August 19, 2017

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

BETWEEN:

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

Claimants/Investors

AND:

GOVERNMENT OF CANADA

Respondent

Expert Report of Stephen Shay

COUNSEL FOR THE CLAIMANTS/INVESTORS

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.

GREGORY J. NASH
BRENT JOHNSTON
CHRIS ELRICK

NASH JOHNSTON LLP
Litigation Lawyers
Suite 3013 – 595 Burrard St
PO Box 49043, Three Bentall Centre
Vancouver BC V7X 1C4
Tel: 604-669-0735 Fax: 604-669-0823
Email: greg.nash@nashlitigation.com

August 19, 2017

Table of Contents

Page

1 **Introduction**. 1

Assignment 1

Qualifications 4

Independence 5

Report structure 6

2 **Executive Summary**. 7

3 **Structure and operation of Investors' Canadian quarry business**. 9

4 **Background on U.S. Federal and state income taxation**. 10

5 **U.S. taxation of Bilcon Nova Scotia Operating Income**. 19

6 **U.S. Federal and state taxation of payments of damages**. 31

7 **Conclusions**. 41

8 **Expert declaration**. 41

1 **Introduction**.

Assignment

1.1 I, Stephen Shay, have been retained by William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. ("**Bilcon Delaware**") (collectively, the "**Investors**"), in relation to a dispute between the Investors and the Government of Canada (the "**Respondent**"). I refer to the Investors and Respondent together as the "**Parties**".

1.2 The dispute involves the Investors' project to construct and operate a quarry and marine terminal at Whites Point in Digby County, Nova Scotia (the "**Whites Point project**").[1] The Tribunal has ruled on the merits that Respondent's actions concerning an environmental assessment of the Whites Point project were in breach of the safeguards that Chapter Eleven of North American Free Trade Agreement (the "**Treaty**") provides the Investors under Article 1105, relating to fair and equitable treatment and full protection and security, and under Article 1102 for treatment no less favorable than Respondent has accorded, in like circumstances, to investments of its own investors.[2]

1.3 The proceedings have been bifurcated and the current proceeding involves the determination of the amount of damages suffered by the Investors as a result of Respondent's breach of its obligations under the Treaty. The Investors' expert, Howard Rosen, has provided his "independent and objective opinion as to the quantum of damages suffered by the Investors as a result of the Respondent's breaches of its obligations under the Treaty."[3]

1.3.1 Mr. Rosen's analysis started with a measurement of lost profits based on the estimated discretionary cash flows that would have been generated by Bilcon of Nova Scotia ("**Bilcon Nova Scotia**") from the Whites Point project but for Respondent's breaches.[4] To measure such discretionary

[1] Award on Jurisdiction and Liability, para. 5.
[2] Award on Jurisdiction and Liability, para. 742(a).
[3] Expert Report of FTI Consulting (Howard Rosen), 15 December, 2016, ¶ 1.4.
[4] Expert Report of FTI Consulting (Howard Rosen), ¶ 5.1

cash flows with respect to a single year, Mr. Rosen started with the estimated amount of cash flows before income taxes that Bilcon Nova Scotia would have generated from the Whites Point project but for Respondent's breaches, which cash flows very generally equal revenues minus ordinary-course expenses (cash flows with respect to a single year, "**Operating Income**", and in the aggregate, "**Total Operating Income**").[5] Mr. Rosen then set discretionary cash flows for a particular year equal to Operating Income reduced by Canadian corporate income tax. He next reduced the Operating Income after Canadian corporate tax by capital expenditures and working capital adjustments for the year to reach discretionary cash flows. Mr. Rosen brought the discretionary cash flows realized with respect to years ending after January 1, 2017 back to present value (as of December 31, 2016) using a Weighted Average Cost of Capital ("**WACC**") discount factor.[6] Mr. Rosen brought past discretionary cash flows (through December 31, 2016) forward to present value using a pre-award interest factor.[7]

1.3.2 Mr. Rosen used this discounted measure of discretionary cash flows, which again are measured after Canadian corporate income taxes (the aggregate discounted discretionary cash flows, the "**Total Lost Profits Amount**" and the undiscounted discretionary tax flows with respect to any single year, the "**Lost Profits Amount**")), as a base on which to determine the quantum of damages equal to the amount of cash the Investors would have received from the Whites Point project after the Investors paid Canadian taxes. Mr. Rosen took account of the fact that, when distributed to the Investors, the Lost Profits Amount would be subject to Canadian withholding taxes and U.S. state and Federal taxes.[8] Because the U.S. and

[5] Expert Report of FTI Consulting (Howard Rosen), ¶ 5.1 and Schedule 1.
[6] Expert Report of FTI Consulting (Howard Rosen), ¶ 5.52.
[7] Expert Report of FTI Consulting (Howard Rosen), ¶ 7.1.
[8] Expert Report of FTI Consulting (Howard Rosen), ¶ 6.1.

Canadian tax systems treat Operating Income from the White Points project differently than payments of damages awards, Mr. Rosen determined the amount of the damages award by adjusting the Total Lost Profits Amount to take into account these tax differences so that the damages award the Investors receive is set at an amount which leaves the Investors with the same amount of after-tax cash as they would have received, in present value, from the Whites Point project but for Respondent's breaches.[9]

1.3.3 I have been asked by the Investors and their counsel, Nash Johnston LLP ("**Counsel**"), to describe for the Tribunal how U.S. taxes would apply to Bilcon Nova Scotia's Operating Income, as determined by Mr. Rosen, in the hands of the individual Investors who are shareholders of Bilcon Delaware (the "**Bilcon Delaware shareholders**").[10] I also have been asked to describe for the Tribunal how U.S. taxes would apply to the payment of the damages award, and why, [redacted] the Lost Profits Amount must be adjusted in order for the Investors to receive the same after-tax cash amount from a damages award as they would have received from earning Operating Income. I explain how each of the United States and Canada tax Operating Income differently than a damages award and why these tax differences mean that, if the amount of the damages were set to equal the Total Lost Profits Amount, the Investors would not receive the same amount of after-tax cash from such damages payment as

[9] Expert Report of FTI Consulting (Howard Rosen), ¶ 6.8.

[10] [redacted]

they would have received, absent the Respondent's breach, from the Whites Point project's Operating Income.

1.4 In preparing this Report I have relied on the following:

1.4.1 Investors' Damages Memorial (March 10, 2017).

1.4.2 Expert Report of FTI Consulting (Howard Rosen) (December 15, 2016).

1.4.3 Expert Report of Thorsteinssons LLP (Michael Colborne) (August 17, 2017).

1.4.4 Witness Statement of Dan Fougere (December 12, 2016).

1.4.5 Witness Statement of Joe Forestieri (December 13, 2016).

Qualifications

1.5 I am a Senior Lecturer at Harvard Law School. I joined the faculty as a Professor of Practice in 2011. I became a Senior Lecturer in 2015 and reduced my teaching to one-half of a full load. Before joining the faculty in 2011, I served in the Obama Administration as Deputy Assistant Secretary for International Tax Affairs in the United States Department of the Treasury (the "**Treasury Department**").

1.5.1 Prior to re-joining the Treasury Department in 2009, I was a tax partner for 22 years with Ropes & Gray, LLP ("**Ropes**") in Boston, Massachusetts, specializing in international taxation.

1.5.2 From 1982 to 1987 I served in the Office of International Tax Counsel at the Treasury Department, including as International Tax Counsel, and actively participated in the development and enactment of international provisions in the Tax Reform Act of 1986.

1.5.3 I have published scholarly and practice articles relating to international taxation, and testified for law reform before Congressional tax-writing committees. I recently have served as an expert consultant to the International Monetary Fund on tax policy missions to Uganda in 2011 and 2017 and to Kenya in 2017. I have had extensive practice experience

in the international tax area and while in active practice was recognized as a leading practitioner in Chambers Global: The World's Leading Lawyers, Chambers USA: America's Leading Lawyers, Euromoney's Guide to The World's Leading Tax Advisers and Euromoney's Guide to The Best of the Best.

1.5.4 I serve on the Executive Committee of the New York State Bar Association Tax Section. I am a past President of the American Tax Policy Institute Board of Trustees and was the IBFD Professor in Residence for 2015. I have been a Council Director of American Bar Association Tax Section and Chair of the Section's Committee on Foreign Activities of U.S. Taxpayers. I have served as an Associate Reporter for the American Law Institute's Federal Income Tax Project on United States Income Tax Treaties and have been a member of the Taxes Committee of the International Bar Association.[11]

1.5.5 I received my B.A. from Wesleyan University in 1972 and a J.D. and M.B.A. from Columbia University in 1976. I am a member of the Bars of Massachusetts and New York.

1.5.6 My curriculum vita is attached as Appendix 1 to this Report.

Independence

1.6 For this engagement, I am acting as a consultant for Ropes. Working under my direction, colleagues at Ropes have assisted me in the preparation of this Report. Payment for my services does not depend in any way on my opinions expressed herein or the outcomes in this matter.

1.7 I am independent from the parties, their legal advisors and the Tribunal. I confirm my genuine belief in the opinions expressed herein.

[11] The opinions expressed in this Report are my own and do not represent the views of any institution that employs or engages me or with which I am affiliated.

Report structure

1.8 This Report will proceed as follows:

1.8.1 In **Section 2**, I provide an executive summary of this Report.

1.8.2 In **Section 3**, I describe the Bilcon Nova Scotia legal structure and the quarrying business operations that would have been carried on by Bilcon Nova Scotia absent the Respondent's breaches.

1.8.3 In **Section 4**, I provide background on U.S. income taxation as it pertains to the Bilcon Nova Scotia's planned quarrying business.[12]

1.8.4 In **Section 5**, I describe how U.S. taxes would have applied to Operating Income earned by Bilcon Nova Scotia to allow the Tribunal to determine the amount of cash that the Investors would have received, absent the Respondent's breaches, after all U.S. and Canadian taxes. I refer to this after-tax cash amount as the "**Target Amount**," or the amount designed to make the Investors whole after the breach.

1.8.5 In **Section 6,** I describe how U.S. taxes would apply to the payment by the Respondent of damages to the Investors and describe how to determine the amount of the damages award that causes the Investors to receive the Target Amount after U.S. Federal and state and Canadian taxes on the damages award (such amount, the "**Appropriate Damages Amount**").

[12] Unless otherwise indicated, I use "U.S. tax" or "U.S. income taxation" to refer to both Federal and New Jersey state income taxes. I only discuss New Jersey taxation separately where relevant to my analysis of the adjustment necessary to make a damages payment equivalent to the receipt of lost profits.

1.8.6 In **Section 7**, I present my conclusions regarding the key differences in how U.S. taxes apply to Operating Income and amounts paid as a damages award and how these differences affect the determination of the Appropriate Damages Amount.

1.8.7 In **Section 8**, I provide my expert declaration with respect to this Report.

2 Executive Summary.

2.1 The Investors proposed to carry on a quarry business in Nova Scotia to extract basalt and ship it to New York for sale. The Tribunal has found that the Respondent's actions breached the Treaty and this proceeding is to determine damages.

2.2 The Investors' Damages Memorial advises that the purpose of a damages award is to undo the harm caused by the breach by restoring "the Investors to the position they would have been in if Canada had not breached its obligations under the NAFTA."[13] The Investors' Damages Memorial concludes that, "in this case, an award of lost profits is the most complete and appropriate measure of damages."[14]

2.3 The Investors' valuation expert, Mr. Howard Rosen of FTI Consulting, used the discounted cash flow ("**DCF**") method to calculate the discretionary cash flows that Bilcon Nova Scotia would have earned from the Whites Point project over the expected life of the project. (These cash flows reflected reduction for Canadian corporate tax on Bilcon Nova Scotia's profits, but not taxes on the Investors.) Relying on input from Mr. Forestieri regarding the Investors' effective overall tax rates, Mr. Rosen applied a factor to this Total Lost Profits Amount to determine the amount the Investors would have received after tax.[15] This factor reflected the difference between the effective tax burden of the Total Lost Profits Amount to the Investors and the effective tax burden of the payment to the Investors of the same Total Lost Profits Amount as a damages award.

---

[13] Investors' Damages Memorial ¶ 233.
[14] Investors' Damages Memorial ¶ 243.

[15] Expert Report of FTI Consulting (Howard Rosen) ¶¶ 6.3 – 6.8.

2.4 In this Report, I describe how U.S. taxes would apply to Bilcon Nova Scotia's Operating Income in the hands of the Bilcon Delaware shareholders. I also describe how U.S. taxes would apply to the payment of a damages award.

2.5 A damages award constitutes full reparation for the Investors only when it leaves the Investors with the same amount of cash after U.S. and Canadian taxes as the Investors would have received, absent the Respondent's breach, from the Whites Point project. I explain why the Lost Profits Amount paid as a damages award must be adjusted in order for the Investors to receive the same after-tax cash amount from a damages award as they would have received from earning Operating Income. Accordingly, I conclude that a gross up to the Lost Profits Amount is necessary for the Investors to be made whole.

2.6 I find that an overall gross up to the Total Lost Profits Amount of 146% would be reasonable and appropriate.[16]

2.7 Any analysis of this nature is sensitive to the assumptions used and there is a false precision in a single number. The Tribunal, however, must reach a number. My

[16] Appendix 4, Total LPA Gross-up to Appropriate Damages Amount, Line 12, Col 1.

conclusion is that a gross up of 146% would be reasonable. This is consistent with Mr. Rosen's gross up of 148%.

3 Structure and operation of Investors' Canadian quarry business.

3.1 Legal Structure

3.1.1 Bilcon Nova Scotia is a Nova Scotia unlimited liability company wholly-owned by Bilcon Delaware.

3.1.2 Bilcon Delaware is a Delaware corporation

3.1.3 Bilcon Delaware is owned by three individuals, William Richard Clayton ("**WRC**"), Douglas Clayton, and Daniel Clayton, sons of William Ralph Clayton. Each of the individual Bilcon Delaware shareholders is a U.S. citizen

3.2 Bilcon Nova Scotia's business plan was to:

3.2.1 extract basalt at the Whites Point Quarry in Nova Scotia;

3.2.2 process the quarried stone into crushed stone aggregate at a processing plant to be built at the Whites Point Quarry;

3.2.3 load the aggregate onto a ship at a marine terminal to be built on Digby Neck proximate to the Whites Point Quarry;

3.2.4

3.2.5

17

4 **Background on U.S. Federal and state income taxation**.

4.1 U.S. Federal income taxation.

4.1.1 It is a feature of U.S. tax rules considered in an international setting that they vary in certain important respects from those of other countries, including: (i) the United States taxes business income on a worldwide basis and allows a credit for foreign income tax to mitigate possible double taxation (while most other countries employ some form of exemption of active foreign business income), (ii) the United States applies entity classification rules for taxation that often result in a U.S. tax classification that differs from the legal and tax classification of an entity for local law purposes in the country where income is earned, and (iii) the United States applies a variety of "substance over form" or "economic substance" doctrines in U.S. tax jurisprudence that allow the tax authority to recast how a transaction is analyzed for U.S. tax purposes.

4.1.2 The U.S. foreign tax credit plays a central role in understanding the difference in U.S. taxation, as compared with Canadian taxation, of an amount that has been subject to an actual foreign income tax and the same net amount that has not been subject to a foreign tax.

4.1.3 This Section proceeds as follows:

[18]

4.1.3.1 Section 4.2 provides background on the history and purpose of the U.S. foreign tax credit.

4.1.3.2 Section 4.3 describes U.S. entity classification rules

4.1.3.3 Section 4.4 describes U.S. corporate and individual income tax rules

4.1.3.4 Section 4.5 describes relevant New Jersey income tax rules.

4.2 History and Purpose of the U.S. Foreign Tax Credit.

4.2.1 International Practice to Avoid Double Taxation

4.2.1.1 A country has a right to impose both source-based taxation on income earned within its borders by foreign persons and residence-based taxation on the worldwide incomes—that is, the sum of domestic and foreign income—of its own residents. If two countries exercise these rights in relation to the same income, international double taxation results.[19]

4.2.1.2 It is accepted international practice for the source country (where the income arises) to assert the primary taxation right and for the residence country to mitigate international double taxation by adjusting the residence country tax burden. The residence country is the country where the taxpayer is a resident for taxation purposes. The internationally accepted means for the residence country to mitigate double taxation are either to allow a credit for the foreign tax or to exclude the

[19] J. Clifton Fleming, Robert J. Peroni & Stephen E. Shay, *Two Cheers for the Foreign Tax Credit, Even in the BEPS Era*, 91 Tulane Law Rev. 1, 3 (2016).

foreign income from the tax base.[20] The United States uses the foreign tax credit to avoid or mitigate double taxation of income that is taxed by another country in addition to the United States.

4.2.2 History of the U.S. Foreign Tax Credit.

4.2.2.1 From the outset of the U.S. federal income tax, the United States has taxed the worldwide income of its individual citizens. The reach of U.S. taxing jurisdiction was upheld by the U.S. Supreme Court in *Cook v. Tait*.[21]

4.2.2.2 The federal income tax on individuals, re-introduced following adoption of a Constitutional amendment in 1913, at first allowed only a deduction rather than a credit for foreign income taxes paid. Rates increased in the United States and elsewhere to fund war obligations in the First World War and double taxation of income became a concern for U.S. taxpayers subject to worldwide taxation.[22] The first foreign tax credit legislation in the United States was adopted in 1918 to alleviate U.S. taxpayers from the burden of double taxation.[23]

4.2.2.3 The foreign tax credit has evolved since its introduction in the Revenue Act of 1918. The kinds of foreign taxes eligible for the credit (creditable taxes) are still largely composed of the original categories – income, war profits and excess profits taxes[24] – but a limitation was imposed on the credit in the Revenue Act of 1921 such that the credit for foreign taxes could not exceed the amount of U.S. tax liability on the

[20] Fleming, Peroni & Shay, at 4; see also Org. for Econ. Co-operation and Dev. [OECD], Model Tax Convention on Income and on Capital, arts. 23A, 23B (July 15, 2014).
[21] *Cook v. Tait*, 265 U.S. 47 (1924).
[22] Michael J. Graetz and Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 Duke L.J. 1021, 1044-1045 (1997).
[23] *See* Graetz, at 1047.
[24] Elizabeth A. Owens, *The Foreign Tax Credit* §1/4, 20-21 (1961).

taxpayer's foreign source income.[25] Although the details of the credit and the methodology for determining its limitation have changed through the years, such as the introduction of limitation by categories of foreign income in 1986 and the reduction of such categories from nine categories to two in 2004, the foreign tax credit has remained an essential part of how the United States taxes income that is earned in foreign jurisdictions.[26]

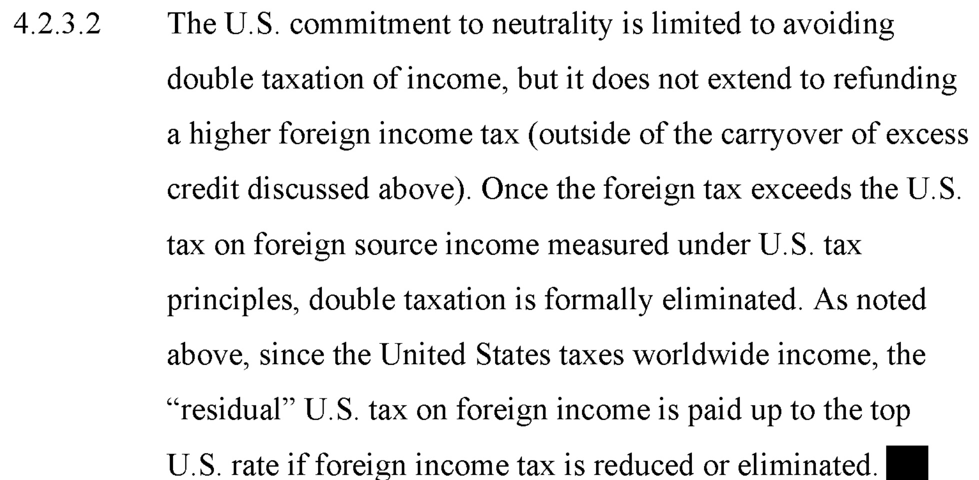
4.2.3 Purpose of the foreign tax credit and the foreign tax credit limitation.

4.2.3.1 The objective of the foreign tax credit, when taken with its limitation, is to make tax neutral the decision whether to invest in the United States or in a foreign jurisdiction with an effective tax, measured under U.S. tax principles, that is equal or lower than the taxpayer's effective U.S. Federal tax on the income. Once the foreign tax exceeds the U.S. tax on the foreign income, the United States will not credit the "excess foreign tax credit," though it does permit a one-year carryback of the excess credit and a 10-year carry forward to allow the taxpayer to use the excess credit in other tax years.[27] "This foreign tax credit limitation is intended to keep high foreign taxes from offsetting U.S. tax on U.S. source income and," within broad rights to 'cross-credit' excess foreign taxes against U.S. tax on other foreign income, "to preserve U.S.

[25] See Graetz, at 1022.
[26] *See* Graetz, at 1023.
[27] IRC § 904(c). Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended (the "**Code**"), and to regulations promulgated under the Code. Unless otherwise indicated, currency amounts are in U.S. dollars. The periods for both the carryback and the carryforward have fluctuated throughout the years, but the current periods have been in effect since 2004.

residual tax on income taxed abroad at rates less than the U.S. rate."[28]

4.2.3.2 The U.S. commitment to neutrality is limited to avoiding double taxation of income, but it does not extend to refunding a higher foreign income tax (outside of the carryover of excess credit discussed above). Once the foreign tax exceeds the U.S. tax on foreign source income measured under U.S. tax principles, double taxation is formally eliminated. As noted above, since the United States taxes worldwide income, the "residual" U.S. tax on foreign income is paid up to the top U.S. rate if foreign income tax is reduced or eliminated.



4.3 U.S. tax classification of a Delaware corporation and a Nova Scotia unlimited liability company.

4.3.1 The U.S. tax classification of an entity determines how the entity will be taxed for U.S. Federal income tax purposes – whether taxes are assessed at the entity level (i.e., if the entity is a "C corporation") or at the owner level (i.e., if the entity is a pass-through).

4.3.2 Since January 1, 1997, the classification for U.S. Federal income tax purposes of a business entity has been determined under regulations that always classify certain kinds of entities as a corporation (each a "*per se* corporation"). Other entities are given a default classification as a corporation or as a partnership (or disregarded as a separate entity if it

[28] John P. Steines, Jr., *The Foreign Tax Credit at Ninety-Five: Bionic Centenarian*, 66 Tax Law Rev. 545, 548 (2013).

would be a partnership but only has one member). Such a default classification may be changed by election.[29] A qualifying domestic corporation (i.e., a domestic entity classified for tax purposes as a corporation) that satisfies certain regulatory criteria may elect "S corporation" status and, notwithstanding corporate entity classification, effectively be treated as a pass-through entity for most U.S. Federal income tax purposes.[30]

4.3.3 Under one of the *per se* classification rules, a Delaware corporation always is classified as a corporation for U.S. Federal tax purposes.[31] A Delaware corporation, however, may elect to be treated as an S corporation for U.S. tax purposes if it meets the regulatory criteria referenced above.[32]

4.3.4 A Nova Scotia unlimited liability company is specifically excluded from *per se* corporation classification status.[33] Under the applicable "default" classification rules for a foreign business entity, if wholly-owned by a single person, a Nova Scotia unlimited liability company is disregarded as an entity separate from its owner for U.S. Federal tax purposes.[34] In the case of such a "disregarded entity," for U.S. Federal income tax purposes the income, deductions and other attributes of the entity are considered those of its owner.

4.4 U.S. Corporate and individual income taxation.

---

[29] IRC §7701(a)(2) – (5); Reg. §§ 301.7701-2, -3.

[30] See Reg. § 1.1362-6(a)(2). A corporation that is not an S corporation is a C corporation. Reg. § 1.1361-1(a)(2). Although most income of an S corporation is passed through and taxed at the shareholder level, certain built-in gains and passive income are taxed at the entity level. IRC §§ 1374-1375.

[31] Reg. § 301.7701-2(b)(1).

[32] Reg. § 1.1362-6(a)(2).

[33] Reg. § 301.7701-2(b)(8)(ii)(A)(1).

[34] Reg. §§ 301.7701-2(b)(8)(ii)(A)(1), -3(b)(2)(C).

4.4.1 The United States generally taxes the taxable income of C corporations at the entity level at rates that graduate up to a top rate of 35%.[35] A corporation that elects to be taxed as an "S corporation" is not subject to entity level corporate tax; instead its income is passed through to its owners, the shareholders.[36] Each shareholder of an S corporation takes into account such shareholder's pro rata share of (1) the corporation's items of income, loss, deduction, or credit, the separate treatment of which could affect the liability for tax of any shareholder, and (2) other gross income less deductions and credits, computed at the corporation level, where these items would not affect shareholders' liability differently and thereby come under (1).[37] Foreign taxes are always passed through separately and treated as if paid by the shareholder directly for purposes of calculating the shareholder's deduction or credit for foreign taxes paid (as discussed below). Thus, the appropriate analysis of the taxation of an S corporation is to look through to the taxation of the shareholders,

4.4.2 An individual U.S. citizen or resident is taxed for U.S. Federal income tax purposes on his worldwide "taxable income" (see discussion below) at graduated rates up to 39.6%.[38] A special reduced rate of 20% applies to capital gains and dividend distributions from C corporations.[39]

4.4.3 Gross income is generally an individual's income and receipts from all sources.[40] Individual U.S. taxpayers generally are allowed deductions against gross income, including deductions for carrying on a trade or

[35] A C corporation that is not subject to special taxing rules, such as those for a regulated investment company or a real estate investment trust, generally is subject to the corporate tax under Section 11. Lower rates phase out so that the tax is a flat rate tax at incomes in excess of approximately US$18 million. IRC § 11.
[36] IRC § 1366(c).
[37] IRC § 1366(a)(1).
[38] IRC §§ 1, 61.
[39] IRC § 1. A net investment income tax of 3.8% can apply to certain investment income of individuals whose modified adjusted gross income exceeds a high threshold ($250,000 in the case of an individual filing a joint income tax return). IRC § 1411.
[40] IRC § 61. In a mining business, gross income is means total sales less cost of goods sold. Reg. § 1.61-3(a).

business, to reach a measure called "adjusted gross income."[41] Additional deductions, referred to as itemized deductions, if elected in lieu of a "standard deduction," may be allowed against adjusted gross income to reach "taxable income."[42] Taxable income is the amount of income and receipts that is ultimately taxable for U.S. Federal income tax purposes.[43] For high income individual taxpayers, an "overall" limitation applies to most itemized deductions such that the amount of itemized deductions otherwise allowable for a year must be reduced by the lesser of 3% of adjusted gross income over a floor ($311,300 for an individual filing a joint return in 2016) and 80% of the itemized deductions otherwise allowable for the year.[44] In effect, the overall limitation acts as a de facto rate increase of 3% times the Federal tax rate of 39.6% or approximately 1.19% for taxpayers in states with relatively high income tax rates such as New Jersey.[45]

4.4.4 In certain cases, a taxpayer may be subject to an alternative minimum tax, or AMT.

4.4.5 A U.S. resident individual taxpayer is allowed for Federal income tax purposes a credit for foreign (i.e., non-U.S.) income taxes paid or treated as paid during the year, or taxes (such as a withholding tax on gross income amounts) paid in lieu of an income tax, subject to a limitation.[47] U.S. taxpayers may also elect to deduct foreign taxes paid in a year in lieu of claiming the foreign tax credit for that year, but the credit is generally

---

[41] IRC §§ 62, 63.
[42] IRC § 63(d), (e).
[43] IRC §§ 1, 11.
[44] IRC § 68; IRB 2015-44. Itemized deductions for medical expenses, investment interest and casualty losses are excluded from this rule. The deduction for state income taxes is not excluded.
[45] The Federal itemized deduction for New Jersey state income tax (imposed at a top marginal rate of 8.87%) is consistently limited as income is increased.
[46] IRC § 55.
[47] IRC §§ 901(b)(1), 903; Reg. §§ 1.901-2(a)(1), -2(a)(3), 1.903-1.

more favorable and is routinely claimed.[48] Under the foreign tax credit limitation, the amount of foreign income tax allowed as a credit for the year may not exceed the U.S. tax (before foreign tax credits) for the year times the ratio of foreign source taxable income over worldwide taxable income.[49] A foreign tax credit that is limited may be carried back one year and forward 10 years.[50]

4.5 New Jersey state taxation.

4.5.1 New Jersey individual residents are taxed on their New Jersey gross income.[51] Since 2010, the highest marginal tax rate is 8.97%.[52]

4.5.2 New Jersey gross income includes a taxpayer's net income from business[53] and a taxpayer's net pro rata share of S corporation income, whether or not the income is actually distributed.[54]

4.5.3 For this purpose, S corporation income is determined by netting together all items of income, gain, loss or expense reported on the S corporation's federal tax return with certain items, including state taxes, added back.[55]

4.5.4 Because New Jersey does not allow for a deduction or a credit for foreign taxes, foreign taxes do not reduce the tax base of an individual in New Jersey.[56]

4.5.5 States are not covered by U.S. Federal tax treaties and are not required to grant a credit for a treaty partner's income tax.

---

[48] IRC § 164. This is true even though a deduction is disallowed for a foreign income tax when the credit is elected. See IRC § 275.

[49] IRC § 904(d). This limitation is applied separately to two categories of foreign source income, "passive category income" and all other foreign income ("general category income"). [redacted] For this reason, as well as ease of exposition, this report will refer to the foreign tax credit limitation without further reference to separate categories.

[50] IRC § 904(c).

[51] N.J. Rev. Stat. §54A:2-1 .

[52] N.J. Rev. Stat. §54A:2-1(a)(5); N.J. Rev. Stat. §54A:2-1(b)(5) .

[53] N.J. Rev. Stat. §54A:5-1(b).

[54] N.J. Rev. Stat. §54A:5-1(p)

[55] N.J. Admin. Code §18:35-1.5(b).

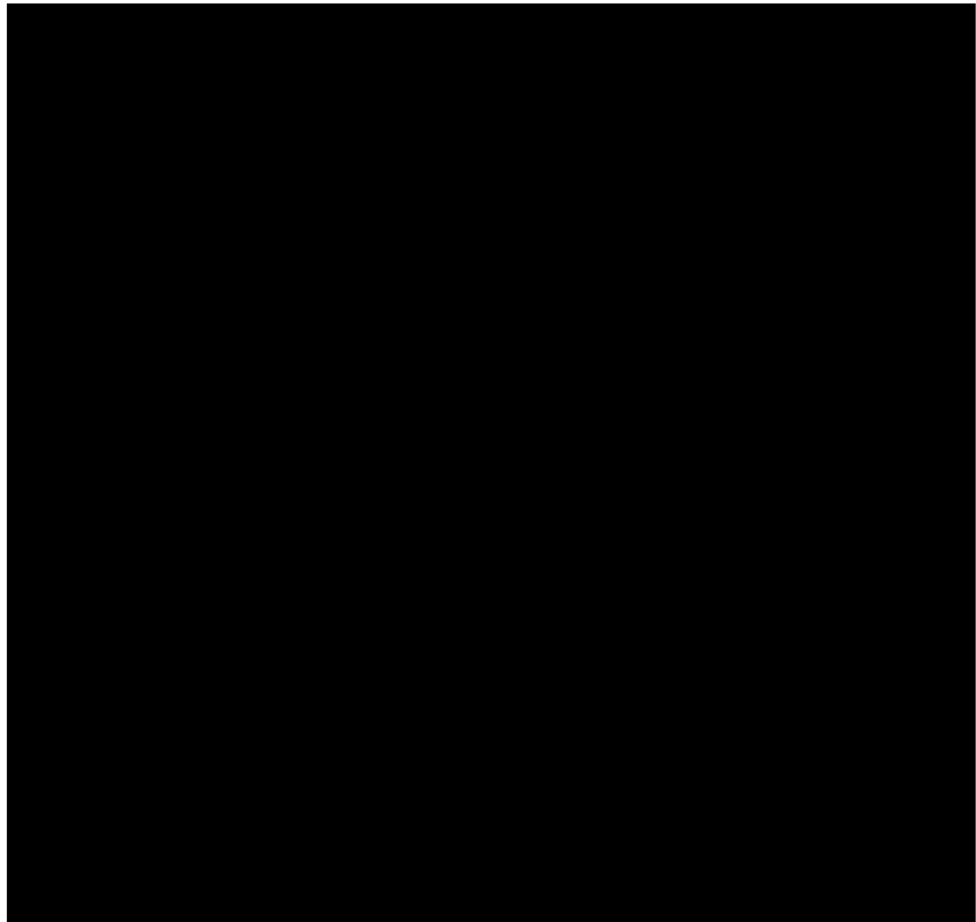
[56] N.J. Rev. Stat. § 54A: 4-1; N.J. Admin. Code § 18:35-4.1.

5 **U.S. taxation of Bilcon Nova Scotia Operating Income**.

5.1 Applying U.S. tax rules to Operating Income.

5.1.1 In this section I start with the analysis of the Operating Income from business operations of Bilcon Nova Scotia outlined in Mr. Rosen's expert report and consider how U.S. Federal and state tax rules would apply to Operating Income to determine the after-tax amount that represents full reparation damages.[57]

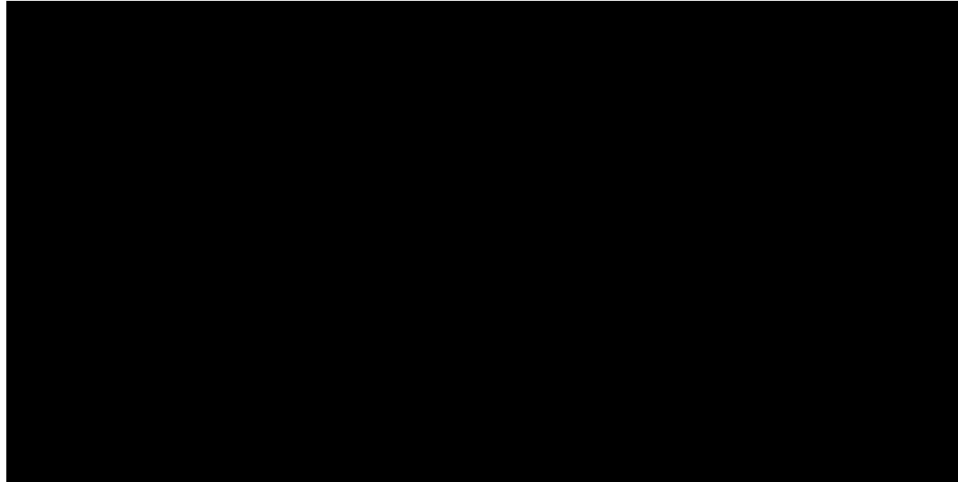
5.1.2 Recall that the Lost Profits Amount as determined by Mr. Rosen (using standard discounted cash flow valuation metrics) is after reduction for Canadian corporate income taxes imposed on Bilcon Nova Scotia.

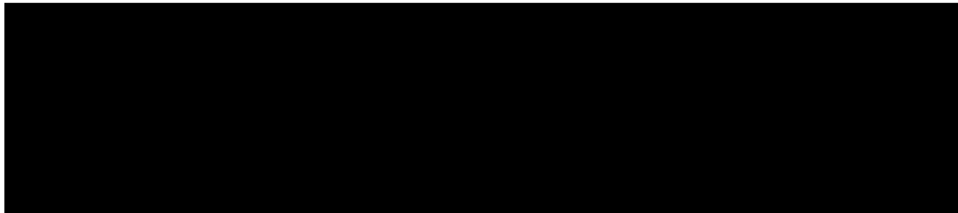


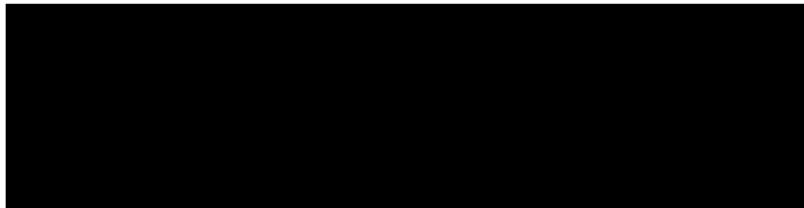
[57] Investors Damages Memorial, para. 233.

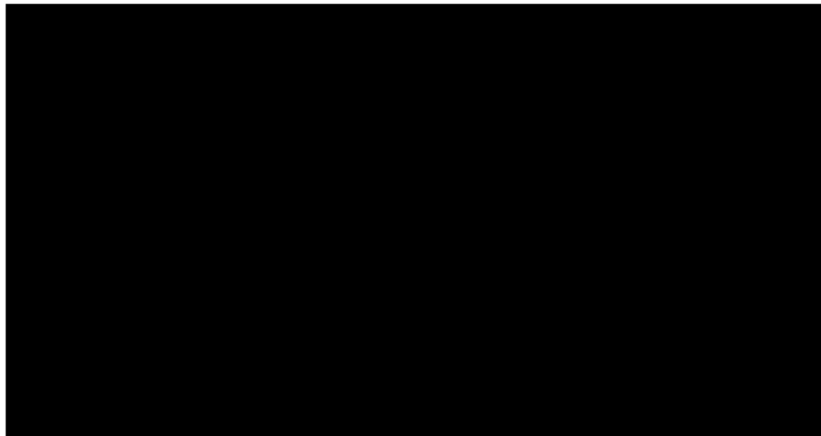
[58] As described in 4.4.5, a U.S. resident taxpayer that credits foreign income taxes may not at the same time claim a deduction for the tax. IRC § 275. This prevents a double benefit for the foreign tax.

5.2 U.S. tax classification - Bilcon structure.

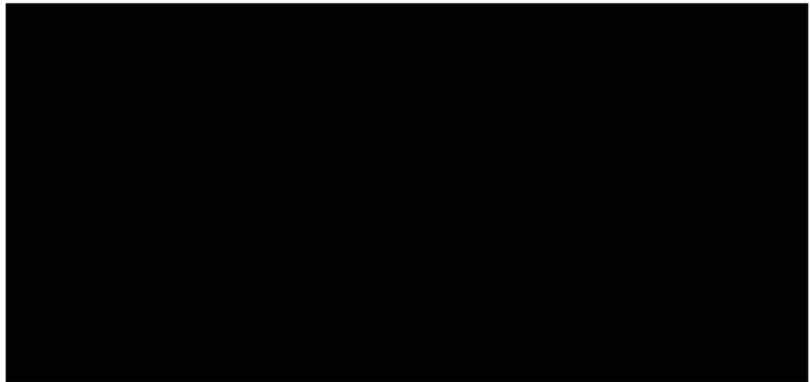
5.2.1 

5.2.2 

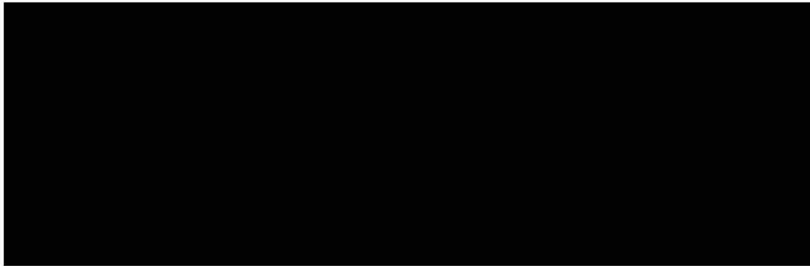
5.2.2.1 

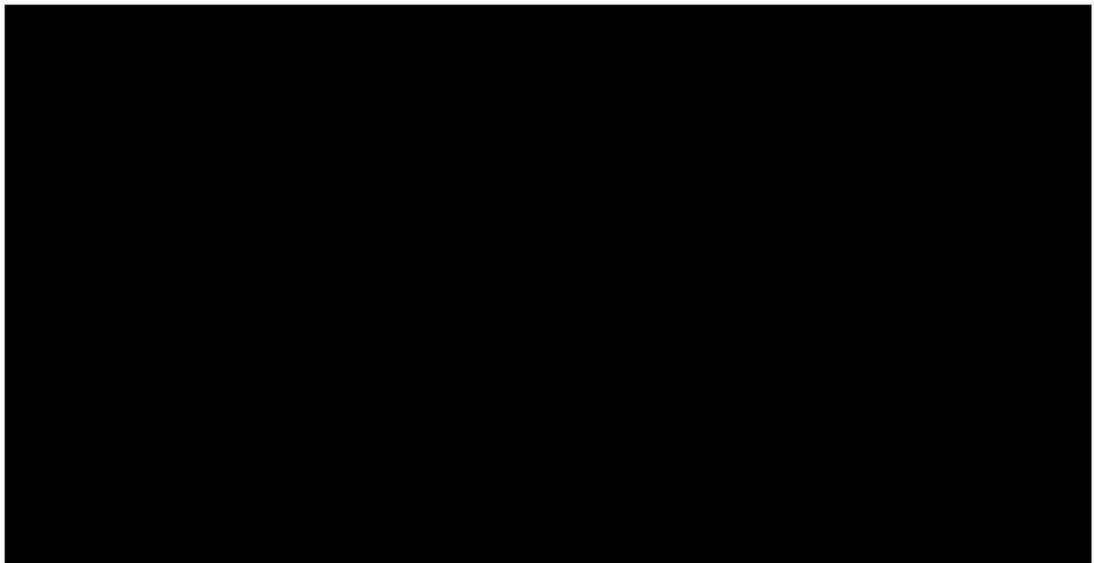
5.2.2.2 

[59] There are limited respects in which a disregarded entity is acknowledged as an entity for Federal tax purposes, but they are not relevant to this report. See e.g., *Seaview Trading, LLC v. Commissioner*, 858 F.3d 1281 (9th Cir. 2017) (Ninth Circuit rules that a limited liability company disregarded from its owner for U.S. income tax purposes is an eligible tax matters partner ("TMP") under IRC § 6231).



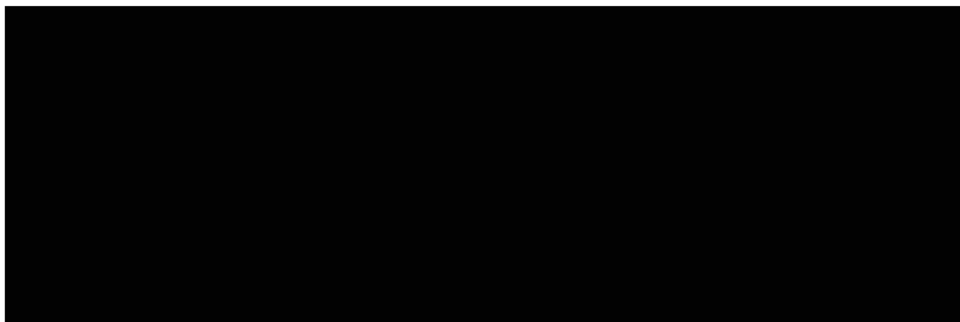
5.2.2.3

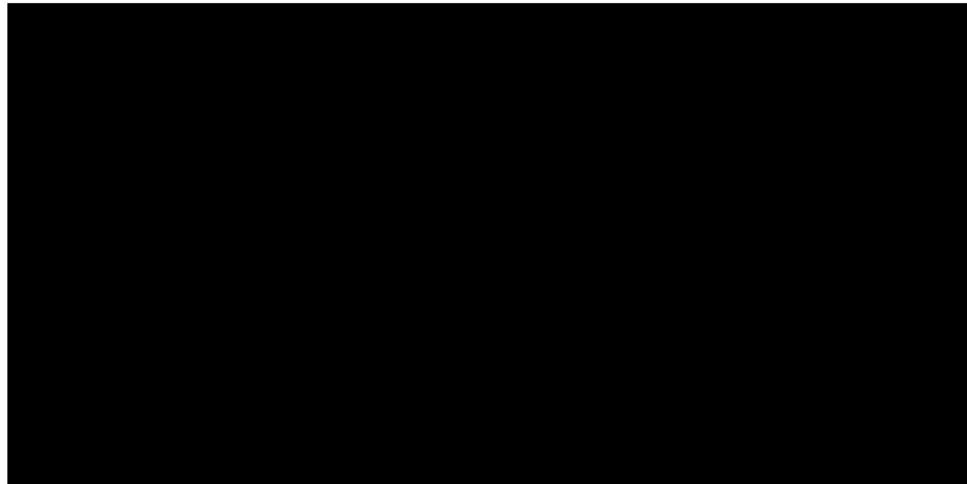




5.3 U.S. taxation of Bilcon Nova Scotia business profits – overview.

5.3.1





5.3.2 In this and following subsections, I consider the respects in which the U.S. net income tax base (i.e. the amount of income, gain, etc. available for taxation in such jurisdiction after reduction for allowable deductions) would differ from the Canadian net income tax base and whether those differences are likely to affect the analysis materially so as to warrant some adjustment. With regard to Mr. Rosen's analysis, I seek to identify where the U.S. rules would vary sufficiently materially from the Canadian rules employed by Mr. Rosen in arriving at net income subject to Canadian tax to warrant an adjustment for purposes of a U.S. tax analysis.

5.3.3 In general, the rules for recognizing income, in amount and timing, from the production and sale of crushed stone would be similar for the United States and Canada. The principal differences in the net income tax base relate to capital recovery rules for investments and the availability in the United States of an allowance for the depletion of (The U.S. term for capital recovery of investment in tangible property is depreciation and for intangible property is amortization, but these terms often are used interchangeably and are just different terms for capital recovery.)

5.3.4 I start with the respective Canadian and U.S. net income tax bases and address the foreign tax credit separately in a subsequent section. I follow this order because the foreign tax credit takes the foreign income taxes as

given, and applies the foreign tax credit limitation solely on the basis of U.S. tax principles and the U.S. tax that would be paid before the foreign tax credit (the limitation being determined by the formula: (foreign source net income/worldwide net income) * pre-credit U.S. tax). In essence, the foreign tax credit comes after all other U.S. tax analysis.

5.4 Capital recovery – Canada and the United States.

5.4.1 Both the United States and Canada have capital recovery rules that divide assets by class based on the assets' features (e.g. land improvements are a class of assets for U.S. tax purposes). Each class varies in terms of its rate of capital recovery and its length of recovery period.[60]

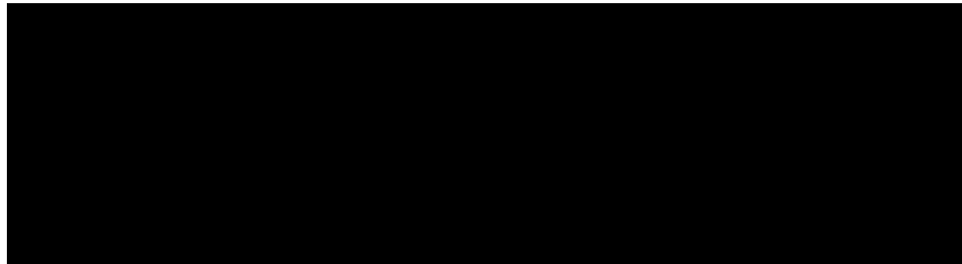
5.4.1.1 The declining balance method of recovery, as used in Canada, means that the capital recovery deduction that is available each year is calculated by multiplying the remaining book value of the asset by the applicable declining balance rate for that asset class. The allowed deduction is subtracted from the book value. The amount of capital recovery allowance therefore decreases each year under this method as the remaining book value of the asset decreases.

5.4.1.2 The straight-line method of recovery, as used in the United States for foreign use assets, means that the amount of depreciation deduction that is available each year is calculated

---

[60] [redacted] Canada and the United States each use a convention for placement in service (i.e. under the U.S. half-year convention any property placed in service during any taxable year is treated as placed in service on the mid-point of such taxable year). Where Canada uses a declining balance method of recovery (see description below), the United States uses straight-line recovery (see description below) over the recovery period specified under an Alternative Depreciation System for assets located or used outside the United States. IRC § 168(g). The declining balance rate in Canada is 30% for Class 29 assets and 5% for Class 3 assets. The Class 29 assets generally correspond to Asset Class 10 assets for U.S. purposes, which would have a slower 10-year straight line recovery. The declining balance rate in Canada is 5% for Class 3 assets. The Class 3 assets generally correspond to Asset Class 00.3 assets for U.S. purposes, which would have a 20-year straight-line recovery (also 5%).

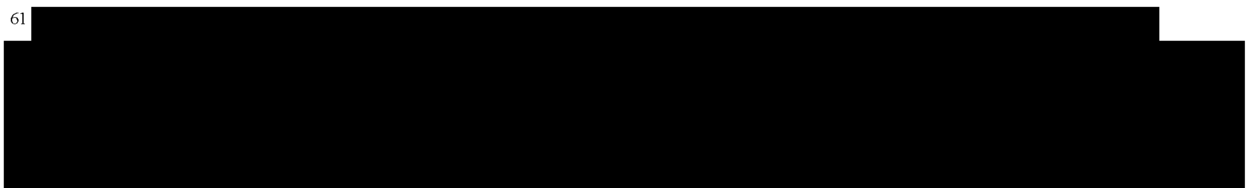
by dividing the starting book value of the asset by the number of years in the applicable recovery period for that asset class. The amount of depreciation is therefore the same amount each year under this method.

5.4.2 

5.5 Depletion deduction.

5.5.1 Unlike in Canada, the United States allows a deduction for percentage depletion of a mineral property to a person who possesses an economic interest in the property.[62] For this purpose, an economic interest includes, in addition to legal title to the property, an interest acquired by investment in the minerals in place with the possibility of profit from that interest dependent solely upon the extraction and sale of the mineral.[63] Basalt or rock that is quarried is eligible for this deduction.[64]

5.5.2 The amount of the deduction allowed is a percentage of the gross income from mining, which includes processing near the mine, but does not include transportation to the customer.[65] The percentage depletion rate for

61 

62 § 611.

63 Reg. § 1.611-1(b)(1); *Kirby Petroleum Co. v. Commissioner*, 326 U.S. 599, 604 (1946).

64 § 613(b)(6)(A); Reg. § 1.611-1(d)(5).

65 § 613(c)(1); Reg. § 1.613-4(a).

basalt and stone used in aggregate is 5%.[66] The amount of the deduction cannot exceed 50% of taxable income.

5.6 State taxes.

5.6.1 In Canada, the federal and provincial income taxes are applied to the same tax base. Accordingly, Canadian provincial taxes are not deducted from the Canadian Federal tax base. In contrast, amounts paid for U.S. state income tax are allowed as deductions for U.S. Federal income tax purposes. Accordingly, the U.S. Federal tax base is reduced by deductible state taxes.

5.6.2

5.6.3 State taxes generally are not covered by U.S. bilateral income tax treaties.[68] The U.S.-Canada treaty does not cover state income taxes for purposes of double taxation relief.[69]

5.7 The U.S. foreign tax credit.

5.7.1 Recall from above that the United States, as the residence country of the Investors, taxes worldwide income and uses a foreign tax credit subject to a limitation to mitigate double taxation of foreign income. The foreign tax credit is elective; a taxpayer elects year-by-year whether to deduct or credit foreign income taxes. If the taxpayer elects to credit foreign income taxes for a year, then no deduction is allowed for creditable foreign income taxes in that year.

5.7.2

---

[66] § 613(b)(6)(A).

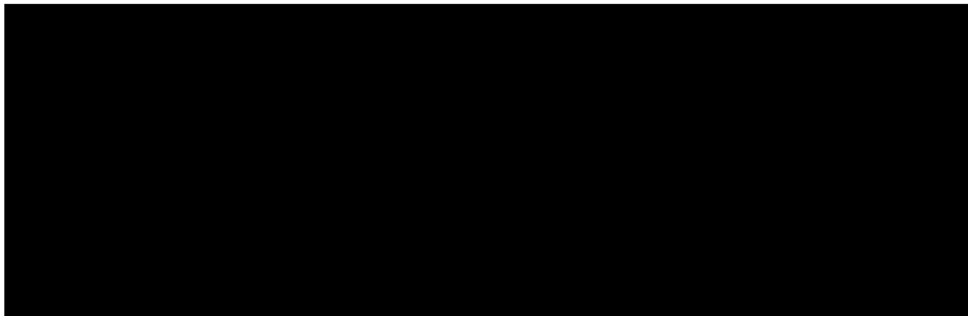
[67] A resident shareholder must report his pro rata share of S corporation income or loss (subject to limitations). N.J. Admin. Code §18:35-1.5(d)(1) .

[68] U.S. Model Income Tax Convention (Feb. 17, 2016), Art. 2(3)(b).

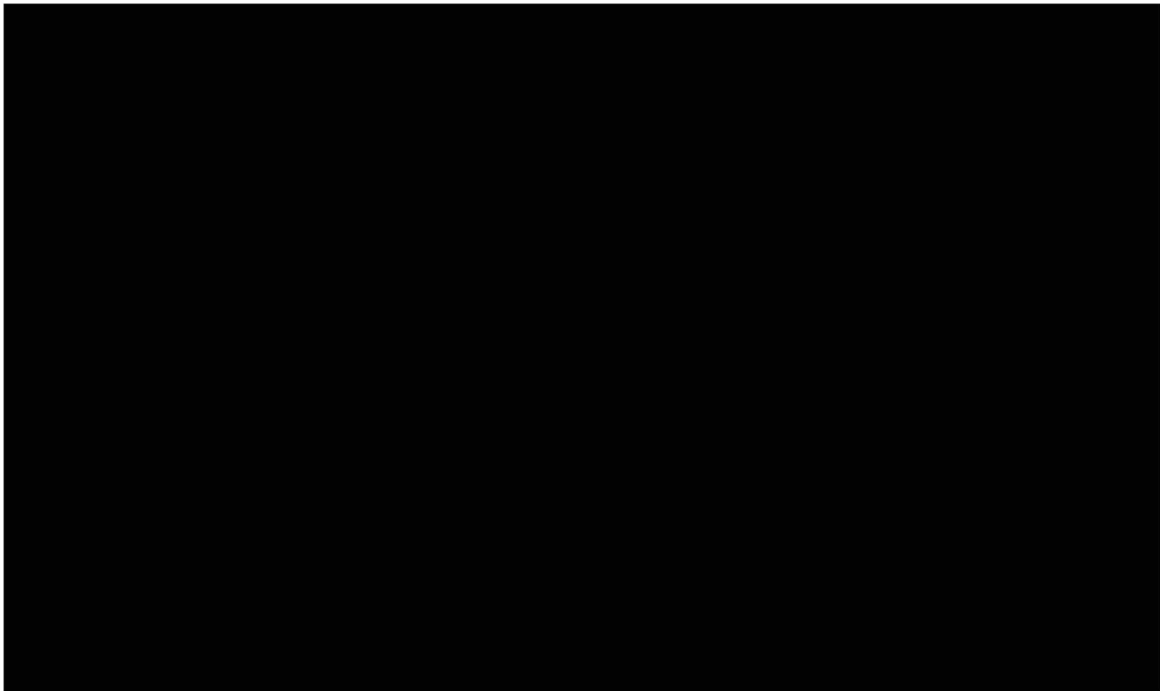
[69] Convention Between Canada and the United States fore the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Taxes on Capital (1980, as amended through 2007), art. II(2)(b).

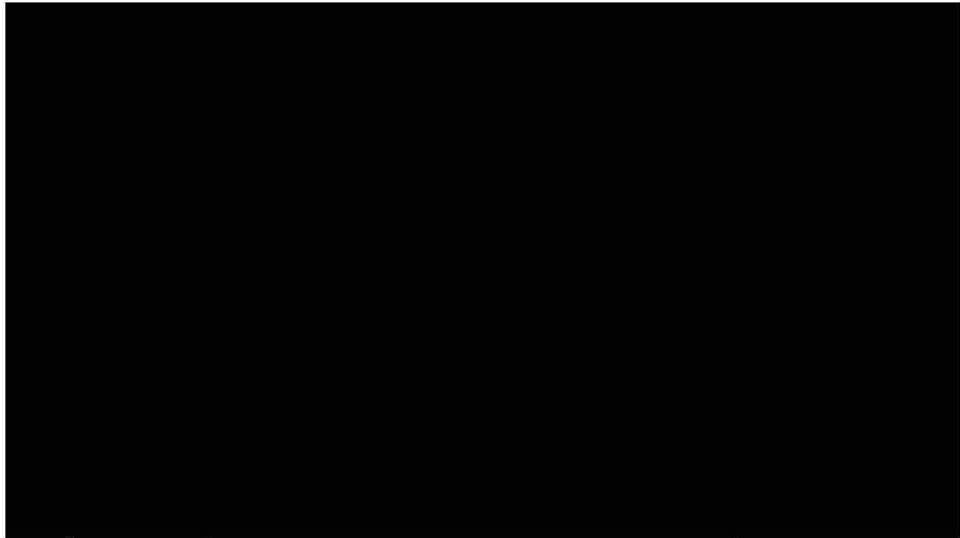
The amount of the credit is subject to the foreign tax credit limitation. That limitation, again, is determined by multiplying the taxpayer's pre-foreign tax credit U.S. tax liability for the year by the ratio of the taxpayer's foreign source taxable income for the year over total taxable income for the year (each determined under U.S. tax principles). While the foreign tax credit and its limitation are determined at the shareholder level, whether the income of an S corporation is foreign source or U.S. source is determined at the S corporation level and then its character passes through to the shareholder.

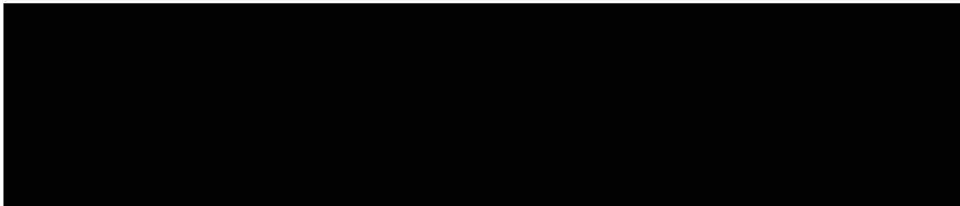
5.7.3 The numerator of the foreign tax credit limitation fraction is foreign source taxable income, which is foreign source gross income reduced by allocable expenses, each determined under U.S. tax principles.



[70] IRC §§ 901, 903. Canadian Federal and provincial income and withholding taxes are creditable income taxes



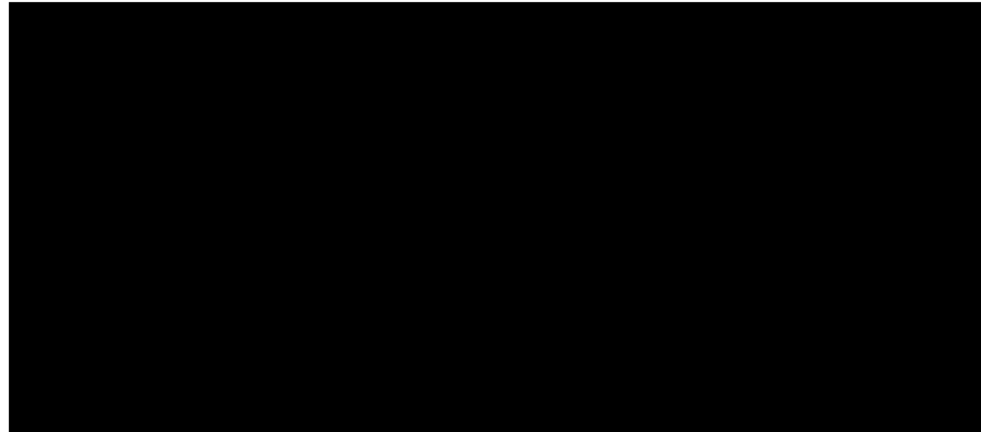
5.7.4 

5.7.5 

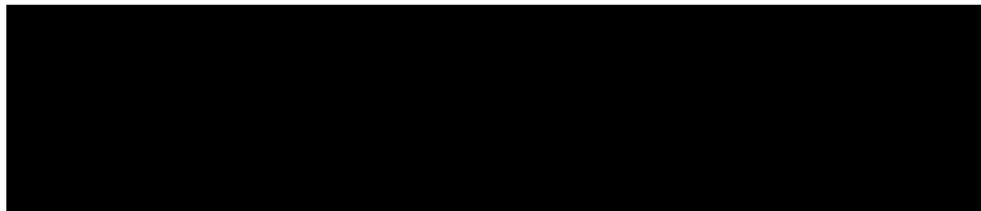
[71] IRC § 863(b). §§ 865(b)(2), 861(a)(6).

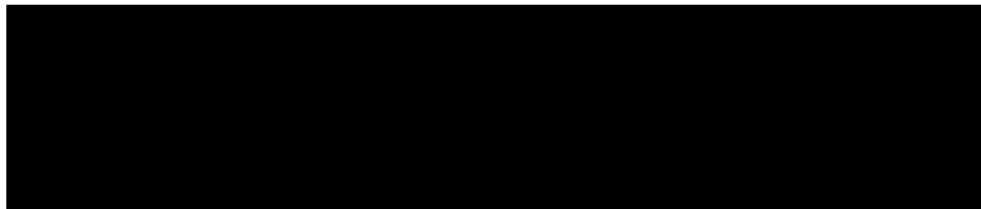
[72] Reg. § 1.863-1(b)(1).

[73] Reg. § 1.863-1(b)(1)(ii).

5.7.6 

5.8 Illustrative Example Based on 2017

5.8.1 

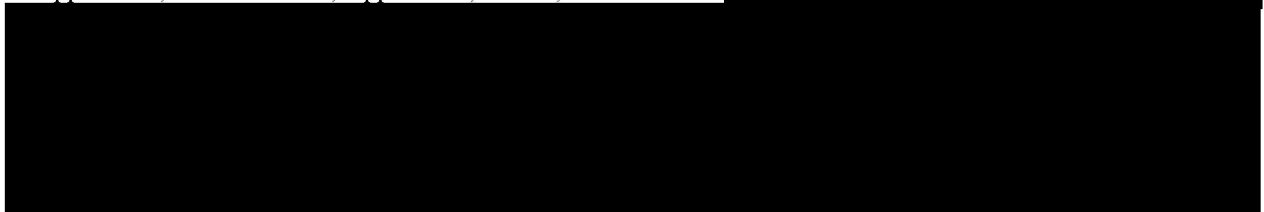
5.8.2 

[74] The *Alice Oldendorff* is a self-unloading bulk carrier. *See* https://www.cslships.com/en/csl-americas/fleet/vessels-and-specs/alice-oldendorff.

[75] Expert Report of FTI Consulting (Howard Rosen), Schedule 1.

[76] Expert Report of FTI Consulting (Howard Rosen), Schedule 1 Col. for 2017.

[77] Appendix 2, US Tax Line 1; Appendix 2, US tax, Lines 2 and 3.



[78] Appendix 2, US Tax Lines 4 and 5.

5.8.3

5.8.4

5.8.5

[79] Appendix 2, US Tax, Line 6.
[80] Appendix 2, US Tax, Lines 7, 8 and 9.
[81]
[82]
[83] Appendix 2, US Tax, Line 15.
[84] Appendix 2, US Tax, Line 10.
[85] Appendix 2, Canadian tax, Line 7.
[86] Appendix 2, US Tax, Line 5 and Line 9.
[87] Appendix 2, Canadian tax, Line 4.
[88] Appendix 2, Canadian tax, Line 7.

5.8.6

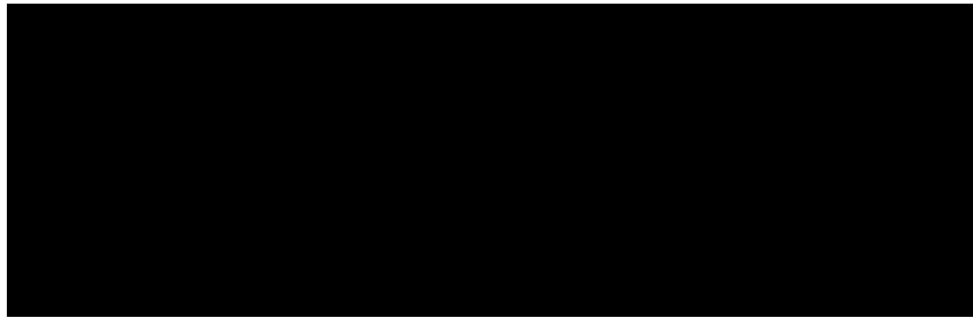
5.8.7

[89]

[90] See IRC § 904(d)(2)(H).

[91] Appendix 2, US Tax Line 12.

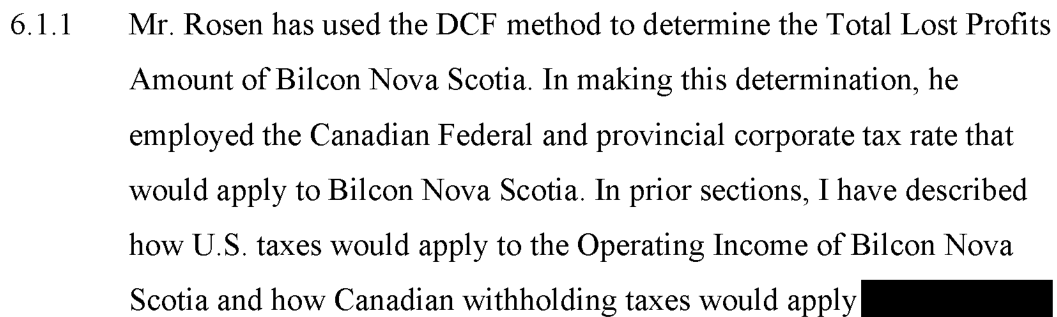
[92]



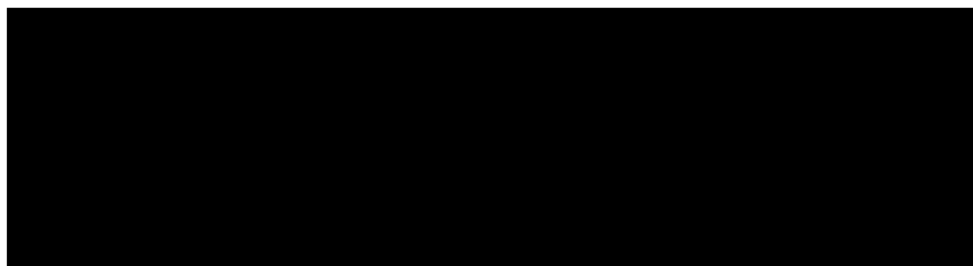
5.8.8 Appendix 2 demonstrates that the Investors will not achieve full reparation of the losses caused by Respondent's breaches unless they receive a damages award in an amount that represents an appropriately "grossed up" amount of the Total Lost Profits Amount calculated by Mr. Rosen.

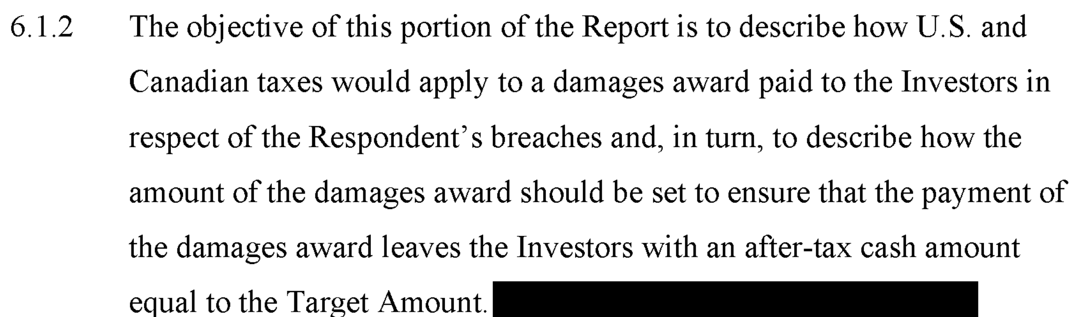
6 U.S. Federal and state taxation of payments of damages.

6.1 Objective of the analysis

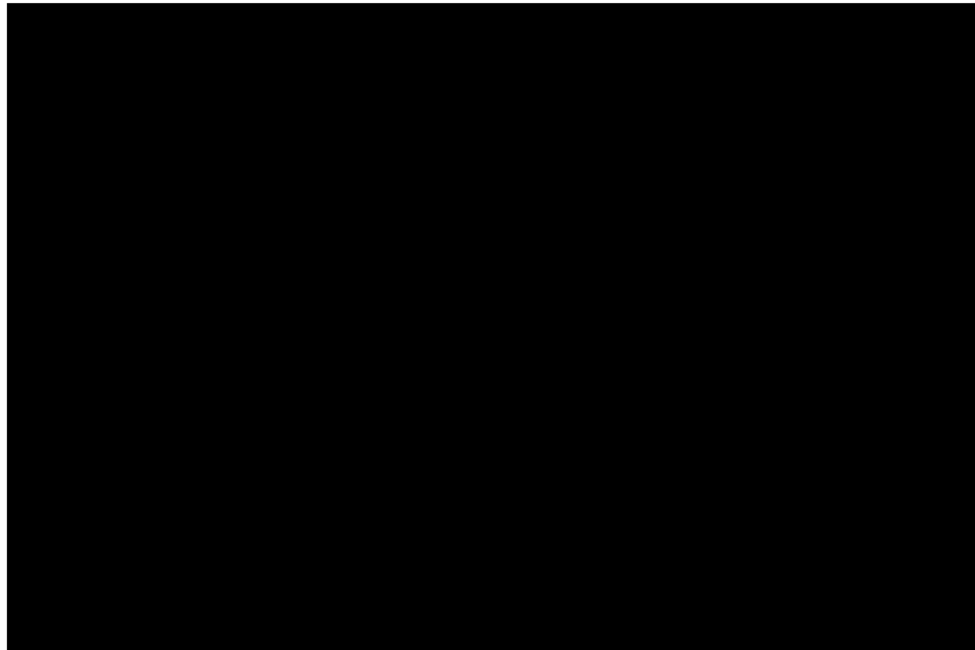


6.1.1 Mr. Rosen has used the DCF method to determine the Total Lost Profits Amount of Bilcon Nova Scotia. In making this determination, he employed the Canadian Federal and provincial corporate tax rate that would apply to Bilcon Nova Scotia. In prior sections, I have described how U.S. taxes would apply to the Operating Income of Bilcon Nova Scotia and how Canadian withholding taxes would apply





6.1.2 The objective of this portion of the Report is to describe how U.S. and Canadian taxes would apply to a damages award paid to the Investors in respect of the Respondent's breaches and, in turn, to describe how the amount of the damages award should be set to ensure that the payment of the damages award leaves the Investors with an after-tax cash amount equal to the Target Amount.



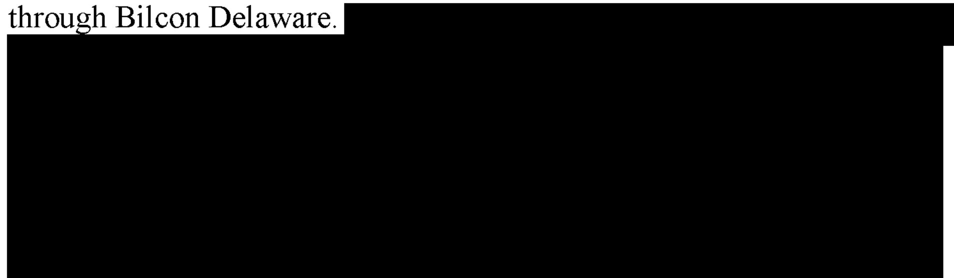
6.2 Taxation of damages in Canada.

6.2.1 Based on advice of Canadian tax counsel, Canada would not impose tax on damages paid to the Investors, including Bilcon Delaware, in respect of the Respondent's breaches.[93]

6.2.2 The same would be true of withholding taxes – Canadian withholding tax would not apply to these damages payments.[94]

6.3 Taxation of damages in the United States.

6.3.1 The parties that today possess an interest in Bilcon Nova Scotia are three of the four individual Investors, each of whom holds his investment through Bilcon Delaware.

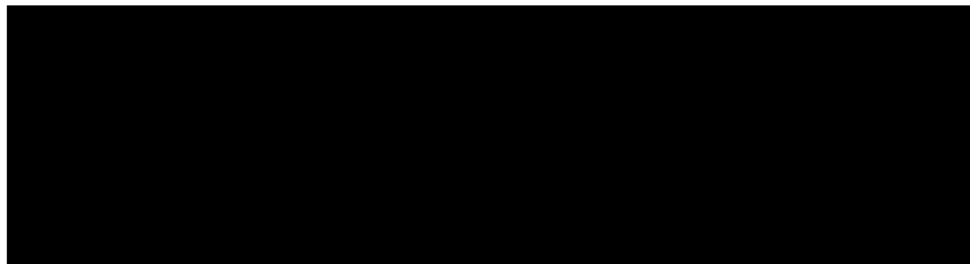


[93] Opinion of Thorsteinssons (Michael Colborne), Response to Question 1.
[94] Opinion of Thorsteinssons (Michael Colborne), Response to Question 2.
[95]

6.3.2 Damages in respect of business losses are generally taxable in the United States, but damages that are for injury to capital assets are excluded from gross income to the extent that the damages are less than the taxpayer's basis in such assets.[96] The manner in which business damages are taxed depends on the nature of the underlying claim. Damages that are received to compensate for lost profits are taxable as ordinary income, but damages that are received for the destruction of a business or a property right would be taxable as capital gain to the extent the damage award exceeds the taxpayer's basis in the asset in question.[97] The default for damages relating to business losses is to be considered ordinary income, and the burden is generally on the taxpayer to prove that such damages are a return of capital and only includable in taxable income to the extent any return exceeds the taxpayer's basis.[98] The test in each case is "[i]n lieu of what were the damages awarded" – if the suit is meant to recover lost profits, ordinary income treatment is appropriate; if the suit is meant to recover for injury to good will or a business, then return of capital treatment is appropriate.[99]

6.3.3 As described in the Investors' Damages Memorial, the damages are in respect of lost profits. Accordingly, the damages award would most appropriately be taxed as ordinary income.

6.4 U.S. Federal and State taxation of damages amounts.

6.4.1 

---

[96] § 61.

[97] *See Swastika Oil & Gas Co. v. Com*, 123 F.2d 382 (6th Cir. 1941); *Taracido, Joseph G. Est.*, 72 T.C. 1014 (1979); *Biocraft Laboratories Inc.*, T.C. Memo 1980-268 (1980); *Benton, Thaddeus G.*, T.C. Memo 1962-292 (1962); FSA 948, Vaughn # 948; and *Raytheon Production Corp. v. Commissioner*, 144 F.2d 110 (1st Cir. 1944).

[98] *See H. Liebes & Co. v. Commissioner*, 90 F.2d 932 (9th Cir. 1937), affg. 34 B.T.A. 677 (1936).

[99] *See Raytheon*, 144 F.2d at 113.

6.4.2

These differences cause the overall effective rate of tax on a damages payment to be higher than the overall effective tax rate on Operating Income. More important for the present proceeding, this difference in effective tax rates means that Investors would not receive full reparation on an after-tax basis if the amount of the damages award were set equal to the Total Lost Profits Amount.

6.5 Adjustment of Operating Income to reach Appropriate Damages Amount.

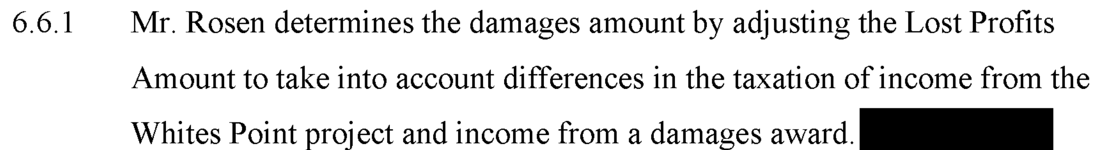
6.5.1

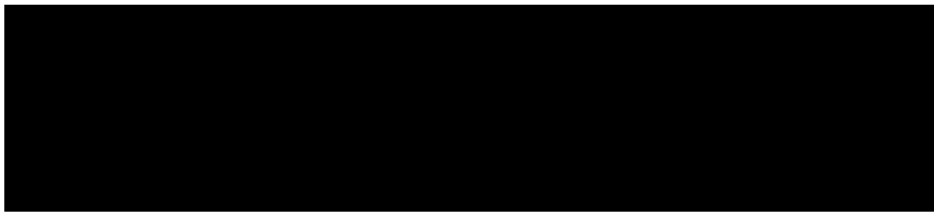
6.5.2

6.5.3

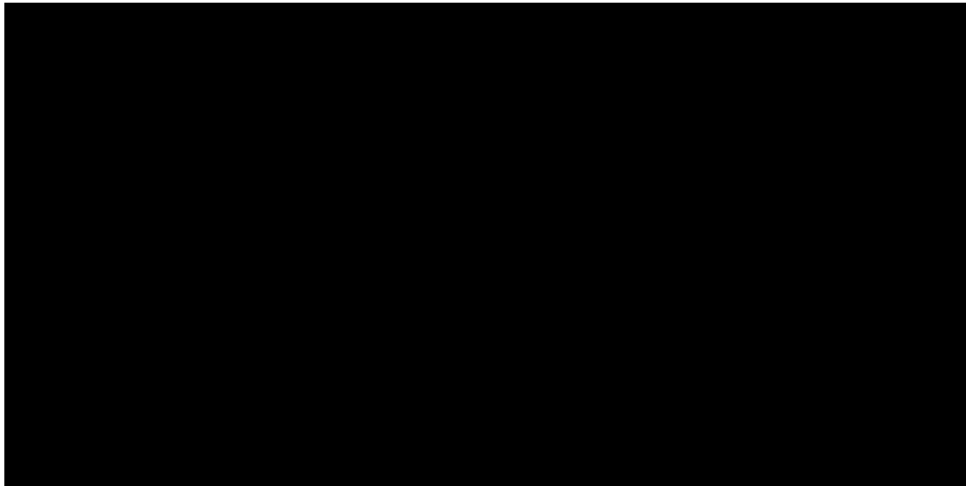
6.6 Adjustment of Lost Profits Amount to reach the Appropriate Damages Amount.

6.6.1 Mr. Rosen determines the damages amount by adjusting the Lost Profits Amount to take into account differences in the taxation of income from the Whites Point project and income from a damages award.

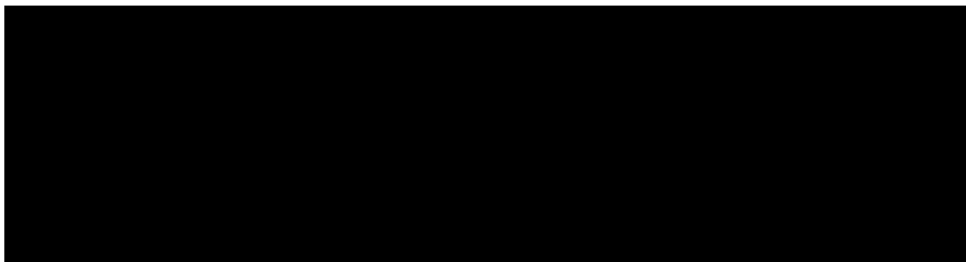




6.6.2



6.6.3



[100] Appendix 2, US Tax, Line 15, Cols 2 – 4.

[101] Appendix 2, US Tax, Line 1, Col 3.

[102] Appendix 2, LPA Gross-up to Appropriate Damages Amount, Line 1, Col 3 and Line 12, Col 1.

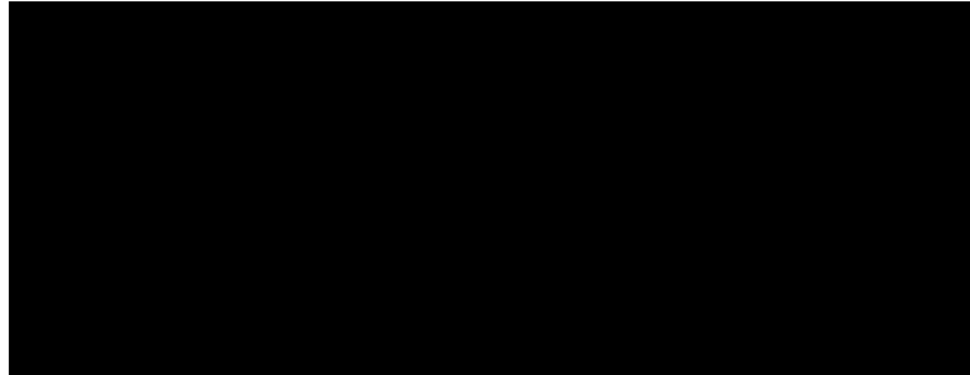
6.6.4

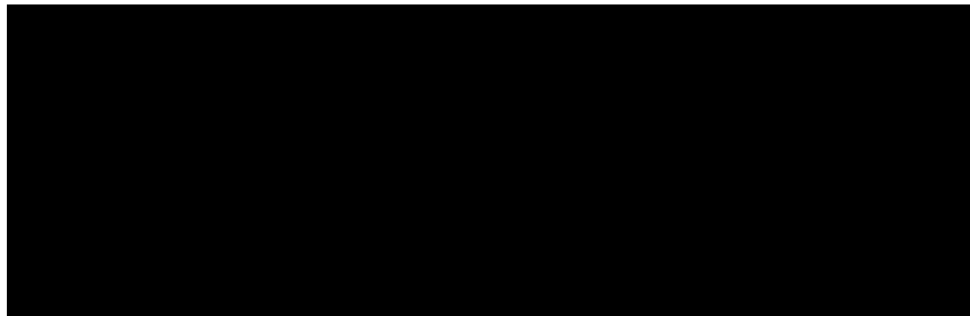
6.6.5

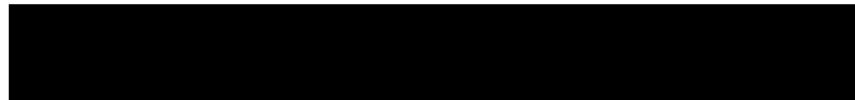
6.6.6

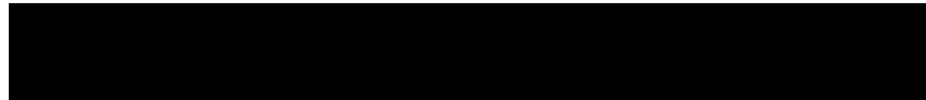
[103] Appendix 2, LPA Gross-up to Appropriate Damages Amount, Line 6, Col 2.
[104] Appendix 2, LPA Gross-up to Appropriate Damages Amount, Line 8, Col 2..
[105] Appendix 2, US Tax, Line 14.
[106] Appendix 2, US Tax, Line 1, Col 1.

6.6.7

6.6.8 

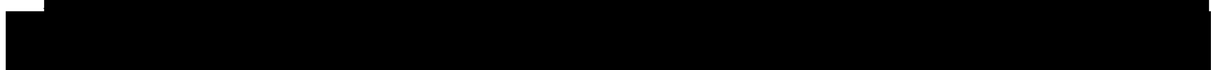
6.6.9 

6.6.10 

6.6.11 

[107] Appendix 2, US Tax, Line 11, Col 2.

[108] Appendix 2, US Tax, Line 11, Col 2 compared to Line 11, Col 4.

[109] 

[110] Appendix 2, US Tax, Line 13, Col 2.

6.6.12

6.6.13

6.6.14

[111] Appendix 2, US Tax Line 15, Col 2.
[112] Appendix 2, US Tax Line 15, Col 1.
[113] Appendix 2, US Tax Lines 4 and 5, Col 1.
[114] One minus the amount shown in Appendix 2, US Tax Line 15, Col 1.
[115] One minus the amount shown in Appendix 2, US Tax Line 15, Col 2.

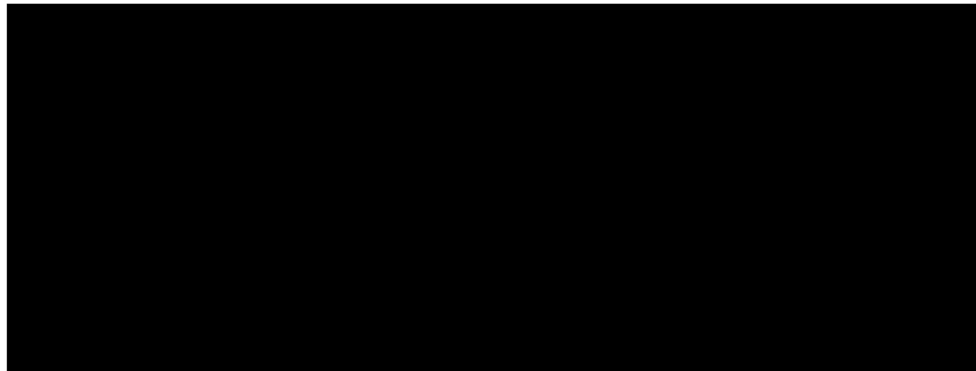
6.6.15

6.6.16

6.6.17

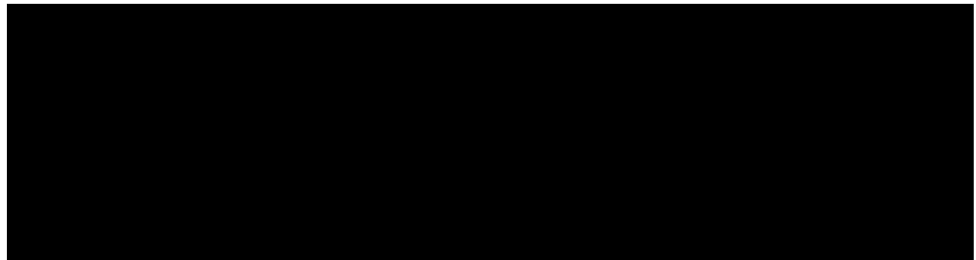
[116] Appendix 2, US Tax Line 11, Col 3.
[117] Appendix 2, LPA Gross-up to Appropriate Damages Amount, Line 11.
[118] Appendix 3, US Tax Line 10c.
[119] Appendix 3, LPA Gross-up to Appropriate Damages Amount, Line 11.

6.6.18



6.7 Adjusting the Total Lost Profits Amount

6.7.1



6.7.2 The analysis shown in Appendix 4 reaches a gross up to the Total Lost Profits Amount of approximately 146%.[123] It must be emphasized that any analysis of this nature is sensitive to assumptions and there is a false precision in arriving at a single number for a gross up. The Tribunal, however, must reach a number. It is noteworthy that my gross-up ratio of 146% is consistent with Mr. Rosen's gross up of 148%.

---

[120] Appendix 3, LPA Gross-up to Appropriate Damages Amount, Line 11 Col 1 and Line 12 Col 1.

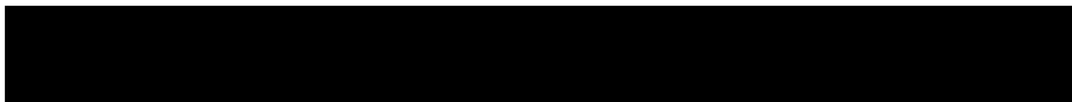
[121] Sum of amounts shown in Rosen Expert Report, Sch. 1 (Row 45).

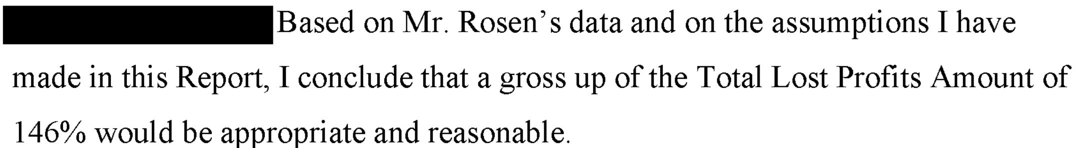
[122]

[123] Appendix 4, Total LPA Gross-up to Appropriate Damages Amount, Line 12, Col 1.

7 **Conclusions**.

7.1 In this Report I describe the key elements in and the principal differences between the taxation of Operating Income from the Whites Point Project and a payment of damages with respect to the loss of such Operating Income resulting from Respondent's breach. In my opinion, the Total Lost Profits Amount would have to be adjusted to result in an after-tax damages amount that is equivalent to what would have been received had the Investors been allowed to earn Operating Income from conducting the Whites Point project.

7.2 

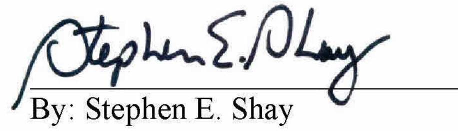

Based on Mr. Rosen's data and on the assumptions I have made in this Report, I conclude that a gross up of the Total Lost Profits Amount of 146% would be appropriate and reasonable.

8 **Expert declaration**.

8.1 I affirm my genuine belief in the opinions expressed in this Report.

8.2 I reserve the right to update or modify this Report for additional information that may come to my attention, including information that was unavailable as of the date of this Report.

Executed this 19th day of August, 2017 at Cambridge, Massachusetts, United States.



By: Stephen E. Shay

APPENDIX 1

STEPHEN E. SHAY

Senior Lecturer on Law

Langdell 337

Harvard Law School

1575 Massachusetts Avenue

Cambridge, MA 02138

Telephone: (617) 384-5311

E-mail: sshay@law.harvard.edu

Stephen E. Shay is a Senior Lecturer on Law at Harvard Law School since 2015.

Before joining the Harvard Law School faculty as a Professor of Practice in 2011, Mr. Shay was Deputy Assistant Secretary for International Tax Affairs in the United States Department of the Treasury. Prior to re-joining the Treasury Department in 2009, Mr. Shay was a tax partner for 22 years with Ropes & Gray, LLP. Mr. Shay served in the Office of International Tax Counsel at the Department of the Treasury, including as International Tax Counsel, from 1982 to 1987, during which Mr. Shay actively participated in the development and enactment of international provisions in the Tax Reform Act of 1986.

Mr. Shay has published scholarly and practice articles relating to international taxation, and testified for law reform before Congressional tax-writing committees. Mr. Shay has served as an expert consultant to the International Monetary Fund on tax policy missions to Uganda and Kenya. He has had extensive practice experience in the international tax area and while in active practice was recognized as a leading practitioner in Chambers Global: The World's Leading Lawyers, Chambers USA: America's Leading Lawyers, The Best Lawyers in America, Euromoney's Guide to The World's Leading Tax Advisers and Euromoney's, Guide to The Best of the Best. Mr. Shay discloses certain related interests and activities not connected with his position at Harvard Law School on the Harvard Law School website.

Mr. Shay is a past President of the American Tax Policy Institute Board of Trustees and was the IBFD Professor in Residence for 2015. Mr. Shay serves on the Executive Committee of the New York State Bar Association Tax Section and has been active in the American Bar Association Tax Section as a Council Director and Chair of the Committee on Foreign Activities of U.S. Taxpayers, in the American Law Institute as an Associate Reporter and in the Taxes Committee of the International Bar Association. Mr. Shay is a 1972 graduate of Wesleyan University, and he earned his J.D. and his M.B.A. from Columbia University in 1976.

EXPERIENCE

Senior Lecturer on Law 2015 - present
Professor of Practice 2011 – 2015
Harvard Law School, Cambridge, MA

Professor-in-Residence 2015
International Bureau of Fiscal Documentation, Amsterdam

Deputy Assistant Secretary, International Tax Affairs 2009 - 2011
U.S. Department of the Treasury, Washington, DC

Partner 1987 – 2009
Ropes & Gray, LLP, Boston, MA

International Tax Counsel, Deputy International Tax Counsel,
Associate International Tax Counsel, Attorney Advisor 1982 – 1987
U.S. Department of the Treasury, Washington, DC

Associate Attorney 1979 – 1981
Coudert Brothers, New York, NY

Associate Attorney 1976 – 1979
Reavis & McGrath, New York, NY

TEACHING EXPERIENCE AND COURSES

Senior Lecturer; Professor of Practice 2011 – present
Harvard Law School, Cambridge, MA

Courses:

- Taxation – 4 credits
- International Aspects of U.S. Federal Income Taxation – 4 and 3 credits Seminar in Tax Law, Policy and Practice (Co-taught with Daniel Halperin) – 1 credit
- Problem Solving Workshop (One section of required first year January term course teaching 6 practice-oriented case studies) – 2 credits
- First year reading group: The Federal Tax System and the U.S. Social Safety Net – Non-credit
- Upper class reading group: The Architecture of International Taxation

Lecturer in Law 2002 – 2003, 2005 – 2008
Harvard Law School, Cambridge, MA

Course: International Aspects of U.S. Federal Income Taxation

Jacquin D. Bierman Visiting Lecturer in Taxation 2004
Yale Law School

Course: International Aspects of U.S. Federal Income Taxation

EDUCATION

Columbia University School of Law and School of Business, New York, NY
J.D. and M.B.A., 1976

Wesleyan University, Middletown, B.A., 1972

Publications

IFA Cahiers 2017 - Volume 102A: *Assessing BEPS: Origins, Standards, and Responses* – General Report (Co-General Reporter with Allison Christians)

Getting From Here to There: The Transition Tax Issue, 154 Tax Notes 69 (April 3, 2017) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

Defending Worldwide Taxation and Addressing Inversions with a Shareholder-Based Definition of Corporate Residence, 6 Brigham Young University Law Review 1681 (2017) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

R&D Tax Incentives – Growth Panacea or Budget Trojan Horse? 69 Tax Law Rev. 501 (2016)) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

Two Cheers for the Foreign Tax Credit, Even in the BEPS Era, 91 *Tulane Law Review* 1 (2016) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

An Overview of Transfer Pricing In Extractive Industries (Chapter 6 in Philip Daniel, Michael Keen and Artur Swistak (eds.), International Taxation and the Extractive Industries (Routledge 2016)

Treasury's Unfinished Work On Corporate Expatriations, 150 Tax Notes 933 (Feb. 22, 2016) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

Designing a 21st Century Corporate Tax — An Advance U.S. Minimum Tax On Foreign Income and Other Measures to Protect the Base, 17 Fla. Tax Rev. 669 (2015) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

Getting Serious About Cross-Border Earnings Stripping: Establishing an Analytical Framework, 93 N. C. Law Rev. 673 (2015) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

The Truthiness of "Lockout:" A Review of What We Know, 146 Tax Notes 1393 (Mar. 16, 2015)

Lessons the United States Can Learn From Other Countries' Territorial Systems for Taxing Income of Multinational Corporations, Urban Institute Tax Policy Center (Jan. 21, 2015) (with Rosanne Altshuler and Eric Toder)

Formulary Apportionment in the U.S. International Income Tax System: Putting Lipstick on a Pig? 36 Mich. J. Int'l Law 1 (2014) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

Mr. Secretary, Take the Tax Juice Out of Corporate Expatriations, 144 Tax Notes 473 (2014)

Base Erosion and Profit Shifting: A Roadmap for Reform, 68 Bul. Int'l Tax'n 275 (2014) (with Hugh J. Ault and Wolfgang Schon)

Theory, Complications, and Policy: Daniel Shaviro's Fixing U.S. International Taxation, Jerusalem Rev. Legal Stud. (2014)

Territoriality in Search of Principles: The Camp and Enzi Proposals, 141 TAX NOTES 173 (2013) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

Preface, Yariv Brauner and Miranda Stewart, eds. (2013) TAX LAW AND DEVELOPMENT (Edward Elgar: Cheltenham, UK)

Designing a U.S. Exemption System for Foreign Income When the Treasury is Empty, 13 FLA. TAX REV. 397 (2012) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

Daunting Fiscal and Political Challenges for U.S. International Tax Reform, BULL. FOR INT'L TAX'N 229 (2012)

Jobs, Deficit Reduction, Revenues and Fundamental Tax Reform, 133 TAX NOTES 213 (2011)

Worse Than Exemption, 59 EMORY LAW J. 79 (2009) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

Commentary: Ownership Neutrality and Practical Complications, 62 TAX LAW REV. 401 (2009).

American Bar Association Tax Section, Task Force on International Tax Reform, *Report of the Task Force on International Tax Reform*, 59 TAX LAWYER 649 (2006) (principal draftsman)

The David R. Tillinghast Lecture: 'What's Source Got to Do With It?' Source Rules and U.S. International Taxation, 56 TAX LAW REV. 81 (2003) (with Robert J. Peroni and J. Clifton Fleming, Jr.)

Reform and Simplification of the U.S. Foreign Tax Credit Rules, 31 TAX NOTES INT'L 1145 (2003) and 101 TAX NOTES 103 (2003) (with Robert J. Peroni and J. Clifton Fleming, Jr.)

Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income, 5 FLA. TAX REV. 299 (2001) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

An Alternative View of Deferral: Considering a Proposal to Curtail, Not Expand, Deferral, 20 TAX NOTES INT'L 547 (2000) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

Deferral: Consider Ending It, Instead of Expanding It, 86 TAX NOTES 837 (2000) (with J. Clifton Fleming, Jr. and Robert J. Peroni)

Taking Territorial Taxation to Task, 20 TAX NOTES INT'L 1178 (2000) (with Robert J. Peroni and J. Clifton Fleming, Jr.)

Qualified Intermediary Status, Act III: Rev. Proc. 2000-12's Final Qualified Intermediary Agreement and Amendments to Final Withholding Rules, 29 TAX MGMT. INT'L J. 403 (2000) (with Susan C. Morse and Christopher J. Peters)

Getting Serious About Curtailing Deferral of U.S. Tax on Foreign Source Income, 52 SMU LAW REV. 455-530 (1999) (with Robert J. Peroni and J. Clifton Fleming, Jr.)

Qualified Intermediary Status: A New Withholding Role for Foreign Financial Institutions Under Final U.S. Withholding Regulations, 27 TAX MGMT INT'L J. 3 (1998) (with Susan C. Morse)

Selected International Aspects of Tax Reform Proposals, 51 U. MIAMI L. REV. 1029 (1997) (with Victoria P. Summers), *reprinted in* A Comprehensive Analysis of Current Consumption Tax Proposals (American Bar Association, 1997)

Revisiting U.S. Anti-Deferral Rules, TAXES (1996)

Taxation Policy, (with Elinore J. Richardson), in Pritchard, ed., Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement Foreign Investment and the Rule of Law in a New Era, (Kluwer 1996)

IRS Makes Flip Transactions Taxable, 5 INT'L TAX REV. 17 (1994)

Re-examining Chapter 3 Income Tax Withholding and the Role of the Withholding Agent, Alpert and van Raad, eds., Essays on International Taxation (Kluwer 1993)

Final Section 367(e) Regs. Improve on Temp. Regs., But Policy Concerns Remain, 4 J. INT'L TAX'N 244 (1993)

Final Dual Consolidated Loss Regs. Still Have Some High Hurdles, 4 J. INT'L TAX'N 52 (1993) (with Rom P. Watson)

Dispute Resolution Faces Numerous Obstacles, 3 INT'L TAX REV. 15 (1992)

The American Law Institute, Federal Income Tax Project - United States Income Tax Treaties (American Law Institute 1992) (Associate Reporter to Reporters David R. Tillinghast, Esq. and Professor Hugh J. Ault)

Section 864(e) and the Allocation of Expenses Under the Temporary Regulations, 18 TAX MGMT. INT'L J. 239 (1989)

The Post-TAMRA Treatment of U.S. Shareholders of PFICs: Part I, 70 J. TAX'N 296 (1989)

The Post-TAMRA Treatment of U.S. Shareholders of PFICs: Part II, 70 J. TAX'N 374 (1989)

Section 864(e) and the Allocation and Apportionment of Interest Expense Under the Proposed Regulations," 17 TAX MGMT. INT'L J. 51 (1988)

The Controversial CFC Interest Netting Rule in the Proposed Interest Allocation Regulations, 17 TAX MGMT. INT'L J. 25 (1988)

Testimony (As Private Witness) Before Congress and Presidential Advisory Panel

Committee on Finance, U.S. Senate, Hearing on Building a Competitive U.S. International Tax System (March 17, 2015)

Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Hearing on Offshore Profit Shifting and the Internal Revenue Code – Part II (Apple Inc.) (May 21, 2013)

Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Hearing on Offshore Profit Shifting and the Internal Revenue Code – Part I (Microsoft and HP) (Sept. 20, 2012)

Subcommittee on Select Revenue Measures of the Ways and Means Committee, U.S. House of Representatives, Hearing on Issues Involving Banking Secrecy Practices And Wealthy American Taxpayers (March 31, 2009)

Committee on Finance, U.S. Senate, Hearing on the Foundation of International Tax Reform: Worldwide, Territorial, and Something in Between (June 26, 2008)

Committee on Ways and Means, U.S. House of Representatives, Hearing on Fair and Equitable Tax Policy for America's Working Families (September 6, 2007)

Subcommittee on Select Revenue Measures of the Ways and Means Committee, U.S. House of Representatives, Hearing on U.S. International Competitiveness (June 23, 2006)

President's Advisory Panel on Federal Tax Reform, Panel on International Income Taxation (May 13, 2005)

Committee on Finance, United States Senate, Hearing on International Competitiveness (July 16, 2003)

Committee on Ways and Means, U.S. House of Representatives, Hearing on WTO Extraterritorial Income Decision (February 28, 2002)

Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, Hearing on Expatriates (March 27, 1995)

Named Lectures and Seminars

The David R. Tillinghast Lecture on International Taxation, New York University (2001): "What's Source Got to Do With It? Source Rules and U.S. International Taxation"

The Fourth Richard Crawford Pugh Lecture on Tax Law and Policy, University of San Diego (2013): "Coherence and International Taxation"

IMF Papers

Uganda, Selected Issues, Issues in International Taxation 2017 (June 2017) (with Victoria Perry and Li Liu)

Kenya, A Review of International Taxation (January 2017) (with Victoria Perry and Li Liu)

Uganda, Tax Policy: Issues in a Changing Economy (July 2011) (with Victoria Perry, Jack Grigg, and Artur Swistak)

Expert Reports and Trial Testimony

Tax Expert for Dell, Inc.: In re: Appraisal of Dell, Inc. (Court of Chancery, State of Delaware (Consolidated, C.A. No.: 9322-VCL) (Report filed 2015)

Tax Expert, confidential arbitration (Permanent Court of Justice, The Hague) (Report filed 2015)

Tax Expert for New Zealand Crown Counsel: Deutsche Finance New Zealand Limited & ANOR V. The Commissioner of Inland Revenue (CIV 2006-404-2535 - High Court of New Zealand, Auckland Registry) (Report filed 2007)

Deutsche (MMKTRPS) Holdings New Zealand Limited & ORS v. The Commissioner of Inland Revenue (CIV 2007-404-367 - High Court of New Zealand, Auckland Registry) (Report filed 2007)

BNZ Investments Ltd. V. CIR (HC WN CIV 2004-485-1059) [15 July 2009] Wild J

Tax Expert for Bank of America: Enrico Bondi, Plaintiff, v. Bank of America Corporation (05 CIV 4015 (LAK) - In re Parmalat Securities Litigation)

Tax Expert for RoDa Drilling Company: RoDa Drilling Company et al v. Siegal et al (CIVIL DOCKET FOR CASE #: 4:07-cv-00400-GKF-FHM - U.S. District Court for the Northern District of Oklahoma (Tulsa)) (Report filed 2009)

Amicus Brief

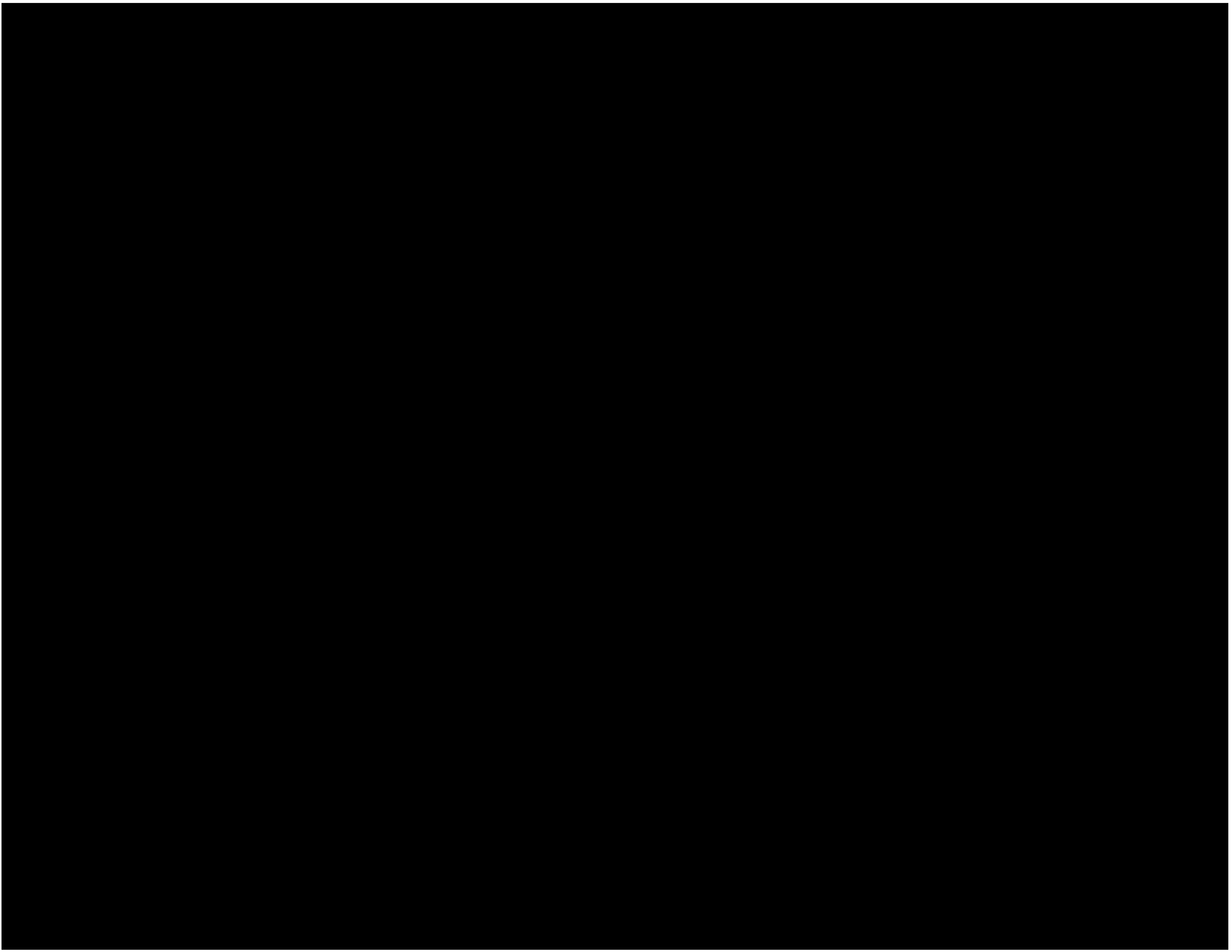
Brief Of Amici Curiae J. Richard Harvey, Leandra Lederman, Ruth Mason, Susan Morse, Stephen Shay And Bret Wells, In Support Of Respondent-Appellant, Altera Corporation and Subsidiaries, Petitioner-Appellee v. Commissioner Of Internal Revenue, Respondent-Appellant, On Appeal to Ninth Circuit Court of Appeals From Decisions of the United States Tax Court (No. 16-70496 and No. 16-70497) (filed July 1, 2016)

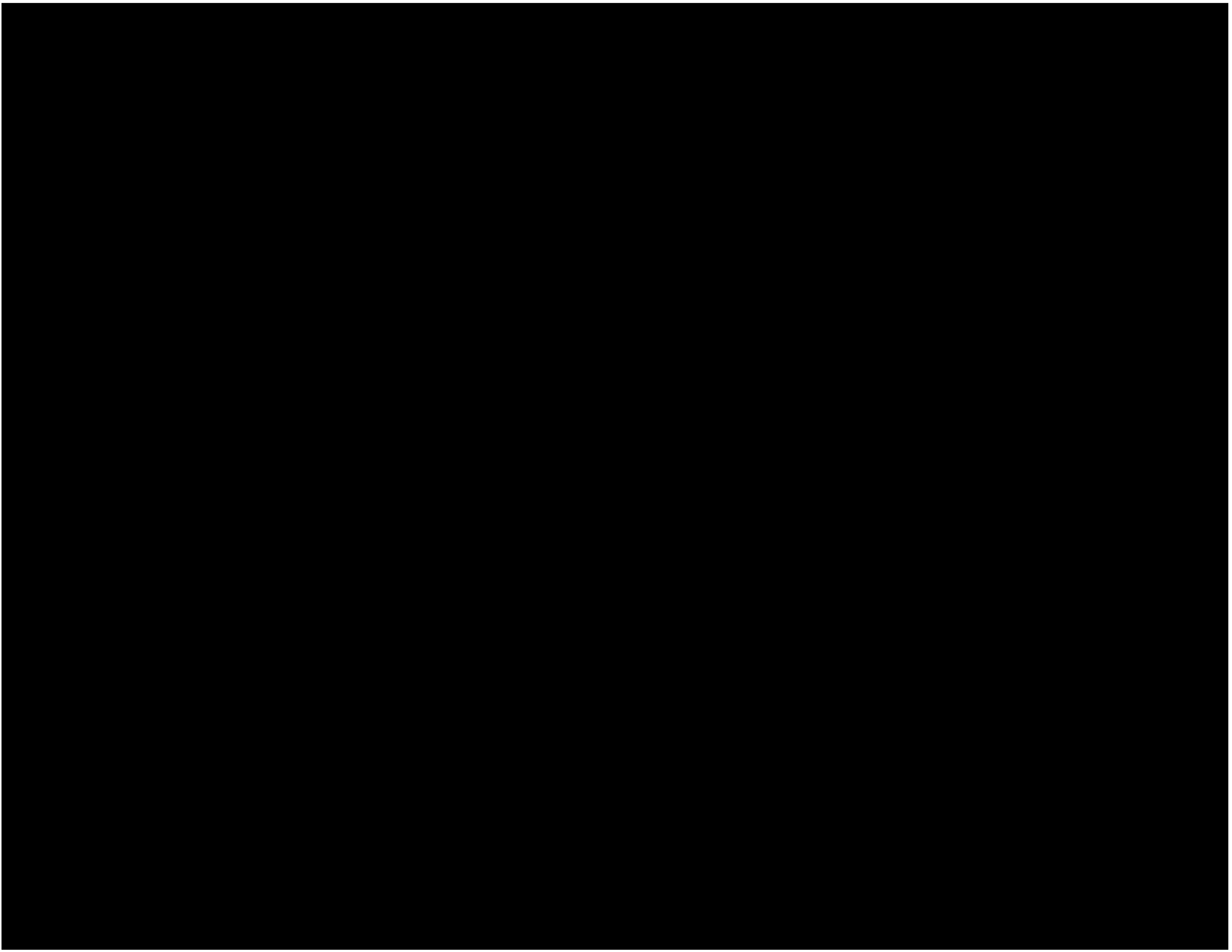
Forthcoming Work and Work in Progress

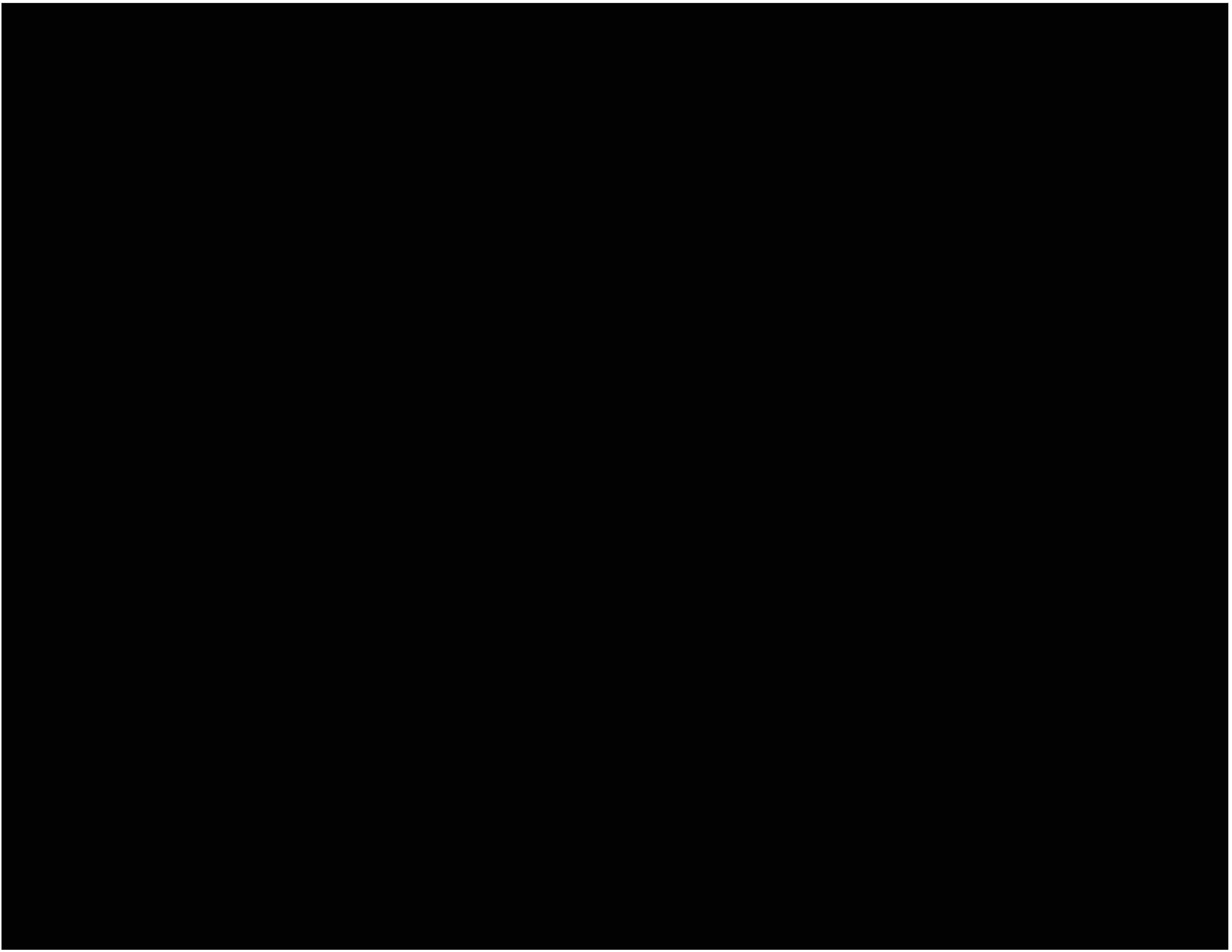
"A Better Way" Business Tax Reform: Moving From Theory to Practice (with J. Clifton Fleming, Jr. and Robert J. Peroni)

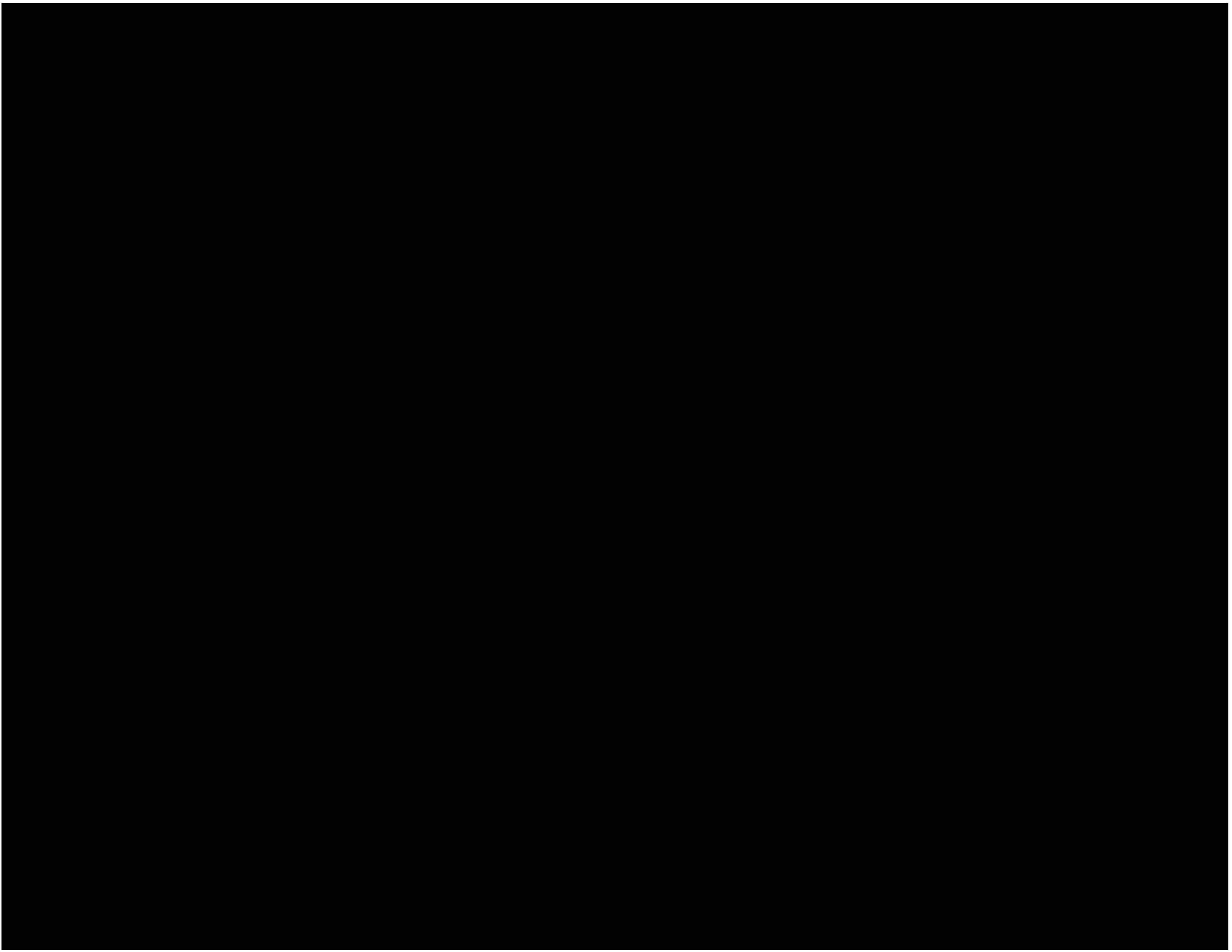
Klaus Vogel Lecture 2017 - "Balancing Competition and Coordination in International Taxation"

APPENDIX 2

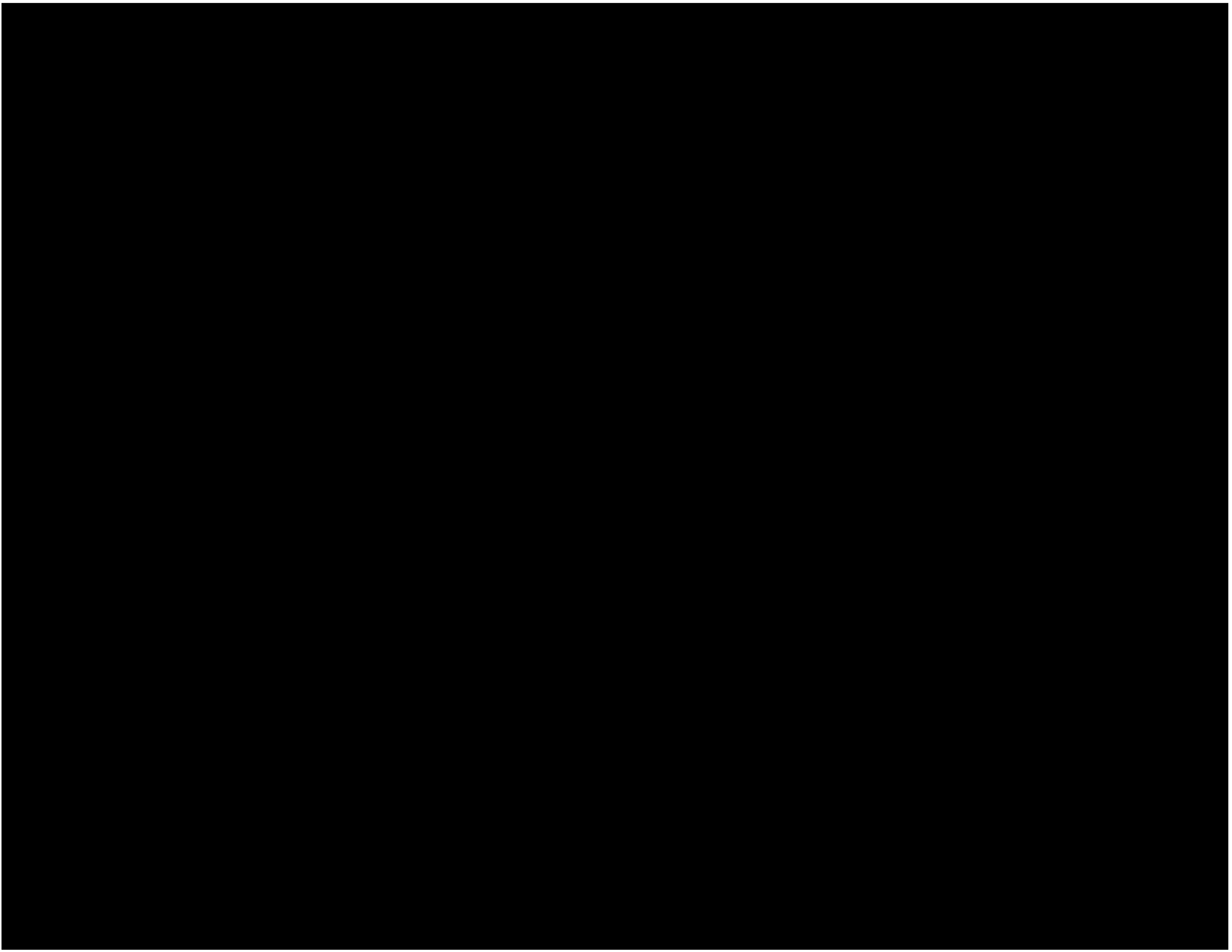


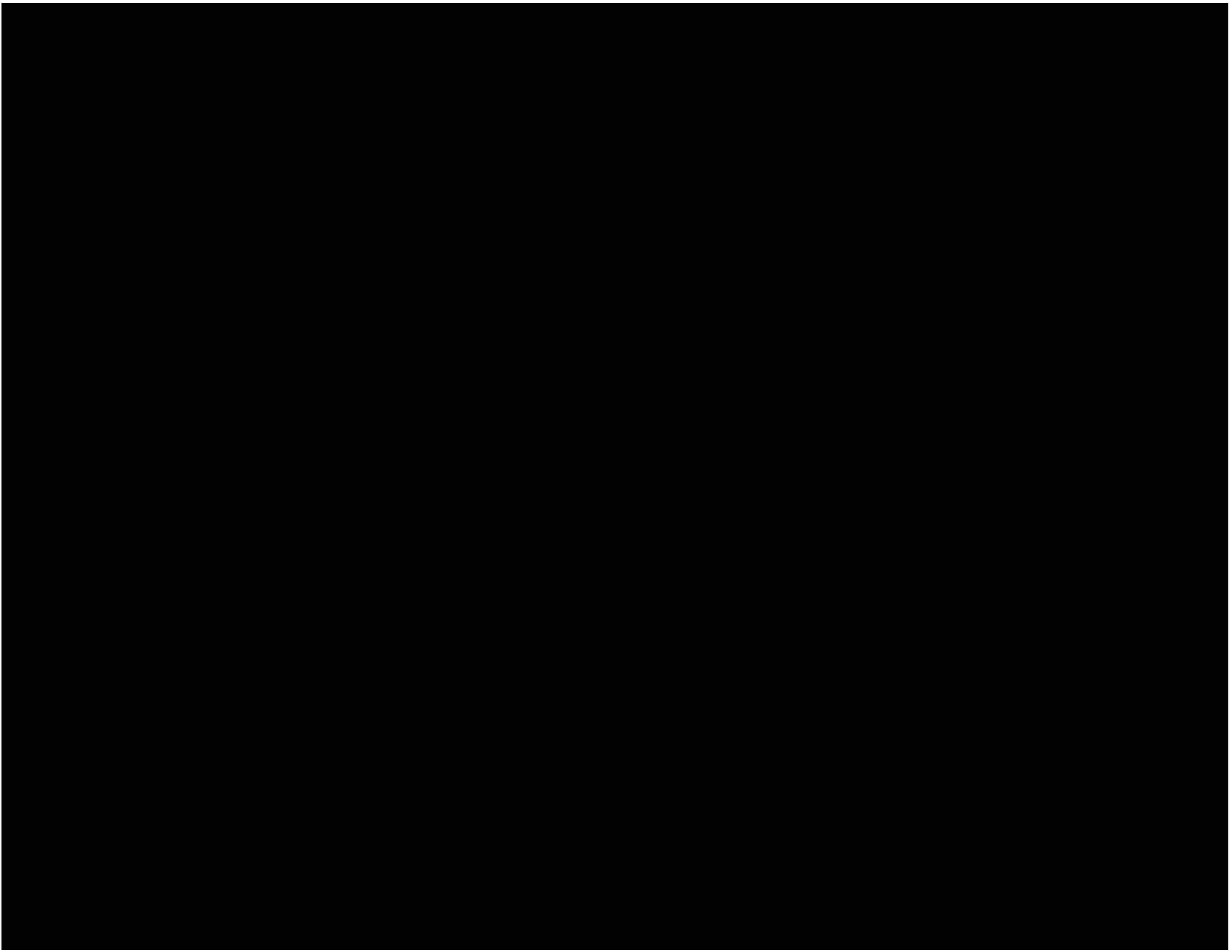


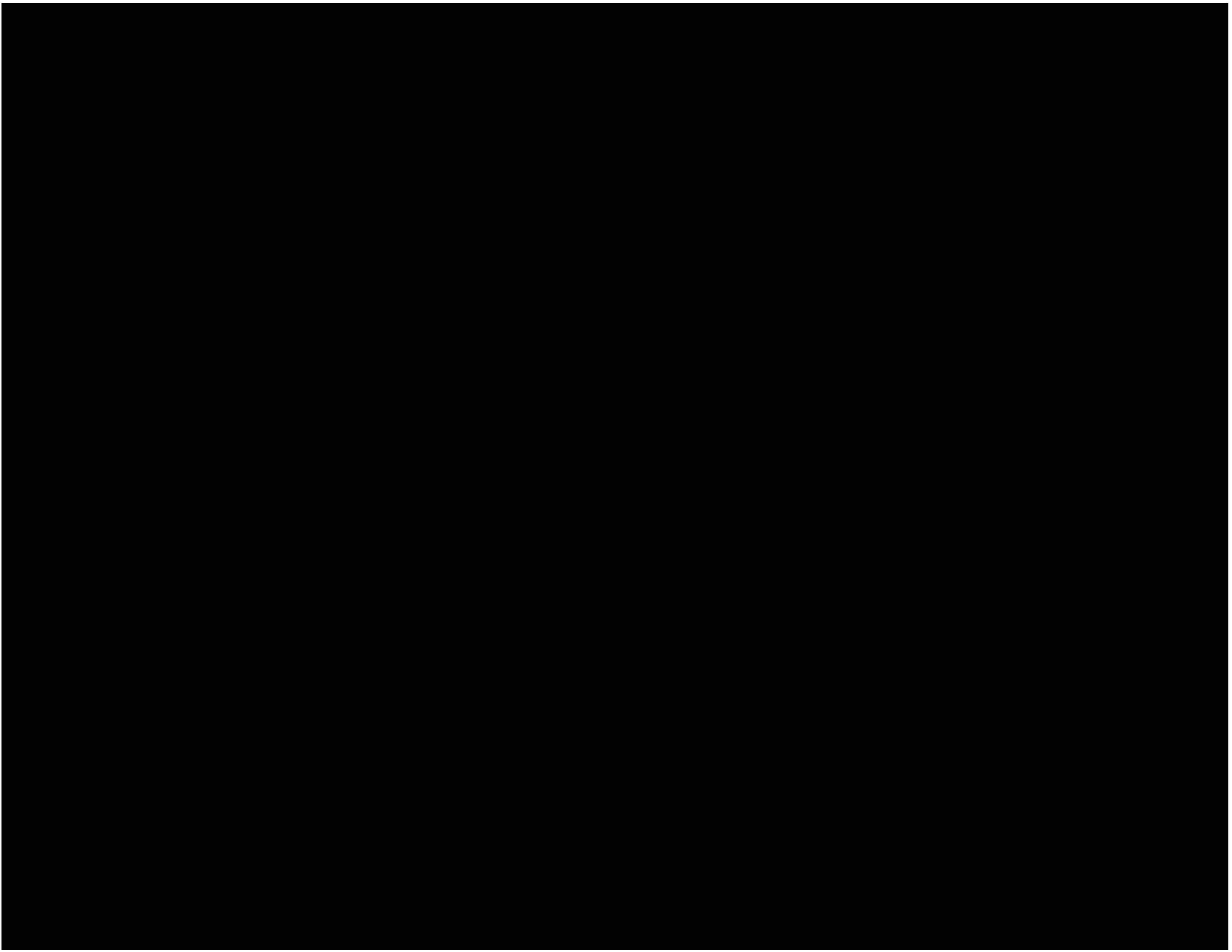


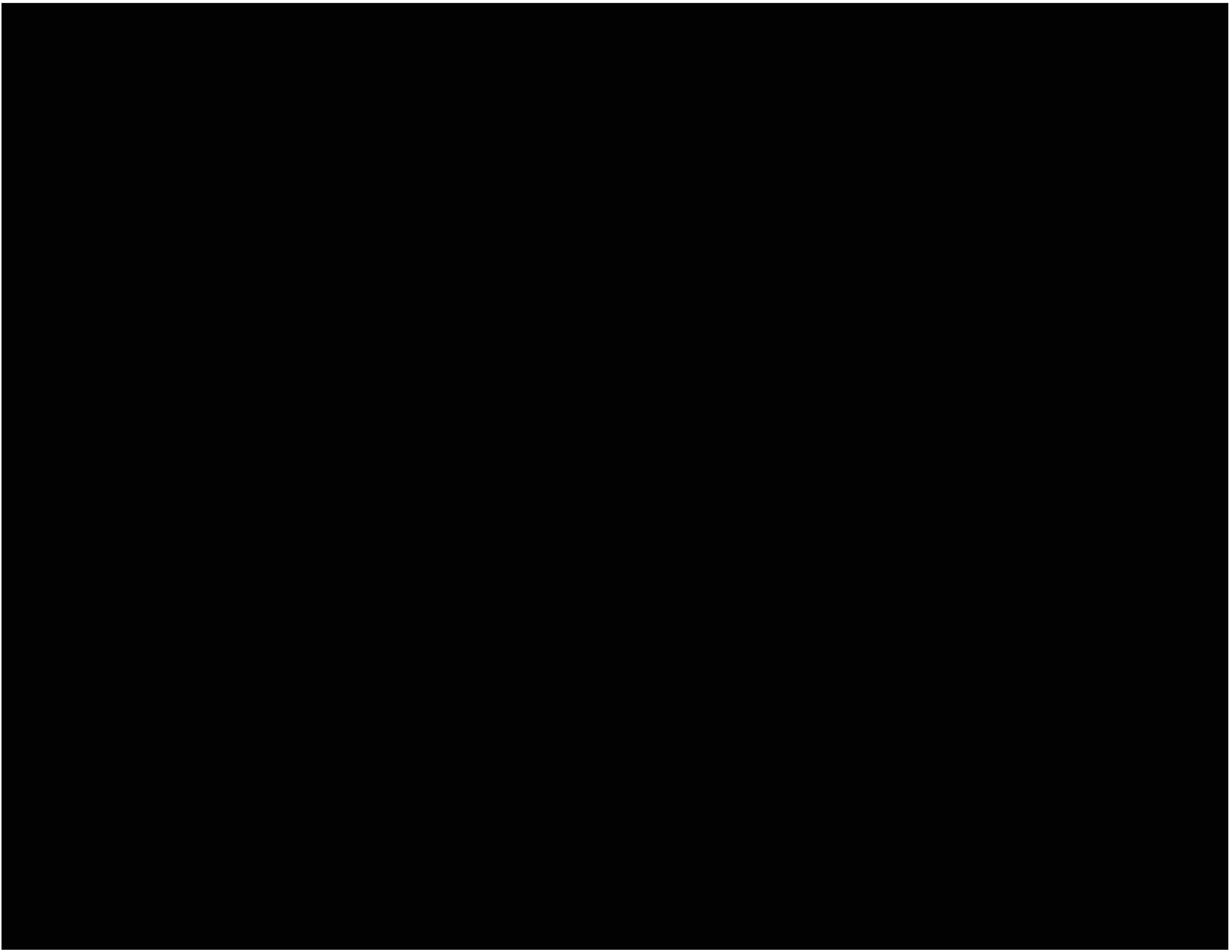


APPENDIX 3









APPENDIX 4