.”); **RA-123**, M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International, 2008), pp. 105-106: (“The injured claimant, therefore, has the burden of demonstrating that the claimed quantum flowed from that conduct. Shelves of books and papers contain discussions of the fundamental role the principle of ‘causation’ plays in determining both liability and compensation. While this volume is not the place to repeat those detailed analyses, we cannot overemphasize the crucial role causation performs in valuation issues. The claimant must satisfy the tribunal that the causal relationship is sufficiently close (i.e., not ‘too remote’) to satisfy the applicable standard of causation.”)

<sup>76</sup> **RA-65**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) First Partial Award, 13 November 2000, ¶ 316.

complained of.”<sup>77</sup> Further, in *UPS*, the tribunal explained that “a claimant must show...that it has persuasive evidence of damage from the actions alleged to constitute breaches of NAFTA obligations.”<sup>78</sup>

42. This interpretation of Chapter Eleven is consistent with the general rule of international law that requires a claimant to prove that the specific breach caused the specific loss it seeks to recover. As the Permanent Court of International Justice in the *Factory at Chorzów* case explained almost 90 years ago, “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.”<sup>79</sup> This rule was reflected and explained in the International Law Commission’s (“ILC’s”) Articles on State Responsibility, which require in Article 31 that a State that has committed a wrongful act make “full reparation”, but only for “any damage...caused by the internationally wrongful act.”<sup>80</sup> The Commentaries to Article 31 further highlight the importance of causation, explaining that “[i]t is only ‘[i]njury ... caused by the internationally wrongful act of a State’ for which full reparation must be made. This phrase is used to make clear 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>81</sup>

43. As the *Biwater* tribunal similarly explained:

In this regard, some meaning must be given to the concept of ‘injury’. In particular, ‘causing injury’ must mean more than simply the wrongful act itself

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<sup>77</sup> **CA-39**, *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL) Award in Respect of Damages, 31 May 2002, ¶ 80.

<sup>78</sup> **RA-79**, *UPS – Award*, ¶ 38.

<sup>79</sup> **CA-327**, *Case Concerning the Factory at Chorzów (Germany v. Poland)* Award on the Merits, 1928 P.C.I.J. (ser. A) No. 17, 13 September 1928 (“*Chorzów – Award on the Merits*”), p. 47.

<sup>80</sup> **RA-60**, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, Text adopted by the International Law Commission at its fifty-third session, in 2001, (A/56/10), United Nations, New York 2001 (“*Commentary on the ILC Articles*”), Article 31. See **RA-144**, T.W. Walde & B. Sabahi, *Compensation, Damages, and Valuation in The Oxford Handbook of International Investment Law* (OUP 2008), p. 1057: (The commission of an internationally wrongful act entails the obligation to put the victim back into the position it would “have – in theory – [been in] had the unlawful act not occurred.”)

<sup>81</sup> **RA-60**, *Commentary on the ILC Articles*, Article 31, Commentary (9).

(e.g. an expropriation, or unfair or inequitable treatment), otherwise the element of causation would have to be taken as present in every case, rather than being a separate enquiry.

[...] Whether or not each wrongful act by the Republic 'caused injury' such as to ground a claim for compensation must be analysed in terms of each specific 'injury' for which [the claimant] has in fact claimed damages.<sup>82</sup>

44. A similar approach to that of *Biwater* was adopted by the tribunal in *Nordzucker*. In that case, the tribunal found that Poland breached its obligations under the applicable investment treaty because the State Treasury failed to act in the required transparent manner in its dealings with the claimant in the pre-contractual phase of an attempt at privatizing sugar groups in Poland. In the damages phase of this arbitration, the claimant claimed damages for lost profits,<sup>83</sup> based on the premise that, but for the breach, it would have acquired the retail sugar groups. The tribunal rejected the claim for damages in its entirety, holding that the claimant had "not proven that the damages which it claims are caused by the lack of transparency of Poland,"<sup>84</sup> the treaty violation in that case, because it had not proven that the absence of the breach would "necessarily have led to [the] purchase."<sup>85</sup> Specifically, the tribunal ruled that the "damages demonstrated by Nordzucker therefore have no causal link with the breach which the Arbitral Tribunal decided in its second Partial Award to have been committed by Poland."<sup>86</sup> The tribunal explained that the ultimate decision-maker was "free in its decision whether to consent" to allowing the investment or not.<sup>87</sup>

45. In accordance with these legal principles, it is incumbent on the Claimants here to prove that the specific breach caused the specific loss they seek to recover. Causation in international law "comprises a number of different elements, including (inter alia) (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit

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<sup>82</sup> **RA-9**, *Biwater Gauff – Award*, ¶¶ 803-804.

<sup>83</sup> **RA-130**, *Nordzucker AG v. The Republic of Poland (UNCITRAL) Third Partial and Final Award*, 23 November 2009, ¶ 47 ("*Nordzucker – Final Award*").

<sup>84</sup> **RA-130**, *Nordzucker – Final Award*, ¶ 60.

<sup>85</sup> **RA-130**, *Nordzucker – Final Award*, ¶ 51.

<sup>86</sup> **RA-130**, *Nordzucker – Final Award*, ¶ 64.

<sup>87</sup> **RA-130**, *Nordzucker – Final Award*, ¶ 58.

linked to the wrongful act, is considered too indirect or remote.”<sup>88</sup> The Commentary to Article 31 of the ILC’s Articles similarly explains that “causality in fact is a necessary but not a sufficient condition of reparation. [...] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in Article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.”<sup>89</sup> Similarly, academic commentary has noted that:

Under the factual test of causation, the issue is whether the wrongful conduct played *some* part in bringing about the harm or injury or was irrelevant to its occurrence. In domestic legal systems, this is also known as the *condition sine qua non* or the ‘but-for’ test (ie, would the harm have occurred but for the unlawful conduct?)

On the other hand, under the legal test of causation, the key issue is whether the wrongful conduct was a *sufficient, proximate, adequate, foreseeable, or direct* cause of the harm or injury. [...] Both factual and legal causation are relevant in determining the existence of the required causal relationship between the wrongful act and the injury, but factual causality alone is insufficient.<sup>90</sup>

46. Thus, even where it can be established that an identified breach was a “but for” cause in the chain of causation, recovery of the damages sought is not permitted unless the claimant can provide that “the wrongful conduct was a *sufficient, proximate, adequate, foreseeable, or direct* cause of the injury.”<sup>91</sup>

### **B. The Claimants Have Failed to Meet Their Burden of Proving that the Identified Breach Caused Bilcon of Nova Scotia’s Alleged Loss of Profits**

47. The Claimants have asked this Tribunal to award them the entire value of the alleged lost profits of the proposed project, as if Bilcon of Nova Scotia was already operating a risk-free

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<sup>88</sup> **RA-9**, *Biwater Gauff - Award*, ¶ 785; **RA-22**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008, ¶ 468; **CA-205**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002, ¶ 140 (“the harm must not be too remote, or [...] the breach of the specific NAFTA provision must be the *proximate* cause of the harm.”)

<sup>89</sup> **RA-60**, Commentary on the ILC Articles, Article 31, Commentary (10) (emphasis added) (citations omitted).

<sup>90</sup> **RA-133**, S. Ripinsky, *Damages in International Investment Law* (London, British Institute of International and Comparative Law: 2008) (“*Ripinsky*”) (emphasis in original), p. 135. See also **RA-145**, T. Weiler & L.M. Diaz, *Causation and Damages 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.

<sup>91</sup> **RA-133**, *Ripinsky*, p. 135 (emphasis in original).

quarry and marine terminal and the Governments of Nova Scotia and Canada expropriated its operations. Indeed, this is evident from the cases that the Claimants rely upon to support their argument for an award of full lost profits in their favour. The two specific decisions the Claimants ask the Tribunal to follow, *Crystallex* and *Gold Reserve*, both resulted from Venezuela's decision to "put an end to [gold] concessions."<sup>92</sup> *Gold Reserve* had expended hundreds of millions of dollars<sup>93</sup> to get its mine operational prior to the "total deprivation of [its] mining rights."<sup>94</sup> *Crystallex* had invested \$645 million dollars into a concession it had been granted over one of the most significant mines in Latin America.<sup>95</sup> The remarkable value of this mine was well understood by the government, since when President Chávez decided to nationalize it, he declared that "the Venezuelan State controls 30,000 million dollars."<sup>96</sup>

48. What the Claimants appear to misunderstand is that the injury caused by the total deprivation of an investment must necessarily be different than damages to redress the impairment of a "fair *opportunity* to have the specifics of [a proposal] considered, assessed and decided in accordance with applicable laws."<sup>97</sup> This is particularly so when the total deprivation resulted in the State's unjust enrichment, as in the case of Venezuela taking back the gold

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<sup>92</sup> **CA-317**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award, 4 April 2016 ("*Crystallex – Award*"), ¶¶ 56, 314, 606, 681; **CA-316**, *Gold Reserve – Award*, ¶¶ 26, 28.

<sup>93</sup> **CA-316**, *Gold Reserve – Award*. *Gold Reserve*, a publicly traded company, acquired rights to a 20-year concession over a 500-hectare near-surface gold mine, automatically renewable for an additional 10-year term, and a 20-year concession underlying the first concession for gold, copper and molybdenum, which could be automatically extended for two additional 10-year terms. Pursuant to several permits it had been granted, the claimant built roads and cleared land. Its Environmental Impact Assessment for one of the concessions had been approved (see **CA-316**, *Gold Reserve – Award*, ¶¶ 10-16). The project had a detailed feasibility study and various impact studies that demonstrated its valuation was consistent with other independent valuations conducted in 2006 and 2007 (see **CA-316**, *Gold Reserve – Award*, ¶ 833). The project underwent third-party financing; minerals (gold and copper) were assessed and made part of the technical report filed with the Toronto Stock Exchange (see **CA-316**, *Gold Reserve – Award*, ¶ 820).

<sup>94</sup> **CA-316**, *Gold Reserve – Award*, ¶ 680.

<sup>95</sup> **CA-317**, *Crystallex – Award*, ¶ 878. The tribunal specifically recognized the "breadth of the activities" undertaken by the claimant to bring the mine to a 'shovel-ready' state, as well as its implementation of social programs, including technical support, upgrading a medical centre, building houses in local communities, and improving the potable water and sewage system (see **CA-317**, *Crystallex – Award*, ¶¶ 914-915). It had completed the exploration (drilling and testing) activities and had contemporaneously prepared feasibility studies establishing the size of the deposits (see **CA-317**, *Crystallex – Award*, ¶ 878).

<sup>96</sup> **CA-317**, *Crystallex – Award*, ¶ 54.

<sup>97</sup> Award, ¶ 603.

concessions after foreign investors spent considerable amounts to develop them. In short, the situations in the cases relied upon by the Claimants have nothing in common with this case.

49. The Claimants seem to simply presume that because the Tribunal has found a breach, they are entitled to recover an extraordinary amount of compensation. In making such a presumption, they ignore the Tribunal's statement that it "[made] no prejudgment whatsoever about the ultimate outcome on compensation."<sup>98</sup> The proper approach to causation begins with an understanding of the breach identified by the Tribunal, and then considers what specific injury was factually and legally caused by that breach. As Canada explains below, the Claimants have not even tried to prove, and indeed could not prove even if they had tried, that the specific breach identified by the Tribunal was the but for and proximate cause of Bilcon of Nova Scotia's alleged lost profits.

### **1. The Breach of NAFTA Identified by the Tribunal**

50. In their pleadings, the Claimants alleged that dozens of measures of Canada and Nova Scotia breached Canada's obligations under Chapter Eleven of NAFTA. In the majority's Award of March 17, 2015, the Tribunal unanimously rejected virtually all of these claims—either on the basis that the claims could not be considered since they were time-barred, or because they lacked merit. The majority of the Tribunal then found a breach of Canada's obligations solely in one regard—that “the approach to the environmental assessment taken by the JRP and adopted by Canada” violated Articles 1105 and 1102, such that “the Investors were denied an expected and just opportunity to have their case considered on its individual merits.”<sup>99</sup>

#### **(a) The Claimants' Allegations and the Majority's Findings with Respect to the Breach of Article 1105**

51. With respect to the minimum standard of treatment in international law, the Claimants alleged that no less than 23 measures breached Canada's obligation under Article 1105. The Tribunal unanimously rejected all but one of these allegations. In particular, the Tribunal concluded that there were no claims concerning the scope and level of assessment that had been

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<sup>98</sup> Award, ¶ 732.

<sup>99</sup> Award, ¶ 741.

brought on a timely basis.<sup>100</sup> Nor did the evidence support the Claimants' contention that the selection of panel members was improper under domestic or international law.<sup>101</sup> Likewise, the Tribunal concluded that the process and end product of finalizing the Environmental Impact Statement ("EIS") guidelines and the emotional environment at the JRP hearing did not themselves constitute breaches of NAFTA.<sup>102</sup> Finally, the majority did not accept the Claimants' allegation that the Governments' acceptance of the JRP Report amounted to a NAFTA breach.<sup>103</sup>

52. However, with Prof. McRae dissenting, the majority of the Tribunal found that "the approach to the environmental assessment taken by the JRP and adopted by Canada"<sup>104</sup> was a violation of Article 1105(1). Specifically, the majority based its findings of a breach on two aspects of the JRP approach that it considered problematic.

53. First, it took "issue with the 'community core values' approach as presented and applied by the JRP."<sup>105</sup> It found that this approach constituted a "fundamental departure from the methodology required by Canadian and Nova Scotia law."<sup>106</sup> Second, it took issue with the fact that, despite acknowledging that mitigation measures were possible with respect to many project effects, the JRP failed to identify any mitigation measures in its recommendation to government decision-makers.<sup>107</sup> The majority considered the JRP's decision not to list mitigation measures to be inconsistent with the JRP's mandate to report on all factors under s. 16 of the *CEAA*.<sup>108</sup> As stated by the majority, this approach amounted to "an unauthorized pre-emption, by the role of a

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<sup>100</sup> Award, ¶ 490.

<sup>101</sup> Award, ¶ 496.

<sup>102</sup> Award, ¶¶ 501 and 576.

<sup>103</sup> Award, ¶ 586-587.

<sup>104</sup> Award, ¶ 531.

<sup>105</sup> Award, ¶ 531.

<sup>106</sup> Award, ¶ 600.

<sup>107</sup> Award, ¶ 546.

<sup>108</sup> Award, ¶ 546.

body charged with gathering information and making recommendations, of the discretion of those who were vested with the ultimate authority to decide.”<sup>109</sup>

54. Based on the foregoing, the majority held that the Claimants and their investment had not been 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. By failing to conduct a proper “likely significant effects after mitigation analysis” on the rest of the project effects, the JRP denied government decision-makers information which they should have been provided.<sup>110</sup> In this regard, the majority's sole basis for determining liability under Article 1105 was that the Claimants 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>111</sup>

55. However, in reaching this finding, the majority also clearly stated that: (1) it was not purporting to conduct its own environmental assessment;<sup>112</sup> (2) it was not 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 the applicable laws;<sup>113</sup> (3) it did not take issue “with the notion that the valuation placed on assessable components can be an integral part of conducting a proper assessment, including the assessment of social effects”;<sup>114</sup> and (4) it had “absolutely no doubt that the extent to which community members value various assessable components can be an entirely legitimate part of an environmental assessment.”<sup>115</sup>

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<sup>109</sup> Award, ¶ 583.

<sup>110</sup> Award, ¶ 535.

<sup>111</sup> Award, ¶ 603. See also Award, ¶ 543.

<sup>112</sup> Award, ¶ 602.

<sup>113</sup> Award, ¶ 602.

<sup>114</sup> Award, ¶ 531.

<sup>115</sup> Award, ¶ 531.

**(b) The Claimants' Allegations and the Majority's Findings with Respect to the Breach of Article 1102**

56. With respect to national treatment, the Claimants alleged that no less than five measures of Canada and Nova Scotia breached Canada's obligations under Article 1102.<sup>116</sup> As the majority noted, the Claimants' issue was not whether the outcome of their EA review was different than in others, but rather "whether Canada provided less favorable treatment concerning the mode of review (JRP) and the evaluative standard."<sup>117</sup> Based on the Tribunal's determination that the Claimants' allegations with respect to the mode of review were time-barred, the analysis of the majority was focused on the application of the "likely significant adverse effects after mitigation" standard.<sup>118</sup> The majority concluded that "the Whites Point project did not receive the expected and legally mandated application, for the purposes of federal Canada environmental assessment, of the essential evaluative standard under the *CEAA*,"<sup>119</sup> and thus, that there had been a breach of Article 1102.

57. In reaching this conclusion, however, the majority made clear that: (1) it did not preclude the possibility of different outcomes in the Whites Point project and other comparator cases if the same standard had been applied;<sup>120</sup> and (2) the outcomes of different reviews of projects involving quarries and marine terminals could be legitimately different, depending on the facts of each case.<sup>121</sup>

**2. The Process Breach Identified by the Tribunal Did Not Cause Bilcon of Nova Scotia's Alleged Lost Profits**

58. The next step in the causality analysis is to determine whether the breach identified by the Tribunal—in this case, the failure of the JRP to conduct the EA in accordance with the legal requirements of Canadian and Nova Scotia law—caused the damages the Claimants seek to

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<sup>116</sup> Claimants' Liability Phase Memorial, ¶¶ 546-605.

<sup>117</sup> Award, ¶ 687.

<sup>118</sup> Award, ¶ 689.

<sup>119</sup> Award, ¶ 697.

<sup>120</sup> Award, ¶ 697.

<sup>121</sup> Award, ¶ 705.

recover. This requires proof that the breach was not only the but for cause of that loss, but also a sufficient, proximate, adequate, foreseeable, or direct cause. As Canada explains below, the Claimants have not proven, and could not prove, either.

**(a) The Government Decisions to Reject the Whites Point Project, Not the JRP's NAFTA Breach, Were the Reason that the Whites Point Project Did Not Proceed**

59. The Claimants' approach simply ignores the fact that the Government decisions to reject the Whites Point project, not the JRP's acts that breached NAFTA, were the reason that the Whites Point project did not proceed. As described above, in finding a NAFTA violation, the majority refrained from taking issue with anything other than the "unexpected approach taken by the JRP."<sup>122</sup> In this regard, it held that "[a]s both Parties agree, it was ultimately a set of decisions taken by the Governments of federal Canada and Nova Scotia, not the JRP Report itself, that led to the rejection of the Investors' project."<sup>123</sup> The majority noted that it was not deciding "what the actual outcome [of the Whites Point project] should have been."<sup>124</sup> Much like the situation in *Nordzucker*, 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>125</sup> Even the Claimants acknowledged the important distinction between the role of the JRP and of government decision-makers in their Reply submissions in the liability phase when they explained that "...it was the joint federal and provincial rejection...that resulted in the project's rejection,"<sup>126</sup> and that "the Canadian Cabinet had full authority to adopt measures that differed from the JRP Report."<sup>127</sup>

60. Despite the majority's careful articulation of the NAFTA breach in this case, the Claimants now ask the Tribunal to effectively do what it said it would not—"to conduct its own

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<sup>122</sup> Award, ¶ 601.

<sup>123</sup> Award, ¶ 577.

<sup>124</sup> Award, ¶ 602.

<sup>125</sup> Award, ¶ 584.

<sup>126</sup> Claimants' Liability Phase Reply, ¶ 779.

<sup>127</sup> Claimants' Liability Phase Reply, ¶ 767.

environmental assessment, in substitution for that of the JRP,”<sup>128</sup> and to usurp the role of Nova Scotia and federal decision-makers by 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>129</sup> That this is what the Claimants ask is clear from their assertions that “[b]ut for the breaches of Articles 1102 and 1105 of the NAFTA, the Whites Point Quarry would have received environmental approval,”<sup>130</sup> that “Bilcon would have easily and readily complied” with any conditions of the environmental approvals it would have been granted,<sup>131</sup> and that “there can be no doubt [the Whites Point project] would have been a very successful decades-long business venture.”<sup>132</sup>

61. In essence, the Claimants ask that this Tribunal 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 would have been necessary for the Whites Point project to proceed. It would be completely beyond the limits of the decision on liability for the Tribunal to do so. As the Tribunal found, what the Claimants lost was not the right to a stream of profits or the right to operate their project, as they contend, but rather the “fair *opportunity* to have the specifics of that case considered, assessed and decided in accordance with applicable laws.”<sup>133</sup> To 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.

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<sup>128</sup> Award, ¶ 602.

<sup>129</sup> Award, ¶ 602.

<sup>130</sup> Claimants’ Damages Memorial, ¶ 215.

<sup>131</sup> Claimants’ Damages Memorial, ¶ 226.

<sup>132</sup> Claimants’ Damages Memorial, ¶ 12.

<sup>133</sup> Award, ¶ 603.

**(b) The Expert Testimony Filed by Canada Explains Why the NAFTA Breach Was Not the But For Cause of the Whites Point Project Not Proceeding**

62. The Claimants assert that “the Quarry would have proceeded to the permitting stage in the usual course” absent the NAFTA breach.<sup>134</sup> This statement contains two assumptions. First, it assumes that but for the NAFTA breach, the JRP would have submitted a report with findings and recommendations that supported project approval. Second, it assumes that the Nova Scotia and federal governments would have unanimously approved the Whites Point project. As explained above, neither of these assumptions is justified on the basis of the findings in the Award. Moreover, the Reports filed by Dr. Tony Blouin and Ms. Lesley Griffiths—both past chairs of EA review panels constituted respectively under the *NSEA* and the *CEAA*—demonstrate the Claimants’ first assumption is false. The Expert Reports of Mr. Peter Geddes and Mr. Robert Connelly—both of whom have longstanding experience and expertise in EA decision-making, respectively under the Nova Scotia and federal EA regimes—establish that the Claimants’ second assumption is also incorrect.

**i. But For the NAFTA Breach, It Would Have Been Reasonable for the JRP Report to Have Contained Findings and Made Recommendations that Were Not Supportive of Project Approval**

63. In their claim for lost profits, the Claimants give little consideration to the findings and recommendations that could have reasonably been made in the JRP Report absent the NAFTA breach. The Claimants’ expert, David Estrin, states: “the JRP had no legitimate basis to recommend the project not proceed. The JRP did not find any residual [significant adverse environmental effects] likely to result within the definition and proper ambit of the *CEAA*.”<sup>135</sup> This assertion overlooks the requirements of the Nova Scotia EA regime. The Whites Point JRP was required to “conduct its review in a manner that discharges the requirements set out in the *Canadian Environment Assessment Act* and Part IV of the *Nova Scotia Environment Act* and the

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<sup>134</sup> Claimants’ Damages Memorial, ¶ 218.

<sup>135</sup> Expert Report of David Estrin, March 8, 2017 (“Estrin Report”), ¶ 10.

Terms of Reference.”<sup>136</sup> Moreover, as Dr. Blouin and Ms. Griffiths explain, Mr. Estrin’s assertion also 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.

64. Dr. Blouin has served as the Chair of the Nova Scotia Environmental Assessment Board, during which time he was the appointed chair of several panel reviews and presided over public hearings and prepared panel reports for the Nova Scotia Minister of Environment.<sup>137</sup> Based on his professional experience, Dr. Blouin concludes that “if the JRP had not committed the NAFTA breach, it was certainly not a foregone conclusion that the Whites Point project would have been recommended for approval under Nova Scotia law.”<sup>138</sup>

65. As explained by Dr. Blouin, in making recommendations as to whether an undertaking should be approved or rejected,<sup>139</sup> provincial review panels evaluate the likelihood that an undertaking will cause “adverse effects” or “significant environmental effects.”<sup>140</sup> Pursuant to the *NSEA*, “effects” are broadly defined, and “socio-economic conditions can be assessed separately and independently from bio-physical impacts on the natural environment.”<sup>141</sup> Importantly, “the *NSEA* does not require a determination of ‘significance’ to be made as a condition of the recommendation that a panel ultimately makes.”<sup>142</sup>

66. In his analysis, Dr. Blouin rejects Mr. Estrin’s sweeping assertion of an “unequivocal standard Nova Scotia EA practice” of approving every EA application for a quarry or marine

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<sup>136</sup> **C-363**, *Agreement Concerning the establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project between the Minister of the Environment, Canada and the Minister of the Environment and Labour, Nova Scotia* (Nov. 3, 2001), s. 4.1 (emphasis added).

<sup>137</sup> Dr. Blouin served as the Nova Scotia review panel chair on the Highway 104 Bypass project in 2005, the Keltic Petrochemicals and LNG Facility project in 2006-2007 and the Goldboro LNG project in 2013-2014 (**RE-2**, Expert Report of Tony Blouin, June 9, 2017 (“Blouin Report”), ¶ 4).

<sup>138</sup> **RE-2**, Blouin Report, ¶ 12.

<sup>139</sup> **R-5**, *Nova Scotia Environment Act*, 1994-95, c. 1 (“*NSEA*”), s. 43(c).

<sup>140</sup> **RE-2**, Blouin Report, ¶ 22-23.

<sup>141</sup> **RE-2**, Blouin Report, ¶ 24.

<sup>142</sup> **RE-2**, Blouin Report, ¶ 33.

terminal since 2000.<sup>143</sup> He explains that “[i]n Nova Scotia there is no such thing as ‘standard’ or ‘unequivocal’ practice with regards to the outcome of an EA review.”<sup>144</sup> Instead, “[e]ach project must be reviewed according to the provincial legislative requirements and on the basis of the merits of that project.”<sup>145</sup>

67. Dr. Blouin reviewed the Whites Point JRP Report and EA record and highlights some of the JRP's findings on the bio-physical and socio-economic effects of the project in his Expert Report. He considers the Whites Point JRP's findings that the project would have an adverse environmental effect, or likely or potential adverse environmental effects, on endangered marine mammals, lobsters, the coastal wetland, groundwater, fisheries, and the reasonable enjoyment of life and property.<sup>146</sup> In addition, Dr. Blouin identifies the JRP's concerns with respect to the project's environmental effects on surface water and tourism.<sup>147</sup> According to Dr. Blouin, the JRP's findings were reasonable and would not have been supportive of a recommendation to approve the Whites Point project, even absent the NAFTA breach. As Dr. Blouin explains, the Whites Point JRP's broader concerns with respect to the adequacy of information provided in the review and the effectiveness of public consultations, in addition to its conclusion that the project was “unlikely to make a meaningful contribution to [the] sustainability of Digby Neck and Islands,”<sup>148</sup> were all relevant factors that could have reasonably contributed to a recommendation that the project should not proceed.<sup>149</sup> Ultimately, Dr. Blouin concludes:

While the JRP Report only identified inconsistency with community core values as being significant and adverse, it clearly had concerns about the other environmental effects of the Whites Point project. As described in my analysis [...], the JRP determined that the project would result in other adverse

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<sup>143</sup> Estrin Report, ¶ 11(iv).

<sup>144</sup> RE-2, Blouin Report, ¶ 36.

<sup>145</sup> RE-2, Blouin Report, ¶ 36.

<sup>146</sup> RE-2, Blouin Report, ¶¶ 49-79, 82-89, 97-104.

<sup>147</sup> RE-2, Blouin Report, ¶¶ 68-79, 90-96.

<sup>148</sup> RE-2, Blouin Report, ¶ 115, citing to R-212, *Environmental Assessment of the Whites Point Quarry and Marine Terminal Project*, Joint Review Panel Report (Oct. 2007), Table 3-2, p. 98.

<sup>149</sup> RE-2, Blouin Report, ¶¶ 105-110.

environmental effects. It also made other findings that, in my view, would not have supported a recommendation to approve the project.<sup>150</sup>

68. In her Expert Report, Ms. Griffiths considers the Whites Point JRP's potential findings absent the NAFTA breach from the perspective of the federal requirements prescribed by the *CEAA*. Ms. Griffiths' conclusions are based on her over 30 years of experience in EA.<sup>151</sup> She has served as the appointed chair or co-chair of five EA review panels constituted under the *CEAA*, and as a member of a federal-provincial EA panel constituted under the *NSEA* and federal *EARP*.<sup>152</sup>

69. Ms. Griffiths explains that in providing information and advice to government decision-makers, review panels constituted under the *CEAA* are mandated to determine whether a project is likely to cause significant adverse environmental effects, taking into account proposed mitigation.<sup>153</sup> In this regard, Ms. Griffiths clarifies that, contrary to Mr. Estrin's suggestion, it is the review panel itself that makes such a determination; it is not the practice of federal authorities to take a position on the significance of environmental effects during the JRP review.<sup>154</sup>

70. Ms. Griffiths also explains that Mr. Estrin is incorrect to assume the Whites Point project would have been approved absent the NAFTA breach because the JRP relied only on the concept of "community core values."<sup>155</sup> As she notes, the JRP raised a number of concerns about other adverse environmental effects of the project. While the JRP did not expressly conclude that these were likely significant adverse environmental effects under the *CEAA*, it also did not conclude

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<sup>150</sup> **RE-2**, Blouin Report, ¶ 44.

<sup>151</sup> **RE-1**, Expert Report of Lesley Griffiths, June 9, 2017 ("Griffiths Report"), ¶ 1.

<sup>152</sup> Such panels included the Federal-Provincial Environmental Assessment Panel for the Halifax-Dartmouth Metropolitan Wastewater Management System; the JRP for Voisey's Bay Mine and Mill Project (a nickel-copper-cobalt mine) in northern Labrador, Newfoundland and Labrador; the JRP for the Sydney Tar Ponds and Coke Ovens Site Remediation Project in Sydney, Cape Breton, Nova Scotia; the JRP for the Lower Churchill Hydroelectric Generation Project in Labrador, Newfoundland and Labrador; and the JRP for the Marathon Platinum Group Metals and Copper Mine Project in Marathon, Ontario. In December 2016, she was appointed to chair the JRP for the Milton Logistics Hub Project in Ontario. **RE-1**, Griffiths Report, ¶ 6.

<sup>153</sup> **RE-1**, Griffiths Report, ¶¶ 28, 42.

<sup>154</sup> **RE-1**, Griffiths Report, ¶¶ 39-40. See also **RE-3**, Expert Report of Robert G. Connelly, June 9, 2017 ("Connelly Report"), ¶ 45.

<sup>155</sup> Estrin Report, ¶¶ 3, 6.

that these effects were not significant. Rather, she explains that it appears that the JRP did not complete its analysis of whether other project effects constituted likely significant adverse environmental effects.<sup>156</sup>

71. In her Expert Report, Ms. Griffiths considers some of these project effects in greater detail to determine if, but for the NAFTA breach, it would be reasonable for a JRP to find such effects to be likely significant adverse environmental effects. Ms. Griffiths is of the view that the JRP could have reasonably concluded that the project would have likely resulted in significant adverse environmental effects on the North Atlantic right whale and the American lobster, taking into account proposed mitigation.<sup>157</sup> In particular, she finds that a review panel could have reasonably found that the project would have a likely significant adverse environmental effect on the right whale because of the endangered status of this species, its presence in the vicinity of the Whites Point project, the uncertainty surrounding blasting effects, the absence of effective mitigation, and the increase in risk of a lethal or sub-lethal shipping strike.<sup>158</sup> Ms. Griffiths also determines that a review panel could have reasonably concluded that the project would have a likely significant adverse environmental effect on lobster and lobster habitat because of the uncertainty around blasting effects, the high potential for invasive species to be introduced via shipping, and the potential for habitat damage through sediment and chemical releases.<sup>159</sup> In Ms. Griffiths' opinion, Bilcon's proposed mitigation would not have adequately protected against these risks.<sup>160</sup> Therefore, 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.

72. In the end, the Claimants' assumption that the JRP had no legitimate basis to recommend the project not proceed, or to make a finding of likely significant adverse environmental effects after proposed mitigation, must be rejected. As explained by Dr. Blouin and Ms. Griffiths, absent

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<sup>156</sup> **RE-1**, Griffiths Report, ¶ 61.

<sup>157</sup> **RE-1**, Griffiths Report, ¶ 64.

<sup>158</sup> **RE-1**, Griffiths Report, pp. 44-45 (Conclusion Text).

<sup>159</sup> **RE-1**, Griffiths Report, p. 63 (Conclusion Text).

<sup>160</sup> **RE-1**, Griffiths Report, ¶¶ 89-93, 120, 130, p. 63 (Conclusion Text).

the NAFTA breach, the Whites Point JRP Report could have reasonably contained findings made in furtherance of the JRP's provincial and federal EA mandates that were simply not supportive of a recommendation to approve the project.

**ii. But For the NAFTA Breach, it Would Have Been Reasonable for Government Decision-Makers Not to Have Approved the Whites Point Project**

73. The Claimants' expert, Mr. Estrin, asserts that "there was no reasonable basis for either government to lawfully deny approval of WPQ."<sup>161</sup> Mr. Estrin's assertion lacks foundation. To the contrary, the Reports of Peter Geddes and Robert Connelly provide a detailed explanation of the broad considerations that factor into the decision-making process under Nova Scotia and federal law, respectively.

74. Mr. Geddes has been directly involved in the administration of Nova Scotia's EA process since 2003.<sup>162</sup> In his Report, he explains that "even where a joint review panel is established, responsibility for approving or rejecting an undertaking for the Province rests with the Minister."<sup>163</sup> He does not dispute that the JRP Report is "an important source of information", but it is not the sole consideration in the Minister's decision-making process.<sup>164</sup> In particular, he notes that the Minister will also consider staff assessments and public comments.<sup>165</sup> Indeed, the Minister's letter providing notice of his rejection of the Whites Point project explained that "it is for the Minister of Environment and Labour to make the final decision on whether or not to approve this Project."<sup>166</sup>

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<sup>161</sup> Estrin Report, ¶ 11.

<sup>162</sup> **RE-4**, Report of Peter Geddes, June 9, 2017 ("Geddes Report"), ¶ 4.

<sup>163</sup> **RE-4**, Geddes Report, ¶ 12.

<sup>164</sup> **RE-4**, Geddes Report, ¶ 24.

<sup>165</sup> **RE-4**, Geddes Report, ¶ 24.

<sup>166</sup> **R-331**, Letter from Mark Parent, Minister of the Environment and Labour to Paul Buxton, Bilcon of Nova Scotia Corporation (Jan. 10, 2007). Minister Parent's letter explained: "I have arrived at my decision following careful consideration of the Panel's Report. I have determined that the proposed Project poses the threat of unacceptable and significant adverse effects to the existing and future environmental, social and cultural conditions influencing the lives of individuals and families in the adjacent communities."

75. Mr. Geddes confirms that in making a project decision, every project is considered by the Minister in its own context.<sup>167</sup> Contrary to what Mr. Estrin claims,<sup>168</sup> there is no “unequivocal standard EA practice.” In fact, accepting Mr. Estrin’s view would improperly remove the Minister’s power to reject a project under the *NSEA*,<sup>169</sup> and replace the Minister’s site-specific review of each project’s “facts-on-the-ground”<sup>170</sup> with a rubber stamp. This is not how EAs in Nova Scotia work. As Mr. Geddes notes, “there is no policy of standardized outcomes for projects” in Nova Scotia.<sup>171</sup>

76. Further, Mr. Geddes explains why it would be wrong to expect Nova Scotia government officials to take a position as to the approval or rejection of a project, or for them to draw conclusions as to the existence of likely significant adverse environmental effects, in their submissions to the JRP.<sup>172</sup> Government reviewers may raise issues, identify means of mitigation, or suggest that there is inadequate information. But contrary to Mr. Estrin’s assertion, they “do not make findings on whether effects constitute an ‘environmental effect’ as defined under the *NSEA*, nor do they provide a determination of whether the project application should be recommended for rejection or approval.”<sup>173</sup>

77. Mr. Geddes explains that the Minister’s site-specific decision is based on a consideration of a broad range of environmental effects,<sup>174</sup> including effects on socio-economic conditions.<sup>175</sup> Accordingly, in addition to bio-physical considerations, he would have considered factors such as: the project’s visual impacts; air and dust emissions; noise and lighting; traffic and road impacts; the location, nature, and sensitivity of the surrounding area; and impacts on

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<sup>167</sup> **RE-4**, Geddes Report, ¶ 19.

<sup>168</sup> Estrin Report, ¶¶ 11(iv), 33-35.

<sup>169</sup> **R-5**, *NSEA*, ss. 32, 40.

<sup>170</sup> **RE-4**, Geddes Report, ¶ 19.

<sup>171</sup> **RE-4**, Geddes Report, ¶ 19.

<sup>172</sup> **RE-4**, Geddes Report, ¶ 11.

<sup>173</sup> **RE-4**, Geddes Report, ¶ 11.

<sup>174</sup> **RE-4**, Geddes Report, ¶¶ 23-24.

<sup>175</sup> **RE-4**, Geddes Report, ¶ 23.

employment and business, including on tourism and fisheries.<sup>176</sup> Since “the Minister was well aware of the concerns surrounding the socio-economic effects of the project because of the numerous letters and submissions received,” Mr. Geddes observes that the Minister would have expected an assessment of socio-economic effects as contemplated in the provincial definition of “environmental effects.”<sup>177</sup>

78. Ultimately, the Report of Mr. Geddes demonstrates that the Claimants have failed to prove that their proposed project would have been approved by the Nova Scotia Minister absent the NAFTA breach. The Minister always had the discretionary authority to reject the Whites Point project or to impose mitigation measures that could have had important impacts on the economic viability of the project.<sup>178</sup>

79. Finally, the Expert Report of Mr. Connelly explains why Mr. Estrin’s conclusion that federal government permits should be regarded by this Tribunal as nothing but a *fait accompli* is also baseless. Mr. Connelly has over 38 years’ experience in the field of EA. He has served as the Acting President of the Canadian Environmental Assessment Agency and was directly involved in the development of and amendments to the *CEAA* and its regulations. He has been the appointed chair of two *CEAA* review panels and has experience providing advice to government decision-makers following the issuance of panel reports under the *CEAA*.<sup>179</sup> In Mr. Connelly’s view, “the government could have reasonably decided not to grant approval to the project.”<sup>180</sup>

80. As Mr. Connelly explains, after a JRP submits its report to the federal Minister of the Environment, s. 37(1.1)(a) of the *CEAA* requires the Responsible Authority<sup>181</sup> to respond to the

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<sup>176</sup> **RE-4**, Geddes Report, ¶ 23.

<sup>177</sup> **RE-4**, Geddes Report, ¶ 25.

<sup>178</sup> **RE-4**, Geddes Report, ¶ 24.

<sup>179</sup> **RE-3**, Connelly Report, ¶ 4-18.

<sup>180</sup> **RE-3**, Connelly Report, ¶ 93.

<sup>181</sup> The Responsible Authority is the Federal Authority responsible for ensuring that an EA is conducted before it can exercise any of the powers or perform certain functions or duties.

report, with the approval of the Governor General in Council (“GIC”).<sup>182</sup> In this regard, an objective of the *CEAA* is “integrating environmental factors” into “decision-making”, and not to “[limit] the decision-making process to environmental factors.”<sup>183</sup> Where findings of likely significant adverse environmental effects are made in a panel report and are accepted by the government, the principles underlying the *CEAA*, which find their expression in its preamble and statement of purpose, call for a wide-ranging consideration of factors that are not limited to bio-physical ones.<sup>184</sup> Moreover, the *CEAA* enshrines the central principle of sustainable development,<sup>185</sup> which calls for the examination of matters that extend beyond pure bio-physical environmental effects.

81. In his Expert Report, Mr. Connelly considers two but for scenarios in the case of the Whites Point project, taking into account the NAFTA breach. In the first, he considers that references to “community core values” are simply excised from the JRP Report and that the rest of the report remains unchanged—i.e., the scenario posited by the Claimants. He opines that in this scenario, the likely government response would have been to conclude that the JRP Report was not “sufficient to satisfy the requirements of the [*CEAA*] because it would include no conclusion on the likely significance of the environmental effects it was mandated to assess.”<sup>186</sup> Such a report would have been sent back for clarification, or would have led to a request for additional information.<sup>187</sup> Mr. Connelly states:

To otherwise approve the project based on the same JRP Report but with the references to community core values excised, as the Claimants suggest, in the absence of any recommendations on how to mitigate effects, with a conclusion that the project is not sustainable, and with clear information about extensive public concern, would very likely have led to judicial review. Similarly a judicial review may also have arisen if the GIC had denied the approval of the

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<sup>182</sup> **RE-3**, Connelly Report, ¶ 20.

<sup>183</sup> **RE-3**, Connelly Report, ¶ 33.

<sup>184</sup> **RE-3**, Connelly Report, ¶ 33.

<sup>185</sup> **RE-3**, Connelly Report, ¶ 36.

<sup>186</sup> **RE-3**, Connelly Report, ¶ 89.

<sup>187</sup> **RE-3**, Connelly Report, ¶ 89.

project on the basis of a flawed report. This would have led to considerable delay in reaching a decision and with no certainty as to the outcome.<sup>188</sup>

82. In the second scenario, Mr. Connelly considers the possible federal government response in light of the opinion articulated by Ms. Griffiths that, absent the NAFTA breach, it would have been reasonable for the JRP to conclude that certain project effects were likely significant adverse environmental effects. Under this scenario, he is of the view that, based on the record before it, “it is unlikely that the government would have found those likely significant adverse environmental effects to be justified in the circumstances.”<sup>189</sup> Accordingly, Mr. Connelly disagrees with Mr. Estrin’s conclusion that there would be no legitimate basis for the Responsible Authority or the GIC to refuse approval of the Whites Point project pursuant to s. 37 of the *CEAA*.<sup>190</sup> In Part VI of his Expert Report, he explains that, to the contrary, there were a number of grounds upon which it would have been reasonable for the government to refuse to issue the federal permits requested by the Claimants.<sup>191</sup>

83. In summary, the Reports filed by Canada reveal the flaw at the centre of the Claimants’ arguments: they cannot prove that the NAFTA breach resulted in the loss of the Whites Point project, and so they have no option but to ask the Tribunal to simply assume this outcome. The Tribunal must refuse to do so. Even if it had not breached NAFTA, the JRP could have reasonably made recommendations that were not supportive of project approval. Moreover, provincial and federal decision-makers could have exercised the wide discretion granted to them under provincial and federal law and rejected the project or refused to issue the requested permits.

### **C. Conclusions**

84. The Claimants have the burden to persuade this Tribunal that the breach identified by the majority was the factual and legal cause of the alleged lost profits they are seeking to recover. They have failed to meet their burden. Instead, they have presented a damages claim completely

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<sup>188</sup> **RE-3**, Connelly Report, ¶ 89.

<sup>189</sup> **RE-3**, Connelly Report, ¶ 93.

<sup>190</sup> **RE-3**, Connelly Report, ¶ 89.

<sup>191</sup> **RE-3**, Connelly Report, ¶¶ 89-99.

unrelated to the process breach identified by the majority. Moreover, their claim relies on speculation and unwarranted assumptions. The Claimants gloss over the fact that a number of hurdles, but for the breach identified by this Tribunal, would have still stood in the way of the operation of the Whites Point project. The process breach found by this Tribunal may well have caused an injury to the Claimants, but the Claimants have not attempted to identify that injury or to quantify the resulting damages. It is not for this Tribunal to remedy such a deficiency. In dismissing the claim and awarding the claimant no damages despite its finding of a breach, the tribunal in *Nordzucker* explained:

[The claimant], in an attempt to prove that it suffered more damages...has neglected to prove the damages possibly suffered as a result of the delay in an alternative investment and of the fruitless costs made for the monitoring of the sales procedures in Poland during another half year...The Arbitral Tribunal thus has no way to determine whether the damages which it had envisaged as a possible consequence of the breach of the BIT by Poland have actually been suffered by [the claimant], nor a way to assess the quantum of these damages.<sup>192</sup>

85. The Claimants' approach to seeking more damages than it suffered as a result of the identified breach has left the Tribunal in exactly the same position in which the *Nordzucker* tribunal found itself. This Tribunal should take the same decision as the *Nordzucker* tribunal—it should entirely reject the Claimants' claim and order the Claimants to bear all of Canada's and the Tribunal's costs.

#### **IV. IN THE ALTERNATIVE, THE CLAIMANTS ARE ONLY ENTITLED TO RECOVER THE AMOUNT IT WOULD HAVE COST TO MITIGATE THEIR DAMAGES**

86. As Canada explained above, the Claimants have failed to establish a causal link between the damages they have claimed and the NAFTA breach found by the majority. It was solely the Claimants' choice to plead their claim as they have, and they did so knowing that causation would be an issue if they pled a claim for lost profits.<sup>193</sup> It is inappropriate for the Tribunal to

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<sup>192</sup> RA-130, *Nordzucker – Final Award*, ¶¶ 65-66.

<sup>193</sup> Government of Canada's Motion Requesting the Tribunal to Consider the Scope of Issues to be Addressed in the Damages Phase as a Preliminary Matter, September 15, 2015.

craft a viable theory of causation on behalf of the Claimants; instead the Claimants must bear the consequences of their choice—their claim must be dismissed.

87. However, if the Tribunal were to consider the question of causation on its own, it 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 laws. As Canada explains below, that value cannot be determined without considering the duty of the Claimants to take reasonable steps to mitigate their losses. Because the NAFTA breach was a “fundamental departure from the methodology required by Canadian and Nova Scotia law,”<sup>194</sup> mitigation was reasonably available to the Claimants and Bilcon of Nova Scotia in the form of judicial review in the Canadian courts. As Canada explains below, the Claimants or Bilcon of Nova Scotia could have simply applied for judicial review of the JRP Report in the Canadian courts, whether in lieu of or in tandem with the NAFTA arbitration, and in so doing they would have fully restored, at minimal expense, what was lost because of the identified breach of NAFTA—an opportunity to have the Whites Point project fairly considered, assessed and decided in accordance with applicable laws. Accordingly, the costs associated with reasonably available mitigation represent the maximum compensation to which the Claimants could be entitled, regardless of the damages allegedly caused by the NAFTA breach.

#### **A. The Claimants Had a Duty to Mitigate Their Losses**

88. The duty to mitigate is an established general principle of international law that is applicable to this dispute.<sup>195</sup> The ILC Articles provide 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>196</sup> This rule is “frequently

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<sup>194</sup> Award, ¶ 600.

<sup>195</sup> **RA-47**, NAFTA Article 1131(1).

<sup>196</sup> **RA-60**, Commentary on the ILC Articles, Article 31, Commentary (11); **RA-116**, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (I.C.J. Reports 1997) Judgement, 25 September 1997, ¶ 80; **CA-322**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6) Award, 12 April 2002, ¶ 167; **RA-122**, *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia* (ICSID Case No. ARB/05/24) Award, 17 December 2015, ¶ 215.

applied by arbitral tribunals when dealing with issues of international law.”<sup>197</sup> In the *Case Concerning the Gabčíkovo-Nagymaros Project*, for example, the ICJ articulated both the duty to mitigate, and the consequences of a failure to exercise the duty, as follows:

‘It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.’ 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>198</sup>

89. The underlying objective of the duty to mitigate is “to avoid the aggrieved party passively sitting back and waiting to be compensated for harm which it could have avoided or reduced. Any harm which the aggrieved party could have avoided by taking reasonable steps will not be compensated.”<sup>199</sup> An injured party is required to take reasonable steps to mitigate its damages when confronted by injury, and its failure to do so will preclude recovery to that extent.<sup>200</sup>

90. A prospective NAFTA claimant is not required to exhaust local remedies prior to commencing NAFTA arbitration, and the duty to mitigate in no way precludes recourse to a

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<sup>197</sup> **RA-108**, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan* (ICSID Case No. ARB/01/06) Award, 7 October 2003, ¶ 10.6.4(1): (“Mitigation 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 – as for instance in Article 77 of the *VCLT* and Article 7.4.8 of the *UNIDROIT Principles for International Commercial Contracts*. It is frequently applied by international arbitral tribunals when dealing with issues of international law.”)

<sup>198</sup> **RA-116**, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (I.C.J. Reports 1997) Judgement, 25 September 1997, ¶ 80. See also **RA-121**, *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Final Award, 16 September 2003, ¶ 20.30: (“it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable - not necessarily exhaustive - effort by the investor to obtain correction”) (emphasis added).

<sup>199</sup> **RA-141**, UNIDROIT, International Institute for the Unification of Private Law, *UNIDROIT Principles for International Commercial Contracts 2010*, Article 7.4.8 [Excerpt], Comment 1.

<sup>200</sup> **RA-60**, Commentary on the ILC Articles, Article 31, Commentary (11).

NAFTA claim.<sup>201</sup> However, the lack of a requirement to exhaust local remedies does not eliminate the duty to mitigate. In distinguishing the duty to mitigate from the exhaustion of local remedies rule, the tribunal in *Dunkeld v. Belize* stated that:

[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>202</sup>

91. In short, while a NAFTA claimant may have recourse to NAFTA arbitration where it has allegedly suffered damage as a result of wrongful government conduct, the duty to mitigate requires a claimant to pursue all available and effective avenues that it can in order to limit its losses.

**B. Judicial Review Was an Available and Effective Remedy that Would Have Fully Restored the Value of the Claimants' Lost Opportunity**

92. In this case, the Claimants could have avoided the damages resulting from their loss of opportunity by taking the reasonable step of using the existing and available local administrative procedures of judicial review, procedures which would have been more efficient than their NAFTA claim. As explained by Justice John Evans, a former Justice of Canada's Federal Court and Federal Court of Appeal, recourse to judicial review in this case by the Claimants "would, as a result, have [provided] an opportunity to have the Project considered in accordance with Canadian law."<sup>203</sup>

93. First, judicial review was an available remedy once the Claimants were in receipt of the JRP Report. As Justice Evans explains, "[t]here is no question that the JRP's Report and

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<sup>201</sup> This point is made clear by **RA-47**, NAFTA Article 1121(1)(b), which requires NAFTA claimants to waive their right to any domestic administrative or judicial proceedings in respect of the alleged NAFTA breach, "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" (emphasis added).

<sup>202</sup> **RA-115**, *Dunkeld International Investment Ltd. v. Government of Belize* (UNCITRAL) Award, 28 June 2016, ¶ 197 (emphasis added).

<sup>203</sup> **RE-6**, Evans Report, ¶ 8.

recommendations were subject to review in Canadian courts.”<sup>204</sup> He adds that “reports of JRPs are reviewable in the Federal Court, even though they contain non-binding recommendations to the Government, and are legally independent of any subsequent Ministerial decision on the issuance of a permit.”<sup>205</sup> Likewise, Rule 7.01 of the *Nova Scotia Civil Rules*, which defines “decision” as including “action taken” and “an omission to take action required” is broad enough to include the JRP Report and recommendations.<sup>206</sup> Accordingly, the JRP Report could have been challenged on the grounds of: (1) non-compliance with the *CEAA* at the Federal Court; and (2) non-compliance with the *NSEA* at the Supreme Court of Nova Scotia.<sup>207</sup> Moreover, the Claimants had standing to apply for judicial review—according to Justice Evans, “[t]hose adversely affected by administrative action have standing to make an application for judicial review to challenge it.”<sup>208</sup> The Claimants’ allegation that the JRP Report caused them financial loss was a sufficient basis for them to have standing to commence applications for judicial review in both the Federal Court and Supreme Court of Nova Scotia.<sup>209</sup>

94. Second, judicial review would have provided the Claimants with an effective remedy. As Justice Evans explains, on the basis of the majority’s conclusions regarding the JRP’s acts, domestic reviewing courts would have considered the JRP’s community core values approach and its failure to consider mitigation measures as errors of law.<sup>210</sup> Moreover, the reviewing courts could have concluded that the JRP’s failure to inform Bilcon of Nova Scotia of the “core community values” approach breached the JRP’s duty of fairness.<sup>211</sup> In view of these errors, Justice Evans states that “there is no plausible basis on which the reviewing courts could have declined to set aside the JRP Report. They would therefore have remitted the matter back for

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<sup>204</sup> RE-6, Evans Report, ¶ 64.

<sup>205</sup> RE-6, Evans Report, ¶ 64.

<sup>206</sup> RE-6, Evans Report, ¶ 64.

<sup>207</sup> RE-6, Evans Report, ¶ 65.

<sup>208</sup> RE-6, Evans Report, ¶ 18.

<sup>209</sup> RE-6, Evans Report, ¶ 66.

<sup>210</sup> RE-6, Evans Report, ¶¶ 74-75.

<sup>211</sup> RE-6, Evans Report, ¶¶ 75-76.

redetermination in accordance with the Court's reasons."<sup>212</sup> He further concludes that the "reviewing courts would also have been likely to accede to a request from the Claimants that the JRP should be differently constituted for the redetermination, despite the additional costs and delays inherent in a remittal to new panel members."<sup>213</sup> This opinion was shared by the Claimants' administrative law expert, Murray Rankin, in the liability phase of the arbitration.<sup>214</sup>

95. In short, accepting the majority's conclusions regarding the correctness of the JRP's acts under Canadian law, if the Claimants or Bilcon of Nova Scotia had simply commenced applications for judicial review of the JRP Report they would have *fully* restored their opportunity to have the specifics of the Whites Point project considered, assessed, and decided in accordance with applicable laws. As stated by Justice Evans:

Judicial review would have been an expeditious and relatively cost-effective remedy for the unlawful administrative action on which the Tribunal based its finding of Canada's liability for the breaches of NAFTA. Whether or not a redetermination would have resulted in an ultimately positive environmental assessment and the subsequent issuance of the permits cannot, of course, be known. However, a redetermination by a JRP would have effectively remedied any breach of the Claimants' right to have their project assessed in accordance

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<sup>212</sup> RE-6, Evans Report, ¶ 77.

<sup>213</sup> RE-6, Evans Report, ¶ 78.

<sup>214</sup> Jurisdiction and Liability Hearing Transcript, Volume 3, October 24, 2013, pp. 78:14-79:23:

Professor McRae: What would be the consequence for the proponent of successful judicial review? Would we have to start over again, or what? Is it void? I think that was mentioned in one of the opinions, that they have to start over again. What exactly would have been the consequence if they had gone to judicial review and you are correct that there are errors?

THE WITNESS: If I am correct, I would have thought that a court would have quashed this decision. They would have said a decision by the statutory decision-maker Ministers predicated on such a flawed process by which there was such an excess of jurisdiction, the panel going so far beyond its terms of reference and asking itself the wrong questions and all of the things that I tried to identify in my report, they would quash that decision. They would say that decision was not – could not stand in law. It was made without jurisdiction. And at that point, it would be for a new panel to be – presumably a whole new process, would have to be started. It is like -- you know, it is like kicking somebody out of the legal profession, or a doctor, on the basis that the hearing was flawed and their livelihood was affected, and they would say -- the court would say, Well, we have got to go back and do it again, with probably different decision makers, and so forth. But I must confirm that there are a variety of remedies available in administrative law. That is just the most obvious one. Go back and do it right, the court would say.

with Canadian law, and mitigated any loss caused by the legal flaws that the Tribunal identified in the original recommendations of the JRP.<sup>215</sup>

### C. Conclusions

96. Given that the damages associated with the lost opportunity were fully mitigable, the only compensation to which the Claimants could be entitled would be those related to their duty to mitigate losses flowing from the NAFTA breach. In this regard, while judicial review would have expeditiously restored the Claimants' lost opportunity,<sup>216</sup> it would have nevertheless entailed: (1) legal costs in the judicial review process; and (2) the costs of remitting the EA back to a newly constituted JRP.

97. With respect to legal costs, Justice Evans has estimated that a judicial review application in both Federal Court and in the Supreme Court of Nova Scotia would have cost C\$80,000, and the cost of an appeal as of right (if such an appeal had been pursued by Canada) would have been C\$50,000.<sup>217</sup> However, he also notes that it is reasonable to expect that 30% of these costs could have been recovered, leaving non-reimbursable court costs of C\$91,000.<sup>218</sup> Justice Evans' figures are in today's dollars. The Brattle Group deflated them back to the relevant time period. If the Claimants had acted on their duty to mitigate and had sought judicial review in 2007 after

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<sup>215</sup> **RE-6**, Evans Report, ¶ 91.

<sup>216</sup> Depending on whether appeals to the appellate courts and Supreme Court of Canada were pursued, Justice Evans has estimated that the Claimants could have expected a first instance ruling on a judicial decision within eighteen months of issuance of the JRP Report. Even if there were appeals all the way up to the Supreme Court of Canada, the judicial review process would have been completed by late 2012, well in advance of the hearing on Jurisdiction and Liability in this arbitration. See **RE-6**, Evans Report, ¶¶ 48, 82-83.

<sup>217</sup> **RE-6**, Evans Report, ¶ 87(a)-(b). To be conservative, Canada has used the top of the estimated range of costs identified by Justice Evans for these proceedings.

<sup>218</sup> **RE-6**, Evans Report, ¶ 89. In Justice Evans' view, "there is no plausible basis on which the reviewing courts could have declined to set aside the JRP Report" (**RE-6**, Evans Report, ¶ 77). The likelihood of the case arriving at the Supreme Court of Canada is therefore low, particularly given that leave is required for an appeal to the Supreme Court of Canada and that such leave was granted in only 20% of cases (**RE-6**, Evans Report, ¶ 48). Accordingly, Canada calculates the cost to mitigate relative only to the intermediate level of appeal, where the parties have a right of appeal. Using the top range of Justice Evans' estimate for costs as noted above, the total court costs amount to C\$130,000. When discounted for a 30% award for court costs, the non-reimbursable court costs amount to C\$91,000.

the JRP decision, they would have incurred approximately C\$77,982 in non-reimbursable costs.<sup>219</sup>

98. With respect to the costs of remission of the EA back to a newly constituted JRP, Justice Evans notes that it would have been open to the parties to save time and expense through submission of the same expert reports and other documentary evidence, supplemented by additional material as appropriate.<sup>220</sup> A newly constituted JRP would have therefore likely been able to commence its review at the public hearing stage of the process.<sup>221</sup> On the basis of invoices produced in the arbitration for costs relating to the JRP process, from the announcement of the public hearing to the issuance of the JRP Report, the total cost to Bilcon of Nova Scotia of remitting the EA back to a re-constituted JRP for a re-hearing and the issuance of a new report would likely be C\$1,072,662.<sup>222</sup> As such, the total maximum costs relating to the duty to mitigate would likely be C\$77,982 (non-reimbursable judicial review costs) + C\$1,072,662 (costs of a remitted JRP process) = C\$1,150,644. This sum represents the maximum amount that the Claimants should be entitled to recover.

## V. IN THE FURTHER ALTERNATIVE, THE CLAIMANTS ARE ONLY ENTITLED TO RECOVER THE AMOUNT BILCON OF NOVA SCOTIA INVESTED IN THE JRP PROCESS

99. As Canada has explained above, the Claimants are not entitled to recover more than what it would have cost to fully mitigate the losses. However, if the Tribunal disagrees and finds that the

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<sup>219</sup> **RE-5**, Expert Report of Darrell B. Chodorow, The Brattle Group, June 9, 2017 (“Brattle Group Report”), Appendix E, Table E.16. Brattle has adjusted the total court costs amount of C\$130,000 to 2007 dollars. Adjusting this number for a 30% costs award, the total non-reimbursable costs in 2007 dollars amount to C\$77,982.

<sup>220</sup> **RE-6**, Evans Report, ¶ 79: (“Reviewing courts would nonetheless have been mindful of the costs of ordering a fresh environmental assessment of the Project. ... Further, it would have been open to the parties to save expense and time by submitting to the second JRP the same experts’ reports and other documentary evidence, supplemented by additional material as appropriate.”)

<sup>221</sup> **RE-6**, Evans Report, ¶ 79: (“However, those who had given oral evidence would probably have to be heard again, together with any others who wished to testify.”)

<sup>222</sup> As set out in **RE-5**, Brattle Group Report, Appendix C, Table C.3, this number is estimated by adding the following components for the period from May 1, 2007, when the JRP announced it was ready to proceed to the oral hearing (see **R-258**), until October 22, 2007, when the JRP issued its report: (1) the consultant and office and operation expenses allegedly incurred by Bilcon of Nova Scotia in the JRP process, as set out in their Exhibits **C-1169** to **C-1318**; and (2) the costs of the review panel and related expenses as recorded in cost recovery invoices from the Canadian Environmental Assessment Agency (see exhibits **R-731** to **R-733**).

Claimants were not required to mitigate, then it must determine the appropriate methodology for valuing the Claimants' lost opportunity to have the Whites Point project considered and assessed in accordance with Canadian law. In this respect, it is clear that the Claimants did not lose the project as a result of the NAFTA breach—that conclusion would have to be based on an assumption that there was not just an opportunity to have the project considered in accordance with law, but in fact an unfettered right to develop the project under Canadian law. Such a right never existed. Rather, for the reasons explained below, the injury caused by the identified breach here could not possibly be any greater than the total value of the costs Bilcon of Nova Scotia sunk into the JRP process that resulted in the NAFTA breach.

**A. The Identified NAFTA Breach Caused, at Most, the Loss of Bilcon of Nova Scotia's Investment in the JRP Process**

100. The majority of the Tribunal found that the NAFTA breach committed by the JRP denied the Claimants and their investment nothing more than an opportunity to have the project fairly considered, assessed, and decided in accordance with applicable laws by government decision-makers. As a matter of fact and law in this case, this opportunity itself did not bring with it any guarantee of project approval. Accordingly, ascribing any value at all to the possibility that the project might eventually be developed would require impermissible speculation and would compensate the Claimants for a right that Bilcon of Nova Scotia never possessed.

101. The relevant causal question is what compensation is required to place the Claimants back into the position they were in before their opportunity was impacted by the NAFTA breach. The answer to this question is simple. The NAFTA breach did not expropriate Bilcon of Nova Scotia's interest in the land. Nor did it in any way prevent Bilcon of Nova Scotia from seeking to, once again, develop that land. Thus, what was lost was, at most, the value of what Bilcon of Nova Scotia invested into the JRP process. Restoring these costs would put Bilcon of Nova Scotia back into the exact position it was in prior to the breach—with the ability to seek an EA of the proposed development of the land in accordance with applicable Canadian laws.

**B. The Claimants Can only Recover Costs Bilcon of Nova Scotia Invested in the JRP Process that Are Substantiated by Evidence**

102. With respect to the costs invested in the Whites Point project, the Claimants have produced 150 exhibits listing expenses Bilcon of Nova Scotia allegedly incurred between 2002 and 2007.<sup>223</sup> However, any JRP costs affected by the NAFTA breach could have only been incurred between the establishment of the JRP on November 3, 2004, and the JRP's delivery of its Report to decision-makers on October 22, 2007. Costs incurred prior to November 3, 2004 could not form part of the injury caused by the denial of the Claimants' opportunity by the JRP because the JRP was not yet in existence. Similarly, costs incurred after October 22, 2007 could not form part of the injury because the JRP had by this time issued its Report and completed its mandate.

103. As explained in the Brattle Group Report, the Claimants have filed evidence which would appear to demonstrate that Bilcon of Nova Scotia invested C\$ [REDACTED] in costs relating to the JRP process between November 3, 2004 and October 22, 2007.<sup>224</sup> This purported amount is inclusive of: (1) fees paid to consultants and experts, such as AMEC or Conestoga-Rovers and Associates, to assist in the preparation of the EIS and in responding to questions from the JRP and members of the public; (2) the costs of the JRP members and Secretariat and other administrative fees paid to the Nova Scotia Department of Environment and Labour and the Canadian Environmental Assessment Agency; and (3) operating costs of Bilcon of Nova Scotia's office.<sup>225</sup>

104. However, once again the Claimants bear the burden of proof with respect to their claim. They are seeking millions of dollars from the taxpayers of Canada, and the public purse of any government cannot be treated lightly. The Claimants must introduce evidence to actually

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<sup>223</sup> See C-1169 through C-1318; C-1342, Letter from Greg Nash to the Tribunal (Mar. 3, 2017), p. 8.

<sup>224</sup> RE-5, Brattle Group Report, ¶ 52. The amount of Bilcon of Nova Scotia's alleged investments in the JRP process excludes amounts for which there is evidence that [REDACTED]

[REDACTED] See e.g., C-1260, Bilcon of Nova Scotia Bi-Weekly Summary with Handwritten Notes, 20 January 2005, p. 1; C-1250, Bilcon of Nova Scotia Bi-Weekly Summary with Handwritten Notes, 2 May 2005, p. 1; C-1252, Bilcon of Nova Scotia Bi-Weekly Summary with Handwritten Notes, 13 June 2005, p. 1.

<sup>225</sup> Canada assumes that Bilcon's office operations were dedicated exclusively to the JRP process while it was ongoing. However, certain non-essential office and operating expenses have been excluded from these costs as they do not have a reasonable connection to the JRP process.

substantiate the alleged expenses before those expenses are recoverable here. Such evidence could include, for example, receipts, contracts with evidence of payment, statements of account from vendors, and witness statements of third parties certifying payment. As the Brattle Group has determined, only C\$332,528 of Bilcon of Nova Scotia's alleged investments in the JRP process have actually been substantiated with evidence.<sup>226</sup>

### **C. Conclusions**

105. The Claimants have not advanced a claim for the costs Bilcon of Nova Scotia invested in the Whites Point JRP process and as such, they are not entitled to compensation for these costs. But as provided in the Brattle Group Report, subject to further substantiation, the costs Bilcon of Nova Scotia invested into the JRP process amount to no more than C\$ [REDACTED].<sup>227</sup> Of this amount, roughly 90% would require further substantiation before it could possibly be awarded as damages.

## **VI. IN THE FURTHER ALTERNATIVE, THE CLAIMANTS ARE ONLY ENTITLED TO RECOVER THE AMOUNT BILCON OF NOVA SCOTIA INVESTED IN THE WHITES POINT PROJECT**

106. For the reasons explained above, the appropriate approach to valuing the lost opportunity caused by the breach identified by the Tribunal considers only the costs invested into the JRP process. However, if the Tribunal were to determine otherwise, the appropriate methodology to use in quantifying the value of the lost opportunity is not a DCF analysis, but rather Bilcon of Nova Scotia's investment costs in the Whites Point project.

### **A. Using a DCF Model to Value an Opportunity to Develop a Project that is Not a Going Concern and Did Not Have a Right to Be Developed is Inappropriate**

107. Applicable principles of damages at international law make clear that it is inappropriate to award compensation for inherently speculative claims. In this regard, claims for future lost profits and lost opportunity are commonly rejected for being too speculative where a project is

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<sup>226</sup> See **RE-5**, Brattle Group Report, ¶ 52.

<sup>227</sup> **RE-5**, Brattle Group Report, ¶ 52.

not operational and does not have a history of profits.<sup>228</sup> Indeed, the “prevalent paradigm” in such situations is for tribunals to award amounts actually invested—they “generally refuse to quantify damages” based on “the ability of a business to generate cash into the future.”<sup>229</sup> The ILC Commentaries make clear that “[t]ribunals have been reluctant to provide compensation for claims with inherently speculative elements” given that “profits are relatively vulnerable to commercial and political risks.”<sup>230</sup> The Commentaries also make clear that future lost profits are to be compensated only where an anticipated income stream amounts to a “legally protected interest of sufficient certainty,” which can be established through evidence such as contractual arrangements or a history of dealings.<sup>231</sup>

108. For example, the tribunal in *Metalclad v. Mexico* held that “where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value.”<sup>232</sup> The investor in that case had purchased, permitted, financed, and constructed a waste disposal facility before Mexico thwarted its operation through an ecological decree. Nevertheless, the tribunal ruled that since the landfill was never operational, the “fair market value is best arrived at [...] by reference to Metalclad’s actual investment in the project.”<sup>233</sup>

109. In *Siemens v. Argentina*, the business was not a going concern, so the tribunal awarded only sunk costs, despite the existence of a contract for services.<sup>234</sup> In *PSEG Global v. Turkey*, the tribunal rejected a claim for lost profits on the basis that it was too speculative, given that the

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<sup>228</sup> See **RA-60**, Commentary on the ILC Articles, Article 36, Commentary (27) (explaining that lost profits “have not been as commonly awarded in practice as compensation for accrued losses.”)

<sup>229</sup> **RA-135**, 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.

<sup>230</sup> **RA-60**, Commentary on the ILC Articles, Article 36, Commentary (27).

<sup>231</sup> **RA-60**, Commentary on the ILC Articles, Article 36, Commentary (27).

<sup>232</sup> **RA-41**, *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB (AF)/97/1) Award, 30 August 2000 (“*Metalclad – Award*”), ¶ 120.

<sup>233</sup> **RA-41**, *Metalclad – Award*, ¶¶ 121-122.

<sup>234</sup> **RA-136**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Award, 6 February 2007, ¶¶ 362-389.

investment was still in the planning stage.<sup>235</sup> In that case, the tribunal had determined that Turkey's negligent handling of the negotiations of a concession contract resulted in a breach of the fair and equitable treatment obligation in the US-Turkey investment treaty. In declining to award lost profits, the tribunal held that future profits would be "wholly speculative and uncertain" given that none of the commercial terms of the contract between the parties had been finalized. As such, it would be "impossible to estimate for the future."<sup>236</sup>

110. In *Wena v. Egypt*, the claimant sought damages for lost profits and loss of opportunity to operate their hotel venture following an attempted seizure by government-affiliated authorities.<sup>237</sup> The claimant had operated one of its hotels for less than 18 months and was in the process of completing renovations on the other. However, the tribunal determined that such claims were inappropriate on the basis that they were "too speculative" and only awarded sunk costs.<sup>238</sup>

111. Likewise, in *Windstream v. Canada*, the NAFTA tribunal rejected the claimant's lost profits claim despite the claimant having a contract in hand which guaranteed its sales at a fixed rate for a 20-year term. Even with a contract in place providing a guaranteed revenue stream, the tribunal concluded the project was at a "relatively early development stage", reflected by the fact that the permitting process had not yet been completed.<sup>239</sup> In the circumstances, the tribunal concluded that it was inappropriate to award lost profits based on a DCF analysis.<sup>240</sup>

112. While ignoring the long line of decisions that consistently reject claims for lost profits for lack of certainty arising out of an absence of contractual arrangements or a history of

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<sup>235</sup> **RA-59**, *PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID No. ARB/02/5) Award, 17 January 2007 ("*PSEG – Award*"), ¶¶ 313-315.

<sup>236</sup> **RA-59**, *PSEG – Award*, ¶ 313.

<sup>237</sup> **RA-83**, *Wena Hotels Limited (U.K.) v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award, 8 December 2000 ("*Wena – Award*"), ¶ 119.

<sup>238</sup> **RA-83**, *Wena – Award*, ¶ 123.

<sup>239</sup> **RA-146**, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016 ("*Windstream – Award*"), ¶ 475.

<sup>240</sup> **RA-146**, *Windstream – Award*, ¶ 475.

operations,<sup>241</sup> the Claimants rely on three decisions, which they claim provide otherwise: *Vivendi v. Argentina*, *Crystallex v. Venezuela*, and *Gold Reserve v. Venezuela*.<sup>242</sup> A review of these decisions demonstrates that they do not support the Claimants' contention. In *Vivendi*, the tribunal denied the claimants' lost profits claims and awarded costs based on investment value because the enterprise was not a going concern and had never turned a profit.<sup>243</sup>

113. In *Crystallex*, the tribunal looked first at whether the claimant had proven that "it is sufficiently certain that the Claimant would have made profits," and second "whether the Claimant ha[d] provided the Tribunal with a reasonable basis to assess such loss of profits."<sup>244</sup> To satisfy the first requirement, the tribunal held that "the Claimant must prove that it has been deprived of profits that would have actually been earned. This requires proving that there is sufficient certainty that 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."<sup>245</sup> Ultimately, the tribunal held that the claimant satisfied its burden, given the "breadth of activities" undertaken by the claimant to bring the mine to a "shovel-ready" state,<sup>246</sup> and the contemporaneously prepared feasibility studies establishing the size of the deposits.<sup>247</sup>

114. Similarly, in *Gold Reserve*, the tribunal awarded future lost profits for 20-year concessions because permits had been granted, substantial work undertaken, and contemporaneous feasibility

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<sup>241</sup> These above mentioned cases are but a sample of the long list of awards denying lost profits in the case of non-operating investments because they are too speculative. Others include **RA-139**, *Senor Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6) Summary of Award from International Arbitration Case Law, 7 July 2011, p. 9; **RA-132**, *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Award, 29 June 2012, ¶ 269; **RA-137**, *Stati et al. v. Republic of Kazakhstan* (SCC Case No. V. (116/2010)) Award, 19 December 2013, ¶¶ 1656 and 1683; **RA-126**, *LG&E Energy Corp. et al. v. Argentine Republic* (ICSID Case No. ARB/02/1) Award, 25 June 2007, ¶¶ 89, 90, and 96; **RA-131**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2) Award, 13 September 2016, ¶ 235; **RA-111**, *Antoine Biloune v. Ghana* (UNCITRAL) Award on Jurisdiction and Liability, 27 October 1989, ¶ 59; and **RA-138**, *OAO Tatneft v. Ukraine* (UNCITRAL) Award on the Merits, 29, July 2014, ¶ 607-609.

<sup>242</sup> Claimants' Damages Memorial, ¶¶ 240-242.

<sup>243</sup> **RA-143**, *Compania de Aguas def Aconquija SA. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3) Award, 20 August 2007 ("Vivendi – Award"), ¶¶ 8.3.5-8.3.11.

<sup>244</sup> **CA-317**, *Crystallex – Award*, ¶ 876.

<sup>245</sup> **CA-317**, *Crystallex – Award*, ¶ 875 (emphasis in original).

<sup>246</sup> **CA-317**, *Crystallex – Award*, ¶ 915.

<sup>247</sup> **CA-317**, *Crystallex – Award*, ¶ 880.

studies existed.<sup>248</sup> However, the tribunal only awarded future profits with respect to rights that had been acquired by the claimant, not those related to the “North Parcel”, a parcel of land over which “it could have acquired rights ... in the future.”<sup>249</sup> Since the tribunal “could not be certain” that the claimant had a legal right to exploit the parcel, it held that it “would be speculative” to assume that a willing buyer would have valued it as though a legal right had been acquired.<sup>250</sup> In the words of the tribunal, it “simply cannot compensate Claimant for the deprivation of a right that it never possessed.”<sup>251</sup>

115. Based on the foregoing, the Tribunal cannot base an award of damages on lost profits where they are too remote or speculative. When a project is not a going concern, does not have a sufficient history of dealings, or has no legal right to exploit the project site, lost profits are too remote and speculative. No international investment tribunal has ever awarded lost profits for an investment that has not obtained all necessary approvals and permits. This Tribunal should not be the first.

**B. The Value of the Lost Opportunity is More Appropriately Reflected by the Amount Bilcon of Nova Scotia Invested in the Project**

116. The Claimants request that the Tribunal compensate them for their lost opportunity by awarding them lost profits based on a DCF analysis.<sup>252</sup> However, the approach advanced by the Claimants ignores that Bilcon of Nova Scotia was in the very early stages of project development. As noted by the Brattle Group:

At the date of the breach, the Project was still in the early stage of development... [T]he Whites Point site has never been subjected to the type of feasibility or pre-feasibility studies necessary to determine whether the resources identified at the site were economically viable and could therefore be

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<sup>248</sup> CA-316, *Gold Reserve – Award*, ¶¶ 11-12, 578-579.

<sup>249</sup> CA-316, *Gold Reserve – Award*, ¶ 682.

<sup>250</sup> CA-316, *Gold Reserve – Award*, ¶ 682.

<sup>251</sup> CA-316, *Gold Reserve – Award*, ¶ 829.

<sup>252</sup> Claimants' Damages Memorial, ¶¶ 240, 243, 251. While their expert divides these profits into past and future lost profits, the reality is that their damages claim is based entirely on future lost profits.

categorized as reserves...lacks an operating history [and also] faced permitting risk...<sup>253</sup>

117. These indisputable facts set this case apart from all of the decisions on which the Claimants rely. In *Vivendi*, *Crystallex*, and *Gold Reserve* there were already long-term concession agreements and guarantees that the projects would be permitted.<sup>254</sup> Indeed, while the *Rusuro* decision cautions against the use of the DCF method of valuation where it is impossible to predict how regulatory changes may affect the operation of the project, such a caution is all the more pronounced where the right to build and operate the project does not yet exist, and all that has been caused by the breach is the loss of a fair opportunity to have the government consider the proposal. In the case at hand, it is not clear that the Whites Point project would have been permitted, and if so, what conditions would have applied to it. As with the “North Parcel” in *Gold Reserve*, Bilcon of Nova Scotia never obtained a legal right to proceed with the Whites Point project. Accordingly, it would be wholly speculative to assume what kind of profits the project might have generated.

118. In light of the principles and case law set out above, the absence of permitting, the lack of a feasibility study on the actual reserves,<sup>255</sup> and the lack of an operating history, using a DCF analysis to value the Whites Point project is inappropriate, as it would be based on layer upon layer of speculation. 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. These investment costs should be measured from April 24, 2002, when Bilcon of Nova Scotia was incorporated,<sup>256</sup> until October 22, 2007, the date of the breach.

119. In addition to those costs that Canada has appropriately categorized as JRP costs in Part V.B above, the costs that would properly be included in Bilcon of Nova Scotia's investment in

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<sup>253</sup> **RE-5**, Brattle Group Report, ¶¶ 89-91.

<sup>254</sup> **CA-316**, *Gold Reserve – Award*, ¶¶ 11-12, 578-579; **CA-317**, *Crystallex – Award*, ¶¶ 562-564; **RA-143**, *Vivendi – Award*, ¶ 4.4.3.

<sup>255</sup> Expert Report of Michael Cullen (Mercator Geological Services), November 17, 2016 (“Cullen Report”), p. 47, s. 14.1.

<sup>256</sup> **R-290**, Certificate of Registration for Bilcon of Nova Scotia, Corporation (Apr. 24, 2002).

the project include: (1) quarry development costs, such as labour and land lease payments; (2) charitable donations; (3) taxes;<sup>257</sup> and (4) newspaper or trade publication subscriptions.

**C. The Claimants Can Only Recover the Costs that Are Substantiated by Evidence**

120. While the Claimants have not specifically claimed damages in their Memorial with respect to Bilcon of Nova Scotia's investment costs, they have provided evidence through Mr. Buxton about the amounts "expended on the Whites Point Quarry."<sup>258</sup> In his calculations, Mr. Buxton asserts "Net Damages" of \$ [REDACTED].<sup>259</sup> In arriving at this number, the Claimants claim that he relied upon 150 exhibits that they produced in support of his calculation.<sup>260</sup> However, they have failed to tie Mr. Buxton's claim to these exhibits, and as determined by the Brattle Group, the exhibits produced do not add up to the amount claimed to have been invested.<sup>261</sup> It is also apparent Mr. Buxton included in his costs [REDACTED]

121. Specifically, in the case of costs incurred by Global Quarry Products ("GQP"), the joint venture between Bilcon of Nova Scotia and Nova Stone Exporters,<sup>262</sup> the evidence shows that Bilcon of Nova Scotia and Nova Stone were splitting these costs.<sup>263</sup> As such, the Claimants could only recover Bilcon of Nova Scotia's share of GQP's costs. The Claimants' exhibit

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<sup>257</sup> Penalties for late payments and foreign withholding taxes, which do not represent the tax liability of Bilcon of Nova Scotia but of foreign employees, are excluded from the calculation. See **RE-5**, Brattle Group Report, Appendix C, Table C.6.

<sup>258</sup> Witness Statement of Paul Buxton, December 13, 2016, ¶ 33; **C-1030**, Whites Point Quarry and Marine Terminal Project Expenses.

<sup>259</sup> **C-1030**, Whites Point Quarry and Marine Terminal Project Expenses. Mr. Buxton does not explain whether this number is Canadian dollars or U.S. Dollars. We have assumed that they are Canadian dollars because they are allegedly based on exhibits which show costs in Canadian dollars.

<sup>260</sup> See **C-1342**, Letter from Greg Nash to Tribunal (Mar. 10, 2017), p. 8. Canada understands these materials to be a comprehensive list of the sources relied on by Mr. Buxton. See Procedural Order No. 22, ¶ 41 (ordering the Claimants to provide sources and documents listed in 11(c) of Schedule I to Canada's letter of January 12, 2017. Item 11(c) read as follows: "Please provide all source materials and calculations underlying Buxton Exhibit 4, and assign them "C" exhibit numbers." See also Letter from Canada to the Tribunal (Jan. 12, 2017), Schedule I, p. 7.)

<sup>261</sup> **RE-5**, Brattle Group Report, ¶ 57.

<sup>262</sup> **R-293**, Partnership Agreement between Bilcon and Nova Stone (May 2, 2002).

<sup>263</sup> See, e.g., **C-1203**, Global Quarry Products July (2) Invoice (Jul. 2003), p. 1; **C-1204**, Global Quarry Products August (1) Invoice (Aug. 2003), p. 1; **C-1205**, Global Quarry Products August (2) Invoice (Aug. 2003), p. 1 (all showing "Bilcon's Portion" as 50% of the total costs shown). See also **RE-5**, Brattle Group Report, Appendix C, Table C.5.

evidence also reveals that [REDACTED].<sup>264</sup> However, these entities are not claimants here and are wholly unrelated to Bilcon of Nova Scotia. They could have been named as claimants in the arbitration, but they were not. The Tribunal cannot compensate an investor that is not a named claimant. Nor can it provide compensation due to one corporation to another corporation. These amounts must be excluded from the total investment cost amount.

122. Finally, as noted in Section V.B above, with respect to the vast majority of costs, the Claimants have failed to provide sufficient evidence to demonstrate that Bilcon of Nova Scotia in fact incurred many of the expenses listed.

123. As demonstrated by the Brattle Group, the Claimants' exhibit evidence shows C\$ [REDACTED] of investment costs paid by Bilcon of Nova Scotia, and, as of now, only C\$ [REDACTED] of that amount is supported by invoice evidence and is therefore verifiable.<sup>265</sup>

#### **D. Conclusions**

124. If the Tribunal determines that the appropriate approach to valuing the opportunity lost by the Claimants contemplates consideration of the entire value of the Whites Point project, then the only appropriate valuation methodology is to assess established and verifiable investment costs. Using a DCF analysis is far too speculative an approach in light of the very early stage of this project. Accordingly, subject to further substantiation, the Claimants could be entitled to no more than C\$ [REDACTED] as compensation for the NAFTA breach identified by the Tribunal. Of this amount, more than 75% remains to be substantiated by the Claimants.

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<sup>264</sup> See e.g., **C-1172**, Global Stone Products Invoices (May 2002), p. 4; **C-1175**, Global Quarry Products Invoices (Jul. 2002), p. 2; **C-1177**, Global Quarry Products Invoices (Aug. 2002), p. 2; **C-1178**, Global Quarry Products Invoices (Sep. 2002), p. 4; **C-1179**, Global Quarry Products Invoices (Sep. 2002), p. 2; **C-1180**, Global Quarry Products Invoices (Oct. 2002), p. 2; **C-1181**, Global Quarry Products Invoices (Oct. 2002), p. 2; **C-1182**, Global Quarry Products Invoices (Oct. 2002), p. 2; **C-1184**, Global Quarry Products Invoices (Dec. 2002), p. 2; **C-1185**, Global Quarry Products Invoices (Dec. 2002), p. 14. See also footnote 224 above; **RE-5**, Brattle Group Report, Appendix C, Table C.5.

<sup>265</sup> **RE-5**, Brattle Group Report, ¶ 53.

**VII. IN THE FINAL ALTERNATIVE, THE CLAIMANTS' CALCULATION OF THE ALLEGED LOST PROFITS OF THE WHITES POINT PROJECT MUST BE REJECTED**

125. For all of the reasons set out above—lack of standing, failure to prove causation, failure to mitigate, and the inappropriateness of a DCF in these circumstances—the Tribunal should reject the Claimants' request for damages based on the alleged loss of profits of the unpermitted and non-operating Whites Point project. However, should the Tribunal find that the Whites Point project's potential profits form some basis for valuing the loss of the opportunity to have the project considered in accordance with Canadian law, it should still reject the Claimants' model. Their lost profits calculation is rife with flaws that result in a gross over-valuation of the Whites Point project's potential profits. Correcting these flaws results in a significantly lower valuation.

**A. The Claimants' Calculation of the Whites Point Project's Lost Profits is Flawed and Unreliable and Must be Rejected**

126. The Claimants' lost profits calculation is flawed in numerous respects, and grossly over-values the Whites Point project. If the Tribunal were to accept that potential profits should be considered in valuing the losses caused by the defined breach, several corrections must be made to the Claimants' calculation. These flaws and corrections are set out in detail in the Brattle Group Report,<sup>266</sup> and a number of them are summarized below.

**1. The Claimants Inappropriately Ignore Basic Project Development Risks**

127. In order to ground their claim for damages in the project's alleged lost profits, the Claimants assume with certainty that the Whites Point project would have gone forward and would have been profitable. However, the Claimants ignore that there was a significant amount of uncertainty regarding the prospect of the project going forward at the time of the breach. In particular, the Claimants ignore market conditions and the fact that the project was in an early stage of development in 2007, and incorrectly assume with certainty that they would have received all of the necessary permits and developed the project.

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<sup>266</sup> RE-5, Brattle Group Report, Sections V and VI.

**(a) The Claimants Ignore Market Conditions**

128. The Claimants assert that the Whites Point project would have been extremely profitable. They value the project today at over three times the value they attributed to it for litigation purposes in their Statement of Claim.<sup>267</sup> However, they ignore that market conditions leading up to the global financial crisis were uncertain and that prospects for the aggregates markets were negative. As the Brattle Group points out, there were concerns about a decline in construction spending in the United States, shipments of aggregate had dropped by an estimated 17% from the first half of 2006 to the first half of 2007, and the last quarter of 2007 reflected the “seventh sequential downturn in aggregates demand.”<sup>268</sup> In addition, stock prices for the two largest publicly traded aggregates suppliers experienced a significant drop in the months leading up to the breach date.<sup>269</sup>

129. The negative outlook for the development of new quarry projects in these market conditions was further illustrated by the Belleoram project in Newfoundland. While this project was released from environmental review around the same time as the Whites Point JRP Report,<sup>270</sup> the Belleoram proponent decided not to go forward, citing negative market conditions in the United States.<sup>271</sup> Specifically, in an e-mail from the project proponent in 2008, it stated that “[o]ur project ... is delayed [given] ‘The Financial Meltdown’.”<sup>272</sup> The Belleoram proponent

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<sup>267</sup> Statement of Claim, ¶ 42(a).

<sup>268</sup> **RE-5**, Brattle Group Report, ¶ 160.

<sup>269</sup> **RE-5**, Brattle Group Report, ¶ 160.

<sup>270</sup> **R-455**, Canadian Environmental Assessment Registry news release, “Belleoram Marine Terminal Project: Environment Minister Announces Decision” (Nov. 22, 2007); **R-586**, Newfoundland Department of Environment and Conservation, Environmental Assessment Division, Environmental Assessment Bulletin (Jan. 26, 2007); **R-587**, Newfoundland Department of Environment and Conservation, Environmental Assessment Division, Environmental Assessment Bulletin (Jul. 27, 2007).

<sup>271</sup> **R-360**, E-mail from Robert Rose, Continental Stone to Randy Decker, Transport Canada (Nov. 3, 2008): (“has it been delayed or cancelled given the financial outlook in the US[?]”... “our project...is delayed and you are right, ‘the financial meltdown’”); **R-588**, Advertiser news article, *Company still interested in Belleoram rock quarry* (Oct. 20, 2014): (“The project was originally released from Environmental Assessment back in 2007. However, due mainly to a downturn in the American economy, work on the proposed project did not begin during the time frame permitted by the Environmental Assessment Regulations”).

<sup>272</sup> **R-360**, E-mail from Robert Rose, Continental Stone to Randy Decker, Transport Canada (Nov. 3, 2008).

recently announced that it was still interested in proceeding, but the quarry is still not operational almost ten years after environmental approvals were granted.<sup>273</sup>

130. The Claimants have assumed that the Whites Point project would have been immune from these market conditions, would have continued along the same course of development as planned but for the NAFTA breach, and would have been extraordinarily valuable. They have provided no evidence to substantiate their assumptions.

**(b) The Claimants Ignore the Early Stage of Development of the Project**

131. In assuming the profitability of the Whites Point project, the Claimants also gloss over the fact that the project was at a very early stage of development. Bilcon of Nova Scotia's capital cost estimates were based on rough order-of-magnitude budget estimates from engineers, as they had not proceeded to the point of preparing a detailed design.<sup>274</sup> Revenues were also based on very rough estimates of the resources available. As noted by Mr. Cullen—who was retained by the Claimants in this arbitration to conduct resource estimates at the Whites Point site in 2015 and 2016<sup>275</sup>—the site has never been subjected to the type of feasibility or pre-feasibility studies necessary to determine whether its resources were economically viable and could therefore be categorized as reserves.<sup>276</sup>

132. The early stage of development and resulting uncertainty for the project is further illustrated by the fact that in their damages claim, the Claimants have moved away from the Whites Point project as presented to the JRP and government decision-makers.<sup>277</sup> The Claimants obviously did not have a final design for their quarry and marine terminal—at least not one by which they are now willing to stand. It is indicative of the early stage of development of the

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<sup>273</sup> **R-588**, Advertiser news article, *Company still interested in Belleoram rock quarry* (Oct. 20, 2014).

<sup>274</sup> Expert Report of Michael Washer, December 8, 2016, ¶¶ 6, 7, 9.

<sup>275</sup> Cullen Report, p. 25: (“Bilcon retained Mercator in September of 2015 to complete a new basalt resource estimation program for the Whites Point site...”).

<sup>276</sup> Cullen Report, p. 47, s. 14.1.

<sup>277</sup> See examples described in **RE-5**, Brattle Group Report, ¶¶ 114-122.

project in 2007 that the Claimants have now made numerous revisions to the design of the project for the purposes of this arbitration.

## **2. The Claimants Inappropriately Ignore Permitting Risks**

133. Finally, and most importantly, in their proposed valuation of the alleged lost profits of the Whites Point project, the Claimants incorrectly assume with one hundred percent certainty that the project would have received all necessary approvals and permits.<sup>278</sup> Despite the Tribunal's clear pronouncement that it 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>279</sup> the Claimants ask the Tribunal to conclude that only one single specific environmental permitting outcome would have occurred—that the project would have been approved. As discussed in Part III above, the EA record does not support their conjecture.

134. As a result of this assumption, the Claimants fail to account for uncertainty and regulatory risk in the valuation that they have provided. This translates into a gross over-valuation of the project. A comparison of market indicators of the Whites Point project's value illustrates the significant impact an appropriate discount for permitting and regulatory risk has on the project's value.

135. First, in 2004, Bilcon of Nova Scotia acquired Nova Stone's █████ share of the opportunity to participate in the permitting and development of the project for US\$ █████ implying a US\$ █████ valuation for the entire project (US\$ █████ indexed to the 2007 valuation date).<sup>280</sup> This purchase price is particularly telling because it was agreed to after two years of preliminary development work, and after the project was referred to a JRP. Thus, it reflects the

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<sup>278</sup> See Claimants' Damages Memorial, ¶ 243 ("But for Canada's breaches, the Whites Point Quarry would have proceeded, and the Investors would have earned the profits generated by the Quarry for the 50 year life of the Quarry"); Rosen Report, ¶ 4.3 ("I have been instructed that absent the Respondent's unlawful breaches of the Treaty, the Investors would have constructed and operated the Whites Point project.")

<sup>279</sup> Award, ¶ 602.

<sup>280</sup> RE-5, Brattle Group Report, ¶¶ 77-79, 181-182.



### 3. The Claimants Incorrectly Value the Project's Potential Profits as of the Date of Mr. Rosen's Report Rather than the Date of the Breach

138. The Claimants' lost profits calculation also incorrectly values the Whites Point project as of the date of Mr. Rosen's report, assumed to be December 31, 2016.<sup>287</sup> Selecting this date as the valuation date, the Claimants present two components to their lost profits calculation: (1) "past lost profits", representing the cash flows that would have been generated from the Whites Point project from January 1, 2008 to December 31, 2016; and (2) "future lost profits", representing the cash flows that would have been generated from the Whites Point project from January 1, 2017 until the project's completion in 2061.<sup>288</sup> Mr. Rosen then adds interest to the "past lost profits" to the date of his report, and discounts the "future lost profits" back to the date of his report.<sup>289</sup>

139. The Claimants' approach is inconsistent with principles of compensation at international law. For example, *Chorzów Factory* establishes that reparation must "reestablish the situation which would, in all probability, have existed if that [illegal] act had not been committed."<sup>290</sup> As set out above, if the NAFTA breach had not occurred, the Claimants and their investment would have had the opportunity to have the federal and provincial decision-makers consider properly issued JRP recommendations. 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. In this case, the breach occurred when the JRP issued its Report on October 22, 2007. Accordingly, the lost profits must be calculated as of that date and subjected to discounting.

140. As the Brattle Group shows, simply discounting Mr. Rosen's calculation all the way back to the breach date, without applying any other necessary corrections, reduces his result by more than 40%—from US\$298 million to US\$170 million.<sup>291</sup> It is thus clear that the Claimants have

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<sup>287</sup> Rosen Report, ¶ 2.4.

<sup>288</sup> Rosen Report, ¶ 4.3 and Schedule 1.

<sup>289</sup> See **RE-5**, Brattle Group Report, ¶¶ 105-106.

<sup>290</sup> **CA-327**, *Chorzów – Award on the Merits*, p. 47.

<sup>291</sup> **RE-5**, Brattle Report, ¶¶ 107-108.

unnecessarily complicated the lost profits calculation they provide in order to obtain a more favourable result. On this basis alone, it should be rejected.

141. Moreover, the Claimants inappropriately ignore the principle that compensation is due at the time of the breach by seeking to recover damages for a different Whites Point project than the one presented for approval to the JRP. A proper valuation at the breach date reflects Bilcon of Nova Scotia's description of, and expectations for, the project at the time of breach, not the Claimants' description of it for the purposes of calculating damages in this arbitration.

142. For example, Mr. Cullen concluded that the Whites Point site contained [REDACTED] of basalt.<sup>292</sup> In contrast, Bilcon of Nova Scotia stated repeatedly in its EIS that the site contained an "estimated 100 million tons" of basalt, and that the project would "result in the removal of approximately 100 million tons" over the 50-year life of the project.<sup>293</sup> It also specifically stated in response to a question from the JRP that it did "not anticipate a future demand in excess of two million metric tons a year from the Whites Point site."<sup>294</sup> The increased resources allowed the Claimants to claim an [REDACTED].<sup>295</sup> The result was an [REDACTED]. Any damages calculations should reflect Bilcon of Nova Scotia's presentation of the project to the JRP.<sup>296</sup>

143. Finally, the Claimants incorrectly rely on hindsight and use actual developments in market conditions—such as shipping rates and prices—as their assumptions in calculating lost profits.<sup>297</sup> When valuing the project as of the breach date of October 22, 2007, the correct conditions to use

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<sup>292</sup> Cullen Report, Table 14.7 (Case Number 4), p. 67.

<sup>293</sup> **R-579**, Whites Point Quarry & Marine Terminal, Environmental Impact Statement, Volume VI (Mar. 31, 2006), Chapter 9.1.2.3, p. 24. See also **R-578**, Whites Point Quarry & Marine Terminal, Environmental Impact Statement, Volume V (Mar. 31, 2006), Chapter 7, pp. 4, 16, 31, 44; **R-580**, Whites Point Quarry & Marine Terminal, Environmental Impact Statement, Volume VII (Mar. 31, 2006), Chapter 11, p. 20; **R-581**, Whites Point Quarry & Marine Terminal, Revised Project Description (Nov. 1, 2006) ("Revised Project Description"), pp. 6, 24, 40, 96.

<sup>294</sup> **R-581**, Revised Project Description, p. 137.

<sup>295</sup> Rosen Report, ¶¶ 5.8, 5.13, Schedules 1 and 2.

<sup>296</sup> See **RE-5**, Brattle Group Report, ¶¶162-174 for application of this principle.

<sup>297</sup> See e.g., Rosen Report, ¶¶ 5.19 (showing prices [REDACTED] based on Mr. Dooley's evidence), 5.22 (showing freight rates [REDACTED] based on Mr. Morrison's report).

are those that existed in 2007, and any expectations that Bilcon of Nova Scotia would have held at that time about future prices or shipping rates.

**4. The Claimants Ignore the Impact of Competition on Future Prices**

144. In presenting their lost profits claim, the Claimants ignore basic economic principles and make unrealistic assumptions about the prices that Bilcon of Nova Scotia would receive for its aggregate over the life of the quarry. In particular, the Claimants use [REDACTED]

[REDACTED]

145. The Claimants ignore the fact that [REDACTED]

[REDACTED]<sup>301</sup> [REDACTED]

[REDACTED] As SC Market Analytics explains, given the dynamics of the New York City area market, aggregate prices would be expected to [REDACTED]<sup>302</sup>

146. In addition, the Claimants' price assumption ignores that [REDACTED]

[REDACTED] For example, by November 2007, the Belleoram project in Newfoundland had received its

<sup>298</sup> Rosen Report, ¶¶ 5.17-5.20; Dooley Statement, ¶ 97; C-1025, [REDACTED]

<sup>299</sup> C-1025, [REDACTED]; Witness Statement of Tom Dooley, December 9, 2016, ¶¶ 83, 87.

<sup>300</sup> Rosen Report, ¶ 5.20.

<sup>301</sup> RE-5, Brattle Group Report, ¶ 132.

<sup>302</sup> RE-8, SCMA Report, ¶¶ 16, 80, 98-99.

environmental approvals to go forward.<sup>303</sup> That project would have added between 2 and 6 million tons per year of crushed granite for export to the United States.<sup>304</sup> In addition, there were other locations in Nova Scotia being identified as attractive sites for a quarry and marine terminal in 2007 such as Black Point. Vulcan Materials recently received approvals to begin producing and exporting 2-5 million tons per year of crushed granite from the Black Point site.<sup>305</sup> SC Market Analytics opines that the addition of even more supply into the market would decrease coarse aggregates prices ██████████ in New York.<sup>306</sup>

## 5. The Claimants Significantly Understate the Operating Costs of the Project

147. The Claimants also make a number of errors with respect to the cost of operating the Whites Point project. Bilcon of Nova Scotia presented freight and labour costs as two of their largest operating expenses for the project in their EIS.<sup>307</sup> The operating expenses the Claimants present to this Tribunal are inconsistent with the expenses that Bilcon of Nova Scotia presented to the JRP in its EIS. They are significantly understated.

### (a) Freight Costs

148. The Claimants rely on the reports of Mr. Morrison and Mr. Rosen for their freight costs. Mr. Morrison's calculations are based on a faulty assumption with respect ██████████  
██████████. With respect to the first, he picks ██████████  
██████████

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<sup>303</sup> **R-455**, Canadian Environmental Assessment Registry news release, "Belleoram Marine Terminal Project: Environment Minister Announces Decision" (Nov. 22, 2007); **R-586**, Newfoundland Department of Environment and Conservation, Environmental Assessment Division, Environmental Assessment Bulletin (Jan. 26, 2007); **R-587**, Newfoundland Department of Environment and Conservation, Environmental Assessment Division, Environmental Assessment Bulletin (Jul. 27, 2007).

<sup>304</sup> **R-357**, Belleoram Marine Terminal Project, Comprehensive Study Report (Aug. 23, 2007), p. 1. As shown in the Brattle Group's report, this project, along with the Whites Point volume, would increase the supply of coarse aggregates products by 140-190% (**RE-5**, Brattle Group Report, ¶ 142).

<sup>305</sup> **C-1091**, Letter from Margaret Miller, Nova Scotia Minister of Environment to Frank Lieth, Vulcan Materials (Apr. 26, 2016).

<sup>306</sup> **RE-8**, SCMA Report, ¶ 80.

<sup>307</sup> **R-279**, *Digby Neck/Islands Economic Profile*, Gardner Pinfold Report (Feb. 2006), p. 24.

[REDACTED]<sup>308</sup> With respect to the second, Mr. Morrison selects [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>309</sup>  
With respect to the third, Mr. Morrison apparently [REDACTED]  
[REDACTED]<sup>310</sup> As Marsoft explains, this is a  
flawed methodology that presents absurd results when applied properly.<sup>311</sup>

149. Mr. Rosen then uses Mr. Morrison's freight rates in his DCF model. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>312</sup> Mr. Rosen also incorrectly assumes that [REDACTED]  
[REDACTED] As Marsoft shows, there is no evidence to suggest that [REDACTED]  
[REDACTED] In fact, the evidence shows that there is no correlation.<sup>313</sup>  
Finally, while Mr. Morrison's freight rates do not appear to include [REDACTED] Mr.  
Rosen applies them as if they do.<sup>314</sup>

150. Marsoft corrects all of the errors made by the Claimants' experts and provides an  
alternative methodology to calculating freight rates based on the [REDACTED]  
[REDACTED]  
His report shows that the Claimants have understated freight costs.

**(b) Labour and Other Operating Costs**

151. The Claimants have also understated the labour and other operating costs of the Whites  
Point project. As the SC Market Analytics Report explains, in order for Bilcon of Nova Scotia to

<sup>308</sup> RE-7, Expert Report of Dr. Arlie G. Sterling, Marsoft, Inc., June 9, 2017 ("Marsoft Report"), ¶¶ 12-18.

<sup>309</sup> RE-7, Marsoft Report, ¶¶ 19-28.

<sup>310</sup> RE-7, Marsoft Report, ¶¶ 29-33; C-1108, Tamarack Excel Model, Freight Rate Calculation.

<sup>311</sup> RE-7, Marsoft Report, ¶¶ 56-62.

<sup>312</sup> RE-7, Marsoft Report, ¶¶ 14-16.

<sup>313</sup> RE-7, Marsoft Report, ¶¶ 34-36.

<sup>314</sup> RE-7, Marsoft Report, ¶ 37; RE-5, Brattle Group Report, ¶ 153(d).

sell [REDACTED]  
[REDACTED]

[REDACTED].<sup>315</sup> Based on the manufacturers' specifications of the equipment that Bilcon of Nova Scotia intended to use, SC Market Analytics shows that [REDACTED]  
[REDACTED]

[REDACTED].<sup>316</sup> However, the Claimants have only calculated certain costs, such as man hours, on the basis of the tons sold.<sup>317</sup> As SC Market Analytics explains, this is inappropriate. Regardless of whether the material can be sold, it still must be processed and moved, and this requires labour and operating costs. The Claimants should have calculated costs on the basis of [REDACTED]. As explained by SC Market Analytics, this difference is significant.<sup>318</sup>

### (c) Missing Operating Costs

152. In addition, the Claimants have not included all of the relevant operating costs. For example, the Claimants submitted an Expert Report by Mr. Oram who provided an opinion on the cost of environmental permitting and monitoring.<sup>319</sup> However, these monitoring costs do not appear to have been included in Mr. Rosen's calculation of the project's potential profits.<sup>320</sup> Mr. Rosen also assumed that Bilcon of Nova Scotia would [REDACTED]  
[REDACTED] While the [REDACTED] cease in Mr. Rosen's calculations in 2016, the cost of [REDACTED] does not appear in any year in his calculations.<sup>321</sup> The Brattle Group's Expert Report identifies additional operating costs that have been omitted by the Claimants.<sup>322</sup>

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<sup>315</sup> RE-8, SCMA Report, ¶¶ 16(3), 95, Appendix IV.

<sup>316</sup> RE-8, SCMA Report, ¶¶ 92-94.

<sup>317</sup> RE-8, SCMA Report, ¶ 16(3), Appendix IV.

<sup>318</sup> RE-8, SCMA Report, ¶ 16(3), Appendix IV, Table IV.

<sup>319</sup> Expert Report of Peter Oram (GHD), December 6, 2016, p. 8.

<sup>320</sup> RE-5, Brattle Group Report, ¶¶ 151-152.

<sup>321</sup> RE-5, Brattle Group Report, ¶ 153(c).

<sup>322</sup> RE-5, Brattle Group Report, ¶ 153.

## 6. The Claimants Understate Capital and Maintenance Costs

153. The Claimants have also understated the capital costs of the Whites Point project. As explained above, Bilcon of Nova Scotia would have [REDACTED] on which the Claimants appear to have calculated these costs. In its Expert Report, SC Market Analytics explains how this would require [REDACTED]

[REDACTED]<sup>324</sup>

## 7. The Claimants Incorrectly Calculate the Discount Rate Used in Their DCF

154. Mr. Rosen calculated both cash flows and his discount rate in real dollar terms, net of inflation.<sup>325</sup> As the Brattle Group explains, Mr. Rosen makes four mistakes in calculating his discount rate. First, he relies on a backward-looking cost of debt input when a forward-looking cost would be more appropriate for forward-looking cash flows.<sup>326</sup> Second, he calculates his “unlevered betas” that underlie his discount rate incorrectly.<sup>327</sup> Third, he uses the wrong formula to convert his nominal discount rate to a real discount rate.<sup>328</sup> Finally, he uses inflation rates from only 2017 and 2018 when longer-term rates would have been more appropriate.<sup>329</sup>

### B. Correcting All of the Flaws in the Claimants' Lost Profits Calculation Results in a Significantly Lower Estimate of the Project's Potential Profits

155. As set out in the Brattle Group Report, applying all of the corrections summarized above and detailed in their Report results in lost profits, assuming full permitting, as of the breach date of US\$8.7 million.<sup>330</sup> However, as explained at length above, full permitting simply cannot be

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<sup>323</sup> RE-8, SCMA Report, ¶ 97, Appendix IV.

<sup>324</sup> RE-8, SCMA Report, ¶ 96, Appendix IV.

<sup>325</sup> RE-5, Brattle Group Report, ¶ 123.

<sup>326</sup> RE-5, Brattle Group Report, ¶ 124.

<sup>327</sup> RE-5, Brattle Group Report, ¶ 125.

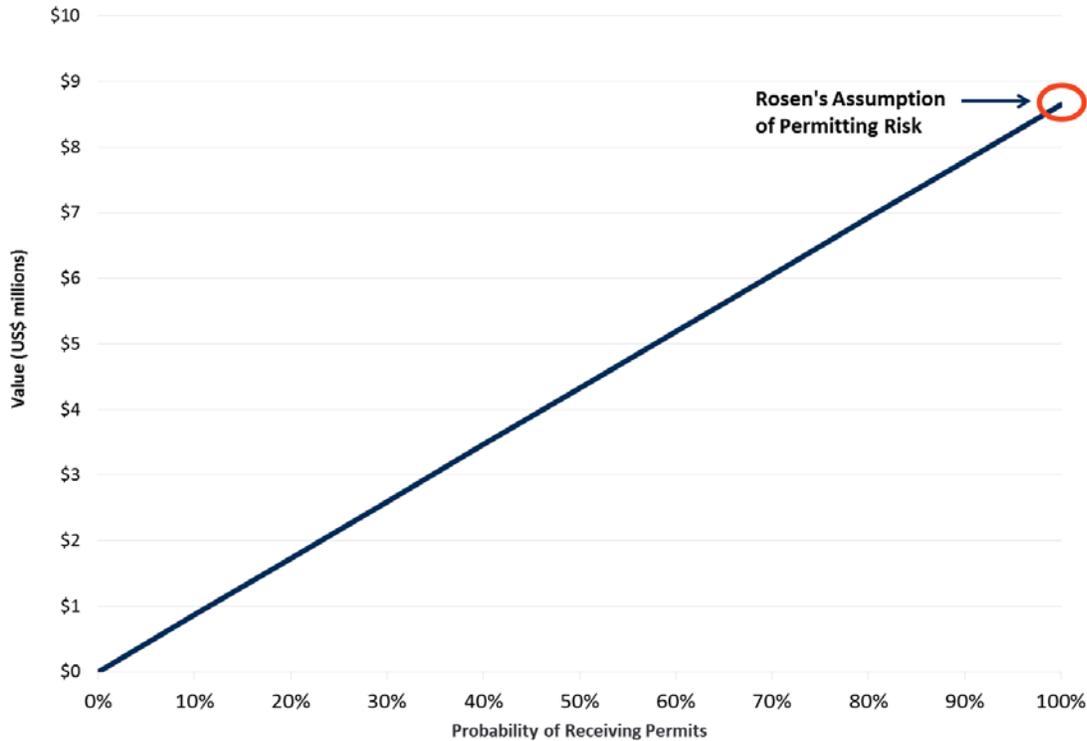
<sup>328</sup> RE-5, Brattle Group Report, ¶ 126.

<sup>329</sup> RE-5, Brattle Group Report, ¶ 127.

<sup>330</sup> RE-5, Brattle Group Report, ¶¶ 177-179.

assumed. The Brattle Group has illustrated the impact that various levels of permitting risk have on the project's value. As can be seen in Figure 1, accounting for permitting risk significantly reduces the value of the project.

**Figure 1: The Impact of Permitting Risk on the Value of Potential Profits from Whites Point<sup>331</sup>**



### C. The Claimants Are Not Entitled to a Tax “Gross-Up”

156. In addition to the US\$298.2 million in damages the Claimants claim in lost profits relating to the Whites Point project, they also seek an additional US\$145 million to account for the United States tax effects of receiving a lump sum award of damages.<sup>332</sup> In particular, Mr. Rosen explains that a “damages award...do [sic] not give rise to the same amount of foreign tax credit

<sup>331</sup> RE-5, Brattle Group Report, ¶ 190. See also ¶¶ 186-192.

<sup>332</sup> Claimants' Damages Memorial, ¶ 251.

[in the United States]”<sup>333</sup> as would dividends paid directly to the Claimants by Bilcon of Nova Scotia. Accordingly, the Claimants ask the Tribunal to increase their damages by 50%.

157. Implicit in the Claimants' claim is that the damages award would be paid to Bilcon of Nova Scotia, which would then immediately issue the entire amount as a dividend to Bilcon of Delaware, which would then be transferred through to its three shareholders in unspecified amounts. As described in Part II above, the Claimants are not entitled to any alleged losses suffered by, and owed to, Bilcon of Nova Scotia under NAFTA.

158. Moreover, even if a damages award were to be paid to Bilcon of Nova Scotia, it is beyond this Tribunal's jurisdiction to compel that corporation to pay dividends to its shareholders. In addition, if damages were to be paid to Bilcon of Nova Scotia directly, the damages would not be subject to United States taxes at all. Accordingly, it would be inappropriate for this Tribunal to increase the damages owed by Canada to Bilcon of Nova Scotia, a Canadian corporation, to account for the tax its shareholders might owe to the United States Government on dividends Bilcon of Nova Scotia is not obligated to pay to those shareholders.

159. Even if the Tribunal were to accept that the damages owed to Bilcon of Nova Scotia should be paid directly to the Claimants, their request that the Tribunal order Canadian taxpayers to subsidize their potential tax obligations to the United States Government is unsupported by any legal authority. Indeed, the Claimants have not cited to single case to support their claim for a tax gross-up. This is understandable, since international arbitral tribunals have not viewed such gross-ups favourably. For example, the tribunal in *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* declared that it was “not aware of a requirement under international law to gross up compensation as a result of tax considerations.”<sup>334</sup> Similarly, the tribunal in *Ceskoslovenska bochodni banka, a.s. v. Slovak Republic* emphasized that income taxes are “unrelated to the obligation of one party to fully compensate the other party for the harm

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<sup>333</sup> Rosen Report, ¶ 6.4.

<sup>334</sup> **RA-127**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 485.

done.”<sup>335</sup> That tribunal went on to hold that income taxes are “consequential” to compensation, and “do not affect its determination.”<sup>336</sup>

160. This Tribunal should follow suit, and reject the Claimants’ request for a tax “gross-up” to account for their tax obligations owed to another sovereign.

#### **D. The Claimants Are Not Entitled to Pre-Award Interest**

161. Under Article 1135(1) of NAFTA, a tribunal has discretion to award “any applicable interest.” However, with the exception of Article 1110 claims, both NAFTA and the UNCITRAL Arbitration Rules are silent on the terms of such interest awards. The guiding principle under international law is that interest is only necessary to ensure full reparation, but that there is no automatic right to it.<sup>337</sup> As a result, the Claimants bear the burden of proving that the circumstances of this case justify an award of interest to ensure full reparation. The Claimants have failed to meet the burden of establishing why, in this case, full reparation requires an award of interest. Moreover, even if the Tribunal determines that the Claimants are entitled to pre-award interest, as the Brattle Group explains, their calculation is erroneous and uses an inappropriate methodology.<sup>338</sup> In particular, while Mr. Rosen’s ultimate selection of the 1-year U.S. Government treasury yield is economically reasonable,<sup>339</sup> his application of the interest rate to the Claimants’ alleged lost profits is methodologically flawed.<sup>340</sup> As a result, the Tribunal should reject the Claimants’ request for pre-award interest.

#### **E. Conclusions**

162. Given the Claimants’ flawed and unreliable damages calculations outlined here and in the Expert Reports of the Brattle Group, Marsoft and SC Market Analytics, the Tribunal should

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<sup>335</sup> **RA-112**, *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4) Award, 29 December 2004, ¶ 367.

<sup>336</sup> **RA-112**, *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4) Award, 29 December 2004, ¶ 367.

<sup>337</sup> **RA-60**, Commentary on the ILC Articles, Article 38, Commentary (1), p. 235.

<sup>338</sup> **RE-5**, Brattle Group Report, ¶¶ 207-211.

<sup>339</sup> **RE-5**, Brattle Group Report, ¶¶ 205-206.

<sup>340</sup> **RE-5**, Brattle Group Report, ¶¶ 207-211.

reject the Claimants' claim for lost profits. As set out above, even accepting that the value of the lost opportunity in this case should account for the potential lost profits of the Whites Point project, and accepting that the project faced no permitting risk, the most the Claimants are entitled to in damages is US\$8.7 million.

### **VIII. ORDER REQUESTED**

163. Canada respectfully asks the Arbitral Tribunal to issue 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.

June 9, 2017

Respectfully submitted on behalf of Canada,



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