PUBLIC VERSION

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

RESOLUTE FOREST PRODUCTS INC.,

Claimant/Investor

v.

GOVERNMENT OF CANADA

Respondent/Party

PCA Case No. 2016-13

CLAIMANT'S MEMORIAL
December 28, 2019

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I. INTRODUCTION

1. The Government of Nova Scotia ("GNS") resuscitated an expired, uncompetitive enterprise in a declining industry by committing funds and policies intended to make a local company into a national champion that would be, when all else had failed, the last company of its kind in business. The American owner of the company had given up, declared bankruptcy, shut down, and was selling out. Other companies looked over the situation—the physical plant and equipment, the location, the forecasts for the products, costs of production and transportation to markets—and concluded that the commercially dead mill had best remain dead.

2. Resolute has first-hand knowledge. It was asked to bid, studied the potential deal, and concluded it was not financially viable. The mill was too far from the market. Electricity and other costs were too high.

3. GNS could not escape the market message. The most viable bids were to scrap the assets, but GNS was determined to save the jobs at the mill rather than seek to redirect them into alternative enterprises.

4. There was only one way for GNS to achieve its goal. It would have to persuade someone willing to operate the mill that it could and would be made profitable. And GNS concluded that there was only one way to persuade a potential operator. GNS would have to provide a virtual guarantee that buying and operating the mill would be more than merely profitable. It would have to be profitable for the foreseeable future by being the most competitive producer of supercalendered paper ("SC paper") in North America.

5. A guarantee of profitability was necessarily a guarantee that the mill would be competitive. The mill already had new equipment and the most volume capacity in

the industry, but it had high costs that could be reduced only with government intervention.

6. After collecting many expressions of interest, the bankruptcy monitor and GNS found it had but one potentially viable investor who might be able to reopen and operate the mill, and not without a guarantee that GNS would reduce operating costs dramatically and for the long-term. GNS promised this lone potential buyer—the one potentially viable company ready to bid to reopen and operate the mill instead of selling it off as scrap—that it would be "the low cost producer in North America." Pacific West Commercial Corporation ("PWCC"), apparently the only investor ready to bid in the presence of the GNS promise and the only bidder acceptable to the Monitor, identified what it would need to be the low cost producer, and GNS delivered.

7. Everything PWCC said it had to have, GNS made sure it had, whether cheap and guaranteed fiber supply or reduced property taxes or below-cost electricity. On the eve of consummating the deal, when only one detail was unsettled (a federal tax break), PWCC said it was walking away unless GNS would find a fix, and so GNS apparently did.

8. GNS had no choice: it was publicly committed to keeping the mill operating, and it had only one prospective operator.

9. The SC paper industry was in secular decline when NewPage Corporation gave up in Nova Scotia and GNS committed to resuming production. The Port Hawkesbury production, however, would become the continent's largest in volume for a single machine. As capacity was being shuttered, Port Hawkesbury would re-enter the market as one of the leading producers by capacity in North America.

10. The SC paper market was not destined to grow. It was certain to shrink. Port Hawkesbury, having been shuttered, could recapture customers only through a combination of superior product and lower prices, which meant necessarily taking customers away from competitors and driving down prices.

11. But for the GNS support, Port Hawkesbury would not have reopened. But for the Port Hawkesbury Paper ("PHP") reopening, prices would have remained stable as supply was reduced to maintain an equilibrium with demand. While the industry's decline would have continued, the pace would have been gradual and continuing operations profitable. The need for adjustments would have been foreseeable and the adjustments manageable. Only the sudden wave of PHP product, neither foreseen nor foreseeable and enabled only by exceptional GNS intervention, could have accelerated the industry's secular decline and damaged Resolute severely.

12. Resolute was operating three SC paper mills in Canada when PHP returned in force to the market. Expert economic analysis shows that, as PHP attracted customers and offered prices reflecting its government-conferred cost advantages, the Resolute mills were forced to lower prices, sacrificing profits and taking on losses. The economists find that, but for the cost advantages conferred by GNS and PHP's consequent competitive position, Resolute would have continued to compete more profitably for SC paper sales in North America. The losses inflicted on Resolute by PHP were, and continue to be, considerable, in the tens of millions of dollars.

13. Resolute, an American company incorporated in Delaware, invested in Canada understanding that it would be competing with other companies producing the same merchandise, but not that it would be competing with a provincial government that

would decide to confer upon the one mill in its province extreme competitive advantages. GNS converted an operation with no possibility of survival into an advantaged company with an ongoing guarantee to be competitively superior. In promising to make PHP competitively superior, GNS promised to take from Resolute in order to advance PHP. Robbing Peter to save Paul does not confer national treatment on Peter, nor meet a minimum standard of treatment that is fair and equitable.

14. Resolute seeks damages for Canada's breach of NAFTA Articles 1102 and 1105. Resolute is no longer seeking damages for a breach of Article 1110 and the closure of Resolute's Laurentide mill. Damages suffered by Resolute's Laurentide mill are limited to Articles 1102 and 1105.

II. FACTUAL BACKGROUND

15. Claimant, Resolute Forest Products Inc. ("Resolute"), incorporated in Delaware, is an integrated forest products company that manufactures a diverse range of wood and paper products, including SC paper.[1]

16. Resolute owns Resolute FP Canada Inc., which owned, when PHP was revived, three Canadian SC paper mills: (1) Dolbeau, located in Dolbeau-Mistassini, Québec; (2) Kénogami, located in Jonquière, Québec; and (3) the now-defunct Laurentide mill, which was located in Shawinigan, Québec. The Laurentide mill was shut down in October 2014.[2]

[1] *Resolute Forest Products Inc. v. Canada,* Decision on Jurisdiction and Admissibility ("Jurisdictional Decision") ¶¶ 1, 50 (Jan. 30, 2018).

[2] *Resolute Forest Products Inc. v. Canada*, Statement of Claim ("Statement of Claim") ¶¶ 21-24 (Dec. 30, 2015); Jurisdictional Decision ¶ 51.

17. Resolute is one of four producers of SC paper in Canada and the only American company producing SC paper in Canada. SC paper is made thin and smooth from being pressed between rollers, or "calenders," and is sold for commercial printing in magazines, catalogs, directories, and newspaper inserts.[3]

18. Respondent, the Government of Canada, is a Party to the North American Free Trade Agreement ("NAFTA"). Canada is responsible under NAFTA for the actions of its constituent political subdivision, GNS.

19. Pacific West Commercial Corporation ("PWCC") is a Canadian company who purchased from NewPage Corporation, under supervision of NewPage's bankruptcy monitor, the paper mill located in Port Hawkesbury, Nova Scotia, which is the subject of this arbitration. PWCC named this operation Port Hawkesbury Paper ("PHP").[4]

20. Nova Scotia Power Inc. ("NSPI") is the main utility provider in Nova Scotia. It was privatized in 1992 pursuant to the *Nova Scotia Power Privatization Act*.[5] Among other rights, NSPI is the only private entity that can expropriate land in Nova Scotia, is essentially exempt from Federal income taxes in Canada, and employees and officers are treated, for compensation purposes, as Nova Scotia public sector employees.[6]

21. NSPI is regulated by the Nova Scotia Utility and Review Board ("NSUARB"), which has supervisory and regulatory power over NSPI's operations and

[3] Statement of Claim ¶ 22.

[4] *See* Jurisdictional Decision ¶ 57.

[5] *See generally* C-103, *Nova Scotia Power Privatization Act*, SNS 1992, c.8.

[6] C-100, *Expropriation Act*, RSNS 1989 c. 156. NSPI is similarly exempt from taxation by a municipality. *See* C-102, *Public Sector Compensation Restraint Act*, SNS 1991, c. 5.

expenditures, including the approval of electricity rates, control over executive compensation and profit sharing distribution, and the ability to audit the books and records of NSPI.[7]

A. The Bankruptcy And Nova Scotia's Determination To Resurrect the Mill

22. The mill now operated by PHP was owned previously by NewPage Corporation. NewPage-Port Hawkesbury ("NPPH") operated two paper machines, a newsprint line and a SC paper machine with an approximately 400,000 ton (equivalent to 360,000 metric tons) capacity.[8] The SC paper machine is well-regarded and believed to be the best quality SC paper machine in North America.[9]

23. Despite these equipment advantages, the mill went bankrupt and closed. The high cost of electricity and the shipping costs for the mill, which is located on Cape Breton Island far from markets for paper, were both cited as reasons for the mill's closure.[10]

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[7] C-101, *Public Utilities Act*, R.S.N.S. 1989, c. 380. NSUARB "is an independent quasi-judicial body which has both regulatory and adjudicative jurisdiction flowing from the Utility and Review Board Act. It reports to the {Nova Scotia} Legislature through the Department of Finance." *See* https://nsuarb.novascotia.ca/about.

[8] C-112, Affidavit of Tor. E. Suther, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.* ¶ 24 (Sep. 6, 2011) ("Suther Aff.").

[9] *E.g.*, C-115, *NewPage Port Hawkesbury mill to be sold*, CBC News (Sep. 7, 2011) ("Right now what we have in the Strait area at Point Tupper is a Cadillac. It is the best mill there is in North America in the production of supercalendar paper and in the production of newsprint. It is the most efficient. It produces the best quality. We have a Cadillac there."); C-183, *Province Invests in Jobs, Training and Renewing the Forestry Sector*, Nova Scotia Press Release (Aug. 20, 2012) ("Aug. 20, 2012 Nova Scotia Press Release) ("These investments will support the most modern paper machine in the industry . . . .").

[10] *See* C-111, *Newpage announces indefinite shutdown at Point Tupper mill*, Cape Breton Post (Aug. 23, 2011); C-110, *NewPage to Initiate Downtime at Port Hawkesbury Mill*, NewPage Press Release (Aug. 22, 2011).

24. GNS recommended to NewPage that it place the mill into creditor protection to find a new owner to operate the mill as a going concern. According to then-Nova Scotia Premier Darrell Dexter, "{O}ur advice to {NewPage} . . . was that {the mill} was a valuable asset in the NewPage chain and that they needed to find a way to be able to preserve that throughout any credit protection and put themselves in a position to be able to find, if they can't do it themselves, to find a new owner for it."[11]

25. NewPage sought protection under the Companies' Creditor Arrangement Act in Canada ("CCAA") for its Port Hawkesbury mill on September 6, 2011.[12] At that time, NewPage-Port Hawkesbury was losing millions of dollars every month and had lost approximately $50 million over the previous year alone.[13] NewPage-Port Hawkesbury's filing brief to initiate the creditor protection action stated that "NPPH is in dire financial straits."[14]

26. GNS, once NewPage-Port Hawkesbury declared bankruptcy, promised that the province would work to find a new buyer to operate the mill as a going concern. Premier Dexter stated that, "{T}he best thing I can do to support workers, families and contractors—now and in the future—is to ensure this mill finds a good new owner. . . I am confident and optimistic that a buyer will recognize this valuable asset and ensure its successful future right here in Port Hawkesbury."[15] Premier Dexter also stated that,

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[11] C-115, *supra* n.9, *NewPage Port Hawkesbury mill to be sold*, CBC News.

[12] *See generally* C-112, *supra* n.8, Suther Aff.

[13] C-112, *supra* n.8, Suther Aff. ¶ 6. All dollars are reported in Canadian dollars unless otherwise stated. However, paragraphs 293-299 report Resolute's damages in U.S. dollars.

[14] C-113, NewPage Port Hawkesbury Corp. Application for an Initial Order pursuant to the *Companies' Creditors Arrangement Act* at 2 (Sep. 6, 2011).

[15] C-116, *Seven-point Woodlands Plan Keeps Plant Resale Ready*, Nova Scotia Press Release, (Sep. 9, 2011) ("Sep. 9, 2011 Nova Scotia Press Release").

"{I}t has become clear that the province will need to work with all levels of government and the private sector to help identify a potential buyer for the Port Hawkesbury mill to ensure its future in the province."[16]

27. GNS ensured the mill was re-sale ready by keeping it in "hot-idle" and paying for a forestry infrastructure fund to ensure the supply chain remained open.[17] This plan was supposed to cover the mill for three months pending a quick sale,[18] but ended up stretching out over a year.

B. Resolute's Analysis Of The Fiscal Feasibility Of Restarting The Mill

28. [redacted], Resolute was approached by an investment bank, on behalf of NewPage, to [redacted] and, [redacted], to participate in the bidding process to purchase the Port Hawkesbury mill.[19] [redacted]

[redacted][20] [redacted]

[redacted][21]

29. [redacted]

[redacted]

[16] C-114, *Province to Focus Efforts on Re-Sale of NewPage Port Hawkesbury Mill*, Nova Scotia Press Release (Sep. 6, 2011).

[17] C-116, *supra* n.15, Sep. 9, 2011 Nova Scotia Press Release.

[18] *See* C-116, *supra* n.15, Sep. 9, 2011 Nova Scotia Press Release.

[19] Statement of Claim ¶ 26; C-107, [redacted] C-118, [redacted]

[20] C-108, Resolute [redacted] PowerPoint at RFP0004950 [redacted]

[21] C-109, Resolute [redacted] PowerPoint at RFP0004982 [redacted].

[redacted][22]

30. [redacted][23]

31. [redacted][24] and that the "[redacted][25]

32. [redacted][26] In addition, [redacted][27]

[22] C-119, Resolute [redacted] at RFP0011517-18 [redacted].

[23] C-119, *supra* n.22, Resolute [redacted] at RFP0011517-18, 11521, 11525; C-109, *supra* n.21, Resolute [redacted] PowerPoint at RFP0004974.

[24] C-119, *supra* n.22, Resolute [redacted] at RFP0011517.

[25] C-119, *supra* n.22, Resolute [redacted] at RFP0011528.

[26] C-119, *supra* n.22, Resolute [redacted] at RFP0011528.

[27] C-119, *supra* n.22, Resolute [redacted] at RFP0011528.

33. Resolute's analysis was that any [redacted][28] [redacted][29]

C. The Bidding And The Sale Of The Port Hawkesbury Mill

34. The CCAA Monitor overseeing the sale contacted one hundred and ten potentially interested parties,[30] including Resolute. Despite the large number of inquiries from the Monitor, only eight parties submitted offers, and only four were invited to continue bidding.[31] Those final four bids were submitted on December 16, 2011.[32] Two of the bids came from liquidators who were going to scrap the mill, and two (including PWCC) sought to keep the mill open as a going concern.[33]

35. One of the two bids to resuscitate the mill came from Asia Pulp and Pacific ("APP"), a company with "a bit of a spotty past" that still had "lingering PR challenges" despite efforts to clean up its image. Analysts reported that APP would seek government assistance and a reduction of the power bill: "Nobody can go in and just

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[28] C-119, *supra* n.22, Resolute [redacted] at RFP0011520.

[29] C-118, *supra* n.19, [redacted] at RFP0005000-01.

[30] *See* C-120, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Second Report of the Monitor ¶ 15 (Oct. 3, 2011) ("Second Report of Monitor").

[31] C-150, *In re A plan of Compromise or Arrangement of NewPage Port Hawkesbury*, Sixth Report of Monitor ¶¶ 17-19 (Jan. 13, 2012) ("Sixth Report of Monitor"); C-133, *In re A plan of Compromise or Arrangement of NewPage Port Hawkesbury*, Fifth Report of Monitor ¶ 16 (Nov. 24, 2011).

[32] C-150, *supra* n.31, Sixth Report of Monitor ¶ 18.

[33] C-150, *supra* n.31, Sixth Report of Monitor ¶ 18.

shovel away money at a losing asset. You've got to make some pretty good concessions to put this thing on a profitable footing to have a hope of survival going forward."[34]

36. PWCC was the only other bidder seeking to resuscitate the mill. It submitted a letter dated October 24, 2011 to pursue its acquisition.[35]

37. On November 1, 2011, as the bidding process was ongoing, Premier Dexter announced to the Nova Scotia legislature that GNS would do whatever it took to reopen the mill:

> THE PREMIER: Mr. Speaker, the government has been involved in the process right from day one. . . As I think all members of the House would know, I was in Port Hawkesbury, I announced the seven-point plan that was designed to keep that facility, that plant, in an operating condition so that a new buyer would be able to come in and bring it back on-line. In some senses, that is already an investment by government in ensuring that a new buyer has an asset that they're able to operate. . .
>
> We're working with the monitor who is in place under the creditor protection Act. We, like everyone else, are doing everything that we can to ensure that that mill remains an operating mill - not just for the Strait area.[36]

38. GNS took these actions even though it understood that the paper industry was in secular decline.[37] As Premier Dexter explained, GNS needed to solve the

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[34] C-143, *Final bids in for NewPage mill*, CBC News (Dec. 16, 2011).

[35] *See* C-127, Email from Ron Stern, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 page 2912 of 3014 (Nov. 10, 2011) ("Ron Stern Nov. 10, 2011 Email").

[36] C-122, Nova Scotia Legislature House of Assembly Debates and Proceedings, Third Session at 2947-48 (Nov. 1, 2011) ("Nov. 1, 2011 Nova Scotia Legislature Proceedings").

[37] C-123, Nova Scotia Legislature House of Assembly Debates and Proceedings Third Session at 3009 (Nov. 2, 2011) ("Nov. 2, 2011 Nova Scotia Legislature Proceedings") (Premier Dexter statement that the Port Hawkesbury mill was "continuing to operate . . . in the face of a number of difficulties. One is that the world price per ton of pulp and paper is declining. The second is that the demand for pulp and paper is declining in almost every market around the world . . . ").

"problem{s} for the mill" such as "increased fibre costs, increased electricity costs, {and} labour costs that are not consistent with what they're getting in other places."[38]

39. GNS negotiated with PWCC even before PWCC was declared the winning bidder. A November 9, 2011 memo from PWCC to GNS addressed PWCC's "calls with the Government and Nova Scotia Power" that "discussed a wide range of issues that impact the viability of the Port Hawkesbury mill moving forward, as well as the benefits that the long-term operation of the mill can provide to both Nova Scotia and Nova Scotia Power." PWCC explained that "{t}he PH mill lost close to $40M (EBITDA basis) in 2010 and was losing close to $4M per month prior to being closed in September 2011. In order for the mill to be a long-term economically viable operation, significant cuts must be made in all cost input areas;" while "power may be the biggest challenge, all costs centres, including fibre, labour, logistics, etc., will need to be reviewed from a cost reduction perspective."[39]

40. On November 10, 2011, PWCC provided GNS (and NSPI) representatives with PWCC's October 24, 2011 Offer Letter to the Monitor, a September 2011 Confidential Information Memorandum, and an October 2011 Investor/Management Presentation.[40] That same day, Premier Dexter explained to the Nova Scotia Legislature that a permanent closure of the mill would be an "unacceptable result" and that a mill restart "would be best for all Nova Scotians."[41]

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[38] C-123, *supra* n.37, Nov. 2, 2011 Nova Scotia Legislature Proceedings at 3009.

[39] C-125, PWCC Discussion Memorandum (Nov. 9, 2011) at CAN000121_0110.

[40] *See* C-127, *supra* n.35, Ron Stern Nov. 10, 2011 Email.

[41] *See* C-128, Nova Scotia Legislature House of Assembly Debates and Proceedings Third Session at 3467 (Nov. 10, 2011) ("Nov. 10, 2011 Nova Scotia Legislature Proceedings").

41. GNS subsequently negotiated with PWCC and NSPI to resolve the issues identified by PWCC needed to make the mill "a long-term economically viable operation." PWCC representatives, on November 18, 2011, held an "update call" that included GNS and NSPI personnel regarding (among other topics) lower fiber costs and operating the mill's Biomass Plant for electricity co-generation.[42] On November 23, 2011, GNS, PWCC, and NSPI held a conference call regarding the mill's electricity rate and the "Unused Mill Tax Losses" worth "in excess of $1 billion," which "could be monetized and provide economic value for the mill."[43] Another call was held among GNS, PWCC, and NSPI on November 26, 2011 to address the mill's electricity issues.[44]

42. Based on these discussions, [redacted] To that end, [redacted] November 28, 2011 Indemnity Agreement [redacted][45] The day after (November 29, 2011), PWCC representatives came to Halifax, Nova Scotia to meet with NSPI and GNS personnel, including the Deputy Minister of Energy, to address electricity issues.[46]

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[42] C-131, Email from Wayne Nystrom, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 pages 2899-2900 of 3014 (Nov. 17, 2011).

[43] C-132, Email from Wayne Nystrom, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 pages 2897-98 of 3014 (Nov. 23, 2011).

[44] C-135, Email from Wayne Nystrom, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 pages 2901-03 of 3014 (Nov. 26, 2011).

[45] C-136, [redacted] at CAN000020_0001 ([redacted]). [redacted] *See id.* at CAN000020_0004.

[46] C-137, Email from Robin McAdam, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 page 1516 of 3014 (Nov. 28, 2011). This email was sent to Murray Coolican, then Deputy Minister of Energy for Nova Scotia. C-169, Murray Coolican Biography (May 16, 2012).

43. In further support of PWCC's bid, on [redacted][47]

44. [redacted][48]

45. GNS is "normally hands-off" in dealing with issues before the NSUARB related to electricity rates.[49] However, the electricity component was "the biggest challenge"[50] and GNS wanted to [redacted][51]. GNS thus engaged Todd Williams, an electricity rate expert from Navigant Consulting, on December 8, 2011—again, before PWCC

[47] *See generally* C-139, [redacted].

[48] C-139, *id.* at CAN000019_0004-05 [redacted].

[49] C-147, PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 2 (2011-12) at page 107 of 165 ("PWCC Meeting Notes").

[50] C-125, *supra* n.39, PWCC Discussion Memorandum (Nov. 9, 2011) at CAN000121_0110

[51] C-139, *supra* n.47, [redacted] at CAN000019_0004-05 [redacted].

submitted its bid and before there was formal approval of PWCC as the winning bidder for the mill—to act under its direction, provide the needed energy expertise in this process, and interface with PWCC and NSPI.[52] Mr. Williams started almost immediately.[53]

46. PWCC, at this point, although in direct and, it seems, exclusive negotiation, was not yet the winning bidder in the CCAA process. On December 16, 2011, the date bids were due to the Monitor, PWCC submitted its bid for $33 million. PWCC, however, demanded "a number of significant conditions that must be satisfied" before the sale, as PWCC had made clear from the "beginning of its discussions" with the interested parties that it wanted to make the mill "the lowest-cost operator in North America."[54]

47. After submitting its bid, PWCC continued to work with GNS, Todd Williams, and NSPI to address the power rate at the mill.[55]

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[52] C-151, Todd Williams Engagement Agreement § 2.02 & Schedule A (Feb. 13, 2012) (requiring Mr. Williams to act under direction of GNS personnel and work with "Stern and NSPI"). The Agreement was effective as of December 8, 2011. C-151 § 3.01.

[53] *See* C-141, Email from Wayne Nystrom, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 page 2434 of 3014 (Dec. 15, 2011); C-142, Email from Todd Williams, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 pages 2732-2734 of 3014 (Dec. 15, 2011); C-140, Email from Todd Williams, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 pages 2873-2876 of 3014 (Dec. 14, 2011).

[54] C-150, *supra* n.31, Sixth Report of Monitor ¶ 20; C-175, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Tenth Report of Monitor ¶ 31 (July 12, 2012); *see* C-160, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Evidence of Nova Scotia Power, Inc. at 9 (NSUARB Apr. 2012) ("NSPI NSUARB Apr. Evidence").

[55] *See* C-146, Email from Ron Stern, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 pages 2428-2439 of 3014 (Dec. 22, 2011); C-145, Email from Darwin Gillies, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 pages 2432-2433 of 3014 (Dec. 21, 2011); C-144, Email from Todd Williams, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 pages 2439-2440 of 3014 (Dec. 19, 2011).

48. On January 4, 2012, GNS announced that PWCC was the winning bidder.[56]

49. A news article explained that PWCC refused to assume the unfunded pension liability of over $100 million and that the company was looking for significant electricity savings. Natural Resources Minister Charlie Parker indicated that GNS would provide the assistance PWCC requested: "Everything is being considered," including offering PWCC subsidies to pay its power bills.[57]

D. What PWCC Had To Have And What GNS Promised

50. PWCC demanded numerous benefits to enable reopening and operating the mill. [redacted][58] PWCC's plan included a package of concessions on electricity, fiber availability and prices, loans and grants.

51. [redacted] increase from NewPage-Port Hawkesbury's last year in operation.[59] PWCC's long-term goal sought

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[56] C-149, *Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready*, Nova Scotia Press Release (Jan. 4, 2012).

[57] C-148, *Pacific West now lone bidder for idled NewPage paper mill in Cape Breton*, The Canadian Press (Jan. 4, 2012). Ron Stern stated why PWCC would not assume the pension obligations: "We're doing a lot of work to position this (mill) as a low-cost producer … If you were to step into that liability, you wouldn't have any hope of achieving that." *Id.* (alterations in original).

[58] C-163, [redacted] at CAN000004_0009 ([redacted]).

[59] C-163, *id.* at CAN000004_0009.

[redacted][60]

[redacted][61]

1. Electricity

52. One of the conditions demanded by PWCC for purchasing the Port Hawkesbury mill was a lower electricity rate. PWCC needed to ensure that PHP's electricity rate was "either the lowest or among the lowest on a North American basis" because electricity is the largest cost of a paper mill.[62] Nova Scotia Power recognized that "{f}rom the beginning of {its} discussions {about the power rate}, PWCC has been clear that . . . {its} objective is to be the lowest cost operator in North America."[63]

53. PWCC's demand required that PHP receive an electricity rate that was "greater than the level necessary merely to operate competitively:"

> PWCC's strategy of becoming the lowest cost operator in North America implicitly means the discount is greater than the level necessary merely to operate competitively. However, it is important that the Board and all parties understand that PWCC does not consider it appropriate to make an investment in the Port Hawkesbury Mill unless it has confidence that there is a solid long-term foundation for success, and it is nowhere near sufficient to simply obtain an electricity costing structure that would allow it to "merely" operate competitively. PWCC has spent considerable time, effort and expense in evaluating the opportunity for the Port Hawkesbury Mill and it believes that if its Restructuring Plan can be implemented, including the requested Load Retention Tariff Mechanism, that the Mill can become the lowest, or a very low, cost operator. The paper business is a struggling industry and only the very lowest cost operators will have a

[60] C-163, *id.* at CAN000004_0011.

[61] C-163, *id.* at CAN000004_0027.

[62] C-184, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Decision ¶¶ 56-57 (NSUARB Aug. 20, 2012) ("Aug. 20, 2012 NSUARB Dec.").

[63] C-160, *supra* n.54, NSPI NSUARB Apr. Evidence at 9.

> chance to succeed. PWCC does not believe it would be appropriate to invest in the Port Hawkesbury Mill to reactivate it unless there was a long-term plan that could benefit all parties: PWCC, its employees, the local community, the Province, NSPI and its ratepayers.[64]

54. PWCC's proposed "story to {the} regulator" was that the "mill was losing money:" "Stern can turn this into a profitable mill {with greater than} $45M/y EBITDA;" the mill will be the "lowest cost SC mill in North America;" and the mill will "have a good business plan."[65] A senior GNS Department of Justice attorney agreed, saying the NSUARB "needs to see this & NSPI's position."[66]

55. The power rate arrangement sought initially by PWCC for PHP encompassed a series of interconnected elements that were all necessary to the first approval by the NSUARB, including: (1) a contribution to NSPI's fixed costs of at least $2/MWh, with the potential for additional payments based upon the mill's profitability through a corporate tax structure that would have allowed PHP to pay NSPI after-tax dividends; (2) use of tax losses to pay for electricity under the proposed corporate structure; (3) payments covering all of the mill's incremental power costs; (4) compliance with Nova Scotia's renewable energy regulatory scheme; and (5) use of the Port Hawkesbury Biomass Plant to generate steam for the mill.[67]

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[64] C-174, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Redacted Rebuttal Evidence of Pacific West Commercial Corporation at 24 (NSUARB July 9, 2012) ("PWCC Rebuttal Evidence").

[65] C-147, *supra* n.49, PWCC Meeting Notes at page 135 of 165.

[66] C-147, *supra* n.49, PWCC Meeting Notes at page 136 of 165.

[67] *See* C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 222-227, 236; *see also* C-164, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Notice of Application For Approval Of A Load Retention Rate ¶ 8 (NSUARB Apr. 27, 2012) ("LRR Notice of Application") ("This proposal is the result of a long period of dialogue involving NS Power, PWCC, the CCAA Monitor, and government, and each of the components is integrally connected with the others.").

56. In addition, PWCC requested this arrangement be put in place for 7.5 years (with a potential review coming after 5 years).[68] PWCC stated that it would not accept an electricity rate "in which it could be back in front of the Board" arguing about its rate "any time sooner than 5 years."[69]

57. PWCC conceded that the rate it was seeking was "substantially less than" NewPage-Port Hawkesbury's current electricity rate (if the mill were operational).[70]

58. GNS supported PWCC's power rate application throughout the entire process in ways unusual for the provincial government. GNS retained Mr. Williams, who was involved heavily in developing the power rate sought by PWCC. GNS and Mr. Williams were tasked with numerous items in a "Project Plan" to develop the rate, such as participating in the process for obtaining regulatory approval from the NSUARB.[71]

59. GNS representatives, including the Deputy Minister of Natural Resources and the Deputy Minister of Energy, participated in numerous meetings and were involved in repeated correspondence with PWCC and NSPI regarding the power rate.[72]

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[68] C-165, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Pre-Filed Evidence of Pacific West Commercial Corporation at 19 (NSUARB Apr. 27, 2012) ("PWCC Pre-Filed Evidence").

[69] C-174, *supra* n.64, PWCC Rebuttal Evidence at 28.

[70] C-171, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Redacted Responses of Pacific West Commercial Corporation to Information Requests from the Avon Group at 21 (NSUARB May 30, 2012) ("PWCC Responses to Avon Group").

[71] C-147, *supra* n.49, PWCC Meeting Notes at pages 78-82 of 165 (detailing tasks for the parties in rate setting, including GNS tasks).

[72] C-130, Email from Diana Movold, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 pages 1522-1526 of 3014 (Nov. 14, 2011); C-134, Email from Diana Movold, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 page 1519 of 3014 (Nov. 25, 2011); C-129, Email from Shawn Lewis, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 pages 3010-3011 of 3014 (Nov. 10, 2011); C-137, *supra* n.46, Email from Robin McAdam, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 page 1516 of 3014 (Nov. 28, 2011).

Even Premier Dexter involved himself, personally contacting the CEO of NSPI to discuss the PWCC power rate.[73]

60. During February 2012 meetings, GNS representatives already were pitching how the province could best present the load retention tariff ("LRT," sometimes called a load retention rate or "LRR") to the NSUARB and what evidence GNS could develop in support.[74] GNS (according to a senior GNS Department of Justice attorney) also determined that Mr. Williams would "be valuable as an expert witness" even though GNS was "normally hands-off" in dealing with regulatory issues before the NSUARB.[75]

61. Mr. Williams's support was instrumental to the power deal. In the words of one attorney at the NSUARB hearing: "{I}t's clear I think from the records that {Mr. Williams} played a pretty important part in getting the parties to where they are. . . ."[76]

62. As detailed more fully below,[77] GNS provided further support at the NSUARB hearing by: (1) presenting a case for the grant of the LRT;[78] (2) resolving the Renewable Energy and Biomass Plant issues that arose during the hearing;[79] and (3)

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[73] C-162, Nova Legislature House of Assembly Debates and Proceedings, Fourth Session, at 1000-01 (Apr. 25, 2012).

[74] C-147, *supra* n.49, PWCC Meeting Notes at pages 94, 107, 108, and 117 of 165; *see also* C-152, Agenda/Key Issues List, Stern Group/NSPI/NS Government/E & Y/McInnes Cooper Meeting (Feb. 22, 2012) (agenda for "Electricity Issues" meeting attended by GNS including specific tasks for GNS to support application).

[75] C-147, *supra* n.49, PWCC Meeting Notes at page 107 of 165.

[76] C-177, Excerpts from Transcript of NSUARB Hearing at 784 (July 18, 2012).

[77] *See infra* ¶¶ 80-85, 106-111.

[78] *See e.g.*, C-178, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Opening Statement of the Government of Nova Scotia (NSUARB July 16, 2012) ("GNS Opening Statement").

[79] *See* C-179, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing (NSUARB July 20, 2012) ("GNS Letter Regarding PWCC LRT").

supporting a revised LRT when the Canadian Revenue Agency ("CRA") denied the tax structure proposed in the original rate formulation.[80]

2. Other GNS Support

63. PWCC needed more than just an unprecedented low electricity rate to purchase the mill. PWCC also required financial support, some already offered.[81] [redacted][82] [redacted][83]) was insufficient to PWCC, which demanded more.

64. PWCC sought: [redacted][84]

65. [redacted]

[80] *See* C-205, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Government of Nova Scotia Letter Regarding Amended PWCC Load Retention Rate (NSUARB Sept. 27, 2012) ("GNS Letter Regarding PWCC Amended LRR").

[81] *See supra* ¶¶ 42-44.

[82] C-139, *supra* n.47, [redacted] at CAN000019_0004-05 [redacted].

[83] C-154, [redacted].

[84] C-156, [redacted]

[redacted][85]

66. [redacted][86] [redacted][87]

67. [redacted][88] [redacted][89]

68. [redacted][90]

69. [redacted]

[85] C-158, [redacted] at CAN0000087_003-004 [redacted].

[86] C-156, *supra* n.84, [redacted].

[87] C-158, *supra* n.85, [redacted] at CAN0000087_003-004.

[88] C-163, *supra* n.58, [redacted] at CAN000004_0031, 0050; C-158, *supra* n.85, [redacted] at CAN0000087_005.

[89] C-163, *supra* n.58, [redacted] at CAN000004_0050.

[90] C-156, *supra* n.84, [redacted] at Note 2 [redacted]

[redacted][91] This package turned ultimately into the $38 Million Sustainable Forest Management and Outreach Agreement that provided PHP with payments [redacted][92]

70. [redacted][93]

E. The Original GNS Bailout Package

71. The GNS Bailout Package for PWCC's purchase of the Port Hawkesbury mill consisted of a collection of measures, including (1) millions of dollars for hot-idle and forestry infrastructure funding; (2) PHP's advantageous electricity rate, which NSPI described as an "integrally connected"[94] set of components that included statutory rights to run the Biomass Plan fulltime and a regulatory waiver from environmental standards; (3) a $24 million loan for increased productivity; (4) a $40 million repayable loan for working capital; (5) $1.5 million to train workers; (6) $1 million for marketing (which would be paid out at $200,000 per year for five years); (7) a $38 million Outreach grant for various forestry management items; (8) $20 million to purchase more than 50,000 acres of land; (9) a Forest Utilization License Agreement for the purchase of wood and payments to PHP for silviculture activities; (10) relief from all pension liabilities; and (11)

[91] C-163, *supra* n.58, [redacted] at CAN000004_0050.

[92] *See infra* ¶¶ 94-96.

[93] C-158, *supra* n.85, [redacted] at CAN0000087_002, 004.

[94] C-164, *supra* n.67, LRR Notice of Application ¶ 8.

indemnification of costs were PWCC not to complete its purchase of the mill.[95] PWCC believed that the Port Hawkesbury mill would be shut down if it were not to receive the bailout package in its entirety.[96]

72. GNS stated that it would pay to keep the "mill in hot idle with a supply chain intact" when NewPage-Port Hawkesbury began CCAA proceedings.[97] This funding was intended to "get {GNS} through the next three months as we prepare for the re-sale of this plant" so that (according to Premier Dexter) it would be "in an operating condition {and} a new buyer would be able to come in and bring it back on-line."[98] The forestry infrastructure funding ensured that a guaranteed wood supply, critical to the restart and continuing profitable operation of the mill, would be available to PWCC when the mill reopened.[99]

73. The originally-planned three months of funding to help NewPage sell to an operational buyer became more than a year, with most of it—$22.8 million of the total $36.8 million spent by GNS—coming after the Monitor declared PWCC was the winning

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[95] *See, e.g.*, C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release; *infra* ¶¶ 49, 74-99.

[96] *See* C-165, *supra* n.68, PWCC Pre-Filed Evidence at 14-15, 18.

[97] C-116, *supra* n.15, Sep. 9, 2011 Nova Scotia Press Release; C-122, *supra* n.36, Nov. 1, 2011 Nova Scotia Legislature Proceedings at 2947-48. Resolute understands that the Tribunal has determined that the Hot Idle and Forestry Infrastructure funding cannot form part of Resolute's claim. Hot Idle and Forestry Infrastructure funding are discussed here as part of the facts and circumstances giving rise to the claim, particularly for the millions in funding that GNS provided beyond the time when it might have benefitted NewPage as the seller because the buyer and ultimate beneficiary had been chosen. As PWCC's March 8, 2012 notes indicate, the "Province today agreed to fund the hot idle for a while to facilitate the process completion." C-147, *supra* n.49, PWCC Meeting Notes at page 70 of 165.

[98] *Id.*

[99] C-116, *supra* n.15, Sep. 9, 2011 Nova Scotia Press Release.

bidder.[100] The hot idle funding was intended to aid GNS, PWCC, and the other interested parties finalize the deal; as stated in the March 9, 2012 notes of a meeting attended by GNS, the "Province today agreed to fund the hot idle for a while to facilitate the process completion."[101]

1. Electricity

74. The electricity deal sought by PWCC was a package concerning (among other things) the fixed cost of service; a tax-efficient structure for payments to NSPI; incremental costs of service; Nova Scotia's renewable energy regulations; the Biomass Plant on site at the mill; and a long-term rate structure. NSPI, in its application, explained that "{t}his proposal is the result of a long period of dialogue involving NS Power, PWCC, the CCAA Monitor, and government, and each of the components is integrally connected with the others,"[102] which helps explain why PWCC said it had to have all of it, or nothing at all.

75. Fixed Costs. NSPI incurs "fixed costs" (*i.e.,* overhead) in operating the power system in Nova Scotia. The NSUARB's ruling required that PHP would pay $2/MWh for the fixed costs NSPI incurs for operating the power grid. NSPI conceded that the $2/MWh rate "reflects a small contribution to fixed costs."[103]

76. In addition to the $2/MWh "minimum" payment, NSPI was supposed to receive a profit-share dividend. PWCC and NSPI had agreed to enter into a

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[100] *See* Canada Statement of Defence ¶¶ 42, 4636.8 (Sep. 1, 2016) ("Statement of Defence"); C-201, *Dexter under fire after agreement reached to open mill*, Truro Daily News (Sep. 24, 2012).

[101] C-147, *supra* n.49, PWCC Meeting Notes at page 70 of 165.

[102] C-164, *supra* n.67, LRR Notice of Application ¶ 8.

[103] C-211, Emera Investors Conference Call at 13 (Nov. 9, 2012).

partnership, with NSPI owning 30 percent of PHP. PHP would then pay out 60 percent of its profits to the shareholders. This scheme, which needed approval from CRA, was intended to make a "significant contribution" to NSPI's fixed costs. The rate structure then would have been reevaluated if NSPI were not to receive at least $20 million in five years from the combination of the $2/MWh payment and the dividend payments.[104]

77. Tax Structure. NSPI's 30 percent ownership interest was structured so that PHP could pay for all electricity through dividend payments to NSPI, which would allow the mill to use $1 billion in tax losses incurred by NewPage-Port Hawkesbury (an asset PWCC would acquire in its purchase of the mill) as an offset on PHP's income taxes. This structure needed approval from CRA.[105] If granted by CRA, this structure would have provided PHP with significant savings on its power bill; PHP estimated in its business plan that this benefit would contribute one-third of the mill's profitability (based upon EBITDA), between $[redacted][106]

78. As part of this tax structure, NSPI could have become responsible for certain existing environmental liabilities previously associated with the mill.[107] NSPI refused to accept these risks absent an indemnification.[108] GNS, not the seller, indemnified NSPI against those risks.[109]

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[104] *See* C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 11, 12, 115-120.

[105] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 134-144.

[106] *See* C-163, *supra* n.58, [redacted] at CAN000004_0042; C-202, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Redacted Pacific West Commercial Corporation Responses To Information Requests From NSUARB Board Staff (NSUARB Sep. 25, 2012).

[107] *See* C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶ 189.

[108] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶ 193.

[109] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶ 194; C-181, [redacted].

79. Incremental Costs. The NSUARB determined that PHP would pay for all incremental costs of the mill, which represented the actual cost of electricity the mill would be purchasing (with additional payments for variable operating costs, incremental capital costs, and line losses).[110]

80. Renewable Energy Regulations. GNS recognized, from the beginning of its negotiations with PWCC, that it had to be addressing renewable energy, stating that [redacted] [111] GNS wrote new energy regulations committing 25 percent of the province's electricity supply, starting in 2015, to renewable energy sources (40 percent starting in 2020).[112]

81. PHP anticipated that its annual energy usage would be over [redacted], representing approximately 10 percent of NSPI's entire electricity production.[113] The additional energy sought by PHP, therefore, could have led to an increase in required renewable energy production to satisfy the provincial regulations. [redacted] [114] GNS refused to address these costs prior to the evidentiary hearing before the NSUARB.[115]

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[110] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 89-114.

[111] C-158, *supra* n.85, [redacted] at CAN0000087_0005.

[112] C-106, Renewable Electricity Regulations, NS Reg 155/2010.

[113] *See* C-163, *supra* n.58, [redacted] at CAN000004_0030; C-221, Audit of Port Hawkesbury Paper Load Retention Tariff, Synapse at 6 (Feb. 28, 2014).

[114] C-153, [redacted]

[115] C-177, *supra* n.76, Excerpts from Transcript of NSUARB Hearing at 159-161 (July 16, 2012).

82. PWCC and NSPI argued before the NSUARB that no additional renewable energy would be required when bringing PHP back online. The NSUARB was not persuaded.[116] Facing a potential denial of the electricity deal, GNS intervened to moot the issue days after the evidentiary hearing concluded:

> The Government commits to ensuring that if the mill load does trigger an additional RES obligation during the term of the proposed mechanism, and if this results in incremental costs, then the Province guarantees that neither PWCC nor other ratepayers will be required to pay these incremental costs.[117]

GNS's intervention then led to NSUARB approval.[118] Hence, in addition to the financial assistance and incentives, GNS changed the law for PWCC's benefit.

83. Biomass For Steam Generation. Steam is a necessary component for mill operation, and PHP intended to supply steam from an on-site Biomass Plant operated by NSPI. PHP needed 1.2 million gigajoules of steam from the Biomass Plant, representing 24 percent of the Plant's operating capacity. Using the proposed tax structure, PHP would pay NSPI $4.72 million for the 1.2 million GJ of steam, and NSPI would pay $750,000 for various services such as water, compressed air, and fire protection.[119]

84. The Biomass Plant would need to run full-time to produce steam for PHP and would not run full-time for any other reason. The Biomass Plant would cost more to run than other forms of electricity generation in Nova Scotia such that the more it would

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[116] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶ 177; C-177, *supra* n. 76, Excerpts from Transcript of NSUARB Hearing at 159-161 (July 16, 2012).

[117] *See* C-179, *supra* n.79, GNS Letter Regarding PWCC LRT at 2.

[118] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 180-183.

[119] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 156-158.

run just for PHP, the greater would be the cost to Nova Scotia ratepayers, paying to keep the Plant running "overtime" for PHP's benefit. The electricity plan estimated that the full-time operation of the Biomass Plant would cost ratepayers an additional 76 percent, or approximately $7 million annually (although disputed by PWCC as "significantly overstated").[120] The NSUARB said it could not approve the electricity deal without controls on additional costs to ratepayers arising from the Biomass Plant operations.[121]

85. GNS again moved to enable the deal after the evidentiary hearing:

> The Government commits to ensuring that PWCC receives the full benefit of the proposed arrangement it reached with Nova Scotia Power Inc. This will be accomplished, as planned, through finalization of amendments to the Renewable Electricity Standard Regulations so that the Port Hawkesbury CHP {Combined Heat and Power} plant is operated as a base load and is deemed must run or we will address the issue through an equivalent solution that meets the objectives of the proposed arrangement.[122]

Based upon GNS's intervention, "NSPI would be obligated to run the Biomass Plant, even though it would not be dispatched based purely on the rules of economic dispatch" because the Biomass Plant "'must run' by law.'"[123] Those regulations were subsequently passed in January 2013.[124]

86. Term. PWCC sought a 7.5 year term for the electricity deal (with the potential for a review of the rate after five years to address fixed costs).[125] PWCC

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[120] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 173-175.

[121] *See* C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 181-183.

[122] C-179, *supra* n.79, GNS Letter Regarding PWCC LRT at 1.

[123] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 179-183.

[124] C-217, Amendments to the *Renewable Electricity Regulations*, N.S. Reg. 155/2010 (Jan. 17, 2013).

[125] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶ 145.

"made it clear throughout the course of the proceedings it would not proceed with the acquisition of the mill unless it obtains the terms and reopener provisions as requested."[126]

87. The NSUARB was concerned about providing such an advantageous rate to PHP for so long, having provided only a three-year term to NewPage-Port Hawkesbury.[127] Nonetheless, the NSUARB granted the 7.5 year term because it "accept{ed} the evidence of Mr. Stern that if the term is shortened PWCC will not purchase the mill."[128]

88. Despite opposition, Port Hawkesbury's power rate application ultimately was granted. The NSUARB approved conditionally the LRT for PHP on August 20, 2012, pending CRA approval of the tax structure and promulgation of regulations by GNS to run the Biomass Plant full-time.[129]

2. Other GNS Support

89. Also on August 20, 2012, GNS publicly unveiled a package for the restart of the mill. In a press conference announcing the deal, Premier Dexter stated that "{w}e are confident that Pacific West is well-positioned to be the most competitive and best supercalender paper mill in the world."[130] Premier Dexter also stated that the paper

[126] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶ 146.

[127] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶ 152; C-138, *In re an Application by NewPage-Port Hawkesbury and Bowater Mersey Paper Company*, Decision ¶¶ 284-286 (Nov. 29, 2011) ("NPPH NSUARB Decision").

[128] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶ 151.

[129] *See generally* C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec.

[130] C-185, *Nova Scotia announces $124.5 million in incentives for NewPage paper mill*, 660News (Aug. 20, 2012).

machine was "the most efficient paper producing machine in the industry"[131] and that "{t}he mill has the most modern machine in North America and we are helping position it to take advantage of this and become a leader in producing supercalendered paper."[132] GNS stated that its goal was "to help the mill become the lowest cost and most competitive producer of super calendar {sic} paper."[133]

90. PWCC representatives stated that "{t}he package really allows us to get out of the starting gate with a strong start."[134] The restart of the mill under such favorable conditions was predicted to cause ripples in the paper industry; according to an analyst, "{i}f Port Hawkesbury mill restarts and is successful, it probably means prices will come under downward pressure and another mill will be forced to take a capacity hit."[135]

91. The additional GNS incentive package (beyond the hot idle keeping the mill ready to run and the electricity deal with all its elements) included a $24 million loan for increased productivity; a $40 million repayable loan for working capital; $1.5 million to train workers; $1 million for marketing [redacted]; $38 million for forestry management through the Outreach Agreement; a Forest Utilization License Agreement; and $20 million to purchase more than 50,000 acres of land. GNS required the [redacted]

[131] C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release.

[132] C-185, *supra* n.130, *Nova Scotia announces $124.5 million in incentives for NewPage paper mill*, 660News (Aug. 20, 2012).

[133] C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release.

[134] C-188, *NewPage gets $124.5M from Nova Scotia to reopen paper mill*, The Canadian Press (Aug. 21, 2012).

[135] C-189, *Plant Restart Could Topple Competitors*, The Chronicle Herald (Aug. 21, 2012).

[redacted] before GNS would provide any assistance to PWCC.[136]

92. $24 Million Capital Improvement Forgivable Loan. GNS would provide PHP with a $24 million forgivable loan to fund capital projects that would improve the mill's productivity and efficiency.[137] [redacted][138]

93. $40 Million Credit Facility. GNS would provide [redacted] $40 million credit facility to PHP. [redacted][139]

94. $38 Million Outreach Agreement. GNS agreed to provide $3.8 million per year for ten years to fund sustainable harvesting and forest land management.[140] [redacted][141] [redacted]

[136] C-182, [redacted] at CAN000002_0004 [redacted].

[137] *E.g.*, C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release; C-189, *supra* n.135 *Plant Restart Could Topple Competitors*, The Chronicle Herald (Aug. 21, 2012).

[138] C-182, *supra* n.136, [redacted] at CAN000002_0002.

[139] C-182, *supra* n.136, [redacted] at CAN000002_0002.

[140] *See generally* C-206, [redacted]; C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release.

[141] *See* C-247, [redacted]

[redacted][142] [redacted]

[redacted][143] There is no governmental inspection to confirm PHP's performance prior to payment.

95. Forest License. PHP and GNS executed a 20-year Forest Utilization License Agreement ("FULA") that permitted PHP to harvest 400,000 GMT/yr from Crown land and allowed PHP to harvest 175,000 tons per year to fuel the Biomass Plant from Crown land. To access so much Crown timber, PHP was required to buy 200,000 GMT/year of wood from private suppliers. GNS was to pay PHP a "Silviculture Fee" of $3 per cubic meter for the harvest of all softwood products and Biomass Fuel, and $0.60 per cubic meter for all hardwood product other than Biomass Fuel (although these rates could change).[144]

96. This deal raised concerns in Nova Scotia because PHP could receive more in silviculture payments than it was paying for stumpage, which happened in 2017, essentially making the Crown timber free (there was no prescribed monitoring of the silviculture expenditures).[145] [redacted]

[redacted][146]

[142] *See generally* C-206, *supra* n.140, [redacted]; C-223, [redacted]

[143] C-206, *supra* n.140, [redacted] § 13.3.

[144] C-207, Forest Utilization License Agreement (Redacted) at Definitions ("Silviculture Fee") and §§ 1.2, 4.1, 4.2, 5.1,

[145] C-170, *Port Hawkesbury mill's deal with province raises concern*, The Chronicle Herald (May 28, 2012) ("In 2017 Port Hawkesbury Paper paid $3.1 million in stumpage fees to the province and was paid back $4.4 million for silviculture work.").

[146] *See* C-247, *supra* n.141, [redacted]; C-231, [redacted]

97. $20 Million Land Purchase. PWCC's $33 million purchase of NewPage-Port Hawkesbury assets included roughly 50,000 acres of land. GNS agreed to pay PWCC $20 million for this land.[147] This payment, [redacted],[148] effectively reduced PWCC's purchase price for the mill and related assets (such as the $1 billion in tax losses) to $13 million.

98. The land purchase was [redacted] NewPage-Port Hawkesbury for essentially the same land; on [redacted], GNS had agreed to pay NewPage-Port Hawkesbury [redacted] for the land.[149]

99. Having finalized their deal, PWCC and GNS [redacted]

[redacted][150]

[redacted]

[147] C-209, [redacted]; C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release.

[148] *See* C-220, [redacted] at CAN000013_0007([redacted] ([redacted]).

[149] C-155, [redacted].

[150] C-190, [redacted] § 1 and CAN000120_0013 [redacted].

F. The Revised Bailout Package, The Eleventh Hour Walk-Away, And The Late-Night Return To The Table

100. NSUARB approval was contingent upon a favorable ruling on the proposed Tax Structure.[151] On September 12, 2012, CRA informed PWCC and NSPI that it would not grant the requested approval for the tax structure.

101. GNS decided to amend its package to PWCC in response to this denial. GNS would earn additional tax revenue from the mill's reopening, which would "create room" for the province to make some of the loans forgivable. "The province offered an alternative way to reduce power costs a week ago: it would allow PWCC to earn forgiveness of a $40 million loan by using the avoided loan repayments to help pay for its power on a taxable basis."[152] With this accommodation, PWCC stated that it would go forward with the purchase of the mill despite the rejection of its proposed tax structure.[153]

102. Despite the apparent recovery from the CRA setback, the deal again seemed to fall apart on September 21, 2012. Premier Dexter announced the mill would not reopen and stated that "{t}he key for Nova Scotia was that this mill operated for the long term . . . ."[154] PWCC also issued a press release declaring the deal was dead.[155] The key sticking point was the treatment of the $1 billion in tax losses PWCC would

[151] *See* C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 231-232.

[152] C-198, *Mill deal revived: Still in game but not out of the woods*, The Chronicle Herald (Sep. 23, 2012).

[153] C-191, *Nova Scotia sweetens deal to Keep paper mill restart alive*, Bangor Daily News (Sep. 17, 2012).

[154] C-192, *Province Standing With Strait After Announcement Mill Will Not Reopen*, Nova Scotia Press Release (Sep. 21, 2012).

[155] C-193, PWCC Press Release (Sep. 21, 2012).

acquire in purchasing the mill and whether those losses could be used to offset profits from other operations of the Stern Group (PWCC's parent entity) outside Nova Scotia.[156]

103. The next day, September 22, 2012, the deal was revived. PWCC and GNS agreed to compromise on the tax losses—PWCC could use the losses in other provinces but would have to share its tax savings with Nova Scotia, giving 32% to GNS and reinvesting 18% in PHP. GNS and PHP, thus, amended two key portions of their prior deal to address CRA's denial of the proposed tax structure: (1) the $40 million credit facility; and (2) tax loss harvesting beyond Nova Scotia's borders.[157] But the deal remained the same in all other material respects.

104. $40 Million Credit Facility. Whereas the $40 million Credit Facility was previously [redacted] but repayable [redacted],[158] it was now forgivable based upon taxes paid by NSPI. PHP could earn forgiveness on this credit facility if it were to [redacted] If those requirements were satisfied, [redacted]

[156] C-198, *supra* n.152, *Mill deal revived: Still in game but not out of the woods*, The Chronicle Herald (Sep. 23, 2012).

[157] PHP agreed to pay GNS an additional profit sharing contribution: the original agreement provided that PHP, [redacted], would pay GNS [redacted] of $9 million [redacted]. The amended agreement provided that PHP, [redacted], would pay [redacted] $24 million [redacted]. C-194, Statement and Backgrounder, Nova Scotia Premier's Office (Sep. 22, 2012); C-195, [redacted] at CAN000003_0004-05 [redacted]; C-212, [redacted] at CAN000017_0003 [redacted].

[158] C-194, *supra* n.157, Statement and Backgrounder, Nova Scotia Premier's Office (Sep. 22, 2012); C-195, *supra* n.157, [redacted] at CAN000003_0001.

[redacted][159] [redacted]

[redacted]

[redacted][160]

105. Tax Loss Harvesting. NewPage-Port Hawkesbury had accumulated $1 billion in tax losses that PHP originally [redacted]

[redacted], such as for the electricity deal with NSPI. The amended agreement permitted PWCC to incorporate "other mills and related assets" into PHP to improve its competitive position through the disposition of these tax losses. For every dollar of tax losses used in this fashion, PWCC would pay GNS 32 cents and PHP would reinvest 18 cents into the mill to improve its competitive position.[161]

106. PWCC filed an amended LRT application with the NSUARB to address CRA's rejection of the proposed tax structure.[162] In particular, PHP proposed to pay NSPI the greater of either $2/MWh or 18 percent of the mill's net earnings before tax, subject to a maximum payment of $4/MWh. These payments could be reevaluated in five years if PHP were not to have paid $20 million in fixed costs to NSPI. Other than

[159] C-195, *supra* n.157, [redacted] at CAN000003_0003.

[160] C-195, *supra* n.157, [redacted] at CAN000003_0004.

[161] C-198, *supra* n.152, *Mill deal revived: Still in game but not out of the woods*, The Chronicle Herald (Sep. 23, 2012); C-195, *supra* n.157, [redacted] at CAN000003_0005-06; C-196, *Province Negotiates New, Better Deal to Reopen Mill, Support the Strait*, Nova Scotia Press Release (Sep. 22, 2012) ("Sep. 22, 2012 Nova Scotia Press Release"); C-200, *New life for Newpage*, Cape Breton Post (Sep. 24, 2012).

[162] *See generally* C-197, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Pacific West Commercial Corporation Application for Amendments to Load Retention Tariff (NSUARB Sep. 22, 2012) ("PWCC Amended NSUARB Application").

changes to address CRA's rejection, the original NSUARB agreement remained in effect in all respects relevant to this dispute.[163]

107. PWCC explained that GNS's revision would "generally preserve the fundamental economics of our restructuring plan:"

> Upon receipt from the CRA of the GAAR Committee's initial determination, PWCC began active discussions with the Province to determine if there was a way forward which could generally preserve the fundamental economics of our restructuring plan. As has been publicly noted by the Province, if the DUA structure is not implemented and the Mill re-starts in any event, then the Province will receive tax revenue that it would not have received if the ATR had been issued. This provides some headroom for the Province to revise certain of the terms of the arrangements between PWCC and the Province which we believe put the Mill in a similar position referable to the Province's share of tax revenue as if the DUA {tax} structure was in place.[164]

108. PWCC made clear that the revised LRT it was seeking from the NSUARB was linked to the remaining assistance package offered by GNS. PWCC anticipated lower returns because of the LRT but the "opportunity for greater upside than it would have had if the {Advanced Tax Ruling ("ATR") from CRA} had been issued, and that opportunity, together with the cash flow benefits of the proposed Provincial government arrangements, have convinced us to proceed with our investment if the Board agrees the amended LRR is appropriate."[165] PWCC also stated that the revised package from GNS coupled with the revised LRT would "generally preserve the fundamental

[163] *See* C-197, *id.*, PWCC Evidence at 1-4.

[164] C-197, *id.*, PWCC Evidence at 6.

[165] C-197, *id.*, PWCC Evidence at 7.

economics of the restructuring plan" such that PWCC was willing "to take the increased risk associated with the impact of the higher electricity cost."[166]

109. Most importantly, PWCC confirmed that it would not have purchased the mill after CRA rejected the tax structure absent a revised package from GNS:

> **Q13 Would PWCC have agreed to the acquisition of NPPH and the restart of the Mill absent a favourable ATR if the Provincial government had not subsequently revisited its support package with PWCC?**
>
> A. No. PWCC made it clear throughout its discussions with all stakeholders, including in its evidence before the Board to date, that its restructuring plan as it existed was dependent upon the issuance of a favourable ATR. Absent such a ruling, an alternative plan was required in order to enable the Mill to restart.
>
> The subsequent negotiations with the Provincial government will lead to a situation where the overall financial condition of the Mill is bolstered somewhat, and in light of the significant efforts to date by innumerable parties, compromises on behalf of many stakeholders, and the potential for some added possible future PWCC upside, PWCC has determined that it is willing to take some further risk with respect to its potential investment.[167]

110. GNS, like it did for the original LRT proposal, supported this amendment before the NSUARB.[168]

111. The NSUARB approved the amended LRT on September 27, 2012.[169]

112. On September 28, 2012, GNS and PHP [redacted] GNS's July 20, 2012 commitment to the NSUARB that neither PHP nor

[166] C-203, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Redacted Pacific West Commercial Corporation Responses To Information Requests From Small Business Advocate at 9 (NSUARB Sep. 25, 2012).

[167] C-197, *supra* n.162, PWCC Amended NSUARB Application, PWCC Evidence at 8.

[168] C-205, *supra* n.80, GNS Letter Regarding PWCC Amended LRR.

[169] C-208, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Amended Decision ¶¶ 11-23, 39 (NSUARB Sep. 27, 2012).

ratepayers would be required to pay additional costs to satisfy the Province's Renewable Energy Standards.[170] Resolving this issue was critical to PWCC, with PWCC CEO Ron Stern stating in meetings that the parties "cannot leave the door open by regulator that RES will/may apply in the future – it has to be never."[171] [redacted][172]

113. Premier Dexter touted the deal, stating that "{t}his government has worked for a year now to restart that mill" and "{t}he new operation will run a super calendared {sic} machine that is the envy of the world. It provides the mill with a key niche market that will keep it competitive and profitable."[173] Mr. Stern echoed this statement, explaining that "{w}e're hoping that there is going to be a bottom in the declining use of paper and that we will be, hopefully, the most competitive mill. We will certainly be the highest quality. Our goal is to be the lowest cost mill."[174]

[170] C-210, [redacted] (Sep. 28, 2012).

[171] C-147, *supra* n.49, PWCC Meeting Notes at page 91 of 165.

[172] C-210, *supra* n.170 [redacted] at CAN000121_0005-06 (Sep. 28, 2012).

[173] C-196, *supra* n.161, Sep. 22, 2012 Nova Scotia Press Release.

[174] C-199, *Nova Scotia mill revived in 11th hour twist*, CBC News (Sep. 23, 2012).

114. PWCC paid $33 million ($13 million net of the land purchase) for the mill. PHP placed a book value of the mill's assets (not including the land sold to the province) at a fair value of $[redacted].[175]

115. For $33 million, Nova Scotia: (1) gave PHP $124.5 million in loans—forgivable and [redacted]—and other Government payments; (2) purchased land for $20 million, thus reducing PWCC's effective purchase price for the mill to $13 million; (3) enabled PHP to garner tax savings in Nova Scotia for assets in other provinces; (4) provided municipal tax breaks reducing Port Hawkesbury property taxes from $2.6 million annually to $1.3 million; (5) guaranteed PHP a favorable electricity contract, including statutory rights to run the Biomass Plant 24/7 and regulatory protection from the costs and obligations of renewable energy standards; (6) granted [redacted]; (7) indemnified PWCC against costs were PWCC not to complete the purchase of the mill; and (8) spent $36.8 million ($22.8 million of which came at or after PHP was announced the winning bidder) to keep the mill in hot idle and ensure the raw material supply chain remained open to Port Hawkesbury through the forestry infrastructure fund.[176]

[175] C-220, *supra* n.148, [redacted] at CAN000013_0007[redacted]

[176] C-196, *supra* n.161, Sep. 22, 2012 Nova Scotia Press Release; Canada Memorial on Jurisdiction ¶ 48 (Dec. 22, 2016); *see* C-213, *Legislation Amends Taxation Agreement for Port Hawkesbury Paper Mill*, Nova Scotia Press Release (Nov. 29, 2012). Based upon the Tribunal's Decision on Jurisdiction and Admissibility, the municipal tax portion of the package is only applicable to Resolute's claim under Article 1102. *See* Article 2103(4)(b) (stating that taxation measures are applicable to claims under Article 1102).

116. The resurrected PHP makes SC paper of multiple grades, including SCA++, SCA+, SCA, and SCB. It operates on one line and can produce 400,000 tons (equivalent to 360,000 metric tons) of SC paper annually.[177]

G. PHP'S Preferential Electricity Rate Dramatically Reduced PHP's Operating Costs

117. The LRT obtained by PHP was worth millions in comparison to both "the standard tariff" applicable to all large industrial users and the prior LRT granted to the Port Hawkesbury mill while it was owned by NewPage. In comparison to the standard tariff for large industrial users, PWCC predicted a cost savings of $32 million per year using the originally proposed LRT over a full year (based upon 2012 costs).[178]

118. PHP received a substantial benefit from the new LRT in comparison to the one previously given to NewPage-Port Hawkesbury. In 2013, PHP used [redacted] MWh of electricity for a total electricity expenditure of $[redacted] at an average rate of $[redacted]/MWh.[179] The rate the failed NewPage-Port Hawkesbury mill was to pay in 2013 would have been $65.77/MWh; at this rate, PHP would have paid $[redacted] for the same MWh it used in 2013.[180] PHP's reduced electricity rate thus represents an $[redacted] savings, which across the 400,000 ton capacity of the mill (assuming PHP operated at full capacity) represents a cost savings of approximately $[redacted]/ton.

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[177] C-248, Port Hawkesbury Paper Datasheet.

[178] C-172, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Redacted Pacific West Commercial Corporation Responses To Information Requests From Small Business Advocate at 1 (NSUARB May 30, 2012).

[179] C-222, [redacted] at CAN000005_0003 ([redacted].

[180] C-138, *supra* n.127, NPPH NSUARB Decision ¶ 287.

119. In 2014, PHP used 1,055,201 MWh of electricity for a total electricity expenditure of no more than $[redacted] at an average rate of no more than $[redacted]/MWh.[181] The rate the failed NewPage-Port Hawkesbury mill was to pay in 2014 would have been $67.86/MWh; at this rate, PHP would have paid $71,605,940 for the same MWh it used in 2014.[182] PHP's reduced electricity rate thus represents a $[redacted] savings, which across the 400,000 ton capacity of the mill (assuming PHP operated at full capacity) represents a cost savings of approximately $[redacted]/ton.

120. In 2015, PHP used 1,007,937 MWH of electricity for a total electricity expenditure of no more than $[redacted] at an average rate of no more than $[redacted]/MWh.[183] There was no set rate for 2015 for NewPage-Port Hawkesbury, but the

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[181] *See* C-243, *In re Port Hawkesbury Paper Load Retention Tariff Pricing Reopener*, Redacted Responses of PHP to Industrial Group at 4 (May 1, 2018) ("PHP Responses to Industrial Group"); C-225, [redacted] at CAN000014_0019 [redacted].

PHP's total electricity expenditure and average rate are arguably less than these numbers, which are derived from [redacted] "[redacted]" CAN000014_19. The [redacted] figure there for 2014, $[redacted], includes: (1) a $4,720,000 payment by PHP for the 1.2 GJ of steam it purchased from NSPI, C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶ 156; (2) fuel PHP purchased to produce additional steam when needed. C-226, Port Hawkesbury Paper Sustainability Report 2014 at 6 (showing purchase of natural gas for small portion of boiler steam).

In comparison, [redacted] $[redacted] of "[redacted]" [redacted] even though its actual payments to NSPI were only $[redacted]. *Compare* C-225, *supra* n.181, [redacted] at CAN000014_0019 [redacted], *with* C-222, *supra* n.179, [redacted] at CAN000005_0003 [redacted]. Therefore, the amounts [redacted] apparently include "[redacted]" payments beyond the actual power PHP purchased from NSPI.

[182] C-138, *supra* n.127, NPPH NSUARB Decision ¶ 287.

[183] *See* C-243, *supra* n.181, PHP Responses to Industrial Group at 4; C-238, [redacted] at CAN000015_0021 [redacted].

proposed rate that NewPage sought to pay was in excess of $70.00/MWh.[184] At this proposed rate, PHP would have paid $70,555,590 for the same MWh it used in 2015. PHP's reduced electricity rate, thus, represents in 2015 a [redacted] savings over what the mill had proposed, which across the 400,000 ton capacity of the mill (assuming PHP operated at full capacity) represents a cost savings of over $[redacted]/ton.

121. PHP received an added bonus, beyond these direct electricity savings, because of the regulations that required the Biomass Plant to run full-time to produce steam for the mill. Absent the Biomass Plant, PHP would have needed to spend more on expensive natural gas.

122. One estimate of these costs at the NSUARB hearing predicted ratepayers would incur an additional $7 million in costs annually to run the Biomass Plant full-time.[185] An NSPI official confirmed these costs in his testimony before the NSUARB in October 2015, conceding that GNS's regulation that required the Biomass Plant to run full-time to support PHP's steam needs cost ratepayers $6-$8 million annually.[186]

123. The Biomass Plant became fully operational in July 2013.[187] GNS amended its Renewable Energy Regulations in April 2016, 2 years and 9 months after the Biomass Plant became fully operational.[188]

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[184] C-138, *supra* n.127, NPPH NSUARB Decision ¶ 287. The NSUARB imposed higher rates on NewPage-Port Hawkesbury than what it had requested to pay. *Compare* C-138, *id.* ¶ 99, *with id.* ¶ 287.

[185] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶ 175.

[186] C-235, *In the Matter of A Hearing into Nova Scotia Power Incorporated 2016 Base Cost of Fuel Reset,* Hearing Transcript at 25-33 NSUARB Oct. 19, 2015).

[187] C-219, *Biomass Plant Humming at Full Capacity,* Pulp and Paper World (July 3, 2013).

[188] C-240, *Government Ends Must-Run Regulation, Reduces Biomass Use*, Nova Scotia Press Release (Apr. 8, 2016).

124. Until these revisions, ratepayers provided PHP with nearly $20 million in benefits to operate the Biomass Plant full-time for steam as a result of GNS's regulations.

125. PHP continues to receive an additional electricity benefit because of the Renewable Energy Regulations. GNS mandated that 25 percent of all electricity, throughout the province, come from renewable energy sources by 2015. The Regulation should have increased PHP's costs by requiring PHP to source electricity outside the benefits of the LRT and the Biomass plant. Mr. Stern called these additional costs "a non-starter," indicating that, if imposed on PWCC, they would crater the deal.[189]

126. GNS mooted the issue by ensuring neither PHP nor ratepayers would incur these additional costs, leading to NSUARB's approval of the special power rate for PHP.[190] [redacted][191] PHP's exemption spared it all such costs.

H. The State Of The Supercalendered Paper Industry At The Time Of The Sale

127. Resolute is one of four producers of SC paper in Canada and the only American company producing SC paper there. The other Canadian producers of SC paper are Port Hawkesbury Paper Inc., Catalyst Paper Corporation, and Irving Paper Limited. One other company, Verso Corporation (formerly NewPage), produces SC paper only in the United States; Madison produced SC paper in the United States until

[189] C-147, *supra* n.49, PWCC Meeting Notes at page 91 of 165.

[190] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 180-183; *See* C-179, *supra* n.79, GNS Letter Regarding PWCC LRT at 2.

[191] C-153, *supra* n.114, [redacted].

2016.[192] The entire North American market for SC paper thus is comprised of only five companies. [redacted].[193]

128. E-commerce and news delivery via the internet have imposed tremendous economic pressures on the pulp and paper industry, reducing the global and North American demand for SC paper.[194] SC paper producers have downsized by idling machines, closing mills, and even shuttering operations completely.[195]

129. Premier Dexter noted during legislative debates that the Port Hawkesbury mill was "continuing to operate … in the face of a number of difficulties. One is that the world price per ton of pulp and paper is declining. The second is that the demand for pulp and paper is declining in almost every market around the world . . . [196] [redacted]

[redacted][197]

130. SC paper is a commodity competing on price, selling in this diminishing market. The U.S. International Trade Commission ("ITC"), for example, found that "relatively small price differences are sufficient to lead a purchaser to switch to an adjacent grade of SC paper." Moreover, "{p}urchasers generally contacted two to five suppliers before making a purchase, indicating robust competition among suppliers for

[192] Statement of Defence ¶ 17.

[193] C-163, *supra* n.58, [redacted] at CAN000004_0018.

[194] Statement of Claim ¶ 3; Statement of Defence ¶¶ 18-19.

[195] Statement of Defence ¶ 18.

[196] C-123, *supra* n.37, Nov. 2, 2011 Nova Scotia Legislature Proceedings at 3009.

[197] *See* C-163, *supra* n.58, [redacted] at CAN000004_0019-0023.

sales. . . We therefore find that price is an important consideration in purchasing decisions."[198]

131. [redacted][199]

132. After the sale of PHP to PWCC in September 2012, Resolute had approximately 520,000 metric tons of SC paper capacity;[200] [redacted]; PHP 360,000 metric tons; [redacted][201]

133. PHP's resurrection, thus, added 360,000 metric tons of capacity[202] to a declining commodity market—an approximately 20 percent increase in capacity in an industry in secular decline.

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[198] C-237, *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination Commission Opinion at 15, 16, 19 (U.S.I.T.C. Dec. 2015); *see also* C-163, *supra* n.58, [redacted] at CAN000004_0024 [redacted].

[199] *See* C-215, Pulp and Paper Sales & Marketing Budget Update to Board of Directors at RFP0011573 (Dec. 6, 2012).

[200] Resolute's [redacted] because its more efficient Dolbeau mill, which reopened in October 2012 with a capacity of approximately 143,000 MT, had a modestly larger capacity than the PM10 at the Laurentide mill, with a capacity of approximately 125,000 MT, which did not close until November 2012.

[201] *See* C-215, *supra* n.199, Pulp and Paper Sales & Marketing Budget Update to Board of Directors at RFP0011573 (Dec. 6, 2012).

[202] C-248, *supra* n.177, Port Hawkesbury Paper Datasheet.

I. The Impact Of PHP's Reopening On Resolute

134. PHP's successful reopening and vigorous market re-entry in 2013 upset Resolute's expectations to retain market share by lowering costs (through the reopening of Dolbeau and the closure of a less efficient SC paper line at Laurentide).[203] PHP's reopening led to a countervailing duty investigation in the United States that required Resolute to pay US$60 million in duty deposits pending final resolution of the investigation and appeal. Canada excluded Resolute from its Joint Defense team against the United States because Resolute had appeared to threaten this arbitration. Fortunately for Resolute, PHP and Irving funded a US$42 million settlement that induced the United States Department of Commerce to revoke a countervailing duty order and instruct U.S. Customs and Border Protection to refund Resolute's cash deposits.

135. PHP's complete market re-entry caused Resolute to sell fewer tons of SC paper, with those sales coming at lower prices. From 2013-2017, PHP's market presence has cost Resolute US$64 to US$71 million in profits. Resolute will continue to be damaged by PHP and, over the next ten years, Resolute will lose an additional US$75 million to US$80.5 million in expected profits.[204]

1. The Gap Between PHP's Closure And Viability

136. PWCC's purchase of PHP was uncertain even the night before the deal was consummated. PWCC had sought a ruling from CRA regarding the tax structure it wanted to use to reduce the price of electricity. CRA denied the requested approval

[203] C-180, Resolute Pulp and Paper Sales & Marketing Strategic Plan at RFP0011899 (July 25, 2012) ("Resolute Strategic Plan").

[204] *See infra* ¶ 293.

and the whole deal seemed to fall apart on September 21, 2012, only to be revived the next day through the commitment and conviction of GNS.[205]

137. PHP's successful reentry into the market was uncertain even when it reopened. PHP needed time "to go through the whole process of requalifying {its} paper with major buyers."[206] As Prof. Hausman previously has testified, that process normally would take "a couple of months."[207] Consistent with Prof. Hausman's experience, PHP stated that "the first months {or} two were . . . dealing with teething problems in the plant . . . ."[208]

138. Citing an analyst's report, PHP claimed that it moved "seamlessly into the market" and that it "consciously chose not to disrupt the market" by "export{ing} product to third countries" even though its intended market was North America.[209] According to a March 2013 report quoted by PHP, "Port Hawkesbury did not initially make great inroads with the large retailers in 2013, but the company has developed a lot more retail business {in 2013} than it appeared would be the case early on."[210] Even Canada has admitted that "PHP did not start printing SC paper at full capacity until later in 2013."[211]

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[205] *Supra* ¶¶ 102-103.

[206] C-236, Transcript of Proceedings before U.S. International Trade Commission in *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530 (Oct. 22, 2015) at 239:22-240:6 ("Oct. 22, 2015 U.S. ITC Tr.").

[207] *See* CWS-Hausman-1 ¶ 11 (Feb. 22, 2017).

[208] C-236, *supra* n.206, Oct. 22, 2015 U.S. ITC Tr. at 239:22-240:6.

[209] C-228, *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Post-Conference Brief of Port Hawkesbury Paper Attachment D (citing C-218, Verle Sutton, *The Reel Time Report* at 5 (Mar. 4, 2013) ("March 2013 *Reel Time* Report"); *see supra* ¶¶ 50, 52, 53, 127.

[210] C-218, March 2013 *Reel Time* Report at 4.

[211] Canada Reply Memorial on Jurisdiction ¶ 93 (March 29, 2017).

139. Freight costs are relatively high for SC paper, and PHP is located far from its North American markets.[212] To ship via truck direct to a customer in the United States (representing 30 percent of PHP's shipments), paper from PHP had to travel over 600 km to the nearest border crossing at Houlton, Maine, before travelling on to its final destination.[213] Rail shipments (representing the remaining 70 percent of PHP's shipments) would go either directly to a customer in the United States (again, at least 600 km just to enter the United States) or to Brampton, Ontario, approximately 1900 km away. From Brampton, paper would then be shipped by truck another 350 km to Detroit, Michigan.[214]

140. The operational costs inherent to the mill, even with GNS assistance, prohibited the newsprint machine at the mill from ever restarting.[215] Newsprint is of lower value than SC paper, magnifying the impact of transportation costs.

141. PHP itself was uncertain in 2012 as to whether the operation would be successful.[216] [redacted][217] One of PHP's competitors even testified at the ITC that "{t}he first year, our feedback from customers was that we're not so sure that this {PHP} machine will survive. It shut down

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[212] C-227, Transcript of Proceedings before U.S. International Trade Commission in *In re Supercalendered Paper from Canada, Inv*. No. 701-TA-530 (Mar. 19, 2015) at 111:16-117:5 (testimony from PHP expert) ("Mar. 19, 2015 U.S. ITC Tr.").

[213] C-233, First Supp. Questionnaire for Port Hawkesbury Paper In *In re Supercalendered Paper from Canada*, C-122-854 (July 6, 2015) at 3-4 ("July 6, 2015 PHP Supp. Quest. Resp."); C-227, *supra* n.212, Mar. 19, 2015 U.S. ITC Tr. at 159:10-16 (PHP witness testifying that "north of 70%" of PHP's shipments are via rail).

[214] C-233, *supra* n.213, July 6, 2015 PHP Supp. Quest. Resp. at 3-4

[215] C-234, *Port Hawkesbury Paper to diversify as newsprint mill demolished*, *CBC News* (Oct. 2, 2015).

[216] *See* Resolute Counter-Memorial on Jurisdiction ¶¶ 71-73 (Feb. 22, 2017).

[217] C-158, *supra* n.85, [redacted] at CAN0000087_0006.

before; what's to stop it from doing that again?"[218] Absent starting when it did and qualifying paper timely, [redacted][219]

2. The State Of Resolute's Production When PHP Reopened

142. Resolute, at the time PHP reopened, had a production capacity of approximately [redacted][220] Resolute was producing SC paper on two lines at its Laurentide mill and one line at Kénogami.[221]

143. In fall of 2012, Resolute reopened its Dolbeau mill and closed the older and more inefficient Line 10 at its Laurentide mill, which had a production capacity of 125,000 metric tons.[222] Dolbeau could produce approximately 143,000 metric tons annually, Kénogami approximately 134,000 metric tons, and Laurentide Line 11 approximately 225,000 metric tons.[223]

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[218] C-227, *supra* n.212, Mar. 19, 2015 U.S. ITC Tr. at 76:4-10.

[219] C-190, *supra* n.150, [redacted] at CAN000120_0003, 0013 ([redacted]

[220] *See* C-215, *supra* n.199, Pulp and Paper Sales & Marketing Budget Update to Board of Directors at RFP0011573 (Dec. 6, 2012).

[221] *See* C-180, *supra* n.203, Resolute Strategic Plan at RFP0011900. Resolute made minimal production of SC paper at its Catawba mill in the United States, [redacted]. The Catawba mill is a coated paper mill and can, on rare occasions, switch temporarily from coated paper to a low grade of SC paper production. *See id.* at RFP0011897 ([redacted]); *id.* at RFP0011900 ([redacted]).

[222] Statement of Defence ¶¶ 22-26; Jurisdictional Decision ¶ 171; Resolute Counter-Memorial on Jurisdiction ¶¶ 49-51 (Feb. 22, 2017); C-121, Q3 2011 AbitibiBowater Inc. Earnings Conference Call at 11 (Oct. 31, 2011) (M. Garneau stating that capacity will have to be closed if Dolbeau were to reopen).

[223] Statement of Defence ¶¶ 24, 25; Canada Reply Memorial on Jurisdiction ¶ 66 n.109 (March 29, 2017); C-249, Kénogami Fact Sheet.

144. Resolute's reopening of Dolbeau was part of its strategy to lower overall costs in order to retain market share. [redacted].[224] [redacted],[225] [redacted].[226]

3. Resolute's Mitigation Of Damages

145. Resolute knew that the GNS-aided resurrection of PHP could trigger a countervailing duty investigation into Canadian exports to the United States of SC paper. The trade law does not permit selective petitions targeting offending companies. Instead, it necessarily sweeps in all imports from a country subject to subsidy allegations. Resolute knew it would not be the target of an American petition, but that it could not avoid or escape subjection to investigation and, inevitably in the state of U.S protectionism, to potential duties.[227]

146. Resolute warned Canadian officials, beginning in July 2014, that it had knowledge of steps being taken in the United States leading to a countervailing duty investigation of Canadian exports of SC paper. Resolute wrote to Canadian Minister of

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[224] C-180, *supra* n.203, Resolute Strategic Plan at RFP0011900.

[225] Resolute relied upon RISI forecast data while adopting a more conservative view of prices for planning purposes. C-180, *supra* n.203, Resolute Strategic Plan at RFP0011901. Resolute graded its actual pricing against RISI's forecasts. *Id.* at RFP0011916.

[226] C-180, *supra* n.203, Resolute Strategic Plan at RFP0011901. [redacted] *Id.* [redacted] *See* C-215, *supra* n.199, Pulp and Paper Sales & Marketing Budget Update to Board of Directors at RFP0011573 (Dec. 6, 2012).

[227] Statement of Claim ¶¶ 58-60.

International Trade Ed Fast in October 2014 raising concerns about both the harm GNS's assistance to PHP was causing Resolute and the potential U.S. trade remedy case. Canada took no remedial action.[228]

147. On February 24, 2015, Resolute's then-CEO Richard Garneau met with Minister Fast to raise Resolute's concerns directly, informing him that GNS's actions constituted a breach of Canada's obligations under NAFTA Chapter Eleven, and that Canada should rectify the problem before a countervailing duty investigation would get underway and make matters much worse. Resolute knew that the United States Trade Representative had raised concerns with the United States under the auspices of the World Trade Organization, that there had been an exchange of questions from the United States about GNS assistance and answers from Canada. Resolute asked to see the exchange. The United States agreed on condition that there would be agreement from Canada. Canada invoked "national security" and refused.[229] In April 2015, Resolute filed a Canadian Access to Information Request for the answers; Canada denied this request in September 2015, saying an answer "could reasonably be expected to be injurious to the conduct of international affairs."[230]

148. Minister Fast did not accept M. Garneau's February warning and did not agree to take any remedial action. Within a week of that meeting, the U.S. Department

[228] Statement of Claim ¶¶ 58, 61-66.

[229] Statement of Claim ¶¶ 66-67; C-230, Email from USTR (Apr. 30, 2015).

[230] Statement of Defence ¶ 70. Notwithstanding these objections, Canada has produced those answers in this arbitration as confidential (but not) restricted access information. C-212, *supra* n.157, Canada Response to USTR Questions of October 10, 2012 (Nov. 23, 2012).

of Commerce initiated its countervailing duty investigation of SC paper from Canada, just as Resolute had predicted and warned for nearly eight months.[231]

149. Canada entered into a Joint Defense Agreement with other Canadian SC paper manufacturers—PHP, Irving Paper, and Catalyst Paper—to defend against the U.S. investigation, but expressly excluded Resolute because of Resolute's then-private and unofficial notice to Canada that it was considering what became this NAFTA Chapter Eleven claim.[232]

150. Resolute paid US$60 million in deposits to the U.S. Customs and Border Protection for potential duties pending final resolution of the Department of Commerce countervailing duty investigation.[233] The Final Determination forcing Resolute to pay was overturned in December 2017 by a panel of the WTO, vindicating Resolute, but the Department of Commerce declined to conform to the WTO decision and, instead, elected to appeal to the WTO Appellate Body while continuing to order the collection of cash deposits at the border on Resolute's exports.

151. On March 20, 2018, Verso (the lone remaining Petitioner in the U.S. Department of Commerce proceeding) entered into a settlement with PHP and Irving Paper to revoke the countervailing duty order and terminate all proceedings.[234] The

[231] Statement of Claim ¶ 70.

[232] Statement of Claim ¶¶ 69-72.

[233] C-244, *United States Department of Commerce Announces Termination of Supercalendered Paper CVD Order*, Resolute Press Release (July 6, 2018).

[234] C-242, Settlement Agreement Between Verso, Port Hawkesbury Paper, and Irving Paper (Mar. 21, 2018).

Department of Commerce ended the investigation in July and eventually refunded all of the deposits with interest, including Resolute's.[235]

152. As a result of the settlement and the subsequent refund of deposits, Resolute no longer claims damages attributable to the "Federal measures[236]" and is no longer pursuing this part of its claims.

ARGUMENT

III. ALL OF THE MEASURES ARE ATTRIBUTABLE TO THE GOVERNMENT OF CANADA

A. The Measures Should Be Taken Together As All Were Indispensable

153. GNS agreed with PWCC on a package of measures that, jointly and severally, were intended to confer upon PHP a competitive advantage in the SC paper market. These measures were intended not only to overcome the energy and transportation disadvantages associated with the location of the Port Hawkesbury mill, but also to place the mill in a competitively advantageous position in relation to other producers in the SC paper market. PWCC considered each and all indispensable.

154. PWCC did not condition its purchase and operation of the mill on assistance that would make it a "reasonably competitive" producer, but rather the "lowest cost producer" in the market. GNS agreed. These conditions were particularly important in a market in secular decline because the government's assurance that PHP

[235] C-246, *Supercalendered Paper from Canada:* Notice of Rescission of Countervailing Duty Administrative Review, 83 Fed. Reg. 32262 (July 12, 2018).

[236] Statement of Defence ¶ 15.

would be the lowest cost producer meant that PHP was expected to outlast all other competitors facing the pressures of falling demand and prices.[237]

155. GNS used multiple tools to meet all of PWCC's demands that, as an ensemble, would make PHP the lowest cost producer: forgivable loans; training and marketing grants; a renegotiated electricity deal with a modified rate; agreement on operation of a biomass plant; acquisition of land; fiber access guarantees; tax breaks; relief from the costs and obligations of renewable energy standards, among others.

156. Many (but not all) of these various benefits have been extended by governments before, in the United States as well as in Canada, to other companies in other industries. But never before, it seems, has any government extended so much, in so many different forms, on such a scale, to a single company, topped by the promise that the ensemble would enable that company to out-compete all competitors.[238] The explicit applicable measurement was not merely profitability, but instead what it would take to make this one company competitively superior to all others.

157. Canada, in its Statement of Defence and arguments during the jurisdictional hearing, has sought to disaggregate these measures in order to dissociate them from the common competitive goals of the province and the domestic investor.[239] The Tribunal, however, should consider the collective effect of these measures, taken as an ensemble, on the treatment that GNS provided to PHP and the resulting harm to Resolute. Prior NAFTA Awards have required consideration of "the record as a whole –

[237] *See, e.g., supra* ¶¶ 38, 46, 54, 70.

[238] *See infra* ¶¶ 274-277.

[239] *See, e.g.*, Hearing on Jurisdiction and Admissibility at 130:18-25 (Aug. 15, 2017) ("I mean, we do have to look at each measure individually.").

not dramatic incidents in isolation – {to} determine whether a breach of international law has occurred."[240]

158. Notwithstanding Canada's disclaimer, the electricity deal crafted for Port Hawkesbury is attributable to GNS and is one of an ensemble of measures employed to vault PHP to the front of the competition in the SC paper market. It was an integral and indispensable component of the bailout package GNS provided to its chosen bidder. Forgivable loans, grants and other measures also were essential government measures in the ensemble, all of which PWCC demanded – and got – to reopen the mill.[241]

159. The Tribunal should reject breaking apart the Port Hawkesbury bailout package and, instead, should treat the entire package as a single ensemble of measures that is attributable to GNS and, therefore, Canada. During the negotiations, PWCC stated repeatedly that, were any element missing, it would walk away.[242]

160. The Tribunal already has chosen not to accept jurisdiction over the hot idle funding as a Measure in this proceeding because it preceded (although only in part) the PWCC acquisition of the mill. The government's payment for it was an extraordinary

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[240] CL-100, *GAMI Investments Inc. (U.S.) v. Mexico*, UNCITRAL, Final Award ¶ 103 (Nov. 15, 2004); *see also* CL-101, *Merrill & Ring Forestry L. P. v. Canada*, ICSID Case No. UNCT/07/1, Award ¶ 144 (Mar. 31, 2010) ("{T}he business of the investor has to be considered as a whole and not necessarily with respect to an individual or separate aspect, particularly if this aspect does not have a stand-alone character.") ("*Merrill & Ring Forestry*"); CL-102, *S.D. Myers, Inc. (U.S.) v. Canada*, UNCITRAL, Partial Award ¶ 161 (Nov. 13, 2000) ("The Tribunal can only characterize CANADA's motivation or intent fairly by examining the record of the evidence as a whole.") ("*S.D. Myers*"); CL-103, W Michael Reisman and Robert D. Sloane, "Indirect Expropriation and its Valuation in the BIT Generation," 74 BYIL 115 at 123 (2003) ("Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. . . Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights.").

[241] *See supra* ¶¶ 74-115.

[242] *See supra* ¶¶ 107-109.

Measure (as were several other Measures). The deal would not have been executed without it. Yet, removal from the case here should make no difference.[243]

161. But for all of the Nova Scotia Measures taken together, PWCC would not have purchased the mill, would not have reopened, and would not have damaged Resolute by adding substantial volume in a declining market, thereby driving down prices. There is no connection between the total value of the Measures, nor of the value of any single Measure, and the harm caused to Resolute. The total value is meaningful only because it made the reopening and market re-entry possible, and because its scale and character was extraordinary and, in its deliberate impact on Resolute, egregious. Damages to Resolute are from the market re-entry of PHP on such favorable terms, enabled by the ensemble of Measures, not from the value or impact of any one of the Measures on its own. Removal of any one Measure may have kept PWCC from completing the deal, but Resolute does not claim that any one on its own had, or could have had, a damaging effect.

B. The Electricity Deal Is, Like The Other Measures, Attributable To GNS

162. The Measures were all taken by GNS. GNS often wanted public credit for them, and that *hubris* should not be denied.[244]

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[243] In a countervailing duty investigation, the value of each alleged subsidy is material because relief is based directly on that value. Here, relief is not related to the quantum of support or market intervention. Instead, it is determined by the damages incurred, which could be greater or less than the cumulative value (when measurable at all) of the market intervention. There may be no price tag on a regulation or statute (as examples), but it may have substantial monetary impact.

[244] *See supra* ¶ 113 (citing C-196, *supra* n.161, Sep. 22, 2012 Nova Scotia Press Release); C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release (GNS press release touting deal); C-186, *Dexter confident $125M deal can turn N.S. mill around*, CBC News (Aug. 20, 2012) ("We've done everything that we can to ensure that this {mill} remains a long-term part of the economic foundation of the province.").

163. The electricity deal should be attributed to GNS as an actionable measure under NAFTA. GNS ensured that the electricity package was agreed upon and implemented so that the transaction with PWCC to open the mill would be consummated.

164. Canada contests whether the electricity deal given to PWCC is a measure attributable to GNS, arguing that it should be excluded from the other measures in the package granted to PHP. Contrary to Canada's position, however, that the LRT was a mere "commercial agreement negotiated between private parties,[245]" GNS staffed the negotiations, [redacted], passed regulations specifically to consummate the deal, and had a direct financial interest in the outcome. Even NSPI recognized that "this is not a 'normal' commercial situation."[246] GNS was invested in the entire negotiations, even sponsoring an expert witness and participating fully and directly in the NSUARB proceeding.

165. The agreement for assistance between GNS and PHP provided for [redacted][247] This explicit requirement—that [redacted]—establishes that the electricity deal was both inseparable from the other measures and attributable to GNS.

[245] Statement of Defence ¶ 75.

[246] C-147, *supra* n.49, PWCC Meeting Notes at page 22 of 165.

[247] C-182, *supra* n.136, [redacted] at CAN000002_0004.

166. The revised power deal (following the denial of the Advanced Tax Ruling ("ATR") on the Tax Structure by CRA) was expressly tied to the $40 million forgivable credit facility, as PHP could earn forgiveness based upon additional tax revenue paid by NSPI to the province.[248] The credit facility was made forgivable as "an alternative way to reduce power costs" once PWCC could not obtain CRA approval for the tax-advantaged structure.[249] Integral as well was PHP's ability to use the $1 billion in tax losses it had acquired to offset investments outside of Nova Scotia.[250]

167. PWCC explained, after CRA refused to grant the ATR, that the "opportunity for greater upside . . . together with the cash flow benefits of the proposed Provincial government arrangements, have convinced us to proceed with our investment if the Board agrees the amended LRR is appropriate."[251]

168. The individual components of the electricity deal were an "integrally connected" set of Measures.[252] GNS took specific and extraordinary actions to ensure that PHP's electricity deal would be approved by the NSUARB, including steps that the NSUARB thought necessary for passage of the LRT: (1) guaranteeing that "neither PWCC nor other ratepayers will be required to pay the {} incremental costs" for additional renewable energy triggered by PHP's return to the power grid; and (2)

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[248] *See supra* ¶ 104.

[249] C-198, *supra* n.152, *Mill deal revived: Still in game but not out of the woods*, The Chronicle Herald (Sep. 23, 2012).

[250] *See supra* ¶ 102-105.

[251] C-197, *supra* n.162, PWCC Amended NSUARB Application, PWCC Evidence at 7; *see also id.* at 8 (explaining mill would not have restarted after ATR denial absent revised financing package from GNS).

[252] C-164, *supra* n.67, LRR Notice of Application ¶ 8.

enacting regulations that required the Biomass Plant (needed by PHP for steam) to run full time, costing Nova Scotia ratepayers an additional $7 million per year.[253]

169. The NSUARB explained: "{i}t became clear during the course of the proceeding that, without some resolution to these two {Renewable Energy Standard – "RES"} issues, the LRT would not likely recover all its incremental costs," which would prevent the NSUARB from approving the electricity deal.[254]

170. At issue with the RES was whether PHP's return to the power grid would require PHP to purchase higher-priced renewable energy to satisfy GNS's regulatory target. PWCC CEO Stern stated that additional renewable energy costs incurred by PHP were "a non-starter" and PHP "cannot leave door open by Regulator that RES will/apply in the future—it has to be never."[255] GNS, in the March 8, 2012 itemized list in the "Project Plan," was tasked with "finaliz{ing} approach to RES capital issue" and "determin{ing} final nature of its form of project support (*e.g.*, requirement for legislation, *etc*.)."[256]

171. This issue still was not resolved by the time of the hearing before the NSUARB. The Chair of the proceedings made clear the importance of resolving the issue during Mr. Stern's July 16, 2012 testimony:

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

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[253] *See supra* ¶¶ 80-85.

[254] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶ 177.

[255] C-147, *supra* n.49, PWCC Meeting Notes at page 91 of 165.

[256] C-147, *supra* n.49, PWCC Meeting Notes at pages 78-80 of 165; *see also* C-157, PWCC/NSPI Tax/Electricity Pricing Structure and Biomass Arrangements, Commercial/Regulatory Project Plan at CAN000121_131 (Mar. 11, 2012) (confirming GNS will sponsor Todd Williams and that GNS "will legislate on certain items not specifically related to electricity pricing.").

MR. STERN: I agree, sir, it would make things easier for all of us.[257]

172. GNS promptly acted to ensure approval of the deal by submitting a July 20, 2012 letter to the NSUARB after the conclusion of the hearing: "The government would like to provide certainty to the Board, with this letter, that the issues raised during the hearing will be addressed." In that letter, GNS ensured that, "neither PWCC nor other ratepayers will be required to" absorb additional costs.[258] [redacted].[259]

173. GNS also acted with respect to the terms for operating a Biomass Plant. PHP needed steam from the Biomass Plant, but required only 24 percent of the Plant's capacity. Nonetheless, the Biomass Plant (which also could produce electricity, albeit at a higher cost than other forms of electricity production) had to operate full-time even when it did not make economic sense for it to do so.[260] Mr. Williams conceded in his July 18, 2012 testimony that running the Biomass Plant full-time just to satisfy PHP's steam requirements "is a problem that needs to be addressed."[261]

174. GNS addressed this issue in its July 20, 2012 letter to the NSUARB, which provided that GNS would amend its Renewable Energy Regulations to ensure that the Biomass Plant, by operation of law, would be deemed as "must run." GNS subsequently amended its Renewable Energy Regulations to satisfy PWCC.

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[257] C-177, *supra* n.76, Excerpts from Transcript of NSUARB Hearing at 159-161 (July 16, 2012).

[258] *See* C-179, *supra* n.79, GNS Letter Regarding PWCC LRT at 1-2.

[259] C-210, *supra* n.170, [redacted] (Sep. 28, 2012).

[260] C-184, *supra* n.62, Aug. 20, 2012 NSUARB Dec. ¶¶ 156, 173-176.

[261] C-177, *supra* n.76, Excerpts from Transcript of NSUARB Hearing at 779-780 (July 18, 2012).

175. Both of these actions, elements of the electricity deal between PWCC and NSPI, were taken by GNS. They both were necessary for passage and approval of the entire electricity deal and, therefore, all the elements of the electricity deal are attributable to GNS.

C. GNS Instructed The Passage Of PHP's Electricity Deal

176. The electricity deal is attributable to GNS also pursuant to Article 8 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* adopted by the International Law Commission (the "ILC Articles"),[262] which provides that "{t}he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." "{T}he three terms 'instructions', 'direction' and 'control' are disjunctive; it is sufficient to establish any

[262] NAFTA Article 1131(1) provides that "{a} Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." The ILC Articles have been widely regarded as "statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which are applicable by analogy to the responsibility of States towards private parties." CL-104, *William Ralph Clayton and others v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶ 307 (Mar. 17, 2015) ("*Bilcon*"); *see also* CL-105, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award ¶ 156 (Nov. 6, 2008). Hence, "{i}n the context of Chapter Eleven, customary international law – as codified in the ILC Articles – therefore operates in a residual way." CL-106, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award ¶ 119 (Nov. 21, 2007) ("*ADM*"); *see also* CL-107, *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility ¶ 76 (Jan. 15, 2008) ("*Corn Products*") ("The rules on State responsibility (of which, it is accepted, the most authoritative statement is to be found in the ILC Articles) are in principle applicable under the NAFTA save to the extent that they are excluded by provisions of the NAFTA as *lex specialis*."); CL-108, *Mesa Power Group LLC v. Canada*, PCA Case No. 2012-17, Award ¶ 345 (Mar. 24, 2016); CL-104, *Bilcon* ¶ 306.

one of them."[263] The instruction or direction by the State can be general instead of specific or overly formal:

> Does the state need to direct the entity to perform the specific act, or will a more general instruction which leaves it open as a method of fulfilling the directive (or perhaps implies a preference for it) suffice? The commentary indicates that the latter position is correct, and that where ambiguous or open-ended instructions are given, acts which are considered incidental to the task in question or conceivably within its expressed ambit may be considered attributable to the state . . . [264]

177. In *Bayindir v. Pakistan*, the wrongful acts of the National Highway Authority ("NHA") were deemed attributable to the State because the State provided clearance and guidance to the NHA. Bayindir, the investor, entered into a contract with the NHA for the purpose of creating a motorway (the M-1 Project), which the NHA terminated. The tribunal found that each allegation made by Bayindir was a direct consequence of the illegal termination of the contract.[265] The NHA (which can sue and be sued in its own name[266]) was an entity controlled by the Government of Pakistan, but the *Bayindir* tribunal found that NHA's termination of the contract was not attributable to

[263] CL-109, James Crawford, *The International Law Commission's Articles on State Responsibilities: Introduction, Text, and Commentaries* at 113, Commentary (7) of Article 8 (Cambridge: Cambridge University Press, 2002); *see also* CL-110, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award ¶ 303 (Mar. 10, 2014).

[264] CL-111, James Crawford, *State Responsibility: The General Part* at 145 (Cambridge University Press 2013).

[265] CL-112, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award ¶ 125 (Aug. 27, 2009) ("*Bayindir*").

[266] CL-112, *Bayindir*, *id.* ¶ 119.

the government under Article 5 of the ILC Articles[267] because the NHA was not acting in the exercise of its governmental authority.[268]

178. Notwithstanding this finding, the tribunal in *Bayindr* held that the termination of the contract still could be attributed to Pakistan under Article 8 of the ILC Articles because the government provided "guidance" and "clearance" to do so.[269] In addition, the government "kept intervening in this Contract" because it "was closely interested in this Contract."[270]

179. The same principles apply here. GNS [redacted] over the electricity deal; passed legislation necessary to enable the electricity deal; took specific steps to address RES and Biomass Plant concerns raised by the NSUARB; and expressly linked the electricity deal to the other GNS support.[271]

180. The importance of these issues to concluding the transaction with PWCC led GNS to retain Mr. Williams as consultant to advocate for the approval of the electricity deal before the NSUARB. He acted at the direction of the GNS Department of Energy and was "intimately involved in the negotiations and design of the LRR."[272]

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[267] Article 5 provides that "{t}he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

[268] CL-112, *Bayindir*, *supra* n.265, ¶ 123.

[269] CL-112, *Bayindir*, *supra* n.265, ¶ 128.

[270] CL-112, *Bayindir*, *supra* n.265, ¶ 126.

[271] C-182, *supra* n.136, [redacted] at CAN000002_0004; *supra* ¶¶ 80-85 (addressing RES and Biomass Plant), 104 (linking loan forgiveness to increased taxes paid by NSPI).

[272] C-151, *supra* n.52, Todd Williams Engagement Agreement § 2.02.

Mr. Williams conducted a number of simulations to advise NSPI and PWCC, showing them how to structure the rate plan to achieve maximum cost savings.[273]

181. Mr. Williams was an emissary of GNS and an indispensable architect of the energy agreement that made possible the resurrection of the PHP mill. GNS and Mr. Williams worked with PWCC and NSPI on the "Commercial/Regulatory Project Plan" for the "Electricity Pricing Structure and Biomass Project Arrangements." They were tasked in this "Project Plan" with: (1) delivering comments regarding "the variable Capex {capital expenditure} figure"; (2) working with NSPI to develop a protocol for delivering energy to the mill; (3) reviewing feedback from the NSPI Board of Directors on the LRT; (4) reviewing computer simulations used to calculate the power rate; (5) participating in the scheduling and process for obtaining regulatory approval for the power rate with the NSUARB; and (6) determining GNS's role in the NSUARB proceeding, including whether to sponsor Mr. Williams as a witness.[274] Mr. Williams, working for GNS, even provided "expert advice" to PHP with respect to fuel and electricity costs.[275]

[273] C-173, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, GNS Responses to Information Requests from Consumer Advocate at 3-5 (NSUARB June 29, 2012).

[274] C-147, *supra* n.49, PWCC Meeting Notes at pages 78-80 of 165; C-205, *supra* n.80, GNS Letter Regarding PWCC Amended LRR; *see also* C-168, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Direct Evidence of Todd Williams at 3, 5 (NSUARB May 2012) (submission of evidence on behalf of GNS in support of LRT).

[275] *See* C-171, *supra* n.70, PWCC Responses to Avon Group at 14, 18.

182. GNS affirmed its commitment to "take a supportive role and sponsor {Mr. Williams}" as an expert witness even though it was "normally hands-off" in dealing with regulatory issues before the NSUARB.[276]

183. GNS had to reopen the mill, and it had to have an electricity agreement in order to reopen. GNS was, therefore, central to the negotiation of an electricity agreement, making the deal, especially for GNS, more than a "commercial agreement negotiated between private parties." GNS explained its purpose and objectives helping negotiate the electricity deal during the NSUARB proceedings:

> In September, 2011 NewPage Port Hawkesbury Corp. (NPPH), the current owner of the mill in Port Hawkesbury, announced that it was insolvent and sought protection from creditors. Since then, the Government of Nova Scotia has been working to have the mill re-open as a going concern. . .
>
> As part of its efforts, the Government has been working closely with both NSPI and PWCC to address the issue of high electricity costs to serve the mill. This application is a crucial step in the process of having the mill resume operations, dealing as it does with a proposal to reduce the mill's cost of electricity through the proposed mechanism.
>
> As part of the Government's involvement in negotiations relating to the re-opening of the mill, the province engaged the services of Todd Williams from Navigant Consulting to help facilitate the discussions between PWCC, represented by Stern Partners and NSPI, and to identify opportunities to operate the facility differently in order to generate savings for the mill and NSPI ratepayers. Mr. Williams's main role was to provide advice and technical support to both parties on matters related to the design of the Load Retention Rate mechanism.
>
> The Board has before it in this application the product of these discussions.
>
> The circumstances surrounding the shutdown of the Port Hawkesbury Mill are unique. As such, all parties have been forced to think anew, and act anew, towards achieving the common goal of having the mill re-start operations, for the benefit of ratepayers and the economy of Nova Scotia.

[276] C-147, *supra* n.49, PWCC Meeting Notes at pages 67 &107 of 165.

> The Government would like to acknowledge NSPI's tireless efforts in working with PWCC to find a workable solution for the design of an acceptable load retention mechanism, and in discussions relating to the future of the mill. . .
>
> The Government of Nova Scotia believes that the arrangement that is before the Board meets the Board's test for approval of a load retention rate, and is in the public interest. As PWCC has noted in its evidence, the electricity arrangements being applied for are both necessary for the planned acquisition of control of NPPH by PWCC, and sufficient for the long-term viability of the mill business. Furthermore, the Government believes that the proposed arrangement results in NSPI's customers being better off with the mill on the system, than if the mill did not resume operations. . .
>
> Mr. Chair, the stakes in this application are high. PWCC has said in its evidence that there is a very high probability that the mill will be shut down if the requested application is not granted. The potential economic impact of the closure of the mill would not only be the loss of jobs at the paper mill, but also jobs of forestry contractors and others in the mill's supply chain.[277]

This story was precisely what PWCC wanted to tell the regulator and what GNS promised to support before the NSUARB.[278]

184. Mr. Williams testified before the NSUARB in July 2012 knowing the importance of restarting the mill to GNS, stating one basis for approving the LRT was that "the resumption of operations at the Mill and associated forestry operations will provide economic benefits that will accrue to Nova Scotia." P-26 at 18. The mill had failed twice before:

> THE CHAIR: So you think we've got it right this time? I should tell you this is the third panel I've chaired where the future of this mill hinged on a rate decision of the Board.
>
> Think we got it right this time?

[277] C-178, *supra* n.78, GNS Opening Statement.

[278] *See supra* ¶ 54.

> MR. WILLIAMS: I think, based on what I've seen and the projections, you've—you would be doing everything that you could from an electricity cost perspective to make it right.[279]

185. Premier Dexter intervened personally in the rate negotiations, stating before the legislature that he had "spoken with the CEO of Nova Scotia Power."[280]

186. Therefore, the Tribunal should find that GNS "instructed," as intended by the ILC Articles, the passage of the electricity deal.

IV. THE NOVA SCOTIA MEASURES VIOLATED CANADA'S OBLIGATIONS UNDER NAFTA ARTICLE 1102(3)

A. The "National Treatment" Standard

187. NAFTA Articles 1102(1) and (2) guarantee "national treatment" for foreign investors and their investments, respectively. Foreign investors are entitled to expect that the NAFTA Party hosting their investments shall accord to them "treatment no less favorable" than the treatment the NAFTA party accords, "in like circumstances," to its own investors (and to the investments of its own investors) "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

188. NAFTA Article 1102(3) specifies that where the treatment in question is accorded by a state or province of a Party, and not by the Party's national government, such treatment must be "no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part."

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[279] C-177, *supra* n.76, Excerpts from Transcript of NSUARB Hearing at 787 (July 18, 2012).

[280] C-162, *supra* n.73, Nova Legislature House of Assembly Debates and Proceedings, Fourth Session, at 1000-01 (Apr. 25, 2012).

189. In order to establish a breach of Article 1102 when provincial treatment is concerned, the foreign investor, according to the Tribunal in *UPS v. Canada,* [281] must establish that:

a. the foreign investor or its investment has been accorded treatment by a province with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;

b. the foreign investor or its investment is in like circumstances with the local investor or investment (*i.e*., the investor or investment of the Party of which the province forms a part) that has been accorded the most favorable treatment by that province; and

c. that province has treated the foreign investor or investment less favorably than it treats the investor or investment accorded the most favorable treatment.

190. This three-part test for Article 1102, formulated by the tribunal in *UPS*, has been endorsed and applied repeatedly in subsequent NAFTA cases.[282] The claimant has the affirmative burden of proving the three elements of the test, but there is no requirement in the test for a demonstration of discriminatory intent.[283] Article 1102 applies even where the measure does not facially discriminate against a foreign investor or investment.[284] Article 1102, therefore, prohibits both *de jure* and *de facto* discrimination.[285]

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[281] CL-113, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits ¶ 83 (May 24, 2007) ("*UPS*").

[282] *See, e.g.*, CL-104, *Bilcon*, *supra* n.262, ¶¶ 717-718; CL-107, *Corn Products*, *supra* n.262, ¶ 117.

[283] *See, e.g.*, CL-104, *Bilcon*, *supra* n.262, ¶¶ 717-719.

[284] CL-114, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 ¶ 43 (Apr. 10, 2001) ("*Pope & Talbot* Phase 2 Award"); *see also* CL-115, *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Award ¶ 183 (Dec. 16, 2002).

[285] *See, e.g.*, CL-107, *Corn Products*, *supra* n.262, ¶ 115; CL-106, *ADM*, *supra* n.262, ¶ 193.

191. The tribunal in *Corn Products Inc. v. United Mexican States*[286] opined that "Article 1102 embodies a principle of fundamental importance, both in international trade law and the international law of investment, that of non-discrimination."[287] That tribunal noted the principle's significance in the GATT/WTO régime,[288] as well as its prominent place in the statement of the objectives of NAFTA in Article 102(1), which include "promot{ing} conditions of fair competition in the free trade area":

> The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to:
>
> > (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
> >
> > (b) promote conditions of fair competition in the free trade area;
> >
> > (c) increase substantially investment opportunities in the territories of the Parties . . . .[289]

B. Canada Breached Its Obligations To Provide Resolute And Its Investments With "National Treatment"

192. Canada, through GNS, breached its obligations to provide Resolute and its investments in Canada with "national treatment" pursuant to NAFTA Article 1102(3). In a North American market comprised of only four other producers, GNS ensured that PHP would be the national champion by making and keeping it the lowest cost producer of SC paper, a commodity sold primarily on the basis of price.

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[286] CL-107, *supra* n.262, *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility ¶ 76 (Jan. 15, 2008) ("*Corn Products*").

[287] CL-107, *Corn Products*, *supra* n.262, ¶ 109.

[288] CL-107, *Corn Products*, *supra* n.262, ¶ 110.

[289] CL-107, *Corn Products*, *supra* n.262, ¶ 113.

193. GNS's actions, attributable to Canada, breached Article 1102(3)'s national treatment clause because: (1) Resolute and its investments were accorded treatment by GNS with respect to the expansion, conduct and operation of those investments; (2) Resolute and its investments are in like circumstances with PWCC and PHP, a Canadian investor and its investment to which GNS accorded its most favorable treatment; and (3) GNS treated Resolute and its investments less favorably than PWCC and PHP. Canada's discrimination in violation of Article 1102(3) undermines NAFTA's core value of fair competition.

1. GNS Accorded "Treatment" To Resolute And Its Investments

194. Resolute and its investments were accorded treatment by GNS with respect to the expansion, conduct and operation of those investments. GNS intended for its Measures, its treatment of the competitors in SC paper, to distort extraterritorially the North American market to PHP's advantage, and the Measures had their intended effect.

195. Canada argued, in its Statement of Defence, that Nova Scotia had "no ability to accord any treatment" to Resolute or its investments because those investments are in Québec, not Nova Scotia.[290] This argument was rejected by the Tribunal in the earlier phase of this arbitration, and it is directly refuted now by the expert testimony of Dr. Seth T. Kaplan.

196. The Tribunal rejected Canada's argument, in its Decision on Jurisdiction and Admissibility, that the effective scope of the national treatment obligation regarding provincial measures was limited to investments located within the particular province in

[290] Statement of Defence ¶ 90.

question. The Tribunal reasoned that, even though Resolute "does not suggest that it was specifically targeted by the Nova Scotia measures, it is open to it to establish on the merits a breach of Article 1102 on some other basis."[291]

197. The Tribunal asked itself four questions in the context of deciding whether the Nova Scotia Measures "related to" Resolute or its investments:

> (a) is it possible that the benefits afforded to Port Hawkesbury might have allowed it to produce at a lower cost than its competitors?; (b) if so, is it possible that prices were reduced as a consequence?; (c) if so, is it possible that in a five-company market competitors might have incurred significant losses as a consequence?; and (d) if so, in a five company market, is a significant business loss in Québec proximate to benefits provided for a company in Nova Scotia?[292]

198. The Tribunal concluded that, on balance, it would answer each of these questions in the affirmative.[293] The Tribunal observed that, while the Nova Scotia Measures might not have solely or specifically targeted Resolute or its investments, the Measures "were intended to put the purchaser {of the mill at Port Hawkesbury} in a favourable position, and in a small and saturated market it was to be expected that competitors would be affected."[294]

199. Dr. Kaplan's expert economics testimony supports fully each of the Tribunal's conclusions. First, he confirms that the very substantial benefits afforded to PHP enabled PHP to produce at a lower cost than its competitors:

> PHP would not have fully re-entered the market in 2013 without the entire benefits package it received from the Nova Scotia Government ("NSG"). I reach this conclusion for several reasons. First, the PH mill was a high-cost mill with large pension liabilities, and generated significant losses

[291] Jurisdictional Decision ¶ 290.

[292] Jurisdictional Decision ¶ 247.

[293] Jurisdictional Decision ¶ 248.

[294] Jurisdictional Decision ¶ 248.

> under previous ownership. With demand for newsprint and SCP in secular decline, there is no reason to expect these cost disadvantages would have disappeared under new ownership. Second, PWCC itself indicated through its statements and actions that the mill would not be profitable without significant reductions in the cost structure of the mill. Third, numerous other potential purchasers, including Resolute, analyzed the mill's operations and determined that it could not operate profitably. Fourth, the purchasers who obtained the mill did so only after receiving a large benefits package that dramatically lowered the mill's costs, including costs associated with keeping the mill running prior to the commencement of operations, the cost of power, the cost of land, the cost of harvesting, the cost of borrowing, training costs, and taxes. The benefits in this package converted the mill from a high cost producer to becoming the low cost producer in North America.[295]

200. Second, Dr. Kaplan's testimony establishes that prices for SC paper were reduced as a consequence of PHP's full re-entry into the market:

> The mill's full re-entry in 2013 added significant capacity to the North American SCP market. Given the conditions of competition for SCP – a North American market; the secular decline in demand for SCP driven by the shift in advertising from print to digital media and declining circulation of magazines; the commodity-like nature of the product; and the need to operate SCP mills at or near full capacity – the significant increase in SCP supply from PHP depressed SCP prices below the levels that would have otherwise occurred.[296]

201. Third, Dr. Kaplan explains the integrated nature of the North American market for SC paper, and how the reduction of prices for SC paper affected the handful of producers:

> As a threshold matter, the SCP market is a North American market and both PHP and Resolute compete in that market. Further, the majority of Canadian production is exported to the U.S. consistent with a single market encompassing both countries. In addition, Canadian and U.S. SCP producers regularly compete for the same customers. Finally, independent analysts view North America as a single SCP market. Thus, the effects of the PHP full re-entry were transmitted to Resolute's SCP operations through changes in North American market prices. …

[295] CWS-Kaplan ¶ 18.

[296] CWS-Kaplan ¶ 17.

> The full re-entry of the Port Hawkesbury SCP mill in 2013 added significant low-cost capacity to the market in direct competition with the other North American SCP producers, including Resolute. PHP has accounted for about 20 to 25 percent of North American SCP capacity since 2013. The sheer magnitude of the capacity increase, the fact that the capacity must be put to use, the secular decline of the SCP industry, and the commodity-like nature of the product reinforce the economic conclusion that the supply increase had large negative effects on PHP's competitors.[297]

202. Finally, Dr. Kaplan's testimony demonstrates that Resolute's SC paper losses in Québec were the direct consequence of the Nova Scotia Measures benefitting PHP:

> {A}ny increase in the supply of PHP's SCP will negatively affect the price of all SCP sold in the North American market consistent with straightforward economic analysis. …
>
> Based on the conditions of competition laid out above, it is easy to understand how PHP's full re-entry had significant negative effects for SCP producers, including Resolute's three SCP mills in Kénogami, Laurentide, and Dolbeau. PHP added over 20 percent to industry capacity that resulted in negative effects on Resolute's prices and shipments. …
>
> As a consequence, and directly attributable to the benefits package that enabled PHP to fully re-enter the market, Resolute suffered lost profits through lower prices and lower shipments than it otherwise would have enjoyed. This is the simplest of economic stories: "but for" the increased SCP supply from PHP, Resolute's SCP operations would have experienced higher prices and shipments, and enjoyed a concomitant increase in profits.[298]

203. Hence, the adverse effect that the Nova Scotia Measures had on Resolute and its investments in the SC paper sector constitutes "treatment" for purposes of Article 1102.

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[297] CWS-Kaplan ¶¶ 35, 41 (footnotes omitted).

[298] CWS-Kaplan ¶¶ 37, 47, 17.

204. NAFTA, like most investment treaties, "do{es} not provide that investors must be given identical treatment; rather, the requirement is to ensure that the treatment is no less favourable. Treatment is more or less favourable where the effect on the investment or investor is to impose advantages or burdens."[299] In determining what constitutes "treatment," NAFTA tribunals have looked beyond the individual impugned measures in order to assess the practical effect of those measures on affected competitors.[300]

205. This approach is illustrated in the NAFTA cases addressing claims against Mexico for measures supporting its domestic cane-sugar industry over producers and importers of high-fructose corn syrup ("HFCS"). HFCS is a low-cost sugar substitute used in soft-drinks.[301] At the time Mexico implemented the various measures, there was a crisis affecting Mexico's sugar industry caused by increased Mexican sugar production, increased availability of HFCS in Mexico, and a trade dispute with the United States.[302] In response to the crisis, Mexico implemented a permit requirement for HFCS imports, steep tariffs on HFCS, and an HFCS tax on bottlers.[303]

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[299] CL-117, Andrew Newcombe and Luís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* at186-87 (Kluwer Law International 2009).

[300] *See* CL-113, *UPS*, *supra* n.281, ¶ 85 (rejecting a narrow interpretation of "treatment" and holding that the "failure to narrow the term 'treatment' in NAFTA definitions is consistent with the practical approach to the issue"); CL-102, *S.D. Myers, Inc.*, *supra* n.240, ¶ 254 ("The word 'treatment' suggests that practical impact is required to produce a breach of Article 1102"); CL-144, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction ¶ 55 (May 16, 2006) {"{T}the ordinary meaning {of 'treatment'} within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty").

[301] CL-118, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶¶ 53, 299 (Sep. 18, 2009) ("*Cargill*").

[302] CL-118, *Cargill*, *id.* ¶¶ 61, 304.

[303] CL-118, *Cargill*, *id.* ¶¶ 2, 100, 208, 297.

206. The claimant in *Corn Products International Inc. v. United Mexican States* challenged the HFCS tax on bottlers under Article 1102. The tribunal, applying the three-part test of Article 1102 to the HFCS tax, held that the HFCS tax on bottlers constituted "treatment" of the HFCS producers:

> {T}he first question is whether the imposition of the HFCS tax on the soft drink bottlers can be regarded as treatment accorded by Mexico to CPI. The Tribunal considers that it should be so regarded. Mexico concedes that the tax was not intended to raise revenue but to assist the Mexican sugar industry at a time of crisis and to respond to what Mexico considered was a US violation of other NAFTA provisions. It is obvious that if either of these objectives was to be achieved, the tax would have to produce an effect upon the HFCS producers and suppliers, of which CPI was the largest (with approximately {XXX} of the HFCS share of the market before the HFCS tax took effect). By contrast, there was no intention to produce any effect upon the bottlers other than of pressuring them to switch from HFCS to sugar as a sweetener. In these circumstances, it would be the triumph of form over substance to hold that the fact that the tax was structured as a tax on the bottlers, rather than the suppliers of sweeteners, precluded it from amounting to treatment of the latter for the purposes of Article 1102.[304]

207. Here, GNS's own public statements demonstrate, similar to the conditions in *Corn Products,* that the objective was to make PHP the lowest-cost producer of SC paper in North America. It is "obvious," just as it was in *Corn Products*, that if that objective were to be achieved, the various forms of support provided to PHP would have to produce an effect upon the other producers of SC paper in North America, including Resolute and its investments in Canada outside of Nova Scotia. That effect amounts to "treatment" under Article 1102.

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[304] CL-107, *Corn Products*, *supra* n.262, ¶ 119; *see also* CL-106, *ADM*, *supra* n.262, ¶ 188 (finding that the HFCS tax impaired the ability of ALMEX to conduct or expand operations in Mexico). In *Cargill*, Mexico did not even contest that the tax resulted in "treatment" of the claimant, and the tribunal proceeded directly to an analysis of the differential treatment of the two groups of producers under Article 1102. *See* CL-118, *Cargill*, *supra* n.301, ¶ 219 ("HFCS suppliers could no longer compete as a result of the HFCS Tax, whereas cane sugar suppliers were not affected").

208. For these reasons, Claimant has shown that Resolute and its investments in the SC paper sector were accorded "treatment" by GNS, and has satisfied the first element of the *UPS* three-part test.

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

209. Article 1102(3) requires a comparison between Resolute and its investments, on the one hand, and the Canadian investor/investments (*i.e*., the investor or investment of the Party of which the Province of Nova Scotia forms a part) that have been accorded the most favorable treatment by GNS, on the other. The most favorable treatment at issue here is the Nova Scotia Measures, which provided PWCC with a promise, and a suite of financial, regulatory, and statutory benefits to purchase and restart the Port Hawkesbury mill out of bankruptcy. The inquiry at this stage of the *UPS* three-part test is whether Resolute and its investments are in "like circumstances" to PWCC and PHP.

210. Resolute and its investments are in "like circumstances" to PWCC and PHP because the Nova Scotia Measures were aimed directly at making PHP the national champion, the lowest-cost producer in North America. Resolute's investments were the competitors in the North American SC paper market that, along with a handful of other producers, the Nova Scotia Measures were designed to impair.[305] Where a government measure aims squarely to discriminate in favor of one competitor in a particular economic or business sector over another, the competitors in that same sector are in "like circumstances" for purposes of Article 1102.

[305] *See supra* ¶ 127.

211. The analysis of whether a claimant is in "like circumstances" to a particular domestic investor is highly fact specific[306] and depends on "the character of the measures under challenge."[307] As the *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* tribunal put it, "all 'circumstances' in which the treatment was accorded are to be taken into account in order to identify the appropriate comparator."[308]

212. The first NAFTA cases to address the national treatment provision established that it was necessary to consider the "legal context" of Article 1102.[309] The tribunal in *Pope & Talbot Inc. v. Government of Canada* found that the "legal context" of Article 1102 included the "trade and investment-liberalizing objectives of NAFTA."[310] The tribunal then stated that, "{i}n evaluating the implications of the legal context, the Tribunal believes that, as a first step, the treatment accorded a foreign owned

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[306] *See* CL-114, *Pope & Talbot* Phase 2 Award, *supra* n.284, ¶ 75 ("It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept of 'like' can have a range of meanings, from 'similar' all the way to 'identical . . . .'"); CL-102, *S.D. Myers, Inc.*, *supra* n.240, ¶ 243 ("The phrase 'like circumstances' is open to a wide variety of interpretations in the abstract and in the context of a particular dispute"); *see also* CL-143, *Canada (Attorney General) v. S.D. Myers Inc*., 3 FC 368, 2004 FC 38, ¶ 74 (Jan. 13, 2004) (dismissing Canada's application to set aside the *SD Myers* award, and stating that "{t}he authorities show that the comparison of 'in like circumstances' is a flexible benchmark, which can be expanded and contracted like an accordion to suit the particular facts of each case").

[307] *See* CL-114, *Pope & Talbot* Phase 2 Award, *supra* n.284, ¶ 76.

[308] CL-106, *supra* n.262, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award ¶ 197 (Nov. 21, 2007) ("*ADM*").

[309] *See* CL-102, *S.D. Myers, Inc.*, *supra* n.240, ¶ 245 ("In considering the meaning of 'like circumstances' under Article 1102 of the NAFTA, it is similarly necessary to keep in mind the overall legal context in which the phrase appears"); *see also* CL-114, *Pope & Talbot* Phase 2 Award, *supra* n.284, ¶ 77.

[310] CL-114, *supra* n.284, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 ¶ 77 (Apr. 10, 2001) ("*Pope & Talbot* Phase 2 Award").

investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector."[311]

213. Unless there is a specific regulatory issue at play, in which case tribunals will also focus on the regulatory context, tribunals focus on whether the foreign investor complaining of discrimination is in the same "sector" as the national investor, and notably the same economic and business sector.[312]

214. This approach was adopted in later cases, including the HFCS tax cases brought against Mexico.[313] The tribunal in the *ADM* case concluded, as did the tribunal in *Corn Products*, that a foreign investor and local investor competing in the same sector are in "like circumstances," reasoning:

> 199. Considering the object of Article 1102 – to ensure that a national measure does not upset the competitive relationship between domestic and foreign investors- other tribunals convened under Chapter Eleven have focused mainly on the competitive relationship between investors in the marketplace.
>
> 200. In *Feldman*, the Tribunal's view was that ". . . the 'universe' of firms in like circumstances are those foreign-owned and domestic-owned firms that are in the same business . . ." (*Feldman*, supra page 55, Award at para. 171). . .

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[311] CL-114, *Pope & Talbot* Phase 2 Award, *supra* n.284, ¶ 78.

[312] *See* CL-102, *S.D. Myers, Inc.*, *supra* n.240, ¶ 250 ("{t}he concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor. The Tribunal takes the view that the word 'sector' has a wide connotation that includes the concepts of 'economic sector' and 'business sector'"); CL-114, *Pope & Talbot* Phase 2 Award, *supra* n.284, ¶ 78 ("as a first step, the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector").

[313] *See, e.g.,* CL-107, *Corn Products*, *supra* n.262, ¶ 120 (concluding that, in relation to the analysis of like circumstances under Article 1102, "{i}t considers that it is necessary to begin with a comparison between domestic and foreign investors operating in the same business or economic sector as the claimant"); CL-106, *ADM*, *supra* n.262, ¶ 198 ("the domestic entities 'in like circumstances' whose treatment should be compared are those firms operating in the same sector, which should be interpreted broadly to include the concepts of 'economic sector' and 'business sector').

> 201. ALMEX and the Mexican sugar industry are in like circumstances. Both are part of the same sector, competing face to face in supplying sweeteners to the soft drink and processed food markets. The competitive relationship between them was confirmed by Mexico's administrative and judicial authorities, when the Government initiated anti-dumping investigations in 1997 on HFCS, based on a petition filed by the Sugar Chamber. In addition, Mexico's Federal Competition Commission has confirmed that HFCS is a substitute of sugar and that both products compete in the same market . . . [314]

215. At the time that GNS implemented Measures in favor of PHP, there were four producers of SC paper in Canada. Resolute was the only American company.[315] Its Canadian SC paper mills (Dolbeau, Kénogami, and the now-defunct Laurentide) were direct competitors of PHP in the very market that GNS chose to distort when it threw its support uniquely behind PHP. Therefore, Resolute and its investments are in "like circumstances" with PHP, as both "are part of the same sector, competing face to face" in supplying SC paper to the North American market.

3. Resolute And Its Investments Received Less Favorable Treatment Than PWCC And PHP

216. The final element of the *UPS* three-part test requires Resolute to demonstrate that GNS treated Resolute or its investments less favorably than it treated PWCC and PHP, which was the Canadian investor/investment to which GNS accorded the most favorable treatment.

217. The *Pope & Talbot* tribunal explained that the right to treatment "no less favourable" in Article 1102 means "the right to treatment equivalent to the best

[314] CL-106, *ADM*, *supra* n.262, ¶¶ 199-201. In *UPS*, Dean Cass, in his separate opinion, opined that competing in the same market was a *prima facie* indication that a claimant was in like circumstances to a comparator. CL-113, *UPS*, *supra* n.281, Separate Statement of Dean Cass ¶ 17.

[315] *See supra* ¶ 127.

treatment accorded to domestic investors or investments in like circumstances."[316] The *ADM* tribunal stated, similarly, that, "Claimants and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances . . . ."[317] Article 1102(3) provides, when provincial governments are involved, that the foreign investor and its investment is entitled to "treatment no less favorable than the most favorable treatment" accorded by the province to a domestic investor or investment in like circumstances.

218. Resolute and its investments are in like circumstances with all of the other SC paper producers in Canada. According to Article 1102(3), the comparative treatment is not the treatment accorded to some competitors (which could be the same as the treatment received by Resolute), but the "most favorable treatment" accorded by GNS to any such competitor, namely the treatment accorded to PWCC and PHP.

219. The most favorable treatment at issue here was accorded through the Nova Scotia Measures, which provided PWCC and PHP with an extraordinary package of financial, regulatory, and statutory benefits in connection with PWCC's purchase of the Port Hawkesbury mill out of bankruptcy. The benefits included:

- a $24 million forgivable loan
- a $40 million forgivable loan
- a $1.5 million productivity grant
- a $1 million marketing grant
- a $38 million Outreach Grant

[316] CL-114, *Pope & Talbot* Phase 2 Award, *supra* n.284, ¶ 42.

[317] CL-106, *ADM*, *supra* n.262, ¶ 205.

- [redacted]
- $20 million to purchase land from the mill
- the ability to use tax losses to offset gains from PWCC investments outside of Nova Scotia
- a 50% reduction on property taxes, from $2.6 million to $1.3 million
- a 20-year forest license that: (1) permitted PHP to harvest fiber for paper and biomass for fuel; and (2) reimbursed PHP for silviculture payments
- indemnification of costs were PWCC not to complete purchase of the mill
- pension liability relief
- statutory rights to run the Biomass Plant 24/7
- regulatory protection from the costs and obligations of renewable energy standards
- the demand and receipt of advantageous electricity terms

220. Resolute's SC paper operations were offered none of these benefits, nor was Resolute when invited to bid on the shuttered Port Hawkesbury mill. The nature of the treatment accorded to Port Hawkesbury – market intervention to make it the "most competitive" producer of SC paper in North America[318] – meant that no other producer could receive equivalent treatment, for only one could be the "most competitive."

221. As explained by Dr. Kaplan:

> "{GNS} made the PHP mill a national champion by conferring upon it benefits that were not presented to other {SC paper} mills, with the intention of choosing this mill to be the low-cost supplier. {GNS} knew that this decision would have consequences for other {SC paper} producers in the industry, including Resolute."[319]

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[318] C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release.

[319] CWS-Kaplan ¶ 33; *see also id.* ¶ 35 ("Thus, the effects of the PHP full re-entry were transmitted to Resolute's {SC paper} operations through changes in North American market prices.").

222. Resolute and its investments were treated less favorably than the most favorable treatment the GNS reserved for a Canadian investor and its investments.

4. The Discrimination Against Resolute's Investments Cannot Be Justified

223. Having established each element of the *UPS* three-part test, Resolute has made out its claim under Article 1102(3). Under the approach to Article 1102 developed in earlier NAFTA cases, the onus now shifts to Canada to attempt to justify the discrimination. However, no such justification is possible in light of the nature and purpose of the Nova Scotia Measures.

224. In *Pope & Talbot*, the tribunal wrote:

> Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.[320]

225. In *William Ralph Clayton and Others v. Canada*, the tribunal wrote:

> The approach taken in *Pope & Talbot*, would seem to provide legally appropriate latitude for host states, even in the absence of an equivalent of Article XX of the GATT, to pursue reasonable and non-discriminatory domestic policy objectives through appropriate measures even when there is an incidental and reasonably unavoidable burden on foreign enterprises. Consistently with the approach taken in the *Feldman* case, however, the present Tribunal is also of the view that once a *prima facie* case is made out under the three-part *UPS* test, the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102. It is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies and circumstances, that an apparently discriminatory measure is in fact compliant with the "national treatment" norm set out in Article 1102.[321]

[320] CL-114, *Pope & Talbot* Phase 2 Award, *supra* n.284, ¶ 78.

[321] CL-104, *supra* n.262, *William Ralph Clayton and others v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶ 723 (Mar. 17, 2015) ("*Bilcon*").

226. Neither of the conditions of the *Pope & Talbot* test is met here. First, the Nova Scotia Measures were unreasonable and had a devastating *de facto* effect on Resolute, a foreign investor in the SC paper sector. Second, the Nova Scotia Measures unduly undermine the investment liberalizing objectives of NAFTA. The Nova Scotia Measures directly violate one of the core objectives of NAFTA, which is to "promote conditions of fair competition in the free trade area."

227. Resolute, an American company incorporated in Delaware, invested in Canada understanding that it would be competing with other companies producing the same merchandise, but not that it would be competing with a provincial government that would decide to confer upon the one mill in its province extreme competitive advantages. GNS converted an operation with no possibility to compete into an advantaged company with an ongoing guarantee to be competitively superior. The discriminatory policy pursued by GNS cannot be justified under NAFTA.

C. The Subsidy Exception In Article 1108(7)(b) Is Unavailable To Canada

228. NAFTA provides an exception to Article 1102 in Article 1108 that Canada invoked in its Statement of Defence. Canada argued that certain of the Nova Scotia Measures fall within the Article 1108(7) exception,[322] which stipulates that Article 1102 does not apply to "subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance." Canada and GNS, however, elsewhere have denied that any and all of the Nova Scotia Measures may be

[322] Statement of Defence ¶ 88. Canada did not present Article 1108(7) as a basis for objections to jurisdiction among the other jurisdictional questions that were decided by the Tribunal in January 2018.

construed as subsidies, nor has Canada in its Statement of Defence identified which among the Nova Scotia Measures it would consider exempt under 1108(7).

229. Canada reported to the World Trade Organization that Nova Scotia provided no subsidies ("nil") for the period between July 14, 2011 and July 19, 2013.[323] Some of the Nova Scotia Measures were the subject of the United States' countervailing duty investigation for *Supercalendered Paper from Canada*, but Canada and GNS vigorously defended themselves and PHP against any and all subsidy allegations, consistent with what Canada reported to the WTO.[324]

230. Canada should be estopped from reversing its position in order to obtain a benefit of the exception in Article 1108(7). Governments are not permitted to contradict themselves in search of defenses.[325] Besides, subsidies require financial contributions,

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[323] Committee on Subsidies and Countervailing Measures - Subsidies - New and full notification pursuant to article XIV:1 of the GATT 1994 and article 25 of the Agreement on Subsidies and Countervailing Measures - Canada, G/SCM/N/253/CAN (July 19, 2013).

[324] Verso, a U.S. producer of SC paper and petitioner in the U.S. countervailing duty proceedings on *Supercalendered from Canada*, reached an agreement with PHP and Irving Paper on March 20, 2018 to dismiss the proceedings in exchange for a settlement payment of US$42 million paid from the refunds of countervailing duty deposits collected until that time by the U.S. Government according to the two companies' pro rata shares of those companies' refunds. *See* C-242, *supra* n.234, Settlement Agreement Between Verso, Port Hawkesbury Paper, and Irving Paper (Mar. 21, 2018). PHP's duty deposit rate was 20.18% *ad valorem*. Irving Paper's rate was 5.87%. Shortly after the agreement was reached, the U.S. Government dismissed the proceedings.

[325] *See, e.g.,* CL-136, *S*eparate Concurring Opinion of Vice-President Alfaro in *Temple of Preah Vihear* (*Cambodia v. Thailand*) at 39, ICJ (June 15, 1962) ("{A} State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation."); CL-137, *Supplier v Republic of X,* Partial Award on Jurisdiction and Admissibility, ICC Case No. 6474, 1992 ("{T}he international concept of 'estoppel' ('*non venire contra factum proprium*') – would seem to suffice to prohibit, under the above-mentioned assumption, the defendant from relying on its own non-recognition by the international community in order to avoid or annul its previous undertaking to arbitrate under the contacts); CL-138, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award ¶ 475 (Oct. 2, 2006) ("Almost all systems of law prevent parties from blowing hot and cold.").

and whereas there are financial consequences in all the Nova Scotia Measures, they do not all involve financial contributions. Even were the subsidies exception available to Canada – and estoppel makes it unavailable here – offending Measures enabling the reopening of the Port Hawkesbury mill and its re-entry into the North American market would remain.

V. THE NOVA SCOTIA MEASURES VIOLATED CANADA'S OBLIGATION UNDER NAFTA ARTICLE 1105(1)

A. The "Minimum Standard Of Treatment"

231. NAFTA Article 1105(1) provides, in pertinent part, that "{e}ach party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Article 1105 serves as a "floor below which treatment of foreign investors must not fall."[326]

232. The NAFTA Free Trade Commission elaborated that "Article 1105(1) prescribes the customary international law minimum standard of treatment," and that, with regard to "fair and equitable treatment," Article 1105(1) does "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment."[327]

233. NAFTA Chapter 11 tribunals have declared that, "In holding that Article 1105(1) refers to customary international law, the FTC {Free Trade Commission} interpretations incorporate current international law, whose content is shaped by the

[326] CL-119, *Attorney General of Canada v. William Ralph Clayton*, 2018 FC 436 ¶ 30 (May 2, 2018).

[327] CL-120, NAFTA Free Trade Commission, North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001).

conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce."[328] Thus, NAFTA tribunals have interpreted the content of the "fair and equitable treatment" standard by drawing guidance from the prior decisions of other NAFTA Chapter 11 arbitration tribunals, other bilateral investment treaty arbitration tribunals, and relevant scholarship.[329]

234. The Free Trade Commission's clarification of Article 1105(1)

> does not require that the concepts of "fair and equitable treatment" and "full protection and security" be ignored, but rather that they be considered as part of the minimum standard of treatment that {Article 1105(1)} prescribes. {A}ny other construction of the Interpretation whereby the fairness elements were treated as having no effect, would be to suggest that the Commission required the word 'including' in Article 1105(1) to be read as excluding." Such an approach has only to be stated to be rejected.[330]

235. Article 31 of the Vienna Convention on the Interpretation of Treaties provides that "{a} treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Thus, "while keeping in mind that the standard set out in the provision is the customary international law minimum standard of treatment, the

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[328] CL-121, *Chemtura Corporation v. Canada*, UNCITRAL, Award ¶ 121 (Aug. 2, 2010) ("*Chemtura*") (citing CL-122, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶ 125 (Oct. 11, 2002) ("*Mondev*")).

[329] *See* CL-121, *Chemtura*, *supra* n.328 ¶ 121 ("The vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments. . . In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law."); *see also* CL-118, *Cargill*, *supra* n.301, ¶¶ 277-279 (providing that arbitral awards outside of NAFTA can be used to demonstrate a rule of customary international law).

[330] CL-116, *Pope & Talbot Inc. v. Canada,* Interim Award at 26 (Jun. 26, 2000); CL-123, *Windstream Energy LLC v. Canada*, UNCITRAL, Award ¶ 359 (Sep. 27, 2016) ("*Windstream*").

Tribunal must also take into account the express language of the provision, which refers to 'fair and equitable treatment' and 'full protection and security.'"[331]

236. Under Article 31 of the Vienna Convention, the "fair and equitable treatment" standard in Article 1105 must be interpreted in its context and in light of the object and purpose of NAFTA. The purpose of NAFTA is to "{e}liminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties" and to "{p}romote conditions of fair competition in the free trade area."[332] Likewise, the NAFTA *Preamble* focuses on fair competition, noting the Parties' resolution to "REDUCE distortions to trade" and "ENSURE a predictable commercial framework for business planning and investment."

B. The "Fair And Equitable Treatment" Standard Under Customary International Law

237. The "fair and equitable treatment" standard under NAFTA Article 1105(1) is an "umbrella concept" that protects investments of investors of another Party from different types of government misconduct that infringe a sense of fairness, equity and reasonableness.[333]

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[331] CL-123, *Windstream*, *supra* n.330, ¶ 356.

[332] NAFTA Article 102; *see also* CL-124, *Cargill*, *Inc. v. Mexico*, C52737, Factum of the Intervenor United States of America ¶¶ 16-18 (Ont. Ct. App., Jan. 31, 2011) (citing Vienna Convention and NAFTA Article 102 as guides for interpretation of "ordinary meaning of NAFTA").

[333] CL-125, *ADF Group Inc. v. United States*, Case No. ARB (AF)/00/1, Post-Hearing Submission of the Respondent United States of America on Article 1105(1) & *Pope & Talbot*, ICSID Case No. ARB(AF)/00/1 at 2-3 (June 27, 2002) ("*ADF* Post-Hearing U.S. Submission") ("The 'international minimum standard' embraced by Article 1105(1) is an umbrella concept incorporating a set of rules that over the centuries have crystalized into customary international law in specific contexts."); *accord* CL-126, *William Ralph Clayton and others v. Canada*, PCA Case No. 2009-04, Article 1128 Submission of the United States ¶ 4 (Apr. 19, 2013); CL-127, *Windstream Energy LLC v. Canada*, UNCITRAL, Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 19 (Jan. 12, 2016) (agreeing with United States that "minimum standard of treatment is an "umbrella concept").

238. The NAFTA Parties have advocated in prior arbitrations for a narrow interpretation of the "fair and equitable treatment" standard based on the 1926 *Neer* decision,[334] but they all have now acknowledged that the "fair and equitable treatment standard" under customary international law (while still subject to a high threshold) can evolve.[335] NAFTA and BIT tribunals agree this standard has evolved since the *Neer* decision:

> {T}he applicable minimum standard of treatment of investors is found in customary international law and … except for cases of safety and due process, today's minimum standard is broader than that defined in the *Neer* case and its progeny. Specifically, this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness.[336]

The *Cargill* tribunal stated that "{t}he Parties and the other two NAFTA State Parties also agree that this standard may evolve and, indeed, may have evolved since 1926."[337]

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[334] *See* CL-128, *L. F. H. Neer and Pauline Neer (United States) v. United Mexican States* (Mexico-United States Claims Commission), Decision of Oct. 15, 1926 ¶ 4 (citing Basset Moore, John, *American Journal of International Law* p. 787 (1910)).

[335] "Canada's position has always been that customary international law can evolve over time." CL-129, *ADF Group Inc. v. United States, Case No. ARB (AF)/00/1*, Second Submission of Canada Pursuant to Article 1128 ¶ 33 (July 19, 2002); CL-125, *ADF* Post-Hearing U.S. Submission, *supra* n.333 at 20 ("As the United States has previously advised this Tribunal, customary international law, including the minimum standard of treatment of aliens, may evolve over time."); CL-104, *Bilcon*, *supra* n.262, ¶ 441.

[336] CL-104, *Bilcon*, *supra* n.262, ¶ 435 (citing CL-101, *Merrill & Ring Forestry*, *supra* n.240, ¶ 213).

[337] CL-101, *Merrill & Ring Forestry*, *supra* n.240 ¶ 213; CL-118, *Cargill*, *supra* n.301, ¶ 272; CL-131, *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award ¶194 (Jan. 26, 2006) ("The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law."); *see also* CL-104, *Bilcon*, *supra* n.262, ¶ 440 ("Many NAFTA tribunals have shared the emerging consensus that the *Neer* standard of indisputably outrageous misconduct is no longer applicable . . . ."); CL-130, *ADF Group Inc. v. United States*, Case No. ARB (AF)/00/1, Award ¶ 179 (Jan. 4, 2003) ("{W}hat customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary

239. The tribunal in *Mondev International Ltd. v. United States* explained that "the status of the individual in international law, and the international protection of foreign investments were far less developed {in the 1920s} than they have since come to be:"[338]

> In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of "fair and equitable treatment" and "full protection and security" of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.[339]

Therefore, "{a} reasonable evolutionary interpretation of Article 1105(1) is consistent both with the *travaux*, with normal principles of interpretation and with the fact that . . . the terms 'fair and equitable treatment' and 'full protection and security' had their origin in bilateral treaties in the post-war period."[340]

240. The tribunal in *Merrill & Ring Forestry L.P. v. Canada* observed in 2010 that "{t}he trend towards liberalization of the {fair and equitable treatment} standard applicable to the treatment of business, trade and investments continued unabated over several decades and has yet not stopped."[341] The tribunal further explained that

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international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.").

[338] CL-122, *supra* n.328, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶ 116 (Oct. 11, 2002) ("*Mondev*").

[339] CL-122, *Mondev*, *supra* n.328, ¶ 116.

[340] CL-122, *Mondev*, *supra* n.328, ¶ 123.

[341] CL-101, *supra* n.240, *Merrill & Ring Forestry L. P. v. Canada*, ICSID Case No. UNCT/07/1, Award ¶¶ 207, 208, 210, 213 (Mar. 31, 2010) ("*Merrill & Ring Forestry*").

> Conduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA Tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention…. A requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*. In the end, the name assigned to the standard does not really matter. What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.[342]

Fair and equitable treatment, therefore, "has emerged to make possible the consideration of inappropriate behavior of a sort, which while difficult to define, may still be regarded as unfair, inequitable or unreasonable. … Specifically, this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness."[343]

241. The types of infringements under the umbrella of Article 1105 include conduct that is egregious, arbitrary, unfair, unjust or idiosyncratic, discriminatory, or exposes a claimant to sectional prejudice.[344]

242. The tribunal in *Cargill v. Mexico* applied these standards to Mexico's measures regarding high-fructose corn syrup ("HFCS") imports. HFCS is a low-cost

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[342] CL-101, *Merrill & Ring Forestry*, *supra* n.240, ¶¶ 207, 208, 210, 213.

[343] CL-101, *Merrill & Ring Forestry*, *supra* n.240, ¶¶ 207, 208, 210, 213.

[344] *See* CL-134, *Waste Management, Inc. v. Mexico*, ICISD Case No. ARB (AF)/00/3, Award ¶ 98 (Apr. 30, 2004) ("*Waste Management II*") (providing a list of prohibited conduct without many of the qualifiers noted by the tribunal in *Glamis*.); *accord* CL-118, *Cargill*, *supra* n.301, ¶¶ 283-284 (citing, with approval, formulation from *Waste Management*); *see also* CL-132, *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (CAFTA-DR), ICSID Case No. ARB/10/23, Award ¶ 450 (Dec. 19, 2013) (holding that prohibited conduct under the international minimum standard of treatment is "conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety."). This listing of cases is exemplary, as others have adopted this standard. *See, e.g.*, CL-133, *CMS Gas Transmission Co. v. Argentina*, ICSID, ARB/01/8, Award ¶ 290 (May 12, 2005).

sugar substitute made by "a few foreign producers" that is used in soft-drinks such as Coca-Cola.[345] Mexico's sugar industry "generates a significant percentage of Mexico's gross domestic product and generates many direct and indirect jobs," but was facing "dire and difficult circumstances . . . at the time of the measures in terms of the crisis gripping its sugar industry and the many citizens employed in that industry" because of increased Mexican sugar production, increased availability of HFCS in Mexico, and a trade dispute with the United States.[346]

243. Mexico, in response to these "dire and difficult circumstances," required HFCS importers to obtain a permit or pay a steep tariff.[347] Mexico also made it difficult for HFCS producers to obtain a permit.[348] Cargill brought claims under NAFTA Chapter 11, including Article 1105, in response to Mexico's measures.

244. The *Cargill, Inc. v. United Mexican States* tribunal explained that Article 1105 is "understood by reference to the customary international law minimum standard of treatment of aliens," which examines

> whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.

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[345] CL-118, *supra* n.301, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶¶ 53, 299 (Sep. 18, 2009) ("*Cargill*").

[346] CL-118, *Cargill*, *supra* n.301, ¶¶ 61, 304.

[347] CL-118, *Cargill*, *supra* n.301, ¶¶ 2, 100, 208. Mexico also enacted a tax but that measure was not at issue in the Tribunal's Article 1105 analysis. *Id.* ¶ 297.

[348] CL-118, *Cargill*, *supra* n.301, ¶ 117; *see also id.* ¶¶ 119-121.

In addition, "the Tribunal emphasizes that although bad faith or willful neglect of duty is not required, the presence of such circumstances will certainly suffice."[349]

245. The *Cargill* tribunal determined that the import requirement breached Article 1105 under these standards. The tribunal found "most determinative the fact that the import permit was put into effect by Mexico with the express intention of damaging Claimant's HFCS investment to the greatest extent possible," which "surpass{ed} the standard of gross misconduct" akin to bad faith. The few HFCS suppliers "were forced to bear the entire burden of" Mexico's actions, which the tribunal described as "willful targeting" and an "intentional{} target{ing}" of Claimant.[350]

246. Other tribunals have ruled similarly, that "bad faith," "willful neglect," and "outrageousness" are not required. The *Pope & Talbot* tribunal found "Article 1105 {} require{s} that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be 'egregious,' 'outrageous' or 'shocking,' or otherwise extraordinary."[351] A later decision of the *Pope & Talbot* tribunal also held that a violation of Article 1105 does not mandate "that every reasonable and impartial person be dissatisfied" with the conduct at issue, but "permits a bit less injury to the psyche of the observer, who need no longer be outraged, but only surprised by what the government has done."[352] And the *Chemtura Corporation v. Canada* tribunal

[349] CL-118, *Cargill*, *supra* n.301, ¶ 296.

[350] CL-118, *Cargill*, *supra* n.301, ¶¶ 299-300, 303.

[351] CL-114, *Pope & Talbot* Phase 2 Award, *supra* n.284, ¶ 118.

[352] CL-135, *Pope & Talbot Inc. v. Canada*, Award in Respect of Damages ¶ 64 (May 31, 2002).

stated, "{t}his is not to say that a violation must be outrageous in order to breach such {a} standard" under Article 1105(1).[353]

247. "NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous," as the NAFTA Parties have argued in previous arbitrations. "The contemporary minimum international standard involves a more significant measure of protection."[354]

248. The types of conduct that would infringe the "fair and equitable treatment" standard must be considered in relation to the circumstances at issue in a particular claim for breach of Article 1105(1). "Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[355] Ultimately, "{a} judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."[356]

C. Canada Breached Its Obligations To Provide Resolute's Investments With "Fair and Equitable Treatment"

249. Canada, through GNS, breached its obligations to provide Resolute's SC paper investments in Canada with fair and equitable treatment pursuant to NAFTA Article 1105. In a North American market comprised of only four other producers, GNS ensured that PHP would be the national champion by making and keeping it the lowest

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[353] CL-121, *supra* n.328, *Chemtura Corporation v. Canada*, UNCITRAL, Award ¶ 215 (Aug. 2, 2010) ("*Chemtura*").

[354] CL-104, *Bilcon*, *supra* n.262, ¶ 433 (Mar. 17, 2015); CL-123, *Windstream*, *supra* n.330, ¶ 379 (finding a breach of 1105(1) for conduct that was "unfair and inequitable within the meaning of 1105(1)" without qualifying the conduct as "egregious" or "outrageous.").

[355] CL-134, *Waste Management II*, *supra* n.344, ¶ 99.

[356] CL-122, *Mondev*, *supra* n.328, ¶ 118; *see also* CL-123, *Windstream*, *supra* n.330, ¶ ¶¶ 358-362 (Sep. 27, 2016) ("In other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts.").

cost producer of SC paper, a commodity sold primarily on the basis of price. These actions were unfair, unjust, and demonstrated a sectional prejudice to put PHP in a market leading position above Resolute.

250. A breach of the "fair and equitable treatment" standard does not require "egregious" conduct as conventionally understood, but the government conduct in this case nonetheless was egregious. GNS resuscitated a bankrupt business in a dying industry with the express intention of out-competing, with every possible government-guaranteed advantage, private enterprises trying to survive without such government intervention in the marketplace.

251. PWCC demanded repeatedly that the Port Hawkesbury mill be the lowest-cost producer of SC paper, and GNS agreed to make it the leader in the market. For example, on February 9, 2012, PWCC CEO Stern stated that PWCC"s "story to regulator" would be that "Stern can turn this into a profitable mill" if it is the "lowest cost SC mill in North America."[357] On [redacted] [358] [redacted] [359] PWCC's [redacted] [360]

[357] C-147, *supra* n.49, PWCC Meeting Notes at page 135 of 165.

[358] C-159, [redacted] at CAN000121_0043 [redacted].

[359] C-159, *id.* at CAN000121_0059.

[360] C-167, [redacted].

252. GNS committed to "helping position" PHP to "become a leader in producing supercalendered paper" in North America. GNS stated that its goal was "to help the mill become the lowest cost and most competitive producer of super calendar {sic} paper."[361]

253. To make sure the previously shuttered and bankrupt mill could become the lowest cost producer and national champion, PHP demanded and received an ensemble of benefits and concessions from GNS, all of which PWCC insisted were necessary for PHP to restart the mill. These benefits and concessions include:

- a $24 million forgivable loan
- a $40 million forgivable loan
- a $1.5 million productivity grant
- a $1 million marketing grant
- a $38 million Outreach Grant
- [redacted]
- $20 million to purchase land from the mill
- the ability to use tax losses to offset gains from PWCC investments outside of Nova Scotia
- a 20-year forest license that: (1) permitted PHP to harvest fiber for paper and biomass for fuel; and (2) reimbursed PHP for silviculture payments
- indemnification of costs were PWCC not to complete purchase of the mill
- pension liability relief
- statutory rights to run the Biomass Plant 24/7
- regulatory protection from environmental standards

[361] C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release.

- the demand and receipt of advantageous electricity terms

In return, PWCC paid $33 million (or, net, $13 million) for assets it valued at $[redacted].

254. PWCC demanded advantageous electricity terms as part of its ensemble of benefits to restart the mill. The electricity deal it received was an "integrally connected" set of its own Measures, and PHP insisted that it had to receive all of the electricity benefits to restart the mill.[362] Under the approved 7.5-year electricity deal, PHP paid only $2/MWh in fixed costs.[363]

255. In addition, GNS acted to ensure that PHP would "never" have to pay for any additional costs for renewable energy occasioned by PHP's addition to the Nova Scotia electricity grid, which was a specific condition demanded by Mr. Stern.[364] GNS passed regulations to cover the additional, excess costs of running the Port Hawkesbury Biomass Plant fulltime. PHP needed the Biomass Plant to run, for the mill's steam generation, at only 24 percent of its operating capacity; to meet PHP's needs, GNS had to pick up the cost of the other 76 percent.[365]

256. When Canada Revenue Agency denied the tax structure proposed to pay for PHP's electricity, GNS sweetened the deal by converting the $40 million loan from an [redacted] facility into a forgivable one. GNS finalized the deal by allowing PHP to use NewPage-Port Hawkesbury's $1 billion in tax losses to offset gains on PWCC

[362] C-164, *supra* n.67, LRR Notice of Application ¶ 8.

[363] *Supra* ¶¶ 86, 106.

[364] C-147, *supra* n.49, PWCC Meeting Notes at page 91 of 165.

[365] *Supra* ¶¶ 80-85 (addressing both Renewable Energy and Biomass Plant issues).

assets outside Nova Scotia, further evidence of a GNS awareness that its policies could have (and sometimes were intended to have) extraterritorial effects.[366]

257. PWCC believed that the Port Hawkesbury mill would be shut down permanently if it did not receive the bailout package,[367] and would not have purchased the mill absent each and every one of these benefits. PWCC answered "No" when asked whether "PWCC would have agreed to the acquisition of NPPH and the restart of the Mill absent a favourable ATR if the Provincial government had not subsequently revisited its support package."[368]

258. PWCC explained why it demanded all of these conditions to purchase the mill: "PWCC's strategy of becoming the lowest cost operator in North America implicitly means the discount is greater than the level necessary merely to operate competitively."[369] GNS's accession to PWCC's demands thus meant PWCC would be the national champion.

259. GNS's actions were even more problematic because the Port Hawkesbury mill was a failed business. Despite having the continent's best SC paper machine, PHP's cost structure—high fiber, freight, and electricity prices—caused it to lose $50 million in the year before seeking creditor protection, with [redacted] in 2009, [redacted] in 2010, and [redacted] from January-August 2011.[370]

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[366] *Supra* ¶¶ 104-105 (addressing $40 million forgivable loan and tax loss harvesting).

[367] *See* C-165, *supra* n.68, PWCC Pre-Filed Evidence at 15-15, 18.

[368] C-197, *supra* n.162, PWCC Amended NSUARB Application, PWCC Evidence at 8.

[369] C-174, *supra* n.64, PWCC Rebuttal Evidence at 24.

[370] C-112, *supra* n.8, Suther Aff. ¶ 6; C-163, *supra* n.58, [redacted] at CAN000004_0035.

260. GNS knew the mill, operating in an industry in secular decline, had "problem{s}" with its costs.[371] GNS, nonetheless, was committed to restarting the mill no matter what.[372]

261. GNS also knew that only the lowest cost producers of SC paper would survive. [redacted] stated that [redacted][373] GNS's August 20, 2012 Press Release also stated that the province's goal was "to help the mill become the lowest cost and most competitive producer of super calendar {sic} paper" and that "Pacific West is well-positioned to be the most competitive and best supercalender {sic} paper mill in the world."[374]

262. Resolute, therefore, was not facing ordinary competition but, rather, a government guarantee for a competitor where "only the very lowest cost operators will have a chance to succeed."[375]

263. GNS's actions were unfair and unjust and denied Resolute fair and equitable treatment.

264. GNS knew that the mill produced SC paper for a North American market, not a Nova Scotia market.[376] GNS also knew that the package of Measures it was providing was intended to give PHP a permanent competitive advantage over every

[371] C-123, *supra* n.37, Nov. 2, 2011 Nova Scotia Legislature Proceedings at 3009.

[372] *See* C-128, *supra* n.41, Nov. 10, 2011 Nova Scotia Legislature Proceedings at 3467.

[373] C-158, *supra* n.85, [redacted] at CAN0000087_0004.

[374] C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release.

[375] C-174, *supra* n.64, PWCC Rebuttal Evidence at 24.

[376] *See* CWS-Kaplan ¶¶ 17, 35.

other producer in a market that extended beyond the GNS borders.[377] GNS was making PHP the lowest cost producer in the SC paper market. All of the competing producers were invested, operating, and doing business outside of Nova Scotia, including PHP.

265. Through the ensemble of Measures it provided and continues to provide, GNS unfairly and unjustly placed PHP at the head of the SC paper market, knowing that the mill otherwise could not exist at all, let alone compete fairly against Resolute in the SC paper market. As PWCC stated, PHP needed benefits to ensure that it could operate "greater than the level necessary merely to operate competitively."[378]

266. GNS also knew, or should have known, that the production capacity added to the market would have an adverse competitive impact on Resolute. As stated by Dr. Kaplan, "{t}his is the simplest of economic stories: 'but for' the increased {SC paper} supply from PHP, Resolute's {SC paper} operations would have experienced higher prices and shipments, and enjoyed a concomitant increase in profits."[379]

267. Knowing that it was intervening in a North American market with limited participants (including Resolute) involving a commodity-like product and facing overcapacity and secular decline,[380] GNS knew or should have known that an

[377] *See* CWS-Kaplan ¶¶ 30-32 ("{GNS} officials at the highest levels knew in July 2012 that PWCC planned to restart the mill as the low-cost producer. {GNS} officials publicly touted the PH mill as being the low-cost producer in North America during the negotiation process. … [redacted]).

[378] C-174, *supra* n.64, PWCC Rebuttal Evidence at 24.

[379] CWS-Kaplan ¶ 17; *see also id.* ¶ 37 ("In conclusion, any increase in the supply of PHP's SCP will negatively affect the price of all SCP sold in the North American market consistent with straightforward economic analysis.").

[380] CWS-Kaplan ¶¶ 34-37.

intervention that would confer a significant competitive advantage on its own, chosen national champion, would be harmful to Resolute.[381] "{GNS} made the PHP mill a national champion by conferring upon it benefits that were not presented to other {SC paper} mills, with the intention of choosing this mill to be the low-cost supplier. {GNS} knew that this decision would have consequences for other {SC paper} producers in the industry, including Resolute."[382]

268. Absent the GNS Measures, the mill would have remained closed and been liquidated. GNS knowingly gave PHP the means to harm Resolute when it provided a package of Measures that would not merely help PHP emerge from the CCAA proceedings, but would position PHP, continually, as the lowest cost producer in the SC paper market.[383]

[381] CWS-Kaplan ¶ 42 ("Basic economics instructs that market prices are set at the intersection of supply and demand. An increase in supply will lower market prices and increase equilibrium quantities.").

[382] CWS-Kaplan ¶ 33; *see also id.* ¶ 35 ("Thus, the effects of the PHP large scale re-entry reopening were transmitted to Resolute's {SC paper} operations through changes in North American market prices.").

[383] Canada may not escape liability by shifting blame from GNS to PHP for the competitive harm to Resolute. Professor Thomas Wälde has written that the full protection and security obligation, for example, "would not only be breached by active and abusive exercise of State powers but also by the omission of the State to intervene where it had the power and duty to do so to protect the normal ability of the investor's business to function. . . a duty, enforceable by investment arbitration, to use the powers of government to ensure the foreign investment can function properly on a level playing field, unhindered and not harassed by the political and economic domestic powers that be." *See* CL-140, Christoph Schreuer, "Full Protection and Security," *Journal of International Dispute Settlement* Vol. 1, Issue 1 at 7 (Aug. 1, 2010). NAFTA Chapter 11 tribunals have not extended the "full protection and security obligation" beyond the provision of police power, but there appears to be a customary international law principle to suggest that a state should "take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury." CL-139, *El Paso Energy International Company v. Argentina Republic*, ICSID Case No. ARB/03/15, Award ¶ 523 (Oct. 31, 2011).

269. Resolute even notified the Canadian Ambassador to the United States and the Canadian Minister for International Trade about the harm that would be caused by the elevation of Port Hawkesbury to a national champion in the market by means of the GNS package. GNS, nevertheless, persisted with its support for the Port Hawkesbury mill and continues to do so today to the detriment of Resolute's investments.[384]

270. GNS's provision of Me*asures to resuscitate PHP and ensure it would be the lowest cost producer was arbitrary, idiosyncratic, and an act of sectional prejudice in breach of the fair and equitable treatment standard.[385] The decision to intervene in an extraterritorial SC paper market was based peculiarly on GNS's own will and preference to place a Nova Scotia company at the head of that market to the benefit of the province and the detriment of the non-provincial market participants. The Port Hawkesbury mill failed as a company because it was uncompetitive, with high energy and transportation costs. NewPage incurred over $86 million in losses in less than three years (from 2009 through August 2011).[386] Resolute determined the mill could not be profitable, and no

[384] *Supra* ¶¶ 146-147; *see also* Statement of Claim ¶¶ 77-82 (addressing interactions with Canadian Ambassador and Canadian support for PHP).

[385] Patrick Dumberry notes that Black's Law Dictionary defines "arbitrary" as conduct "founded on prejudice or preference rather than on reason or fact." *See* CL-141, Chapter 3: The Substantive Content of Article 1105, in Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* at 182, (Kluwer Law International 2013) (citing *Black's Law Dictionary* (8th ed. West Group 2004)); *see also* CL-142, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award ¶ 184 (Aug. 27, 2008) ("Unreasonable or arbitrary measures - as they are sometimes referred to in other investment instruments - are those which are not founded in reason or fact but on caprice, prejudice or personal preference.").

[386] *See* CWS-Kaplan ¶¶ 19, 21, 23 ("The inability of the mill to operate profitably was previously demonstrated…. PH closed because NewPage could no longer afford to keep it operating with spiraling and uncontrollable losses. … Even {GNS} recognized that the mill was a high cost producer and that it had to help solve the mill's inherent cost disadvantages for it to restart.").

company wanted to bid for the mill as a going concern without the promise of substantial government support.

271. GNS's intervention in the SC paper commercial marketplace altered the competitive field and made PHP the winner for reasons that inherently were not founded in competitive market principles[387] respected by free market economies in NAFTA and the rest of the world. GNS wanted the mill to be operational despite its non-profitability. Canada's Statement of Defence does not explain the peculiar reasons why the Port Hawkesbury mill was not allowed to be sold for scrap and dissolved, following in the path of the thousands and tens of thousands of commercially unviable companies in North America. Resolute, when making its investment in its own SC paper operations, never considered the prospect of competing with a failed mill whose cost-structure and operational requirements were altered fundamentally through massive government intervention.

272. GNS acted with sectional prejudice by subverting the competition of the SC paper market in order to put its own sectional interests ahead of all others. Governments may protect their own interests, but they are not permitted to damage intentionally other market participants residing outside their borders. Here, GNS inflicted such damage, favoring its own provincial interests when GNS altered the SC paper market and made an untenable mill the national champion of North American SC paper.[388]

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[387] CWS-Kaplan ¶ 50 ("The PHP mill would not have opened were it not for the entire benefits package the NSG gave PWCC."); *see also id.* ¶¶ 19, 21, 23 (explaining unprofitability of mill absent government ensemble of measures).

[388] *See, e.g.*, CWS-Kaplan ¶ 33; C-149, *supra* n.56, *Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready*, Nova Scotia Press Release (Jan. 4, 2012).

273. Just as it was an Article 1105 breach for Mexico to require foreign investors to "bear the entire burden" of the government's trade policy toward the United States, it is a breach for GNS, in a declining market, with overcapacity and limited participants, to force Resolute, a foreign investor, to bear the burdens of an otherwise commercially unviable mill in the SC paper market.[389]

274. The customary practice among NAFTA Parties, and in market-oriented economies generally, is for companies that are not commercially viable to be allowed to fail. Every year, tens of thousands of companies in North America fail commercially and are liquidated through bankruptcy proceedings. For example, *The Bankruptcy Yearbook, Almanac & Directory* provides the following figures for the number of companies in Canada and the United States that were liquidated through bankruptcy proceedings[390]:

Year	Total Bankruptcies in Canada (equivalent of Chapter 7 in the United States)	Total Chapter 7 Bankruptcies in the United States
2017	2,700	14,157
2016	2,884	15,033
2015	3,089	15,917
2014	3,116	18,184
2013	3,187	22,334
2012	3,236	27,274
2011	3,643	33,698
2010	4,072	39,485

275. Resuscitating a shuttered and bankrupt operation, bankrolling it at government expense, enabling it with special legislation into a competitively superior

[389] *See* CL-118, *Cargill*, *supra* n.301, ¶ 300.

[390] C-241, Excerpts from *The* 2018 *Bankruptcy Yearbook, Almanac & Directory*, New Generation Research Inc. (28th ed. 2018). Excerpts from earlier editions are also included.

position over others in the same industry – the Port Hawkesbury story – appears to be unique in the annals of the thousands of recent bankruptcies in North America.

276. Claimant has reviewed public CCAA filings in search of instances where a government converted a dying business into a national champion, according to the following criteria:

> 1. The government funded the debtor to idle a mill, plant, or facility, avoiding liquidation or facilitating a going-concern sale.[391]
>
> 2. The government funded the restart of the mill, plant or facility.[392]
>
> 3. The government provided financing upon exit from the CCAA proceedings to recapitalize the company. [393]
>
> 4. The government took extraordinary measures to assure the competitiveness of the emergent company.[394]

277. There appear to be examples of government assistance meeting one or two of these criteria, but Claimant has not been able to find any example in the public CCAA filings comparable to what was done for PHP. The GNS intervention to resurrect a company from the dead and elevate it above the living appears to be so extraordinary as to be unique.

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[391] GNS stated that it would pay to keep the "mill in hot idle with a supply chain intact" when NewPage-Port Hawkesbury began CCAA proceedings. C-116, *supra* n.15, Sep. 9, 2011 Nova Scotia Press Release.

[392] GNS provided tens of millions of dollars in loans for increased productivity, worker training and marketing. *See, e.g.*, C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release.

[393] GNS provided tens of millions of dollars in forgivable loans for working capital. *See, e.g.*, C-183, *supra* n.9, Aug. 20, 2012 Nova Scotia Press Release.

[394] GNS forgives loans and electricity rates and benefits continue to make PHP the lowest cost producer. *See supra* ¶¶ 92, 104, 105; C-245, In the Matter of An Application by PHP for approval of its Load Retention Tariff Pricing Mechanism, Decision (NSUARB July 9, 2018) (continuing with fixed cost payment structure).

278. PHP has no right to be the lowest cost producer when its inherently higher costs were the reason for it being shuttered. GNS disregarded the rules of market competition that are fundamental to the existence of NAFTA and created its own market champion. PHP was elevated not by the nature of its competitiveness in the market, but out of GNS's own pleasure and prejudice for favoring one of its own. GNS picked a winner in the market, leaving Resolute, a foreign investor, without a fair basis upon which to compete. GNS went to extraordinary lengths to ensure PHP would be the leading producer in the market, at Resolute's expense, in "such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[395]

279. The GNS conduct was egregious, far beyond what might be necessary or advisable to meet domestic policy goals, and continues to be in violation of the minimum standard of treatment under Article 1105.

VI. RESOLUTE INCURRED DAMAGES AS A CONSEQUENCE OF THE VIOLATIONS OF ARTICLES 1102 AND 1105

A. The Breaches Caused Harm To Resolute

280. Dr. Kaplan analyzed whether: (1) the GNS benefits package caused PHP's full re-entry in the market in 2013; and (2) whether PHP's full re-entry in the market in 2013 caused Resolute's damages.[396]

[395] CL-102, *S.D. Myers, Inc.*, *supra* n.240, ¶ 263.

[396] CWS-Kaplan ¶ 14.

1. Dr. Kaplan Determined PHP Would Not Have Restarted Without GNS's Ensemble of Benefits

281. Dr. Kaplan first concluded that "{t}he Port Hawkesbury SCP mill was restarted only because it received a benefits package that assured the new owner it would be the "the lowest cost producer of Super Calendered {sic} paper in the world."[397] Dr. Kaplan explained why:

> First, the PH mill was a high-cost mill with large pension liabilities, and generated significant losses under previous ownership. With demand for newsprint and SCP in secular decline, there is no reason to expect these cost disadvantages would have disappeared under new ownership. Second, PWCC itself indicated through its statements and actions that the mill would not be profitable without significant reductions in the cost structure of the mill. Third, numerous other potential purchasers, including Resolute, analyzed the mill's operations and determined that it could not operate profitably. Fourth, the purchasers who obtained the mill did so only after receiving a large benefits package that dramatically lowered the mill's costs, including costs associated with keeping the mill running prior to the commencement of operations, the cost of power, the cost of land, the cost of harvesting, the cost of borrowing, training costs, and taxes. The benefits in this package converted the mill from a high cost producer to becoming the low cost producer in North America. Absent these significant financial benefits, PWCC would not have invested $33 million to purchase the mill.[398]

282. "Even the NSG recognized that the mill was a high cost producer and that it had to help solve the mill's inherent cost disadvantages for it to restart."[399] So too did PWCC: [redacted]"[400]

In comparison, NewPage-Port Hawkesbury was losing millions each month and

[397] CWS-Kaplan ¶ 17.

[398] CWS-Kaplan ¶ 18.

[399] CWS-Kaplan ¶ 23.

[400] CWS-Kaplan ¶ 25.

NewPage "could no longer afford to keep it operating with spiraling and uncontrollable losses."[401]

283. According to Dr. Kaplan, "{t}he substantial benefits conferred on PH were intended to convert the mill into the low cost producer in the North American market in order to ensure its future viability in the face of falling demand for SCP."[402] [redacted][403]

2. Dr. Kaplan Found That PHP's Full Reentry Caused Resolute's Damages

284. Dr. Kaplan next determined that PHP's full reentry into the market in 2013 caused Resolute's damages:

> The full re-entry of the PH mill introduced 360,000 MT of SCP capacity to a declining market with moderately elastic demand. This significant addition of supply was not due to, or met with, a significant increase in demand, thus, prices for SCP fell. This fall in prices caused higher-cost mills to exit the market and led to profit declines for the mills that remained in the market. …
>
> {GNS's} actions impacted adversely the profitability of Resolute's three mills, Kénogami, Dolbeau, and Laurentide, as the NSG assistance offset the costs for a direct competitor.[404]

[401] CWS-Kaplan ¶¶ 19-21.

[402] CWS-Kaplan ¶ 29.

[403] CWS-Kaplan ¶ 30.

[404] CWS-Kaplan ¶¶ 50-51.

285. Dr. Kaplan examined initially the SC paper market generally. It is a North American market that is in secular decline involving "commodity-like products that are highly substitutable and sold primarily on the basis of price."[405] In addition, SC paper mills must operate at or near full capacity "to maximize efficiency."[406]

286. Based upon these factors, "{t}he conditions of competition distinctive to the SCP industry made Resolute's SCP operations particularly vulnerable to economic harms by the large scale market re-entry of the Port Hawkesbury mill."[407] As Dr. Kaplan explained:

> The supply conditions described above result in a stepped industry supply curve. The lowest cost mill will produce at its capacity once price exceeds its variable cost or, alternatively, remain idled (or shuttered) at prices below variable cost. The second most efficient firm will then begin production once price exceeds its higher variable cost. Likewise, with each successive mill as ranked by efficiency. This cost structure results in a supply curve where production is stepped rather than continuous – as prices increase, each mill supplies its full capacity once its variable cost is reached.[408]

287. As a result of these conditions, "it is easy to understand how PHP's full re-entry had significant negative effects for SCP producers, including Resolute's three SCP mills in Kénogami, Laurentide, and Dolbeau. PHP added over 20 percent to industry capacity in 2013 that resulted in negative effects on Resolute's prices and shipments."[409] Dr. Kaplan concluded that "{a}fter PHP's full re-entry with costs lowered through the {GNS}'s benefits package measures, it was able to ramp up to produce high

[405] CWS-Kaplan ¶¶ 35-37.

[406] CWS-Kaplan ¶ 38.

[407] CWS-Kaplan ¶ 34.

[408] CWS-Kaplan ¶ 39.

[409] CWS-Kaplan ¶ 47.

quality SCP at artificially low costs. These downward price pressures resulted in lost profits for Resolute."[410]

288. The United States International Trade Commission ("ITC") made the same basic findings as Dr. Kaplan with respect to PHP's impact on the market and consequent damage to competitors. The ITC found that PHP added significant volume to a declining market;[411] that the additional volume necessarily drove down prices;[412] that the lower prices injured PHP's competitors.[413]

B. Resolute Is Entitled Under NAFTA Chapter 11 And International Law To Recover For The Damages Incurred

289. NAFTA Articles 1116 and 1117 permit an investor to make a claim for damages or losses incurred as a result of a Party's breaches of its obligations under Chapter 11. Article 1135 authorizes the Tribunal to make a final award of monetary damages and any applicable interest, plus costs, in accordance with the applicable arbitration rules.

290. NAFTA's Chapter 11 does "not identif{y} any particular methodology for the assessment of compensation in cases not involving expropriation," so the tribunal in *S.D. Myers, Inc. (U.S.) v. Canada* "consider{ed} that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the

[410] CWS-Kaplan ¶ 49.

[411] C-237, *supra* n.198, *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination Commission Opinion at 18 n.3 (U.S.I.T.C. Dec. 2015) ("Vice Chairman Pinkert finds that the increase in volume and market share of imports from Canada during the POI is largely attributable to the acquisition of the Port Hawkesbury, Nova Scotia mill by Pacific West Corp. and its reopening as Port Hawkesbury Paper in October 2012.").

[412] C-237, *supra* n.198, *In re Supercalendered Paper from Canada*, Final Determination Commission Opinion at 25.

[413] C-237, *supra* n.198, *In re Supercalendered Paper from Canada*, Final Determination Commission Opinion at 25.

specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA."[414]

291. The *Chorzow Factory (Indemnity)* case teaches that "reparation {for an illegal act} 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."[415] NAFTA Chapter 11 tribunals, like many international law tribunals, have applied this principle,[416] which is also reflected in Article 31 of the International Law Commission's *Articles on State Responsibility*.[417]

292. The quantum of damages must be proven with reasonable certainty. The tribunal in *Cargill*, for example, determined that the appropriate measure of damages was the "present value of the net lost cash flows," and found that making projections to do so was not "so unusual or difficult that employment of the method is inappropriate in this proceeding."[418]

C. Resolute Incurred Measurable Damages

293. Prof. Hausman analyzed Resolute's expected sales and compared them to Resolute's actual sales for 2013-2017. He calculated that Resolute lost between US$103 million to US$109 million in profits (including pre-award interest) as a result of

[414] CL-102, *supra* n.240, *S.D. Myers, Inc. (U.S.) v. Canada*, UNCITRAL, Partial Award ¶ 309 (Nov. 13, 2000) ("*S.D. Myers*").

[415] CL-102, *S.D. Myers*, *supra* n.240, ¶ 309.

[416] *See, e.g.,* CL-118, *Cargill*, *supra* n.301, n. 145 (citing *SD Myers* for the same);

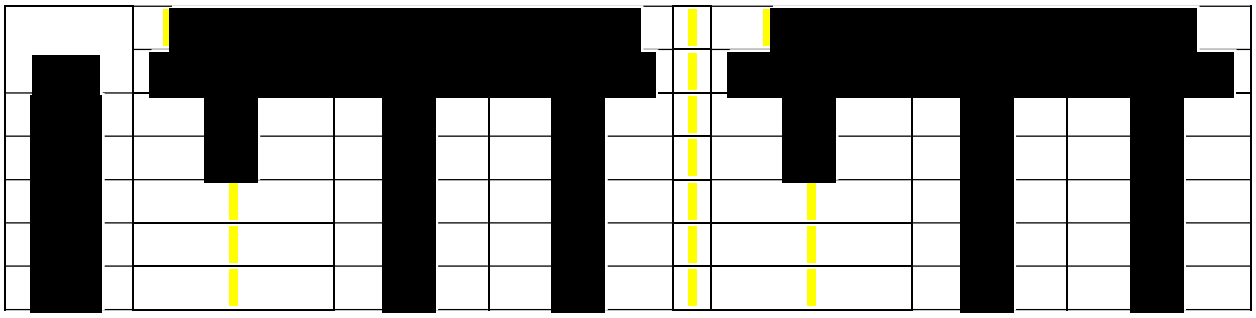
[417] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its fifty-third session (2001), Article 31 ("The responsible State is under an obligation to make full reparation for the injury caused by the Internationally wrongful act.").

[418] *See* CL-118, *Cargill*, *supra* n.301, ¶¶ 444-445.

PHP's market re-entry and competitive advantages. Prof. Hausman also forecast Resolute's damages from 2018-2028 and calculated that Resolute will lose between US$60.6 million to US$92.7 million in expected profits (discounted to present value) because of PHP.[419]

1. 2013-2017 Lost Profits

294. Prof. Hausman first compared (i) the price per metric ton of SC paper Resolute expected to receive, using RISI data, before PHP reentered the market, with (ii) the actual price Resolute received per its own "scorecards" (which are the internal Resolute documents tracking each mill's performance)[420]:



295. Prof. Hausman then compared the expected and actual variable costs Resolute would incur for each metric ton of SC paper (which would be deduced from either the expected or actual mill price, as appropriate). He provided two alternate methods of computing expected variable costs, using a 2% yearly increase or RISI's forecasts.[421]

[419] CWS-Hausman-2 ¶ 48. Prof. Hausman's analysis is conservative because it does not consider any effects from lower shipments and market related downtime due to PHP. *See id.* ¶ 22. Resolute reserves the right to claim such damages.

[420] CWS-Hausman-2 ¶ 29. All of Prof. Hausman's calculations are done at the mill level and expressed in U.S. Dollars. *See generally* CWS-Hausman-2.

[421] *See generally* CWS-Hausman-2 ¶¶ 30-41. These differences are reflected in the "RISI" and "2%" columns in the tables below.

296. Prof. Hausman computed the expected profits for 2013-2017 by multiplying expected prices by the quantities shipped and deducting costs.[422] He repeated this calculation (using the actual numbers) for the actual profits. Resolute's lost profits for 2013-2017 represent the difference between the expected and actual profits (provided in net present value)[423]:

	Laurentide			Dolbeau			Kénogami	
	Damages RISI	**Damages 2%**		**Damages RISI**	**Damages 2%**		**Damages RISI**	**Damages 2%**
2013-2017	[redacted]	[redacted]		[redacted]	[redacted]		[redacted]	[redacted]

2. 2018-2028 Lost Profits

297. Prof. Hausman repeated these calculations for 2018-2028 using two assumptions. First, he assumed the expected and actual profits would both decline by [redacted] per year, which is consistent with both Resolute's own analysis and RISI's historical forecasting trends. Second, Prof. Hausman used 2028 as the end year for damages based upon his understanding of Resolute's operations and the paper industry generally.[424]

298. Prof. Hausman determined expected and actual profits were[425]:

	Dolbeau			Kénogami		
	Expected Profits		**Actual Profits**	**Expected Profits**		**Actual Profits**
	RISI	**2%**		**RISI**	**2%**	
2018	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[422] CWS-Hausman-2 ¶ 41.

[423] CWS-Hausman-2 ¶ 45 (presented in US$1,000). Resolute's lost profits relating to the Laurentide mill were sought only prior to the mill's closure in October 2014. *See generally* CWS-Hausman-2 ¶¶ 28-29. Resolute is not seeking damages for any other aspects of Laurentide's closure.

[424] CWS-Hausman-2 ¶¶ 42-43.

[425] CWS-Hausman-2 ¶ 43 (presented in US$1,000).

2019	[redacted]	[redacted]	[redacted]		[redacted]	[redacted]	[redacted]
2020							
2021							
2022							
2023							
2024							
2025							
2026							
2027							
2028							
Total 2018-2028	[redacted]	[redacted]	[redacted]		[redacted]	[redacted]	[redacted]

299. Resolute's lost profits (provided in net present value) were[426]:

	Dolbeau			Kénogami	
	Damages RISI	**Damages 2%**		**Damages RISI**	**Damages 2%**
2018-2028	[redacted]	[redacted]		[redacted]	[redacted]

300. Resolute's total damages were calculated between US$163.7 million and $201.9 million.[427]

VII. CONCLUSION

301. The Government of Nova Scotia decided to resuscitate the SC paper mill on remote Cape Breton Island, enable and guarantee that, despite its manifold inherent cost disadvantages, it would become immediately and for the long-term, the lowest cost-producer of SC paper in North America.

[426] CWS-Hausman-2 ¶ 45 (presented in US$1,000).

[427] CWS-Hausman-2 ¶ 48.

302. "North America" was referenced often by both the company buying the mill out of bankruptcy (PWCC) and GNS because North America was to be the resurrected mill's principal market, competing with only four other North American producers.

303. "Lowest-cost producer" was essential because, with demand for SC paper in secular decline, a significant infusion of volume into market competition necessarily would drive down prices, what Dr. Seth Kaplan has characterized as "the simplest of economic stories."

304. GNS knew or should have known that its policies (here, the Nova Scotia Measures) would result in damage to Port Hawkesbury's competitors, necessarily driving down prices and eventually driving them out of business. PWCC CEO Ron Stern had the temerity to say so, forecasting that Port Hawkesbury would be the last survivor in the industry.

305. Professor Jerry Hausman charted the price declines after PHP's full re-entry into the market in 2013, not to discover the inevitable damage explained by Dr. Kaplan, but to measure the damage.

306. Nova Scotia's Measures at best were reckless, without a care for the fate of other companies. The evidence suggests worse, that GNS knew what would happen and preferred to create a continental champion in Nova Scotia rather than leave for dead a dying and bankrupt domestic operation that, without extreme and extraordinary government help, could not compete.

307. GNS, on behalf of Canada, violated obligations in NAFTA Articles 1102 and 1105, which are fundamental to the object and purpose of NAFTA to promote free and fair trade. The lone foreign investor in the competition, Resolute, was treated very

differently from PHP, as the latter was showered with every support and advantage PWCC demanded while Resolute was provided nothing. The treatment accorded to PWCC was accorded to no one else.

308. The Nova Scotia Measures, taken together, enabled PHP to inflict severe damages on Resolute. But for the Measures, Resolute would not have been damaged, and but for all the Measures taken together, PHP never would have re-entered the market and Resolute would not have been damaged. The line is straight: extraordinary, possibly unprecedented and unparalleled Measures to salvage a bankrupt operation successfully put that operation, with guarantees for the future, into advantaged business against a handful of competitors. The restored operation then did exactly what it was designed to do, flooding a declining market with additional volume to the detriment of companies competing to meet the same demand. Prices fell.

309. Neither PHP nor GNS was bothered by the falling prices. PHP was guaranteed to be profitable, and GNS cared about keeping the mill in business, even though its profitability was also at GNS's expense. Resolute cares, however, as PHP, through the Nova Scotia Measures (first to resuscitate the mill, then to keep it operating profitably) saps Resolute of its profits and threatens its survival. NAFTA's Chapter 11 was written to dissuade governments from the kind of conduct manifested in this case by GNS.

VIII. RELIEF REQUESTED

310. Resolute respectfully requests that the Tribunal issue an award in Resolute's favor providing the following relief:

a) a finding that the Measures are attributable to GNS, and therefore to Canada;

b) a finding that Canada has violated its obligations to Resolute under Article 1102;

c) a finding that Canada has violated its obligations to Resolute under Article 1105;

d) a finding that Canada's breaches of its obligations under NAFTA Chapter 11 caused Resolute to incur damages;

e) an award of damages in the amount of at least US$163,695,000 or such other amount to be determined by the Tribunal;

f) an award to Resolute for its costs and fees of this arbitration; and

g) such other relief as the Tribunal may determine to be lawful and appropriate under the circumstances.

Respectfully submitted,

_____

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