PUBLIC VERSION

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

BETWEEN:

RESOLUTE FOREST PRODUCTS INC.

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

PCA Case No. 2016-13

GOVERNMENT OF CANADA

REJOINDER MEMORIAL ON MERITS AND DAMAGES

March 4, 2020

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CANADA

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I. INTRODUCTION AND SUMMARY OF CANADA'S DEFENCE

1. In its Reply Memorial, Resolute Forest Products Inc. ("Resolute" or the "Claimant") continues with its same strategy to portray financial assistance by the Government of Nova Scotia ("GNS") to the Port Hawkesbury mill in 2012 as a breach of NAFTA Chapter Eleven: misstating the law, misrepresenting the nature and amount of the assistance provided and wrongly ascribing malevolent intentions to the GNS.

2. *Resolute misstates the law*. First, the Claimant improperly seeks to attribute to the GNS the electricity load retention rate ("LRR") negotiated between two private companies, Pacific West Commercial Corporation ("PWCC")[1] and Nova Scotia Power Inc. ("NSPI"). The significant reversal from Resolute's Memorial, which relied solely on the international legal test from Article 8 (Conduct directed or controlled by a State) of the *International Law Commission's Draft Articles on State Responsibility* ("ILC Articles"), to ILC Article 4 (Conduct of organs of a State) and Article 11 (Conduct acknowledged and adopted by a State as its own) only serves to confirm the correctness of Canada's position that "the LRR had indeed resulted from negotiations based on market considerations"[2] between two private companies that were not under the GNS' effective control, which is required under international law for attribution of private acts to the State.

3. The private conduct of PWCC and NSPI was separate and distinct from the conduct of the Nova Scotia Utility and Review Board ("UARB") and the GNS' Department of Energy ("DOE") in carrying out their regulatory roles. The regulatory conduct of these entities is not the conduct alleged to have caused harm to Resolute, namely the "discounted" and "preferential" LRR that Resolute alleges is less than what Port Hawkesbury should have been paying for electricity. As the International Court of Justice ("ICJ") and other international tribunals have confirmed, international law maintains a clear distinction between the conduct of State organs and the conduct of private parties and will not conflate them, as Resolute does, unless the effective control test is

[1] Port Hawkesbury Paper ("PHP") is the corporate entity that owns the mill and is in turn owned by PWCC. In this Rejoinder and where appropriate in the particular context, Canada will refer to PHP as the corporate entity operating the mill since September 2012.

[2] **R-238,** *United States – Countervailing Measures on Supercalendered Paper from Canada*, Report of the Panel (Jul. 5, 2018) ("WTO Panel Report"), ¶ 7.77. Contrary to what Resolute asserts in this arbitration, the WTO Panel has already determined that the GNS did not entrust or direct NSPI to provide the requested electricity rate to Port Hawkesbury. *Id.*, ¶ 7.75.

passed. Resolute has failed in this respect and its arguments regarding electricity cannot be saved b referenc t IL Articl o 11 Th LR i outsid th Tribunal' jurisdictio becaus i is n t a measu e "adopt d r maintain d y a Part " s requir d y NAF A Artic e 1101(1

4. Secon , t e Claima t realiz s th t i s NAF A Artic e 11 2 cla m s essential y mo t f t e exclusio s o t e nation l treatme t obligati n fou d n Artic e 1108( ) f r procureme t a d governme t support d loa s a d gran s a e appli d s writt n a d intende . n y t anoth r significa t shi t n emphas s fr m i s Memoria , Resolu e o long r reli s n t e princip e f estopp l o avo d applicati n f Artic e 1108(7 . t n w resor s o "go d faith " accusi g Cana a f "self-contradictio " bas d n pa t positio s t t e Wor d Tra e Organizati n ("WTO" . Th s misleadi g portray l f Canada s pa t positio s s unavaili g a d Resolu e h s o credib e leg l bas s o arg e th t th s Tribun l c n refu e o app y t e explic t te t f a provisi n n NAF A Chapt r Elev n becau e f n alleg d non-complian e wi h a provisi n f a differe t trea y ov r whi h t e Tribun l h s o jurisdictio

5. Thir , ev n f Artic e 1102( ) we e o app y o t e No a Scot a measur s t issu , Resolu e wou d sti l n t succe d n establishi g a violati n f Canada s nation l treatme t obligatio . Resolu e s incorre t wh n t sa s n i s Rep y th t nationality-bas d discriminati n s irreleva t n t e conte t f Artic e 1102( ) (r Artic e 11 2 generall) – t e long-standi g concorda t vie s f a l thr e NAF A Parti s a d t e preponderan e f authori y contradi t th t positio . Furthermor , Resolute s Rep y Memori l do s nothi g o advan e i s argume t th t t w s accord d "treatmen " y t e G S r th t i s treatme t w s accord d " n li e circumstance " o th t f PWC

6. Fourt , Resolu e tri s o dilu e t e hi h thresho d f severi y a d egregio s behavio r th t t e minim m standa d f treatme t f alie s n customa y internation l l w deman s befo e a NAF A Par y c n e he d n violati n f Artic e 110 . t asser s a "proportionalit " tes , whi h s n t pa t f t e minim m standa d f treatme t b t whi h t e No a Scot a measur s wou d satis y easi y anywa . t al o as s t e Tribun l o sta d n t e sho s f t e G S o determi e wh t mig t ha e be n a mo e preferab e cour e f actio , whi h NAF A a d oth r investme t tribuna s ha e consistent y sa d s n t the r rol . Resolu e mak s oth r unsupport d leg l argumen s su h s " n internation l la , t e intere t f a constitue t eleme t do s n t overco e t e interes s f t e

greater whole"[3] wi h he ame a m of we ken ng t e legal s andard in rticle 1105 because it nows tha , if th Tribunal applies custo ary in ern tiona l w to the f cts of thi ca e, oth ng the GN did can e ai ly de cribed as "a gross denial o justice, mani e t arbitrarin ss a omplete ack of ue process, ev de t discrimi atio o a manife lack of reas ns."

7. *Resolut al o misr pre ents t e atu e and amou t of the as ist nce r vided by the NS* A rime examp e of the C aimant's is ead ng n rrative o the G S' alleged y nfai assistanc t Po t Ha kesbu y i the LRR which t e lai ant portray as he GNS be di g over back ards to nsure PWCC receiv d c eap elect ici y for i s ill. The realit i ve y differ nt. t was Res lut tha c nvinced he U RB i N vem er 201 that it w s com on thro gho t ort America and in the "broa er public ntere t" to prov de m jor i dustries wi h low r elec ricity ra es ("lo d etenti n ta iff" or LR ") when hey are n conom c istre s i ord r to av id he load lea ing th electrici y system entir ly. Res lu e urged t e UAR to approve a lo er lec ricity ate fo its Bow ter Mersey mil and its compet tor P rt Ha kesbu y then sti l wned y N wPag) in rd r fo both mills t stay open op rate pro it bly and co ti ue o con ribute t the loc l e ono y. Reso ute an it exp rt, during t e UA B proceedi gs, l o rec gnized that a lo er el ctri ity rat wou d he p NewPage el ort Hawkesb to a new ow er.[5]

8. B t Re ol te p etends n ne f t is happe ed a d ow rotests t at t was e regiou an gro sl unf ir for PW C to have bene ited from t at a e opp rtunity for a low r el ctr city ra e. PWCC w s abl to nego iate a ew variab e pr cing ech nis wi h NS I, but the RR that t act all receiv d a ter it advanc ta ruling "A R") was re ected b the C nada Re en e Agency "CRA) i Septembe 2012 h s ge era ed nowh re n ar he sav ng PWCC h

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[3] *Reso ute or st Product I c. v. overnment f Canada* (NCITR L) Claima t's Reply on M rits and Dama es, 6 Decemb r 2019 (C aima t s R ply"), ¶ 23

[4] *See* **R-319**, *n e an Ap lica ion by New age Port Ha kebsur and owater M rsey Pa er Comp ny*, M04175 C osing S bmis ion of New age P rt awkesbu y Corp and owater ersey P per C mp ny Lim ted (No . 9, 20 1 , pp. 77 l ne 2 & Ap endix , in 8 10; **C-138**, *n e an Ap lica ion by New age Port Ha kebsur and owater M rsey Pap r Co pany*, eci ion 2 11 SUARB 184 (N v. 29, 2 11) (UAR Decisio (Nov. 29 2 11 "); **R-383**, *n e an Ap lica ion by New age Port Ha kebsur and owater M rsey Pa r Comp ny*, M041 5, Direct E id nce and xhibits o Dr. lan Rosenb rg (J n. 22, 20 1) p 3; **R-429**, *n e an Ap lica ion by New age Port Ha kebsur and owater M rsey Pa er Comp ny*, M0417 , pen ng S atement o D . A an Ros nb r in he Matter of a Loa Re entio Ra e for NPB (Oct. 2 , 2011) ("Rosenberg pe in tateme t" , . .

[5] **R-319**, *n e an Ap lica ion by New age Port Ha kebsur and owater M rsey Pa er Comp ny*, M04175 C osing S bmis ion of New age P rt awkesbu y Corp and owater ersey P per C mp ny Lim ted (Nov. , 2011), pp. 58-68.

and is, in fact, not much better than the electricity rate that the UARB had said would have been applicable to Port Hawkesbury in November 2011.[6] Resolute tries to confuse matters by pointing to the GNS' confirmation to the UARB in July 2013 of its pre-existing renewable energy standards ("RES") and policy plans for the NSPI-owned biomass plant.[7] Resolute incorrectly asserts that they provide some kind of additional financial benefit to Port Hawkesbury – they do not.

9. As for the other Nova Scotia measures, Resolute misleadingly lumps together every dollar in an effort to portray the GNS' actions as an extravagant and unfair financial donation to a private company. Again, reality does not support Resolute's narrative. For example, while there is no dispute that PWCC received two loans from the GNS totalling $64 million and $2.5 million in grants for training and marketing,[8] this can hardly be described as "extraordinary" when a government faces the collapse of a critical industry. The Tribunal need only look to Resolute's Bowater Mersey newsprint mill, which also received $50.25 million in financial assistance from the GNS (with an option for an additional $40 million) intended to make it "a low-cost, highly competitive mill" [redacted][9]

10. The Claimant misrepresents the nature of other measures as well. It is unclear what forms the basis of Resolute's complaint that the GNS purchased land from NewPage/PHP given that the transaction was done at fair market value.[10] Resolute's complaint regarding the Sustainable Forest Management and Outreach Agreement ("Outreach Agreement") is also misplaced – that

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[6] *See* Part IV.C.1(b) below.

[7] **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 (Jul. 20, 2012).

[8] **C-182**, [redacted] An additional $1.5 million from funds previously allocated to keeping the mill in hot-idle was used to help with its restart. *See,* **C-190**, Preparatory Activities Agreement (Aug. 27, 2012).

[9] *See* **R-149** [redacted] **R-211**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-62 (Dec. 8, 2011), p. 5015: ("We went through every single part of the cost chain with Bowater and removed costs so that they would be a *low-cost, highly competitive mill in the market* that exists.") (emphasis added).

[10] Canada's Counter-Memorial, ¶ 23; **R-207**, Forestry Transition Land Acquisition Program, Guidelines for Applicants (Apr. 2008), p. 1: ("The Land Acquisition Program gives forestry companies that are operating in Nova Scotia an opportunity to sell some of their non-essential land assets to the Department of Natural Resources at fair market value."); Witness Statement of Julie Towers, 17 April 2019 ("Towers First Statement"), ¶¶ 14, 30; Rejoinder Witness Statement of Julie Towers, 4 March 2020 ("Towers Rejoinder Statement"), ¶ 11. *See* **R-216**, [redacted]; **C-209**, [redacted]

agreement i nothi g m re han th GNS pay ng P P u to $. mi on a year [redacted] [redacted][11] Resol te's argu ent regard ng the Fore t Utili ation Lic nse Agre me t (" ULA" is even mo e bscure it no long r a gues tha PHP r ceiv s tim er f om Crown la d e sential y f r free,[1] b t adv nces no ther coh re t argume t to in icate what is wrong wit an greement tha r qui e PHP to p y a s eci ied pric for stumpage an , s parately [redacted].[13] Glo sing ov r he de ails of he e mea ur s in order to ex ggerate thei s gnif ca ce s part of he Claima t's st ateg , b t it does n t esta li h a b each of NAFTA C Eleven.

11. Fin lly, *Re olute wr ngly ascri es malevol nt int ntio s to the G S.* Re olute's eply Mem rial contai s ac usa ion th t the NS was inten on "cr shing foreign om etition"[1] by prov d ng PHP w th a "vir ua guara tee to beco e i me iately an to remain in pe petuity N rth Am rica s lowest co t p od cer"[15] a d b creating "a invu nera le giant th t no ther SC aper roducer could o t-compet ."[16] Re olu e a cu es the G S f engaging in a "*M thanex*-s yle" ca pa gn her by it wa the s ec f c target o a provi ci l cam ai n to ca it os .[17]

12. None of the e a cusat on are tru . I re lity, the NS pproached the 20 1- 012 cr sis of hav ng tw of i s thr e pa er m lls shut down im lta eousl as any ot er gov rn ent wo ld, by acti g r sp nsib y and n ood fait . It gather d inf rma ion about the pro pects fo the il s i light of the fu ure poten ial for th ir re pective aper produ ts newsprint and s perca ende ed paper "S paper") . I assess d the br ader e on mic mpac of eac mil cl sing down nd onsidered th i pli ations o n t st pping in ith financ al ass sta ce i.e., th

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[11] **C 206**, [redacted] ¶¶ 5 1, 5.4. 5 5 [redacted], 6. -6.6 [redacted]) 7 1 ([redacted], 1 .1 and 1 .2 [redacted]. Canada's Cou t r-Me orial, ¶ 231 Towers Fi s St tement ¶ 39; To ers Rejoin er Stat me t, ¶¶ 5- .

[12] *R solute F rest Pr ducts Inc. v. Govern ent of Can da* (UNCITR L) Claim nt s Memo ial on Merit a d Damage , 28 December 201 ("Claimant s Mem ri l"), 96.

[13] **R-192** P rt Haw esbury Paper, Fore t Utili ation Lic nse A ree ent (ep. 27, 2 2) ("FULA").

[14] Cla m nt's ep y, ¶ 198.

[15] Cla m nt' R ply, ¶ 20.

[16] Cla m nt' R ply, ¶ 20.

[17] Cla m nt's Reply, ¶ 270.

option). It considered whether investing a reasonable amount of public funds was necessary and appropriate in light of all the circumstances.

13. In the case of Bowater Mersey, despite the gloomy prospects for newsprint and the mill's outdated equipment, the GNS worked with Resolute to agree in December 2011 on a financial assistance package that would complement Resolute's other cost reduction measures (in particular, a lower electricity rate and a new labour agreement) with the intention that the mill would stay open [redacted]. While it is unfortunate that Resolute decided to close the mill in June 2012 after a collapse in foreign currency exchange rates affected its future prospects, there can be no doubt that the GNS acted in good faith and with a rational public policy objective when it decided that investing was better than the "do nothing" option for Bowater Mersey.

14. The GNS took the same approach with respect to Port Hawkesbury. NewPage had entered into *Companies' Creditors Arrangement Act* ("CCAA") proceedings in order to sell its mill as a going concern "to preserve the greatest benefit and value for its creditors, employees and other stakeholders and for the local community as a whole."[18] An open and competitive bidding process commenced and the GNS encouraged Resolute to make a bid for the mill. While Resolute chose not to do so, many other companies did. In the end, PWCC was selected by Ernst & Young (the "Monitor") in December 2012 as the highest bidder and the most likely to successfully operate Port Hawkesbury as a going-concern. In the meantime, the GNS had been [redacted][19] Accordingly, just as it did with Resolute, it considered what would be a reasonable amount of financial assistance that would complement PWCC's other cost reduction measures (in particular, a lower electricity rate and a new labour agreement) and weighed that financial support against the "do nothing" option. Doing nothing could have impacted the Province's GDP by [redacted],[20] resulted in higher electricity rates for other consumers and

[18] **R-024**, *Re NewPage Port Hawkesbury Corp.*, Affidavit of Tor E. Suther (S.C.N.S.) (Sep. 6, 2011), ¶ 8.

[19] **R-146**, [redacted]

[20] **C-158**, [redacted], p. 2: (The Department of Finance estimated that "there would be a decrease [redacted] on the base case forecast on the provincial GDP" following a permanent shutdown of NewPage.) *See also* **R-160**, [redacted]. p. 3; **R-157**, [redacted]. *See also* **R-430**, [redacted]

caused massi e l ss of emplo me t in ru al pa t of the Pro ince t at was almost e ti ely depen ent on the m ll. Ag in ther can be o d ubt t at the NS ac ed n go d faith a d with a rati nal publi pol cy objecti e wh n it deci ed t at i vesting in o P rt Hawkesb ry as etter th n the " n th ng" ption.

15. I is lso inc rrect t at t e GNS engaged in a "*Metha ex* style campaig to cau e Resolu e los .[2] Resolu t ies to p rt ay [redacted] as vidence of he NS "knowing y" and "w fu ly" targeting [redacted] [22] Unsur risingl e olute ig ores [redacted] . Re olu e al o ig r s the fa t th t [redacted] by 201 ha [redacted] The GNS h d to ala ce those risk and un ert inties again t he ons quences f the " o noth ng op ion w ich, at th end f Ju y 201 , w uld have me nt the co lapse of NewPa e's ou t-approved Pla of Comprom se nd rrangement nd the liquida ion of the mill. [4] Sta es a e often f ced with ifficult ecisions nvolvi g comp ting publi po icy obj ctives a d serious eco omi imp ica ions but the a e "not equired to elev te nconditio al y t e inter sts of t e for ign inves or above all o he cons derations in eve y ircu stanc ."[2] In thi case, he G S did no hing hat viol ted AF A Art

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[2] laim nt s Reply, ¶ 270.

[2] lai ant's p y, ¶ 2 ; -**161**, [redacted] p 36

[2] **R-263** [redacted] . 24.

[2] **R-0 4,** *Re NewP ge Por Hawkes ury C rp.*, Meeti g Ord r (.C.N.S) (Jul 1 , 2012) **R-1 9**, *Re NewP ge Por Hawkes ury Co p.* Tw lfth Re ort o t e Moni or (Aug. 8, 20 2), ¶¶ 32-141.

[25] **CL-2 0**, *Electrab l .A. v. epubli of ung ry* (ICSID ase No A B/07/19) Awar , 25 Novembe 015 ("*El c rabe – Award*"), ¶ 165.

16. Accompanied by new witness statements from Messrs. Murray Coolican and Duff Montgomerie and Mmes. Jeannie Chow and Julie Towers, as well as expert reports by Cohen Hamilton Steger and AFRY (formerly Pöyry)[26], Canada's Rejoinder Memorial is organized as follows. In Part II, Canada addresses the Claimant's arguments regarding attribution of Port Hawkesbury's electricity rate to the GNS. While there would still be no violation of Article 1102 or 1105 even if the LRR were included amongst the measures attributable to the GNS, it is important as a matter of international law to distinguish the acts of the GNS from those of two private parties that negotiated a new electricity pricing mechanism because it served their commercial interests.

17. In Part III, Canada responds to Resolute's claim of a violation of NAFTA Article 1102.[27] Canada first explains why the majority of the Nova Scotia measures are covered by the exclusions from the national treatment obligation set out in Article 1108(7). But even if none of the Nova Scotia measures were excluded from the scope of the national treatment obligation, Resolute still fails to establish a breach of Article 1102.

18. In Part IV, Canada describes why the Claimant's allegation that Canada has breached the minimum standard of treatment of aliens in customary international law, which is the standard under NAFTA Article 1105, is untenable. In Part V, Canada requests that the Tribunal dismiss Resolute's entire claim on the merits.

19. Finally, in Part VI, Canada addresses the eventuality of the Tribunal concluding that there has been a breach of NAFTA Article 1102 and/or 1105 and considers whether any damages should be awarded. Canada will demonstrate that the Claimant should not be awarded anything: Resolute not only fails to establish legal causation, but also fails to quantify its damages to the reasonable certainty threshold required by international law.

[26] In light of its recent corporate name change, Canada will refer to the two reports filed by AFRY (formerly Pöyry) as: Expert Report of AFRY/Pöyry, 17 April 2019 ("AFRY/Pöyry-1") and Rejoinder Expert Report of AFRY/Pöyry, 4 March 2020 ("AFRY/Pöyry-2").

[27] The Claimant's Reply Memorial changed the order of argument from its Memorial, now addressing Article 1105 before Articles 1102(3) and 1108(7). For the sake of consistency and logical argumentation, Canada will in this Rejoinder Memorial maintain its order of presentation, first dealing with Article 1108(7) and Article 1102(3) in Part III and addressing Article 1105 in Part IV.

II. THE ELECTRICITY RATE NEGOTIATED BETWEEN PWCC AND NSPI IS NOT ATTRIBUTABLE TO THE GNS UNDER INTERNATIONAL LAW

20. Since its Statement of Defence, Canada has argued that the electricity rate negotiated between PWCC and NSPI is not within the jurisdiction of the Tribunal because it is not a measure of a Party as defined in NAFTA Article 1101(1).[28] The Claimant maintains that the LRR negotiated between PWCC and the GNS is attributable to the GNS, but its approach to attribution has undergone a significant shift from its Memorial. In its Reply Memorial, Resolute has demoted its primary argument that the conduct of PWCC and NSPI is attributable to the GNS under the legal test outlined in Article 8 of the ILC Articles and now emphasizes that the conduct is attributable under the State organ test in ILC Article 4.[29] As a fall-back position, Resolute argues that even if the application of the legal tests in ILC Articles 4 or 8 do not result in the LRR for Port Hawkesbury being attributable to the GNS under international law, it should nevertheless be considered attributable "to the extent that the State acknowledges and adopts the conduct in question as its own" as per ILC Article 11.

21. All of Resolute's arguments are unavailing. The Claimant's sudden reliance on ILC Article 4 misapplies the customary international law test for attribution by incorrectly conflating the supposed international wrong — the alleged "preferential" and "reduced"[30] electricity rate negotiated between PWCC and NSPI – with the UARB's statutorily mandated regulatory oversight and with the GNS DOE's conduct in confirming its long-standing and pre-existing renewable energy policies. Resolute essentially eliminates the critical distinction between ILC Articles 4 and 8, that is, the conduct of State organs versus the conduct of private or non-State parties, and assumes that regulatory association with private acts always results in attribution of the latter to the State. That is not how the rules of international law operate. Rather, they require a focus on the

[28] *See Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Canada's Statement of Defence, 1 September 2016 ("Canada's Statement of Defence"), ¶ 75. Canada did not propose that this issue be dealt with in the preliminary phase of the arbitration because it was highly intertwined with the merits of the case. *See* Canada's Statement of Defence, ¶ 104; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Canada's Request for Bifurcation, 29 September 2016, fn 3.

[29] **RL-032**, International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries* (Text adopted by the International Law Commission at its fifty-third session, in 2001) ("ILC Articles"), Articles 1-11 and 28-39.

[30] Claimant's Reply, ¶¶ 9, 264.

specific conduc a issu an whethe th Stat has effecti e contr l ov r t e priva e ac s alleged to be wrong l.

22. In his c se, the con uc of WCC and SP is leg lly and factu lly dist nct rom ha of the ARB and the GNS DOE and the fo mer ca no be attrib te to the la ter u der the r le of internati nal aw. The LRR ai by PH to N PI, w ich Reso ute all ge is on of the finan ial bene its prov de by the GN to ort Hawkesbur ,[3] s a com lex pri ing mecha ism negoti ted bet een two pri ate compa ies ac in in t eir own commer ial intere ts. Fai ur to attri ute hat pri ate con uct u der ILC Art c e 8 ca no be s ve by recas in i a i it ere the ame con uc as ha of the ARB and GNS DOE and hus attribut ble u der ILC Art cl 4.

A. Resolu e's Argu ent hat the Electri ity at is Insepar ble rom the O her ova Sc tia Meas re is Inconsis ent ith B sic Te et of the Internati nal La of S ate Responsibi ity an is Factu lly W ng

23. Reso ute ar ue in its R ply Memo ial hat the "electri ity measu es" are insepar ble rom ova Scot a's o her meas res (e g., the govern ent oan and gra ts) and sh ul be tre te s a si gle compo en o an "ensem le of meas res hat are all attribut bl to the GN [32] hi is oth leg lly inappropr ate and factu lly inaccur e.

24. Fi st as Ca ada has ar ued previou ly i i an essen ial ele en of jurisdic ion f r a N FTA Cha ter El ven Trib nal hat the impu ned mea ur be "ado te or mainta ne y a P rty rela ing to an inve tor and its investm nt. The Clai ant ca not side- tep his require ent u der N FTA Art cle 110 (1 by ta i g a si ple "ensem le" appr ach hat re ie on o her meas re to estab ish jurisdic ion v r a mea ure hat w uld not other ise s an on its

25. Sec nd, Resolu e's "ensem le" appr ach ign res the fundame tal struc ur of the gen ral internati nal la of S ate responsibil ty. ILC Art c e 2 ets out the elem nt o an internation lly wron ful ac f a St

[31] Claima t's Re 1 , ¶ 30

[32] Claima t's Memor a , ¶ 159 and Claima t's Re 1 , ¶ 30.

> There is an internationally wrongful a t f a Sta e wh n condu t consisti g f an act on or omission:
>
> a) is attributab e t the tate nder internat onal law; a d
> (b) consti u es a b ea h f an internat onal oblig ti n o the Sta .[33]

26. This appr ach, refle ting cust mary internat ona la and ap li d b th I J in *Diplo ati and Con ular ta f in T hran (U ited S a es v I an), Applic ti n of Gen cide Conve tion (B sni and Herzeg v na v S rbi and Monten gro* and *rmed Activ ti s o the Terr to y o the ongo (Democ atic Rep bl c o the o go v Ugand),*[34] req ires t at a tri unal irst dete mine wh the the a ti n or omi si n is attribu ab e t the S ate and then dete mine wh t er a b ea h of internat ona la has occu re . In ther w rds the inqu rie are dis inc and c nn t be conf ated ev n if her are ther mea ures over hic the tate doe not co test attribu ion. Resol te's at em t to mak the electr city rat and al eged sa in s t PHP vicari usly attribu able th oug the ther Nova S otia mea ures c nn t be acc pted in e it doe not f llo the co rect app oa h in internat onal w.

27. T ir , t is ro g o the act for Res lu e to a sert tha the electr city mea ure are attribu ab e t th GNS be ause the are "insepar ble" fro the rema nd r o the Nova S otia measur s.[3] For exa ple th G S is a d rect ar y t the loa and rant agre ment with WCC the land pur hase agree ent the Out each Agre men an the FU A.[36] he e s no di pute that such mea ure are attribu ab e t th GNS be au e t is a counter ar y to ea h of hese agreem

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[33] **RL 032** ILC Arti les, Ar ic e .

[3] *See* **CL 210**, *Case Conce ning U ited S ates Diplo ati and Con ular ta f in T hran (U ited S at s of Am ri a v. I an)*, Judg ent, I C.J. Re orts 98 , 2 May 1980 ("*Diplo ati and Con ular ta f in T hran Ca e*), 56: ("[f] rs , it must dete min how far, leg lly the ac s in que tio m y be reg rd d as impu ab e t the Ir nian S ate. Seco dl , it must con ider heir compatib li y or incompatib lity wit the obliga io s of Iran nder tre ti s in or e or nde any ther ul s of internat ona law tha m y be applicabl ."); **RL 194**, *Case Conce ning rmed Activ ti s o the Terr to y o the ongo (Democ atic Rep bl c o the o go v Ug nda)* Judg ent, I C.J. Re orts 00 , 19 Dec mber 0 5, ¶ 215: (" t]he C urt, h ving establ shed tha the co du t o the UPD a d o the off cer and sol ie s o the UP F is attribu ab e to Ug nda, mus now ex mine wh ther this co duct consti u es a b ea h of Uga da's internat onal obligation ."); **RL 115**, *Case Conce ning Applic ti n o the Conve ti n o the Preve tio and Punis me t o the ri e of Gen cide (B sni and Herzeg vi a v. S rbi and Montene ro)*, Judg ent, I C.J. Re ort 2 , 26 Feb uary 2007 ("*Gen cide Conve tion Ca e*), ¶ 37 .

[35] Claim nt's R pl , ¶ 26, 3 -3 .

[3] *See* **C 1 2**, [redacted]; **C 9** , [redacted]; **R 192**, ULA; **R 2 6**, [redacted]; **C 06**, [redacted]

28. In contrast, it was PWCC that wanted to negotiate an entirely new approach to electricity with NSPI rather than just using the LRR approved by the UARB in November 2011 for Bowater Mersey (and Port Hawkesbury, had the mill been operational at the time).[37] The outcome of those negotiations was never guaranteed, as is evident from the fact that PWCC sought a deal from NSPI that would lower the electricity rate down to [redacted].[38] The GNS had an occasional observer role and provided a consultant to facilitate their discussions, but it had no authority to furnish PWCC with the electricity rate that it sought. PWCC and NSPI were the applicants to the UARB for the LRR,[39] not the GNS (indeed, as former Deputy Minister of Energy Murray Coolican testifies, the GNS declined the request to be a co-applicant[40]). Nor did the GNS direct the UARB to approve the LRR negotiated between PWCC and NSPI, a conclusion that a WTO panel has already reached.[41] Port Hawkesbury's electricity rate is clearly separate and distinct from the other measures at issue and the rules of attribution in international law cannot be disregarded simply because of the allegation that the LRR was part of an "ensemble" of measures intended by the GNS to help Port Hawkesbury reopen.

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[37] Witness Statement of Murray Coolican, 17 April 2019 ("Coolican First Statement"), ¶ 11; Rejoinder Witness Statement of Murray Coolican, 4 March 2020 ("Coolican Rejoinder Statement"), ¶¶ 4-6; *See* **C-125**, PWCC Discussion Memorandum (Nov. 9, 2011); **C-138**, UARB Decision (Nov. 29, 2011), ¶¶ 223-224: ("[T]he Board believes that the LRR being approved in this Decision would have been an appropriate LRR for NewPage, had it continued to operate the mill.")

[38] **C-125**, PWCC Discussion Memorandum (Nov. 9, 2011), p. 1; **C-222**, [redacted], p. 3. See Part IV.C.1(b) below; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial on Merits and Damages, 17 April 2019 ("Canada's Counter-Memorial"), ¶ 170.

[39] **R-062,** *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, 2012 NSUARB 126, M04862, Decision (Aug. 20, 2012) ("UARB Decision (Aug. 20, 2012)"), ¶ 9: ("PWCC and NSPI applied to the Board for approval of a Load Retention Tariff ("LRT") pricing and dividend calculation mechanism. Each of them filed Applications, dated April 27, 2012, with the Board, which then sat down a hearing to commence on July 16, 2012 at its offices in Halifax.")

[40] Coolican First Statement, ¶ 17, *citing to* **C-147**, PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 2, p. 108 of 165.

[41] **R-238**, WTO Panel Report, ¶ 7.63.

B. The GNS Did Not Exercise "Effective Control over PW C and NSPI nd the Alleged Wro gful Conduct – the " referential" an "Reduced" Electricity Rate – A Req ired Un er us oma y Interna ion l Law (ILC Article 8)

29. I its Memori l, the Claimant s ubm ssion o a tributi n re ted entirel o ILC Art cle , a guing tha th conduct o PW C a d NSPI was "d re ted and controll d by" the NS.[4] Unable t dispute Cana a's submissi n that c st mary inter ational aw require eviden e f "ef ect ve control" of private cond ct i order f r a tribut on of private cts o a State[43] and na le o demonst ate such e fective on rol on the v den e, R solute's el an e on ILC Ar icle 8 h s een releg ted to an a terna ive ar ument in its R pl Me ori l.[44] Whil Canada r sponds el w to he new argu ents re ar ing conduct of State org ns ILC Art cl) and co duc ac nowl dged an ado te b a State s ts ow (ILC Articl 11 , it is impo ta t to first re-emph si e the con eque ces of Reso ut 's f ilu e to es ablish that he con uct P CC nd NS I is attr butable o th GN .

30. n ts Repl Me orial, Resolu e oes not try to contest he a plicabili y f t e " ff ctive co tro " test descr bed by the ICJ in *Mil ta y and aramil ta y Activi ies (Nicara ua v. United St tes of Americ)* and ppl ed consis entl b inte na ion l courts an tribunals he it com s to th q est on of tt ibu ion of p iva e conduct to the State. In th *Mi ita y and Para ilita y Activ tie* case, the ICJ determine that, d spite the U ited Sta es' exten ive upp rt, in olveme t ith and in lu nce ove the *contra* rebels n Ni ara ua, t did not ef ectively co tro them an thu could ot be resp nsible for sp cific cts alleged to io ate inte national l w.[45] Th *Ap lication of G nocide Con ention (Bos ia a d Herzeg vina v Serbia and Monte egro)* cas aff rmed that ri orous st nda d, re ui ing that in tr ctio s given b t

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[42] laimant's Memoria , ¶ 176-18 .

[3] Canada's Counte -M morial ¶¶ 172-182

[44] laimant's eply, ¶¶ 74- 0.

[45] **RL-11** *, Case Con er ing Militar and Para ilitary Ac i ities n and ga nst Nica agua (Nic ragua United State o Ame ica)* Judgment, .C. . Reports 19 6, 27 June 1986 (" *i itar an Para ili ary A ti iti s Case*") ¶ 115. As Judg A o not d in is sepa ate opi io , "[o nly in cases wh re cert in m mbers of tho e force h ppe ed to ave be n specifica ly charge y the Unit d St te auth rit e to commit a pa ti ular act, or carry ut a p rticul r task f som k nd on behal o t e Unit d Sta es would it be po sib e so t regard them" as attribut ble to the Unite States. (**L-195** *Militar and Pa am litar Activi ies as* , Se arate O inio of udg Rob rto Ago, 2 June 986, ¶ 16.) Th IC he d th U ited St tes res onsible or t own act of suppo t or the *con ras* but a gener l ituation of ep ndence nd support ou d b insuff ci nt o justi y a tributi n o the cond ct o the tate." *See* **RL-032**, ILC Articles, pp. 47-48.

which t e lleged io ati ns occu red, no gene al y in respe t f the ve all act ons ta en by the per ons or groups of person h ving committed the viola ions. [46] Tribunals in inves or-State cases such as *Jan de Nul, Ham ste , White Industries, Almas* an others av applied he de a ding "ef ective on rol stan ard s r quirin "both a gen r l contro of the St te ver t e pe son or nti y and a spe if c con ro o the State over the ac the attribut on of which is t stak ."[47] Th Claimant s ole reliance on *Bayindir,*[48] as Canada al ead ex lai ed n its C unter-Mem rial, i unavailing b th n he law and th totally different factual situation that has no similarity to the present case.[49] Interna io al aw i clear: n or er fo the con uct of PWCC and NS I to be attr but ble to the GNS, Re olute m st p ove that the GNS had *both* gene al c ntrol over the parties *nd* pecific cont ol o er the elec ici y pricin mech ni m th y n gotiated o estab ish the L R payabl at Po t Hawke bury

31. T e C aiman fails to me t he e fectiv co trol st nd rd. Res l te simply as erts that t e GN "gave nstructio s o NSPI w thin th meaning o Article 8 to ens re an lectrici y rate pas ed" sup orted by s ndr list of inaccur te haract ri ati ns of the fa ts.[50] C nada has alrea y d scr bed n ts oun er- emo ial he natur of the ne oti tions b tween P CC and NSPI, and the ro e o the GNS a d Mr. Todd Wil iams th rein,[51] bu cert

Re ly Memo ial requ re correct on he e

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[46] **RL-1 5**, *G no ide C nventi n Ca e,* 400.

[47] **C -105**, *a de Nul .V. nd Dr dg ng n ernation l N.V. v. Eg pt* (CSID Cas N . ARB/0 /13) ward, 6 No ember 200 ("*Jan e ul Award*") ¶ 173, *ited with pprov l in* **R -1 6**, *White Indu tries A stralia Li i ed v. Th R public of Indi* (U CITR L) Fina Award 0 Novemb r 20 1 (*Wh te In ustri s – Aw rd*") ¶¶ 8.1.16-8.1 18. *Se a so* **R -069**, *G sta F Hamester Gmb and Co K v. Gha a* (I SI Case No. ARB/0 /2) A ard 1 Ju e 2010, ¶ 79 (des ribin t e effe tive contr l test in term iden ic l to the *Jan de ul* tr buna); **RL- 20,** *Almas v. Po and* (UNCITR L) A ar , 27 Jun 2 16, ¶¶ 268-26 ; **RL 118** *Tulip Rea Estat a d Dev lopme t etherlan s B.V. . Repub ic of Turkey* (ICSID Case No. ARB/11/28) Award, 10 Marc 2014 ¶ 304-30 ; **RL-11** , *Teinver . rgentin* (ICSI Cas No ARB/09/01 Award 2 Jul 2017 ¶ 722-724; **RL 117**, *Gavri ovic v roa ia* (IC ID Case o. ARB/12/39) Awa d 26 ul 2018, ¶¶ 828-82 .

[8] C aimant's Reply, ¶ 76.

[49] *S e* C n da's Coun er-M mor al, ¶ 178. As Canad des ribed n its Coun er Memorial, *Bay ndir* was a de art re ro th "effe t ve con rol" test dee ly entr nc ed in inter ation l jurisp ud nce and w s in any e ent a highl f ct- pecific findin o at ribution here appro al o termina a contract w s obta n d b t e highes levels of the Pa is ani gove nment and military.

[50] Claimant's Reply, ¶ 77.

[51] Canada's Counter-Memorial, ¶¶ 183-221.

32. First, Resolute alleges that the GNS "requested" that NSPI initiate discussions with PWCC "as soon as they were selected" as the winning bidder.[52] This does nothing to establish effective control of the GNS over NSPI. The Monitor introduced PWCC to GNS officials during the CCAA process,[53] and the GNS in turn introduced PWCC to NSPI officials so they could hear about PWCC's ambitious and creative electricity savings plan.[54] Introducing PWCC (a newcomer to the Province with no experience with Nova Scotia's electricity market) and NSPI (a publically traded for-profit corporation operating in a regulated market) can hardly be classified as an instruction to establish effective control as understood in international law – in the words of the *Electrabel* tribunal, "an invitation to negotiate cannot be assimilated to an instruction",[55] especially since the GNS had no authority to instruct NSPI to give PWCC the electricity rate it was seeking.

33. Second, Resolute alleges an "active role" of the GNS during negotiations by "providing work product and reviewing others' work product" and by hiring Mr. Todd Williams from Navigant and sponsoring his testimony before the UARB.[56] The "honest broker" role of Mr. Williams has been exhaustively described in Canada's Counter-Memorial, Mr. Coolican's first witness statement and in Mr. Williams' own testimony to the UARB.[57] Retaining Mr. Williams in December 2011 to facilitate the discussions between PWCC and NSPI does not mean he nor the GNS had any ability to issue instructions to those parties to reach any particular deal on an electricity rate.[58] It is hardly surprising that GNS officials would occasionally attend meetings to

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[52] Claimant's Reply, ¶ 77.

[53] **C-318,** [redacted].

[54] Coolican First Statement, ¶ 13; **C-125**, PWCC Discussion Memorandum (Nov. 9, 2011), p. 3.

[55] **RL-113**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.111. In *Electrabel,* the tribunal held that a letter by the government encouraging the power plant owner and operator to negotiate in the direction favoured by them could not be considered an "instruction" because its "purpose was to encourage." *Id.,* ¶ 7.107.

[56] Claimant's Reply, ¶ 77.

[57] Canada's Counter-Memorial, ¶¶ 189-192; Coolican First Statement, ¶¶ 15-16; **C-168**, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated,* Direct Evidence of Todd Williams (May 2012), p. 6: ("Essentially, I served as an 'honest broker' in these discussions. I listened carefully and, as needed, tried to get each party to understand the other party's perspective and to reach agreement on the various elements of the Load Retention Rate Mechanism as it was being developed. *I did not advocate for any specific party or position, but occasionally offered suggestions and proposals to help resolve differences and keep the discussions moving forward.*") (emphasis added).

[58] **R-425** [redacted]; **C-151**, Todd Williams Engagement Agreement (Feb. 13, 2012). Mr. Williams contract

observe th progres o NS I a d PHP s discussion . T e demandi g effecti e contr l te t that internatio al aw requi es to attrib te he negotia ed d al betw en P CC nd N PI to he NS is not t.

34. Th rd, Reso ute all ges hat the GNS oan agree ent ith WCC was "lin ed to the electri ity eal nd [redacted].[59] Ms. Jea nie C ow, Dire to at the ova Sc tia Depart en of Busin ss, addre sed his inaccu ac in her f rst wit ess state ent and oe so fur he in her se ond wit ess statemen [redacted].[6] I is illog cal for Reso ut to a [redacted] let a one ha it establi hes effec ive con rol ver WCC and NSP .[62] T ese ere two sepa ate and dist nct meas res sub ec to sepa ate and dist nct proces .

35. Fina ly, the Clai ant rep ats a ain its gratui ous com ent hat ova Scot a's Pre ier De ter s ok to NS I's CEO du ing the ate negotiation .[63] Ca ada re ers the Trib na to its Counter-Memo ial w ere Resolu e's misrepresenta io of the re ord was alr ady addresse

st tes ha he was not the a en of the Provi ce" (s. 9 01) an it lim ted his man at to hel ing WCC and SP in the negotiati ns, inclu in by determi ing the v lu of the innovat ons b ing prop se by WCC (Sche ule A)

[59] Claima t's Re ly ¶¶ 47 49, 77. *See* **C-** , [redacted] p 4

[60] Wit ess State en of Jea nie C ow 17 A ril 019 (" how F rst Statemen " , ¶ 17; Rejoi der Wit ess State en of Jea nie C o , 4 M rch 020 (" how Rejoi der Statemen ") ¶¶ -4

[61] **C- 46,** E ail rom Jea nie ho to uff Montgom rie (ep. 21, 20 2) p. CAN000124_0 02- CAN000124_0 [redacted]

[62] Reso ute sugg sts hat hi is sim la to the Pakis ani governme t's ol in termina ing the cont ac at i su in **CL-12**, *Bayi dir In aat Tu izm Tic re Ve Sa ayi .S v. Isl mic Repu li of Paki tan* (I SID ase No. ARB/03 29) Aw rd 27 Au ust 2 09. T ere ar no paral e s in hat c se, the Chai ma of the government-contro led Nati nal Hig way Autho ity rece ved "exp ess cleara ce" rom Pakist n's mili ary c ief execu iv to termi a e a contr ct

[63] Claima t's Re 1 , ¶ 77

[64] Cana a's Counter-Memor a , ¶ 87, *ci ing* **C- 62**, ova Legisla ure H us of Asse bly Deb tes and Proceedi gs, Fo rth Ses ion (pr. 25, 20 2) p. 000 the Pre ier was "confi ent hat the uti ity and Pac fic est are wor ing toge he to b i d a la in the est inter st of ova Scoti ns. nce hat la is finali ed it il go be ore the ova Sc tia Uti ity and Re iew B ard for approva .")

36. None of the conduct identified by the Claimant, even with its significant mischaracterizations, rises to the level of effective State control over private conduct required to meet the test for attribution under international law. The "preferential" and "discounted" electricity rate that Resolute alleges enabled Port Hawkesbury to reopen and cause it damage was a commercial agreement between PWCC and NSPI, which they negotiated and agreed to on a basis that was "entirely consistent with market principles."[65] They were not acting on the instructions, or under the direction or control, of the GNS.

C. Resolute's New Argument Relying on ILC Article 4 is Unavailing Because the Conduct of the UARB in its Regulatory Role is Separate and Distinct from the Conduct of PWCC and NSPI in Negotiating the LRR

37. The Claimant's Reply Memorial introduces a new approach to its attribution argument. Now relying on ILC Article 4, it argues that the conduct of the UARB in approving the LRR (and the GNS DOE's conduct regarding renewable energy standards and biomass, addressed below) makes the electricity rate paid by PHP to NSPI attributable to the State.[66] However, that is not the determination which follows from a proper application of customary international law.

38. ILC Article 4 outlines when the conduct of a State organ is necessarily an act of the State and thus attributable thereto:

> *Article 4 - Conduct of organs of a State*
>
> (1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> (2) An organ includes any person or entity which has that status in accordance with the internal law of the State.[67]

39. Within this framework, there is no dispute that the UARB is a State organ: it is a quasi-judicial body that occupies a statutorily mandated role to independently supervise all utilities,

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[65] **R-238,** WTO Panel Report, ¶ 7.77.

[66] Claimant's Reply, ¶ 46.

[67] **RL-032,** ILC Articles, Article 4. ILC Article 4 is considered to be reflective of customary international law. *See* **RL-115**, *Genocide Convention Case*, ¶ 385.

incl ding electri ity an the ates they c arge cust me s i the Pro in e of Nova S otia pursu nt to the *ublic Uti ities* [68]

40. But dete mining he her an en i y is Stat o gan is not by itself suf ic ent to ati fy the nquiry i erate un er ILC r icle 4 ecause consid rati n mu t lso b g ven o hat is the s ecific *ondu t* hat is ll ge to be w ongfu under intern tion l la . his i wh re the C aimant imp operly mpu es the on uct f P CC a d NSPI a re i g t a new elec ricity ricing mec anism w ich is the lleged internat onally w ongf l ct, to th UARB wh se own on uct is not ll ge to be w ongful eca se all it id was ful il its st tuto y ole of dete mining hether rat payer w uld be bet er o f w th the p oposed LRR. [9] ust s "the instru tions, di ec ion or ontr l must re ate to the ondu t hat s aid o have a ou te to an internat onally w ongf l act un er ILC rtic e ,[70] so t o mus t e e be nexus etw en the s ecific on uct of th Stat or an nd the internat onally w ong ul ac un er ILC rt e 4

41. The on uct as etwe n P CC a d NSPI ver us the on uct of t e U RB are learly distingui ha le. As Can da has lready o tl ned in its Counter-Memo ial [71] nd was rec gn zed by the UAR [72] a d also ackno le ged by th p nel in its *United S ates - Supercal ndere Paper* de isi n, the elec ricity ricing me ha ism in he RR was ev sed y P CC a d NSP fter a v gorous si -month nego iatio whi h "*had indeed r sult d from negot ation b sed on market considerati ns.*"[73] Re er ing to PWCC's will ngne s (a) to become 'p iority interrup ibl ';

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[68] **R-061**, *Public Ut liti s Act*, R S.N.S 1 89, . 80, s. 18: ("Supe vi ion of ti ity by Boa d. Th Boar sha l h ve the eneral supe vi ion of all public ut lit es nd m y m ke all ne essary exami ati ns and in uir es a d keep itself i fo me as to the com li nce by t e said public ut liti s w th the pro is ons of aw an sha l h ve th r ght to obta n f om any public til ty all info mation ne es ary to ena le th B ard to ful il its dut es "); s 64( ) ("No public tilit shall harge, emand, ol ect or ece ve any compe sat on or any ervice pe fo me by i unt l such public til ty ha first su mit ed or the a pr val of th oard a s he ule of rates to ls and har es nd has o tai ed the a pr val of th Board the eo .")

[69] **R-06** , UARB D cisio (A g. 20, 2 12) ¶ 69, *citing* **C-13** , UARB D cisio (N v. 29, 20 1), ¶¶ 1 4-1 5. T e es to be pp ied by th Boa d when cons de ing an appl cat o for a Load Re enti n Rate co siders het er the p opo ed LRR is ne ess ry and suf ici nt f r SPI to ret in t e oad of the c sto er and het er th total evenue r ceiv d f om the c stome (PHP) xce ds the incr menta costs ass ciat d wi h NSPI erv ng the cu to er.

[70] **L-0 2**, ILC Ar icles, rt cle 8, Com enta y 7).

[71] C nada's Counter-Me o ial, ¶ 93.

[72] **R-06** , UARB D cisio (A g. 20, 20 2), ¶ 36-41 noti g with es ect to t e ove 3,00 p ges of eeting notes email communic tio s, an draft do uments etw en th teams nego ia ing on be alf f N PI an PWCC: "[T]he re or is s f ll and c mp ete s een by the B ar .")

[73] **R-2 8,** WT Panel e ort, ¶ 7.77 (e phasis dded).

pay for its electricit i par o th basi o th mos expensiv incrementa sourc o energ i the sta k n a y giv n ho r th t t purchas d electricit ; [an] ( ) o pre-p y i s bi l n a week y basis," he TO pa el w nt on to concl de that:

> [ ]t se ms entirely consis ent ith ma ket princi les fo an electri ity provid r to se k t both ma age its load and acc mmoda e the needs of its lar est c stomer, and or a com a y tha consu es a large amo nt of electricity to ake co cessions and accept f exibil ti s that woul result in a ower rate bei g pay bl .[74]

42. That om erci l deal o electr city s w at R olut alleges s ve PHP over [redacted] fr m 20 2- 015, n co par so to wh t i wou d have h d t pay at the ate approv d fo NewPag -Port H wk sbury (a d Bowat Mer ey) in November 20 1.[75]

43. Bu the ne otia ion of th t dea between PWCC an NSPI, wh ch esolute al eges gen rate the " in ncial b ne it" tha cau ed it d ma e, i *n t* t e sam cond ct a tha of th UARB, whos only r le was o adjudicat , after a le gth adversarial pr cess wi h t e pr sentation of writ en nd oral vid nce, hethe the propo ed LRR wou d le ve r tepay rs better off than they wo ld be ther is . *T at* cond ct by the UARB is not alleged t be i te nat onally wro gful, wh ch is hy Reso u e' relian n LC A ticle 4 s flawed.

44. In thi r spect, Re olute's eliance on *B lc n* is en ir ly isp aced.[7] In *Bil on* it was t e actu l con uct of the oi t R view Pan l de e mined by the trib nal to e a Sta e organ) that w s the al ege inter ational y wrongf l ct i.e., enying pp oval of he uarry project y ado ting the wrong s an ard nder anadia l w).[77] I th s case, un ike in *B lcon*, he conduct of the UARB itse f in fu fi ling its sta utory m ndate of a jud cating whe her ate ayers ar be te of wi h the ro ose LRR is not the

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[74] **R- 38** WTO Panel Report ¶ 7.77.

[75] Cl imant's Re ly, ¶¶ 16 -165.

[6] laimant s Reply ¶¶ 5 -53.

[77] **L-025**, *illiam alph Cla ton, Wi liam Ric ard Cl yton, D ugl s Clay on Daniel C ayto a d Bilc n of Delaw re, I c. v. Canada* (U CIT AL) Award n urisd ctio and Lia i ity, 7 arch 2015 (" *ilc n – Award on Ju isdictio and Liability*"), ¶¶ 305-320.

45. Resolute argues that the WTO *United States - Supercalendered Paper* decision on "entrustment" or "direction" does not diminish its argument on attribution,[78] but the reasoning applied by the WTO panel in distinguishing the actions of the UARB from NSPI serves to illustrate the same flaws in the Claimant's reasoning in applying ILC Article 4, as Canada described above. In reaching its conclusion that NSPI had not been entrusted or directed by the UARB to provide an LRR to PHP, the WTO panel cautioned against equating a State organ "merely exercising its general regulatory powers" to entrustment and direction of a private company.[79] This is the mistake Resolute makes in conflating the UARB's regulatory role of determining that the proposed LRR met the requirements under the *Public Utilities Act* with the conduct of PWCC and NSPI to reach a specific agreement over the rate. If Resolute cannot demonstrate that the latter conduct is attributable to the GNS through ILC Article 8, it cannot create vicarious attribution for the same alleged wrongful private conduct simply by switching its focus to the conduct of the UARB through ILC Article 4.

D. The GNS Department of Energy's Confirmation of its Pre-existing Renewable Energy Policies Does Not Make the Electricity Rate Negotiated by NSPI and PWCC Attributable to the GNS

46. The Claimant also attempts to attribute the PWCC-NSPI electricity rate mechanism to the GNS using ILC Article 4 by arguing that the GNS DOE "modified" renewable energy requirements to facilitate confirmation of the LRR by the UARB by (a) resolving the Board's concern that future government action could create additional renewable energy costs for NSPI's ratepayers, and (b) designating the Port Hawkesbury biomass plant as "must run."[80] Here again, the Claimant glosses over the critical distinctions between the actions of the DOE, the UARB and PWCC/NSPI and their implications under customary international law.

47. Resolute relies on the July 20, 2012 letter from then-GNS Deputy Minister of Energy Mr. Coolican to the UARB addressing the risk of future incremental renewable energy supply ("RES")

[78] Claimant's Reply, ¶¶ 79-80.

[79] **R-238**, WTO Panel Report, ¶¶ 7.37-7.38, 7.61. The panel referred to the WTO Appellate Body's previous statements that entrustment and direction "cannot be inadvertent or *a mere by-product of governmental regulation*." (emphasis added).

[80] Claimant's Reply, ¶¶ 61-62.

costs.[81] A Mr Coolica point ou i his Rejoinder witn ss stateme t, gi en he G S' ongoing eff rts s nce 00 to pro ote renew ble electri ity and re uce reli nc on coal, [2] t is unsurprisin th t t e UAR r ised th uest on o what w uld ha pen if the NS were to chang ts RES re uire ents in the uture such that ad itio al co ts would result for PWC an /or other rat paye s.[83] NSPI and P CC w re c nfident hat a ditional os s were ve y unli ely iven he a ou t of rene ab e e ergy that would oon be available in the P ovinc ,[84] bu as Mr. Coolica t sti ies, he Bo rd wa ted fur her omf rt on the issue so t could pro ee wit it dete min tion on th LRR p oposed b PWC and NSPI. Mr. Coolican' le ter rovided t at c arifi at on, sa ing the GN "was onfiden tha th re is eno gh RES supply om ng on-line hat the ill- oad will no tr gger an ncremental RES c st ver the te m of the p op se mech nism.[85] The GN w nte to be re pons v to an iss e be ng addressed by the U RB, s it m de c mmitmen t at dditional incremental cost wou d no b im osed on PH or on N PI s other atep yer .

48. But ust as he cond ct f the UAR is dis in t f om he ri ate conduc of PWCC a d NSPI, t e conduct o the GNS DOE n larifyin its int nt regardi g RES-rela ed ev nt ali ies s di tinct fr m th ne oti ted commerci l terms of ow uch N PI w uld be pai for ts el ctricity. nd e , the R S ssu is no -issue t ere in to pa

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[81] **C-179**, *In e an Applic tion y Pacific Wes Commercia C rpor tion a d Nova Scotia Po er I corp rated*, Go ernmen of Nov Scot a L tter R ga ing PWCC Load Ret ntion Tar ff Hearing Jul. 20, 2 12).

[82] The *nvironme tal oa s a d Su taina le Pr sp rit Act*, in 2007, ma dated th t by the ye r 2 13 1 .5% of t e to al electr city needs f Nova S otia had to be obtained f om re ewa le electric ty sources (*Se* **R-194** *Envi on en al Goals and Su tainable Pr sper ty ct*, .N.S 2007, c 7, s 4 2)(b)(i)). Re ulatio s f om the sa e ye r require NSPI, in 2 10 2 12, to sup ly its cust mers wit renewa le electr city i a propo tion of not ess han %. (**R-17** , *R newabl Ene gy Standard Reg latio s*, N.S. R g. 35/ 007, ss 5(1)). T is requirem nt was later incr ased to 10% (**R 17** , *ene able El ctri it Regula ions*, N.S. Reg. 155/ 010, s. 5) ut all wed SPI o cqui e a dit onal renew ble electri ity eithe from PPs r from its own ge er tion fa ilities *ee also* **R-424**, Nova Sc tia De artmen of E ergy, "Towar a Gre ner Fu ure, Climat Change Ac io Plan" Jan. 20 9 , p. 17 **R-180**, Nova Scotia D part ent of Energy, " oward a Gree er Fut re, ova Sc tia's 2009 En rgy Str tegy" (Jan 2009); **R-1 1**, No a Scot a epar ment f Ener y, "Ren wab e Electri ity Plan: A ath t good ob , ab e prices and a cl aner envir n en " Apr 201), p. 2.

[83] Cooli an Re oin er State ent ¶ 7. t t e UARB he ring, t e Board as e the q es ion "if in eed the rene ab e targ ts c anged a a resul of govern ent ac io …the e s a risk wi h respect o other rate ayers aving t p ck up the cost of re ewables serv ng your lo d?" (**-39** , *In re an pplic tion by Pacif c West Com e cial C rp. a d N va Sco ia Power Incor or ted*, Tra script – Part A (u . 16 2012) p 1 0: 3-18).

[84] C na a's Cou ter- emorial, ¶ 219; **C-179**, *In e an Applic tion y Pacific Wes Commercia C rpor tion a d Nova Scotia Po er I corp rated*, Go ernmen of Nov Scot a L tter R ar ing PW C oa R tention Tar ff Hearing (Jul 20, 2012)

[85] **C-179**, *In e an Applic tion y Pacific Wes Commercia C rpor tion a d Nova Scotia Po er I corp rated*, Go ernmen of Nov Scot a L tter R garding PWCC Load Retention Tariff Hearing (Jul. 20, 2012).

RES-related incremental costs because a predicte i 2012, the m ll l ad as ne er triggered any such osts si ce it reope [6]

49. The sta em nt n th Ju y 20 20 2 G S DOE ette with r sp ct o th Port Hawk sbury b omass pl nt is sim larly di tinc fr m the p icing mec anism te ms f th L R. s was a ready exp ai ed in Ca ada's Counter-Me ori l a d Mr. Cool can's first w tness statem nt, [7] the etter dis uss d the draft regul tions d vi ed i 2011 i.e., efore N wPag wen int CCAA procee ings that a ready p an ed to des gna e the b omass pl nt as "mus run" b ca se it ad ance Nova Sc tia's ren wable nergy oli y nd it imply con irme tha "the olicy int nti n h s not ch nge " a d t e GNS would follow-t ro gh n its pre-ex stin plan wh ch t id in J nuary 20 3). [8] The regu atory c nd ct to "enh nc[e] ystem relia ili y and facili at[ ] the bal nc ng of no -firm interm tten wind generat on [89] is se ara e and di tinct c nduc fr m the sp cific p icing ter s and cond tio s f r the up ly of elect icity nego iated b twee NS I an PWC that Re olute a leges sav PHP [redacted] b tween 2013-2 15.[90] I dee , th fac th t the b omass regu ati n was mo if ed y t e NS i 2016 w thout al erin Port Hawkes ury

[86] Co lican First Stat me t, ¶¶ 0- 1.

[87] Ca ada's Counter-Mem r al, 211; Co lican First Stat me t, ¶¶ 8- 3.

[88] -**1 9**, *In re an Appli at on by P cifi West Comm rcial Corpo ati n an Nova cotia Power Incorpo ated*, Gove nm nt o Nova cotia etter Reg rdin PWC Load Ret ntion ariff H aring (Ju . 20, 012); -**186**, Or er in Co nci , No. 2 13-13 (Ja . 17, 013); -**225**, Or er in Co nci , No. 2 13-12 (Ja . 17, 013), Sc ed le . The amen me ts o RES Regul tion were pr par d and re eas d for ublic consul at on o Ju e 27, 2011, onths efor PW C wa e en n the pi ture. -**185**, Pr posed Amen me ts to Ren wable Elect icity Regul tions Re eased (Ju . 27, 01).

[89] -**1 9**, *In re an Appli at on by P cifi West Comm rcial Corpo ati n an Nova cotia Power Incorpo ated*, Gove nm nt o Nova cotia etter Reg rdin PWC Load Ret ntion ariff H aring (Ju . 20, 01).

[90] Clai ant's e ly, 16 . PHP re ei es no fin ncial b nefi fr m the b omass p an – i pay NSPI $4.72 m lli n for tea , the p ic ng of whi h th UAR sa d was "reas nab e a d not subs di ed by ratepa ers." (-**062** UARB De ision (Au . 20, 01), ¶¶ 156 158) E en i NS I had d cid d ot to o era e the B omass lan , PHP would stil hav bee a le to bta n the nec ssary stea fr m i s own gas fired oiler PB4), whi h w s no s ld to NSPI. (-**062** UARB De ision (Au . 20, 0 2), 156; -**4 7**, *In re an Appli at on by P cifi West Comm rcial Corpo ati n an Nova cotia Power Incorpo ated*, M 4862, Re acted P cifi West Comm rcial Corpo ation (" WCC") Res on es to Infor ation Re uest fr m the Small Bu iness Ad ocat (M y 30, 012), R quest R- 4, . 25: ("Th Port Hawk sbur Mi l has suff cient steam gene ation ca ac ty o r n th Mil fr m its wholly own d PB4 boile .")). Reso ute's re ia c on a new paper a ticle (-**05** , CB News "Nova cotia Power rate ayer fo t $7 bi l fo Port Hawk sbury P per," (Oc . 20, 01)) is misl a ing – PH do s not r ce ve $7 m llion an ually b ca se f the b omass lant; r ther th t was SPI's es im te f the extr c st o all rate ay rs n the Pr vin e for r nni g th m ll in or er t me t its ren wable nergy ta gets NS I was w ll ng to bsorb these co ts t me t its ren wable nergy t rg ts a the were still c eape than wind. (-**1 2**, *In re an Appli at on b Nova cotia Power Inc.*, Appli ati n for Ap ro al of C pita Work Or er CI 9029 Port Hawk sbury B omass P oject (A r. 9, 01), .). As no ed n the Rej inder xpert ep rt of Peter S e er, 4 Marc 2020 ("Stege - "), ¶ 40, Reso ute's xpe t Dr. apl n h s not in lud d any fin ncial b nefit a isin fr m the b omass pl nt n his d mages calcula ions.

demonstrates the clear divide between the regulatory conduct of the GNS and the private conduct o PWC an NSPI

50. I sum th rule o stat responsibilit fo internationall wrongfu act recogniz tha distinction shoul b mad betwee th conduc o Stat orga an attributio o conduc o non-Stat actor t th State Jus a th IC an othe internationa tribunal hav distinguishe betwee th consequence flowin fro conduc attributabl t Stat organ fro consequence flowin fro th conduc attributabl solel t privat actors,[9] s to mus thi Tribuna maintai th distinctio whe considerin IL Articl an Articl 8 I thi case th action o PWC an NSP t creat th allegedl "preferential an "discounted LR canno b attribute t th GN becaus i di no hav "effectiv control ove eithe o th privat partie tha negotiate an agree t th commercia term unde whic Por Hawkesbur pay fo it electricity Th UARB' regulator approva o tha privately-negotiate rat an th conduc o th GN DO t confir it pre-existin polic intention regardin renewabl energ standard ar separat an distinc fro th allege internationall wrongfu act

E Resolute' Allegatio tha [redacted] i Erroneou an Ha N Bearin o Attributio

51. I it Repl Memorial th Claiman make th argumen tha "[t]h electricit measure ar attributabl t GN becaus th UAR i Stat orga o Nov Scoti an GNS throug th [redacted]"[9] an tha [redacted]"[9] Resolute' sol basi fo attributio her i [redacted]

[9] *Se e.g.* **RL-114** *Militar an Paramilitar Activitie Case* ¶ 93-112 115 ("Fo thi conduc t giv ris t lega responsibilit o th Unite States i woul i principl hav t b prove tha tha Stat ha effectiv contro o th militar o paramilitar operation i th cours o whic th allege violation wer committed [… I take th vie tha th contra remai responsibl fo thei acts an tha th Unite State i no responsibl fo th act o th contras bu fo it ow conduc vis-à-vi Nicaragua includin conduc relate t th act o th contras.") **CL-105** *Ja d Nu Award* ¶ 172-17 (distinguishin betwee th conduc o th Sue Cana Authorit an othe Stat organs) **RL-116** *Whit Industrie Award* ¶ 8.1.18-8.1.21 10.2.3 10.4. (distinguishin th conduc o th India Governmen an court fro th conduc o Coa India)

[9] Claimant' Reply 43

[9] Claimant' Reply 49

[redacted][94] Canada's Counter-Memorial and the witness statements of Ms. Chow demonstrate the flaws in this reasoning with respect to ILC Article 8.[95] Resolute's attempt to fit the reasoning into ILC Article 4 is similarly illogical.

52. Resolute is wrongly conflating two different measures (loan versus LRR), two unrelated State organs [redacted] versus UARB) and two distinct processes (approval of a loan versus approval of a proposed electricity rate).

53. The process for obtaining approval for a proposed LRR is an independent and statutorily mandated process before the UARB pursuant to the *Public Utilities Act*. Not even the Minister of Energy, let alone a [redacted] had the authority in fact or in law to give approval for PWCC to receive the LRR. That review process before the UARB has nothing to do with the [redacted], and vice-versa. As Ms. Chow explains, the [redacted].[96] The latter conduct does not create attribution of the former under international law.

54. Resolute's attempt to draw parallels to *Bilcon* is again misplaced. In *Bilcon*, it was the environment Ministers from both the GNS and Government of Canada who had the final say on whether to accept or reject the joint review panel's recommendation on approval of the quarry project, a discretion they exercised in deciding that the project should not proceed.[97] The situation here is totally different: [redacted] had nothing to do with the negotiation or approval of

[94] **C-182**, [redacted] p. CAN000002_0004.

[95] Canada's Counter-Memorial, ¶ 196; Chow First Statement, ¶ 17; Chow Rejoinder Statement, ¶¶ 2-4.

[96] Chow Rejoinder Statement, ¶¶ 2-4; **C-346,** [redacted], p. CAN000124_0002-CAN000124_0003.

[97] **RL-025**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015 ("*Bilcon – Award on Jurisdiction and Liability*"), ¶ 311: ("The final decision of the responsible authority … must be exercised with the approval of the Governor-in-Council – that is, the federal cabinet, the senior decision making body in the executive of Canada.")

the LRR and the [redacted].

F. Resolute's Attempt to Attribute the LRR to the GNS by Reference to ILC Article 11 is Also Without Merit

55. Resolute's final argument is that, if the Tribunal were to find that the electricity rate was the product of private actors, the GNS' actions nevertheless "acknowledged and adopted" it and is therefore attributable to the State pursuant to the customary international law principles reflected in ILC Article 11.[98] Resolute relies on the same misplaced imputation of conduct and factual misrepresentations, including with respect to the regulatory hearing at the UARB and RES issues, as well as the [redacted] The Claimant's reliance on ILC Article 11 to attribute the Port Hawkesbury LRR to the GNS is no more appropriate than its flawed reliance on ILC Articles 4 or 8.

56. ILC Article 11 is entitled "Conduct acknowledged and adopted by a State as its own" and states:

> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

57. ILC Article 11 is only potentially applicable if the conduct by PWCC and NSPI in concluding a "discounted" and "preferential" electricity rate is not attributable to the GNS via ILC Articles 4 or 8 (or any other earlier article). ILC Article 11 requires "clear and unequivocal" acknowledgement *and* adoption of conduct by the State, and it will not be sufficient if a state "…merely acknowledges the factual existence of conduct or expresses its verbal approval of it."[99] For example, in the *Diplomatic and Consular Staff in Tehran* case, the ICJ recognized that once

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[98] Claimant's Reply, ¶ 68.

[99] **RL-032**, ILC Articles, Article 11, Commentaries (6) and (8). *See also*, **RL-196**, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) ("*Crawford, ILC Commentary*"), Article 11(6)(8) at p. 123. *See also,* **CL-210**, *Diplomatic and Consular Staff in Tehran Case*, ¶¶ 73, 91; **RL-197**, *Affaire relative à la concession des phares de l'Empire ottoman,* UNRIAA, vol. XII, 24/27 July 1956, at p. 198; **RL-198**, James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), p. 187 (stating that the act of adoption may be express, as in *Diplomatic and Consular Staff in Tehran* or implied, as in the *Affaire relative à la concession des phares de l'Empire ottoman (Lighthouses)* arbitration).

the Iranian Government maintained the occupation of the U.S. Embassy and the detention of hostages for the purpose of exerting pressure on the United States, the legal nature of the situation was "fundamentally transform[ed]" whereby "the approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of hostages into acts of that State."[100]

58. In contrast to the *Diplomatic and Consular Staff in Tehran* case, nothing in the conduct of the GNS with respect to the PWCC-NSPI LRR can be accurately described as an express or implied acknowledgment and adoption of the impugned conduct as its own.

59. First, the UARB did not seek to make the conduct of PWCC/NSPI in negotiating the LRR its own conduct. The UARB's role was limited to making a determination as to whether the proposed LRR, which PWCC and NSPI negotiated based on their own commercial interests, met the statutory test of leaving all ratepayers better off than they would otherwise be if Port Hawkesbury's load was removed from the electricity system. Resolute is wrong to suggest that a State organ that adjudicates a regulatory process to review a proposed private transaction (e.g., a court approving a bankruptcy settlement or corporate merger) acknowledges and adopts the conduct of the private parties appearing before it. Imputing responsibility on the UARB or any adjudicative State organ in that way would have radical implications for the international law on State responsibility.

60. Second, Resolute's mischaracterization of [redacted] is no more relevant in the ILC Article 11 context than it is under ILC Articles 4 or 8. The GNS does not operate the Port Hawkesbury mill nor is it a party to the pricing mechanism under which PHP pays NSPI for electricity. Whether Port Hawkesbury can realize any electricity savings under the LRR rests on PHP and NSPI (which, as discussed above, has proven to be far more difficult than PHP had hoped for).[101] The GNS did not "adopt" the LRR as its own through

[100] **CL-210**, *Diplomatic and Consular Staff in Tehran Case*, ¶ 74.

[101] **R-431** [redacted], p. CAN0000131_005: [redacted]

the loa agreement – the GNS was simply p esen ed with the dea t at WCC and NSP had co cl ded reviewe i a d elieved it t be s ff ciently sound o justify mak ng a oan. [02] That is no w at inter at ona law considers to be a State "acknow edging a d adop in " onduct of pri ate partie as t own. Resol te's su gestion t at a St te organ lending m ney t a privat party automa ically means tha under i te nat onal law he State has " dopted as i s own" tha private pa ty's contractu l rights nd obligat s vis-à- is third p rties is unten ble.

61. Final y, Res lut 's Re ly Memori l poin s again to the GNS OE's ren wable energy ac ion as eviden e t at GNS "ack owledge[d] a d adop [ed] th elect icit mea u es.[103] Cana a ill not r peat he e t at a roper view f the f cts eve ls t e clear is inction b tween PWCC and NSP creating an allegedl "pr fer nti l" a d "reduced" e ect icity rate a d the GNS' l ng-stand ng and p e-e isting g vernmen al pol cies to s ift the prov nce ow rds lean, r newab e e ectricity. No e o thi conduct ee s t e inter ati nal law test escri ed n I C Art cle 11. The requisite exus di n t e ist betw en he egu at ry ac io s of the province and the RR in order to mee th exacting d of " ckno le gme t and ad ption.

62. Again, ju t as th Cla mant mis ed the dist nctions be ween this c se an *Bi con* wit r spe t to att ib tion u de ILC Arti le 4, its elia ce on *B lc n* i simila ly na posite ith respect o ILC Arti l 11. In *Bi con,* the tri unal found that a ove nment Minister ad expli it y adopted t e JR 's ssentia f ndings n dete mi ing th t the project in di pute sho ld b deni d under env ronmenta la s and this "lin b twe n t e f ndi gs and rec mmend tions of the J P nd the Min st r's final ec sion would be s ffi ient to ons itu e an ack ow edgemen and ad ptio for the purpose of Article 1 ." [04] hat "ack ow edg ment an adoption" by the Mini ter of he all ged inter ational wro gf l conduct i.e , the J P' alleged use f a s andar not pr sen in C nadian aw) mea t that, even if the JR 's conduct wa no attributabl to C nad by its lf, wa attr bu ab e under ILC Art cl 11.

63. Bu there s n si ilar conduct n t is case her by the GN "a knowle ged and ado ted" the PWCC-NSP L R (.e., the all ged wro g ul

[102] Chow R joinde tat men , ¶¶ 2- .

[103] l imant s eply, ¶ 54.

[04] **L-025**, *Bil o – A ard on Jurisdiction and Liability*, ¶ 324.

applicant before the UARB (indeed, it declined the invitation to do so).[105] Further, its actions on the renewable energy issues were a by-product of broader regulatory action that does not have the requisite nexus to engage attribution under ILC Article 11, which requires a full acknowledgement and adoption of the measures as if it were the State's own conduct as exemplified by the *Diplomatic and Consular Staff in Tehran* case. That is not the situation here.

III. CANADA HAS NOT VIOLATED ITS OBLIGATIONS UNDER NAFTA ARTICLE 1102 (NATIONAL TREATMENT)

A. The Exclusions Set Out in NAFTA Article 1108(7) Apply to the Vast Majority of the Nova Scotia Measures

64. In its Counter-Memorial, Canada argued that: (1) the $40 million credit facility and the $24 million capital loan are "government supported loans", (2) the [redacted] are "grants", (3) [redacted] is a "government supported loan", (4) the [redacted] is a "grant" or a "government supported loan", (5) the Land Purchase Agreement is "procurement", and (6) the Outreach Agreement is "procurement" or a "grant".[106] All of these measures would thus fall within the scope of Article 1108(7).[107]

65. In its Reply Memorial, Resolute does not actually dispute the characterization of these measures as "procurement by a Party" or "subsidies or grants provided by a Party […] including government supported loans, guarantees and insurance", thereby conceding that they are covered by the terms of Article 1108(7). Resolute only takes issue with Canada's argument in relation to the FULA and the Outreach Agreement, alleging that they do not qualify under Article 1108(7) and are accordingly subject to the national treatment obligation in Article 1102. This contention is without merit.

66. Resolute did not articulate its complaint with respect to the FULA in its Memorial. In response, Canada pointed out the lack of specificity and noted that, if Resolute is alleging the GNS is "essentially making the Crown timber free" through the FULA (which is false), then Article

[105] Coolican First Statement, ¶ 17.

[106] Canada's Counter-Memorial, ¶¶ 225-232.

[107] Canada does not argue that the electricity rate negotiated between NSPI and PWCC is subject to an exclusion in Article 1108(7) as it was negotiated between two private entities on the basis of market principles. Canada's Counter-Memorial, ¶ 224. *See also* Part II above.

1108(7)(b) would still app y, nd furthermore, that pay ents ma e b the G S for silviculture act vities co du ted by PHP would constitute "pr curemen " overed y Article 1108 (a).[108]

67. esolu e's Repl Mem ri l adds o lar ty to ts clai , stat ng s mpl th t t e G S "is ot bu in goods or ser ice –whe PH pays fo stum age under the FULA "[109] This do s othing o further su sta tiate the nderlying ccus tio tha PHP pa s next o n thing for Cro n imber, an lleg ti n with no upportin ev dence and co tr dic ed by he seco d witness st tement of Deput M nis er o the N va Scotia ep rtmen of Lands an Fore try Julie owe s.[11] B t eve if her were an e idence to esta lish that this ere rue then the NAF A Article 108(7)(b) excep ion would apply.[11] Res lute al o ignore Cana a's oint tha p yme ts y he NS to PHP unde th FULA for si viculture ct vitie on C own ands f ll ithin t e eanin of NAF A Article 1 08 7)(a). As Deput Minis er Towers expl ins, "th Province c mpe sat s PHP or t ki g car of Cr wn land . W th ut PHP r anothe licensee onduc ing those si viculture a ti ities it ou d f ll to th Cr wn to pay c nt ac ors to do so Ent ring into such gree ents with li ensees o perform si viculture ct vities is c mm npla e in N va co ia an it is to the ad ant ge of th P ovin e s m st of the ctiv ties ill yiel be efits f r dec des fter they have been perf rm d." [12] In ny ev nt, it s not or Canad to argue esol te' c se or t and th Tribu al should disregard esolute's arguments reg rdin t e FULA a co fused nd having no ance.

68. esolute's compl int about th Outreach Ag eeme t is also i relevant Re olute has co sistent y al eged tha pay en s m de y he NS to PHP a axim m of $3 8 mill on ear fo a pe iod of 10 ears) are "g nts."[1 3] Deput Minis er owers has clar fied hat hes

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[10] Canada's Counter Me orial, ¶ 23 -234.

[109] laiman ' Rep , ¶ 30 .

[110] As Deput Mini ter Ju ie Towers expla ns, unde the FULA "PH pa s for al stumpage harv sted rom C ow la ds at he rices and uantities re cri ed in he FUL ." Towers Rejoinder t te ent ¶ 3.

[111] As ex lained by Deput Mini ter Ju ie Tow rs in her fir t witness sta ement (¶ 3 -36) t e FULA i a modern licens ng r gime t at ll ws PHP to ac ess row la d for he timber i re uir s for its pa er making pe ati ns at th stum age rat s set o t the ein hile a so ayi g PHP for si viculture ct vities it nd rtake i order to c mply with Nov Scoti 's forest anagement req ire ents. *See al o*, Towers Rejoinder t te ent ¶ 3.

[12] Towers Rejoinder t te en , ¶ 3. At 4 of her Rejoinder tateme t, Deput Minis er Tower ex lains the ro isi ns o the FUL th t se ou wh t the G S obt ins nder that agre me t whe i comes to si viculture a tiv tie .

[113] *See e.g.,* laimant's Me ori l, ¶ 7 , 21 a d 2 3. In its Repl M moria (¶ 264), th Claim nt s ate th t the GN provide PWC /PHP wit over $ 0 illion n gran s. Canada u ders ands tha Res lu e ge s to t is amount by ddin the su s pay ble unde the $1 5 million workforc train ng ra t, the 1 million marketing co tri uti n and the

disbursed to PHP so [redacted][114] Therefore, the Outreach Agreement is more properly considered as "procurement" of services covered by the exclusion set out in Article 1108(7)(a).[115] In either case, Resolute cannot include the Outreach Agreement in its national treatment claim because of Article 1108(7).

69. Resolute complains that "Canada has refused to produce documents itemizing how much money was attributable to each different cost category in the Outreach Agreement".[116] This is a misleading and irrelevant point. First of all, Canada produced all of the documents responsive to the relevant document request and made redactions only in some documents in line with the Tribunal's decision contained in Procedural Order No. 9.[117] As explained in a letter to the Claimant dated October 12, 2018, Canada only redacted the amount of payments or reimbursements made in connection with the Outreach Agreement after October 15, 2014.[118] Anything after that date (i.e., when the Claimant closed the Laurentide mill[119]) is irrelevant to this dispute. But regardless of Resolute's belated complaint about redactions, it fails to explain how amounts of payments made after October 15, 2014 have any impact or relevance for the application of Article 1108(7).[120] As noted above, payments by the GNS for activities performed under the Outreach Agreement

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Outreach Agreement ($3.8 million per year for 10 years). If the payments in the Outreach Agreement are considered to be "grants," then they are exempt from NAFTA Article 1102 because of Article 1108(7)(b).

[114] Canada's Counter-Memorial, ¶ 231; Towers First Statement, ¶ 39: ("[redacted]"); Towers Rejoinder Statement, ¶¶ 5-6. At ¶¶ 7-8 of her Rejoinder Statement, Deputy Minister Towers explains how the four elements cited by Resolute as not constituting "procurement" "are related to services provided to, and approved by, the GNS."

[115] Canada's Counter-Memorial, ¶ 232.

[116] Claimant's Reply, ¶ 310. *See also,* Towers Rejoinder Statement, ¶ 9 (explaining that the quarterly reports prepared by PHP "provide to the GNS detailed work reports and expenses for nine categories of work", which "correspond with the eligible work in the Outreach Agreement." These report are subject to review by the Department of Lands and Forestry and PHP submits an annual independent auditor's report, "which reviews the schedule of work performed and payments received under the Outreach Agreement.")

[117] Procedural Order No. 9, 21 August 2018, pp. 21-24.

[118] **R-432**, [redacted], p. 3.

[119] **R-016**, Resolute Forest Products, News Release, "Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Québec" (Sep. 2, 2014).

[120] Claimant's Reply, ¶ 310.

constitute "procurement. Resolu e refer to th m as "grants". Article 1108(7 pplies in ei her case and the Outre ch Agr em nt c nn t be part f Resol te's Article 110 claim.

B Th ribunal as No A th rity or Rea on to isregard the E plicit Languag of N FT Article 1108(7) ased on Resolut 's Mislead ng haracteri io s f Can da's Past Position

70. In its Re ly Mem rial Resol te con in es to ins st t at Canad sh uld be revente from appl ing the Ar icl 11 8(7) e clu ions bec us it d d not no if th me sures at ss e pursuan to the WTO *Agreem nt on Su sidie and Counter ailing M asur s* ("SCM Agre ment"). Reso u e also as erts tha "Cana a t ok a iffer nt position efore th Worl T ade Or aniz tio ("WTO") wh re it den ed that GN provid d any ubs dies (includ ng grants, loans and procurement to PHP/PWC ."[121] Bo h conte tions are ithou le al or fac ual validi y.

71. First nd f r most, Resolut 's con ention t at NAFTA Ch pter lev n tribun l ca r fuse to apply t e expli it te t of Ar icle 1108(7) b caus f an alle ed non comp iance with a differ nt re ty over whic th t tr bunal ha no juris icti n nd that contains d ffer nt text s w th ut precedent T is Tri unal ha no ju isdictio to eci e whether C nada omplied wi h ts bli ations under rti le 25 of the SC Agreeme t,[22] and Re olut h s o stand ng to all ge or r ly on an alle ed viola ion of hat p ov sio .[123] esolute h s

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[121] Claimant s Re ly, ¶ 27 .

[122] NAFT A ticles 1 16 nd 1 17 st t that an inv sto may o ly br ng a c ai o its own b hal r on b ha f of an e te prise f r a br ac of Sectio A f C apter Eleven f the N FTA, not any ot er treaty. A NA TA tri unal ha no ju isd ction to dec de whether anada has violated its bligat ons u der ny nterna iona tr aty other ha th NAFTA. T is was r cogniz d by the tribun ls n *Gra d Rive , M tha ex* (wh re the the tre ty was he GA T), *B yview* and *A M.* **L-019**, *G and R ve En er rises ix Nat on , Ltd., et al. v. nited ta es of A eric* (UNCIT AL) A a d, 12 Ja u ry 011 ("*G and Rive – Award*"), ¶ 1; **RL- 54**, *Me ha ex Corp ration v. nited State o Am rica* (UN IT AL) Final Aw rd f the T i unal o Jur sdiction a d Merit , 3 Augu t 20 5 (*Methane – Fi al A ard*"), art II, Chapter B, ¶¶ 4-6; **L- 05** *B yview rrigati n Dist ict et al v Un ted Mexican S ates* (CS D Ca e No. A B(AF /0501) ward, 9 June 007, ¶ 21 **RL-09** , *Arch r Da iel Midland v. Me ico* (I SI Case No ARB AF)/0 / 5) Award 2 Novembe 20 7 (" *DM – Aw rd*" , ¶¶ 28-1 1. *See a so* **RL-199** *MOX Plan Case (I eland v Un ted Kingdom* , Order o Requ st for rovis on l M a ures, IT OS Re or s 2001 p. 95, D cem er 20 1, ¶¶ 50-52 (" E] en if he SPA Conven ion, t e EC Tr aty an t e Euratom T eaty co ta n ights or blig tio s simi ar to or ident cal wit t e r ghts or obl gat ons se ou in the Con entio , the rights and obli a ions und r those a reem nts h ve a epa ate existe ce rom those under th Convention [ ] t e app ic tion of intern ti nal law ul s on inte pr tation f treaties to identical or simil r p ovi ions f d ffer nt treat es may not yi ld he sa e res lts, having re ard to, *inter lia,* diff rences n t e respect ve context , object a d purpo es, subsequ nt practice o pa ties nd *ravaux répara oir s* […] sin e the di pute bef re the A nex VII arbitral t ib nal concern t e i terpretati n o a plica ion of th Conve tio an no other agreeme t …].")

[123] The WTO *Un erstandin on Rules and ro edures G verning the Set le ent of D sputes* "DSU" ap lie to dispu es ris ng unde the SCM A reement a d t e d sp te ett em nt m chanism s t ut n the D U i on y vailabl to WTO Memb rs and no to private part es like Resol te *See* **L-2 0**, WTO, *Un erstanding on rules and procedures*

precedent that would justify the non-application of the NAFTA text because of an alleged violation o differen treaty wi h differe t tex

72. Secon , Resolute s late t appe l n i s Rep y Memori l o t e gener l princip e f go d fai h s ju t s irreleva t o th s iss e s i s initi l relian e n t e conce t f estopp l (whi h h s be n relabell d s enjoini g "self-contradiction.").[14] A considerab e weig t f authori y indicat s t e princip e f go d fai h mu t e ground d n a sour e f obligatio , su h s t e gener l princip e f estoppel.[1]

73. Whi e go d fai h for s pa t f gener l internation l law,[16] t do s n t constitu e a separa e sour e f obligati n whe e no e wou d otherwi e exis . s t e I J explain d n t e *Ca e Concerni g Bord r a d Transbord r Arm d Actio s (Nicarag a . Honduras*

> T e princip e f go d fai h s [ ] "o e f t e bas c principl s governi g t e creati n a d performan e f leg l obligation " [ ] t s n t n itse f a sour e f obligati n whe e no e wou d otherwi e exist.[1]

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governi g t e settleme t f dispute , Artic e 4 2 (Consultations : ("Ea h Memb r undertak s o acco d sympathet c considerati n o a d affo d adequa e opportuni y f r consultati n regardi g a y representatio s ma e y *anoth r Memb r* concerni g measur s affecti g t e operati n f a y cover d agreeme t tak n with n t e territo y f t e forme " (emphas s added) . *S e al o* D U Artic e : ("[t] e rul s a d procedur s f th s Understandi g sha l app y o disput s broug t pursua t o t e consultati n a d dispu e settleme t provisio s f t e agreemen s list d n Append x 1 o th s Understanding" . Append x I o t e D U includ s a referen e o t e multilater l agreemen s list d n Ann x A o t e *Agreeme t Establishi g t e Wor d Tra e Agreemen* . T e S M Agreeme t s list d n Ann x A a d s th s subje t o t e rul s a d procedur s s to t n t e DS .

[14] Claimant s Repl , ¶ 291-30 . n i s Memoria , Resolu e argu d th t Cana a shou d e estopp d fr m relyi g n Artic e 1108(7 . *S e* Claimant s Memoria , ¶ 23 . Cana a h s alrea y explain d n i s Counter-Memori l th t Resolu e h d o leg l r factu l bas s o re y n t e princip e f estoppe . *S e* Canada s Counter-Memoria , ¶ 240-24

[15] *S e* **RL-12** , Jam s Crawfor , *Brownlie s Principl s f Publ c Internation l La* , 8[h] e . (Oxfo d Universi y Pres , 2015 , . 42 ; **CL-20** , I. . MacGibbo , *Estopp l n Internation l* L w (195) 7 IC Q 46 , . 47 ; **RL-20** , Yearbo k f t e Internation l L w Commissi n 195 , V l I , Docume t A/CN.4/6 : Repo t y M . . Lauterpach , Speci l Rapporteu , . 14 .

[16] *S e e.g* , Artic e 6 ("*Pac a su t servanda*) f t e *Vien a Conventi n n t e L w f Treati s* ("*VCLT*) provid s th t "[e]ve y trea y n for e s bindi g up n t e parti s o t a d mu t e perform d y th m n go d faith " (**RL-08** , *Vien a Conventi n n t e L w f Treatie* , M y 2 , 196 , 11 5 U.N.T. . 3 , 7 Janua y 198 , Artic e 26

[17] **RL-20** , *Ca e Concerni g Bord r a d Transbord r Arm d Actio s (Nicarag a . Hondura)* Jurisdicti n a d Admissibilit , Judgmen , I.C. . Repor s 198 , . 6 , 0 Decemb r 198 , ¶ 9 , quoti g **CL-20** , *Nucle r Tes s Ca e (Austral a . Franc)* Judgmen , I.C. . Repor s 197 , . 2 8 ("*Nucle r Tes s Case*" , ¶ 4

74. The ICJ confirmed this principle in the *Case Concerning the Land and Maritime Boundary Case between Cameroon and Nigeria (Cameroon v. Nigeria)*.[128] In that case, Nigeria contended that Cameroon had violated the principle of good faith by "omitt[ing] to inform it that it intended to accept the jurisdiction of the Court, then that it had accepted that jurisdiction and, lastly, that it intended to file an application".[129] Nigeria also alleged that Cameroon prepared itself to address the Court while it maintained bilateral contact with Nigeria on border issues.[130] The Court did not accept Nigeria's argument and repeated the holding in the *Nicaragua v. Honduras* case cited above and noting further that:

> In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submission.[131]

75. Thus, while the principle of good faith is an overarching principle to be applied to the interpretation and application of a specific legal rule, it does not permit this Tribunal to refuse to apply an explicit provision of a treaty (namely NAFTA Article 1108(7)) because of the alleged non-compliance of Canada with a different provision of another treaty (namely Article 25 of the SCM Agreement) over which the Tribunal has no jurisdiction. Under NAFTA Chapter Eleven, the NAFTA Parties are not required to notify measures pursuant to Article 25 of the SCM Agreement in order to invoke the exclusions found in Article 1108(7). A general invocation by Resolute of the general principle of good faith changes nothing in the Tribunal's responsibility to apply Article 1108(7) as written.

76. Resolute fails to acknowledge that the underling substantive elements for the application of this principle is not present in this case. As Canada already mentioned in its Counter-Memorial,[132] the underlying principle for Vice-President Ricardo Alfaro's Separate Concurring Opinion in the *Temple of Preah Vihear* case was that "a State must not be permitted to benefit by its own

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[128] **RL-134**, *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* Preliminary Objections, Judgment, I.C.J. Reports 1998, 11 June 1998 ("*Land and Maritime Boundary Case*").

[129] **RL-134**, *Land and Maritime Boundary Case*, ¶ 36.

[130] **RL-134**, *Land and Maritime Boundary Case*, p. 296.

[131] **RL-134**, *Land and Maritime Boundary Case*, p. 297.

[132] Canada's Counter-Memorial, ¶ 242.

inconsistency t t e prejud ce of an ther State".[133] s Judg Alfaro no ed, "[t]he prima y ound tion of [t e princi le of es oppel is the good f it that must prevail n inter at onal relation , nasmuch as inconsi te cy f co du t or op ni n o the part o a Stat t the prejudi e of anot er is incompatible with good fait ." [34] H wever thi pr nciple of goo faith does n t xist eparate rom es oppel. As uch, Reso ute cannot emplo it to isregard t e re uirem nt to meet th ap lic ble test der intern tional l w or stoppel.

77. Resolute' relian e n t e Sepa at Conc rring pini n in he *Temple of Pre h Vihear* case fa l to est blish the ap lica ility of a gen ral prin ip e of good fai h as bein relevant i this ca e. [35] That case co c rned a uestion of overeig ty, in a d spute betwe n two Sta es, and a the cour oted "wh n two c untri s e ta lis a fron ier bet ee t em, one of the pr mar objects i t achie e tabi i y an f nality", it can ot b th t a l ne is estab ished an the one State c nt nual y calls it nto q e tion.[136] I su h a s enario, he e a co si tent nd final pp oach by st tes on their fr nt ers is paramo nt the appli at on of th princi le f good fa th is merited Indeed, th existen e o legitimate re ia ce by Ca bodi was sign fic nt as it be iev d that ce tai ty a d finalit on the fr ntiers ad been a hieved, fu filling not er ssential le ent f esto pel a d the pr ncip e o good faith, w ich requ res hat he par y in oki g the rule mu t have el ed pon t e stat ments r ond ct f the oth r ar y, ither t its own detr

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[133] **L-136** *Case oncerning th Temple of Preah Vi ear (Cambo ia v. T ai and)*, Separate Concurr ng Opin on o Vice-Pr si ent A faro, 5 June 1 62 ("*Templ o Pr ah ihear – Alfaro Op nion*" , p. 4 .

[134] **CL 136**, *Tem le of rea Vihear – lfaro pi ion*, p. 2.

[35] Clai ant' Reply, ¶¶ 293 295.

[136] **L-203** *Case oncerning th Temple o Preah ihear (Ca bodia . Thail nd)* M ri s, J dgme t, I.C.J R ports 1962, 15 une 1962 (*Tem le of P eah Vi ea* "), p . 34-35

[137] **R -20** , *Tem le f P eah Vi ea* , p. 32. *Se al o*, for t e aspec of rel ance n the c ndu t, **L-209**, *N clea Tests ca e*, 46. T e C aimant als relie on th *Lism n* nd *Beri g S a* awards ut it fa ls to ex lain the relevanc of those cas s t this arbi ra ion. F r ins ance th arbitra or n *Lisman* n ted t a the cla mant had pr vio sly ta en position on rar to the on it was advocati g in th co tex of he ar itr tion. Thi is not t e ase he e: he p sition presented by anada an N va Sc tia co cer ing the mea ures t issue before t e D C a d t e NAFT Cha ter ineteen and the WTO panels have bee c nsi tent. he laimant's r li nce n the *Ber ng Se* ar itration is al o m splaced g ven t e onsist ncy in t e posi io s t ken by an da and ova Sco ia in the ontext of va ious dispute settlement proceedings.

78. In its Reply Memorial, the Claimant relies on the principle of consistency as iterated by Dr. Iain MacGibbon,[138] but fails to mention his acknowledgement that "international practice, if not international jurisprudence, has accorded less tentative recognition to the principle of consistency",[139] and that the limited extent to which it has been invoked in the international sphere is "in the relations between States".[140] Indeed, the guiding source of this principle is based in international relations between States, and the necessity for one State to not benefit from its own inconsistency to another State.

79. Resolute similarly relies upon a variety of cases, including *the Arbitral Award by the King of Spain* at the ICJ, the *Legal Status of Eastern Greenland* at the Permanent Court of International Justice and the *Oil Fields of Texas* before the Iran-United States Claims Tribunal to support its arguments for applying the principle of good faith and the principle against self-contradiction.[141] However, none of these cases illustrate how a general principle of good faith can exist as a separate source of obligation, nor does relabelling "estoppel" as "self-contradiction" provide Resolute with the justification to eschew the test for estoppel. These cases do not justify Resolute's disregard for international jurisprudence that reiterates the basic and essential elements for estoppel and the principle of good faith in international law.[142] In its failure to illustrate these elements, most fatally on the ability to illustrate reliance on its part, Resolute has no standing to argue estoppel or the general principle of good faith.

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[138] Claimant's Reply, ¶ 292.

[139] **CL-204**, I.C. MacGibbon, *Estoppel in International* Law (1958) 7 ICLQ 468, p. 469.

[140] **CL-204**, I.C. MacGibbon, *Estoppel in International* Law (1958) 7 ICLQ 468, p. 471.

[141] Claimant's Reply, ¶¶ 296-300.

[142] *See* Canada's Counter-Memorial, ¶ 240. Numerous arbitral tribunals in investor-state disputes, the ICJ, the International Tribunal on the Law of the Sea, and State-to-State arbitral tribunals have found that for estoppel, a party will be bound to its prior words or conduct if it has evinced (1) a clear and authorized statement, action or omission with (2) reliance in good faith by another party on that statement, action or inaction (3) to that party's detriment or to the advantage of the first party. *See* **RL-204**, Charles T. Kotuby, Jr., Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press, 2015), Chapter 2: Modern Applications of the General Principles of Law, p. 122. *See also* **CL-116**, *Pope & Talbot v Canada* (UNCITRAL) Interim Award, 26 June 2000, ¶ 111; **RL-130**, *Canfor Corp et al. v. United States of America* (UNCITRAL) Order of the Consolidation Tribunal, 7 September 2005, ¶ 168; **RL-205**, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/02/06) Decision on Jurisdiction, 29 January 2004, ¶ 109.

80. Resolute also turns to *Chevron*, in order to make the argument that the general principle of good faith exists under international law, separate from the general principle of estoppel.[143] The tribunal in that case denied Ecuador's jurisdictional objection that Chevron had not made an investment in Ecuador, relying on findings to the contrary by Ecuadorian courts. In doing so, the *Chevron* tribunal relied on Article 26 ("*Pacta sunt servanda*") of the VCLT to evaluate whether the parties had performed their obligations in good faith under the Arbitration Agreement derived from the investment treaty at issue.[144] *Chevron* is very different than the case at hand given that the *Chevron* tribunal had jurisdiction over both the investment treaty and the Arbitration Agreement. Resolute cannot rely on such a precedent to ask this Tribunal to consider the performance by Canada of its obligations under the SCM Agreement, a treaty over which this Tribunal has no jurisdiction, and to prevent Canada from relying on the exclusions set out in Article 1108(7).

81. Finally, Resolute has no basis to complain that the applicability of Article 1108(7) was not dealt with during the jurisdiction and admissibility phase of this dispute.[145] There was no obligation or need to do so, and in any event, it is normal for NAFTA tribunals to deal with Articles 1102 and 1108(7) together with the merits.[146] Canada explicitly stated in its Statement of Defence that Article 1108(7) applied to the Nova Scotia measures and fully articulated its arguments in its Counter-Memorial.[147] The Claimant's protest on this issue is hollow.

82. While as a matter of law the Tribunal need not inquire into the issue further, it is important to dispel Resolute's misleading allegation that Canada has adopted different positions in other proceedings with respect to the characterization of the measures at issue.

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[143] Claimant's Reply, ¶ 277.

[144] **CL-239**, *Chevron Corp. v. Republic of Ecuador* (UNCITRAL) Second Partial Award on Track II, 30 August 2018, ¶ 7.106.

[145] Claimant's Reply, ¶ 277.

[146] *See e.g.*, **RL-122**, *Mercer International Inc. v. Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018 ("*Mercer – Award*"), ¶ 6.27; **CL-123**, *Windstream Energy LLC v. Canada* (UNCITRAL) Award, 27 September 2016, ¶ 391; **RL-052**, *Mesa Power Group v. Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶ 214; **CL-113**, *United Parcel Service of America Inc. v. Canada* (UNCITRAL) Award on the Merits and Separate Statement of Dean Ronald A. Cass ("*UPS – Award and Separate Statement of Arbitrator Cass*"), ¶ 125; and **CL-130**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 4 January 2003 ("*ADF – Award*"), ¶ 86. Canada requested bifurcation on four specific issues of jurisdiction and admissibility because, as the Tribunal confirmed in its Decision on Bifurcation, it would be more efficient to proceed with those as a preliminary matter.

[147] Canada's Statement of Defence, ¶¶ 12, 14, 88-90 and 103; Canada's Counter-Memorial ¶¶ 222-244.

83. Canada and Nova Scotia's positions before the United States Department of Commerce ("DOC"), as well as before the NAFTA Chapter Nineteen and WTO panels, have been consistent. Canada and Nova Scotia did not dispute a number of the elements that led to the DOC's Final Determination that some of the measures at issue in this case were countervailable subsidies under U.S. domestic law.[148] As for the subsequent NAFTA Chapter Nineteen and WTO proceedings, they dealt with a narrower range of issues, namely the electricity rate negotiated by NSPI and PWCC, the provision of stumpage and biomass to PHP and payments made by the GNS under the Outreach Agreement.[149] It is thus incorrect to allege that Canada's past positions are somehow contradictory to the arguments it is now making under Article 1108(7).

84. Whether Canada notified the Nova Scotia measures under the SCM Agreement is also irrelevant to the application of the exclusions found in NAFTA Article 1108(7). As Canada already noted in its Counter-Memorial, the SCM Agreement itself provides that WTO "[m]embers recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself."[150] It is nonsensical to argue that the absence of notification under the SCM Agreement precludes the

[148] At ¶ 289 of its Reply Memorial, Resolute submits that Canada "was defending GNS's action before the U.S. Department of Commerce by denying that GNS had conferred subsidies" without submitting any evidence to support its claim. In fact, with respect to most of the measures at issue in this arbitration, the GNS never contested that there was a subsidy and limited its arguments to the quantification of the benefit.

[149] Canada's Counter-Memorial, ¶¶ 154-155. On the electricity rate, the main issue before the Chapter Nineteen and WTO panels was the DOC's finding on entrustment or direction by the GNS (both panels disagreed with the DOC on that point). The WTO Panel also found that the DOC's determination that the provision of electricity conferred a benefit was inconsistent with the SCM Agreement (**R-238**, WTO Panel Report, ¶¶ 7.68 and 7.78; **R-270**, NAFTA Article 1904 Binational Panel Review, Supercalendered Paper from Canada: Final Affirmative Duty Determination, Memorandum Opinion and Order (Apr. 13, 2017) ("NAFTA Panel Report"), p. 4). As for the provision by the GNS of stumpage and biomass, the questions before the Chapter Nineteen and WTO panels related to the initiation of an investigation by the DOC (**R-238**, WTO Panel Report, ¶ 7.154; **R-270**, NAFTA Panel Report, pp. 3-4). Finally, with respect to the Outreach Agreement, the NAFTA Chapter Nineteen Panel found that the determination by the DOC that payments under that agreement were grants was reasonable and supported by substantial evidence (**R-270**, NAFTA Panel Report, pp. 44-50).

[150] Canada's Counter-Memorial, ¶ 239, *citing to* **RL-193**, WTO, *Agreement on Subsidies and Countervailing Measures*, Article 25.7. Canada's 2013 Subsidy Notification also provides that "The notification process under Article 25 of the Agreement on Subsidies and Countervailing Measures (ASCM) aims to enhance transparency by calling for the provision of information on the operation of the notified programs and measures. Therefore, and further to Article 25.7 of the ASCM, this notification does not prejudge the legal status, nature or effects of notified programs under the ASCM and GATT 1994; certain programs included in this notification may not be considered as "specific subsidies" within the meaning of the Agreement." *See* **C-021**, Canada's New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, G/SCM/N/253/CAN, at page 2 (the "2013 Subsidy Notification").

application of Articl 1108(7)(b) when the notifica io of the ame mea ure oes not prej dge its egal st tus its ef ects or the na ure of the easur un er he SCM Ag eement se f.

85. In any ev nt, by t e time C nada s 2013 Su sidies Notif cat on was su mi ted n uly 1 20 3, th is ue h d been di cu sed at two m et ngs of he WTO Co mi tee on Su sid es and Counter ailing M asure ("SCM Comm tte ") and Can da had p ovided ritten res onses, in luding s ecific etail ab ut the m as res at is ue, to qu st ons it had r ceiv d f om the United Sta es [151] At the ctob r 2 12 SCM Co mittee m eting, Canada stat d hat it was orki g w th th [Nova cotia] gov rn ent on ep ies to the qu stio s t at the US h d sent re ardi g thi is ue and e pe ted to rovi e such ep ies in N vembe 2012" (whi h were pr vid d) a d hat t "wa r ady o have urther d al gue n this matt r with int rested Membe s."[1 2] W en t e Nova Scotia m asur s were di cusse a ain at th Apr l 2 13 SCM Co mittee m eting, Canad not d t at " t t ok the c ncerns ser ous y" a d hat it had worked (t geth r w th t e GN) wit ot er WTO em ers to eso ve the issue. Canad noted urthe "t at the circum ta ces of t e ale of t e Port Ha ksbu y m ll nd its re- peni g were a ma ter of public re ord in the on ext f [t e CCAA p oc ss] i w ich US cr dit rs an other stake old rs had igured prom ne tly in the decision-maki g. [15] At n point durin th se SCM Co mittee m et ng or in the ritten re ponses p ov ded to the United Sta es did Cana a ever "den " t at he GNS p ovided su si ies to HP.[15] Wh le he WTO notif catio is ue has no ea ing on the appl ca ion o NAFTA rticle 1 08(7), Res lute's po tr yal of C nada's " enial" re ard ng the na ure of t e Nova Scotia m as res is mislead

[151] **C-03** , USTR Qu stions Re arding ep rts of Ass st nce o Port Haw esbur (O t. 10, 2012); - **12**, [redacted].

[152] **R-07** , WTO, Co mi tee on Su sid es and Counter ailing Me sures, " in tes of the egular eeti g el on 23 ctober 201 ", W O Doc. G/S M/M/8 (J n. 10 2013) ("G/SCM/ / 3") ¶ 3.

[153] **R-07** , WTO, Co mi tee on Su sid es and Counter ailing Me sures, " in tes of the egular eeti g el on 2 April 201 ", W O Doc. G/S M/M/8 (ug. 5 2013) ("G/SCM/ / 5"), ¶ 1 1.

[54] See **R-078**, G/S M/M 83 and **R-079**, G/SC M/8 .

[155] Res lute's tt mpt to as ign an u terior mo ive to Canad hows a ack of unders an ing of the com le ity f that p ocess, esp cial y w en he WTO Member resp nsi l for a notif ca i n is a ederal st te. In r sp n e to a q estio p sed by the United Stat s with es ect to C nada s 2013 ubsidy Notifi ation, Canada ex lain d hat it "is ng ged in con inuing consul atio s w th the pro inc al and terr torial gove nments re arding ubsidy notif cation requir men s" a d that "[ ]ur ng the consu tat on or t e 2013 notifi atio , five pr vin es an three terr tories i form d it] of p ogra s th t m et the c ite ia or the p rp ses of notifi ation wh ch was an impr veme t o er t e 2 09 a d 2011 notific tions. **R-43** , WTO, Co mi tee on Su sid es and Counter ailing Me sures, "Su s dies -

86. Resolute also erroneously conflates the legal tests applicable under the SCM Agreement and NAFTA Article 1108(7) and confuses this arbitration with a trade remedies case. For instance, Resolute alleges that Canada contends that the FULA and the Outreach Agreement "are covered by the *subsidies* exception of 1108(7)(b)," that Canada thus concedes that it receives "less than adequate remuneration for the fiber, a subsidy according to the [SCM Agreement]" and that "Canada is providing subsidies to PHP under the Outreach Agreement."[156] Resolute is confusing matters and it has no justification for disregarding the plain language of the applicable treaty.[157]

87. As Canada explained in its Counter-Memorial and again above, the Outreach Agreement is properly considered as "procurement" under Article 1108(7)(a), but if Resolute believes that payments thereunder are "grants", then Article 1108(7)(b) applies. As for the FULA, Resolute has not articulated a coherent argument in either its Memorial or Reply Memorial, so there is nothing for Canada to concede. However, even if Resolute's unsubstantiated claims were true, the Article 1108(7)(b) exclusion would apply to the provision of stumpage and the Article 1108(7)(a) exclusion for "procurement" would apply to payments made with respect to silviculture activities.

88. Resolute also relies on the Separate Statement of Dean Cass in *UPS* to convince this Tribunal that it should not apply NAFTA Article 1108(7).[158] In his Separate Statement, Dean Cass noted that Canada Post had "declared – in materials not prepared in contemplation of the current dispute – that it receives no subsidies of any kind."[159] In contrast, Canada did not contest the nature of some of the Nova Scotia measures as subsidies in the DOC, NAFTA Chapter Nineteen or WTO proceedings – the quantification of a benefit for the purposes of countervailing duties under U.S. law was in dispute, but that is irrelevant for the purposes of Article 1108(7). Nor did Canada

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Replies to Questions Posed by The United States Regarding the New and Full Notification of Canada", WTO Doc. G/SCM/Q2/CAN/62 (Oct. 31, 2014), p. 2.

[156] Claimant's Reply, ¶ 311 (emphasis added). There are important differences between the definition of "subsidy" contained in Article 1.1 of the SCM Agreement and the language of NAFTA Article 1108(7)(b). For instance, under Article 1.1 of the SCM Agreement, "grants" are cited as an example of "direct transfer of funds" (and hence of "financial contribution") and can constitute a "subsidy" if a benefit is conferred. In contrast, Article 1108(7)(b) speaks of "subsidies *or* grants" and treats them as distinct elements (emphasis added).

[157] In its Counter-Memorial, Canada set out the definitions of some of the terms used in Article 1108(7) (*See* Canada's Counter-Memorial, fn. 473 (ordinary meaning of "loan"), 476 (ordinary meaning of "grant"), 486 (ordinary meaning of "procurement")). Resolute did not offer different definitions or argued that the terms should be interpreted differently based on their context or in light of the object and purpose of NAFTA.

[158] Claimant's Reply, ¶ 303.

[159] **CL-113**, *UPS – Award and Separate Statement of Arbitrator Cass*, ¶ 156 of Separate Statement.

dec are du ing SCM Commi tee meet ngs hat PHP had rece ved "no subsi ie of any ki d," which conce ned ean ass in *PS*.

89. More substanti ely, Dean Cass ound that "Ar icle 1108( )(b) doe not a pear int nd d to ove the en ire, road we p of gover ment act vity that ight r duc the os s or inc eas the ben fi s of a parti ular busi ess but th t it "ap ears int nded more nar ow y to each only self-cons iou and vert deci io s by gover me t to expr ssly c nvey cash ben fi s to a parti ular busi ess, enterp is , or activity "[160] Th s is what hap en d i the ca e at hand with re pe t t th GNS g ving PWCC oan and g an s to a si t it wit the pur ha e o the Port Hawke bury il . As a re ult the con erns Dean Cass r is d i *UP* ar not pr se t in this arbitra n.

C. Ev n i the Tri unal We e to Find tha the Exclu ion Se O t in AFTA Ar icle 11 8( ) D Not A ply, he e s No Viol ti n of Ar icle 102

1. Evi en e of Nationality- ased Discrimin ti n is Req ire fo the Tri un l to F nd a Viol ti n of Ar icle 10

90. As C nada expl in d i its Counter-Memo ial, Ar icle 11 2 is int nd d to pr tect fo eign inve tors from discrimin ti n o the as s of nation li y b the host P rty The pu po e of that prov si n i n t to pro ibi all differe tial trea ment mong inve tor and invest ent b t to e sure tha the AFTA Pa ti s d not reat inve tor and invest ents tha ar "in like circumsta ces" differ ntly as d on heir nationalit [61]

91. I its eply Memo ial, Res lute con uses nationality- ased discrimin tion w th a requir me t to demons rate discrimin tory in ent For inst nce, Res lute ite the fi di g o th *ADM* tri unal that "pre ious Trib nals have r li d o the meas re's ad erse ef ec s o the rel vant inve tor and heir invest ents r ther th n o the i te t o the Respo dent State "[162] Res lute conveni ntly mi s to me tion tha the same tri unal ound that " t]he nat onal trea ment oblig tion nder Ar icle 11 2 s an applic ti n o the ge eral prohib ti n of discrimin tion as d on nationa ity, incl ding bo h *de jur* a d *de acto* discrimina ion and that "Ar icle 1102 proh bits trea ment hich discrimi at s o the as s o the fo eign inves or's nationality "[1 3] In *ADM*

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[160] **CL 113** *PS – war and Sep rate Stat me t of Arbit ator a s,* 1 9 of Sep rate State ent

[161] Can da's Counter-Memo ia , ¶¶ 250 253

[162] Claim nt's R p y, ¶ 229

[163] **RL 092** *DM – A ar* , ¶ 19 and 205.

claimant's U.S. nationality was precisely the point of the measures (i.e., to bring about a change i U.S governmen trad policy) Tha i plainl no th situatio here

92. Resolut misunderstand an misrepresent Canada' argument Canad di no sugges tha fo somethin t b nationality-base discriminatio i mus als b show t constitut intentiona discrimination.[16] claiman i no require t establis discriminator intent Rather t establis breac o Articl 1102 includin Articl 1102(3) Resolut mus sho evidenc o nationality-base discrimination i.e evidenc tha th Claiman o it investment wer treated i fac o i law les favourabl tha Canadia investor o thei investment becaus o it U.S nationality Resolut stil ha no me thi burden.[16]

93. Resolut ha no provide an objectiv evidenc tha i wa accorde les favourabl treatmen tha PWC (Canadia investor becaus i i a investo o th Unite States.[16] Canad ha alread demonstrate tha ther i n evidenc whatsoeve o nationality-base discriminatio i thi case.[16] Biddin o th Por Hawkesbur mil wa ope t Resolut an an othe company regardles o nationality Th Monito an NPPH' creditors no th GNS selecte PWC a th winnin bidde no becaus o it Canadia nationalit bu becaus i ha th bes bid Further th re-openin o th mil ha a impac o Canadia S pape producer Irvin (fro Ne Brunswick an Catalys (fro Britis Columbia a well no onl o Resolute

94. T suppor it vie tha Articl 110 doe no requir proo o nationality-base discrimination Resolut focuse o th languag o Articl 1102(3 an insist tha "[t]h Tribuna

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[16] Indeed numerou NAFT tribunal hav hel tha i i no necessar t prov a inten t discriminate thoug evidenc o suc inten ma b considered See fo instance **RL-092** *AD Award* ¶ 209-210 **RL-091** *Cor Product International Inc v Unite Mexica State* (ICSI Cas No ARB(AF)/04/01 Decisio o Responsibility 1 Januar 2008 ¶ 11 an 138

[16] Th *UP* tribuna foun tha th lega burde t sho th element necessar t establis violatio o th nationa treatmen obligatio "rest squarel wit th Claimant Tha burde neve shift t th Party her Canada. (**CL-113** *UP Awar an Separat Statemen o Arbitrato Cass* ¶ 83-8 o Award) Articl 24(1 o th 197 UNCITRA Arbitratio Rule provide tha "[e]ac part shal hav th burde o provin th fact relie o t suppor hi clai o defence. Th tribuna i *Thunderbir* explaine that i clai unde Articl 1102 th burde o proo lie wit th claiman pursuan t tha provisio o th 197 UNCITRA Arbitratio Rule (**CL-131** *Internationa Thunderbir Gamin Corporatio v Unite Mexica State* (UNCITRAL Award 2 Januar 200 ("*Thunderbir Award*") 176) Th NAFT Partie als agre o thi point See fo instance **RL-096** *Mes Powe Grou v Canad* (UNCITRAL Secon Submissio o th Unite State o America 1 Jun 201 ("*Mes U.S Secon 112 Submission*") 4 fn 10 **RL-20** *Mes Powe Grou v Canad* (UNCITRAL Secon Submissio o Mexico 1 Jun 201 ("*Mes Mexic Secon 112 Submission*") ¶ 5-6

[16] Canada' Counter-Memorial 252

[16] Canada' Counter-Memorial ¶ 252-253

must be guided by the specific terms of Article 1102(3) to determine the conten an scop o the 'nationa treatment obligatio i respec o sub-nationa measures."[16]

95. Resolut incorrectl suggest tha Articl 1102(3 set ou lega tes tha i differen fro th on establishe unde th firs tw paragraph o Articl 1102 Th *Pop Talbo* tribuna foun tha "th treatmen o state an province i Articl 1102(3 i expressl a *elucidatio* o th requiremen place o th NAFT Partie b Articl 1102(1 an (2) an "th treatmen require b Article 1102(1 an 1102(2) o th on hand an 1102(3 o th other *t b identical* sav fo th limitation t state an provinces".[16]

96. I comin t thi conclusion th *Pop Talbo* tribuna referre t th structur o Articl 110 an t th fac tha i "expressl state tha i i *definin* th meanin o th requirement o Articl 1102(1 an 1102(2 whe thos provision ar applie t state an provinces".[17] I othe words Articl 1102(3 i mean t clarif th meanin o Article 1102(1 an 1102(2 whe th treatmen a issu i accorde b stat o province no t establis distinc lega tes fo suc treatment Thi interpretatio i supporte b eminen scholars wh hav explaine tha Articl 1102(3 wa adde b th NAFT Partie "apparentl *t clarif* th obligation the wer undertakin wit respec t state an provinces."[17]

97. Whil Articl 1102(3 require provinc o stat t accor t foreig investor (an thei investments "treatmen n les favourabl tha th mos favourabl treatment i accord t investor (an thei investments o th NAFT Part "o whic i form part, nationalit mus stil for th basi fo th leas favourabl treatmen i orde fo tha treatmen t constitut breac o Articl 1102

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[16] Claimant' Reply 216

[16] **RL-058** *Pop Talbo Inc v Canad* (UNCITRAL) Awar o th Merit o Phas 2 1 Apri 200 ("*Pop Talbo Awar o Merit o Phas 2*") ¶ 41-4 (emphasi added)

[17] **RL-058** *Pop Talbo Awar o Merit o Phas 2* 4 (emphasi added) Articl 1102(3 start wit th phras "[t]h treatmen accorde b Part unde paragraph an means wit respec t stat o provinc […]"

[17] **RL-207** Meg N Kinnea e al. *Investmen Dispute unde NAFT* (Kluwe La International 2009) p 54-110 (emphasi added) Counse fo Resolut recognize tha thi i th correc interpretatio durin th jurisdictiona hearing "Articl 1102 o course i th nationa treatmen provisio i NAFTA an th previou tw paragraph […] se ou tha th NAFT partie guarante nationa treatmen t investors an the guarante nationa treatmen t investments The there' thi paragrap 3 whic i mean *t specif* wha tha mean i respec o measure adopte b stat o provinc o sub-nationa governments stat o provinces. *Resolut Fores Product Inc v Governmen o Canad* (UNCITRAL Jurisdictiona Hearin Transcript 15-1 Augus 201 ("Jurisdictiona Hearin Transcript") Da 1 p 367:2-1 (emphasi added)

98. For instance, in a situation where a Canadian province (for instance, Nova Scotia) would treat more favourably investors from another Canadian province (for instance, British Columbia) than its own local investors, a foreign investor from another NAFTA Party could still bring a claim alleging a breach of Article 1102 based on the fact that it did not receive the treatment accorded by Nova Scotia to investors from British Columbia. There would still be a nationality element to such a claim and, contrary to what Resolute alleges, there is no "loophole for sub-national protectionism."[172]

99. The NAFTA Parties have consistently agreed on the fact that Article 1102 is designed to protect against nationality-based discrimination.[173] Commentators and scholars as well as a number of previous NAFTA tribunals have also emphasized this point.[174]

100. The consistent and concordant views of the NAFTA Parties on nationality-based discrimination must be given "considerable weight"[175] by the Tribunal given that they constitute a

[172] Claimant's Reply, ¶ 223.

[173] Canada's Counter-Memorial, ¶ 250. For a list of submissions made by the NAFTA Parties on this issue, see Canada's Counter-Memorial, fns. 523-525. Resolute points to the fact that the NAFTA Parties' submissions cited by Canada to support its arguments on nationality-based discrimination do not refer to Article 1102(3) (Claimant's Reply, ¶ 240). The explanation for this is simple: even when their claims relate to a provincial measure, claimants will bring them under Article 1102 in general or under one of the first two paragraphs of this provision.

[174] Canada's Counter-Memorial, ¶¶ 250-251 and fns. 527-531. *See also* **CL-117**, Andrew Newcombe and Luís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) ("*Newcombe & Paradell*"), p. 147, s. 4.1: ("[o]ne of the main objectives of international trade and investment law is to limit state measures that discriminate based on the nationality of the foreign individual, entity, good, service or investment in question"), p. 148: ("[i]nternational economic treaties limit nationality-based discrimination through two distinct non-discrimination treatment obligations: national and most-favoured-nation (MFN) treatment"), pp. 182-183: ("[t]he standard of treatment does not differ depending on whether the nationality-based discrimination is *de facto* or *de jure*"), and p. 189: ("[i]t may be argued that best-in-state treatment is more consistent with the overriding rationale of the relative treatment standards: to prohibit differential treatment of comparable investors on the basis of nationality […] Since national treatment is a discipline on nationality-based discrimination, discrimination based on residency in a particular subdivision is not within the purview of national treatment.")

[175] The tribunal in *Mobil v. Canada* ("*Mobil II*") found that "the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight". **RL-208**, *Mobil Investments Canada Inc. v. Government of Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility, 13 July 2018 ("*Mobil II – Decision*"), ¶ 158.

"subsequent practice"[176] und r Arti le 3 o the VCLT.[177] esolute onsi ers that the Tr bunal sho ld d sregard th s subseq ent pra tice becau e "the AFTA Par ies have no interpreted A ti le 1102(3) as to ationality-based discrimin tio ".[178] How ver, and as Canada xplaine ab ve, Article 1 0 (3) does ot es abli h a different legal te t o treatme t accord d y a p ovinc o s ate. A su h, here is o round or th Tribunal o gno e pri r stateme ts y the NA TA Parties on the issue of nation it -ba ed discrim nation.

101. A for Resolute's co tention that "[i]nst ad of rely ng upon var ous statemen s i arbitral s bmissions th ap ropri te mech ni m for the NAFTA Pa t es to ea h agreement on a att r of inter retation is the Fre Trade C mm ssion "[179] the t ibunal n *Mobil* eje ted a simi ar ar ument and f un tha "that her mi ht be m ny r ason for he absence of a Fre Tr de Co mis ion dec sion and [did] not elieve t at the subse uent ractice of he three NAFTA Partie can be di regar ed me ely becau e it t kes forms ifferent from a Commissi n d cision "[180] Sim lar y, t e *B lcon* trib na wa also not onvinced by t e c aimant ' rgu ent th t th "power of th FTC to make au ho itati e interp eta ions of NAFTA r places t e ule in Articl 1(3)(b) f th VCLT".[181]

102. Res lute also is egards basic principl s of treaty i terp etation hen all ging th t "Article 1 02(4 furt er emonstr tes th t here the Parties wanted to pro ibit is rimination o the basi o nationality, he said so expres ly".[182] I fails to notice that thi parag

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[176] T e *Bi con* ribunal re al ed hat "the ommentary t t e ILC draft conclusion on 'Subsequen agreeme ts and subs qu nt ractice in rel ti n to the nterpret tion of tre ti s' nclude ' t temen s in the co rse of a le al dispu e' as pote tially r le ant su seq ent practice of States for the p rposes o interp etati n." (**RL- 09**, *Wil iam Ral h Clayto , Willi m Richar Clayt n, Doug a Clayt n, Daniel Cl yton & ilcon of D la are, I c. v. Gove nment of Canada* (NC TRAL) A ard n Damage , 10 Ja ua y 2019 ("*B l on – Award on am ges*"), 378, *ef rri g to* **RL-210**, Re ort of he LC, Sev ntie h s s ion (30 April- June nd 2 Ju y-10 Aug st 2018 , U oc A/73 10, hap er IV, ¶ 18 (no e that t e *ilcon* tr buna re err d to "C apter VI" b t the co rect efe ence is "Chap er IV")

[177] **RL- 86**, *V LT* Article 31(3)( ) rea s s fol ows: "There s all be t ken nto account, tog the wi h the cont xt: […] b) any subsequent ra tic in th appl cation of t e t eaty whic e tab ishes t e agreeme t o the parties reg rdi g its inte pretat o ."

[178] C aimant's R ply, ¶ 2 2.

[179] C aimant' Repl , 43.

[180] **R - 08**, *il I – Decisi n,* ¶ 160

[181] The *Bil on* t ibun l a ded t at the act tha the N FTA Par ies did not ma e a b nding interpr tation nder N FTA rticle 1131(2) "means that t eaty in erp etatio simply follow the n rmal nterpre ative ules, w ic include t king accou t o subsequen agreeme ts and subsequen practi e of t e parti s. **RL-209**, *B lcon – A ard on Dam ges*, ¶ 3 7.

[182] Claimant's Reply, ¶ 221.

"[f]or greater certainty,"[183] whic make it cle r that he paragraph oes not cr a e a prohibi ion on nationality- ased discrimin tion that doe not al eady xi t in Ar icle 102. Ra he , it clar fies th t the proh bi ion on national ty-based disc imin tion a so ap lies to t e equ rement s t out in ticle 11 2(4)( ).

2. Res lut Fails to Meet t Burde t Prove Bre ch of rti le 102

a) The GNS did not ac ord "tre tm nt" to Resolute r ts inv stments

103. As an da emonstrated in it Co nter- em rial, the fact of which Resolu e omplains c nn t be consi ered to con ti ute "tre tme t" f Resolute nd it invest ents und r rti le 11 2.[184] In ts Reply Memorial, Re olute c ntin es t suggest th t his requi em n is et bas d on a ve y remote no ion f " rea ment that ha n t b en en orsed by NA TA ribu al.

104. For the ost pa t, Resolu e simply re states al eg tio s contain d i its Memo ia . For i st nce, t insist o us ng element of the ri unal's Decis on n Jurisdictio and Admissi il ty with respect to Artic e 1 01(1 t build i s ase in elation o rticle 110 .[185] As Canada has already oted, th *Methane* tri unal bserved tha "[a]n ff rma ive findi g of the r uisit 'rel tion' nder NAF A Ar icl 1101 […] d es not ne essa ily e tab ish h t there has b en a corr sp nding violati n of NAFT Arti le 102."[186] Also, the T ib nal highligh ed in its Decis on n Jurisdictio and Ad iss bil ty that it wa not "n ce sary to discus in urt er deta l ere the mea in of 'tr atment' i

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[83] Ar ic e 1102( ) reads a follow (em hasis a ded): "*For gr ater erta nty* no Pa ty ma : (a) im os on an nvest r of another arty a require ent t at a mini um le el of equi y n a enterpri e n t e ter it ry o t e P rty be hel by i s na ionals, other than nomina qu lifying s ar s for directo s r incorporato s f c rporati ns or (b) eq ire an nvesto o anoth r art , by reason f ts n ti nality, t sell o o he wise dispo e f a investme t n t e terri ory of the P rty."

[184] Canada' C unter-Me orial, ¶ 254-262. Re olute c nt nues to a tem t to tra sform the national t eatme t bligati n fo nd in Art cle 1102 by hav ng recours to th o jecti es list d in NAF A Article 02. Se laim nt's R ply, ¶ 275 Can da em hasi es nce again ha the bj cti es of AFTA do not im ose oblig tions on the AFT Parties, o ly its sub tan ive provisions do.

[18] laim nt' Reply, 246.

[186] Canada' ount r-Memo ial, ¶ 56, *citi g* **RL-05** , *Meth nex F n l Award* a t IV – h pt B Page 1, ¶ 1.

[87] *Resol te F re t Prod cts Inc. v Canada* UN ITRAL) Decis on n Jurisdiction an Admiss bili y, 30 Janu ry 2018 ("Decis on n Jurisdiction a d Admi sibility"), ¶ 291.

105. In the absence of a definition of the term "treatment" in the NAFTA, the Tribunal must apply the rules of treaty interpretation set out in the VCLT.[188] Far from being a "diversion" as suggested by Resolute,[189] the definition of "treatment" put forward by Canada in its Counter-Memorial (i.e. "behaviour in respect of an entity or person") is supported by customary international law and is in line with the findings of the tribunal in *Siemens*.[190]

106. In relation to Resolute's continued reliance on *UPS* and the three sugar cases brought against Mexico to support its claim that it was accorded "treatment" by the GNS, Canada has already explained why these cases are different on the facts. In *UPS*, there was "treatment" that meets the definition presented above by Canada,[191] and in the three sugar cases (*ADM, Corn Products* and *Cargill*), the claimants had made investments in the jurisdiction imposing the measure at issue *and* the tribunals found that there was nationality-based discrimination or protectionist intent by Mexico.[192] As none of these elements are present in this arbitration, Resolute's contention that the GNS accorded it "treatment" must be rejected.

107. Resolute's reliance on the testimony of Dr. Kaplan and on [redacted], as well as its contention that these documents demonstrate that the "GNS accorded Resolute treatment for purposes of Article 1102(3)" are also ill-founded.[193] Rather than showing that the GNS accorded treatment to Resolute and its investments, these documents discuss [redacted].

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[188] *See* Canada's Counter-Memorial, ¶ 257 and fn. 541.

[189] Claimant's Reply, ¶ 250.

[190] Canada's Counter-Memorial, ¶ 257 and fn. 542. At fn. 373 of its Reply Memorial, Resolute cites excerpts from the Decision on Jurisdiction from that tribunal to support its contention that the term "treatment" should be given a "wide scope". It omits to include the very sentence where the *Siemens* tribunal refers to the ordinary meaning of "treatment" as "behaviour in respect of an entity or a person". **RL-165**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Decision on Jurisdiction, 3 August 2004, ¶ 85.

[191] Canada's Counter-Memorial, ¶ 260. The *UPS* tribunal considered that the "*conduct* of Canada Customs in processing items to be delivered in Canada" by UPS and its investment and the "assignment of costs and obligations in connection with processing of items" constitute "treatment". **CL-113**, *UPS – Award and Separate Statement of Arbitrator Cass*, ¶ 85 of Award (emphasis added).

[192] Canada's Counter-Memorial, ¶ 261. **RL-092**, *ADM – Award*, ¶¶ 8, 100, 190, 208 and 212; **RL-091**, *Corn Products – Decision on Responsibility*, ¶¶ 2, 137-138; **RL-050**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 ("*Cargill – Award*"), ¶¶ 1, 220. In *Cargill*, the Respondent did not even challenge that it accorded "treatment". *See* **RL-050**, *Cargill – Award*, ¶ 222.

[193] Claimant's Reply, ¶¶ 248-249.

108. As discussed in Part IV(F) below, [redacted] However, [redacted][196] [redacted][197]

109. As Ms. Chow explains in her second witness statement, market predictions such as [redacted] "are uncertain because they operate without perfect information, especially with respect to other market participants and dynamics."[198] Resolute [redacted], to allege that there was "treatment" by the GNS of a specific enterprise and its investments.

b) The treatment allegedly accorded to Resolute and its investments is not "in like circumstances" to the treatment accorded to PWCC and PHP

110. Even if the Tribunal were to find that the GNS accorded treatment to Resolute and/or its investments, Canada has already shown that such alleged treatment was not "in like circumstances" to the treatment accorded to PWCC and PHP.[199] In its Reply Memorial, Resolute does not raise anything new and focuses on its contention that the Nova Scotia measures "were aimed directly at making PHP the national champion" and that "competitors in that same sector

[194] **R-161**, [redacted], pp. 10, 36, 38.

[195] **R-161**, [redacted], pp. 8, 53 and 56.

[196] Canada's Counter-Memorial, ¶ 109, *citing* **R-161**[redacted], pp. 8, 55-56.

[197] Canada's Counter-Memorial, ¶ 109, *citing* AFRY/ Pöyry-1, ¶ 46.

[198] Chow Rejoinder Statement, ¶ 8.

[199] Canada's Counter-Memorial, ¶¶ 263-272.

are in 'like circumstances' for purposes of Article 1102 when a measure singles out and discriminates in favor of one competitor in that sector."[200] This argument must fail because factors other than the existence of a competitive relationship must be taken into account in a determination of whether treatment was accorded "in like circumstances".

111. The fact that a domestic investor and a foreign investor (and their respective investments) are in the same economic or business sector is not sufficient to conclude that treatment was accorded "in like circumstances". As Canada noted in its Counter-Memorial, past NAFTA tribunals have recognized that this element is pertinent but not determinative.[201] In addition, past NAFTA tribunals have found that the relevant circumstances in an Article 1102 analysis "are context dependent"[202] and that such analysis requires consideration "of all the relevant circumstances in which the treatment was accorded".[203] Resolute's attempt to narrow the scope of the "in like circumstances" part of the test should therefore be rejected.

112. Canada has already highlighted other factors that must be taken into account in a determination of whether treatment was accorded "in like circumstances", including the regulatory framework applicable to the foreign and the domestic investors as well as public policy considerations that justify the differential treatment by showing that it bears a "reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments".[204]

113. Contrary to what Resolute alleges, the Nova Scotia measures were not "designed to impair" Resolute's investment.[205] Rather, the GNS implemented those measures to further a number of legitimate public policy objectives: to avoid a potential [redacted] to the Province's economy, to avoid significant increases in electricity prices because of the loss of NSPI's largest

[200] Claimant's Reply, ¶ 255. Resolute attempts to use references to [redacted] but fails to articulate how they are relevant to determining whether treatment was accorded "in like circumstances". *See* Claimant's Reply, ¶ 261.

[201] Canada's Counter-Memorial, ¶ 266, *citing* **RL-058**, *Pope & Talbot - Award on the Merits Phase 2*, ¶ 78.

[202] Canada's Counter-Memorial, ¶ 267, *citing* **RL-058**, *Pope & Talbot – Award on Merits of Phase 2*, ¶ 75.

[203] Canada's Counter-Memorial, ¶ 267, *citing* **CL-113**, *UPS – Award and Separate Statement of Arbitrator Cass*, ¶ 87 of Award.

[204] Canada's Counter-Memorial, ¶¶ 268-269 and 271 and authorities cited therein. **RL-058**, *Pope & Talbot – Award on Merits of Phase 2*, ¶ 79.

[205] Claimant's Reply, ¶ 257.

custo er, to sup or ontin ed e pl yme t in a r ral art of the Province with ew alternativ em lo ment op ort nities and to support he Provi ce's susta nable forest y ma a ement goals, just to ame few. Int rnatio a law ill gen ra ly extend " igh meas re o deferen e" to the ig t of a d mestic overnment to egulate matte s w thin its ow borders.[206] It is *a fortiori* not for Resolute to decide whether the GNS should have "r fraine from ad pting th No a Scoti M asures , " aken steps t mitigate th dama e" or spent its considerabl reso rces in ot er ays o boost empl ym nt".[207]

114. W th respec to the GN ' allege go l of cre ting a "n tio al ch mpio ", Newc mbe and Par de l note that "i there wer an open compet tion to btai sp cial ad ant ges and com et tio criteria w re not tied to th n tion lity of he investm nt an argu ent co ld be ade t at he inve tment or nve tor ch sen y the state f r pecia treatment was not n like circ mstan es to oth r i vestors."[208] This escr ption ap ly desc ibes wh Re olut 's Article 102 clai s fatal y f awed: the CAA pr cee ing inclu ed a pr ces fo soliciting off rs f r he asse s f N PH and the com etition as pen to id ers f a l nat ona iti s. Resolute was inv ted to bid but cho e no t . Nati nali y as ot one of the cri eri used to select PWCC s t e preferr d bidder. Th Tribuna sh uld adop th reason ng suggest d by New ombe and aradel an dismiss Res lut 's national trea men claim.

c) R solute and its inves ent we e not ac or ed le s fa oura le tre tment

115. F r the Tri unal to r ach this part o the national tre tmen an lys s, Resol te should h ve emon tra ed tha th GNS acc rde "tr atment" and tha the lat er was ac or ed in l ke cir umstan es". R sol te fail d to do so, nd, n any ev nt, Can da has alre dy d mon trated t at Re olute and ts investm nts ere ot cco ded "less favou

[20] Canad ' Cou er- emorial ¶ 272.

[0] Claimant s eply ¶ 263.

[208] **C -1 7**, *N wcombe Pa adell*, p. 88. Resol te seems o ha e a opte the exp ssi n "natio al champion" from th same au ho s.

[20] Canada' Co nte -Mem rial ¶¶ 275-276. o s ar , Res lute did n t show t at t e t eatment its C pap r op rat ons rec iv d fr m the juri dict on her they ar l cat d i l ss f vou able tha the one ccorded y th GN to PWC an PHP For ins ance, Resol te d es not is ute the fact th t th electrici y ra e i pay to Hydro- ué ec i mo e fav urabl th n the ra e negotiat d by PW C a d NSPI. Al o, t e Claimant negotiated certain tax abatements with

116. In its Reply Memorial, Resolute contends that the "most favorable treatment was the Nova Scotia Measures" and observes that it received none of these benefits.[210] According to the Claimant, "[t]he nature of the treatment accorded to Port Hawkesbury […] meant that no other producer could receive equivalent treatment."[211]

117. Resolute cannot blame Canada or the GNS for this situation given that it had the opportunity to bid on the Port Hawkesbury mill and to approach the GNS for financial assistance. It decided not to bid for the mill and it did not ask the GNS for assistance. While Mr. Garneau's personal expectations as to what might or might not happen may have influenced Resolute's decisions and actions, there is no evidence that Nova Scotia would have refused to provide financial assistance to Resolute if it had decided to bid on the mill.

118. Despite its allegations, Resolute has failed to demonstrate that this case amounts to one of the scenarios presented by the Tribunal as potential breaches of Article 1102 in its Decision on Jurisdiction and Admissibility.[212] The measures at issue did not keep Resolute or its investments out of Nova Scotia (the Claimant did that to itself) and there was no campaign by the GNS to target Resolute and cause it loss. Even if those two scenarios were just "examples" as Resolute contends, it has not demonstrated that Canada breached its national treatment obligation on any other basis.

119. In light of the fact that this is not an instance of nationality-based discrimination and that Resolute still has not fulfilled its burden to show that it meets the national treatment test, its Article 1102 claim must fail.

IV. CANADA HAS NOT VIOLATED ITS OBLIGATIONS UNDER NAFTA ARTICLE 1105 (MINIMUM STANDARD OF TREATMENT)

A. The Claimant Has Provided No Evidence of State Practice and *Opinio Juris* to Support its Claim

120. The Claimant has not attempted to provide evidence of substantial state practice and *opinio juris* to establish that the minimum standard of treatment of aliens under customary international

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the municipality of Saguenay for its Kénogami mill. *See* Canada's Counter-Memorial, fn. 543 and references cited therein.

[210] Claimant's Reply, ¶¶ 264-265.

[211] Claimant's Reply, ¶ 265.

[212] Decision on Jurisdiction and Admissibility, ¶ 290.

law conta ns disciplines on t e p ovision of subsidies, grant and ov r ment sup orted loa s by a tate to a dome tic i vest r. Ju t s he *U S* tri unal found that there s n rule under cu tomary int rnational law p ohibiting or reg la ing a ticompetitive behaviour [213] nor is there a us omary international law rule prohib ti g or egu ating omestic subsidies. Failure to carry its burden of proof to establish otherwise is fatal to esolut 's Ar ic e 1 05 laim.[214] As th *Mobil/M rphy* trib nal noted, [i]t s not th function f a arbitra trib na es ablished nd r N FTA to l gisla e new stan ard which is ot refle ed in th ex sting rule of cu toma y i t rnatio al law."[21]

121. In tead, th Claimant' en ire ca e or brea h f Arti le 1105 res s on ampl fying the olu e of it c aim of "gro s un airness" tha Port Ha kes ur was llowed to merge fro CCAA p ocee in s, re-e ter t e C pa er mark t and alle edly cau e a dro i prices, w ich in t rn red ced R solute's profits. The se of yp rbolic l n uage in t e Reply Memo ial cc sing No a Scotia f reatin a "nationa ch mp on"[216] wi h "a virtu l gua antee to ecome mmed ately and to rem in in per etu ty orth Am th servic

[213] **RL-0 2**, *Un te Parcel Servi e f Americ Inc. v Ca ada* (UNCITR L) Awar n Juri d ctio , 22 No ember 20 2, ¶ 9 .

[1] **RL-05** , *arg ll – Aw rd*, ¶ 73 ("[T]he p oof of c ang in a us om is no an e sy matt r o e tablish. ow ver the bur en o do ng so f lls clearly n th Clai an . If the Claima t oe no pr vide he Tri unal wit p oof of such evolu ion, it is ot the pl ce of t e ribunal t assum thi tas . R ther, th Trib na , in such an nstance, s ould hol that the C aim nt f ils to sta l sh the p rtic lar s andard as er ed.") *S e lso* **CL- 30,** *ADF – Awar* , 185: ("Th In estor, of course, in th end has the burden o sus aining its cha ge o inconsist ncy ith Articl 1 0 (1). Tha burden h s not b en ischarged ere nd ence a a st ictl technica matter, the esp ndent does not have o rove that customar int rn tional la concern ng st ndards of re tment c nsists only f d screte, speci ic rules ap licabl to imi ed con ext .")

[21] **R -170,** *obil I vest ent Canada Inc. a d Murphy Oi Company . C nada* (ICSI C se No. A B(F)/ 7/04 Decision on L a ility and P i cipl s o Qua tum, 22 May 20 2 ("*Mobil/Mur hy – De ision*" , ¶ 15 . *ee also* **RL-029** *Mon ev nternational td. v. Un ted Sta es o America* (CSID Cas o. A B(AF) 99/2) Aw rd, 11 October 20 2 "*Mondev – Awar* ") ¶ 120: "The Tri una ha no d ffi ult in accepting that an rb tral tr bun l may no app y it o n idios ncratic st dard in lieu of t e stan a d la d down in Arti le 1105( )" ; **RL 05** , *Car ill Aw rd*, ¶ 2 8: ("Art cl 1105 req ires no or , no less than the min mum sta dard of treatmen demanded y cus om ry interna io al law "); **CL-026** *Cromp o (Chem ura) Corp. v. G v rnment o anad* (UN IT AL) Award, 2 Augu t 2 10 (" *he tura – ward*), ¶ 121 ("i i not dispu ed that the co e of Arti le 1105 of NA TA must be eterm ned by r ference to cust mar internat onal law."). he AFTA Pa ties' in is ence that th custo ar internati na law inimum sta dard of treatment o a iens is applicabl t their espe tiv cove ed i ve tments s further confirm d by Ar icl 14.6 nd Ann x 4-A of **R -21** , *Agre ment be ween Ca ada, t e nited St tes o Americ , he United exi an States,* signed 30 Nove ber 018, Chap er 4 ("CUSMA" .

[216] la man 's Reply, ¶¶ 10 , 133, 143 196.

[217] Claimant's Reply, ¶¶ 17, 20 (emphasis in original).

of crushing foreign competition"[218] is intend d to ev ke ima es of conspira y, discriminat on and malic ous in ent targe ing Resolu e' SC p per m ll in Qué c.

122. But Resolu e's narra iv of conniv nc is not reflec iv of real ty As descr be in Cana a's Counter-Memo ial and fur her be o , a s ber anal si of the time ine an of ova Scot a's act ons ith res ec to ort Hawkes ury rev als not ing b t a good-f ith ef or by the GN to try and ach eve ha it lso wa te t d in coopera ion ith Reso ut in Dece ber 011 hen its Bow ter Me sey ill f ced sim lar econ mic distr ss: in e t a reason ble am un of pu lic f nd to sup ort PW C's sepa ate eff rt to l wer opera ing c sts (inclu ing new electri ity and la our dea s), be ome profit ble and re a n a contrib to to on of the ost crit cal sec or of the Provin e's econ my I is not the ol f a N FTA Cha ter El ven trib na to substi ute its own v ew a to hat m ght ave e n a prefer ble ath for the GNS regar ing ort Hawkesb ry. The Trib nal nly n ed to cons der whet er in l gh of all the circumstan es, the cho ce of the GNS er so objecti ely egreg ou a to consti u e a br ac of the min mum stan ar of treat en of al en in custo ary internati nal aw. Not ing hat has een prese te to the Trib nal supp rts u h a find g.

B. The Clai ant S ek to Di ute the Thres ol of the Custo ary Internati nal Law Min mum Stan ar of Treat en of Al ns

123. Reso ute t kes i sue ith "emphasi ing the adv rbs and adject ve to pre ede the descript on of hat constit tes un air and inequit ble treatm nt" and critic zes the *Gl mis* tribun l's us of "hyperb lic terms. [219] Wate ing own the internati nal l gal stan ard applic ble u der N FTA Art cle 10 is ar of the Claima t's ef or to m tch the la to its mislea ing ver io of the fa

[218] Claima t's Re l , ¶ 8.

[219] Claima t's Re l , ¶ 90.

124. What Resolute dismisses as "hyperbole" was also employed by the *Waste Management II*,[220] *Cargill*,[221] *International Thunderbird*,[222] *Mobil/Murphy*,[223] *Eli Lilly*[224] and other tribunals[225] to emphasize the high level of egregious behaviour required before a finding of liability against a NAFTA Party can be made under the minimum standard of treatment of aliens under customary international law:

> [T]he existence of such a high threshold is clear given NAFTA tribunals' consistent use of qualifiers such as 'manifest,' 'gross,' 'evident,' 'blatant' and 'complete.' In fact, the existence of this high threshold of severity is probably the predominant characteristic of NAFTA case law.[226]

125. This is not an inconsequential use of "hyperbole," as Resolute would have this Tribunal believe. As both the *Grand River* and *Glamis* tribunals emphasized:

> The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. Although the

[220] **CL-016**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004 ("*Waste Management II – Award*"), ¶¶ 98, 115 (State action must be "grossly unfair" and "wholly arbitrary" in order to violate the minimum standard of treatment in customary international law). Indeed, the *Glamis* tribunal endorsed the approach of *Waste Management II*. *See* **CL-025**, *Glamis Gold v. United States of America* (UNCITRAL) Award, 8 June 2009 ("*Glamis – Award*"), ¶ 559. *See also* **RL-170**, *Mobil/Murphy – Decision*, ¶ 146 (noting that the *Glamis* tribunal followed the approach of *Waste Management II*).

[221] **RL-050**, *Cargill – Award*, ¶ 296. The *Cargill* tribunal described the requisite standard in terms almost identical to *Glamis*: impugned measures must be "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."

[222] **CL-131**, *Thunderbird – Award*, ¶ 194 (Article 1105 protects against acts that "amount to a *gross* denial of justice or *manifest* arbitrariness falling below acceptable international standards.") (emphasis added).

[223] **RL-170**, *Mobil/Murphy – Decision*, ¶¶ 152-153 (Article 1105 only protects against "grossly unfair" and "egregious behavior.")

[224] **RL-169**, *Eli Lilly and Company v. Canada* (UNCITRAL) Final Award, 16 March 2017, ¶ 222 (endorsing the *Glamis* description as accurately representing customary international law).

[225] **RL-028**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Interim Award, 25 October 2016, ¶ 282: ("[t]he Tribunal agrees with the analysis…of the tribunal in *Glamis Gold*, to the effect that a violation of the customary international law minimum standard of treatment requires an act that is sufficiently egregious and shocking so as to fall below accepted international standards.")

[226] **CL-141**, Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (2013) ("*Dumberry*"), p. 271: ("The *Glamis*, *Cargill*, *Waste Management*, *ADF* and *Thunderbird* tribunals have all set a very high threshold of liability."). The *Apotex* tribunal specifically endorsed Professor Dumberry's assessment that "a high threshold of severity and gravity is required in order to conclude that the host state breached any of the elements contained within the FET standard of Article 1105." *See* **RL-051**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, (ICSID Case No. ARB(AF)/12/1, Award (Aug. 25, 2014) ¶ 9.47.

> circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor.[227]

126. The Tribunal need not give weight to Resolute's reliance on *Merrill & Ring* or *Bilcon* with respect to NAFTA Article 1105. In *Merrill & Ring*, the tribunal was internally divided on how to conceptualize the minimum standard of treatment of aliens in customary international law.[228] In any event, it also dismissed the Article 1105 claim because of the claimant's flawed "but for" damages analysis and "entirely speculative" projections on future prices in the market (a problem that also affects Resolute's damages claim here).[229] In *Bilcon,* the tribunal noted with specific approval the *Waste Management II* standard,[230] but split on whether a mere alleged breach of domestic law should result in a breach of the minimum standard of treatment of aliens in customary international law.[231] That issue, as well as the *Bilcon* claimants' "legitimate expectations" and allegations of arbitrariness, are not relevant in the case before this Tribunal.

127. It is axiomatic that merely causing economic loss to a foreign investor is insufficient to result in a violation of the minimum standard of treatment. But there is nothing more to Resolute's claim than that: it does not attempt to demonstrate that Nova Scotia's actions were arbitrary[232] and it

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[227] **CL-025**, *Glamis – Award*, ¶ 615, cited in **RL-019**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 214.

[228] **RL-060**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL) Award, 31 March 2010 ("*Merrill & Ring – Award*"), ¶¶ 219-246: (The tribunal noted the existence of "different opinions within the Tribunal on the applicable scenarios and their corresponding thresholds, and whether, under either scenario, there has been a breach" (¶ 246)). *See* **CL-141**, *Dumberry,* pp. 272-273 (critiquing the lower threshold of Article 1105 described in *Merrill & Ring* as not reflecting customary international law).

[229] **RL-060**, *Merrill & Ring – Award*, ¶¶ 256-266.

[230] **RL-025,** *Bilcon – Award on Jurisdiction and Liability*, ¶¶ 442-443; **RL-212**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Dissenting Opinion of Professor Donald McRae, 10 March 2015 ("*Bilcon – Dissenting Opinion of Professor Donald McRae*"), ¶ 32: (Professor McRae noted his agreement "with the majority that the appropriate standard to apply in the application of 1105 is that set out in *Waste Management*.")

[231] *See* **RL-212**, *Bilcon – Dissenting Opinion of Professor Donald McRae*. Since the *Bilcon* award, the NAFTA Parties have been unanimous that the mere breach of domestic law does not by itself establish a breach of the customary international law minimum standard of treatment. *See* **RL-213**, *Mesa Power Group v. Government of Canada* (UNCITRAL) Canada's Observations on the *Bilcon* Award, 14 May 2015, ¶ 19; **RL-096**, *Mesa – U.S. Second 1128 Submission*, ¶¶ 21-22; **RL-206**, *Mesa – Mexico Second 1128 Submission*, ¶ 11. *See also* **CL-130,** *ADF – Award*, ¶ 190: ("Something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1).")

[232] **CL-025**, *Glamis – Award*, ¶ 617: ("a breach of Article 1105 requires something greater than mere arbitrariness, something that is surprising, shocking or exhibits a manifest lack of reasoning."). This reflects the description by the ICJ of arbitrariness in the *ELSI* case: "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety." See **RL-178**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment, I.C.J. Reports (1980) 15, 20 July 1989, ¶ 128. The description of arbitrariness by the ICJ has been endorsed

does no allege a repudiati n of "legitimate xp ctat ons" that wou d have been cre ted by expli it commitmen s o represe tati ns y No a Scot a.[233] Th Cla mant's Reply M mor al al o eaves behind the arg me t that the No a Scotia easures were iscriminat ry and b sed o " ec ional pr judice" a und rs ood in customary interna ional law ecau e it knows there s o evidenc to support such an allegation.[234] The bidding process for Port Hawkesbury was open to inve to s f a y na ionality I dee , Resolute was pecifically enc uraged by the GNS to bid on Port Hawkesbury and, if it had been selected by the Monitor, it could have tself a ked for finan ial assistance f om Nova Scotia.[235] M reover, Resolute has ackn wledged t at wo Canadian SC pa er pro uce s (rving and Cata yst) we e also impacted b ort Ha ke bur 's reopeni g.[236] This confi ms th t t ere was o d scrimin tion by t e GNS and that eso ute s fore gn national ty w s no a fac or n he P ov nce's d cisi n-making, which t e laiman h s alre dy conce ed [W]e [Re olute] a e not sayin nec ssarily ha N va Scotia had in mind to support Port Hawkesbury because it wanted to impact Resolute as a ei n i vesto only. […] *We just happened to be the only foreign articipan with an inves ment n Canad , so we ual fied or p otect on un er AFTA.*"[237]

128. n its Rep y Me or al, R so ute misund rstands C nada's argume t r garding discrim nation und r Art cle 11 5 an th right of N FTA P rty to eny nat ona treatment when it omes to governme t upported l ar ued hat t e e clusi ns in NAFT Art cle 1 08(7) a e excl s ons fr m the m nimum s andard o treat e t.

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by ma y NAFTA nd other t ibunal . *S e e g.,* **RL-12** *, Merc r – Aw rd*, 7.78; **R -029**, *o dev – Aw r* , ¶ 27; **RL-1 4**, *Philip orr s B ands Sàrl et a . . Orient l Rep bli of Ur gu y* (ICSID Cas No ARB/10/) Awar , 8 July 2016 (" *hilip Morr s Award*), ¶ 390.

[33] Thi a legation ha no been dev lo ed by es lute sin e it Notice of rb tration. Se *Resolut Forest Pr ducts Inc. v. Government of Canada* UN I RAL) No ice of Ar itrat on and tat me t of Cla m, 30 Dece be 201 ("Statemen o Cl im") ¶¶ 1 1-105 R sol te's r ferences t preambular ta ements of a gene al nature in NA T Article 02 to "pro ote c ndi ions of fr e comp t tion in he free tr de area" o not reate legi imate x ecta ons or othe wise assi t n es ablishing a io ation of A ticle 1105. S e Cla mant's Reply 19 .

[234] Cla mant's emorial, 2 2; C aimant's Rep y ¶ 13 .

[2 5] Witness Sta ement of uff Montgome i , Ap il 2019 (" ontgom r e Fi st State ent") ¶ 2 ; Rej inde Wit ess S atement o D ff Montg me ie, 4 March 2 20 ("Mont ome ie Rejoi der ta ement), 8.

[236] Claima t's Reply, ¶ 132 Resolu e no es that here wer four ot er rod cers of SC paper in North Ame ica (Resolute nd NewP ge, both of whi h re .S. companie , and Cat lyst an Ir ing, both anadia (ritish C lumbia and New Brunswick, respectively).

[237] Jurisdictional Hearing Transcript, Day 1, pp. 350:21-351:4 (emphasis added).

[238] Claimant's Reply, ¶¶ 129-139.

Rather, Canada explained that the NAFTA specifically allows a Party to provide subsidies and grant , includ ng govern ent spo so ed loan , to domestic inve tors but no to oreign investors *eve whe t ey re in li e ci cumstances.*[239] If this is he ase, th same ac io cannot b p ohibit d by the mi imum standard of trea nt of alie s in c stom ry in er ati nal law. [40]

129. Re olut 's entire case rests on the singular pre ise th t cus omary int rna iona law *requi ed* th GN to ta d a ide and let Port Ha kesbury close a d hat it as "egr gious, un ust, inequ table"[2 1] to ro ide it wi h finan ial assist nce be ause oing so alleg dly r duce the pric s for SC aper tha Reso ut might ave therwise eceived. Reso ute seems to eli ve that custo ar in ernat onal law proh bits t e c nsiderat on of t e o her c rcumstanc s fa ing the Pro ince n 2011 a d 012, in lu ing that he GNS had gi en milli ns of d llars i finan ial as i tance to Resol te t help Bo ate Mer ey become l w-c st il , t at Reso ute had be n en ouraged by he GN to id o ort Hawkesbury (ut d cided n t to do so), that ourt-su ervis d open bi di g process id nti ie a willing b yer Canadian b coin id nce n t by f vouri ism wit in ovative id as n ho to r duce cos s and that th closu e f t e mill wou d have h d deva tating impact o the P ovin e's economy. n other w rds, R solu e ar ues that its f nan ial i terests should hav bee ele ated abo e all o he c ns der t ons and t at Nova Sc tia's e t do so w s a vi lation of A ticle 110 .

130. The ribunal shoul rej ct t is po trayal of customar internati nal aw. Even thos tribunal applyin auto omo s fa r and equ tabl tre tm nt claus s, wh ch are ore stringe t th n what i req ired unde Arti le 110 (1),[242] av affirm

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[239] NAFT Articl s 11 2 and 1 08 7)(b). The am easoni g a plie with r spect o procu ement by Pa ty. *See also* **RL-211**, CUSMA, Ar ic e 14.12 5).

[240] *S e* Can da's Cou ter Memor al, ¶¶ 88-2 2 and ases ci ed therein *S e also* **RL-059**, *S D. My rs, Inc v. Go er ment of anad* (UNCI RAL) i st Pa tial Aw rd, 13 N v mber 2000 ("*S D. M ers – Fir t Par ia Award*), 255: (sta ing that "CA ADA S ight o source ll gov rnment r quiremen s a d t gr nt subsi ie to the Ca adian indus ry are bu two examp es o leg timate lterna ive e sur s" tha could hav be n imposed ather t an a b n o the Cl imant s CB exp rts.); **L-021,** *Marvin Roy eld an Karpa v. U ited M xi an State* (IC ID Case N . ARB(AF)/ 9 1) ward, 16 Decemb r 20 2 "*Fel ma – wa d*") ¶ 103 "[G]ov rnments ust be ree to act in the broader publ c i te est thro gh rotectio of the envi on ent, new o m dified tax regimes, *t e granting or withdrawa o gover ment su sidies*, re uc ions o increases i ta iff level , impositi n of zonin restricti ns and he l ke. Re so able gov rn ent regulati n of th s type ca not be a hie ed i any business tha i a vers ly aff cted may seek ompensation, nd t is safe o say hat custo ary int rna ional law ecogni e thi) (mphasis added .

[241] C aim nt s R ply ¶ 13 .

[242] **RL- 14** *L man Casp an Oil BV and NCL Du ch I ves ment BV v. Republic of Kazakh ta* (IC ID C se No. R /07/14) xc rpts of w rd, 2 June 010 ("*Li an – Exce pts f A ard*"), 2 3: "[T]he ribuna consi ers that he pu pose of E T Article 0(1), seco d sent nce is to rovide a protection which goes beyond the minimum

unconditionally the interests of the foreign investor above all other consideration in every cir umstance." [43] The *BayWa* tribunal, endo sing the co clus on of th *An aris* tri un l, said the same:

> *The os St te is no requ red to e evate the inter sts of he investor ab ve ll other conside ations* and the application of the [Energy Charter Treaty Article 10(1)] FET stand rd llows for a b la c ng or ei hin ex rcise by the ta e and th dete mination f a bre ch of the FE stan ard must be m de n light o the *hig m asure of de erence w ich interna io al law g nerally extend to t e ri ht of natio uthoriti s to reg late matter within their own bord rs* [244]

131. esolute concede t at tates eserve de ere ce when it c mes o decisio -m kin in the public nter st b t it says that uch deferenc is not unl mited."[2 5] Tha i an uncont ov rsia obse vation. But w at he Claima t fails to ap rec ate is hat unde A ticle 110 , he cus om ry ntern ti nal l w minim m tandar f treat ent o alie s *is* the lim t on State actio , o nless a m asu e falls below hat minim m thres ol , there is no l ability for a NAF A Part . T e "hig m asur of efere ce" th t internatio al law llow or State to ake good faith polic decisions [46] ensure th t a tri un l r itself o a

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sta da d f treat ent nder i ternational law The ECT w s inten ed to o furth r han imply re ter ting th prote tion o fered by he latt r. I this respect ECT Art cle 10(1), second enten e, dif ers rom N FTA Articl 1 05 (in ts in erpre ation gi en by the ree Trade Co mission on 31 July 2001) whic con ains an e press refere ce to in e national law. The ef re, when ass ssing Respond nt's cti ns, a s ecific s anda d f fairness and equitab ene s a ove the min mu st ndard m st be i entified nd pplied f r the pplicatio of he ECT.") **CL-1 1**, *Dumb rry*, p. 262-2 3: NAFTA t ibunals " re r quired, nder Art c e 1105 to apply th minimum tand rd This stand rd nvolves a hig er thre hold of li b lity t a an nqu lified FET clause."

[24] **CL-230**, *Electra el – wa d,* 165. he *Elec rabel* t ibuna w s pplying Ar icle 0(1 of the E ergy Chart r Trea y, hic is an a to omo s "fair and equi ab e treatme t" clause an not the same as t mi imum st ndard of t eatment i custo ary nte natio al l w.

[2 4] **RL-21** , *Ba Wa R.E. Re ew ble E ergy G bH a d B yWa R.E. A set Hold ng GmbH v. Kingd m of Spai* (I SID Case N . RB/15/16 ecision n Ju isdicti n Liability n Di ections o Quantu , 2 De ember 2 19 ("*Ba Wa – Decision*" , ¶ 459 (emphas s ad ed), *citi g* **L-2 6**, *An aris GMB (Germany) and Dr ich el G de (Germa y v. The z ch Repu lic* (UNCITRAL) Award, 2 May 018 ("*Ant r s - Award*) ¶ 3 0( ).

[245] C ai ant s Reply, 1 0.

[46] *Ba Wa – Deci ion* ¶ 459. In a ditio o the stateme t by t e *ayWa* tr bunal, *see* **L-05** , *S.D. yers – ir t Partial Award*, ¶¶ 261-263 (e pla ning ha a "high measure of ef rence ge erally xtends to th ri ht of dome tic aut oritie o regu a e m tters wi hin hei o n b rde s" ; **CL-025**, *Gla is – Awa d*, ¶ 762 (hol ing that "i i no for an intern tio al tribu al to d lve int the det i s of a d jus ificati ns f r domes ic l w.") **CL- 26**, *hemtura – Award*, ¶ 123 taking into accoun that " he fact t at certain age cies m nage h ghly specialized d mains i volving cient fi an p blic p licy d term nat ons."); **RL-1 3**, *emplus, S.A., et al. v. Mexi o* (I SID Case o ARB(AF) 0 /3 an ARB(AF)/ 4/) ward, 16 Jun 20 0 ("*Gemp us – Aw rd*" , ¶ 6-26: (" ourth, as t ' efe ence', the ribu al accep s the esp ndent's ubm ssions to he effe t hat this Tri unal shoul not exercise 'an op n-e ded m nd te o second-gu ss gover me t de ision-mak ng', in the words f the ar i rati n tr bu al n *S D. My rs.*" ; **CL- 30**, *E ectr bel – Awar* , 181: ("It i ll too asy, man ye rs ater w th hindsight, to second-guess a State's decision and its effect on

subjective basis, what was 'fair' or 'equitable' in the circumstances in each particular case…it may no simpl adop it ow idiosyncrati standar o wha i 'fair o 'equitable withou reference o establish d sourc s f law."[247] As he tribu al in *Feldman* obse ved:

> [G]overn ents mu t be fr e t a t i the br ader p blic int rest th ough prote ti n o the environ ent n w or mod fie tax reg mes *the gra ti g or withd aw l of gover ment subsi ies,* reduc io s or incr as s in t riff le els, impos ti n of z ning restric ion an the ike. Reaso able gover ment regul ti n of this type c nn t be ach ev d i any bus ness th t is adve sely aff cte may seek compensa ion a d t is sa e t say that cust mary internat ona law recog izes thi [48]

132. In ther w rds, this Tri unal s oul not a cep the Claim nt's invit ti n to subst tut its subje tive b li f s to what ould have bee the "be ter" dec si n by Nova S otia when aced wit the c oi e of le ting Port Hawke bury lo e or g vi g it a c an e to re- nte the ma ke .

C. Resol te's Argu ents tha the Nova S otia Mea ures Off nde the Prin ip e of Proportion lit and Wer N t i the P blic Int res Ar Not Gro nd d in Internat ona La and Ha e No as s in act

133. Resol te's eply Mem rial pre ent two re ated argu ents that C nada will ad ress tog th r in this sec ion. F rst the Cla mant a gues tha th GNS vio ate the prin ip e of proportion li y in internat onal la .[249] Se ond the Cla mant a gues tha th GN di no a t i the p blic int res and th t no defe en e is ow d to C nada be aus "in internat onal law the int re t of a consti uent el ment doe not ove com the inte es s o the gr ater whole "[250] Both argu ents mis pply internat ona la and re y on a misle ding present ti n of f

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one eco omic a tor, whe the tat was req ir d a the ti e to con ider much ider inte es s in aw ward circumsta ces, bala cing diff ren and comp ting factor ."); **RL 122**, *M r er – A a d*, ¶ .42: (as a ge eral egal princ pl , i the ab en e o bad f i h, a me su e of defe en e is ow d to a St te's regul tory policie ."); **RL 174**, *P ilip M r is – A a d*, ¶ 418: (" t]he fai and equi able trea ment sta da d i ot a justic able sta da d of good govern ent an the tri un l i ot a ou t of appea ."); **RL 052**, *M sa – A a d*, ¶ 553: "the defe ence hich AFTA Ch pt r 11 trib nal we a tate wh n it om s to asse sin h w to reg lat and m nag its affai s."

[247] **RL 029**, *M n ev – A a d*, ¶ 119

[248] **RL 021,** *Fe d an – A a d,* 103 (emp asis ad ed)

[249] Claim nt's R pl , ¶¶ 191 208

[250] Claim nt's R pl , ¶¶ 107 123.

1. Resolute Has No Basis to Argue that the Nova Scotia Measures Violated the Alleged Principle of "Proportionality" in International Law

a) The minimum standard of treatment of aliens in customary international law does not include a "proportionality" test

134. Resolute simply asserts in its Reply Memorial that the minimum standard of treatment of aliens in customary international law includes an obligation of proportionality, but fails to present any state practice and *opinio juris* to demonstrate this, let alone any relevant NAFTA award or other authority that supports the application of such a test in the context of Article 1105. As Professor Dumberry succinctly noted:

> *[T]he proportionality test presupposes that the objective behind a consented measure taken by a State is legitimate*. The 'suitability for a legitimate government purpose' is indeed the first question to be examined by a tribunal when applying the proportionality test. *It is difficult to conceive how a measure considered as 'sufficiently egregious and shocking' could ever be deemed by a tribunal as serving a legitimate government purpose*. In other words, because under Article 1105 the threshold of severity is so high, it is submitted that the contested measure will never satisfy the first step of the proportionality test. *When faced with an egregious and shocking measure, a NAFTA tribunal need not apply the proportionality test*.[251]

135. None of the cases cited by Resolute are relevant here. Resolute's reliance on *ADM*[252] is entirely misplaced. In that case, the tribunal was applying the principle of proportionality in the context of *countermeasures*, an area where the requirement of proportionality is part of customary international law.[253] Countermeasures are not at issue before this Tribunal.

[251] **CL-141**, *Dumberry*, p. 264 (emphasis added).

[252] Claimant's Reply, ¶ 205 fn. 302.

[253] **RL-092**, *ADM – Award*, ¶¶ 124-126, 133. Proportionality is a customary international law principle applicable in the context of countermeasures and self-defence. *See* **RL-032,** ILC Articles, Article 51 and commentary thereto at pp. 294-296; **RL-114**, *Military and Paramilitary Activities Case*, ¶ 176 (affirming that it is well established in customary international law that "self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it.").

136. Resolute's reliance on *S.D. Myers* is also misguided.[254] That tribunal did not apply a "proportionality" test in the context of Article 1105.[255] Moreover, the tribunal stated that it would have been "legitimate" for Canada to provide subsidies to its domestic companies even though doing so would have caused significant financial harm to the claimant.[256] If the *S.D. Myers* tribunal believed that subsidies to domestic companies that would have had adverse financial effects on a foreign competitor were "legitimate," it is difficult to understand how Resolute can argue the opposite in this case.

137. The Claimant's reliance on cases like *Occidental*,[257] *PL Holdings*,[258] *Azurix*[259] and *RREEF*[260] is inapt, not only because of the entirely different factual circumstances of those cases, but also

[254] Claimant's Reply, ¶ 205. The *S.D. Myers* Partial Award is of limited precedential value on Article 1105 in any event because it was rendered *before* the 2001 FTC Note of Interpretation confirmed that NAFTA tribunals should apply no more than the minimum standard of treatment of aliens in customary international law. *S.D. Myers – Partial Award* (**RL-059**) was rendered on November 13, 2000. The FTC Note of Interpretation regarding Article 1105 was issued on July 31, 2001. See **RL-001**, NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter Eleven Provisions" (July 31, 2001).

[255] The discussion at ¶ 255 of the *S.D. Myers – Partial Award* (**RL-059**), to which the Claimant cites in its Reply, was in the context of Article 1102, not Article 1105. Furthermore, the majority of the tribunal provided no meaningful analysis for its finding of a breach of Article 1105: it simply concluded at ¶ 266 that "the breach of Article 1102 essentially establishes a breach of Article 1105 as well". Arbitrator Edward C. Chiasson Q.C. disagreed with this conclusion, noting that the breach of another provision of NAFTA is not a foundation for the conclusion that there has been a violation of fair and equitable treatment in international law and that on the facts of the case, there was no violation of Article 1105 (¶ 267).

[256] **RL-059**, *S.D. Myers – Partial Award*, ¶ 255: ("CANADA's right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures.")

[257] **CL-225**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador* (ICSID Case No. ARB/06/11) Award, 5 October 2012 ("*Occidental – Award*"). In this case, the Ecuadorian government terminated a hydrocarbons participation contract and seized property from Occidental's offices and oil fields as property of the State, which the tribunal did not consider to be proportional to its intended goal. The tribunal also considered proportionality because the Ecuadorian Constitution establishes the principle of proportionality as a matter of Ecuadorian law (¶ 397). *Occidental* is not a relevant authority in the context of this NAFTA dispute.

[258] **CL-235**, *PL Holdings S.à r.l v. Poland* (SCC Case No. V 2014/163) Partial Award, 28 June 2017 ("*PL Holdings – Partial Award*"), ¶ 354. This tribunal was looking at claims that arose out of alleged forced sale of the claimant's shareholding in a Polish bank, FM Bank PBP, which was alleged to be an expropriation under the Luxembourg–Poland BIT. *PH Holdings* is also inapposite in the context of this NAFTA case.

[259] **CL-233**, *Azurix Corp. v. Argentina* (ICSID Case No. ARB//01/12) Award, 14 July 2006 ("*Azurix – Award*"), ¶ 310. In this case, the tribunal held that Argentina had expropriated the claimant's investment as a result of interference with the tariff regime applicable to claimant's investment and breaches of obligations under a water concession agreement. *Azurix* considered the principle of proportionality in the context of expropriation without compensation. Further, Resolute states that the tribunal in *Azurix* considered *S.D. Myers* case as "useful guidance" on the doctrine of proportionality, however, this is a mischaracterization. Indeed, the tribunal in *Azurix* only referred to *S.D. Myers* as it related to the purposes of regulatory measures, and even then, criticised the findings of that tribunal as being "contradictory" (¶ 311).

[260] **CL-240**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l v. Spain* (ICSID Case No. ARB/13/30) Decision on Responsibility and on the Principles of Quantum, 30 November 2018

because thos tribuna s were applying auton mous fa r and equitable cl uses from different treatie ,[26] which is not the inimum st nd rd of tr atment in c stomary internationa law refle d i Article 1 05 1).[262]

138. The "pr nc ple o prop rtio alit " i not legal t st hat any NA TA tribun l has a pl ed to de ermine he her an imp gned mea ure is onsisten w th the mi im m stan ar of treat ent of aliens in c stom ry i terna ional l w. Jus as a NA TA Cha ter Elev n ribunal sho ld not s ek to eplace th r t onal olicy de isi ns f a NAFT Pa ty by its own j dgment an issu d scusse fur her below) i hould also no e ga e in a e erminat on s to whether a easur was "p oport

("*RREEF Deci ion*" . Thi tr bunal fo nd hat Spain h d bre che its o ligatio s under th nergy ha t r Trea y, as a r sult of a series o e erg reforms u dertaken y t e Governme t affec ing the ene ables sec or However, the p inciple of prop rtio al ty applied in th t ase is inappos te er , as the ppl cab e law n that ase was the Energy C arter T eat . Th tr bunal app ied the f ir and e ui able tr atmen a fo nd i Arti le 10(1) f the EC , w ich express y requi es the Contr cti g Part es to en ourage and cre te "stabl " ondit ons for Investo s (¶ 288).

[2 1] *See* **L- 30**, *Elec rabel – Award* ¶ 92, 116 **L- 40**, *R EEF - Decis on*, ¶ 1 (bot i ter reted rticle 0(1) of the E ergy Cha te Treaty, hi h c ntains o refere ce to the mi im m standar of treatment in cu omary i ternat o al law . **CL 233**, *Azurix - Award*, 361 (i te pre ing rticle II.2( ) of the 1 91 A gentina- S IT, which al o c ntains o refere ce to the mi im m standar of treatment in cu tomary nternation l law); **L 225** *Occidental – Award*, 388 (i te pre ing rticle II. (a) f the 1993 Ecu do -US BIT, hi h c ntains o refere ce to the mi im m standar of treatment in cu tomary nt rnationa aw); **CL 235**, *P old ngs – Partial Award*, 273 (i ter reting Article 3(1) of th Poland- el ium BIT, hi h c ntains o refere ce to the mi im m stan ar of treat ent of aliens in cu tomary int rnationa l w). Res lute's r liance on **CL-038** *Tecni as Medioa bienta es T cme v. Mexico* (I SID Ca e o. RB(A)/ 0/2) Award, 29 ay 2 03 is al o misplac d: that tribuna d scu sed pro or ionality in th co text of xpropriat on, not f ir a d equit ble treatmen (s e ¶ 22) Furtherm re, the f ir and eq it ble tre tmen p ovi ion n Article 4( ) o th 1 96 Spain- ex co IT had o refere ce to the mi im m standar of treatment in us omary int rnation l law ¶ 151).

[62] **CL-025**, *Glamis – A ard*, ¶¶ 609-611 (aff rmi g that au onomous f ir and qui ab e treat ent claus s re f limit d eleva ce in t e context of NAFT Articl 105(1) ; **RL-0 0**, *C rg ll Award*, ¶ 76: "It s the Tribu al's view t at sig ifican ev de tiary we gh should no be a for ed to aut nomous [fa r and e uitable re tm nt] c au es inas uch s it could b ass med tha such cla ses wer ado ted p ecisely ecaus the set a standa d ther than that re uire y cust m); **R -052**, *Mesa – A ard*, ¶ 50 : (" he ribunal di agrees with the lai ant's submis ions tha the 'aut nomous' f ir and equ ta le tr atment p ovisio s in other treaties imp se additi nal re uirem nts on C nada bey nd thos deriving fr m t e mi im m sta dard the FTC Note is c ear t at he Tribun l must apply he ustomary in ern tional aw stand rd of the mi imu standa d of reatm nt and ot ing e se. There is t us no sco e or aut nomous sta dards to imp se add tiona requiremen s on th NAFT arties." ; **L-214**, *L man Excerp s of Awa d*, ¶ 263: ("[T he ribunal co sid rs that the pu pose o ECT Arti le 10 1), sec n sentence, is to prov de a p ote tion wh ch goes ey nd the mi imum tandard of tr atme t u der int rnationa l w. The ECT was ntende to go furt er han simply reitera in th protec io off red by t e l tter. I this espect ECT Arti le 10(1 , se ond s ntence, diff rs rom NAFTA Article 105 (n ts nter retat on given b t e ree rade ommis ion on 3 J ly 2001 which co ta ns an express refe ence to in erna ional law Therefore, hen asse s ng Respo dent's a ti ns, a sp cif c standard of fairn ss nd equi ableness abov t e minimum tan ard mus be ide tified and pp ied for the applica ion of th EC ."); **CL- 41**, *Du berry*, pp 262 263: (NAF A tri unals " re re ui ed, u der Article 1105, to pply the mini um stand r . This standard nv lves a hi her hr shold of li bil ty than a unqualified FET clause.")

b) Resolute's "proportionality" argument is also misguided on the facts

139. Resolute argues that the GNS could have used its financial resources in other ways to help displaced workers, including giving assistance directly to employees or investing in other industries that are not in decline.[263] But as Deputy Minister of the Nova Scotia Department of Labour and Advanced Education Duff Montgomerie has already testified,[264] Nova Scotia *did* consider the option of not offering financial support to Port Hawkesbury. However, it decided that, in light of all the circumstances (including [redacted][265]), helping the mill reopen was the better option.

140. It is not the role of the Tribunal to decide, as Resolute argues it should, that giving $124 million to unemployed workers or investing in some other industry would have been the more "proportionate" option. This Tribunal need only determine whether financial support to Port Hawkesbury had a rational connection to a legitimate public policy goal. As the *Eli Lilly* tribunal stated, "it is not the role of a NAFTA Chapter Eleven tribunal to question the policy choices of a NAFTA Party."[266] In that case, the tribunal accepted that there was a rational public policy justification for the legal test that resulted in the nullification of the claimant's patents and found that it "need not opine" on whether that test was the only or best means of achieving those policy objectives.[267] The *Merrill & Ring* tribunal found that: "the Tribunal's task is not to pass judgement on the policy legitimacy of Canada's log export regime".[268] The *Glamis* tribunal took the same

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[263] Claimant's Reply, ¶ 192.

[264] Montgomerie First Statement, ¶¶ 28-29: ("[W]e considered all of the options before us based on the information we had, including the option of not offering any financial support to the mill.")

[265] **C-158**, [redacted], p. 2. *See also* **R-160**, [redacted], p. 5; **R-157**, [redacted].

[266] **RL-169**, *Eli Lilly and Company v. Canada* (UNCITRAL) Final Award, 16 March 2017 ("*Eli Lilly – Award*"), ¶ 426.

[267] **RL-169**, *Eli Lilly – Award*, ¶ 423: ("*The Tribunal need not opine on whether the promise doctrine is the only, or the best, means of achieving those [policy] objectives*. The relevant point is that, in the Tribunal's view, the promise doctrine is rationally connected to these legitimate policy goals.") (emphasis added). *See also* ¶ 428: ("In the Tribunal's view, Respondent has advanced a legitimate justification for this distinction: the sound prediction doctrine allows inventors to obtain a patent before they can demonstrate that the invention is useful. In exchange for the monopoly granted, the patentee must disclose to the public the basis of its prediction of utility and what makes it sound. *Whether or not this is the preferred approach, it is plainly not an irrational one*.") (emphasis added).

[268] **RL-060**, *Merrill & Ring – Award*, ¶ 236: ("*It is non-controversial that the Tribunal's task is not to pass judgment on the policy legitimacy of Canada's log export regime, but only to determine in this case whether its application breaches the minimum standard of treatment for aliens*. Canada clearly feels that it is in the country's national interest to promote the local processing of its timber. The fact that its chosen regulatory instrument imposes a degree of

pproac : "[ ]he sol in uir for the Tribunal [… i *wh ther r n t there wa a m nifest la k o re sons for the legislat on.*"[269] O her ribu als have a so e phasized this point.[270] This Tribuna sho ld reach t e sa e concl si n w th r spect o the Nov Scotia m asures.

141. Reso ute contends that he a proach ak n with espect o Bowa er Mers y, amel to make the mill "tempora ily c mpet tive , would have be n " roportion te" and the efor approp ia e with pe t to PHP.[271]

142. As a p el mi ary mat er, t is not ble that Res lute no conc des hat t would ha e b en a ceptab e or Nova Scotia to provide fi an ial ssis ance to ke p Por Hawk sb ry open, which i in ont adiction with its prev ous pos tion t at t e GNS s oul hav a lowed the mill to clo e pe manentl .[2 2] This r treat y R solute s if s t e analy is to one w ereb i sugg

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constra nt on th freedom of ot er Canadian based busine ses particula ly the im erland owner , to export thei un rocessed lo s *ma p o erly be se n as a legiti ate public ol cy onsequ nce of its chosen ndustri l olicy* I deed i wo ld e hard to ee the m osition of such a on-dis ri inatory po icy in espect of fo eign investo s as sufficie tl repre en i le to mo n to a b each of min mum standard wi h the sub tantial th eshol conside ed u der cenari two. Suc p licy c uld not b f irly describ d n this ont xt as eeting any of t e ad ecti es t at h ve een us d ov r he years, uch as egre ious, outr geous, rbitra y, grossly un air or manifest y unreaso able.") (em hasis a ded).

[6] **CL-02** , *Gla is - Awar* , ¶ 805 (em has s adde).

[270] he awa ds in *S.D. Myer , GA I, Che tura, Mesa owe , Thun erb rd* an *Gla is* ll fo nd tha t e State hould be ccor ed defe en e w th res ect to ts olic choices and hat inte nat onal aw oes not allow f r second-g essing gov rnm nt deci ions *See* **L 059**, *.D. Mye s – Fi st Partial ward,* ¶ 261 263; **CL-100** *GAM Inves me ts Inc (U.S.) v. Mexic* (UNCI RA) Final ward, 1 Nov mber 200 , ¶ 114: (Mexi o dete mine t at early ha f o the mi ls in he country shou d e e propri ted in the pu lic int res …that mea ure was p ausi l connected with a egitim te goal o pol cy ensur ng that he ug r i dustr w s in th hands of so ven en erprise) and w s p lied neither i a dis rim na o y manner or as a di guise barrier to equ l oppor unity.") **L-026**, *C emtu a – Awa d,* ¶ 1 4; **RL- 5** , *Me a – Awa d,* ¶ 505; **C - 31**, *Th n erbir – Awar* , ¶ 16) **CL-02** , *Glam s – Aw rd* ¶ 79: ("[I t s no the role of thi Tribunal, or any inter at onal tri una , t supplan i s own judg ent of nderlyin fa tual ma eri l an s p ort for t at of a ualifie domest c a ency Ind ed o r only task is to decid wh ther Claim nt has adeq ate y proven that t e a ency's revi w and c n lusio s exhi it a gross enial of justice, manif st arbi rariness, b a ant unfa rnes , co plete la k of du process, evide t i criminat on, r manife t ac o rea on so as to ri e to the le el f a breac of the custo ary internat onal law st ndard e bedded i Article 1105."); **L-232**, *Crysta lex Interna io al Corpor tion v Ven zue a* (ICSID Case No. AR (F)/11 2) Aw r , 4 pri 2016, ¶ 5 1. The *E ectrabel* ribuna sim lar y st ted tha i s ro e was not to "s t etrospec ivel in judgm nt upon Hunga y's disc et o ary exerc se of so erei n power, *not mad ir ationally an no exercis d in ba faith…*". **L 230**, *E e trab l Award,* 8 35 of Decisio on Jurisd cti n, pplicable La a d Liabil ty of 30 Novem er 2012, appended o Award (em hasi added) *See also* **L 230**, *E e trab l – wa d,* 18 : ("I is ll to easy man years lat r ith hindsigh , to seco d-guess St te' decis on and its effe t on o e ec nom c act r, hen the ta e w s re ui ed at th tim to c nsider mu h ider in erests in awkw rd circum tances, b lan ing diffe ent and co pet ng factors ")

[271] C aima 's eply, ¶ 19 .

[272] Cl im nt's Mem ria , ¶¶ 274-275. *See a so* Juri dictional H ari g ra script, D y 1, p. 372 3-13: ([Pr sid nt raw ord] " f yo had g ne o No a S otia nd said ' n or er to c mply it Art cl 1 02, we ant to b trea ed t e sam way ' wh t would th t have invo ved? [Reso ute]: " ou annot p ov de t e sup ort to yo r local industry,

have bee “proportiona ” or ova S ot a to rovide enough inancial ssi tance for Po t awkesb ry t re ain open and “temporarily comp titive” like Bo ate Mer ey but j st as ong as it did not beco e the “na iona cham ion” th t w uld “defeat all competition.”[273] Reso ute’s ea oning is flawed multi le front .

143. First Resolu e s again se kin to su st tu e it beli f as to w at ould have een th p eferab e c urs of ct on for th GNS. s es rib d a ove, it i not he role f NAFTA ri un l to xami e if i would have b en be ter po icy f r th GNS to al ow Po t Ha kesbury to b only “tempo ari y co petitive” fo some nd termi d perio of time.

144. Second, Re olut ’s uggesti n that the Bowa er Me sey ppro ch w uld have been or “proportional” is elf-defe ting The Dece ber 201 ag eem nt etween t e G S and Re ol was intended to [redacted].[27] Resolu e d es no explain how i i “propo tional” t provide f na cial as istanc t Bow te Mers y t help it ower it cos s and make t m re co pet tive but it is not “pr por io al fo the GNS to d the same f Port awkesbury.

145. Third, Resolute’ “proporti nality” compari on bet een Bowa er Mersey nd Port Hawk sbury i m splaced beca se t igno es that th actual ssi tance pr vid d was b sed on the actual iff ren es bet een the two ills. The ec no ic i plications o Port H wkesb ry’s clos e oul have b en [redacted] of the clo ure of he sma ler Bowa er Merse mill. [75] Indu try se tor rts o [redacted]

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ec use othe wise, we ar bein necessari y being nega ively impacted…the ot er h poth tica i th t they giv us th e uivale t mou t of oney S you ould give us equ l treatmen .”)

[27] C aimant’s Rep y, ¶¶ -1 6.

[27] **49**, [redacted] p 2: (“[redacted]” .

[275] *ee* **R-148**, [redacted]; **R-157**, [redacted].

was Bowater Mersey's sole product.[276] A Canad ha stated th Tribuna shoul no ste int the sho s f t e GN , b t n a y even , t e assistan e provid d w s proportiona

146. Finall , t e Claima t sa s t e No a Scot a measur s a e n t proportion l becau e th y we e intend d o ma e P n "invulnerab e gia t th t o oth r C Pap r produc r cou d out-compet " wi h a virtu l guarant e o beco e immediate y a d o rema n n perpetui y Nor h America s lowe t co t producer."[27] Resolu e a d i s form r Preside t a d C O M . Richa d Garne u alle e th t t e G S "see s o ha e invit d PW C o defi e exact y wh t t thoug t t need d fr m t e provin e o ma e t t e lowe t co t produc r n Nor h Americ , a d th n t e provin e see s o ha e giv n PW C everythi g t ask d for."[28] The e exaggeratio s la k credibilit

147. t s a cana d th t t e G S ga e PW C everythi g t demand d a d a "virtu l guarante " o e t e lowe t co t produc r n Nor h Americ . F r exampl , Resolu e spen s mu h f i s Rep y Memori l complaini g abo t Po t Hawkesbury s "discounte " a d "preferentia " electrici y rat . Whi e t e L R s n t a measu e f t e G S a d n t attributab e o t und r internation l la , ev n f t wer , t s cle r th t t e G S a d NS I provid d nothi g ev n remote y resembli g a "guarante " n electrici y rate . PW C we t in o negotiatio s wi h NS I n Novemb r 20 1 seeki g n electrici y ra e f [redacted].[29] t believ d t cou d achie e th t ra e throu h a variab e prici g mechanis , ener y stora e strategi s a d a tax-efficie t partnersh p t negotiat d wi h NSPI.[30] B t PWCC s applicati n f r n advanc d t x ruli g w s reject d y t e Cana a Reven e Agen y n Septemb r 201 , whi h mea t t e mi l wou d e "considerab y le s profitabl " th

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[26] **R-14** , [redacted] . 1 , 1 , 2 , 2 , 7 [redacted] *S e* **C-16** [redacted] . 2 . Resolu e itse f recogniz d t e potenti l f r profitabili y selli g SC + pape . *S e* **C-11** [redacted] p . 3- .

[27] Claimant s Repl , ¶ 1 , 2 .

[28] Claimant s Repl , ¶ 3 , 3 ; Garne u Stateme t ¶ 1 .

[29] **C-12** , PW C Discussi n Memorand m (No . , 2011 ; *S e al o* **R-43** [redacted] . CAN000338_000 : [redacted]

[30] *S e* **R-06** , UA B Decisi n (Au . 2 , 2012 , ¶ 20-2 ; Coolic n Rejoind r Statemen , ¶ ; **R-36** , *e NewPa e Po t Hawkesbu y Corporatio* , M0417 , Openi g Stateme t f NewPa e Po t Hawkesbu y Cor . (Oc . 2 , 2011 , p . 2- .

PWCC ha planned nd the LRR th t was ul imately appro ed wo ld not be s ben ficial as PW C had originally inten ed.[281] ur her ore, because of th risks inherent n the variable le tricity pr cing mechanism t nego iated ith NSPI PHP's actual nergy cos s are much higher than th [redacted] it had o iginally con emplated: n 2013 they were [redacted] Notably this is [redacted] than what i would have paid under the fixed el ctri ity rate th t the UARB appr ved in Nove ber 20 1 fo Bowater er ey (nd Port Hawk sbu y, ha it been o erat ng at the time .[283] he G S n ver guarant ed tha Port H wke bur would e low ele trici y osts. I deed, t e G S observ d [redacted] In 2014 and 2015, P P eported publi ly t at it neede to t ke ownti e becaus of pr hi itive y high el ctri ity os s an other factors, making it "ve y d fficult for PHP] o ma e roper e ono ic d ci ions fo its b sin ss rega ding wh n t ope ate the mill at varying le els a d t best utili e its pulp storage apab li y."[285] In act, he e ectri ity low r than

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[28] **R- 63**, *R Pa ific W s Co merc al Corpo at on*, 012 SUARB 1 4 (Sep. 7, 2 12), 19: ("In re ponse to R's from va ious p rt es, PWC filed conf den ial financial in orm tion pdate to re lec pro ec ion for pr fitabili y o the mi l, recognizing he l ss of the TR. It roj cts the il to b con ider bly les pr fita le without he TR t an it would ha e be n ad th AT bee g an ed "). See lso appli ation by PW C to ame d th LRR, o s to no mak the order conditional pon th ATR, -**170**, *e Pac fic W st ommerc al Co porati n,* Order, NSUA B M048 2 1 433 (Sep. 28. 20). P ter teger stim ted from [redacted] tha the pro ected annual [redacted] were mo e m dest tha the Claima t's Memoria wou d s gge t bec use he p oposed electr c ty rra gem nt ith the A R w uld have ee appro ima ely [redacted], but th ATR was rejected ee S eger-1 ¶ 95 96

[282] *ee* anad 's Counter Me o al ¶ 17 . -**222** [redacted].

[2 3] In 201 , PH pai an aver ge of $[redacted]), hich is only [redacted] ess than he 2 13 r te the UARB app oved for Bowate Me se and would hav b en ppro riat for P rt H wkesbury had i be n oper ti g at the ime (*See* **C-138**, B Dec sion (2 , 2011), ¶¶ 224 *e als* **R-434** [redacted].

[84] **R 431**, [redacted] p. C N0000 31_ 05: [redacted]

[28] **R-4 5**, Let er from PW C o UARB (Mar 21, 2 14), p. 2. *See als* **C-23** , Transcri t f roceedings befo e U.S Int rnation l Tr de ommission *n re upe calend red Paper from Canada*, Inv. No. 701-TA-530 (Oct. 22, 2015),

the electricity rates in Nova Scotia.[286] The Claimant's portrayal of the GNS endowing PHP with cheap electricity is simply not true.[287]

148. Resolute's exaggeration about Port Hawkesbury "crushing foreign competition" is further discredited by the fact that it abandoned its allegation that Nova Scotia enabled PHP to engage in predatory pricing.[288] It did not pursue that claim because it has no evidence to support it. As an industry expert reported at the time, [redacted][289] Indeed, the Claimant had no response to Canada's observation that, in 2013, Resolute attempted to drive down prices while PHP was driving them up.[290] Nor has Resolute presented any evidence of unfair competition by PHP. If Resolute's allegations regarding PHP's role in the SC paper market were actually credible, it could have filed a complaint with the Canadian competition authorities, which have jurisdiction to deal with unfair practices such as abuse of dominance and abuse of market power.[291] Resolute has never done so.

149. Finally, Resolute ascribing so much weight to PWCC's aspiration to become North America's "lowest cost producer" is a red herring. Resolute not established that this is true and the

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pp. 163:19-164:2: ("Port Hawkesbury Paper gets its electricity rate from the privately-held company Nova Scotia Power Incorporated. Under our contract we are the last customer served. Meaning, we get the most expensive power available, but have the option not to use it. As a result, from the time Port Hawkesbury resumed operations in October 2012 until July 2015, Port Hawkesbury took 40 days of lost production because the electricity was uneconomical or unavailable.")

[286] *See* Canada's Counter-Memorial, ¶ 275 fns. 571 and 572 and exhibits cited therein. *See also* **R-147**, [redacted], p. 17; **R-436** to **R-444**, Hydro Québec, Comparison of Electricity Prices in Major North American Cities, 2011-2019, p. 5 of each document (demonstrating that large industrial user (like paper mills) electricity rates as between NSPI and Hydro-Québec are more than double in Halifax, Nova Scotia as compared to Montreal, Québec).

[287] Resolute's suggestion at ¶ 166 of its Reply that PHP receives a financial benefit from NSPI's biomass plant is also untrue. As Canada has previously explained (Canada's Counter-Memorial ¶¶ 194, 208), PHP pays $4.72 million annually for the steam it gets from NSPI and UARB found that to be "reasonable and not subsidized by ratepayers." **R-062**, UARB Decision (Aug. 20, 2012), ¶¶ 156-158.

[288] Statement of Claim, ¶¶ 55 and 96.

[289] *See* **R-261** [redacted] (emphasis added).

[290] *See* Canada's Counter-Memorial ¶¶ 361-362. *See also* ITC Final Determination, noting that two buyers described Resolute as driving prices down: **C-054**, *In re Supercalendered Paper from Canada*, U.S. International Trade Commission Inv. No. 701-TA-530, Final Determination (Dec. 2015), p. V-7.

[291] **R-445**, Canada Competition Bureau, "Abuse of Market Power" (Feb. 22, 2018); **R-446**, Canada Competition Bureau, "Abuse of Dominance," (Nov. 11, 2015).

companies' respective financial information actuall indicates t e opposite: Resolute's Dolbea and Kén gami ills have pr duced their pa e at a lower a erage co t t an PH s nce it reo ened in 2012.[292] Resol te wrongly char cter zes the NS' ctions as being anti-compet tive a d targeting fore gn investors ecause of cc sio al eferences b the GNS to [redacted][293] (w ich also included le s pr sa c sta ents y P CC of bein [redacted] [redacted]"[294]) a d h toric l flourishe in pre s r lease.[295] This d es not tr ns ate into violation of cust ry inte natio al la .

150. I sum, while there is no legal b sis nd r NA TA Artic e 1 05 to eve cons de the q es ion, he e is si ply n bas s i fac to argue ha the GNS' assis anc to Port Hawkesbur w s "disproport onat " n internat onal la A [redacted] a sis ance p ck ge [redacted] [redacted])[296] ca ardly be describ d as a dis ro ortion te in estme t o public und given the eco om c a d social imp cts to t e Pr vince had t e mi l been liqu date . Nova Scoti pa d f ir m rk t value or t e land it re eiv d rom Ne Page/PHP, a d i fa rly compensates HP or th silvi ulture and other fo es managem nt servi es t perfo ms o

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[92] *Se* Expert Repor of Pete Steger C hen H milto Steger, 17 A r l 2 19) ("Steger 1" , ¶ 116 and Sched le 29 (stim ting PHP s average ca cost fo 2013 2015 a [redacted] a erage ota annual a h ost / [redacted] and St ge -1 ¶ 19 and Schedule 2 (esti atin Dol eau s average ca co t for 2013 2015 as [redacted] and Keno ami s average ca t cos for 2012-2015 as [redacted] *See ls* AF Y/Pöy Ann x II pp. 50-5 [redacted] *ee* FRY Pöyry-1, ¶ 64.

[2 3] *ee* Cla mant's Reply, 32, *citin* **C-158**, [redacted] (emp a is added).

[294] **R-4 4**, [redacted] p. CA 0003 8_0002

[295] **C-00** , Nova cotia Pre ier's O fi e, "P ovince In est in Jobs Tr ining, a d Renew ng th Fo estry ect r" (Aug. 20, 20 2). The a nouncement of inan ial assist nce or P rt awkesb ry ca e o ly two on hs afte the cl sur of Bo ater Mersey *See* **R-34** , Nova cotia Pr mier's O fi e, "Premie Respon s o Indef nite losur of Bowate Mi l" (Ju 15, 2 2 .

[296] **C-182**, [redacted] **C-195**, [redacted] .

on behalf of the Province.[297] Th Claimant' argumen tha Canad violate th minimu standard f treatme t n customa y internation l l w becau e t e GN ' measur s we e n t "proportionate" sho ld be reject .

2. Resolut 's Argum nt t at he N va Sco ia Measu es W re ot in he Pub ic Inter st is Basel s

151. In ts Re ly Memori l, Resol te alle es t at he N va Sco ia measu es w re ot in he pub ic intere t, ad extraterritor al effe ts nd w re theref re illegitimate. [98] Resol te arg es t at N va Sco ia ac ed in "paroch al self-intere t" nd ot in he wi er pub ic inter st beca se it fai ed to priorit ze Resolut 's investme ts in Qué ec o er investme ts on ts territ ry nd subm ts t at in internatio al l w, he inter st o a constitu nt elem nt d es ot overc me he intere ts of he grea er whole."

152. To sta t, Resol te as ot ci ed to ny author ty t at sugge ts he mini um stand rd of treatm nt of ali ns in custom ry internatio al aw requi e a sub-natio al governm nt (s ch a a provi ce or sta e) to ut he intere ts of fore gn invest rs loca ed i a differ nt provi ce or st te ab ve th se of he invest rs loca ed on ts territo y. T is can ot be t ue a a gene al proposit on e en w en talk ng ab u a natio al government, [00] nd Resol te as ot explai ed ow t is an be t ue in he e en m re speci ic cont xt of sub-natio al governmen

153. Moreov r, it is errone us or Resol te to ar ue t at N va Sco ia id ot ct in he "pub ic interes ." Can da as alre dy demonstra ed in ts Counter-Memor al nd in t is Rejoin er Memor al t at N va Sco ia ad *b na f de* pub ic pol cy justificati ns to prov de financ

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[97] Tow rs Rejoin er Statem n ¶ 1; **R-2** [redacted]; **C-2** [redacted] **R-1 2,** FU A; **C-2** , [redacted]

[98] Claiman 's Rep y, ¶¶ 105-1 3.

[99] Claiman 's Rep y ¶ 1 . Resolut 's gratuit us refere ce to **C-3 2**, *AbitibiBowa er I c. v. Cana a*, IC ID Cons nt Aw rd (D c. 5, 20 0) is irrelev nt in t is ca e. It is axioma ic t at custom ry internatio al aw all ws Sta es to national ze or expropri te fore gn investme ts as l ng as it is d ne w t a pub ic purpo e, in accorda ce w th ue proc ss of aw nd w th paym nt of compensati n. In he c se of AbitibiBowat r, he expropriat on of AbitibiBowate 's ass ts in Newfoundl nd nd Labra or as d ne w t a pub ic purp se nd in accorda ce w th he ue proc ss of l w, as requi ed by NA TA Arti le 1110(1) a) nd ( ). Un er he Cons nt Awa d, AbitibiBowa er as p id C$ 30 mill on or he f ir mar et va ue of he expropria ed investm nt nd as requi ed by NA TA Arti le 1110(1) d) nd ( ). T is d es noth ng to adva ce Resolut 's cl im in t is ca .

[00] As he *Electra el* nd ot er tribun ls h ve confirm d, " he h st St te is ot requi ed to elev te unconditiona ly he intere ts of he fore gn inves or ab ve ll ot er considerati ns in ev ry circumstanc ." *ee* **CL-2 0**, *Electra e – Awa d* ¶ 1 5; **RL-2 5**, *Ba W – Decisi n* ¶ 59 (empha is adde), *cit ng* **RL-2 6**, *Anta i - Awa d* ¶ 360(.

assistance to Port Hawkesbury, just as it did for supporting Bowater Mersey. Th mos obvious w s t e potenti l impa t n t e Province s econom

[redacted][31]

154. T e permane t closu e f Po t Hawkesbu y wou d ha e h d significa t implicatio s througho t t e province s econom , particular y n rur l Ca e Bret n Islan , affecti [redacted][32] Closu e wou d ha e al o affect d electrici y rat s througho t No a Scoti : Resolute s o n expe t D . Al n Rosenbe g testifi d o t e UA B th t Po t Hawkesbury s closu e wou d ha e "rippli g effec s througho t t e econom , th t wou d inevitab y le d o sti l mo e lo t fix d co t recover , whi h wou d n tu n le d o sti l high r [electricit] rates."[33] n lig t f t e serio s econom c impac s f r t e Provinc , providi g $66 5 milli n n loa s a d gran s c n hard y e describ d s n t n t e publ c interes

155. Ev n f t e L R betwe n PW C a d NS I s attributab e o t e G S (t s not , t s disingenuo s f r Resolu e o arg e th t t w s n t n t e publ c intere t f r Po t Hawkesbu y o g t it.[34] Resolu e itse f argu d o t e UA B n 2011[35] th t bo h Bowat r Mers y a d Po

[31] **C-1 8** [redacted] S e al o **R-16** [redacted] **R-15** [redacted]

[32] **R-43** , [redacted]

[33] **R-42** , Rosenbe g Openi g Statemen , . .

[34] s not d n Pa t I abov , t e L R itse f s n t attributab e o t e G S becau e th t variab e prici g mechani m a d t e electrici y co t savin s therefr m w s negotiat d s betwe n PW C a d NSP , t o priva e parti s ov r whi h t e G S d d n t ha e effecti e contro . B t ev n f t we e attributab e o t e GN , Resolu e sti l cann t questi n t e UARB s findi g th t t w s necessar , appropria e a d n t e publ c intere t f r Po t Hawkesbu y o recei e t e request d LR .

[35] **R-16** , *e NewPa e Po t Hawkesbu y Corporatio* , Lett r r : Propos d Amendmen s o No a Scot a Pow r Inc.' . Lo d Retenti n Tarif , M041 5 NPB 1 (Ju . , 2011 ; **R-16** , *e NewPa e Po t Hawkesbu y Corporatio* , Pre-Fil d Eviden e f NewPa e Po t Hawkesbur , M041 5 NPB 4 (Ju . 2 , 2011 ; **R-16** , *e NewPa e Po t Hawkesbu y Corporatio* , Pre-Fil d Eviden e f Bowat r Mers y Pap r Compa y Limite , M041 5 NPB 5 (Ju . 2 , 2011 ; **R-**

Hawke bury sh uld e gr nt d lower lectricit rates because they were in con mic istr ss, that at pay rs w ul be etter off it them receiving an L R than if oth mil s we e to l ave the le tricity s stem a d ecaus "*the pub ic int rest is far better served if these mills can remain in operation*".[306] Resolute's expert Dr. Al n Ro enberg tes ifi d th t "[m]any North Am rica ju i dictions ave provi io s f r load ret nt on ariffs. The are a mech ni m a ailabl to he ut lity and o he regulator to retain loa o t e s stem th t ould therwise b lost. [307] Dr Rosenbe g we t o to say t at "a LR [load r te tion tariff merely e ulates wh t any ra ionale bu ines w ul do in li e circum tan es. A rationale business concludes that it is better to discount the standard price and keep th cust mer, as long s th new p ice overs th avo de co t nd akes a contributio to ixed os s."[308] T e UARB ag eed with Res lute tha it was in the ubl c in erest for bot m lls to c nt nue perating and app ove a ate for Bo at r Mer ey, and Por Ha kesbu y h d it not bee in CCAA proceedin s, t at was ot subsid zed by other ratepayer .

156. n 2012, the U RB ap lie the am reasoni g with r sp ct to PW C' application:

> Mo eov r, t e establ shment of n LRT base on eco om c distr ss is grounded on long-e ta lis ed an w ll a cepted ra emaking rinc ples ppl ed in arious jurisdict on , i clud ng y the Bo rd i this provinc . Fu ther, *s ch ra es are i th public i te est. In the end, the ap roval of a we l- esi ned LRT, he he it s to av id he swit hi g of load n he insta ce of co-generat on by th cu to er, or t help pre ent the los re or relocati n of an ex ra arge in us ria custom r due to econ m c dist ess, ben fit all ther cus omer class s o*
>
> t pr vi es fo rates that ar reason ble nd

164, *In e an A plicat on by NewP ge P rt Hawkesb ry and Bowat r Mers y Paper omp ny*, Orde (ec. 21, 011); **R-38** , *Re N wPage Port awk sbury or oration*, Direct Evidence nd Exhi its of Dr A an Ros nberg, M0 17 N B-3 (Jun. 2 , 011), p 3:1 -15; **R-429** Ro enberg pening State ent p. 1

[306] **R- 19**, *In e an Appli at on by N wPag Port Hawk bsury and Bowater Mersey Paper Company* M04175 Clos ng Submis io o NewPage ort Haw esb ry C rp. an B wat r Me sey aper Compa y Limited (N v. 9, 2 11), p. 6 (mphasis added) *See lso* **R-3 8**, *Re New Pa e Port Hawke bur Corpo at o* , Opening tat ment o Bowa er Merse P per omp ny L d. M04 75 N B-53 (Oc . 4, 20 1), p. 4 ("F nally, Mr. Chair, Boar me be s, we know you hav to ake his ecision on ound ec nomic nd regula or pri ciples, *bu we und rst nd yo may lso take in o a count the ro der publ c nte est.* In th s regard, we elie e the B ard fu ly u der tands the i portan e f our mill o t e economy f south-we ter Nova Sco ia, and n f ct th signifi an impac on other reas and busin sses throughout the Provi ce. The pulp a d pa er busines is high y ntegrate wi h s w ills, oo supp iers, trucking transportat on suc as throug th Port of Hali ax, and has a myriad f other enviro me ta , ngineering, le al, acc unti g and othe su port se vices.) (em hasis ad ed); **C-1 8**, *I re an App icati n b NewP ge Por Hawkebs ry an Bo ater Mer ey aper C mp ny*, Dec sion 2011 NSUAR 184 (Nov. 2 , 2011 ("UARB eci ion (Nov 2 , 2 11)" .

[307] **R-38** , *Re N wPage Port awk sbury or or tion*, irect Evi ence an Exhibits f r. Ala Rosen erg, M041 5 NPB-3 (Jun. 22, 011 , . ; **R- 29**, osen erg Opening Statement, p. 2.

[308] **R-429**, Rosenberg Opening Statement, pp. 2, 9, 110, 304, 310.

> appropriate for all customers. […] *The Board is satisfied that the evidence of PWCC establishes the need for a LRR in order for the mill to re-open and afford it the prospect of long-term viability*. The Board considers that some contribution to fixed costs is better than the other ratepayers having to bear all of the costs. The Board therefore finds that the granting of a load retention rate is necessary.[309]

157. Resolute has no basis to question the finding of the UARB, a quasi-judicial and impartial body empowered by law to adjudicate the issue, that it was reasonable, in the public interest and more beneficial for ratepayers overall for Port Hawkesbury to receive a LRR, especially since it was Resolute that opened the door to that outcome.

158. The Supreme Court of Nova Scotia also affirmed, as is required when approving a plan of compromise or arrangement under the *CCAA*,[310] that the public interest was served by PWCC's

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[309] **R-062**, UARB Decision (Aug. 20, 2012), ¶ 83 (emphasis added), *citing* **C-138**, UARB Decision (Nov. 29, 2011), ¶ 85 (emphasis added). *See also*, ¶ 221 of **R-062**: ("With respect to necessity and sufficiency, the Board is satisfied that the evidence of PWCC establishes the need for a LRR to re-open the mill and afford it the prospect of long-term viability. The Board considers that some contribution to fixed costs is better than the other ratepayers having to bear all the costs. The Board therefore finds that the granting of a LRR is necessary and the rate is sufficient.")

[310] Canadian courts are required under the *CCAA* to determine whether a plan is "fair and reasonable" and whether it is in the public interest. *See* **R-447**, *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, ¶ 60: ("[T]he court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company […]. *In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed*.") (emphasis added); **R-448**, *Re Repap British Columbia Inc.* (1998), 1 C.B.R. 4(th) 49 (B.C.S.C.), ¶ 2: ("the 'fairness' of the Plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as 'shareholders' of the company, creditors of the company, suppliers and employees of the company, and competitors of the company."); **R-449**, *Re Canadian Airlines Corp.*, 2000 ABQB 442, ¶ 3: ("Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: *does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge?* It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan."); ¶ 60 (a CCAA plan "must be *fair and reasonable*."); ¶ 174 ("*The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways.* It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travelers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.") (emphasis added); **R-450**, *Re Canwest Global Communications Corp.*, 2010 ONSC 4209, ¶ 21: ("In assessing whether a proposed plan is fair and reasonable, considerations include the following: (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan; (b) what creditors would have received on bankruptcy or liquidation as compared to the plan; (c) alternatives available to the plan and bankruptcy; (d) oppression of the rights of credits; (e) unfairness to shareholders; and (f) *the public interest*.") (emphasis added) and ¶ 26 ("The last consideration I wish to address is the public interest…the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact

lan for Por Ha kesbury ecause t wa " air and rea ona le" and " reater be efit will be de ived from the co tinu d o eratio of [the] b si ess than wou d result from the orced liqu datio o the Comp ny's ssets."[31] In eed, "the *CCAA* is aimed at avoiding, where possible, the devastating social and economic consequences of loss f usiness pe a ions, nd i aimed at llowi g the co pora io to carry on business in a manner that causes the least possible harm to employees and the communiti s in whi h it o erates. en e, the treat ent of claims n a *CCAA* roc eding is u derta en with the p bl c in erest n mi d."[312] The Clai an can ot challen e th conclu ion of t e S preme Court of N va cotia hat PWCC's pur hase of Po t Hawkesb y from N wP ge was fair and rea ona le" and n th pu lic inte est befor this NAFTA Tri unal.

159. R so ute is imply equ ting its wn nterest wi h the "pub ic" inte est. over ments are required o al nce om eti g in erests an prior ties co stantl and he ften face ifficul de isio s a to hat s the bes c urse of action wh n no option ead to a favourable outcome or all. The fa t tha the e ay e adve se financial co sequenc s fo other inve tors, dom st c or foreig , is ofte part of the oli y de isi n-ma i g pro ess th t S ates will unde take in good aith. Cu to ary inter ati nal law does n t hold a tate li ble for suc decision with ut cl ar e idence o egre ei n i vestor. here is no such e idenc h re.

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on the anad an public "); **R-451** Janis P. arra, *Re cue! The Companie ' C editor A ra g ment Ac* (2nd ed.) (T ronto: Cars el , 2013) pp. 158-167, 5 0-501, 530- 34.

311 **-347**, *In re A P an of om r m se o Arrangem nt f Ne Page Port Ha kesbury Corp* , Plan S nc ion Order Sep. 5, 2012 , . 2 (h) a pr vin the Pla Schedule A) Ar ic e 2 1, "Pur os of the Plan : (The purpose o this Plan i to (a) co plete eorganizat on f the Compa y y i plementi g the R st uctur ng Transa tio s and (b t ef ect a c mp omise an a r ngeme t of all Af ect d claims, i ord r to enab e the b sine s f the C mpan to continue s a going co cer , *in the expe tatio that gre ter benefi will be de iv d f om the co tinued o era ion f its us ness th n wo ld result rom th forc d liquidat on f the Comp ny s a sets.*" *ee also* **R- 52,** *R Ne Page P rt Haw es ury Cor* ., O der (Appro ing th Activitie of th M nit r (S.C. .S.) (Aug. 30, 2 12 ; **R-45 ,** *Re ewP ge Port Hawkesbu y orp* , Fou teen h epo t of the M ni or S.C.N.S.) Se . 6 2012), 3 . T e Monit r r ported t the ur th t i was not wa e of any oppo it on o the s ncti n of the Am nded and Res ated Pl n" (¶ 34 a d t ere we e no inte ven ions i the NewPa e CCAA pr ceedings op osin the pl n as ot being in the public in erest *S e* **R-02** , *Compa ies' Cre it rs rrangement Act* R.S.C., 1 85, c. C-3 , s. 11: (Gen ral Power of ourt D sp te anything in the ankru tcy nd ns lvency ct o the W nding-up and Restru tu ing Act, if an pp ica ion is made under th s A t in re pect of a de to co pany, the co rt, on he appl cati n f any er on ntere ted in th matter may, ub ec to the rest icti ns et ou in hi Act, on otice to an o her person or withou no ice as it ma s e fit, make an or er that it considers appropriate in he c rcum tances.")

312 **R-451** Janis P. Sarr , *Rescue! The Companies' Creditors Arrangement Act* (2nd ed.) (Toronto: Carswell, 2013), p. 501.

D. Resolute Cannot Complain of Unfairness While Simultaneousl Admitting That It ever Asked fo Government Ass stan e to Suppo a id for P rt Hawkes ury

160. Th Cl imant complai s t at it as n ver off red a y f th sa e s pport gi en to WCC or the pur hase of he Port awkesbur mill [313] I fa t, Resolut never *ask d* or gove nmen assistanc to ope at Port awkesb ry ec use it pulled i self o t o the co peti ion be e the bi di g even egan

161. T ere is no dis ute that No a S oti *wa ted* esolute to bid f r the ort Hawk sbury mill. Dep ty Minist r Mo tg merie has estified th t he enc uraged esolute to oin he b dding roc ss an tha N va Sc ti had h pe th t it wo ld do so.[3 4] I his wi ness st tement Mr. Ric ard Garneau ad its that th GNS enc uraged es lute to consider bi g on Por H wkes ury.[315]

162. PWCC had no more speci ic assura ces of over ment fin nci l s pport than Res lute (o any ot er compan) when it dec ded to su mit a on- ind ng l tt r of inte t f r the mi l on eptem er 28, 201 .[31] PW C, Pa er Excellenc and the oth r 9 co pani s that d cid d t me t th t deadline ll had the s me inform tio as Res lute, inc udin the gener l knowl dge that " he Nova Scot a government ha i dicated a wi li gness to b con tructive in su por ing ill ope ati ns"[317] and that the GNS had pre iously pr vided s bs antial fin ncial suppo t t stru gling pape m lls and othe indust ies in t e Prov nce hrou h t e *Nov Scotia Jobs*

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[13] Clai ant's Rep y, ¶ 268; itness S a ement of Rich rd Garnea , 6 December 2 19 "Ga neau Statem nt"), ¶ 19.

[314] on gom rie First State ent, ¶¶ 2 , 24; Mont o er e R joinder Statement, ¶ 8.

[15] G rne u State en , ¶ 15: ("At he reque t of t e Province Resolut se ior managem n ex mined he ossi ility a [redacted] o buying he ort Ha ke bury mi l.")

[316] **R-030** *Re Ne Page P rt Haw es ury Corp.*, econd Repo t of he Monito S.C N.S.) Oc . 3, 20 1), 17; **R-029** *Re N wPage P rt Hawke bu y Corp.* Or er Approval f Settlem nt nd Tr nsition Agree en and S les Proc ss (Se . 9, 011 , Sche ule A, pp. 9-10.

[31] **R-361**, San be Confide tial I forma io Me ora dum (Sept 201) p. 5 . The Sept mber 011 ana e Me oran um noted tha the mill has i torica ly benefitte fro a trong rela ionship wit th pro in ial g vern ent" and t at n 2006, Po t Hawkesb ry h d re ched a agr ement wi h N va Scot a hat pro ided $65 m llion n upp rt o er sev n years. t wa als publi kn wledge t a No a Scoti had pr vided a 75 mil ion loan to No ther (ap r Exc llence) n 2010 so t could urch se timber a d m intain mil ope ations. *ee* **R- 54**, CBC Ne s art cle, "N S. gover ment ends 75 to No thern ulp" (Mar. , 2010); -**455**, N va Sco ia Exec tive Cou cil O fi e websi e excerpt Orde in Counci # 201 -90 Feb. 2 , 2010) **R-456**, N va Scot a Natura Resour es w bsite exc rpt, Ne nah La d Purc ase" (Mar. , 20 0); **R-45** , Nova Sc tia News Release, "Province Supports For stry Ind stry, En ironme t, con my" (ar. 1, 2010)

[3 8] *See e g.*, **R-458**, O der i Co ncil N . 2009 136 (ar 23, 20 9); **R-459**, O der i C uncil o. 201 -131 Ap . 4, 20 3); **R-460**, O der i C uncil o. 201 -132 Ap . 4, 20 3); **R-455**, rder n C uncil o. 2010-90 (Feb. 26, 2010);

163. It was only *after* 21 non-binding letters of intent were submitted on September 28, 2011, and only *after* PWCC and Paper Excellence were selected by the Monitor on October 29, 2011, that the GNS started to discuss in earnest their respective requests for government assistance. [redacted][319] By that time, Resolute had already taken itself out of the process. As Deputy Minister Montgomerie has already testified, there is no reason to believe that Resolute could not have also negotiated with the GNS for financial assistance had it chosen to pursue the opportunity.[320]

164. Resolute may have had its reasons for not participating in the CCAA process, including the fact that [redacted] but NAFTA Chapter Eleven cannot be used to insure Resolute against the implications of its own business decision to [redacted] As the *Antaris* and *BayWa* tribunals noted, in the absence of specific promises or representations, a foreign investor, "may not rely on an investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework."[322]

165. Resolute's complaint that it was never offered assistance in negotiating an electricity rate with NSPI, hiring a consultant or getting support for obtaining UARB approval for an LRR is

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R-461, Nova Scotia Department of Natural Resources Land Purchases, 2006-2015; **R-462**, News article "Sweeter smell of prosperity: Funding to help reduce pulp mill odour, increase efficiency (Jan. 20, 2011); **R-463,** Pulp and Paper Canada News Article, "N.S. to pay $6M toward Northern Pulp's new wastewater treatment plant" (Aug. 23, 2018).

[319] Montgomerie First Statement, ¶ 25.

[320] Montgomerie First Statement, ¶ 24: ("Had Resolute submitted a bid to purchase the mill within the deadlines set by the Monitor (which I encouraged Resolute to do) and had the Monitor selected Resolute as a qualified bidder, I can confirm that the GNS would have been ready to discuss reasonable requests for financial assistance, just as we did with PWCC and Paper Excellence once they were chosen by the Monitor.")

[321] **C-118**, [redacted], p. 3; **C-119**, [redacted] pp. 8, 9, 11.

[322] **RL-215**, *BayWa – Decision*, ¶ 459, *citing* **RL-216**, *Antaris - Award*, ¶ 360(10); *See also* **CL-016,** *Waste Management II – Award,* ¶ 114: ("investment treaties are not insurance policies against bad business judgments."); **RL-170**, *Mobil/Murphy – Decision,* ¶ 153: ("In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies changes and rules change. These are facts of life with which investors and all legal and natural persons have to live with.")

similarly illogical.[23] All f t is occurred *af er* Res lute decided not t participate in he CCAA id ing process an *af er* PWC was selected by the Monit r a o e of two going- once n bi ders. WCC ad no mo e ssu ances from No a Sc tia than esolute or ny oth r omp ny w th r spe t to electri ity r tes. By the time PWCC and N PI started th ir iscu sions in ear y Novemb r 2 11, esolute had long since walked away from the CCAA process.

E. The GNS' Financial Support for Re olute's Bowate M rs y M ll s not a "Distract on" – it Provides he F ll ontext as to why th Fin cial Sup ort for P rt H wkesbury Does Not iol te AFTA Ar icle 1 05

166. es l te dismisses No a cot a's finan ing for ts Bowater M rsey mi l s a dive sio ".[324] T the c ntr ry, he GNS' si ultan ous ffo ts to keep oth the Bowater ersey a d ort Hawk sbur mill open and compe iti e provide cr tical co text on t e NS good f ith ecision- m ng and m tivation , hich is ess ntial t an Ar icle 1105 analysis.

167. R solute atte pts to istin uish Bow te Mer ey rom ort Ha k sbury by saying t at the GNS n ver inte ded to help it mill ec me a low-cost p oducer of newspr nt and o ly anted Bowater Me sey to be temporarily mpetit ve"[325] Howe er, he facts ontradi t R sol te' asserti ns.

168. irst, the ecem er 201 ag eement betw en the GNS and Re olute tated e plicitly that t was he s ar d goa of he p r redu y o en [redacted]:

[redacted][326]

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[33] Garn a Sta men , ¶ 1

[34] Claimant' Reply, ¶ 1

[25] laim nt's Rep y, 193.

[32] **R-149** [redacted] p. 2 (e phasis adde). T e [redacted] w s wha Resolute had wanted to achieve or even better than what it had aimed

169. Second, the goal was to make Bowater Mersey a low-cost and competitive newsprint mill. When the *Bowater Mersey Pulp and Paper Investment (2011) Act* was adopted by the Nova Scotia Legislature,[327] the Premier made the following statements describing the purpose of providing financial assistance to Resolute:

> [W]e went through every single part of the cost chain with Bowater and removed costs so that they would be a *low-cost, highly competitive mill in the market that exists*.[328]
>
> We set this up to ensure that the investments that were going to be made were going to go directly into the mill, that they weren't going to leave Nova Scotia and they weren't going to go anywhere else, and that *the money was going to be invested right back into the plant to make it a more efficient, low-cost mill and therefore be able to survive in that exact environment*.[329]
>
> *What we wanted to do was put money in place that would allow that mill to actually operate in that low-cost, high-efficiency environment*. We know that at some point in time the newsprint market will reach its equilibrium, and when it does, the remaining mills will be able to make money and be prosperous.[330]
>
> What we know is that there is an industry in transition and we know that there will be mills that do survive. The question is, how will they survive? *They will survive in a low-cost, high efficiency, and very competitive market, and that's the way this [Bowater Mersey] mill is being positioned*.[331]

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for. *See* **R-320**, "Bowater Mersey on the Brink of Closure," (Nov 3. 2011), p. 2: ("Dexter said AbitibiBowater wants to reduce labour costs to $80 per tonne from $97, and manufacturing costs to $480 per tonne from $537.")

[327] **R-151**, *Bowater Mersey Pulp and Paper Investment (2011) Act,* SNS 2011, c. 32 ("*Bowater Mersey Act*"); **R-149**, [redacted]

[328] **R-211**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-62 (Dec. 8, 2011), p. 5015 (emphasis added).

[329] **R-212**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-64 (Dec. 12, 2011), p. 5220 (emphasis added).

[330] **R-212**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-64 (Dec. 12, 2011), p. 5220, (emphasis added).

[331] **R-212**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-64 (Dec. 12, 2011), p. 5222 (emphasis added). The Premier made similar statements to the media. *See e.g*, **R-330,** Global News, "Nova Scotia offers $50 million package for Bowater Mersey paper mill" (Dec. 2, 2011): ("In the end, I believe that in the newsprint industry it is the lowest-cost mills that are going to survive, and once the newsprint industry reaches an equilibrium, those companies will make money and they will be a long-term business.) Other GNS officials made similar comments about the agreement between the GNS and Resolute: **R-333**, Nova Scotia Houses of Assembly, Standing Committee on Economic Development (Dec. 6, 2011), p. 20 (per Marvin Robar): ("[T]he whole exercise was designed to reduce the operating costs of the [Bowater Mersey] mill to a cost-competitive level. So the union contributed to it. The province worked with the company [Resolute] and the company indicated that, you know, if we had $25 million to

170. Resolute's argument that the GNS never had the intention of helping to make Bowater Mersey a low-cost and competitive mill is revisionist history.

F. Resolute's Allegations Regarding the [redacted] Are Misleading

171. Resolute alleges that [redacted], evidences a "knowing" and "wilful" attempt by Nova Scotia to harm Resolute.[332] This is not true.

172. As Deputy Minister Montgomerie testified,[333] with both the Port Hawkesbury and Bowater Mersey mills facing permanent closure in September 2011, Nova Scotia started to consider the future of its forestry industry and the prospects for both of those mills. As part of that effort, Nova Scotia [redacted] and other consultants to advise on the SC paper and newsprint markets in North America and abroad.[334] The [redacted][335] [redacted], it was still unknown who would be the winning bidder for the mill, but [redacted] provided some encouragement to Nova Scotia that there was a future for the mill and that it would not be imprudent to consider a reasonable amount of financial assistance if a credible buyer was selected by the Monitor.

173. However, in the first half of 2012, the market had unexpectedly deteriorated due to a sharp drop in demand for SC paper, causing prices to plunge.[336] Nova Scotia accordingly requested [redacted].[337] The [redacted][338]

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invest, we could invest in energy-saving projects that would result in significant reduction in our costs per ton for energy.")

[332] Claimant's Reply, ¶¶ 3-4, 23, 102-103. *See* **R-161,** [redacted]

[333] Montgomerie First Statement, ¶¶ 6-8.

[334] **C-116**, Nova Scotia Department of Natural Resources, "Seven-point Woodlands Plan Keeps Plant Resale Ready" (Sep. 9, 2011). *See also* **R-148**, [redacted]

[335] **R-146**, [redacted] pp. 9-11, 39-43, 64-65.

[336] AFRY/Pöyry-1, ¶ 42.

[337] Montgomerie First Statement, ¶ 30.

[338] AFRY/Pöyry-2, Section 4.

174. In its Reply Memorial, Resolute focuses exclusively on [redacted][340] Resolute argues that this is evidence that Nova Scotia knowingly and deliberately tried to harm its Kénogami mill.

175. However, the Claimant's Reply does not [redacted][341] Resolute's singular focus on one pessimistic aspect of the [redacted] ignores its broader context.

176. In any event, the pessimistic scenarios turned out to be wrong [redacted][342] While that return may have had a short-term impact on market prices,[343] the Kénogami mill did not shut down and it remains operating profitably today. Furthermore, the increase in

[339] Claimant's Reply, ¶ 103.

[340] **R-161,** [redacted], p. 36.

[341] *See e.g.,* **R-161,** [redacted]

[342] *See* AFRY/Poyry-2, Section 4.

[343] Canada has never claimed that the re-entry of Port Hawkesbury in September 2012 had zero effect on market prices in the short term. What Canada has always contested is that even if there was a short-term market impact, it is not compensable to Resolute under the NAFTA and international law. *See Resolute Forest Products v. Canada* (UNCITRAL) Canada's Memorial on Jurisdiction, 22 December 2016, ¶ 22 fn. 35

demand for SCA+ paper, which resulted from customers moving away from more expensive coated mechanical paper, [redacted] and helped SC paper prices to increase in 2013.[344] By 2013, as contemporaneous market commentary confirms, [redacted] [345] and it "[redacted]." [346]

177. During the jurisdictional phase of this arbitration, Resolute even acknowledged that PHP sought to avoid causing disruption when it re-entered the market by exporting much of its SC paper outside of North America.[347] This was consistent with the business plan PWCC presented to the GNS indicating its [redacted] [348]

178. Resolute says the GNS "knew…the restart of Port Hawkesbury would cause the demise of a Resolute mill."[349] This is not true. If Resolute is referring to the Laurentide mill, [redacted] That mill only produced SCB/SNC paper, whereas Port Hawkesbury is focused on higher grades of SCA+ paper. Therefore, any market impact would have been limited given that [redacted].[350]

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[344] *See* Steger-1, ¶ 86; Steger-2, fn 59.

[345] **R-263**, [redacted], p. 24 (emphasis added).

[346] **R-261** [redacted], p. 24 (emphasis added). The first expert report of Peter Steger contains numerous references to contemporaneous market commentary confirming that the SC paper market absorbed Port Hawkesbury's production without much disruption to prices or competition. See Steger-1, ¶ 86.

[347] *Resolute Forest Products v. Canada* (UNCITRAL) Claimant's Rejoinder Memorial on Jurisdiction, 3 May 2017 ("Claimant's Rejoinder on Jurisdiction"), ¶¶ 61-62 (confirming that the following statement from PHP is consistent with Professor Hausmann's analysis: "[W]hen PHP entered the market in the end of 2012 and the beginning of 2013, it could have brought a fair amount of SC paper to the U.S. market. Rather than do this and deliberately seeking to avoid market disruption, PHP exported this product. PHP acted responsibly with regard to the U.S. market.")

[348] **C-163**, [redacted]; **C-167**, [redacted]

[349] Claimant's Reply, ¶ 141.

[350] **R-161,** [redacted] 13, 29, 30.

Furthermore, the [redacted] could not foresee that Resolute would reopen its Dolbeau mill in October 2012 to make the same SCB/SNC paper as Laurentide, thereby contributing to Resolute's decision to close Laurentide two years later.[351]

179. In other words, the only possible conclusion regarding [redacted] is precisely what Resolute has argued about "gurus and soothsayers"[352] trying to predict market forces: "Forecasts about markets are always speculative."[353]

180. However, even more important than what [redacted] got right or wrong is the broader context in which Nova Scotia's good faith decision-making took place. NewPage had initiated the CCAA proceedings in September 2011 with the goal of selling Port Hawkesbury as a going-concern in order to "preserve the greatest benefit and value for its creditors, employees and other stakeholders and for the local community as a whole."[354] [redacted].[355] In the same month, PWCC was selected by the Monitor through a fair and open bidding process supervised by the Nova Scotia Supreme Court, a process which the Province had specifically encouraged Resolute to participate in.[356] PWCC was selected not only because it was the highest bidder but because of its ability to bring new thinking and efficiencies to mill operations. For more than six months, PWCC negotiated a complex web of agreements with NSPI, labour unions, the GNS and other actors. [redacted] a decision from the UARB on the LRR application was imminent, and PWCC and NewPage (a U.S. investor) had already secured approval by the Supreme Court of Nova Scotia of the Plan of Arrangement and were on the verge of receiving approval by the creditors. As the Monitor told the Court, by that point in the CCAA process, liquidation was the only alternative, which would have deprived

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[351] AFRY/Pöyry-1, ¶ 15.

[352] *See e.g.,* Jurisdictional Hearing Transcript, Day 1, pp. 269:11-19, 272:22-273:6.

[353] Claimant's Rejoinder on Jurisdiction, ¶ 57.

[354] **R-024**, *Re NewPage Port Hawkesbury Corp.,* Affidavit of Tor E. Suther (S.C.N.S.) (Sep. 6, 2011), ¶¶ 8, 89-92 and 104.

[355] **R-146**, [redacted]

[356] Montgomerie First Statement ¶ 20; Garneau Statement ¶ 15; Montgomerie Rejoinder Statement ¶ 8.

NewPage's creditor f signific nt valu and re ul ed in t e "loss of continu d benefits of mploymen and economic tivity." [57]

181. R solute can ot re sonab y argue t be ause [redacted] the mi im m standar o treat en of alien in customary internat ona re ui ed t e GN to walk way nd allow P rt Ha kesbury to e li uidated Even set ing side the fact tha the Kénogami il contin es to oper te pr fit bly oda and that the more nega e fore ast [redacted] tu ned out to e ov r tated, whe a g ve nmen acts in oo fa th and in the p blic nterest w ile balan ing difficult and co peting poli y obj cti es t ere can b no l abili y under NAFTA Ar icle 110 .

G. Reso ut Continues to xaggerate an Mi repres nt he Na ur an Sco e of th GN ' Su port for P rt Hawke bu y in Or er o Bol te its C aim of "Gro Unfair ess

182. Cana a has alre dy accura ely describ d th vario s Nova S ot a mea ur s at issue in th s rbi ration in its Counte -Memoria . [58] Ho ever, a ri f re ut al f some of he inaccurate cha acterizat on co tained in he Cl imant's ep y Memoria is arrant d ev n houg non of them ha e ny earing on he Tribunal's de erminat on of whe her h re has be n a b each of NAFTA ticle 105

183. First th Tribun l has alre dy uled tha the R chmond C unty ta at on meas re s out id th scope of it jur sdictio w th resp ct to Ar icl 1105,[35] but Res lu e persis s in a leging t at property tax reduc io was "par of what WCC dema de , and ot, to reopen the mill."[36] The T ibunal sh uld disregard he Claimant s ubmi sions n thi po nt, which re ina curate in

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[357] **R-1 9**, *R NewPage P rt Haw esbury orp.*, we fth Report o t e Monito , ¶ 132-141

[358] Canada's Cou te -Memoria , ¶ 111-138

[3 9] Decision o Ju isdiction and d issi ili y, ¶ 329.

[60] Cla ma t's Repl , a f . 2 0.

[3 1] It was NP H hat soug t t di clai th May 2006 tax greement with R chmo d Coun y see **C-303**, *An ct espectin t e Tax tion of S ora Enso P rt Hawk sb ry imited by th M nic pality of the Count of Richm nd* SNS 2006, c. 1), wh ch the Coun y of Ric mon oppo ed. The f nal agr emen be wee PWCC and th mu icipa it was ba ed on reduc d per tions. In its Cou ter-Me orial Can da noted tha f there w s "ben fit to PWCC, the

184. Second, Resolute suggests that the [redacted] PWCC to avoid $130 million in pension liabilities.[362] This is misleading. Unlike when Nova Scotia took over Resolute's $118.4 million pension obligations to its workers at Bowater Mersey,[363] Premier Dexter stated that the Port Hawkesbury pension liability "cannot be transferred to the taxpayers" and the Province never took on any liability or topped up NPPH's pensions.[364] Workers at the mill negotiated new pension terms with PWCC rather than become unsecured creditors of NPPH in the CCAA proceedings and those workers with existing pensions were given more time before their plans were wound up.[365]

185. Third, Resolute says that Canada never explains why the "GNS gave PWCC [redacted] more than it had promised to pay for the same land from NewPage-Port Hawkesbury."[366] As Deputy Minister Towers explains, the reason for this is that the lands ultimately purchased were different and more valuable parcels with a corresponding higher fair market value.[367]

186. Finally, the Claimant maintains that it is somehow relevant to the Article 1105 analysis that PWCC is allowed under the terms of its financing with the GNS to use tax losses on assets located outside Nova Scotia.[368] There is no substance to this complaint. The *Income Tax Act* is a federal statute so the benefits arising from it can be "extraterritorial" to Nova Scotia. The more relevant point, which Resolute ignores, is that this aspect of the [redacted]

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exclusion for subsidies and grants set out in Article 1108(7)(b) would apply. *See* Canada's Counter-Memorial, fn. 472. Resolute's Bowater Mersey mill also received a municipal property tax reduction. *See* Canada's Counter-Memorial, ¶ 135; **R-149,** [redacted], p. 6; **R-151**, *Bowater Mersey Act*.

[362] Claimant's Reply, ¶ 182.

[363] Canada's Counter-Memorial, ¶ 66.

[364] **R-464**, CBC News, "Underfunded NewPage pensions plans to be abandoned" (Apr. 13, 2012); **R-465**, CTV News, "N.S. won't bail out pension plan for NewPage workers: Dexter" (Jan. 5, 2012).

[365] **R-466,** Canadian HRReporter, "Legislation to delay N.S. paper mill pension windup" (May 10, 2012).

[366] Claimant's Reply, ¶ 183.

[367] Towers Rejoinder Statement, ¶ 11. *See also* Towers First Statement ¶¶ 14, 30; **R-207**, Forestry Transition Land Acquisition Program, Guidelines for Applicants (Apr. 2008), p. 1: ("The Land Acquisition Program gives forestry companies that are operating in Nova Scotia an opportunity to sell some of their non-essential land assets to the Department of Natural Resources at fair market value."); **R-216** [redacted]; **C-209**, [redacted]

[368] Claimant's Reply, ¶¶ 184-185. *See also* Canada's Counter-Memorial, ¶ 116.

[redacted].[369] This restriction on PWCC and additional security for the GNS' investment is what matters.

H. The EY Report is of No Value in Establishing a Breach of the Minimum Standard of Treatment of Aliens in Customary International Law

187. In its Memorial, Resolute alleged that 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".[370] To support its allegation, Resolute relied on photocopies of a bankruptcy yearbook and provided no explanation other than asserting that it has not been able to find any comparable example in CCAA proceedings to what was done for PHP.[371] After Canada critiqued this approach, Resolute retained Ernst and Young ("EY") to buttress the credibility of this line of argument in its Reply Memorial.[372] Unfortunately for Resolute, the self-serving EY Report does nothing to bolster its case. In fact, the flaws in EY's methodology are numerous and sufficient by themselves to undermine the credibility and value of the report.

188. First, because the EY report is limited exclusively to Canada, it does not provide evidence of substantial state practice sufficient to establish that what Nova Scotia did for PWCC is not in line with the minimum standard of treatment of aliens in customary international law. EY did not consider the practice of any other State, let alone that of the other two NAFTA Parties whereas Resolute alleges it is "customary practice" to allow companies that are not commercially viable to fail.[373]

189. Second, EY's analysis erroneously includes the hot idle funding ($15.1 million) and the funding provided under the Forestry Infrastructure Fund ($19.1 million), measures that the

[369] Chow First Statement, ¶ 16. In its Reply Memorial, Resolute suggests that PWCC would have likely reinvested in the mill regardless; *see* Claimant's Reply, fn. 270. Resolute has no knowledge of PWCC's tax planning motivations and thus has no basis to make this assumption, which it seems to wrongly attribute to Canada.

[370] Claimant's Memorial, ¶ 274.

[371] Claimant's Memorial, ¶¶ 274-277.

[372] Expert Witness Statement of Ernest and Young Inc., 6 December 2019 ("EY Report").

[373] It is a given in the practice of States that financial assistance to distressed domestic companies may be provided when it is in the public interest to do. *See e.g.,* **R-467**, Grigorian & Raei, "Government Involvement in Corporate Debt Restructuring: Case Studies from the Great Recession", IMF Working Paper WP/10/260 (Nov. 2010).

Tribunal has already ruled outside of its jurisdiction.[374] EY's comments that debtor-in-possession (DIP) financing is uncommon are therefore irrelevant.[375]

190. In an appendix to its report, EY also refers to the purchase of "timberlands from PHP for $20 million" under the heading "Funding on Emergence from CCAA."[376] Canada recalls that the Land Purchase Agreement was a transaction done at fair market value,[377] so it is unclear why EY would consider this to be "government funding" in the same category as a government supported loan or a grant. In the same appendix, EY refers to a "reduced electricity rate agreement," which, even if it were attributable to the GNS (it is not), was negotiated "based on market considerations" and "entirely consistent with market principles" according to a WTO panel.[378] Similarly, EY includes in that appendix a reference to "$3.8 million annually for 10 years to support harvesting and forest land management" and an unquantified reference to a "forest utilization and license agreement," but provides no reason as to why PHP being paid to perform valuable silviculture services, which are to the benefit of the Province, has any bearing or relevance on the "uniqueness" of government support.

191. In other words, EY makes no attempt to identify the actual quantum of financial assistance provided by the GNS to PWCC and no independent effort to assess whether Resolute's characterization of the measures is accurate and comparable to the other cases it investigated. It is therefore unclear how EY can come to the conclusion that the Nova Scotia measures were "unique" when its analysis includes measures that have already been ruled outside the scope of this dispute and transactions that were done for fair market value or consistent with market principles.

192. Third, further to instructions received from the Claimant's counsel, EY intentionally limits its analysis to situations where a company sought creditor protection under the CCAA.[379] This is despite EY's own observation that "[t]here may be instances whereby government assistance was provided to an insolvent company in order to avoid having it file for formal insolvency

[374] Decision on Jurisdiction and Admissibility, ¶ 244; EY Report, ¶¶ 18-21, 61-63.

[375] EY Report, ¶ 60.

[376] EY Report, Appendix H (Summary of Comparable Cases).

[377] Canada's Counter-Memorial ¶¶ 120, 318; Towers First Statement ¶ 30.

[378] **R-238,** WTO Panel Report, ¶ 7.77. In Appendix H, EY also lists "water permit" under the heading "Other". It is unclear to what measure, if any, this entry refers.

[379] EY Report, ¶¶ 3 and 32.

proceedings."[380] There is no principled reason for EY to distinguish between formal and informal restructuring scenarios. Furthermore, this arbitrary approach allows EY to ignore cases that are clearly relevant, including precedents where companies have received billions of dollars in government funding to keep them from having to seek protection from their creditors or file for bankruptcy. The support provided by the Canadian and U.S. governments to domestic automakers in 2008-2009 is an obvious example, which was far more financially significant than the support provided to PHP by the GNS. However, in both instances, governments had the same motivations: "to avoid the significant negative economic consequences of the [a]uto [c]ompanies ceasing their operations."[381] EY provides no credible explanation as to why the government intervention with respect to domestic automakers is excluded from its analysis but a much smaller financial package to help avoid a mill closure that could have resulted in a [redacted] decline in Nova Scotia's GDP is "unique".[382]

193. EY's arbitrary scope of analysis also allows it to avoid dealing with the most obvious comparable example: Resolute receiving $50.25 million of government support (plus a potential additional $40 million) in order to help keep the Bowater Mersey mill open [redacted].[383] EY also says nothing regarding other measures of financial support the GNS has provided to other mills (e.g., Paper Excellence) and industries over the years.

194. Moreover, EY is overly restrictive in various ways in its analysis of CCAA cases:

- It analyzed 174 CCAA cases since 2009, which is less than half of the 363 cases that are publicly listed on the Office of the Superintendent of Bankruptcy's website.[384]
- EY's analysis is limited to the post-October 2009 period, which it justifies by the fact that the Office of the Superintendent in Bankruptcy "initiated" its registry at that time.

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[380] EY Report, ¶ 44.

[381] EY Report ¶ 45. *See also* **R-468,** Goolsbee & Krueger, "A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler," NGER Working Paper Series (Mar. 2015).

[382] **C-158** [redacted]. See also **R-160** [redacted]; **R-157**, [redacted]; **R-430,** [redacted]

[383] **R-149** [redacted]

[384] *See* CCAA records list on the website of the Office of the Superintendent of Bankruptcy: https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br02281.html (last modified: March 1, 2019). Because of its volume, Canada did not submit the list as an exhibit but it can do so if the Tribunal so requests.

Howe er, EY discu se a number of case fo which Mo it r repo ts a e no onger pub icly av ilable on the basis of an internet search.[385] It is therefore unclear why it decided to ignore CCAA cases predating October 2009.

- EY excluded from its review CCAA cases that pertain to a number of industry classific tion by simp y sta ing that it was unlikely uch com anies woul obtain government assistance while in insolvency proceedings."[386] In the same vein, E judg s tha two CCAA cases involv ng m nin companie a e not compar ble withou el bora ing o its rea oning for comi g to this co clusion.[387] At least one of those excluded cases shows important similarities with the situation t ssue. [88]

- EY identifi d 11 CCA case th t had no apparent form o go ernment ass stan e uring the estr ct r ng pro ess EY ad it that this gr up in ludes ases where governmen a e cies r Cro n cor or tions ma have be n among t e reditors[3 9] bu it i no e the p ss bility hat a government tha is a ebtor can decide to c mp omi e it cla m eyond w at o her credito s i a iven c as would be asked to do [390] EY al o ails to recognize that there is a number of reasons why a government may decide not o interven , such as t e ac that i s aller CCAA proc edin s the net effec on t e publ c i teres i lik ly to be marginal.

  E d es not expl in how i s naly is is cons stent with ac dem c studies th t have fo nd g vernmen invo ve ent n 34 ercent of c ses in olving CAA proce dings.[391]

195. E en within he roup o CCAA cases EY c nsider to be comparab e, i seeks o ake art fi ial distincti ns. For in tance, t ont nds th t uppo t given to U.S Ste l anada Inc ("U. . S eel") nd Essar teel Alg ma ("Al oma) was mostly bo t addre sing

di ti guishes g ver men s pport i t e amou t o $ 50 mill on in he rm f r payab e lo ns an gran s t assist ith the up rade and m derniz tion of steel mill

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[38] EY Repor , ¶ 48.

[3 6] EY Repor , ¶ 38-39.

[38] EY R po t, ¶¶ 1, 54.

[38] The Blo m Lake c se, wh ch as excl ded b cause it nvolves m nin com any, de ons ra es that g ver men s in that c se st te enter rise can off r ina cial ss stan e to debto in rde to ens re o pr mote egion l e onom c growth nd support t er compa ie involved n the am se to . See E Re ort, ¶ 56.

[389] E Report, 7.

[390] otably this happ ned in the as s of U.S. Steel C nad Inc. and Te race Bay Pulp I c., wh ch are bo h mentione at Appendi H Summ ry of ompar bl Cases of the EY eport.

[391] **R-469**, St phanie Ben- sha & L riss Lucas, *G vernment nvolve ent in CCAA roc ed ngs: Ha T anspar ncy Been Achieved?*, Annual Review of Insolvency Law (2015). *See also* **R-451**, Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed.) (Toronto: Carswell, 2013), pp. 470-471.

[392] EY Report, ¶¶ 66-68.

by noting the "extremely difficult environment that Algoma was operating in given the application o U.S tariff o Canadia steel an th fact "th t t e governme t assistan e w s n t uniq e to Alg ma nd as provi ed to ot er st el companies."

196. Th se re distincti ns with u a differe ce to he pres nt ca e. Governm nt assista ce an t ke m ny fo ms nd he f ct t a a comp ny sa es on co ts rela ed to leg cy obligati ns or on expen es it wo ld n ed to in ur to upd te outda ed equipm nt is o a suffici nt ba is to concl de t at differ nt scenar os re ot comparab e. Furthermo e, he assista ce provi ed to HP as ot "uniqu ": he NS u ed he *N va Sco ia J bs F nd* as he financ ng prog am or he l an to P CC nd u ed mo ey previou ly alloca ed un er he N va Sco ia Natu al Resour es Strat gy to purch se l nd f om NewPage/PWCC. [94] Th se s me pre-exist ng governm nt progr ms w re u ed to l nd mo ey to nd purch se l nd f om E 's wn cli nt Resol te or ts Bowa er Mer ey m ll in Decem er 2011. [5]

197. Desp te he restrict ve appro ch it adopt d, EY no es t at th re re ca es wh re governme ts h ve provi ed assista ce in he f rm of lo ns or concessi ns to debt rs or purchas rs in he cont xt of C AA proceedi gs to m ke " he busin ss m re success ul in he lon er term". [96] It no es t at assista ce or industr al compan es invol ed in s ch proceedi gs an t ke vari us for s, includ ng "incentiv s, gran s, and or lo ns to ass st in mak ng he busin ss m re success ul to sati fy conditi ns o a prospect ve purcha er or he business" [97] nd t at "[ ]n la ge industr al compan

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[93] EY Repo t ¶ 1. Howev r, in he s me paragra h, EY no es t at P P, Alg ma nd Terr ce ay P lp I c. ll "recei ed gra ts and or lo ns f om he governme t, to effectiv ly ass st in he modernization/transformat on of he mi ls nd impr ve efficie cy w th he ultim te g al of he m ll be ng success ul o er he lon er ter ." *ee a so* **R-4 1**, Ja is P. Sar a, *Resc e! he Compani s' Credit rs Arrangem nt ct* (nd e .) (Toron o: Carswe l, 201), p. 71 (In he 1991-1 92 Alg ma worko t, he Onta io Governm nt u ed he incent ve of m re t an $ 00 mill on in l an guarant es to h lp br ng part es to he bargain ng table ")

[94] **R-1 9**, *N va Sco ia J bs F nd A t*, NS 20 1, c. 0, s 3 (D c. 1. 201); C ow Fi st Stateme t, ¶¶ 4 5, 8; Tow rs Fi st Statem nt ¶¶ 4, 23 30 **R-2** 7, Fores ry Transit on L nd Acquisit on Progr m, Guideli es or Applica ts (A r. 200), p. 1: (" he L nd Acquisit on Prog am gi es fores ry compan es t at re operat ng in N va Sco ia an opportun ty to s ll s me of th ir non-essent al l nd ass ts to he Departm nt of Natu al Resour es at f ir mar et value.); **R-2** , [redacted] **C-2** [redacted]

[95] **R-1** [redacted] *ee* C ow Fi st Statem n ¶ 4, n. 2; Tow rs Fi st Statem nt ¶¶ 24- 7.

[96] EY Repo t ¶ .

[97] EY Repo t ¶ 5. A ¶ 78 of ts repo t, EY no es t at "[m]onet ry assista ce is usua ly in he f rm of lo ns or gra ts to he debtor/purcha er u on e it of he C AA proceeding ."

that offer ignifica t regional mployment, over ments ha e pr vided bo h monetary and on-moneta y s istance t a purchase o complete tr nsaction and continue th usiness as a going con ern."[398] T ese statements corr spon *ex ctl* to what th GNS did and to its mo iv tio s wi h respect o the ort Hawke bu y m ll.

198. cco din to EY, there are two act rs isti guis ing t e PH case from ther CCAA ases where gov rnment as ist nc was provided (1 it haract rize t e G S' s ated goal as not on y a sisting in m king PH com eti ive, "but t he p the ill eco e th lowest cos and most co pe itive rod cer of SC paper, nd (2) its perception of th co prehensive ess of the governme t ssistan prov ded to HP [399]

199. Wit respec t t e firs factor, i is ard y surpr si g that the purpose of governm nt ass stance ff red n the conte t f CAA p o eedings is to allow a comp ny to e c mpetit ve. As or the se on fa tor, EY r lie on the f ct that PHP "rec ived in erim f nding" bu , as C nad ex lain d above th ho idle fun ing and he fi anc ng provi ed under the F rest y I frastru tu e F nd are out ide of the Tribu al s jurisdi tio .[400] In ad ition, the governme t ssist nce provi ed to ot er com anies cit d by EY was s mil rly comp ehensiv and included ar ou co pone ts [401] If EY can ome o the conc us on that P P' c se i "uniqu ", it s only becau e of the q esti na le pa ame ers t at t hos and whic l d to the exclusion of el vant om ara ors.

200. In li ht of the funda ent l laws af ect ng the E repor , the Tr bu al should co sider it as having o val e to R so ute's NAF A c ai . If a ything, he EY ep rt actually serv s t dem nstrate that the GNS a tion with resp ct o P rt Haw es ury are not un que n the conte t f CCA procee ings or ot er si i ar situatio s whe e a ove nment, f ce

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[39] EY eport, ¶ 76. *Se also* **-451**, J nis P. Sarra, *escue! Th Companies' Cre itor Arr ngement A t* (2nd ed) (Tor nt : Ca swell, 013 , p. 471: ("Wh le a l creditors mu t m ke compromise in the estructurin pro ess, gover ment m st com romis mor so n th sense th t they have c mpeting pu li pol cy objecti es f debt coll cti n and en ou aging the s rv val of usine ses. On t e ne hand they ish t collec mo ies owing th ough tax inst um nts co tributio s to CPP and or ers' co pensation, as well s ndustrial start- p or r ca ita izati n loa s. On t e ther hand, clo ure f operation can ha e d vasta ing effects fo loca c mmunities in te ms f decr ased loc l tax ba es, ost tax r venues from inanc al difficul ies face by spin-of ec nomic act vitie , nd inc eased co ts of so ia supports n terms o em loyment insurance a d we fare assist nce. Thus overnm nts will often as ist the rest ucturing thr ugh ebt forgiv ne s, lo n guarante s or other dju tm nt meas re .")

[39] EY eport, ¶ 8 -86.

[400] De isi n on Jurisdict o and Adm ssi il ty ¶ 44

[4 1] *ee* ¶¶ 6 a d 6 of EY repo t or he descri tion of th financi l assis an e pa kages gra ted to .S. Steel and Algoma.

a critical industry that could have devastating effects for the local economy, decides it is in the publi intere t to pro ide assis an e to ensure that a company ontinues o operate as a going-conc rn

V. ONCLUS N O THE MERIT

201. The la mant's ef o t to e ta lish breach f NA TA rtic es 110 a d 1105 relie on flawe le al reasoni g and inaccurat r pre entati ns o t e f cts. Eve if the bene its a ising from HP's elec ricity rate er at ribu able o he GNS, whi h it is not, an ev n if ost of t e ot er easures ere ot xempted rom the n tional trea ment blig tion which t ey ar , Reso ute stil ca not ove come the rea ity t at the NS acte fair y, n go d faith an with ratio al public poli y ob ecti e that ook into acc unt all relev nt c rcumst nce when ma ing he decisi n that pr viding fin nc al a sis ance to PW C w s eas nable nd in the pu li interest. I i di inge uo s on the pa t of Re olut to protes that th public intere t co sid rat ons hat he GNS ook nt account w en it pro ided a fin ncial a si tan e packa e to i s Bo ater M rse mill sh uld ot apply to Port Haw esb ry. R solute had qu l o po tuni y to bid o Po t Ha kesbury a d seek fin ncia as ista ce from he NS. It ch se not o. NAF A hap er Eleve i not inten e to comp nsa e a claiman f r the out ome of t eir own bu ine s decis ons an no hing th G S did re ul s in a breac of eit er N FT Arti le 102 or 1 05. Th Tribun l should d smiss Resolute' cla m entire y.

VI RESOLUT I NO ENTITL D TO TH DAMA ES THAT IT EK

A. O er iew

202. As oted in Canada's ou ter-M mor al, in o de f r Resolu e o be en itled to da ages ursuant o NA TA rticl s 116 nd 11 7, i mu t prove t at t e urported ha m i suffe ed is the d re t conseque ce of spe if c b each that is th p oxi ate cau e of the cla med loss.[402] T e uant fica ion f such loss us subsequen ly b calcu ated in a man er that pr vides reasona

[402] Canada's o nter emo ial, ¶ 3 5.

[403] Canada's o nter emorial, ¶ 328.

203. Resolute fails on both counts. It does not prove proximate harm or quantify damages with reasonable certainty. Rather, through Drs. Kaplan and Hausman, it advances what they each misleadingly refer to as a "well-accepted" and "widely used" economic approach to damages.[404] Resolute's economic theory is as follows: but-for the added supply of SC paper due to PHP's re-entry, Resolute's SC paper prices would have been higher, as quantified using price increases forecasted in October 2011 by RISI.[405] Resolute asks for damages calculated by subtracting the prices at which its three mills sold their paper from the prices they would have received, according to percentage increases predicted by RISI. By basing its calculations on predictions made in October 2011, Resolute asks for 16 years of future lost profits, which it wrongly divides into past and future periods. It is wrong to conceive of any of this period as being in the "past" because its 2013-to-present damages are based on price predictions made in 2011. According to Resolute, "MIT Professor Jerry Hausman, using a combination of Resolute data and industry market forecasts for SC paper, showed that Resolute incurred between $91 million and $137 million in damages because of Port Hawkesbury's restart."[406]

204. Resolute's problem is that a theory coupled with a forecast does not *show* that damages were incurred. Dr. Kaplan's economic theory of causation and Dr. Hausman's RISI forecast-based quantification amount to guesswork, not proof. Canada pointed out the Claimant's failure to prove proximate cause in its Counter-Memorial.[407] Resolute responded that "Canada and its experts … lack understanding of the economics", "do not follow this well-accepted economic approach to damages," and "prefer some other analytical approach than the 'but for' world".[408] However, it is the Claimant that is wrong, as a matter of law. In law, its approach fails for many reasons, but most of all because it does not isolate the harm of price erosion allegedly caused by the breach from all of the other market factors affecting prices.

205. One of those market factors is highlighted by Dr. Kaplan himself: the effect of pulp costs. Canada pointed out that, based on economic theory, SC paper prices should have experienced a

[404] Reply Expert Witness Statement of Jerry Hausman, Ph.D, 6 December 2019 ("Hausman-3"), ¶ 6; Reply of Seth T. Kaplan, Ph.D., 6 December 2019 ("Kaplan-2"), ¶ 33.

[405] Kaplan-2, ¶ 4, Hausman-3, ¶ 3.

[406] Claimant's Reply, ¶ 368.

[407] Canada's Counter-Memorial, ¶¶ 339-345.

[408] Claimant's Reply, ¶¶ 378, 384; Kaplan-2, ¶ 33; Hausman-3, ¶ 6, p. 1.

"[redacted][409]

However, in 2011/2012, SC paper prices did not go up; they weakened and there was excess supply. Dr. Kaplan explains that the expected jump in SC paper prices never occurred because Bleached Softwood Kraft Pulp costs were so low.[410] If Resolute's own expert is of the opinion that one cost factor can totally offset the price effects of the removal of 360,000 MT of SC paper supply from the market, then surely it cannot expect the Tribunal to accept its position that 16 years of price erosion in the SC paper market will have been caused by PHP's re-entry alone. The downfall of the Claimant's damages methodology is that it attributes all of the price erosion to one cause only, never addressing other market events or facts.

206. Dr. Hausman feigns surprise that Canada's experts point to other events and factors, arguing that there is no other analytical approach than his "well-accepted" but-for economic approach.[411] However, operating in the but-for world does not entitle the Claimant to pretend that other market factors did not cause its prices to fall in the real world. It also does not allow the Claimant to pretend that the price increases forecasted in October 2011 by RISI would have been borne out, when we know that they were based on incorrect assumptions. RISI's forecast was not based on accurate predictions of economic growth or exchange rates, but even more significantly, it [redacted][412]

Resolute's sales alone were down 100 MT that year.[413] Already from 2012, *before the alleged breach even occurred*, real world events rendered the RISI forecast defective. The Claimant's damages case fails because it relies on a but-for world that is constructed using speculative forecasts built on false assumptions.

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[409] **R-470** [redacted] pp. 68, 61, 64; Canada's Counter-Memorial, ¶¶ 355-356, 383.

[410] Kaplan-2, ¶ 54. Dr. Kaplan's explanation for a price offset being caused by a decrease in Bleached Softwood Kraft Pulp costs in 2012 is contradictory to the explanation offered in his first report where he described "stable" prices following the closure of the Port Hawkesbury mill in 2011 as "offset by declining demand." Kaplan-1, ¶ 49, fn. 79.

[411] Hausman-3, ¶ 6, p. 1.

[412] Canada's Counter-Memorial, ¶ 353, citing **R-235**, [redacted] ¶ 21.

[413] **R-246**, Resolute Forest Products Inc., Annual Report for the Fiscal Year Ended December 31, 2011 (Form 10-K); **R-247**, Resolute Forest Products Inc., Annual Report for the Fiscal Year Ended December 31, 2012 (Form 10-K); Steger-1, Schedule 10.

207. Ultimately, even if the Claimant succeeds in proving that the "single ensemble of measures" caused a breach of NAFTA,[414] it cannot be awarded any damages because it has chosen a means of proving and quantifying its damages – the price erosion of its products sold – that is wholly inappropriate. It is too speculative, indirect and remote for a sufficient causal link to be established between the alleged breach and the harm. Since Resolute's methodology fails to isolate any injury caused by the breach from other market effects causing its SC paper prices to fall, it is impossible to quantify its alleged damages with reasonable certainty. Pointing to another incorrect forecast, [redacted], does nothing to save the Claimant's case. [redacted] that were common to all forecasters, including RISI. For Resolute to speculatively project damages 16 years into the future based on any prognostication defies logic. A projection of a single day into the future is equally unacceptable when it is based on incorrect assumptions. By purposely ignoring important market factors that affected prices in the real world and/or would have affected them in the but-for world, Resolute's claim for damages fails.

B. Resolute Fails to Prove Legal Causation

1. The Claimant's Request for a Simplified and "Flexible" Damages Test that Does Not Isolate the Harm Caused by the Alleged Breach Is Unsupported by Law

208. Canada laid out the elements that the Claimant must establish to demonstrate causation at customary international law in its Counter-Memorial.[415] To summarize, the burden is on the Claimant to prove causation of its injury by the breach of the NAFTA, which requires that the damage it suffered arose directly from the breach, not from other causes.[416] As the tribunal in *Rompetrol* said, "[t]o the extent […] that a claimant chooses to put its claim […] in terms of monetary damages, then it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and the necessary

[414] Claimant's Reply, ¶ 30. Canada remains of the view that if any one of the impugned measures are compliant with NAFTA or dismissed as outside of the Tribunal's jurisdiction, the only option for the Tribunal would be to award no damages due to the Claimant's position that without the entire package of measures "PHP never would have re-entered the market and Resolute would not have been damaged." The Claimant has not provided any other means of quantifying its damages. *See* Canada's Counter-Memorial, ¶¶ 373-376.

[415] Canada's Counter-Memorial, ¶¶ 329-335.

[416] Canada's Counter-Memorial, ¶¶ 329-335.

causal link between the loss or damage and the treat breach".[417] A necessa y starti g point for the constru ti n of a bu -for ana ys s t any da ages asses me t is isol tin the i pa t o the alleged har si ce th S ate is not resp nsi le f r ha m hat it id not ca .[418]

209. In re ponse, R solute argu s hat t prove cau at on, t must mere y sh w t at the lleged inj r was a "fore eeable cons qu nce of the rea h" a d th t h s is a "fl xible" t st.[419] F rt er, it argu s that "compe satio shal co er any fina cially ass ssable damage in ludi g oss of rofits ns fa a it is establish d. [420] To upp rt its po iti n, the C aimant re i s on short st ing o cases in olvi g lost prof ts,[421] but, unl ke t e ase a ha d, the cl im nts i thos cases proved pr xima e h rm a d we e ble to q ant fy the loss s with rea onable cer ain y. The de is ons i cites warded amage b sed n lost sa es, [422] t e fair marke v lu of an investm nt, [423] and repl cement co ts, [424] all o whi h were estab ished, ass ssa le a d tied d re tly to the res ective breac es.[425] Re olute, h wever, a vanc s one o thes h ads of amage, in ludi g lost sal s, fo w ich it dd

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[417] **L-1 0**, *The Ro petro Gro p .V. v. omania* (ICS D C se No. AR /06/3) A ard 6 M y 2013 ("*Ro p trol – A a d*"), ¶ 1 0.

[418] **L-17 ,** *S.D. Myer , nc. v. Gov rn ent of Canada* (UN ITRAL) Second artial Aw rd, 21 ctob r 2002 ("*S.D yers – Second artial A a d*"), ¶ 140: (" ama es m y nly be wa ded to the exte t tha t e e is a suf icient caus l link etw en the br a h of a s ecifi NAFTA pr vis on nd t e loss su ta ned by the in estor Oth r ays of exp ess ng t e same oncep m ght e t at t e ha m m st not be too em te, r t at the br ach of the s ecifi NAFTA pr visi n ust be the pr ximat c use of the arm." NAFTA rticle 116(1) itself limits reco erable am ges t thos whic oc ur "by rea on of, or ris ng ut f" the w ongf ac .

[419] Cla mant's R ply, 36 .

[420] Cla mant's R ply, ¶ 369, *citing* **L-1 5**, ILC rti le 6.

[421] Cla mant's R ply ¶ 69 f . 6 2.

[422] **L-0 2** *ADM – A ard*, ¶ 2 7.

[423] **L-2 4**, *CM Czech R publ c .V. v. Th Czech R public* (UN ITRAL) artial Aw rd, 13 Se temb r 200 "*CME – artial A a d*"), ¶ 6 8.

[424] **L-231**, *H vatska Elektrop ivreda d.d.v. R pu lic of S ovenia* (ICS D C se No. ARB 05/24) Aw rd, 17 D cemb r 2015 (*"H v tska – A ar "*), ¶¶ 62-3 3 (id no awa d lost pr fit). The T ibun l als not d t at the Res ond nt was orre t th t only damage a tually i curred rep ese ts th uppe l mit of the am unt of ama es an tha , "HEP cannot ecover amag s hat it id not uffer Th se ar trite pri ci les of intern tiona law " (*See* 36).

[425] In **L-231**, *H v tska – Awa d,* the t ibunal e p oyed a "Repl cement Mo el" to ca cul te the dif er nce in quant fiabl costs i cu red by the C ai ant in re lacing elec rici y that shou d ha e been s pplie nder a b eached ag eeme t f om t e ost of elec rici y that shou d ha e been pplie und r that ag ee ent (3 8). In **L-0 2** *ADM – Awa d,* the t ibuna fou d t at t e oss of rof ts was tr gg r d by a oss o sa es a d t at the Cl imants su mitted "suf icient ev de ce" to efl ct th sha p rop i sales imme iately fo low ng the lleged br ach (2 7). In **L-2 4** *CME – artial Award,* amag s were cal ulate b sed on t e fair marke v l e of going onc rn and on th b si of an arms lengt o fer to uy the om any (61). The p rti s' DCF calcu atio s were ult mat ly n t sed as the t ibuna fou d hem to " o tain a rath r high le ent of unce tai ty and specul tion." (**L-2 7**, *CM Czech R publ c .V. v. Th Czech R public* (UN ITRAL Final Aw rd, 1 Marc 003, ¶ 604.

evidenc a d did not even attempt to quan ify.[426] Instead, R solute's clai r sts sol ly on price rosi n. t striv s to e tablish that the ll ged br ach a sed *some* decline in prices over a 16-year period, but its methodology fails to distinguish and quan ify the de lin caused b t e all ged brea h from t effects of mu titude of t er rel vant f ct rs.

210. R solute h s not identifie a s ngle aw rd, r even dome ti ourt eci ion, hat gra te lost pr fits ba e on a laim f r pr ce er sio of products so d or a single a th r th t otes the vailab lity f this et od.[427] As wi l b discus ed below, price ero ion i o casi nally pu fo ward in p tent dis utes, which s w at i spire D . aus a 's econo ic appr ac ,[4 8] but even the e i is not favou ed m th d. I i often r jecte fo the sam reas n th t it ust be rejected ere t e patent's p ic rop aft r he in ringeme t may be a tribut bl to a ar ety of other c ses "inc ud ng sh fts in d mand o m rke ing." [29]

211. The cases on which Res lute elies do ot alter the eces ar require ent under cust mary in ern tion l l w, to i entify the ca sal link etw e the har and al eged br ach [430] In i s que t for f exib e da ages theory, the Cl ima t oul prefer t d op thi req irement but as one o the de isi ns it rel es upon cl arl states, lost rofi s a e allow ble in of r a the Claima ts prove tha he al eged dam ge is n t *speculati e or uncertai* – i.e., that the profits ant cip ted we e probable or [31]

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[426] See Ste er 2, ¶¶ 7 b) 14, fn. 1 .

[427] eading comm ntaries on damages in in estme t treat a bitratio con ai o discus ion o pr ce erosi n on pro uct sold s a poss ble basis for award ng dama es *See* Sergey R pinsky and Kev n Willia s, *Dama es in Int rn tional Invest ent Law* (London Bri ish In titute f Inter ational and Co parative Law 20 8), Irm ar Marboe, *Calc lation of ompe sat on nd Damag s in I ternationa Inves ment aw*, 2nd d. (Oxf rd: Oxfor U iversit P ess, 2017) an John Trenor *Th Gu de to Da age in Inte national rbit ation*, 3rd ed. (Londo : La Bu ine s Rese rch, Ltd, 20 8).

[42] Hausm n-3, ¶ 5.

[429] See below, Part VI.B.3 *citing* **R 4 1**, Th mas F. Cotte , *Compara ive Pat nt Reme ie : A ega and Eco omic Analysis*, Ox or , (2013) p. 09.

[430] Can d 's Cou t r-Me orial, ¶ 329-330.

[431] **RL-0 2**, *AD – A ard*, ¶ 285 Academic om entary ha also n ted t at ribuna s' discretion i computing da ages "does n t extend o s eculati e, un ertain, or hy otheti al amages." See **RL 218**, Borzu Sabahi, abi Dugga a d Nicholas Bi ch *Principl s imiting he Amount of Com ensation* in Ch is ina L. eh rry, *Co tem orary and Em rging Issues n the Law f Damages a d Valuat on in Internat onal I ve tmen Arbitration* (Leiden: Brill Nijhoff, 2018), p. 337.

212. Lost profits is a controversial subject in international law. The ILC has noted that lost profits "have not been as commonly awarded in practice as compensation for accrued losses," and particularly not where their determination is "uncertain and their calculation is speculative."[432]

213. The ILC specifically commented on the unsettled nature of the law in 1993 when it said:

> The relative uncertainty in the case-law discloses three questions which give rise to controversy: a) In what cases are loss of profits recoverable b) Over what period of time are they recoverable? And c) How should they be calculated? … The state of the law on all these questions is, in the Commission's view, not sufficiently settled and the Commission at this stage, felt unable to give precise answers to these questions or to formulate specific rules relating to them.[433]

214. The ILC's statement still captures the principal difficulties associated with many lost profits claims to this day, and why many tribunals consider these claims not to be compensable. While there is no doubt that customary international law recognizes the right to loss of profits, the ILC Articles make clear that it is only "insofar as it is established,"[434] and it is their establishment that remains controversial. Indeed, in this dispute, Canada and the Claimant would answer each of the ILC's questions cited above differently.

215. The first question – whether lost profits are recoverable – is one that the Claimant presumes and one that Canada contests. Canada has admitted that PHP's re-entry had an effect on the market, but contests the extent of the effect, particularly with respect to Resolute (as opposed to paper producers that compete directly with PHP, including European producers of SCA+ paper and

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[432] **RL-032**, ILC Articles, Article 36, Commentary (27); **RL-192**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Award, 25 July 2007 ("*LG&E – Award*"), ¶ 96; *See also* **RL-219**, *Amoco International Finance Corporation v. Iran* (IUSCT Case No. 56) Partial Award, 14 July 1987 ("*Amoco – Partial Award*"), ¶ 238: ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded."); **RL-220**, Jiménez de Aréchaga, E, *International Responsibility*, in Max Sorensen (ed.), *Manual of Public International Law* (Toronto: Macmillan, 1968), p. 570, as cited in **RL-192**, *LG&E – Award*, ¶ 89: ("Prospective gains which are highly conjectural, 'too remote or speculative' are disallowed by arbitral tribunals."); **RL-221**, *SolEs Badajoz GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/38) Award, 31 July 2019, ¶ 478, *citing* **RL-173**, *Gemplus, S.A., et al. v. Mexico* (ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4) Award, 16 June 2010, Part XII, ¶ 12-56: ("Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.")

[433] **RL-222**, Report of the International Law Commission on the work of its forty-fifth session, 3 May-23 July 1993, Official Records of the General Assembly, Forty-eighth session, Supplement No. 10, Document A/48/10, ¶ 39 at p. 76.

[434] **RL-032**, ILC Articles, Article 36(2).

producers of coated mechanical paper).[435] The only proof that Resolute offers is an economic theory on the effect that PHP's re-entry had on the prices of Resolute's mediocre SCA, SCB and SNC grades of paper.[436]

216. The second question – over what period are lost profits recoverable – is also contested in this case. The Claimant suggests that it is owed lost profits based on price erosion until its mills stop producing paper, which in Dr. Hausman's opinion is no less than 16 years from 2013.[437] He has no reason for selecting this period other than his confidence that Resolute will still be in business in 2028. However, the fact that Resolute may be operating 16 years into the future, and whether and how a discount rate should be applied, does not answer the question of how long into the future PHP's re-entry allegedly damaged the Claimant. Relying on Pöyry and Peter Steger's expert opinions as well as the contemporaneous views of industry commentators, including RISI, Canada argued[438] that PHP's supply was [redacted]"[439] and that PHP "[redacted]"[440], which is demonstrated by the fact that SC paper was "[redacted]" just six months after PHP's full market entry.[441] The effect of PHP's re-entry was mainly anticipatory and once it became apparent that PHP was servicing customers previously absent from the SC paper market, prices "came back up."[442] Resolute's Reply Memorial is silent on this contemporaneous evidence and the only point that Dr. Hausman raises in response is that [redacted]. However [redacted]

[435] AFRY/Pöyry-2, ¶¶ 2, 13, 34.

[436] Claimant's Reply, ¶ 373.

[437] Hausman-3, ¶ 32.

[438] Canada's Counter-Memorial, ¶ 322; Steger-1, ¶ 86; AFRY/Pöyry-1, ¶ 85; AFRY/Pöyry-2, ¶ 35.

[439] **R-259**, [redacted] p. 15.

[440] **R-261**, [redacted], p. 24.

[441] **R-263**, [redacted], p. 24.

[442] **C-236**, Transcript of Proceedings before U.S. International Trade Commission *in re Supercalendered Paper from Canada*, Inv. No. 701-TA-530 (Oct. 22, 2015), pp. 170-171, Testimony of John Coche.

[redacted][443] Indeed, no market commentator made the correct prediction, including RISI, who Dr. Hausman uses as his benchmark for SC paper prices. By June 2013, RISI had already scaled back the price drop it had previously forecast, writing that the restart of the [redacted]"[444]

217. The third question – how to calculate lost profits – is the biggest point of disagreement between the Claimant and Canada, since the but-for analysis of SC paper price erosion chosen by the Claimant[445] is speculative, indirect, and fails to isolate the effect of the harm from other effects on prices. As the tribunal in *Hochtief* stated, it is important to isolate the effects of the breaches from those resulting from other causes, such as a market decline, "in order to differentiate between damage proximately caused by the breaches and damage resulting from other causes."[446] Only when harm is clearly identified can it be quantified with reasonable certainty. Canada will set out below all of the problems with the Claimant's calculation of damages, but the fundamental mistake Resolute makes in choosing its but-for causation model is to pin any and all of the alleged price erosion on PHP's re-entry. This approach ignores all of the other effects on Resolute's prices in

[443] AFRY/Pöyry-1, ¶ 81; AFRY/Pöyry-2, ¶¶ 67, 73.

[444] **R-236**, [redacted] p. 77.

[445] Resolute has abandoned claims of expropriation and predatory pricing by PHP, and although it continues to allege that it lost sales to PHP, it has adduced no evidence to back up this claim and makes no attempt to quantify them. See Steger-2, ¶ 14.

[446] **RL-223**, *Hochtief A.G. v. Argentine Republic* (ICSID Case No. ARB/07/31) Award, 19 December 2016, ¶ 22; **RL-224**, Ermelinda Beqiraj and Tim Allen, *Assessing Damages for Breach of Contract* in John Trenor, *The Guide to Damages in International Arbitration*, 3rd ed. (London: Law Business Research, Ltd., 2018), p. 184: ("External factors may have an affect on damages that was not necessarily foreseeable at the time of the breach. Disentangling the effects of the global economic crisis in order to isolate and assess the impact of a breach has been a common feature of […] disputes arising since 2008, particularly in the energy sector. For example, a 10-year forecast of profits from an oil and gas concession prepared in December 2008 would look very different from a similar forecast prepared 6 months earlier."); **RL-225**, Wolfgang Alschner, *Aligning loss and liability – Towards an integrated assessment of damages in investment arbitration* in Theresa Carpenter et al., *The Use of Economics in International Trade Disputes: Lessons Learned and Challenges Ahead* (Cambridge University Press, 2017), p. 293: ("Hence, a case starts with injury, that injury must be matched to a wrong, then causation between the two must be established and other factors contributing to the injury must be de-attributed in order to isolate the injury that actually flows from the wrong and which can then be remedied […]. Similarly, in investment arbitration the investor's losses form the starting point of the analysis; this loss is matched to an investment treaty breach and then causation must be established. Step-by-step, compensable loss is thus separated from non-compensable loss until, in the end, an amount of loss remains that is equivalent to the wrong actually caused.")

the real world and the likely effects that would have occurred in th b t-f r world f HP n t eturn ng to he m rket.

218. As will e s own in t e n xt thr e sectio s, t e C ai ant and Canada isagree over al of he fundam ntal equi em nts t s o prox ma e ca se when com s to a cla m of lo t profit .

2. he Claimant s But-F r nalys s ust Be eje ted B cause i F ils to Isol te the Pric Eros on of t e Alle ed Breac from P Decline Caused by O her Fa tors

219. Resolute rgue that C nada rong y c nsiders that fa tors other than the re emergen e of ort Hawkesb ry cause alleged price erosion. [47] Howev r, Resolu e misu de sta ds Can da's argument. anada s no sa ing that Re olute s prices ere ot a fe te by PHP's e-en ry, o ly that i i impossible tha PH 's reo ening is espon ible fo *all* of the p ten ial rice erosio t at R solute may have ex erie ced or wi l xperi nce etwee 2 13 nd 202 . As Pö ry ade cl ar n its exp rt report, and otin D . Hau man' ack owledgement th t "I a ree wi h t is tatement" [48]: pa er pri es are not depe de t only o supply volume but a so n econom c growth, tor costs nd e change rates "[449]

220. Dr. Kap an al o ackno le ges t at ther are ot er driver of price eros on wh n he dis usses on part cular co t: Bleach d S ftwood Kr ft Pulp. [50] He raise the mat er in re pons to ana a's a gume t t at, in lat 20 1 and 2 12 when PHP ha ex ted the ma ket SC pa er pr ces did n t follow t e common se se economics concl sio expecte by fore a ters. ISI for e amp e, xpected "[redacted]"[451] yet rices did no ncrease a a l, hey wea ened. [52]

221. Ac or ing o Dr Ka lan, p ic er sion at ha ti e was cau ed by the dec ine in raw m terial cos s. [453] ut th C aimant an ot ave it bo h way . It cannot on t e one han , argue that omm n sens eco omics dicta e how" the ric s will n

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[447] Clai an 's R ply ¶ 367.

[448] a sma -3, ¶¶ 6-7.

[4 9] AFR /Pö ry-1, 6 .

[4 0] Kaplan-2, ¶ 5 .

[4 1] **R-471**, [redacted].

[452] AFRY/Pöyry 1 ¶ 4 ; C nada's Co n er- emorial, ¶ 383.

[4 3] Kapl n-2, ¶ 54; Claimant's Reply, ¶ 372.

of new supply,[454] irrespectiv o facto costs economi growth exchang rates etc. and o the oth r han , arg e th t pric s d d n t o p wi h t e remov l f supp y n accou t f a "significant c st item."

222. P lp pri es is j st ne of m ny relev nt fact rs t at Resol te fa ls to acco nt or ts dama es methodolo y, wh ch improp e ly attribu es ll of he d op in SC pa er pri es to he re-en ry of P P A mar et as comp ex as he No th Ameri an SC pa er mark t, wh ch is subj ct to variab es s ch as shift ng grad s, qual ty differenc s, dem nd shoc s, vari us sup ly shoc s, Europ an competiti n, econo ic gro th nd fore gn excha ge ra es can ot be analy ed w th relia le accur cy b a but- or mo el t at igno es th se factors. [56] r. Kap an specifica ly acknowled es t at is econo ic causat on analy is d es ot consi er ny of th se fact rs w en he sta es t at is "met od as ot to tr ce he pr ce of CP *o er t me* nd ry to segreg te he effe ts of chan es in ll possi le sup ly nd dem nd drivers." [7]

223. Recogniz ng t at he d es ot segreg te ot er effe ts on pri es eith r, r. Haus an tu ns to criticiz ng Canad 's expe ts or ot opin ng on w at he pr ce of SC pa er wo ld h ve b en with ut PH 's re-entry. [58] "I agr e" wri es r. Hausm n, " ut it d es ot ans er he fundamen al questi n" of "w at wo ld CP pri es h ve been." [59] is criti ue mis es he m rk beca se t is is o a quest on or Can da to answ r. Resol te ch se pr ce eros on as ts me ns of calculat ng damag s. It co ld h ve cho e a m re relia le nd tes ed meth d. It m de t is elect on e en tho gh ts expe t, r. Hausm n, recogni es t at he met od fa ls to isol te he effe ts of PH 's re-en ry f om ll ot er effe ts on Resolut 's SC pa er pric .

224. he bur en re ts squar ly on Resolut 's should rs to expl in hy he Tribu al sho ld acc pt ts dama es methodolo y, ut he Claim nt as no explanati n. Inste d, it arg es t at it d es

[54] At Kaplan 2 ¶ 6, r. Kap an profes es to " ut fo t a framew rk of analy is to direc ly ass ss *ow* re-en ry o a lar e, low-c st CP m ll affe ts he pri es nd shipme ts in t at mark t" (empha is adde), howe er is framew rk d es ot meas re ow or ow l ng in te ms of quantificati n, or d es it segreg te he effe ts f om ot er pr ce drive s. ee Steger 2, ¶¶ 6 .

[55] Claiman 's Rep y ¶ 3 .

[56] AFRY/Pöyry 2, ¶¶ 9- 4, 0, 30- 7.

[57] Kaplan 2 ¶ 0.

[58] Hausman 3, ¶¶ 7, 8.

[59] Hausman 3 ¶ .

matter if other factor contribute t pric erosio , sinc , accord ng to he Claima t, Can da is li ble ve if t ere are concur ent ca ses for the harm [0]

3. The Clai ant Ca not el on Contribu ory Ca se to A oid its Obliga io to how Proxi ate C e

225. The Clai ant ar ues hat ve if additi nal fac ors particip te in cau ing its dama es, Ca ada w uld s il be f lly liable [46] It re ie on the princ pl of contribu ory causat on as articul te in *CME* and *Gava zi* to att mp to a oid pro ing proxi ate causation [2]

226. The c ses hat Reso ute c tes are inappo it as the concur ent c us of ar in t ose c ses ere the act on of identifi ble t ird p rty tortfeas rs as opp se to ma ket eff ct on prices [463] Ma ket fac o s – ike econ mic gro th, exch nge ra es, and c s s – are not wr ngs commi te by ano her tortfea or. The princ ple h t a S ate sh uld no be all we to es ape responsibi it by poin ing the fi ge at ano her wrong- oe is well-kn wn, bu it app ies nly a ter the responsibi it of hat S ate has een establis ed It ca no be inv ked wit out f rst ha ing pr ven proxi ate ca

227. In any ev nt, the appr ac in *CME* favo re by Resolut [464] has een specific lly reje te by o her tribun ls, inclu ing the trib na in *Lauder* [4 5] a ase b se on the ame fa ts. hat trib nal reje ted the invest r's c aim for dam ge on the b sis hat the br ac in ques ion was too re ot to qua if s a rele ant c use for the arm caused, [466] fin ing hat " ve if the br ach […] constit tes on of sev ral ' ine qua on' a ts, his a on is not sufficient. [467] The trib nal lso no d:

> In o de to om o a fin in f a compens ble da ag i is lso neces ary hat t ere exi te no interve ing c use for the dam ge. [ ]he Clai ant there ore

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[460] Claima t's Re l , ¶ 82.

[461] Claima t's Re l , ¶ 82.

[462] Claima t's Re ly ¶¶ 82, 83.

[463] **CL- 14**, *C E – Par ial Aw r* , ¶ 82; **CL- 18**, *M rco Gav zzi and Ste ano Gav zz v. Rom nia* (I SID ase No. ARB/12 25) Exce pt of Aw rd 18 A ril 2 1 , ¶ 75.

[464] Claima t's Re l , ¶ 82.

[465] **CL- 13**, *Ro al S. La de v. C ech Repu lic* (UNCIT AL) F nal Aw r , 3 Septe ber 001 ("*La d r – Awar* ").

[466] **CL- 13**, *La d r - Aw r* , ¶ 5.

[467] **CL- 13**, *La d r - Aw r* , ¶ 4.

> to sho th t he l st, d rect ac , the i media e aus [ ] did not become a su ers ding ca se and th reby prox at cause.[468]

228. In *Rompetro ,* the tr bun l rejected the Cla man 's requ st for damag s to ts stoc pr ce beca se it da ages stud w s incapable of " ifferen iat ng bet een the ma k t effects of a c mpany s coming unde i ves igation by he u horities f r a leg tim te urpose a d the asser ed incr me tal effects f il egalitie t at appene i the co rse of such an inv sti ation."[46] The *Rom etrol* trib nal noted that he eve t s udy meth d d d no m et the test f establishi g a su ficie t causa ne us betw en the cla med ill gality a d th as erte lo s and that no alt rna ive ethod ha bee adva ced tha would p t h Tribuna i a positi n to de erm ne whether a y quanti iabl e ono ic loss to the p esent laimant flow d sp cif cally from he potenti lly actiona e ve ts."[470]

229. A in *Rompetrol*, the Claima t's ontent on that Canada is esp nsi le or an a d ll dr ps in S paper p ices, whatev r th ir ause, doe ot est blish a causa ne us betw en the all ged breac and the ha m.

4. R so ute's Proof o P ice Erosion I Too Indire t, pecu ati e and D es Not Pro ide Reaso bl Cert inty

a P ice Er sion Is Not an pp opriate W y to Ca cu ate ages th s Disput

230. The Cl imant present p ice er si n s hough it i an a ce table means of quant fying da age , based o Dr. Hausm n' ompari on to a pate t infrin eme t ase,[4 1] et it f ils to ad ance any egal autho ity supportin its po it on, whether a i ternatio al or d mestic l w.[472] In tead, Re olute s eks to us ify i s use o p ice erosi n on the basis t at its xp rt b l eve it to be a wel -accept d" an "widely used" ec no ic approach to damag s. [73] How

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[468] **C -213**, *a der Aw rd*, ¶ 2 4.

[469] **RL 1 0**, *Rom et ol – Awar* , ¶ 286, 2 8.

[470] **RL 1 0**, *Rom e rol Aw rd*, ¶ 288.

[4 1] usm n-3, ¶ 5.

[4 2] usm n-3, ¶ 5.

[4 3] ausman-3, ¶ 6; aplan-2, ¶ 33.

accepted as Drs. Kaplan and Hausman's economic theory might be in economic circles, it has not been accep ed in investor-st te arbitrati .

231. he o ly insta ce t at Can da as fo nd o a cl im or pr ce eros on in an investor-st te cont xt is *Rompetr l*, wh re he claim nt argu d, ba ed on an exp rt ev nt stu y, t at ts st ck pr ce drop ed a a res lt of crimi al investigati ns conduc ed by he respondent. [74] he tribu al clos ly scrutini ed he exp rt ev nt stu y, nd wh le ot doubt ng ts h gh quality, [75] ultimat ly rejec ed he cl im on he ba is t at he ev nt st dy id ot s o a "suffici nt cau al ne us betw en he clai ed illegal ty nd he asser ed lo s" in p rt beca se it as incapa le of differentiat ng betw en he effe ts cau ed by he bre ch nd he mar et effe ts ot rela ed to he brea :

> he Tribu al theref re co ld o ly acc pt a a va id techni ue or he quantificat on of econo ic dama es ne whi h, proceed ng f om he pr or n ed to establ sh by he appropri te stand rd of pr o a suffici nt cau al ne us betw en he clai ed illegal ty nd he asser ed lo s, all w a suita ly object ve compari on t en to be m de betw en he sta us uo a te nd he Claiman 's situat on at he t me t at s it is broug t. he ev nt st dy met od as advan ed in th se proceedi gs fa ls t at te t, nd no alternat ve met od as b en advan ed t at wo ld ut he Tribu al i a posit on to determ ne whet er ny quantifia le econo ic l ss to he pres nt Claim nt flo ed specifica ly f om he potentia ly actiona le event. [6]

232. At domes ic l w, pr ce eros on as occasiona ly b en awar ed in pat nt dispu es wh re competit on f om an infring ng prod ct improp e ly redu es he pr c a pat nt hol er ay obt in or ts product. [77] Howev r, it is notewor hy t at e en in t at setti g, "[g]lobali ed competiti n, turbul nt econo ic conditio s, nd he c st nd complex ty of pr ce eros on analy es h ve redu ed he recov ry (nd m st lik ly pursu t) of pr ce eros on claims."

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[74] **RL-1 0**, *Rompet o – Awa d* ¶ 2 3.

[5] **RL-1 0**, *Rompet o – Awa d* ¶ 2 1.

[76] **RL-1 0**, *Rompet o – Awa d* ¶ 2 8.

[77] **R-4 2**, Da id M. N. Bohr r, M tt Lyn e, nd Elizab th M. N. Morr s, *he Shift ng Sa ds of Pr ce Erosi n: Pr ce Eros on Dama es Sh ft by T ns of Milli ns of Doll rs Depend ng u on he Admissibil ty of Pre-Not ce Ero ed Pric s*, 25 Sa ta Cl ra H gh Te h. L J. 23 (201), p. 7 7. *ee a so* **R-4 3**, oy Epste n, *he Mar et Sh re R le w th Pr ce Erosi n: Pat nt Infringem nt L st Prof ts Dama es af er* Cryst l, AI LA Quarte ly Journ l, V l. 1. o. 1. (200), p. .

[78] **R-4 4**, P C, *2 12 Pat nt Litigat on Stu y: Litigat on contin es to r se a id grow ng awaren ss of pat nt val e*, p. .

233. Arguably, the unique features of patent infringement cases lend themselves to findings of price erosion because they typically involve a less complex market based on the fact that the patent holder enjoys a legal monopoly.[479] Where the patent holder's monopoly is infringed upon by an illegal market entrant, it is theoretically possible to measure the amount by which the patent holder had to actively lower its prices given that there are only two parties in question, the patent-holder and an infringer.[480] Where the market is not quite that circumscribed and non-infringing substitutes exist, the court may refuse to award lost profits.

234. Another important element of price erosion claims is the recognition that fewer sales will be made at higher prices, so "in a credible economic analysis, the patentee cannot show entitlement to a higher price divorced from the effect of that higher price on demand for the product. In other words, the patentee must also present evidence of the (presumably reduced) amount of product the patentee would have sold at the higher price."[481] Accurate calculations of price erosion damages must account for such changes in volumes relative to price, which is known as demand elasticity. Courts view "price erosion damages that do not account for demand elasticity as "less than credible".[482]

235. In sum, although price erosion has been used to award lost profits in patent disputes in some circumstances, it has not been without significant complication. Globalized competition, non-infringing substitutes, turbulent economic conditions and difficulties in discerning demand elasticity have caused price erosion to fall out of favour as a remedy to patent disputes.[483] Professor

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[479] **R-475**, *Kalman v. Berlyn Corp.*, No. CIV. A. 82-0346-F, 1988 WL 156126 (Jul. 25, 1988), at *8: ("A patentee may recover lost profits by proving that but for the infringement, the patentee would have charged higher prices. […] When the relevant market includes only two competitors, one may infer that the patentee would have charged higher prices but for the competition caused by the infringement. […] Having found that only two competitors, plaintiff and defendant, participated in the relevant market, the Court finds proper an inference that plaintiff would have charged higher prices but for defendant's t infringement.")

[480] **R-476**, Andrew Harington, Alexander Stack, Dimitrios Dimitropoulos, *Calculating Monetary Remedies in Intellectual Property Cases in Canada*, A Reference Book of Principles and Case Law (2018 Edition), p. 134.

[481] **R-477**, *Crystal Semiconductor Corp. v. TriTech Microelectronics Int'l Inc.,* No. 99-1558 (Fed. Cir. Mar. 7, 2001) at p. 18 of pdf. *See also* **R-478,** *In re Mahurkar Patent Litigation*, District Court, N.D. Illinois, (28 U.S.P.Q.2d 1801), August 18, 1993 and October 22, 1993.

[482] **R-479**, James Nieberding, The But-For Market, Economic Damages, and Elasticity Considerations, *Economics Committee Newsletter* Vol. 9 No. 2. Fall 2009, p. 19; AFRY/Pöyry-2, ¶ 24; Steger-2, ¶¶ 14 (fn.12 "Dr. Hausman's model explicitly calculates no change in Resolute's sales volumes as between his but-for world versus Resolute's actuals in the real world."), 17, 27.

[483] **R-471**, Thomas F. Cotter, *Comparative Patent Remedies: A Legal and Economic Analysis*, Oxford, (2013), p. 109.

Cotter writes that although courts have occasionally adopted a price erosion analysis that compares the patentee's profits on sales before and after the infringement over some relevant period, this approach is not favoured today "for obvious reasons":

> The amount of the patentee's profit before and after infringement may be attributable to a variety of other causes not limited to the infringement, including shifts in demand or marketing; ... Recognizing these flaws, courts today would permit computation of the patentee's lost profit using these techniques only when the evidence supports the reasonableness of the underlying assumptions, that no other causes led to the loss of profits or that every sale the defendant made would have gone to the patentee.[484]

236. Resolute's damages case suffers from exactly the same flaws. Its price erosion claim fails to isolate the harm caused by the alleged breach, requesting damages that could just have easily arisen out of globalized competition in SC paper, substitution by non-SC paper, inaccurate predictions concerning economic growth and exchange rates, and an assumption that Resolute's mills would have sold the same amount of paper at a higher price.

237. Ultimately, the Claimant's price erosion claim has no foundation in international investment law. Dr. Hausman likens the damages scenario to a patent infringement case,[485] but Resolute is not akin to a patent holder with a monopoly in the market, and Dr. Hausman's approach fails to rule out price effects from other causes than the alleged breach.

b) Resolute Has Shown at Most an Indirect Effect on the Price of its Low Quality Paper Products with the Re-Emergence of Port Hawkesbury's High Quality Paper Supply

238. Canada argued in its Counter-Memorial that Resolute's SCB/SNC paper (which constitutes the majority of its [redacted])[486] competes with standard grades of UM paper such as high bright news, whereas PHP's high quality SCA+ grades (which constitutes the majority of its [redacted] annual production) are in direct competition with North American CM paper and European imports.[487] As a result, any effect that PHP had on Resolute's prices was at most indirect, and at the same time, "the two main shock absorbers of PHP's re-entry into the

[484] **R-471**, Thomas F. Cotter, *Comparative Patent Remedies: A Legal and Economic Analysis,* Oxford, (2013), p. 109.

[485] Hausman-3, ¶5.

[486] Steger-1, Sch. 11, p. 54.

[487] Canada's Counter-Memorial, ¶ 347.

market were the European SC paper suppliers and the CM suppliers".[488] I addition Canad also point d o t th t M pap r supplie s r Europe n SC + impor s wou d ha e fill d t e void l ft by HP, not Resolute [9]

239. In its R ply Memor al, Reso ute ad it it " oes not pro uce CA+ paper" [90] bu it ar ues hat his oes not ma ter bec use "t er is ove la in competit on in SCA pa er, and bec use "at the ma gin SCA comp tes ith S A+, an is there ore affe te by cha ge in the pr ce of SCA+" [49] It lso ar ues hat t er i an "extre ely igh correla ion bet een SCA and SCB grades, [492] and fin lly hat the Un ted St tes Internati nal T ade Commis ion (" .S. I C") reje ted argum nts regar ing the substitutabi it of hi her gr des (CM and S A+) and l wer gr des (SNC SCB and UM, ike igh br ght n ws) paper [3]

240. Resolu e's argu ent hat t er is correla ion bet een al SC p per pr ces and there ore any incr as in the su pl of CA+ p per ill c use the ero io of its CA, SCB and SNC p per price [494] is by definit on an indi ect th or of causa ion hat f il to eet the l gal stan ard neces ar to a ard dama es A is ell recogni ed, si ple correla ion oes not i ply causation [495] The assump ion hat cha ge in CA+ su ply affe ted SCA/SCB SNC pr ces bec use t eir p

[488] Cana a's Counter-Memor al ¶¶ 45, 47, 51.

[489] Cana a's Counter-Memor a , ¶ 71; AFRY/Pöyr -1 ¶¶ 36, 44, 50.

[490] Hausma - , ¶ 22.

[491] Claima t's Re l , ¶ 75; Kapla - , ¶ 7.

[492] Claima t's Re l , ¶ 73.

[493] Claima t's Re l , ¶ 76.

[494] Claima t's Memor a , ¶ 02; Ex ert Wit ess Re or of et T. Kap an 28 Dece ber 018 ("Kaplan- " , ¶ 37.

[495] **RL- 26**, La ren Sti oh, *Pro ing Causa io in Dam ges Analy es* in *Econo ic of Antitr st: Com lex Is ue n a Dyn mic Econ my*, 007 ("*Stiro* ") p. 81: [… an empir cal correla ion bet een the bad ct" and the calcul ted dam ges oes not i ply causation ") p. 84: (The distinc ion bet een correla ion and causa io is the pres nc f a the r , a c ai of reaso ing hat expl ins why the c use l ad to the eff ct. hat the ef ect has foll wed the c us in the as is not sufficien .") *See* AFRY/Pöyr - , ¶ 47, explai ing hat Reso ute oes not adv nc an adeq ate th or to demonst ate ho an incr as in CA+ su ply w uld c use the all ged imp ct on l wer p per gr des g ven the na ur of th SC p per ma ke to inc ude substitu ion and impo ts. *See a so*, **RL- 27**, oaz Mos lle and Ro nie Bar es, *The Us of Econome ric and Statist cal Anal sis and To ls* in ohn Tre or, *The G id to Dam ge in Internati nal Arbitrat on*, 2nd ed. (Lon on: Law Busi ess Resea ch, L d., 20 8) p. 04: One ca not necessa ily conc ude hat t er s a ca sal relation hip bet een two varia le a no ma ter how sophistic ted econ mic techni ues are util ze to inter ret uch d ta, the exer ise bec mes on of ha is disparagi gly refe re t as " ata mini g", w ere ch nce correlat ons are conf sed ith meanin ful relation .")

movements are correlated is precisely the type of weak causal linkage that tribunals reject.[496] The caus l li k th t Resolu e pu s forwa d b t fai s o pro e s tha : i) a "si gle ense bl of measures" allegedly amo nt ng t mor than 124.5 m llion cause PHP's re-entr [49] and an i creased supply of ostly SCA paper t at eso ute did not produce, ii) lthough t at su ply was full ab orbed nto the ma ket la gely b taki g ma ke sh re from M and European i port ,[498] dro e own the pr ce o Re olu e's SCA, S B nd SNC g a es of p per for a 1 -year peri d; and iii) during his eriod, no hing else c used any price erosion (includ ng slower eco omic gro th om etiti n from oth r CM, C o UM ap r sup liers, tc). T e le ps of logi requi ed to ump rom the alleg d reach t the harm re too gr at to justify Resolu e's th ory of cau ation. e ca sal link is imply to remote.

241. Th t the U.S. ITC rej cted a gu en s o grad sub titution hould in no way uide thi Tri una . W ile it is tru tha the .S. ITC was n t co cer ed with gra e substitutio , t is was becaus i s nvest gatio wa cir umscr bed to C ap r only The U S. ITC s mandate i to a se s inju y of th petitioners based on a like pr duct ana ysis [49] which is diffe ent ha the t st o proximat c use that is before this Trib nal. In he f ce of in ont ove ti le vide ce th t CM pape w s one of the m in shock abso bers of HP's r -entry in 2013 th s Tribunal ca not s mply dismiss th im orta ce f gr de ubst tut on i t e same w y hat the U.S. ITC did In addition o the evid nce already p ese ted,[500] Reso ute's own ocume ts re rep ete w th s ate ent abou the market sh re t at P P nd ot er SCA+ su pliers too from CM aper upp iers

[redacted]

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[496] *See fo e ample,* **R -190**, *R mpetrol – Awa d*, ¶¶ 287- 88; **RL- 80** *Biwat r Gauff Ta zania) L mited . Un ted Republic o Tanza ia* (ICS D Cas N . AR /05/ 2) ward, 24 ul 20 8, ¶ 7 7, 807

[497] apl n-1, ¶¶ 18, 2 .

[498] **R-236**, [redacted], p. 7 AF Y/P yry-1, ¶ 9; AFRY/Pöyry-2, ¶ 35.

[499] **C- 54**, *In e Su ercalendered aper rom Canada* U.S In ernational rade ommission Inv No. 01-TA- 30 Fin l D terminat on (Dec. 2015), p I 7.

[500] C nad 's Cou M morial 48-349

R-480 [redacted]; **R-4** [redacted]; **R-482**, [redacted] **R-484**, [redacted]; **R-485**, [redacted]

[redacted][502] and [redacted][503] RISI, the Claimant's chosen market forecaster, similarly concluded less than six months after PHP's re-entry that its supply [redacted]

242. Second, Resolute's Board of Directors' documents are equally replete with statements about [redacted][507] This was also something the ITC did not consider in its scope of investigation.

243. Third, Resolute's Board of Directors' documents and other contemporaneous evidence emphasize the important role played by European imports. In contrast to Drs. Kaplan and Hausman's dismissal of imports as "minor" and "limited",[508] RISI refers to cuts in European imports as [redacted].[509] Indeed, SC-A/A+ imports from Europe dropped by 111,000 MT, from 385,000 MT in 2011 to 274,000 MT in 2014.[510] Moreover,

[502] **R-486**, [redacted]

[503] **R-486**, [redacted]

[504] **R-236** [redacted] p. 77.

[505] **R-480**, [redacted] **R-481**, [redacted] **R-487** [redacted])

[506] **R-488**, [redacted]

[507] **R-489**, [redacted].

[508] Kaplan-2, ¶¶ 64, 69; Hausman-3, fn. 11.

[509] **R-236**, [redacted], p. 77.

[510] AFRY/Pöyry-2, ¶ 13.

European imports have continued to exert pressure, suggesting that had PHP not re-entered the market the woul hav bee vyin fo th marke shar tha PH an Irvin too fro C paper producer . s RI I economi t Jo n Maine s id i a 2 17 intervi w, he paper "indu try ill also con in e to b ttle im or s as a ea s of bala cin the ma ket but hese ba tles will have marginal s cc ss t best a l ng s the real c lp it driving up the i ports, the strong dollar, remains unche ked "[511] Resolu e's [redacted] not the same thin , st tin tha the [redacted] [redacted][51] an that [redacted] [redacted] [13] rs. Kap an a d H usma m y believ that t e ole of Eu ope n i ports is marginal, ut the ndustry conomists t R SI bel eved ot erwis , and n th but- or world absent PH , there is e ery reas n to be ieve that i porte vol mes rom Europe ul ha e be n reater.[514]

244. In the f ce of su stant al evi enc that: a P P's supply w s ab or ed by sub titu ion rom CM p per and ut from Eu opean imports; b) Resol te f ce moun ing pressure rom UM pap r a d ewsprint supplie s; an c) E ropean im or s of C ap r continued t ris , it s inc nceiva le that HP's a ded su ply direct y cau ed all o Re olute' pri e erosio . The effec tha Reso ute e perienc d rom HP' added su ply if any was ndir ct, not dire t. Other than s ati g that SC p per pric s are or elated Re olute off rs no causa (r e onomic) ex lan tio o ho c anges t one end of th SC marke dro p ices at he ther end.

245. I Resolu e had un erta en a da ag s anal sis tha f cused on ac ual ov rlap in rodu tion, at er than ne that reli s n ind rect correlat on, i wou d have ex luded HP's SC + rade o paper, eavin i ith an ana ys s based on a e su ply of pproxi atel [redacted], not 360,000 T.[515] T is amo nt com ar s c osely to t e amount of CA p per that eso ut has been produc ng o t of énoga i, except that PHP s paper s better ual

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[5 1] **R-490**, Pape 360 web ite excer t, Mar R shton, Indust y Trend i G aph c Pape 017 , p.

[1] **R- 88**, [redacted]

[513] **R 4 2** [redacted]

[14] AFRY/Pöyry 2 ¶ 3.

[515] AFRY/P y y-1 ¶ 3 ; AFRY Pö ry-2, ¶ 4; This f gu e i bas d o repo ting by P I ulp and Pa er We k that 20 per nt of PHP' a pro imate y [redacted] ro uction s CA p er and 11 percent is SCB.

quality as [redacted],[516] wh ch it recognizes [redacted][517] In rec gnit on th t it i [redacted], Resolut has re ently inve ted $11 mi lio to "enh nce t e Kéno ami paper ill's short-term ompetitiven ss by mod rn zing qu pment i order to rodu e high-grade SC + supe calendered aper a lowing the mill to access more avo able ma kets."[518] f th Tribunal needed any ot er indi at on that esolute nd PHP lay n ifferent mark ts, it need look no furt er

c) The la mant' Quantification of Damages i Bas d on Sp culat ve Market Fo ecasts hat Rely on F lse Assump ions and at annot P ovide Reas nable Cert inty

246. r. Hausman q a tifie Resolu e's dama e by mp oy ng a pr ce e osio analysis bas d on an Octob r 2 11 RISI orecas , t e type of hich t e laimant its lf had prev ously rgued is spe ul tiv at best.[519] Can da d mons rate in its oun er-M morial th t his RISI orecast ha been p oven o be inco rect regar ing, am ng t othe elemen s: fo ecasted v lumes of su ply without PHP' re-en ry, signif cant ow grad ng from coa ed mec ani al pape to SCA+ grades, G ro th and f re gn excha ge rates [520]

247. In respo se to Ca ada's argum nt that Re olute's mea s o qu ntifying d mages is spe ulative nd not re son bly cert in, he Claiman main ains its posit o that "Prof ss r Jerry ausm n, sing a c mbinat on of Res lu e ata an indus ry m rket for casts of S paper, *showed* ha Res lute incurre … damages b cause of P rt Hawk sb ry's restart."[521] Res lute's robl m is that or casts do not sh w", they pe ul te. To aw rd damag s on he asis of an inc rrect f recast wo ld run coun er to he eneral p in ipl highlig

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[516] da' Count Mem rial, 351; **R- 30**, [redacted]

[517] **R- 30**, [redacted]

[518] **R-427**, eso ute New R lea e, "Reso ute nv sts $38 milli n i its K oga i mill i Québe " (Jan. 5, 2 20 .

[519] *Resolute F rest Produ ts Inc. v. Canad* (NCITRAL) Clai an 's Count r-Mem ri l on J isd ction, 2 February 2017, ¶ 8-91

[52] Canada's ounter M mor al, ¶ 385

[521] C aimant's Reply, ¶ 368 (emphasis added).

Opin on in *CME* that m rely specul tive bene its, ased upon unp oven eco omic projectio s, o not co nt as inve tm nt or as return "[52]

248. The Cl imant rgue that anada misunder tand th t Dr. H usma do s no r ly on ISI's fore asted p ice , ut on ISI's fore asted early ha ge in p ices, wh ch it a pl es to Reso ute's ctua mi l net ri es to est blish quant m.[5 3] The Clai ant's po it on is ba e on a disti ction w t out a diffe ence, sin e the early ha ge in ri es is neces arily ba ed n the fore asted pr ce of SC pa er by RIS . One annot det rmi e the early perc ntage hange w thout k owin wh t the early fore asted rice re.

249. Tri unal hav been a ve se to award d mages ba ed on arket fore asts, in e, s the *Mobil/ urphy* tr bunal foun with r sp ct o oil price fore asts t ey o no me t the re eva t and gen rally ac epted st nd rd of reas nable certain y.[52] When l oki g "at a to al ty of re eva t and nec ssary vari bles" ee ed to cal ulate da age , the tr bun l was " imply na le t have conf denc th t the esti at on f the ntire p ct re s on that m ets t st of 'reas nable certainty ." [25] In *P ilips Petr leu* , the I an-US laims Tr buna to k th same pos tion, otin that "expe ience show that forec sting uture cru e oil ri es is dif icu t an o e to hig r sk of being roved wr ng y the subs quent rea it es f the ctual marke ."[5 6] The eval at o of long er od o lost pr fi s, in co tr st t pas lost pr fi s, is "ext emely hazardou [527]

250. Reso ute's d mages cl im i j st as specu ativ with r sp ct o th past eriod (2013 2017 th t Dr. H usm n has desi na ed as it s the uture (2018 2028) peri d.[52] T is is b cau

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[522] **R -22** , *CME Czech Re ubli B V. . The Czech Re ublic* (UNC TRAL) Se arate O in on f Ian Bro nl e, 14 March 2 03, ¶ 3 .

[523] Clai ant's e ly, 387

[524] **R -170**, *Mobil/ u phy – Dec s on,* 47 : (In ana yzi g oil prod ction for casts among other cr tical market based vari bles "The Tr bun l has a pli d the reas nable cer ainty st ndard dis ussed bove, whi h h s n t e to a conc usi n p r s , but at e to a f ndin that th re s to much *uncer ai ty* a this sta e f r the Tr bu al t ake a determinati n." . *Se also* **R -229**, Craig Mil s and David eiss, *Ov rv ew of Prin iples Re ucing Da ag s,* i John T eno , *The Gu de to D ma es in Interna ional Arbitr tio* , 3 [d] ed. (L ndo : Law Bu iness Res arch, Ltd., 01), . 84: ("The st ndar most often ut li ed in mun cip l and interna ion l aw s ne of "reas nable cert in y or a "reas nable eg ee of certai ty.)

[525] **R -170**, *Mobil/ u phy – Dec s on,* 477

[526] **R -230**, *Ph llips Pet oleum C mpan I an . The I lamic Re ub ic of Ira , the Na ional I ani n Oil C mpany* IUSC Ca e N . 39) wa d, 2 June 1 89, 12 .

[527] **R -170**, *Mobil/ u phy – Dec s on,* 47 .

[528] Clai ant's e ly, 386.

Hausman's "past period" is wrongly conceived, since it is based on a future prediction made in Octobe 201 . he pe io of 201 -2018 th refore e lects a fut re a her than a past per od. Perh ps the for cas be omes more and mor specu at ve with t e passage of time,[529] but i s ro sly naccurate p edi tion o C p per ons mp ion (or d ma d, as R SI calls it) n 2012 re ders it f awed as o 2013.[530] sing a fore ast th t relies on ncor ect assu pt ons akes it wrong from day one and more and ore incorr ct as those ssum tions are projec ed in o the future.[531] s t e Iran-US Cl ims Tribu al ade clear, ro ecti ns c n be use ul ind cations fo prospective investo ut they cannot b used y a tr bunal s the easure f a fair ompensatio ." [32]

251. In i s Re ly Mem rial, Res lut d es n t offe a credib e ebuttal o anada's criticis s f the 011 RI I 5- ear fo ecast, nd in some ase , it of ers no response at all.[53] I ste d, it s mply rgue th t Canad re uses to on ider th but for worl . Ho ever, op rat ng in t e bu -f r w rld doe not nt tle he C aima t t prete d that the 2011 RISI fo ecast was cor ect wh n t as al eady known by 2012 that RI I wa w ong RI I's or cast ro gly predic e h v lume of C pap r t at wou d be pur has d i 2012 y [redacted] [34] and made an error in predicting [redacted] he esult o having m d an er o in redic ing

[529] **R -190**, *Romp trol – A ard* ¶ 2 7: (The Tri una notes [… f ndament l c uti n that an even stu y gro s le s reliabl th less well ef ned th ev nts to e st died an the long r i time over w ich they ext nd.")

[530] FRY/Pöyry ¶¶ 20- 3.

[31] **RL- 31**, Mark Kantor, *Val ation for Arbi ration C mpe satio Stand rds Valuatio Metho s an Exp rt Ev dence* (K uwer Law nternat onal, 2008) p. 25 "One reason wh fore asts s ff r from hig er or ra es is that they project assu pt ons acr ss a long p riod f ime. Err rs in redi ting the scop of identi iable ev nt , such as c anges in int rest rates or d scoun rates, will pla ou over t e entire ura ion of fore a t. Thos error ill ften ave lar e onsequences fo he overall value.")

[32] **RL-219** *Amoco – Partial ward*, ¶ 23 : ("Th el ment of spec lat on in a shor -te m projectio is rat er limi ed, altho gh u exp cted e en s can ma e it u n out to b wrong. he sp cula ive el men rapidly ncrea es w th the um er of year to hi h projec io elates It is ell kn w , and cert in y take into ccount by in esto s, th t f it ap lie to rather dis ant future projection is alm st purely pe ul tive, e en if i s done b the m st ser ous and expe ienced fore ast ng firms, especially f i elates to s ch a vola ile factor as o l p ice . uch proj ct ons an e usefu in icati ns for a p ospe tive nves or, who u dersta ds how ar i can rel o th m and a ce t the risks associate wit them; t ey certainly cann t e used b a tribun l as me sure of fair compensatio .)

[5 3] Cana a's Co t r- emo ial ¶¶ 79-386; Stege - , ¶ 37.

[534] ana a's Co t r-M mor al, ¶ 3 3, citing **R-235**, [redacted] p. 66. *See also* AFRY/Pöyry-2, ¶ 12, Table 2-1.

[535] **R-470**, [redacted], pp. 68, 61, 64.

the cost of pulp.[536] Thes ar just a few of he err rs t at m ke he R SI forec st unreliab e, already rom 012, efore the alleg d br ach even occur ed. Having constru ted a but-for or d that begi s in Oct ber 201 do s not en it e the Claimant to overlo k re l wo ld events ha took place prior to the all ged b each. ny but-for orld hat is cons ructed us ng spec lativ forecasts uilt on false ass ptions mus be rej ct d.

252. Res lut 's attem t o justi y its app oach by dra ing arall ls betwee th RI I price f recasts a d e or casts c ntained in [redacted] is equ lly nava lin . [redacted][538] and hat hey id ot fo esee, like IS an othe fo ecast rs at th t me, th sh rp incre se in d man fo SC paper n 201 and the su uent pri e ffect .[5 9] [redacted]

How ver, s noted by R SI and ot er co mentators fol owin PH 's eop ning [54] thi was not he c se as S -A prod cers wer r nnin at full c a it to m et d mand.[543] [redacted], it wou d h ve undo btedly agre d (a it doe t day with RISI a d all of the other et c [redacted]

[536] Kapl n-2, ¶ 54

[537] Clai nt' Reply, ¶¶ 38 , 88.

[5 8] A RY/Pöyry 2, ¶¶ 66-73.

[539] a ada' Counter-Memo ia , ¶ 14 ; A RY/Pöyry-2 ¶¶ 66 7 .

[54] Cla mant's Rep y, ¶ 3 5

[54] Cla man 's Rep y ¶ 3 .

[42] See abov , ¶ 16.

[5 3] **R-4 3**, Ree T me Repor (J n. 201), p. 7 ("The SCA mar et s very st ong nd the SC mark t is eve s ronger T ere w ll not be en ugh SC p per av ilable n the fa l unl s impor s i crease q it a it.")

[44] **R-236**, [redacted] p 77; **C-236**, Transc ipt f Proceedings befor U.S. Inte na io al Trade Commis ion *i re upercal nder d P per from C nada*, Inv No. 7 1-T -530 (Oc . 22, 201), pp. 70-171 Test o y f J hn Coc e; **-259** [redacted] p. 15; **-260**, ER F rest Products Monthly, "A Com rehens ve Analy is of t e For st roduct S cto " (Ja . 29 20 3), p 20 **R- 61** [redacted] p. 24; **R- 2** [redacted], pp. 21- 22; **R-263**, [redacted]

253. The Claimant seizes on the word "demand" in an attempt to undermine Pöyry's understanding of the market, arguing that Canada and its experts cannot distinguish between consumption and demand and therefore lack an understanding of economics.[545] However, Pöyry was using the term "demand" in its colloquial business sense, the same way that RISI used it when it assessed the market with PHP idled as follows: [redacted] Then, with PHP having re-entered, RISI stated: [redacted][546] The Claimant's request that Pöyry's entire report be dismissed because it used the term "demand" in its colloquial rather than its economic sense rings hollow when its economic approach to damages relies on a forecaster that uses the term the same way.[547]

254. In 2013, with the re-entry of PHP, all of the SC paper produced in North America was being consumed with demand actually exceeding supply.[548] After this reality was acknowledged by producers in June 2013, prices returned to where they were immediately before PHP's reopening and the market continued on a path of secular decline. [redacted], like RISI, relied on the wrong assumptions when it predicted that [redacted] due to PHP's re-entry. By choosing a method of proving causation and quantifying damages that relies on a price forecast, the Claimant's case fails.

C. It is Not for Canada to Estimate Resolute's Alleged Damages According to Resolute's Failed Economic Theory

255. Dr. Hausman argues that he did not attempt to forecast using independent values of the independent variables in an econometric model because of its "necessary complexity."[549] Instead,

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[redacted], pp. 23-24; **R-264** [redacted] p. 26.

[545] Claimant's Reply, ¶¶ 378-381; Kaplan-2, ¶ 30.

[546] **R-235**, [redacted], p. 66 (emphasis added).

[547] Note that Dr. Hausman also uses the term "demand" in the business sense (*See* Hausman-3, ¶¶ 11, 13, 17, 23, 27).

[548] **R-483**, [redacted], p. 7.

[549] Hausman-3, ¶ 14.

he adopte a sim le econ mic app oa h to quantif cati n that ignores afor mentioned ma ket ac ors that he admits affec pr ces.[550] As ne comme tator not s " n e onomist w o as been asked t esti ate damage fi st iden ifies the bu -fo worl (i. ., he world hat the p aintiff wou d h ve xpe ienced but or the de endant s ac s) *T e second ste is to q antify the re evant va iables tha describe th bu -for w rld.* F nally, th d mages xper calculates the dam ge t at t e pl in iff su ta ned by no being able to o erate in the b t-f r world."[551] r. Hau man f ils o underta e the res onsibi ity f the second ste , dvancing an economic theory ba ed on fals a sumptions and incorr predic ion [552] inste d of a cal ul tio of any *actual* dama es [553]

256. In eed, Dr. Hausman' adj stment f is damages ca cul tion in lig t of rec nt y btained 018 at [554] is ndicative o t e undame tal ro le s in an pproach th t is f r too specu ati e t be r lied upon as an ccurate mea ure f future da ages.[555] His ow mo el d monst ates the possibi ity that Resolut i actua ly *be ter off* with PHP's re- ntry t roug the introducti n f r cent sa es in ormation w ich may eco e even mo e pro ou ced if Dr. H usman would cont nue o readjust his estima es ba ed on actual sa es infor ation f om 2019 onw rd.[556] Th bette v ew, as ex la ned by Ca ada's expert, is that Dr H usm n's model s ntenab e by irtue of bein c mpletel pended by o e ear (2018 of m rket pri e ecov ry (n t t mentio a second yea of con inue price rec ver in 2019 hich Dr. Ha sma ignor s). [557]

257. Ra her than addr ssing he cri ic sm lev lle at his mod l, Dr. H usman co te ds t at Ca ada "fails to a swer th fu dam nta economic ques ion of w at wo ld CP price have been if HP had not r -ope ed o u dertake su h an

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[550] Hau man-3, 14. See above, ¶ 21

[5 1] **RL-22** , *Stiro* , . 18 (emphasi ad ed).

[552] Hausma -3, ¶ .

[553] **RL-226** *Sti oh*, p. 185 (Becaus th eco omist anno set p a exper men that a lo s him to ewind he ime pe iod ov r which the dam ge w s lleged to oc ur an repla the market even s wit ou the ba a ts in q est on, he of en elies u on st tistical tool to tte pt to so ate the impact of the acti ns nde inve tigation f om the impact of na ural mar et forc s t at re not ei g chall nge by th p ain iff.") esolut notabl did n t attempt t isolate he impac o the llege breach t r ugh uch a statisti a an ysi , as note b A RY/ Pöy y (Pöyry-2, ¶ 16 .

[554] aus an-3, ¶ 2 .

[55] St ger-2, ¶¶ 4 18, 19; A RY/ öyry-2, ¶¶ 38 39

[55] Steger-2, ¶ 19.

[557] Steger-2, ¶ 18(a)(ii).

[558] Hausman-3, ¶¶ 8, 13.

analysis.[559] Th responsibilit lie squarel with t e Claima t o ma e i s cas . f t h s fail d to pr ve proxim te cau e, or to qua tif its da ages with reaso able certa nty the Trib nal, like the tr bunal in *Rompetrol* [56] has n ch ic but to dis iss i s c aim for ma es.

258. In the alte na ive if the ribunal deci es that eso ute ha proven p oximat cause Can da does pr vide an st mat of the im acts f PHP's re-e ry.[56] ase on the op nion o market com enters, i cludi g R SI, Mr Steger qu ntifies da ages p u til t e po nt t at Port Hawk sbury's re ope ing w s fully bsor ed nto the m rket, a quantum na ysis h s ands y afte having eviewed Re olute s Reply emo ial an expert epo

[559] **RL-173,** *emplu , .A. e al. v Mexic* (IC ID ase No. ARB(F)/ 4/3 and ARB(A)/04/4 ward, 12-56: ("Under inter ati nal law and t e B Ts, the C aima ts ear the overal b rden of pro ing he loss oundi g thei cl ims for compe sa ion. If t at loss s ou d t be too u ce tain or spe ul tive or o herwise u pro en, the ribu al mus reje t these clai s, even if l ab lity is est blished aga nst the Respo d nt.), 13- 0: ("I is for the Cl im nts, as c aimants ll ging an ent tl ment to such compe sa ion, to e tab ish th a ount of that compe sat on: the p incipl actori ncumbit ro atio is 't e bro d ba ic rul to the al oc tio of th b rden f roof in inter ational pro edur '. Thi bur en oes ot r st on a res ondent [… ."")

[560] **RL-190**, *R m etrol ward* ¶ 88.

[561] anada's Counter-M m rial ¶ 392; S e er- ¶ 0.

[562] S e er- , ¶ 86 **R- 36**, [redacted] 77; [redacted] S eg r- , ¶¶ , 8-10.

VIII. ORDE REQUESTE

259. Fo th foregoin reasons Canad respectfull request tha thi Tribuna issu a award

i findin tha th Claimant' claim relatin t th Por Hawkesbur electricit rat ar outsid th Tribunal' jurisdiction

ii dismissin th Claimant' claim tha Canad ha violate it obligation unde Article 110 an 110 o NAFT i thei entirety

iii dismissin th Claimant' clai tha i incurre damage a th resul o Canad violatin it obligation unde Chapte 1 o NAFTA

iv orderin th Claiman t bea th cost o thi arbitratio i ful an t indemnif Canad fo it lega fee an cost i thi arbitration an

v grantin an furthe relie i deem jus an appropriat unde th circumstances

Marc 4 202

Respectfull submitte o behal o th Governmen o Canada

_____

Mar A Lu
Rodne Neufel
Anni Ouelle
Stefa Kuuskn
Azee Mangha

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