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

INVESTORS' REPLY DAMAGES MEMORIAL

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I. INTRODUCTION

1. If the Investors had received fair and equitable treatment, without discrimination, they would be operating the Whites Point Quarry successfully and profitably today. All of the overwhelming evidence in this case proves this to be true.

2. The Investors' claim is rooted in fact, and grounded in reality. In sharp contrast, Canada's Counter-Memorial is based on hypothetical speculation and abstract theory devoid of reality. Canada presents no evidence of any consequence to counter the Investors' claim. Instead, Canada relies on fiction, conjecture, misinformation, false projections, and artificial, speculative estimations.

3. Canada's experts ignore the real evidence, which demonstrates beyond doubt the true value of the Whites Point Quarry to the Investors, based on the actual profits they would have earned over the 50 year life of the Quarry.

4. The legislated regime governing environmental approval legally compelled the approval of the Whites Point Quarry Project. If the Project had been approved, as the Investors reasonably and properly expected it would, the Investors would today have a long-term, secure supply of quality stone in close shipping proximity to their already existing operations and markets in New York City and New Jersey.

5. The Whites Point Quarry stone [redacted] the Investors had already been importing from the Bayside Quarry in New Brunswick for ten years, and added a modest incremental addition to the New York City market.

6. Canada's experts simply ignore the facts which refute their theories. Some of the facts Canada ignores are that, by 2008:

   a) the Claytons had been in the aggregate and concrete business for over half a century;

b) the Claytons were experienced, industrious, highly competent and successful business people, with a long-term vision for their highly successful enterprise;

c) the Claytons were and remain the largest concrete manufacturer and supplier in New Jersey;

d) [redacted]

e) the Claytons were already operating a highly successful aggregates business in New York City and New Jersey;

f) New York City is a unique aggregates market because of its geographical inaccessibility;

g) [redacted] New York City [redacted] New Jersey;

h) the docks the Claytons controlled were the only significant access points for bulk carriers delivering aggregate to the New York City Harbor;

i) [redacted] New York City New Jersey [redacted]

j) [redacted]

k) [redacted]

l) the Claytons had a veteran expert quarry manager from New Jersey (John Wall), living in Nova Scotia for 2 ½ years, who developed the quarry design and who planned to stay in Nova Scotia to be the Whites Point Quarry Manager;

[1] Witness Statement of John Lizak, dated July 8, 2011, Exhibit 1, p. 5.

m) [redacted] New York City [redacted]

n) the Claytons had engaged from the outset a veteran local professional engineer (Paul Buxton), who was fully experienced with local conditions in every way, and was immersed in every aspect of developing the Whites Point Quarry as the Project Manager;

o) [redacted] New York City [redacted] New York City [redacted] New York City [redacted] New Jersey;

p) [redacted] New York City [redacted] New Jersey [redacted]

q) [redacted] New York City [redacted] New York City [redacted]

r) [redacted]

7. Canada's experts turn a blind eye to these irrefutable facts. Canada's Counter-Memorial provides no answer to the reality of what would actually have happened "but for" Canada's breaches of the NAFTA.

8. Canada's expert reports are not grounded in reality. Instead of addressing the actual facts, they overestimate, underestimate, speculate, invert, or invent facts to conform to their pre-conceived theories and conjectures. In doing so, they clearly demonstrate that Canada has no credible answer to the Investors' claim.

9. The Brattle report is a clear example. It is not derived from independent research, analysis or knowledge. It is constructed on a series of "*instructions*" from legal counsel, which are unsupported by the facts or the law.

10. Nonetheless, Brattle not only accepts those instructions, but then repeats the propositions for effect throughout the report, virtually treating them at points as true facts proven in evidence, which of course they are not. For example:

Regarding "Permitting Risk"

Para 9	"Most importantly, I understand that the Project faced permitting risks that could have prevented Whites Point from reaching commercial operations even absent the breach"
Para 17	"I have been instructed that, but for the breach, Whites Point still faced permitting risk."
Para 23	"I am instructed that Whites Point faced permitting risk even absent the breach."
Para 26	"As noted above, I have been instructed that Whites Point would have faced permitting risk even absent the breach."
Para 60	"First, I have been instructed that even without the breach, Whites Point faced the risk that it would not be able to obtain the permits and approvals necessary to build and operate the quarry"
Para 83b	"I have been instructed to assume that: b. Absent the breach, there remained uncertainty as to whether Whites Point would be able to obtain the permits and approvals necessary to build and operate the quarry."
Para 111	"If Whites Point faced permitting risk even absent the breach, Mr. Rosen's analysis will overstate lost profits. I am instructed that the JRP may have recommended against the Project for reasons other than those that the Tribunal determined to breach NAFTA. I am also instructed that a favorable JRP report would not guarantee permitting and that the Tribunal did not find that a decision by the Governments to withhold permits for the Project would have been a breach NAFTA. If either of these instructions is correct, Mr. Rosen's assumption that Whites Point would be permitted with certainty causes him to overstate damages."
Para 159	"An important risk faced by the Project was permitting risk. I have been instructed that: (1) even absent the breach, the Project still faced the risk of a negative JRP recommendation"
Para 186	"However, I have been instructed that Whites Point would have faced permitting risk even absent the breach identified by the Tribunal"

Regarding "Mitigation" (Judicial Review)

Para 17	"I have been instructed that the Claimants had an opportunity to mitigate the impact of the breach on the Project's value through a judicial review."
Para 27	I have been instructed that the Claimants could have mitigated the effects of the breach through a judicial review to obtain a non-breaching JRP report.
Para 28	"Assuming that the Claimants could have mitigated the effects of the breach through a judicial review, the breach did not destroy the full value of Whites Point."
Para 61	"Second, I have been instructed that the Claimants had a legal right to pursue a judicial review of the JRP report."
Para 83c	"I have been instructed to assume that: c. "The Claimants had a legal right to pursue a judicial review of the JRP process, which would have allowed them to challenge the JRP report findings."
Para 104	"However, I understand that the Claimants had the ability to appeal the JRP decision through a judicial review."
Para 157	"In particular, I understand that the Claimants had the opportunity to mitigate losses resulting from the breach through a judicial review, which is not reflected in this assessment."
Para 159	"I have been instructed that: ... (2) the Nova Scotia and Federal governments were not bound by the recommendation of the JRP."
Para 193	"I have been asked to evaluate the effect on the value of Whites Point assuming that the Claimants had the right to appeal the breach through a judicial review." For purposes of this analysis, I have been instructed to assume that: a. The breach could have been remedied through a judicial review; b. With a favorable decision on judicial review, the Project would undergo a second JRP process that would result in a non-breaching report; c. A second, non-breaching JRP process would not have guaranteed a favorable JRP recommendation and receipt of permits; and d. The Claimants did not pursue this avenue of judicial review."

Para 195	"I have been instructed to assume that the judicial review through the appellate courts would have cost no more than US$103,780 dollars."
Para 196	"If the Project had been required to undergo a second JRP, I have been instructed that many of the materials prepared for the first JRP process would have made a second JRP process more cost effective. Specifically, I have been instructed that the cost of a second JRP process can be approximated by the sum of BNS' invoices from CEAA for Joint Review Panel and the JRP-related Consulting, Office, and Operations expenses incurred from 1 May 2007 through 22 October 2007."
Para 198	"I have been instructed to assume that the judicial review would have concluded by December 2010. I have been further instructed that a second JRP, if required, would have been expected to take one year, which again assumes a faster JRP as prior work could be re-purposed for the proceeding."
Footnote 268	"I have been instructed that the judicial review through the appellate courts would have cost the Claimants between C$105,000 and C$130,000 in 2017 dollars based on the judicial review cost estimates in the Expert Report of the Honourable Justice John Evans."
Footnote 269	"I have therefore been instructed that the cost of a second JRP may be approximated by BNS's expenditures on the first JRP over the time period from May, when the JRP panel announced it was ready to proceed to a hearing (see R-258), through October 2007, when the first JRP issued its report."
Footnote 272	"At the instruction of Counsel, I assume the Judicial Review would conclude on 31 December 2010 and the second JRP process would conclude on 31 December 2011."

Regarding "Expenditures"

Para 46a	"I have been instructed by counsel to define the JRP-related EA costs as those incurred from 3 November 2004, when the JRP was constituted, through 22 October 2007, when the JRP issued its report."
Para 49	"Based on a review of cost descriptions, the Claimants' Memorial (which identified individuals and firms that contributed to the EA process), and instructions from counsel where it was not clear how to categorize an expense, I allocated costs into four categories."

Para 51	"Payments for office and operational expenses ("Office & Operations"), excluding certain cost items that I have been instructed were not related to the JRP process."

Regarding "The Breach Date"

Para 83a	"I have been instructed to assume that: The damages should make the Claimants whole for the effects of the breach as of 22 October 2007, the date when the JRP completed its report."
Para 101	"I have been instructed that the appropriate legal standard for damages in this case is to compensate for the economic loss as of the date of the breach."
Para 105	"Where a DCF can be used to reliably measure lost profits, I have been instructed that the relevant measure of loss would be the value of lost profits as of the breach date."
Para 157	"I have been instructed to determine the present value of the future profits of Whites Point as of the 22 October 2007 breach date excluding the effect of the breach using a DCF analysis."

Regarding "Tax"

Para 213	I have been instructed that the application of a gross-up in this case is not appropriate and hence have not included it in my analysis.

11. Building on the unsupported assumptions Canada's legal counsel directs its experts to make, Canada's experts are driven to unsupportable theories and conclusions about the value of the Whites Point Quarry, all divorced from the reality of the proven loss of profit to the Investors.

12. Because Canada's experts are unable to refute the unassailable facts supporting the Investors' claim, Canada is reduced to making spurious arguments, without the legal foundation, to the effect that the Investors were required to litigate in order to mitigate. Canada says that the Investors are compelled to go through an uncertain six year judicial review process that would undoubtedly be vigorously contested, and then, at best, go through yet another JRP process (very possibly as

contaminated and "unwinnable from the outset" as the first), and to spend many more millions of dollars in the faint hope of receiving approval for the Quarry a second time around, ten years down the road. This is not reasonable.

13. Canada's notion that it would be fair treatment for the Claytons to be engulfed in a 15 year regulatory quagmire to have a simple quarry in Nova Scotia approved, after being invited by the Government of Nova Scotia to invest in the Whites Point Quarry, is wholly disconnected from Nova Scotia's long standing and ongoing policy of promoting the easy development of quarries in the Province, as a mainstay of its economy.

14. Canada does not contest (because it cannot) that the policy of the Government of Nova Scotia has been for decades to promote the development of quarries, particularly tide water quarries for the export of stone to the United States. This policy was, of course, most recently implemented in 2016, with the quick approval by the Governments of Canada and Nova Scotia of the mega quarry at Black Point, after a 14 month Comprehensive Study.

15. Yet Canada says that the Investors were required to be subjected to a further ten years of litigation to get fair treatment. Compelling the Investors to litigate in order to mitigate would not "wipe out all of the consequences" of Canada's already established unfair treatment of the Investors. It would compound it.

16. Canada is also reduced to making a further spurious contention that there was uncertainty in permitting ("permitting risk") to avoid compensating the Investors for their loss caused by Canada's proven breaches. There can be no doubt on the evidence that, if the Investors had received fair, honest, and non-discriminatory treatment, they would have received all of the approvals, permits, licenses and authorizations ordinarily granted to operate the Whites Point Quarry. In any ordinary, fair and honest process there was no permitting risk for the Whites Point Quarry Project. There can be no doubt that Canada's wrongdoing caused

the Investors to lose the Whites Point Quarry and the profits they would have earned from it.

17. Canada is then further reduced to recycling an argument it has made unsuccessfully before, that the Investors' claim should have been brought under a different Article of the NAFTA. In this contention, Canada also fails.

18. In its Counter-Memorial Canada has not refuted any of the essential elements of the Investors' claim. In the result, the evidence, and FTI's Reply Valuation, compel a full reparation in damages award of US $458,609,734.

II. VALUATION

19. The proper valuation of the loss suffered by the Investors turns principally on the revenues the Whites Point Quarry would have generated and the costs that would have been incurred to build and operate the Quarry and to ship the aggregate from the Quarry to New York City and New Jersey.

20. On the revenue side, the Investors made conservative assumptions about [redacted] Canada contends that [redacted] For the reasons explained below, this contention is wrong.

21. On the costs side, Canada contends that operating costs would be higher, [redacted] For the reasons explained below, this contention is also wrong.

22. With regard to freight rates, Canada contends that the Investors' freight rates are under-stated. For the reasons explained below, this too is wrong.

A. VALUATION DATE

1. The Date of the Award is the Correct Date

23. Canada agrees that the fundamental principle of full reparation in international law is derived from *Chorzów Factory*.[2] It is the only authority on the point that Canada refers to in its Counter-Memorial. However, Canada quotes only one sentence fragment from *Chorzów Factory*: reparation must "reestablish the situation which would, in all probability, have existed if that [illegal] act had not been committed." On the basis of this truncated quote, Canada contends:

> ... if the NAFTA breach had not occurred, the Investors and their investment would have had the opportunity to have the federal and provincial decision-makers consider properly issued JRP recommendations. If the loss of that opportunity is best valued by calculating the lost profits of the project, then those profits must be calculated as of the date the opportunity was lost.[3]

24. However, the entire passage from *Chorzów Factory* says:

> The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation for an act contrary to international law.[4]
>
> [Emphasis added]

25. By truncating the passage it quotes, Canada endeavors to avoid the full import of the true standard of compensation in international law: a State that is held responsible for a breach of its obligations must make full reparation to compensate for the injury caused by its conduct. The reparation, in the form of

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2 *Case Concerning the Factory at Chorzów* (*Germany* v. *Poland*), 1928 P.C.I.J (ser. A) No. 17 (September 13, 1928) ("*Chorzów Factory*") (***Investors' Authorities*, Tab CA327).**

3 Canada's Counter-Memorial on Damages, dated June 9, 2017, p. 22.

4 *Chorzów Factory* (***Investors' Authorities*, Tab CA327, p. 47**).

restitution and/or compensation, must "wipe-out all the consequences of the illegal act." The reparation must undo the harm caused by the breach and make the wronged party whole to the extent possible.

26. This principle is re-stated in Article 31 of the *International Law Commission's Articles on State Responsibility*, which provides:

> Reparation
>
> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.[5]

27. In *Rompetrol Group N.* V. v. *Romania,* the Tribunal put it this way:

> The true position is that damages, in the legal sense, must be understood as what is required to make good in monetary terms some enduring alteration for the worse in the economic, financial or commercial position of the foreign investor which can be traced, in a sufficiently direct and proximate way, to the host State's unlawful course of action, taken as a whole.[6]
>
> [Emphasis added]

28. Yet, based on its incomplete reference to the principle of full reparation in *Chorzów Factory,* Canada instructed Brattle "that the relevant measure of loss would be the value of lost profits as of the breach date,"[7] and "to determine the present nature of the future profits of Whites Point as of the 22 October, 2007 breach date excluding the effect of the breach using a DCF analysis".[8]

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5 2001 Articles on Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10), p. 43, U.N. Doc. A/56/83 (2001) (***Investors' Authorities*, Tab CA328, p. 43**).

6 *The Rompetrol Group N.V.* v. *Romania*, ICSID Case No. ARB/06/3, Award, 13 May 2013 (***Investors' Authorities*, Tab CA327, para. 287**).

7 Expert Report of the Brattle Group (Darrell B. Chodorow), dated June 9, 2017, para. 105.

8 Expert Report of the Brattle Group (Darrell B. Chodorow), dated June 9, 2017, para. 157.

29. To the contrary, in order to achieve full reparation, that is, to put the Investors in the same position as if Canada had not breached the NAFTA, the appropriate date to value the Investors' investment is the date of the arbitration Award. This allows the Tribunal to ensure that the Investors will be properly compensated, by taking into account the events and conditions which have actually transpired in the ten years since Canada's wrongdoing, and which, but for Canada's breaches would have in reality, directly affected the Investors and their investment.

30. As Mr. Rosen correctly states in the FTI Reply Valuation:

> A current date analysis allows experts to incorporate actual market data available up to the effective date of the report rather than attempting to artificially create a proxy for the market outlook as of the breach date. My approach also avoids potential hindsight issues as all available information can be included in my analysis.[9]

31. Mr. Rosen's approach is also consistent with the principle that compensation for illegal State conduct under international law is based on full reparation. Valuing the Whites Point Quarry Project on a full reparation of lost profits basis recognizes that, but for Canada's breaches, the Whites Point Quarry would have proceeded, and the Investors would have realized the profits generated by the Quarry for the 50 year life of the Quarry.

32. It is not possible for the Tribunal to turn back the clock and allow the events to unfold as they should have (with the illegality and discriminatory stamped out), resulting in the Investors now operating a fully operational Quarry. The only way to accomplish full reparation, therefore, is to award "payment of a sum corresponding to the value which a restitution in kind would bear."

33. As many recent awards have confirmed, the "value which a restitution in kind would bear" means a value determined as of the date of the Award, not the date

[9] Expert Reply Report of FTI Consulting (Howard Rosen), dated August 23, 2017, para. 3.8.

of the breach, so that the actual reality of the conditions after the date of breach can be taken into account.

34. In *ADC Affiliate Limited* v. *Republic of Hungary*[10], for example, the Tribunal valued the subject project on the basis of lost profits, and specifically rejected the date of breach as the date of valuation, since that would not have achieved full reparation of the claimants' loss.

35. The *ADC* Tribunal observed that where the evidence shows that the value of the project is higher at the date of the award (taking into account post-breach developments) compared to the value at the date of breach, "the application of the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award.

36. As in *ADC*, the Tribunals in *El Paso Energy International Company* v. *The Argentine Republic,*[11] *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation,*[12] and *Bernhard von Pezold and Others* v. *Republic of Zimbabwe* [13], among others, all held that where the valuation date was in dispute, compensation for the State's illegal conduct (whether it is an expropriation or breach of another treaty provision) should be based on the higher value of the investment at the date of the award.

37. The *von Pezold* Tribunal, in discussing the principle that "compensation should be calculated at the time of the Award, rather than at the time of the unlawful acts," explained that the valuation should consider the current value of the

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10 ICSID Case No. ARB/03/16 ("*ADC*") **(*Investors' Authorities*, Tab CA323)**.

11 *El Paso Energy International Company* v. *The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 706 **(*Investors' Authorities*, Tab CA330, para. 706)**.

12 *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation*, UNCITRAL, PCA Case No. AA 227, 18 July 2014, para. 1763 **(*Investors' Authorities*, Tab CA331, para. 1763)**.

13 *Bernhard von Pezold and Others* v. *Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 ("*von Pezold*") **(*Investors' Authorities*, Tab CA332)**.

investment as "a hypothetical value ... which would have existed had the Respondent not acted unlawfully".[14]

38. Instead, Canada contends[15] that the FTI Valuation, which is based on the current-date or award-date, should be rejected simply because it produces a higher quantum of damages than a valuation calculated as of the date of breach. This is spurious.

39. If the quantum of damages is higher at the time of the Award, it is only because the Investors are being fully compensated in accordance with the *Chorzów Factory* standard, not because Investors have "unnecessarily complicated the lost profits calculation ... in order to obtain a more favourable result." Indeed, in all of the cases that have established the award date as the proper valuation date, the reasoning of the Tribunals points to the higher level of compensation as a factor in favour of upholding the standard.

40. Canada contends further[16] that the calculation of lost profits ought to be limited to the parameters of the project presented to the JRP. As the evidence shows however, an EIS is prepared at a very early stage of a project and is intended to be conceptual, and focussed on the environmental effects of a project. It is not, nor is it intended to be focused on the specifics of the project's business model or design. In this regard, there is no basis in fact or in law to limit the Investors' lost profits to the parameters of a description in the EIS.

41. In short, Canada's contention that using valuation at breach date is appropriate is contrary to the fundamental principle of compensation in international law. Under the standard enunciated in *Chorzów Factory*, the Investors are entitled to recover compensation based on the likely actual development of the Whites Point Quarry, in the but-for scenario, based on the best available evidence.

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14 *Von Pezold*, paras. 764, 766.
15 Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 140.
16 Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 141.

B. QUANTIFYING THE LOSS

1. The Investors' Projected Revenues are Reasonable and Reliable.

42. The Investors' projected revenues are based on conservative assumptions about the volume of Whites Point aggregate to be sold and the price at which it would be sold, taking into account [redacted] established aggregates business in New York City and New Jersey.[17]

43. The Investors' projections have the over-arching advantage of being anchored in actual evidence from first-hand market and industry participants. The Investors' projected sales and pricing reflect the reality of aggregate sales in New York City, including the importance of water access to the New York City harbor, and the true position of other aggregate producers.

44. Canada contends that the Investors "ignore basic economic principles and make unrealistic assumptions about the prices"[18] for Whites Point coarse aggregate.[19] However, Canada's contention is premised on the erroneous theory that [redacted] New York City [redacted]

45. SCMA's analysis and, by extension, Canada's argument are fundamentally flawed. SCMA misapprehends the realities of supply, demand, and participation in the New York City aggregates market, and distorts the effect of Whites Point aggregate on pricing in the New York City market.

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17 Investors' Damages Memorial, dated March 10, 2017, paras. 177-206.
18 Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 144 *et seq.*
19 Canada does not contest the Investors' expected sales of fines (grits and concrete sand) or associated projected revenues (Expert Report of SC Market Analytics, dated June 9, 2017, paras. 84-87).
20 Canada's Counter-Memorial on Damages, dated June 9, 2017, paras. 145-146.
21 Expert Report of SC Market Analytics, dated June 9, 2017, pp. 9-29.

a) SCMA misapprehends the New York City market

46. SCMA fundamentally misapprehends the actual reality of the New York City aggregates market. SCMA's artificial depiction of the New York City market includes many quarries that are not, and could not, be viable participants in the New York City aggregates market.

47. SCMA itself appears to partly acknowledge this artificiality by qualifying the graph titled "New York City Aggregate Sources – Actual & Potential" as being merely "a graphical representation of the rough dynamics of the market".[22] In truth, SCMA's graph is visually deceptive and does not at all represent the market accurately at all.

48. In particular, SCMA ignores the importance of water access to New York City grossly overstates the number of actual and potential aggregate suppliers in the New York City market, and misstates the demand for coarse aggregate products in New York City. These errors all contribute to SCMA's fundamentally erroneous conclusion about the effect of Whites Point Quarry aggregate on pricing and, by extension, to Canada's misconceptions about the Investors' revenue projections.

(i) SCMA ignores water access to New York City

49. The SCMA report artificially equates "water-based" quarries with <u>water access to New York City,</u> and thus entirely overlooks the importance of [redacted] for competitive participation in the New York City aggregates market. [23]

50. The importance of water-access in New York City is primarily a function of aggregates' bulk, weight, and relatively lower price (compared with other commodities), and the high cost and inefficiencies associated with other [redacted]

[22] Expert Report of SC Market Analytics, dated June 9, 2017, p. 11, fn. 28.
[23] For example, Expert Report of SC Market Analytics, dated June 9, 2017, paras. 31, 59.

[redacted] into densely populated urban areas such as New York City.[24] As such, a seller's ability to [redacted] into New York City [redacted] is critical and, where it exists, creates a distinct and invaluable advantage.

51. [redacted] New York City [redacted] New York City:

[redacted]

52. SCMA's presumed list of "actual and potential suppliers"[26] includes five Canadian offshore quarries (operational and non-operational) that have no, or [redacted] New York City [redacted]

53. [redacted] New York City [redacted] New York City. [redacted] New York City, [redacted] New York City [redacted] New Jersey [redacted]

[24] Reply Witness Statement of Tom Dooley, dated August 18, 2017, paras. 29-32.
[25] Reply Expert Report of John T. Boyd Company (Michael Wick), dated August 17, 2017, para. 2.
[26] Expert Report of SC Market Analytics, dated June 9, 2017, p. 11, fig. 2.
[27] Reply Witness Statement of Tom Dooley, dated August 18, 2017, para. 9.
[28] Reply Witness Statement of Tom Dooley, dated August 18, 2017, para. 10.

54. Mr. Dooley, who was Manager of NYSS from 1999 to 2015, emphasizes the importance of [redacted] New York City [redacted]

6. [redacted] New York City [redacted] New York City [redacted]

7. SCMA's failure to understand the importance of [redacted] New York City [redacted] leads it to fundamentally misunderstand [redacted] New York City. [redacted]

8. SCMA's misunderstanding of [redacted] New York City [redacted]

9. [redacted] New York City [redacted]

10. [redacted] New York City [redacted] New York City [redacted] New Jersey New York City [redacted]

[29] Reply Witness Statement of Tom Dooley, dated August 18, 2017, paras. 6-10.

55. [redacted] New York City [redacted] New York City [redacted]

56. [redacted] New York City [redacted] As Mr. Dooley explains:

> 14. [redacted] New York City [redacted]
>
> 15. [redacted]
>
> 16. [redacted] New York City New York City

57. The Administrative Manager of the Martin Marietta's Auld's Cove Quarry from 1998 to 2011, Dan Fougere, confirms the critical importance of [redacted] New York City [redacted]

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30 Reply Witness Statement of Tom Dooley, dated August 18, 2017, para. 13.
31 Reply Witness Statement of Tom Dooley, dated August 18, 2017, para. 13.
32 Reply Witness Statement of Tom Dooley, dated August 18, 2017, paras. 14-16.

9. [redacted] New York City [redacted] New York City [redacted]

10. [redacted] New York City [redacted]

...

13. [redacted] New York City [redacted] New York City [redacted]

58. [redacted] New York City [redacted] New York City [redacted]

59. [redacted] New York City [redacted] New York City [redacted] New York City [redacted]

[33] Reply Witness Statement of Dan Fougere, dated August 18, 2017, paras. 9-10.
[34] Reply Witness Statement of Dan Fougere, dated August 18, 2017, para. 13.
[35] Expert Report of SC Market Analytics, dated June 9, 2017, para. 71.
[36] Reply Witness Statement of Tom Dooley, dated August 18, 2017, para. 12.

60. SCMA also ignores the fact that [redacted] New York City [redacted] New York City.

61. [redacted] New York City [redacted] New York City [redacted]

62. As Dan Fougere explains:

> 29. [redacted] New York City [redacted]

63. SCMA's error in not properly accounting for the importance of [redacted] to New York City and misunderstanding [redacted] unique position in the market place leads to a completely erroneous assessment of the New York City aggregates market.

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[37] Reply Witness Statement of Dan Fougere, dated August 18, 2017, paras. 15-20; Reply Witness Statement of Tom Dooley, dated August 18, 2017, para. 24.
[38] Reply Witness Statement of Dan Fougere, dated August 18, 2017, paras. 24-26, Exhibit 2.
[39] Reply Witness Statement of Dan Fougere, dated August 18, 2017, para 29.

(ii) SCMA [redacted] New York City

64. Most of the mainland quarries SCMA includes as "potential or actual" suppliers to the New York City market cannot, or do not, in reality participate meaningfully in the New York City market, due primarily to prohibitive transportation costs or depleted reserves.

65. [redacted]

66. [redacted] New Jersey [redacted] New York City. As Mr. Dooley explains:

> 30. [redacted] New Jersey [redacted] New York [redacted] New York City [redacted] New York City [redacted]

67. [redacted] New Jersey [redacted] New York City [redacted]

[40] Reply Witness Statement of Tom Dooley, dated August 18, 2017, paras. 29-30.
[41] Reply Witness Statement of Tom Dooley, dated August 18, 2017, para. 30.
[42] Reply Witness Statement of Tom Dooley, dated August 18, 2017, para. 31.

[redacted] New York City [redacted]

[redacted] New York City [redacted]

68. [redacted]

[redacted] New York City [redacted]

69. [redacted]

[redacted] In his Reply Expert Report, John Lizak addresses this analytical flaw, stating:

[redacted]

70. [redacted]

(iii) SCMA misstates demand for coarse aggregate

71. SCMA misstates the demand for coarse aggregate products in New York City as "not growing".[47] Reliable data demonstrates that, in reality, the opposite is true.

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[43] Reply Witness Statement of Tom Dooley, dated August 18, 2017, para. 32.
[44] Reply Witness Statement of Tom Dooley, dated August 18, 2017, para. 33.
[45] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 19; Reply Witness Statement of John Wall, dated August 18, 2017, para. 42.
[46] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 19.
[47] Expert Report of SC Market Analytics, dated June 9, 2017, p. 21.

72. SCMA's demand theory relies on internal forecasts of cement consumption (which cites a "Proprietary Cement Forecasting Model") and construction contracts.[48]

73. SCMA's theory, however, is belied by independent and transparent market data showing New York City construction spending and New York City cement demand. The construction and cement data is publicly available and represents "excellent demand indicator[s] that directly correlate to premium crushed stone usage"[49]

74. The data demonstrates that construction spending and cement demand increased materially starting from approximately 2011, when Whites Point Quarry aggregate would have [redacted] New York City [redacted] New York City.[50]

75. Michael Wick summarizes the data's effect on SCMA's theory:

> The entire Respondent's financial case rests on the ability to convince the reader that [redacted] A review of the latest independent and transparent demand data [redacted] shows the exact opposite.[51]
>
> [Emphasis added]

76. SCMA's own construction data in fact also reveals an overall growth trend [redacted] New York City [redacted] Mr. Wick examined SCMA's index and concluded:

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[48] Expert Report of SC Market Analytics, dated June 9, 2017, pp. 21-24.
[49] Reply Expert Report of John T. Boyd Company (Michael Wick), dated August 17, 2017, paras. 33-35, figures 2, 3.
[50] Reply Expert Report of John T. Boyd Company (Michael Wick), dated August 17, 2017. para. 34.
[51] Reply Expert Report of John T. Boyd Company (Michael Wick), dated August 17, 2017, para. 33.

[redacted]

77. Reliable data shows that real-world demand for coarse aggregate in New York City has been and, in all probability, will continue to be strong. Mr. Wick concludes:

> The demand for stone has been, and is forecast to remain, extremely strong and is currently at record levels, as measured by NYC construction spending. Historic and projected cement demand data also support this observation.[53]

b) SCMA distorts the effect of Whites Point aggregate on New York City prices

78. The SCMA report theorizes [redacted] New York City [redacted] For this, SCMA relies on [redacted] New York City, [redacted] New York City [redacted]

79. SCMA's pricing models are fundamentally methodologically flawed, [redacted]

[52] Reply Expert Report of John T. Boyd Company (Michael Wick), dated August 17, 2017, para. 30.
[53] Reply Expert Report of John T. Boyd Company (Michael Wick), dated August 17, 2017, para. 38b.
[54] Expert Report of SC Market Analytics, dated June 9, 2017, p. 34.

(i) SCMA's hypothetical pricing models are flawed

80. [redacted] New Jersey [redacted] New York City [redacted]

81. However, [redacted] New York City [redacted]

82. Most glaringly, [redacted] New York City [redacted] New York City.[57]

83. Indeed, the reality is entirely different. United States Geological Society (USGS) data [redacted] New York City.[58]

84. Consequently, [redacted] New York City [redacted]

85. [redacted]

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[55] Expert Report of SC Market Analytics, dated June 9, 2017, p. 15, figures 4a, 4b; p. 15, fig. 5; Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 5, 11-14.
[56] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 11.
[57] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 11-12.
[58] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 12.
[59] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 13.
[60] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 13.

[redacted] These products trade in different markets and command different prices than construction aggregate and, accordingly, are not comparable.[62]

86. Notably, as John Lizak points out:

[redacted]

87. Ultimately, SCMA also fails to analyse, or even consider, the regional market for imported stone. This failure [redacted] New York City [redacted] New York City [redacted] New York City [redacted]

88. Thus, SCMA's pricing models and analyses are wholly unrealistic and unreliable. and provide no assistance in [redacted] New York City [redacted]

[redacted]

89. SCMA's theory-based prediction of [redacted] SCMA's theory simply does not withstand scrutiny.

90. As Mr. Dooley explains:

> 46. SCMA's theory [redacted] New York City market [redacted] is completely

[61] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 13.
[62] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 13.
[63] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 13.
[64] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 18.

unsupported by the facts, exhibits a critical misunderstanding of [redacted] New York City [redacted] and is fundamentally wrong.

47. [redacted] New York City [redacted]

48. [redacted] New York City [redacted] New York City [redacted] New Jersey.

49. There is no evidence to support the proposition that [redacted] New York City [redacted] New York City [redacted] The evidence and the history is entirely to the contrary.

50. [redacted] New York City [redacted]

51. [redacted] New York City [redacted]

52. [redacted] New York City [redacted]

53. [redacted] New York City [redacted]

[redacted] New York City [redacted]

91. [redacted]

92. [redacted]

93. Mr. Lizak describes [redacted]

[redacted]

[redacted]

[65] Reply Witness Statement of Tom Dooley dated August 18, 2017, paras. 46-53
[66] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 15.
[67] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 15-17.
[68] Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 16.

94. In addition to SCMA's theory of [redacted] being contrary to historical fact, it is also contrary to rational economic behaviour. In short, [redacted]

95. Indeed, the suggestion [redacted] New York City [redacted] is absurd. As Mr. Wick explains:

[redacted]

96. SCMA's theory also fails to recognize that [redacted] In this regard, Mr. Wick concludes:

[redacted]

97. Mr. Wick succinctly captures the probable reality of Whites Point's effect on pricing in New York City, and further reinforces that SCMA's theory is, in a word, fantastical.

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69 Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, pp. 16-17, Table 1.

70 Reply Expert Report of John T. Boyd Company (Michael Wick), dated August 17, 2017, para. 10.

71 Expert Report of SC Market Analytics, dated June 9, 2017, para. 74.

72 Reply Expert Report of John T. Boyd Company (Michael Wick), dated August 17, 2017, para. 3.

2. SCMA Miscalculates Production Levels

98. Canada contends that the Whites Point Quarry would [redacted] and that the Investors have therefore understated related capital and operating costs. The SCMA report states:

[redacted]

99. The SCMA report "fundamentally misconceives the Whites Point crushing plant's design" and is "flat wrong".[75] [redacted]

100. Accordingly, Canada's operational and capital cost contentions, [redacted] are wholly fictitious.

[redacted]

101. [redacted]

102. [redacted]

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[73] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 151.
[74] Expert Report of SC Market Analytics, dated June 9, 2017, para. 94.
[75] Reply Witness Statement of George Bickford, dated August 8, 2017, paras. 4, 6.
[76] Witness Statement of John Wall, dated December 8, 2016, para. 55.

[redacted]

103. [redacted]

104. [redacted]

105. [redacted] In this regard, the Investors' design-engineer, George Bickford, summarizes the operation of the Revision D Design:

> **11.** [redacted]

[77] Reply Witness Statement of George Bickford, dated August 8, 2017, para. 7.
[78] Reply Witness Statement of George Bickford, dated August 8, 2017, para. 9.
[79] Reply Witness Statement of George Bickford, dated August 8, 2017, para. 9.
[80] Reply Witness Statement of George Bickford, dated August 8, 2017, para. 12.

[redacted]

[Emphasis added]

106. [redacted]

107. [redacted]

108. [redacted]

109. [redacted]

110. AggFlow is an industry-leading software tool that simulates a crushing plant's operation. It draws on extensive embedded data, including rock geology, equipment specifications, and screen throughput capacities, to reliably model the

81 Reply Witness Statement of George Bickford, dated August 8, 2017, para. 11.
82 Reply Witness Statement of John Wall, dated August 18, 2017, para. 6.
83 Reply Witness Statement of John Wall, dated August 18, 2017, para. 6.
84 Reply Witness Statement of George Bickford, dated August 8, 2017, paras. 13, 27, 29.

flow of aggregate, thus enabling a plant to be constructed and operated virtually.[85]

111. In verifying a particular plant design, AggFlow generates an on-screen display called a "mass flow balance" that depicts the flow of material throughout the plant.[86] The "mass flow balance" indicates the quantity of material that will pass through or across all elements of the plant and be deposited onto each stockpile.[87] It also identifies any aspect of the plant design that is incompatible with the planned volume and flow of crushed stone and allows for revisions to the design to be made virtually.[88]

112. As simulation software, AggFlow is capable of very closely approximating the actual operation and yield of a given plant design. It is widely used by designers and producers in the aggregates industry, including companies such as Vulcan Materials Co., Martin Marietta Aggregates, Oldcastle Materials Inc., and Lafarge North America, Inc.[89]

113. [redacted]

114. Through 2005 and 2006, Mr. Wall worked with LB&W [redacted]

[85] Reply Witness Statement of George Bickford, dated August 8, 2017, paras. 16-17; Reply Witness Statement of Dan Fougere dated August 18, 2017, paras. 31-33.
[86] Reply Witness Statement of George Bickford, dated August 8, 2017, para. 19.
[87] Reply Witness Statement of George Bickford, dated August 8, 2017, para. 19.
[88] Reply Witness Statement of George Bickford, dated August 8, 2017, para. 20.
[89] Reply Witness Statement of George Bickford, dated August 8, 2017, paras. 22-23.
[90] Reply Witness Statement of George Bickford, dated August 8, 2017, para. 27.
[91] Reply Witness Statement of John Wall, dated August 18, 2017, para. 10.
[92] Reply Witness Statement of John Wall, dated August 18, 2017, para. 11.

[redacted]

115. [redacted]

116. [redacted]

117. [redacted] the plant would have yielded sufficient quantities of the required finished products. In this regard, Mr. Wall states:

[redacted]

[93] Reply Witness Statement of George Bickford, dated August 8, 2017, para. 29.
[94] Reply Witness Statement of John Wall, dated August 18, 2017, para. 12.
[95] Reply Witness Statement of George Bickford, dated August 8, 2017, paras. 30-36.
[96] Reply Witness Statement of Tom Dooley, dated August 18, 2017, paras. 74-75.

[redacted]

118. [redacted]

3. SCMA Miscalculates Operating and Capital Costs

119. [redacted] SCMA repeatedly miscalculates the costs that would have been incurred to operate the Whites Point Quarry.[98]

120. [redacted] SCMA miscalculates the number of employees required to operate the plant [redacted]

121. SCMA carries through its flawed analysis in its calculation of:

Fuel costs:

[redacted]

Capital Costs:

[redacted]

97 Reply Witness Statement of John Wall, dated August 18, 2017, para. 16.
98 Expert Report of SC Market Analytics, dated June 9, 2017, Section VI, Appendix IV.
99 Expert Report of SC Market Analytics, dated June 9, 2017, Appendix IV, pp. 41-43, para. 3(1).
100 Expert Report of SC Market Analytics, dated June 9, 2017, Appendix IV, p. 44, para. 3(2); Reply Witness Statement of John Wall, dated August 18, 2017, paras. 33-37.
101 Reply Witness Statement of John Wall, dated August 18, 2017, paras. 33-35.
102 Expert Report of SC Market Analytics, dated June 9, 2017, Appendix IV, p. 45, para. 3(1).

Additional Plant Expenditures:

[redacted]

Contingency:

[redacted]

Maintenance:

[redacted]

122. SCMA also mistakenly compares the automated Whites Point Quarry to other non-comparable quarries,[110] leading to erroneous conclusions regarding costs.

4. Marsoft Mischaracterizes and Miscalculates Freight Costs

123. Canada contends that the Investors have understated the freight costs for the Whites Point Quarry Project.[111] Canada alleges various problems with the Expert Report of Tamarack Resources, dated December 9, 2016 (the "First Tamarack Report"), and relies on the Expert report of Arlie G. Sterling, Marsoft, Inc., dated June 9, 2017 (the "Marsoft report").[112]

124. In fact, the freight rates estimated in the First Tamarack Report are substantiated by independent contemporary documentation. The freight rates that were

[103] Reply Witness Statement of John Wall, dated August 18, 2017, para. 38.
[104] Expert Report of SC Market Analytics, dated June 9, 2017, Appendix IV, p. 45, para. 3(2).
[105] Reply Witness Statement of John Wall, dated August 18, 2017, paras. 13-25; Reply Witness Statement of Mike Washer, dated August 8, 2017, paras. 9-11.
[106] Expert Report of SC Market Analytics, dated June 9, 2017, Appendix IV, p. 46, para. 3(3).
[107] Reply Witness Statement of Mike Washer, dated August 8, 2017, paras. 5-8.
[108] Expert Report of SC Market Analytics, dated June 9, 2017, Appendix IV, p. 46, para. 3(4).
[109] Reply Witness Statement of John Wall, dated August 18, 2017, para. 39; Reply Witness Statement of Mike Washer, dated August 8, 2017, paras. 12-15; Reply Expert Report of Bill Collins (SNC-Lavalin), dated August 14, 2017.
[110] Expert Report of SC Market Analytics, dated June 9, 2017, p. 42; Reply Witness Statement of John Wall, dated August 18, 2017, para. 31; Reply Witness Statement of Dan Fougere, dated August 18, 2017, paras. 21-22.
[111] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 150.
[112] Canada's Counter-Memorial on Damages, dated June 9, 2017, paras. 148-150.

actually paid to transport aggregate from the Bayside Quarry to NYSS in New York and New Jersey, and offered in 2009 for subsequent years, independently verify that the freight rates estimated in the First Tamarack Report are reasonable estimates grounded in reality.[113]

125. [redacted]

a) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[113] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, paras. 6-13.
[114] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 148.
[115] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 148.
[116] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, paras. 15-17.
[117] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 19.
[118] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 16.

[redacted]

b) [redacted]

[redacted]

[redacted]

[redacted]

c) [redacted]

[119] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 23.
[120] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 148.
[121] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 33.
[122] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 37.
[123] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 38.
[124] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 148.

[redacted]

126. [redacted]

127. [redacted]

128. [redacted]

129. [redacted]

[125] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 31.
[126] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, paras. 29-30.
[127] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 149.
[128] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, paras. 15-17.
[129] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 26.
[130] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 149.
[131] Expert Report of FTI Consulting (Howard Rosen), dated December 15, 2016, para. 5.23.

[redacted]

130. The Marsoft report also mischaracterizes [redacted]

[redacted]

[redacted]

131. However, Figure 10 of the Marsoft report is misleading. [redacted]

[redacted]

[132] Reply Expert Report of FTI Consulting (Howard Rosen), dated August 23, 2017, para. 5.41.
[133] Reply Expert Report of FTI Consulting (Howard Rosen), dated August 23, 2017, para. 5.41.
[134] Expert Report of Marsoft Inc. (Arlie G. Sterling), dated June 9, 2017, para. 70, p. 22.

[redacted]

132. [redacted]

[redacted]

133. This corrected version of Figure 10 shows that [redacted]

[redacted]

[135] Expert Report of Marsoft Inc. (Arlie G. Sterling), dated June 9, 2017, para. 34.

134. Canada also wrongly assumes that [redacted]

[redacted]

135. [redacted]

136. [redacted]

51. [redacted]

52. [redacted]

53. [redacted]

[136] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 149.
[137] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 43.
[138] Reply Expert Report of FTI Consulting (Howard Rosen), dated August 23, 2017, paras. 5.43-5.44.
[139] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 150.
[140] Reply Witness Statement of Paul Buxton, dated August 18, 2017, para. 39.

[redacted]

54. [redacted]

137. Mr. Fougere further explains that:

> 34. I have had the benefit of reviewing the Expert Report of Mr. Wayne Morrison (Tamarack Resources) dated December 9, 2016 and comment as follows.
>
> 35. I consider Mr. Morrison's descriptions and conclusions [redacted]
>
> 36. [redacted]
>
> 37. [redacted]
>
> 38. [redacted] New York City New Jersey. [redacted] New York

[141] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, paras. 51-54.

City [redacted] New York City.[142]

138. Marsoft's [redacted] is also flawed in many other ways. For example:

a) [redacted]

b) [redacted]

c) [redacted]

139. [redacted]

5. The Right Discount Rate

140. In its Counter-Memorial, Canada contends that "Mr. Rosen makes four mistakes in calculating his discount rate".[147] This is a mischaracterization of the differences

[142] Reply Witness Statement of Dan Fougere, dated August 18, 2016, paras. 34-38.
[143] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 56.
[144] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 60.
[145] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, para. 64.
[146] Reply Expert Report of Tamarack Resources (Wayne Morrison), dated August 18, 2017, paras. 65-66.

between the FTI Valuation and the Brattle report. As Mr. Rosen explains, "the issues raised by Mr. Chodorow [with respect to the discount rate calculation] are areas where we hold differences of opinion in terms of approach, but are not 'methodological flaws'".[148]

141. An area where Mr. Rosen does agree with Brattle's approach is with respect to "unlevered betas", the effect of which is a reduction of Mr. Rosen's discount rate from 5.78% to 5.41%.[149] This, in turn, causes an increase in Mr. Rosen's calculation of future lost profits.[150] Mr. Rosen calculates that the effect of adopting all of the adjustments suggested by Brattle is an even greater reduction of Mr. Rosen's discount rate from 5.78% to 5.10%.[151]

6. The Investors are Entitled to Pre-Award and Post-Award Interest

142. In its Counter-Memorial, Canada cites the first paragraph of the *Commentary on the ILC Articles, Article 38* as support for the proposition that "[t]he guiding principle under international law is that interest is only necessary to ensure full reparation, but that there is no automatic right to it."[152] Canada then claims that the Investors "have failed to meet the burden of establishing why, in this case, full reparation requires an award of interest".[153]

143. However, Canada's reference to the *Commentary on the ILC Articles* is transparently selective and self-serving. Canada omits to mention that the very next paragraph in the *Commentary* states that "[s]upport for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence".[154] The *Commentary* then also goes on to quote

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147 Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 154.
148 Reply Expert Report of FTI Consulting (Howard Rosen), dated August 23, 2017, para. 5.72.
149 Reply Expert Report of FTI Consulting (Howard Rosen), dated August 23, 2017, paras. 5.72, A2.4-A2.5.
150 Reply Expert Report of FTI Consulting (Howard Rosen), dated August 23, 2017, paras. 5.73, A.2.18.
151 Reply Expert Report of FTI Consulting (Howard Rosen), dated August 23, 2017, paras. 5.72, A2.17.
152 Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 161.
153 Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 161.
154 Commentary on the ILC Articles, Article 38, Commentary (2) (***Canada's Index of Legal Authorities,* Tab R-60**).

from *The Islamic Republic of Iran* v. *The United States of America (Case A-19)*, in which the Full Tribunal stated that "it is customary for arbitral tribunals to award interest as part of an award for damages..."[155]

144. In the FTI Valuation, Mr. Rosen further explains why pre-award interest is necessary to achieve full reparation:

> The Investors incurred lost profits during the period from 2008 to the current date, and since the Investors did not receive the lost profits in the years in which they were expected to be earned, the Investors have been deprived of the opportunity to utilize the money generated from the Whites Point project and earn interest.[156]

145. Nonetheless, the Brattle report calculates a <u>negative</u> pre-award interest amount, which Brattle attempts to justify by saying the Investors "avoided large project-related cash outflows from [redacted]"[157] In effect, the Brattle report suggests that the Investors should reimburse Canada for the privilege of being denied the approval of the Whites Point Quarry and therefore not needing to invest funds in the Quarry.

146. Contrary to Canada's assertions and the Brattle report, Mr. Rosen's methodology is obviously principled and sound. As Mr. Rosen explains:

> As stated throughout the FTI Report, the damages claimed by the Investors are the lost profits from the Whites Point project resulting from the Respondent's breaches of the Treaty. Under the Investors' claim, prior to [redacted] no lost profits were generated. It is unreasonable to calculate pre-award interest for periods where no actual damages are being claimed. Therefore, I believe that the methodology applied in the FTI Report for calculating pre-award interest is reasonable.[158]

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[155] Commentary on the ILC Articles, Article 38, Commentary (3) (***Canada's Index of Legal Authorities*, Tab R-60**). Notably, Decision 16 of the Governing Council of the United Nations Compensation Commission also provides that "[i]nterest will be awarded from the date the loss occurred until the date of payment...": Commentary on the ILC Articles, Article 38, Commentary (4) (***Canada's Index of Legal Authorities*, Tab R-60**).

[156] Expert Report of FTI Consulting (Howard Rosen), dated December 15, 2016, para. 7.1.

[157] Expert Report of the Brattle Group (Darrell B. Chodorow), dated June 9, 2017, para. 211.

[158] Reply Expert Report of FTI Consulting (Howard Rosen), dated August 23, 2017, para. 7.5.

147. The Investors are therefore entitled to pre-award interest in the amount calculated by Mr. Rosen.

148. To achieve full reparation, the Investors are also entitled to post-award interest, which is customarily awarded by tribunals.[159] The Tribunal in *Crystallex International Corporation* v. *Bolivian Republic of Venezuala* explained the rationale:

> With regard to post-award interest, the Tribunal also considers that awarding such interest is appropriate under the circumstances. It agrees with the observation made by the tribunal in *Aucoven* v. *Venezuela*, whereby 'post-award interest is intended to compensate the additional loss incurred from the date of the award to the date of final payment'."[160]

7. A Tax Equity Adjustment is Required for Full Reparation

149. The fundamental principle of international law for assessing the loss to the Investors is that Canada must make "full reparation" to compensate for the loss caused by its breaches, "to re-establish the situation which would, in all probability, have existed if that act had not been committed."[161] As explained by Mr. Shay, if a tax equity adjustment is not added to the damages award the Investors will be undercompensated.[162]

150. Canada contests the tax equity adjustment included in Mr. Rosen's lost profits calculation in the FTI Valuation.[163] Canada's position is based on both a misunderstanding of the Investors' case and a mischaracterization of

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[159] *ADC* **(*Investors' Authorities*, Tab CA323, para. 522)**; *Crystallex International Corporation v. Bolivian Republic of Venezuala, ICSID Case No. ARB(AF)/11/2,* Award, 4 April 2016 ("*Crystallex*") **(*Investors' Authorities*, Tab CA317**, para. 928).

[160] *Crystallex* **(*Investors' Authorities,* Tab CA313, para. 939).**

[161] *S.D. Myers, Inc.* v. *Government of Canada*, UNCITRAL, First Partial Award, 13 November 2000 ("*S.D. Myers*"), **(*Investors' Authorities,* Tab CA313, paras. 311-313)**; Also Meg N. Kinnear, Andrea K. Bjorklund, et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, Supplement No. 1, March 2008 (Kluwer Law International 2006), ("Kinnear") **(*Investors' Authorities,* Tab CA311, p. 1135-16)**; and Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) ("Dumberry") **(*Investors' Authorities,* Tab CA312, p. 300-301)**.

[162] Expert Report of Stephen Shay, dated August 19, 2017, paras. 2.5, 6.4.1-6.4.2.

[163] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 160; Expert Report of FTI Consulting (Howard Rosen) dated December 15, 2017, paras. 6.1-6.9.

international arbitral decisions. The established principles of international law, and the evidence, demonstrate that a tax equity adjustment is required to fully compensate the Investors for their loss.

151. In its Counter-Memorial, Canada mistakenly assumes "that the damages award would be paid to Bilcon of Nova Scotia, which would then immediately issue the entire amount as a dividend to Bilcon of Delaware, which would then be transferred through to its three shareholders in unspecified amounts".[164]

152. This is incorrect. The Tribunal's damages award will of course be paid to the Investors,[165] not to Bilcon of Nova Scotia. As Stephen Shay explains, "[f]or U.S. tax purposes, the income from the damages award would be considered income of the Bilcon Delaware shareholders either directly or indirectly through Bilcon Delaware".[166] Mr. Shay explains the corporate structure of Bilcon of Delaware and Bilcon of Nova Scotia as follows:

[redacted]
New Jersey
New Jersey [redacted]
[redacted]
[redacted]

[Emphasis added]

153. Canada thus misconceives the tax consequences of a damages award. Contrary to Canada's misconception, it is not necessary for the Tribunal to "compel" any

[164] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 157.
[165] Investors' Damages Memorial, dated March 10, 2017, para. 255.
[166] Expert Report of Stephen Shay, dated August 19, 2017, para. 6.3.1.
[167] Expert Report of Stephen Shay, dated August 19, 2017, paras. 5.2.1 and 5.2.2.1.

corporation to pay dividends.[168] The damages award will be subject to U.S. tax when it is paid to the Investors without any distributions at all.

154. As Stephen Shay explains, a damages award to the Investors will be taxed differently from the profits realized from operating the Whites Point Quarry, for which the damages award is intended to compensate the Investors.[169] Since 1918, the U.S. has provided its taxpayers with a foreign tax credit to "alleviate... the burden of double taxation".[170] However, as Mr. Shay notes, "the payment of damages does not give rise to a foreign tax credit to net against U.S. Federal income tax".[171]

155. The effect of the difference in treatment is that the overall effective rate of tax payable on a damages award made to the Investors is higher than the overall effective rate of tax that would have been applied to profits from operating the Whites Point Quarry.[172] As Mr. Shay explains, this is why a tax equity adjustment (or "gross up") is necessary to ensure that the damages award to the Investors constitutes full reparation for the Investors' loss:

> 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. (This is principally as a result of the absence of a foreign tax credit in relation to a damages award, but is also attributable to other differences between U.S. and Canadian taxation.) Accordingly, I conclude that a gross up to the Lost Profits Amount is necessary for the Investors to be made whole.[173]
>
> [Emphasis added]

[168] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 158.
[169] Expert Report of Stephen Shay, dated August 19, 2017, paras. 6.4.1-6.4.2.
[170] Expert Report of Stephen Shay, dated August 19, 2017, paras. 4.2.1.2 and 4.2.2.2-4.2.2.3.
[171] Expert Report of Stephen Shay, dated August 19, 2017, para. 6.4.1.
[172] Expert Report of Stephen Shay, dated August 19, 2017, para. 6.4.2.
[173] Expert Report of Stephen Shay, dated August 19, 2017, para. 2.5.

156. Mr. Shay then adds with regard to the amount of the "gross up" figure:[174]

> ...there is a false precision in a single number. The Tribunal, however, must reach a number. My conclusion is that a gross up of 146% would be reasonable. This is consistent with Mr. Rosen's gross up of 148%.[175]

157. As Mr. Shay's explanation makes clear, necessary adjustment or gross-up is not any sort of "subsidy".[176] Canada has entered into the NAFTA with the United States, and has also entered into the *Canada-U.S. Tax Convention*.[177] Canada's breach of the NAFTA causes adverse tax consequences for the Investors which are the direct, natural and logical outcome of Canada's breaches and which were entirely foreseeable by Canada.

158. The requirement of a tax equity adjustment is simply a direct consequence of the application of basic principle of international law that the Investors are entitled to "full reparation" for the losses caused by Canada's wrongful conduct. The Investors will only be fully compensated if a tax equity adjustment is included as part of the damages award.

159. In its Counter-Memorial, Canada relies on two international arbitral awards, for its opposition to a tax equity adjustment. Both awards are easily distinguishable on the basis that the Tribunals in those cases did not have the thorough evidence of the actual tax consequences of a damages award that is before the Tribunal in this case.

160. Canada's discussion of *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Canada*, does not mention that the Tribunal's "gross up" decision was premised on the fact that the Claimants "did not justify why compensation could not remain with the Canadian enterprises, nor why it had to be taxed in the

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[174] Expert Report of Stephen Shay, dated August 19, 2017, paras. 6.7.1-6.7.2.
[175] Expert Report of Stephen Shay, dated August 19, 2017, para. 2.7.
[176] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 159.
[177] Some of the consequences of the *Canada-U.S. Tax Convention* are described in the Expert Report of Michael Colborne, dated August 17, 2017, pp. 4-5.

United States, nor what the tax rate was, nor why [a tax gross up] is a necessary part of any resulting compensation".[178]

161. In this case, the Investors have provided the Tribunal with detailed factual and expert evidence explaining how the damages award will be taxed in the United States, what the relevant tax rates are, and why a tax equity adjustment is a necessary component of the damages award to achieve full reparation.

162. Similarly, with regard to the Award in *Ceskoslovenska obchodni banka, a.s.* v. *Slovak Republic*, Canada fails to note that the Tribunal expressly said that "the evidence before the Tribunal does not permit it to make any assessment on CSOB's tax duties, past and present".[179]

163. In *Chevron Corporation and Texaco Petroleum Corporation* v. *The Republic of Ecuador*, the Tribunal noted that "the Tribunal's task is to make the Claimants whole, and not more than whole, under international law, as if the wrong had not occurred",[180] which the Tribunal understood needed to "take into account the effect of applicable Ecuadorian taxes on the amounts due the Claimants under the 1973 Agreement, and ultimately on the Claimants' total compensation".[181] The Tribunal further noted that:

> In order to fall within the ambit of the Tribunal's assessment of damages, the taxes to be deducted must be determined with certainty and must be sufficiently connected to the same legal relationship between the parties that is the subject of the arbitration. Taxes may thus be taken into account when there exists a specific provision in an agreement or an established

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[178] *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012 ("*Murphy*") **(*Investors' Authorities*, Tab CA326, para. 485)**.

[179] *Ceskoslovenska obchodni banka, a.s.* v. *Slovak Republic* (ICSID Case No. ARB/97/4) Award, 29 December 2004 **(*Canada's Index of Legal Authorities*, Tab RA-112, para. 367)** ("*Ceskoslovenska*").

[180] *Chevron Corporation and Texaco Petroleum Corporation* v. *The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Final Award, August 31, 2011 ("*Chevron*") **(*Investors' Authorities*, Tab CA377, para. 306)**.

[181] *Chevron*, para. 306.

> practice between the parties relating to their allocation, collection, or withholding.[182]

164. In this case, the applicable taxes have been established with certainty, including with regard to the established practise between Canada and the United States under the *Canada-U.S. Tax Convention*.

165. The law and the evidence are therefore clear. The Investors are entitled to full reparation for their losses, and tax equity adjustment is needed to achieve full reparation for the Investors.

8. Canada Misconstrues the Nature and Purpose of an Environmental Impact Statement ("EIS")

166. Canada instructed Brattle to assume that "the operational characterizations made by the Claimants during the project planning and environmental assessment stages were an accurate representation of their expectations at the time."[183]

167. Brattle then treats various business and operational descriptions and dollar amounts referred to in the EIS as being definitive commitments, rather than a general reflection of the Investors' assessment at the time.

168. For example, the Brattle report states:

> 18. Mr. Rosen also calculates lost profits using numerous assumptions that are different from those that BNS communicated in its Environmental Impact Statement ("EIS") and reflected in other contemporaneous documents, and these differences inflate his estimate of lost profits. For example, the EIS and other contemporaneous planning documents reflected an expectation that Whites Point would produce 2.0 million tons of aggregates annually. Mr. Rosen assumes that the Project would achieve annual output of [redacted] resulting in an overestimate of lost revenues. Similarly, Mr. Rosen uses a freight cost that assumes [redacted]

[182] *Chevron*, para. 311.

[183] Expert Report of the Brattle Group (Darrell B. Chodorow), dated June 9, 2017, para. 83; Canada instructed SCMA to adopt similar assumptions (Expert Report of SC Market Analytics, dated June 9, 2017, para. 2).

[redacted] These are two of many examples. In effect, Mr. Rosen is valuing a project that is substantially different from the Whites Point operations envisioned and documented prior to the breach.

24. I adopt assumptions that are consistent with the operations of the Project as described by BNS in the EIS and other contemporaneous documents. For example, I assume annual Whites Point output to be consistent with the 2 million tons-per-year described in the EIS and I use a freight rate that reflects [redacted]

121. *Shipping Costs.* [redacted]

122. *Labor Costs.* Mr. Rosen's labor costs were based on an analysis prepared for the purposes of this arbitration. The assumptions underlying the labor cost relied upon by Mr. Rosen are inconsistent with BNS plans reflected in the EIS and planning documents. Rather than assuming the 44 week production period reflected in the EIS, Mr. Rosen's labor costs reflect only [redacted]

146. Mr. Rosen uses a forecast of freight costs that are unreasonably low. As discussed above in Section V.E.1, [redacted]

149. However, as discussed in Section V.E.1, the operating costs assumed by Mr. Rosen do not reflect the Whites Point operating plans described by BNS in the EIS, as evidenced by the labor cost calculation in Exhibit C-1010.

162. I model the operations of Whites Point consistent with the details

Footnote 123. The EIS did include some estimates of capital costs, but the Claimants themselves did not deem these to be sufficiently reliable to be relied upon in this proceeding.

Title of Section E. 1. Many Assumptions Adopted by Mr. Rosen from Other Witnesses Are Inconsistent with the Whites Point EIS or Earlier Planning Documents

Title of Figure 8. Assumed Annual Whites Point Production – Rosen vs. EIS

169. Canada then contends in its Counter-Memorial:

> 147. The Claimants also make a number of errors with respect to the costs of operating the Whites Point project. Bilcon of Nova Scotia presented freight and labour costs as two of their largest operating expenses for the project in their EIS. The operating expenses the Claimants present to this Tribunal are inconsistent with the expenses that Bilcon of Nova Scotia presented to the JRP in its EIS. They are significantly understated.[184]
>
> [Emphasis Added]

170. However, Canada ignores the fact that it is expected and ordinary that business-related facts and descriptions referred to in an EIS are known and understood to be approximations and projections, which are revised and refined as detailed planning and design specifications are developed and finalized during and after the industrial permitting phase.

171. Mr. Buxton clearly explains the nature and purpose of the EIS:

> 20. It was widely known and understood by those involved in the environmental assessment process in the 2000s that an EIS was drafted at a very early stage of a project, was intended to be conceptual, and was naturally focused on the environmental effects of a project and mitigation measures, not the specifics of the project's business model or design.
>
> 21. In the 2000s Canada encouraged proponents to undertake an environmental assessment early in the planning stages of a project, and Canada continues to do so.
>
> 22. Canada's website entitled "Basics of Environmental Assessment" explains that "[a]n environmental assessment should be

[184] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 147.

> conducted as early as possible in the planning stage of a designated project in order for the proponent to be able to consider the analysis in the proposed plans, including incorporation of mitigation measures to address adverse environmental effects".
>
> 23. Specific business-related facts and dollar amounts referred to in an EIS, and business plans drafted at the early stages of the process were, by necessity, and as is usual, approximations made at the early stage of the project, always subject to revision in response to changing conditions and circumstances. These projections would ordinarily be revised and refined, and be expected to be revised and refined, as detailed planning and design specifications were developed and finalized during and following the industrial permitting phase of the project.
>
> 24. Estimated capital and operating costs, anticipated prices for product, details like the number of sailings from port of origin to point of destination (for Whites Point, to the New Jersey/New York City area) as expressed in an EIS, were known and understood to be approximations, obviously and normally subject to change. This was expected, was routine and was not a problem, as long as the design and construction of the project did not materially expand the environmental footprint.
>
> 25. Where the Brattle report and the SCMA report suggest that the business parameters of the Project, the specific numbers or the Investors' projections or expectations in that regard or specific production volumes cited were cast in stone in the EIS or in the draft of a business plan, they are mistaken.[185]

172. The expert evidence of Peter Oram is to the same effect:

> An EIS is fundamentally a planning document that forms the basis for a project and is by its very nature, conceptual and envisions variations in how a project is ultimately built. Nova Scotia Environment's "Proponents Guide for Environmental Assessment" states that "EA approval is based upon the review of the conceptual design, environmental baseline information, impact predictions and any mitigation presented in the EA report." The *Canadian Environmental Assessment Act* also states:
>
> 5(2) Notwithstanding any other provision of this Act,

[185] Reply Witness Statement of Paul Buxton, dated August 18, 2017, paras. 20-25.

> (*a*) an environmental assessment of a project is required before the Governor in Council, under a provision prescribed pursuant to regulations made under paragraph 59(g), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part; and
>
> > (i) shall ensure that an environmental assessment of the project is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made,
>
> Regulators, therefore, are aware and expect that variations will occur in the ordinary course between the project described in EA documents and its final design and indeed through its lifespan. This is particularly true with aggregate operations, due to such factors as weather, market demands and equipment issues. For example, the Pioneer Coal Project in Nova Scotia, that I consulted on, there were variations between the EA description and the operation phase for moving soil and rock. While the EIS specified the use of mobile equipment (excavators and haul trucks), the proponent ultimately used conveyors to move the materials. This variation did not concern the regulators and we implemented them at the site without the need for further approvals or modification of any permits.
>
> There are necessarily cost variations between the description in the EIS and the final design of the project at the permitting stage. As additional technical work is completed more accurate numbers are determined as the project is closer to development. Costing presented in an EIS are typically estimates of a proponent's anticipated cost to complete the project as conceptualized based on data available at the time of the EIS. The EIS process rarely takes capital expenditures into consideration except to get a rough idea of local benefits. Variations are typical and expected.[186]

173. Accordingly, the actual estimates and projections supporting the FTI Valuation, which reflect the actual costing of the design and operation of the Whites Point Quarry, are the best evidence to establish the "but for" world.

[186] Reply Expert Report of GHD Limited (Peter Oram), dated August 17, 2017, p. 1-2.

C. VALUATION METHODOLOGY

1. DCF is the Appropriate Methodology to Achieve Full Reparation

174. All of the cases relied on by Canada regarding the DCF model are premised on one point: that the losses claimed were, in the circumstances, speculative, and therefore not sufficiently certain to apply a DCF analysis of lost profits.

175. This characterization cannot possibly apply to the Investors' lost profits from the Whites Point Quarry. There is nothing speculative or uncertain about them.

176. The evidence before the Tribunal clearly establishes that the DCF methodology is the appropriate methodology to achieve full reparation for the Investors. The Investors have proven, beyond any doubt, the profitability of the Whites Point Quarry.

177. The Whites Point Quarry was not a start-up. It was not a green field operation. It was a division of the Investors' fully established, integrated, and profitable, aggregate enterprise.

178. [redacted]

179. [redacted]

180. But for Canada's breaches, the Whites Point Quarry would have been part of a fully developed, fully operating aggregate enterprise bringing the Investors' Canadian aggregate into New York City and New Jersey.

181. [redacted]

[redacted] New York City [redacted] New Jersey [redacted] New York City [redacted] New Jersey [redacted]

182. In these proven circumstances, Canada's contention that the Investors claim is speculative because they have no established history or track-record of profit is nonsense.

183. Simply put, Canada's position amounts to this: Because of my egregious breach of the NAFTA, you are unable to establish a track-record of profit. Therefore you cannot now claim for the profit you would undoubtedly have realized had I not egregiously engaged in unfair and inequitable treatment that prevented you from establishing a track-record of profit by denying you the Quarry I was legally bound to approve.

184. In short, Canada's position offends the well-established legal principle that a wrongdoer cannot benefit from its own wrongdoing.

185. The Investors' losses are not based at all on speculation. Canada's comparison of the Whites Point Quarry to other cases that are not comparable is without merit. Canada refers to cases arising in completely different factual scenarios, characterized by investors seeking to operate novel businesses in emerging markets, with unpredictable business climates, where the execution risk of starting a successful business is higher by orders of magnitude than opening and operating an ordinary quarry in Nova Scotia, Canada.[187]

[187] In *Metalclad Corporation* v. *The United Mexican States*, Case No. ARB(AF)97/1 for example, the investors were hoping to operate a hazardous waste facility in Guadalcazar, Mexico (***Investors' Authorities*, CA16**). Similarly, *Wena Hotels*, Case No. ARB/98/4, Award, dated 8 December 2000, concerned a dispute over an agreement to lease, operate and manage two hotels in Egypt (***Investors' Authorities*, CA337**). *Windstream Energy LLC* v. *Government of Canada*, PCA Case No. 2013-22, involved the first offshore wind project in North America, with no permits, no site control and novel technology (***Canada's Index of Legal Authorities*, Tab RA-146**). Yet, even in these circumstances the Tribunal declined to simply award sunk costs and awarded damages on a comparative transactions basis.

186. It scarcely needs saying that the plan to operate a quarry at Whites Point, Nova Scotia is fundamentally different from a plan to operate and Egyptian hotel or Mexican toxic waste dump. The market for crushed stone is stable and predictable. It is a fungible product in high demand, with no country risk.

187. Where the fact of future profits are proved on a balance of probabilities, the DCF method is the correct method to use. As the Tribunal said in *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela*:

> The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities. This, of course, means that damages cannot be speculative or merely "possible", as both Parties acknowledge. In the Tribunal's view, all of the authorities cited by the Parties – including by the Respondent in relation to its claim that a degree of certainty is required – accord with the principle that the balance of probabilities applies, even if some tribunals phrase the standard slightly differently. In particular, those cases that discuss the requirement for "certainty" do so in the context of distinguishing "proven" damages from speculative damages, rather than suggesting that a higher degree of proof is applied to damages than to liability.[188]
>
> [Emphasis added]

188. In the result, the Tribunal found that the compensation payable to Gold Reserve for the Treaty breaches "should reflect the seriousness of the violation" and awarded damages of US$740 million, even though Gold Reserve had not received its permits or finalized a mine plan, and had no history of earning profits.

189. Most recently, the tribunal in *Crystallex International Corporation* v. *Bolivarian Republic of Venezuela* awarded damages for lost profits where the investment was a commodity, for which the investor had not received all the needed permits, nor produced the commodity.[189]

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[188] *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1., para. 685 ("*Gold Reserve*") (***Investors' Authorities*, Tab CA316, para. 878**).

[189] *Crystallex* (***Investors' Authorities*, Tab CA317, para. 878**).

190. In awarding lost profits, the Tribunal said:

> 879. Furthermore, gold, unlike most consumer products or even other commodities, is less subject to ordinary supply-demand dynamics or market fluctuations, and, especially in the case of open pit gold mining as in Las Cristinas, is an asset whose costs and future profits can be estimated with greater certainty. The Tribunal thus accepts that predicting future income from ascertained reserves to be extracted by the use of traditional mining techniques—as is the case of Las Cristinas—can be done with a significant degree of certainty, even without a record of past production.
>
> 880. In short, the Claimant has established the fact of future profitability, as it had completed the exploration phase, the size of the deposits had been established, the value can be determined based on market prices, and the costs are well known in the industry and can be estimated with a sufficient degree of certainty.[190]
>
> [Emphasis added]

191. In *Crystallex*, the Tribunal also drew a distinction between the fact of a loss and the quantum of that loss, and explained that once the right to damages has been proven on a balance of probabilities, a tribunal may estimate the actual loss:

> [O]nce the fact of damage has been established, a claimant should not be required to prove its exact quantification with the same degree of certainty. This is because any future damage is inherently difficult to prove. As the tribunal in *Lemire v. Ukraine* observed,
>
> > "[o]nce causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss."[191]
>
> [Emphasis added]

[190] *Crystallex* (**Investors' Authorities, Tab CA317, paras. 877-878**) [emphasis added].
[191] *Crystallex* (**Investors' Authorities, Tab CA317, para. 868**).

192. The Tribunal in *Gold Reserve* similarly explained the rationale of the distinction:

> 686. The Tribunal further notes that, while a claimant must prove its damages to the required standard, the assessment of damages is often a difficult exercise and it is seldom that damages in an investment situation will be able to be established with scientific certainty. This is because such assessments will usually involve some degree of estimation and the weighing of competing (but equally legitimate) facts, valuation methods and opinions, which does not of itself mean that the burden of proof has not been satisfied. Because of this element of imprecision, it is accepted that tribunals retain a certain amount of discretion or a "margin of appreciation" when assessing damages, which will necessarily involve some approximation. The use of this discretion should not be confused with acting on an *ex aequo et bono* basis, even if equitable considerations are taken into account in the exercise of such discretion [...][192]
>
> [Emphasis added]

193. Likewise, the Tribunal in *Gemplus Industrial, S.A. de C.V.* v. *United Mexican States* cautioned:[193]

> It would be wrong in principle to deprive or diminish the Investors of the monetary value of that lost opportunity on lack of evidential grounds when that lack of evidence is directly attributable to the Respondent's own wrongs.
>
> [Emphasis added]

194. *Rusoro Mining Ltd.* v. *Bolivarian Republic of Venezuela*[194] is another case where the Tribunal recognized the future profitability of an undertaking without an operating history. Although the case involved the assessment of fair market value and not lost profits, the Tribunal determined that the value of the investment was $966.5 million, even though only minimal mining had begun.[195]

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[192] *Gold Reserve* (***Investors' Authorities*, Tab CA316, para. 686**).

[193] ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, (***Investors' Authorities*, CA321, Part XIII**). Gemplus involved the cancellation of a right to operate a drivers' registry which was not a going concern. On the evidence, the Tribunal concluded that the Investor had not established profitability.

[194] ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 ("*Rusoro Mining*") (***Investors' Authorities*, Tab CA345**).

[195] *Rusoro Mining* (***Investors' Authorities*, Tab CA345, paras. 652-653, 790**).

195. A rote denial of lost profits just because a business was not yet operating, as Canada contends, simply puts form over substance. As one scholar observed:

> Denying lost profits simply because the injured business is new would leave the injured claimant less than whole and would fail to achieve the goal of full compensation.[196]

196. In a similar commentary related to oil exploration, Ripinsky and Williams observed:

> [O]nce the exploration campaign proves successful, the major risk of the investment is gone, and one should be able to predict with reasonable certainty the range of revenues that the concession will generate, even without a prior record of profitable operations.[197]
>
> [Emphasis added]

197. In the context of the Whites Point Quarry, there is no risk. The rock is there. It is tangible. It is visible. It is accessible. It is easy to extract. It is fungible. [redacted] The Investors' had a long track record of experience and success in the industry and the market. Canada is also a stable political and economic environment, governed by the rule of law, in which the Investors expected to do business for a long time.

198. With far less, the Tribunal in *Waguih Elie George Siag and Clorinda Vecchi* v. *The Arab Republic of Egypt*,[198] noted, in regard to a recent hotel that had never operated:

> The Tribunal is persuaded that the opportunity which was identified by Mr. Siag was a very promising one and that the Project appeared to be moving forward successfully, albeit that it was still at an early stage.[199]

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[196] John Y. Gotanda, "Recovering Lost Profits in International Disputes", *Georgetown Journal of International Law* (Fall 2004), **(*Investors' Authorities*, Tab CA334, pp. 61-112)**.

[197] Sergey Ripinsky, *Damages in International Investment Law* (London: British Institute of International and Comparative Law, 2015), **(*Investors' Authorities*, Tab CA381, p. 283)**.

[198] ICSID Case No. ARB/05/15, Award, June 1, 2009 ("*Siag*") **(*Investors' Authorities*, Tab CA335).**

199. The Tribunal rejected Egypt's claim that the value of shares sold between family members or figures used in a financing agreement were reasonable proxies for the project's value, and awarded damages based on a market-based approach which, like DCF, measured the ability of a business to generate profits into the future. The Tribunal held that the property was comparable to the best properties in the region and, that if the hotel was built, it "would have become a central feature of a major coastal resort."[200]

200. In considering lost profits, tribunals, including the *Crystallex* Tribunal, have also taken into account the governmental promotion of a project in relation to the investor having sufficient expertise and a record of profitability in similar circumstances.[201]

201. As was the case with the respondent government in *Crystallex*, Nova Scotia clearly understood and appreciated the value of aggregate production in general, and the great value, in particular, of the stone at Whites Point Quarry on the North Mountain. The Nova Scotia government had mapped it out, written about it, and extolled its potential in promotional government publications intended to attract U.S. investors to develop a quarry at Whites Point. Most damningly, the government continued to promote the quarry potential of Whites Point in 2006, during the very same time period the Investors were being subjected to the phony JRP assessment.[202]

202. Nova Scotia relentlessly promoted the development of a quarry at Whites Point in the sound expectation that Nova Scotia's economy would reap benefits from increased employment and tax revenue, as it has historically done from the development of quarries, and will continue to do with the approval of the new

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199 *Siag* (***Investors' Authorities*, Tab CA335, para. 542).**

200 *Siag* (***Investors' Authorities*, Tab CA335, para. 574).**

201 *Crystallex* (***Investors' Authorities*, Tab CA317, para. 879)**; Also *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2010 ("*Vivendi*"), (***Investors' Authorities*, Tab CA336, paras. 8.3.4, 8.3.10)**.

202 *Industrial Mineral Potential in Nova Scotia, Opportunities to Develop Deep-water Aggregate Quarries, Nova Scotia Natural Resources*, Phil Finck, Investors' Damages Memorial, dated March 10, 2017, Appendix B.

mega quarry at Black Point, for which Nova Scotia went so far as expropriate legendary coastal property.

203. The Nova Scotia and Federal government typically use the expectation of future profits to justify government "investments" in far more speculative ventures. In funding a multi-million dollar bailout of the Port Hawkesbury Mill in Nova Scotia, for example, the Nova Scotia government justified this remarkable intervention on the grounds that it constituted approximately 2.5% of the Province's GDP, despite the fact that the business had failed.[203] Likewise, in justifying a $372.5 million loan to Bombardier that it was unable to secure in private capital markets, the Prime Minister of Canada proclaimed:

> "But we also have a responsibility to ensure that the investments we make with taxpayers' dollars are leading to good jobs and growth."[204]

204. Although the legal standard only requires reasonable proof on a balance of probabilities, the Investors have proven, far beyond a balance of probabilities that, but for Canada's wrongdoing and its egregious breaches of the NAFTA, the Whites Point Quarry would have been built and operated profitably based on the Investors' estimates and projections in this Arbitration proceeding.

2. Canada Denies the Investors Full Reparation

a) Pre-Wrongdoing Offer, Transactions and Proposal

205. The Brattle report contends that [redacted] the Investors' 2002 purchase of their interest in Whites Point Quarry, the Investors' buyout of Nova Stone in 2004, [redacted] are "market indicators" of the value of the Whites Point Quarry Project.[205]

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[203] *The Chronicle Herald* – Mill gets Millions in N.S. Cash, dated August 20, 2012 (***Investors' Authorities*, C1540**).

[204] *Montreal Gazette* – While you Were Sleeping: Bombardier's Embarrassment of Riches, dated March 31, 2017 (***Investors' Authorities*, C1540**).

[205] Expert Report of the Brattle Group (Darrell B. Chodorow), paras. 62-82; Canada's Counter-Memorial, dated June 9, 2017, paras. 135-136.

206. These pre-breach transactions or proposed transactions, are not, in any way, indicative of the full reparation compensation required to "wipe out all of the consequences" of Canada's breaches of the NAFTA.

207. In FTI's Reply Valuation, Mr. Rosen explains why, from a valuation standpoint, these transactions or proposed transactions are not indicators of the Investors' lost profits. In particular, Mr. Rosen explains:

> 4.4 The Brattle Report purports to use these transactions or offers to test the reasonability of my lost profits calculation, but fails to acknowledge that they represent two different exercises. As discussed in the FTI Report, my lost profits analysis sought to "restore the Investors to the position that they would have been in but for the Respondent's breaches of the Treaty." Under this counterfactual scenario, the Investors would have owned and operated the Whites Point project for over 50 years inclusive of the construction phase and vertically integrated the quarry into the Clayton Group of Companies. Effectively, a full reparation standard of compensation.
>
> 4.5 On the other hand, the value of an asset, such as the Whites Point project, is typically calculated in cases where the subject asset has been expropriated and the requested remedy is its "value" at a specific point in time, be it market value, fair market value ("FMV"), or some other definition. FMV is a commonly used definition of value equal to, "the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms-length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."
>
> . . .
>
> 4.7 Full reparations are ultimately concerned with the perspective of the Investors rather than the views of the general market. Absent the Respondent's breaches of the Treaty, the Investors intended to develop and make use of the Whites Point project. Changing the standard of compensation from full reparations to an undefined notion of "value" assumes that the Investors intended to put the Whites Point project up for sale and would, absent the Respondent's breaches of the Treaty, potentially accept a price

different than the present value of the profits they could receive by operating the project themselves.[206]

208. As to the actual circumstances of the 2002 and 2004 transactions, Paul Buxton explains:

> 83. [redacted]
>
> 84. [redacted]
>
> ...
>
> 88. This partnership was established at the earliest stage of the Project, and the amount paid by the Investors at this time was not, in any sense, an indication of the value of the Whites Point Quarry Project to the Claytons.
>
> 89. As I have said previously, from discussions I had with government agencies and representatives in 2002 and early 2003, it appeared most likely that the environmental approval process would take the form of a Comprehensive Study, and, as noted earlier, significant EIS-related work was undertaken in 2002 and early 2003.
>
> 90. When the Project was put into the Joint Review Panel process it was clear that the cost of the environmental approval process would increase very significantly and the receipt of all Industrial Approvals would be delayed, likely for some years.
>
> ...
>
> 92. [redacted]

[206] Expert Reply of FTI Consulting (Howard Rosen), dated August 23, 2017 paras. 4.4-4.5, 4.7.

[redacted]

93. Having said that, the Claytons were generous in their business dealings with others. [redacted]

94. All of this aside, having been involved in the Project from the beginning and throughout, and having worked very closely with the Claytons for many years, and having seen first-hand how they conduct their business affairs, with a sophisticated long-term, multi-generational vision, and generous approach, Nova Stone's sale of its interest in the Whites Point Quarry Project in 2004 is in no sense any indication of the value of the Whites Point Quarry to the Claytons or anyone in their position.[207]

209. And Bill Clayton Jr. explains:

4. Our partnership with Nova Stone happened in the earliest days of our involvement in the Whites Point Quarry Project. [redacted]

5. By the 2000s, our family had been working in the aggregates industry for 50 years. We planned the Whites Point Quarry to be an addition to our vertically integrated enterprise, which we had decades of experience operating, and which included by that time importing very significant volumes of aggregate from Canada.

...

7. We do not take advantage of people. That is not our business philosophy or our business practice. [redacted]

[207] Reply Witness Statement of Paul Buxton, dated August 18, 2017, paras. 83-84, 88-90, 92-94.

[redacted]

8. By the time of our buyout of Nova Stone, we had spent approximately [redacted] on the Project. We spent almost [redacted] more to take the Project through the environmental assessment. [redacted]

210. With regard to the [redacted] proposal, Mr. Clayton explains:

9. I do not know what prompted [redacted] to propose [redacted] for the Whites Point Quarry [redacted] It was an extra add-on to a proposal to [redacted] I do know that the [redacted] offer had nothing to do with the actual value of the Whites Point Quarry to us, based on the profits we expected to realize over the life of the Quarry.

...

13. [redacted] New York City [redacted] New York City. [redacted]

14. [redacted]

15. [redacted] New York City [redacted]

[208] Reply Witness Statement of William Richard Clayton, dated August 21, 2017, paras. 4-5, 7-8.

[redacted] New York City [redacted]

211. In reality, and in view of the value of Whites Point Quarry's value to the Investors as a component of their established enterprise, the Investors never had any interest in selling the Quarry. As Mr. Clayton says clearly:

> 12. We are not flippers. [redacted] New Your City [redacted] New Jersey [redacted]

b) Feasibility/Pre-Feasibility Study

212. Canada relies on the false assertion in the Brattle report that the absence of a formal "feasibility" or "pre-feasibility" study indicates that the Whites Point Quarry Project was speculative and uncertain [211] and was "still in an early stage of development"[212] at the time of Canada's wrongdoing.

213. In doing so, Canada ignores the known history and purpose of feasibility studies. Canada and Brattle both ignore the fact that the Investors did not need any such studies for any purpose, least of all to satisfy themselves of the profitability of the Whites Point Quarry, in conjunction with their well-established enterprise in the aggregates industry.

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[209] Reply Witness Statement of William Richard Clayton, dated August 21, 2017, paras. 9, 13-15.
[210] Reply Witness Statement of William Richard Clayton, dated August 21, 2017, para. 12.
[211] Canada's Counter-Memorial on Damages, June 9, 2017, para. 131.
[212] Expert Report of the Brattle Group (Darrell B. Chodorow), June 9, 2017, para. 89.

214. In Canada, publicly traded mining companies use feasibility and pre-feasibility studies to demonstrate viability when seeking investment for a project from the general public.[213] As Mr. Rosen explains:

> 3.19 National Instrument 43-101 *Standards of Disclosure for Mineral Projects* ("**N143-101**") is a set of rules established by the Canadian Securities Administrators, an umbrella organization comprised of Canada's provincial securities commissions, which regulates Canada's Stock Markets. N143-101 specifically governs the disclosures made by mining companies **to the public** about the quality and quantity of its Mineral Resources and Mineral Reserves. In Canada, N143-101 regulates the content of feasibility studies and pre-feasibility studies that are published by public companies in order to attract investment.
>
> 3.20 N143-101 was created in the mid-1990's following a scandal where Canadian mining company Bre-X Minerals Ltd. ("**Bre-X**") fraudulently reported that it had discovered a major gold deposit in Indonesia. The news caused Bre-X's share price to increase significantly from 1995 through 1996. Bre-X was able to deceive the public markets because, at the time, there were no disclosure rules specifically tailored to the mining sector.
>
> [Emphasis added]

215. [redacted]

[213] Reply Expert Report of FTI Consulting (Howard Rosen), dated August 23, 2017, paras. 3.19-3.28; Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 29; Reply Expert Report of Mercator (Michael Cullen), dated August 1, 2017, p. 2.

[214] Expert Report of FTI Consulting (Howard Rosen), dated August 23, 2017, paras. 3.19-3.28; Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 201, p. 29; Expert Report of Mercator (Michael Cullen), dated August 1, 2017, p. 2.

216. 

217. In the result, the determination that the Whites Point site met the definition of "reserve base" or "reserve" led Mr. Lizak to report in 2002:

> Physical lab tests, chemical lab tests, and examination of the core samples and outcrop exposures indicate that the Whites Cove site contains an advantaged, large reserve of high quality construction aggregate. The site contains in excess of 200 million tons (English) of in-place stone, which is ideally suited for quarrying, processing, shipping, and construction.[217]

218. The Investors knew very well the volume of the reserve estimate; they were experienced with the methods of extracting and processing rock from the Whites Point Quarry; they were intimately familiar with the market, because they were already in it; they satisfied every possible environmental considerations relating to the Quarry; they had all of the information they needed about design, equipment, capital and operating costs, and they were ready to launch the Quarry as soon as it was approved, which they fully expected it to be.

219. In short, the Investors were better placed than anyone to analyze for themselves whether the Quarry would be profitable as an integrated part of their enterprise.

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[215] Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 29.
[216] Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 30.
[217] Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), dated August 8, 2017, p. 30.

220. In postulating that the Whites Point Quarry ended too early for profitability to be reliably predicted, Canada attempts to use the fruits of its wrongful conduct in breach of the NAFTA as a shield against being held properly accountable for the consequences of its conduct.

c) Brattle's Sunk Costs Analysis Does Not Apply

221. The Investors' claim for full reparation is properly measured by the loss of demonstrated profits resulting from Canada's breaches. Accordingly, the Investors are not claiming the costs incurred or "sunk costs" in developing the Whites Point Quarry Project.

222. Despite this, one of Canada's alternative contentions is that the Tribunal should ignore Whites Point's proven value to the Investors' established aggregates business and focus only on the Investors' sunk costs as "substantiated by evidence".[218]

223. For that purpose, in a monumental tabulation, Brattle devotes untold resources to creating an eighty-seven page Appendix (Appendix C) purporting to analyze every penny the Investors spent on the project [redacted]

224. Canada then relies on the Brattle report to suggest that the Investors have not tendered proper evidence in support of their costs.[219] In reality, however, the Brattle report's sunk costs analysis is misleading, erroneous, and only serves to reinforce the Brattle report's overall lack of reliability.

225. Brattle "understands from [Canada's] counsel that the Claimants are obligated to provide evidence that payments were actually made in the form of receipts and

[218] Canada's Counter-Memorial on Damages, dated June 9, 2017, paras. 106, 120-123.
[219] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 123.

invoices in order to be included...".[220] Payments, however, are not made in the form of receipts and invoices. Invoices are evidence of services rendered and goods supplied. The entitled approach is intended to wrongfully suggest that the evidence of invoices in the form of invoices is not proof of the fact that the expenses were incurred. This is wrong. The exercise is tailored to produce an artificially low and misleading amount.

226. [redacted] which Mr. Buxton confirms were paid.[221] Mr. Buxton, addresses the Brattle report's analysis this way:

> There is no evidence that I am aware of that any of the invoices in the evidentiary record were not paid, and I am virtually certain that all of the invoices submitted were paid. The Brattle Group appears to have misapprehended the evidentiary record available to it and its assertion that only [redacted] in costs have been substantiated is simply incorrect.[222]

227. The Brattle report's [redacted] review [redacted] also replete with errors.[223] A sampling of Brattle's errors include:

[redacted]

[redacted]

[220] Expert Report of the Brattle Group (Darrell B. Chodorow), dated June 9, 2017, para. 50.
[221] Reply Witness Statement of Paul Buxton, dated August 18, 2017, para. 68.
[222] Reply Expert Report of Paul Buxton, dated August 18, 2017, para. 68.
[223] Expert Report of the Brattle Group (Darrell B. Chodorow), dated June 9, 2017, para. 48, Appendix C, Table C.5.

[redacted]

228. [redacted]

[224] Expert Report of the Brattle Group (Darrell B. Chodorow), dated June 9, 2017, para. 50.
[225] Reply Witness Statement of Joe Forestieri, dated August 21, 2017, para. 3.

229. What Appendix C of the Brattle report clearly does demonstrate is the Investors' absolute commitment to expending however many millions of dollars were required to have the Quarry approved so as to secure a long-term, reliable supply of high quality aggregate for their existing operations in New York City and New Jersey.

230. Absent Canada's breaches there was no uncertainty at all about the Whites Point Quarry going forward. It was ready to proceed at the end of 2007, and would have proceeded as planned had the Ministers approved the Quarry as they were expected and legally compelled to do. Had the Quarry been approved, it would have been a highly profitable part of the Investors' enterprise.

III. MITIGATION

231. Prior to its Counter-Memorial, Canada has not pleaded in the proceedings that the Investors had not taken steps to mitigate their loss. It now raises this issue for the first time.

A. THE INVESTORS' WERE NOT OBLIGATED TO PURSUE JUDICIAL REVIEW OF THE MINISTERS' UNLAWFUL DECISIONS

232. Canada spuriously contends that the Investors were obliged to litigate to mitigate their losses. The contention is wrong, both as a matter of fact and as a matter of law.

233. The principle of mitigation required the Investors to take reasonable steps in the circumstances to mitigate their losses. It is Canada's burden to prove that the Investors did not take reasonable steps in the circumstances.

1. Judicial Review is not an Adequate Remedy

234. Canada's contention is that the Investors:

a) having been subjected to serial abuses of authority by officials at the highest levels of the Canadian government, acting in the shadows and in concert to thwart, at every turn, the Investors' investment in the Whites Point Quarry; and

b) having invested over five years and many millions of dollars on a fundamentally flawed and unfair environmental assessment (which the Tribunal has determined to be "unwinnable from the outset"), including commissioning dozens of expert reports on every aspect of the environmental assessment,

should then be forced to fight Canada in its domestic courts for what would likely amount to a further six years, for the purpose of being put through another JRP process for a further three years, no doubt costing more millions of dollars all (in the words of Canada's expert, the Honourable John Evans) "with an outcome that cannot be predicted".[226]

235. This suggestion is patently unreasonable.

236. In his Reply Expert Opinion, Dean Lorne Sossin concludes:

> 10. The Government of Canada in its Counter-Memorial asserts that the Investors could have mitigated their losses had they pursued remedies within Canada's domestic courts and legal frameworks. While the decision of the Ministers could have been challenged in Canadian Courts through judicial review or by way of civil action, the process and remedies available through these domestic judicial recourses differ substantially from the NAFTA process and remedies. I am aware of no duty of exhaustion in the NAFTA context that would have compelled the Investors to pursue remedies domestically prior to seeking a remedy through the NAFTA process, especially where those domestic processes involve different standards, procedural hurdles and remedies.

[226] Expert Report of the Honourable John Evans, dated June 9, 2017, para. 80.

> 11. Speculating on what might have occurred had the Investors hypothetically sought judicial review of the Ministers' decision involves myriad contingencies that would make any view expressed by an expert a largely subjective exercise. That said, assuming the Investors did pursue remedies through Canada's domestic courts through a civil action, the monetary remedies or damages sought would have precluded concurrent proceedings under NAFTA. Given the unpredictability of timelines in the domestic Canadian courts and the complexity of any proposed domestic court challenge (involving, potentially, either or both Federal and Nova Scotia proceedings), it is not reasonable to conclude such proceedings could have been completed, including any possible appeals of interlocutory and/or final outcomes, in the three year period before the Investors' ability to engage the NAFTA process would become time-barred.
>
> 12. While the Investors hypothetically could have pursued non-monetary remedies through judicial review concurrently with NAFTA proceedings (that is, assuming they sought remedies other than monetary damages in such a judicial review), the likeliest result of such judicial review would have been to remit the approval process back to Federal and Nova Scotia Ministers, for a further discretionary process, in which the Investors reasonably would have lacked confidence in light of their experience that culminated in the rejection of the project.[227]

237. If the Investors had sought judicial review, the second JRP process would likely be concluding about now.[228] It bears noting here, that in the meantime (in 2016), the Governments of Canada and Nova Scotia both approved the Black Point mega quarry (6-8 million tons a year) after a 14 month Comprehensive Study level of environmental assessment, which even involved the Government's expropriation of private property to facilitate the Quarry.

238. Mr. Buxton also explains that ten to twenty percent of the information submitted in the first JRP process would have been useful in the second JRP process.[229]

239. To provide context for the magnitude of the undertaking a second JRP process would have involved, it should be noted that for the first JRP process the

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[227] Reply Expert Report of Lorne Sossin, dated August 3, 2017, paras. 10-12.
[228] Reply Witness Statement of Paul Buxton, dated August 18, 2017, paras. 43-49.
[229] Reply Witness Statement of Paul Buxton, dated August 18, 2017, para. 47.

Investors, through Mr. Buxton, commissioned the expert studies below which were completed or in process by November, 2004:

28 February 2004	Brylinsky, Michael, PhD. – "Interpretation of a Sublittoral Benthic Survey along the Shoreline of Whites Point, Digby Neck, Nova Scotia".
30 June 2002	Brylinsky, Michael, PhD – "Results of a Survey of the Intertidal Marine Habitats and Communities at a Proposed Quarry Site Located in the Vicinity of Whites Cove, Digby Neck, Nova Scotia".
6 October 2003	Carver, C.E., M.Sc.,. and Mallet, A.L., M.Sc, Mallet Research Services Ltd., – "A Preliminary Assessment of the Risks of Introducing Non-Indigenous Phytoplankton, Zooplankton Species or Pathogens/Parasites from South Amboy, New Jersey (Rartian Bay) into Whites Point, Digby Neck, Nova Scotia".
8 October 2003	Christian, John, M.Sc., LGL Limited – "Whites Cove Quarry Blasting: Potential Impacts on American Lobster".
August 2003	Hannay, David E., M.Sc., JASCO Research Ltd., and Thompson, Denis M.Sc., LGL Limited – "Peak Pressure and Ground VibrationStudy for Whites Cove Quarry Blasting Plan".
December 2002	Hogg, Dwayne, M.Sc, P.Eng., Jacques Whitford Environmental Ltd., and MacFarlane, David, M.Sc., P.Geo., Jacques Whitford Environmental Ltd. – "Preliminary Hydrogeological Assessment, Proposed Quarry, Whites Cove, Digby Neck, Nova Scotia".
December 2002	Lizak, John, M.Sc, P.Geo. Mineral Valuation and Capital, Inc. –"Geological Assessment of the Whites Cove Site".
July 2002	Moody, Barry, PhD. – Whites Point Quarry Property Historical Background, Digby Neck, Nova Scotia".
July 2002	Newell, Ruth E., M.Sc. – "Plant Survey of Whites Cove Property, Digby Neck, Digby County, Nova Scotia". *August 2002.* Addendum to report entitled "Plant Survey of Whites Cove Property, Digby Neck, Nova Scotia".

May 2003.	Watrall, Charles R., PhD. – "Category C Archaeological Assessment Whites Point/Whites Cove Quarry Project, Digby Neck, Digby County, Nova Scotia Heritage Research Permit Number: A 2002 NS 36".
June 2003	Water – Marine Water – Chemistry, Metals, Bacteria (Source: PSC Analytical Services).
2002 and 2003	Philip Analytical Water – Surface/Intertidal Water Quality.
Started in May 2002	Eastcan Geomatics – Ariel photos, survey services, digital contour.
Started in July 2002	Scotia Surveys – Quarry site surveys.
August 2002	Canadian Seabed Research – Geophysical/ bathymetry /mapping.
September 2002	O'Halloran Campbell –Marine terminal concept.
Started in 2002	Mineral Valuation & Capital Inc – J. Lizak – quality of rock.
Started in 2002	Logan Drilling – core samples.
December 2002	David Kern – commenced assembling EIS.
2003	Philip Analytical – water testing.
December 2003	K. Bishop – Community consultation.
January 2004	Canadian Seabed Research –EIS Marine Mapping.
February 2004	Michael Brylinsky –Assembling EIS – Biology, Structure of EIS.
June 2004	TPH Applied Fisheries Research – EIS salmon.
May 2004	George Alliston - EIS wildlife (Birds, bats, *etc.*)
July 2004	James Ross –Marine mammals/ fish – Blasting for EIS.

240. Indeed, Canada's mitigation argument misapprehends the unfair treatment of and injury suffered by the Investors. They were not subjected to a mere

misapplication of Canadian law that could have been rectified through judicial review. The political, administrative and bureaucratic environment within which the Whites Point Quarry was considered was biased against the Investors from the start and throughout.

241. The improper focus on "community core values" was not just a totally unprecedented misapplication of Canadian law. It was symptomatic of a fundamentally unfair process that discriminated against Bilcon and the Investors on the basis of their U.S. nationality, as compared to investors in Canada in like circumstances. As the Tribunal observed, the regulatory approval process "was unwinnable from the outset".[230]

242. The Investors were deprived not just of an opportunity, but of a fair or just opportunity.[231] While judicial review may have given the Investors another opportunity 6 years down the road, nothing suggests that it could have guaranteed the Investors a fair and just opportunity.

243. This is confirmed by the Tribunal's finding that the Investors suffered injury not just as a result of a violation of Article 1105 (breach of minimum treatment), but also as a result of the violation of Article 1102 (breach of national treatment).

244. Canada cites *Dunkeld International Investment Limited* v. *The Government of Belize*, but the *Dunkeld* case supports the Investors, not Canada. In *Dunkeld*, the tribunal noted that an investor would be "derelict in failing to attempt a local process" if "local administrative procedures may offer a remedy that appears more rapid or certain than that of an international claim."[232] But for the very reasons explained here, judicial review was not a "more rapid or certain" or in any way an effective remedy in this case.

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[230] Award on Jurisdiction and Liability, dated March 17, 2015, para. 453.
[231] Award on Jurisdiction and Liability, dated March 17, 2015, paras. 603, 741.
[232] *Dunkeld International Investment Limited* v. *The Government of Belize*, PCA Case No. 2010-13, Award, 28 June 2016 ("*Dunkeld*") (***Canada's Index of Authorities*, Tab RA-115**).

245. In the "but for" damages scenario where the progress and development of the Whites Point Quarry is evaluated on the assumption that these wrongs are removed, this bias does not exist. The discrimination against the Investors on the basis that they were American investors seeking to develop a local Nova Scotia resource does not exist in the "but for" scenario. But recourse to the domestic courts for judicial review simply could not achieve this result.

246. The domestic courts could not guarantee that a second JRP process, commenced in the same poisoned environment, would be conducted any more fairly than the first, which was doomed from the start. Canada's argument, if accepted, would boil down to condemning the Investors, like Sisyphus, to a hopeless cycle between a biased administrative process and a court system ill-equipped to correct it.

247. Moreover, it is only through the extensive discovery process in this arbitration (which would not have been available in judicial review) that the Investors discovered the real truth about the poisoned and discriminatory political and administrative environment.

248. Judicial review would not have uncovered that evidence, and thus would likely have simply thrown the Investors back into the same situation, perpetuating the mistreatment they had already suffered during the first JRP process. This would have left the Investors in a more desperate situation from a limitations point of view, and might have even foreclosed subsequent recourse to NAFTA, due to the three-year cut off period.

249. Canada is wrong to suggest that the Investors simply sat back and were passive, and should thus not be properly compensated.[233] The Investors were not passive, and did not just sit back. They did not withdraw from the JRP as soon as it was ordered, or as soon as they saw first signs of trouble. Convinced, as they were, of

[233] Canada's Counter Counter-Memorial on Damages, dated June 9, 2017, para. 89.

the merits and environmental soundness of the Whites Point Quarry, they persevered through the JRP process in good faith, spending millions of dollars in the vain expectation that sound judgment, neutrality and professionalism, science and the faithful application of the criteria under the applicable statutes would carry them through to approval. They fully engaged with the local process, only to be rewarded with a fundamentally unfair, unsatisfactory and indeed unlawful result.

250. Professor McCamus points out that if this were an action in a Canadian court, there is no precondition that a plaintiff first seek judicial review of administrative action. It is trite to observe that before one sues a public authority for damages in Canadian law, there is no need to "mitigate" by first seeking judicial review. So for example, if Bilcon had chosen to sue governmental authorities for the tort of misfeasance in public office, there would have been no need to seek judicial review of that behaviour, before seeking damages:

> In the context of the tort of misfeasance in a public office, the defendant official is liable for pure economic loss, including lost profits. It is not a precondition of seeking such relief that the plaintiff has pursued any potentially available remedies for judicial review.[234]

251. In the unanimous decision of the Supreme Court of Canada in *Attorney General* v. *TeleZone Inc.*,[235] the Court dealt with a claim for negligence and breach of contract against the federal Crown for approximately $250 million in losses for an allegedly improper denial of a telecommunications licence. There, the Attorney General of Canada likewise argued that judicial review was required, instead of the damage claim that the applicant brought in the Ontario Superior Court. The Supreme Court said:

> This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal

[234] Expert Report of Professor John McCamus, dated August 14, 2017, para. 26.
[235] 2010 SCC 62 ("*Telezone*") **(*Investors' Authorities*, Tab CA445)**.

> system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.[236]

252. The *North American Free Trade Agreement Implementation Act* (S.C. 1993, c. 44) is a statute of Canada. The pursuit of Chapter 11 claim under the NAFTA is a remedy available under Canadian law. If the Investors choose the Chapter 11 route to pursue damages, rather than pursuing judicial review in a domestic court, then in the words of the Supreme Court, it "*should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity*".

253. Accordingly, the Court denied that the claimant had to first proceed by judicial review:

> However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.[237]

254. The Supreme Court also found that the Claimant "*would acquire no practical benefit from a judicial review application*"[238]. It noted that what was being sought was compensation for costs thrown away and lost profits. There was no effort or desire to attack the ministerial order by way of judicial review and therefore "*judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay*".[239]

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[236] *TeleZone* (***Investors' Authorities*, Tab CA445, para. 27**).
[237] *TeleZone*, (***Investors' Authorities*, Tab CA445, para. 19**).
[238] *TeleZone*, (***Investors' Authorities*, Tab CA445, para. 27**).
[239] *TeleZone*, (***Investors' Authorities*, Tab CA445, para. 27**).

255. Likewise, there was no need for the Investors to take the "extra step on the judicial review application" – it "should be permitted to pursue its chosen remedy directly" – namely to seek relief under the NAFTA, as it has rightfully done.

256. Equally important is the Supreme Court's recognition that "unlawfulness (in the judicial review sense) and negligence are conceptually distinct". Put another way, "while Crown liability in tort and the validity of an underlying administrative decision may generate some overlapping considerations, they present distinct and separate justiciable issues."[240]

257. The Supreme Court added that "the grant of relief on judicial review is in its nature discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention". In other words, even if Bilcon were to pursue judicial review, it could conceivably still find itself denied a remedy, merely due to the wide array of discretion available to a reviewing court on judicial review applications.[241]

258. And, very specifically and clearly, the Supreme Court said:

> Such an approach does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. In judicial review, 'the discretionary nature of the court's supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals.
>
> (Citing Brown and Evans at paragraph 3:1100).

2. There is No Requirement to Exhaust Local Remedies under NAFTA

259. Canada's argument that the Investors should have mitigated their loss through judicial review also amounts to imposing, during the damages phase, a requirement to exhaust local remedies when (a) no such requirement exists in NAFTA as a matter of jurisdiction/admissibility, and (b) the Tribunal already has

[240] *TeleZone*, (***Investors' Authorities*, Tab CA445, para. 30**).
[241] *TeleZone*, (***Investors' Authorities*, Tab CA445, para. 56**).

rejected, during the liability phase, Canada's defense that the Investors suffered a mere misapplication of Canadian law that could and should have been remedied through judicial review. As a result, the Tribunal should also reject Canada's mitigation argument on the basis that it is precluded as a matter of law.

260. Under Chapter 11 of NAFTA, there is no requirement to exhaust local remedies as a condition of an investment claim.[242]

261. Canada concedes this point, recognizing that "[a] prospective NAFTA claimant is not required to exhaust local remedies prior to commencing NAFTA arbitration".[243]

262. If Canada cannot bar a NAFTA claim because a prospective claimant has not exhausted local remedies, it should not be able to eviscerate the NAFTA claim by raising the failure to exhaust local remedies at the damages phase. This would amount to allowing Canada to achieve indirectly what it is unable to achieve directly.

3. The Issue Was Already Decided in the Merits Phase

263. The Tribunal, in the liability phase, already rejected the argument that the NAFTA breaches alleged by the Investors were simple breaches of Canadian law that could be addressed through judicial review.Canada should not be allowed to argue, during this damages phase, that the Investors should have sought judicial review to mitigate their losses when

264. The Investors acknowledge that even where there is no requirement to exhaust local remedies from a jurisdictional or admissibility point of view (such as in Chapter 11 of NAFTA), the failure to exhaust local remedies may, in some

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[242] Bjorklund, Kinnear, and Hannaford, "Article 1121 – Conditions Precedent to Submission of a Claim to Arbitration", in Kinnear, Bjorklund et al, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, Supplement No. 1 (Kluwer Law International: Kluwer Law International 2006) (***Investors' Authorities*, Tab CA338, p. 1121**).

[243] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 90

circumstances, lead to the conclusion that the investor has failed to make a meritorious claim. This was the principle enunciated in *Generation Ukraine, Inc.* v. *Ukraine*:

> it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant government authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such circumstances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction.[244]

265. The decision to deny the Investors the Whites Point Quarry was made at the highest level of governmental authority – by the Ministers themselves. These were not low level administrative errors.

266. In the merits phase of this arbitration, the Tribunal found:

> 453. In the result, the Investors were encouraged to engage in a regulatory approval process costing millions of dollars and other corporate resources that was in retrospect unwinnable from the outset, even though the Investors were specifically encouraged by government officials and the laws of federal Canada to believe that they could succeed on the basis of the individual merits of their case.
>
> . . .
>
> 472. In the letter from Minister Thibault to the Minister of the Environment requesting a referral to a JRP, Minister Thibault notes potential environmental impacts as well as the desirability of harmonizing the federal review with the Nova Scotia environmental assessment process. Under the CEAA, a responsible authority could request a Review Panel on two possible bases: that a project may cause significant adverse environmental effects after mitigation, or public concern. <u>The referral letter mentions only the former, environmental impact.</u>

[244] *Generation Ukraine* v. *Ukraine*, ICSID Case No. ARB/00/9, 16 September 2003 (***Canada's Index of Authorities*, Tab RA-121, para. 20.30**).

...

738. It may bear reiterating, therefore, the Tribunal's view that under NAFTA, lawmakers in Canada and the other NAFTA parties can set environmental standards as demanding and broad as they wish and can vest in various administrative bodies whatever mandates they wish. Errors, even substantial errors, in applying national laws do not generally, let alone automatically, rise to the level of international responsibility vis-à-vis foreign investors. The trigger for international responsibility in this particular case was the very specific set of facts that were presented, tested and established through an extensive litigation process.

739. In the present case the evidence shows that some of the individual factual elements were highly unusual in their own right. The unprecedented nature of the JRP's approach is confirmed by remarks of the Chair of the Panel. Extensive and detailed expert testimony confirmed that the approach was not only at variance with the existing legal framework, but also with the actual treatment provided in comparable cases. The comparators included situations involving coastal mining and marine terminals as well as situations where a local community was politically divided over the project.

740. The distinctive and exceptional overall set of facts that came together to produce a finding of liability in this particular case include:

- representations from state officials that welcomed investors to pursue coastal quarry and marine terminal projects, and to these investors specifically to do so at the particular site;

- reliance by the Investors on those encouragements to devote very substantial resources to engaging in the statutorily mandated environmental assessments, including the attempt to design the project to meet all legal requirements concerning environmental protection;

- an approach to the assessment by the JRP that effectively found the area to be a "no go" zone for projects of this kind, rather than including, as at least a major part of its work, a proper assessment of likely significant adverse effects on the environment and of the means by which these effects might have been mitigated;

- lack of prior notice to the investor of the unprecedented approach the JRP was going to adopt, thereby denying the investor a fair opportunity to seek clarification and respond;

- the role of the JRP in the overall system as legislated includes providing in its report an impartial and thorough assessment of

> facts and of mitigation options that can be used by the ultimate decision makers in government and that can inform public opinion.
>
> 741. The *CEAA* prescribes finding ways to promote both dimensions of sustainable development, that is to say, environmental protection and economic growth. The *NSEA* acknowledges that protection of the environment requires a strong economy. The regional *Vision 2000* statement observes that activities of primary industries, including mining, can be carried out in a way that maintains and even enhances the region's culture and environment. Whether or not their case would have prevailed if appropriately evaluated, the Investors' case was that this particular project could in fact be constructed and operated in a way that would satisfy both economic and environmental concerns. It would, in the Investors' submission, have diversified the local economy, which was stressed by limitations on harvesting the living resources of the sea, and encouraged community residents to remain in the community while at the same time it would have preserved an environment that supports traditional industries and modern ecotourism and that is valued for its beauty and tranquility. The Tribunal's respectful conclusion is that in all the particular and unusual circumstances of this case, the Investors were denied an expected and just opportunity to have their case considered on its individual merits.[245]
>
> [Emphasis added]

267. Canada's contention at this damages phase is nothing more than a transparent attempt to recycle its merits argument. It would be wrong for the Tribunal to now allow Canada, through the mitigation argument, to have another bite at the apple and to again seek to excuse Canada's wrongful conduct, which the Tribunal found notwithstanding the Investors' decision to proceed to a claim under NAFTA without a diversion to judicial review.

268. As the Tribunal has held, Canada's breach of the NAFTA resulting from the unfair and inequitable treatment accorded to the Investors was much more than a mere breach of Canadian law. The breach could not be mitigated through a domestic mechanism that would, at most, address a narrow issue regarding the proper application of Canada's law. The treatment the Investors faced and the recourse

[245] Award on Jurisdiction and Liability, dated March 17, 2015, paras. 453, 472, 738-741.

provided by the NAFTA would not be addressed by judicial review, even if the judicial review would have been successful.

269. In any event, requiring the Investors to pursue judicial review is contrary to the plain language of the Treaty, which contains no such requirement.

270. In the days of diplomatic espousal, the exhaustion of local remedies was a prerequisite for investors petitioning their country to bring an international claim on their behalf. Under modern investment treaties, countries have moved away from this approach and the vast majority of treaties no longer require the exhaustion of local remedies. The few that do are predominantly first-generation BITs.[246] Instead, waiting periods, fork-in-the-road clauses, or provisions such as NAFTA's "no U-turn" clause in Article 1121 have become the provisions of choice in modern investment treaties, as a means of managing the interaction of domestic and international recourses. The development is consistent with simplifying the process, and protecting injured investors from the burden of going through all of the steps of a national administrative court system that may already be set against it before being able to bring a claim under the Treaty.

4. The Reasonableness Standard Governs Mitigation

271. Even if Canada could somehow in this damages phase raise the equivalent of a defense of exhaustion of local remedies, under the guise of mitigation through judicial review, it cannot succeed on the facts of the matter in this particular case. The duty to mitigate is governed by the standard of reasonableness, and on the facts of this case, it would not have been reasonable for the Investors to seek judicial review.

272. The notion of mitigation of damages has its roots in domestic legal systems and is intimately tied to breach of contract. Its basic tenet is that, when a contract is

[246] Christoph Schreuer, *Interaction of International Tribunals and Domestic Courts in Investment Law in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010* (A.W. Rovine ed) 71, **(*Investors' Authorities*, Tab CA339, pp. 72-73)**.

breached, the innocent party should take reasonable steps to mitigate its losses, including loss of profits arising from the breach.[247] It has also been phrased as an obligation for the aggrieved party to take reasonable steps to minimize loss and to abstain from doing anything to increase or aggravate that loss.[248]

273. Professor McCamus explains the roots of the mitigation principle in domestic law:

> 162. The classic articulation of the rule is that of Viscount Haldane in British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Rys. Co. of London Ltd., where, in explaining the first principles for calculating damages, he explained as follows:
>
> > "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach, but this first principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."
>
> 163. It is well-established that the burden of proof in establishing a failure on the part of the plaintiff victim of the breach to take reasonable steps to avoid further losses falls upon the defendant, the party who is in breach of contract.
>
> 164. Not only does the burden of proof concerning lack of mitigation fall upon the defendant, the Privy Council has recently indicated in Geest Plc v. Lansiqot that if a defendant intends to argue failure to mitigate, notice of such intention should be given to the plaintiff in advance of the hearing of the matter. Lord Bingham explained as follows:
>
> > "It should, however, be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damages, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare

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[247] Jeff Waincymer, *Procedure and Evidence in International Arbitration,* (Kluwer Law International; Kluwer Law International 2012), **(*Investors' Authorities*, Tab CA340, pp. 1095-1189)** ("Waincymer").

[248] Alexander S. Komarov, Chapter 2. *Mitigation of Damages in Yves Derains and Richard H. Kreindler (eds), Evaluation of Damages in International Arbitration*, Dossiers of the ICC Institute of World Business Law, Volume 4, Kluwer Law International; International Chamber of Commerce (ICC) 2006), pp. 37-56 **(*Investors' Authorities*, Tab CA341, p. 40)**.

> to meet it. If there are no pleadings, notice should be given by letter".

165. It is well established that the standard of reasonableness against which the plaintiff is required to act in mitigating the loss is not a high one. An oft-quoted statement of this point is that of Lord Macmillan in Banco de Portugal v. Waterlow as follows:

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment, the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency".

...

167. The burden thrust upon the defendant in such circumstances is to demonstrate that the actual steps taken in mitigation by the plaintiff were unreasonable. Thus, in the more recent decision of the English Court of Appeal in Wilding v. British Telecommunications Plc., Sedley L.J., after quoting the passage from Lord Macmillan's opinion quoted above in the immediately preceding paragraph, went on to explain as follows:

> "In other words, it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable for the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to this duty to mitigate that the defence will succeed."

...

170. I am not aware of Canadian authority suggesting that the duty to take reasonable steps in mitigation of loss extends to the taking of litigation against the party in breach in an attempt to reduce losses caused by the breach. In the ordinary course, the plaintiff victim will have commenced litigation against the party in breach to recover damages. I am not aware that it has ever been suggested or held in a Canadian case, that a reasonable step that must be taken in mitigation might be to

> advance a claim for specific performance or for an injunction to prevent or reduce the flow of losses resulting from the defendant's breach...
>
> 171. More particularly, I am not aware of any Canadian authority that suggests that an obligation arises as a reasonable step in mitigation to pursue litigation against the party in breach where the litigation is likely to be complex and uncertain in outcome, and where that party is highly resourced and likely to vigorously defend such a lawsuit, including the possibility of appellate review of any result favourable to the plaintiff up to and including an appeal to the Supreme Court of Canada. In my opinion, it is most unlikely that a Canadian court would determine that such a course of action by the victim of the breach was required as a reasonable step in mitigation.
>
> ...
>
> 177. I am not aware of any English cases, however, where a court has held that it would be considered a reasonable step in mitigation of its loss for a plaintiff to be required to embark on litigation of any kind against the party in breach of the contract whose misconduct has caused the loss.[249]

274. Professor McCamus also observes that there is a related common law principle that a wrongdoer should not be able to profit from its own wrong:

> Additionally, there is a well-established line of English and Canadian authority that holds that "a party shall not take advantage of his own wrong, or of an event brought about by his own act or omission.[250]

275. Various authors have similarly noted that in international law the principle of mitigation should not be applied too strictly so as to unduly favour the wrongdoer. In the context of international investment law, Irmgard Marboe explains that the duty to mitigate requires that the party concerned acted reasonably from a financial and commercial perspective.[251]

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[249] Expert Report of John McCamus, dated August 14, 2017, paras. 162-165, 167, 170-171, 177.
[250] Expert Report of John D. McCamus, dated August 14, 2017, para. 12.
[251] Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law (Oxford University Press 2017) (***Investors' Authorities*, Tab CA468, p. 3.256-3.257**).

276. There is therefore no doubt in the jurisprudence that the duty to mitigate is qualified: the Investors only need to take reasonable steps to mitigate. Moreover, what is reasonable in the circumstances is solely a matter of fact, to be proved by Canada.

277. In this regard contrary to Canada's Counter-Memorial, the Court in the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Solvakia)*[252] did not "articulate both the duty to mitigate, and the consequences of a failure to exercise the duty". In citing this excerpt Canada omitted the immediately preceding sentence, which clarifies that the Court is paraphrasing Slovakia's argument and is not articulating the Court's own understanding of the duty to mitigate. Canada also omits the immediately following paragraph, which shows that the Court declined to examine the question of mitigating damages at all. The entire relevant passage says:

> (1) Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained." It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.
>
> (2) Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damages invoked by Slovakia does not need to be examined further.[253]
>
> [Emphasis added]

[252] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Solvakia)* (I.C.J. Reports 1997) Judgement, 25 September 1997 ("*Gabcikovo-Nagymaros*") (***Canada's Index of Exhibits,* Tab RA-15**).

[253] *Gabcikovo-Nagymaros* (***Canada's Index of Exhibits,* Tab RA-15, paras. 80-81**).

278. In *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company* v. *Republic of Kazakhstan*, the Tribunal confirmed that the burden of proof is on the party pleading mitigation – in this case Canada. It also confirmed that mitigation is a question of fact, and that the requirement only calls for reasonable action to be taken. The Tribunal also considered it wrong to impose on claimants a duty to examine alternative solutions.[254]

279. Similarly, the Tribunal in *Middle East Cement* v. *Egypt*[255] "emphasized that the duty to mitigate was a general principle of law". Even though the duty to mitigate damages was not explicitly contained in the subject BIT the party invoking the duty to mitigate "has the burden of proof for the facts establishing such a duty," and that all that is required to rebut the duty is a "plausible" explanation.[256]

280. In *Hrvatska Elektroprivreda D.D.* v. *Republic of Slovenia*, the Tribunal echoed that "general principles of international law applicable in this case require an innocent party to act reasonably in attempting to mitigate its losses"[257] and, where alternate courses of action are available, a party cannot be faulted for its decisions to choose one path over the other "without evidence those decisions were unreasonable".[258] Canada's mitigation argument must fail.

IV. CAUSATION

A. CANADA'S BREACHES OF THE NAFTA CAUSED THE INVESTORS' LOSSES

281. The Investors' losses are the logical, foreseeable, and inexorable result of Canada's breaches of the NAFTA. The evidence establishes each element in the

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[254] *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company* v. *Republic of Kazakhstan* (ICSID Case No. ARB/01/06) Award, 7 October 2003 ("*AIG Capital*") **(*Investors' Authorities*, Tab CA342, paras. 10.6.4-10.6.5).**

[255] *Middle East Cement Shipping and Handling Co. S.A.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/99/6 **(*Investors' Authorities*, Tab CA322)** ("*Middle East Cement*").

[256] *Middle East Cement* **(*Investors' Authorities*, Tab CA322, para. 170)**.

[257] *Hrvatska Elektroprivreda D.D.* v. *Republic of Slovenia* (ICSID Case No. ARB/05/24) Award, 17 December 2015, ("*Hrvatska*") **(*Investors' Authorities*, Tab CA343, para. 215)**.

[258] *Hrvatska* **(*Investors' Authorities*, Tab CA343, para. 400)**.

chain of the events leading to the Investors' losses, and international law requires Canada to make "full reparation".

282. Article 31 of the ILC Articles confirms:

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

283. In *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*, the Tribunal described the basic elements of causation:

> The requirement of causation comprises a number of different elements, including (inter alia) (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote.[259]

284. In *Lemire* v. *Ukraine,* the Tribunal expressed the test even more economically, saying that "proof of causation requires that (A) cause, (B) effect, and (C) a logical link between the two be established."[260]

285. Even an intervening chain of events between the breaches and the loss does not bar a claim for damages. As the Tribunal in *Lemire* noted:[261]

> The classic definition of this principle is contained in the *Administrative Decision num* 2 of November 1, 1923 of the US - German Mixed Commission:
>
> > "It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of . – It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no breach in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act... All indirect losses are covered provided only that in legal contemplation Germany's act

[259] *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 (***Investors' Authorities*, Tab CA344, para. 785).**

[260] *Lemire* v. *Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 ("*Lemire*") (***Investors' Authorities*, Tab CA325, para. 157).**

[261] *Lemire* (***Investors' Authorities*, Tab CA325, para. 166).**

> was the efficient and proximate cause and source from which they flowed. "
>
> [Emphasis added]
>
> If it can be proven that in the normal course of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.
>
> The chain of causation can also be seen from the opposite point of view: offenders must be deemed to have foreseen the natural consequences of their wrongful acts, and to stand responsible for the damage caused. Proximity and foreseeability are related concepts: a chain of causality must be deemed proximate, if the wrongdoer could have foreseen that through successive links the irregular acts finally would lead to the damage. As the Portuguese - German Arbitral Tribunal said in the *Angola* case:
>
> > "It would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that, in the chain of causation, there are some intermediate links ".
> >
> > [Emphasis added]

286. The Tribunal added:

> The best that the Tribunal can expect Claimant to prove is that through a line of natural sequences it is probable – and not simply possible – that Gala would have been awarded the frequencies under tender. If it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.[262]

287. Applying the international law principle of causation, it is apparent that but for Canada's breaches of the NAFTA, the Whites Point Quarry would have been approved and permitted and would have produced and shipped stone. The evidence and expert opinions undoubtedly confirm that:

[262] *Lemire* (***Investors' Authorities*, Tab CA325, para. 169).**

a) The Investors had a detailed design of the Quarry which was ready to be built;

b) In the absence of significant adverse environmental effects that could not be mitigated, there was no lawful basis for the JRP not to recommend approval of the Quarry;

c) In the circumstances, the Ministers were legally compelled to approve the Quarry;

d) The Quarry would have in the ordinary course received all permits and authorizations to build and operate the Quarry and marine terminal; and

e) The Investors were already in the market where the stone from the Quarry would be sold.

288. In these indisputable circumstances, it is not possible for Canada to reasonably deny that, Canada's proven breaches of the NAFTA prevented the Investors from developing the Quarry, exactly as they were invited, and as they fully expected were able to do.

289. In his first Expert Report, David Estrin confirmed that the JRP ought to have recommended approval of the Whites Point Quarry Project. In its Counter-Memorial, Canada attempts to raise arguments to the contrary, but these are in direct conflict with the Tribunal's Liability and Jurisdiction Award logic, and the evidence.

290. In essence, Canada's argument is based on a *nonsequitur* - that if "community core values" is read out of the JRP Report, then the Report would not be a basis for the Ministers to make a decision. Canada also purports to use the JRP's unlawful recommendation as a pretext to invent ways the JRP might, in different circumstances, have had a lawful basis note to recommend approval of the Quarry.

291. In view of a number of key findings made by the Tribunal in its merits phase Award, Canada's make-believe inventions are, in any case, *res judicata*. In his Reply Expert Report, Mr. Estrin summarizes these findings:

> This Arbitration Tribunal previously found that the only "significant adverse environmental effect" (SAEE) likely to arise from the WPQ identified by the JRP was community core values – a factor with no legal relevance under applicable legislation:
>
> > "The Report expressly identifies only one effect of the project as both significant and adverse, namely "inconsistency with community core values". With respect to other impacts of the project, the Panel allowed that "with the effective application of appropriate mitigation measures, competent project management and appropriate regulatory oversight, most project effects should not be judged 'significant'".[263]

Further:

> "The Tribunal finds that the decision-makers in Nova Scotia and federal Canada had the authority and duty to make their own decision about the future of the Bilcon project. If they had considered the methodology report flawed, they could have sent it back to the JRP for clarification or further work. They could have provided for different or additional mitigation provisions. They could have agreed that the project likely had significant adverse effects after mitigation, but still approved it on public interest considerations in all the circumstances. Both Nova Scotia and then federal Canada, however, accepted the conclusion of the JRP that the project likely would have significant adverse effects on "community core values" and rejected it."[264]
>
> The JRP did not make any other findings of SAEE, even though they referenced other potential environmental effects. That was consistent with the evidence and submissions of all experts from the federal and provincial governments that made submissions and testified before the JRP hearing.

292. It is also clear that reading out "community core values" from the JRP report does not render it incomplete. In reaching this conclusion, Mr. Estrin explains:

> Mr. Connelly then makes the important observation, in paragraph 63, that although, in his view, the WPQ JRP Report indicates the panel was left with many questions regarding the adequacy and sufficiency of the information that was provided by Bilcon, "it concluded that it did have sufficient information to fulfill its mandate".

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[263] Reply Expert Report of David Estrin, dated August 21, 2017, para. 7.
[264] Expert Reply Report of David Estrin, dated August 21, 2017, paras. 8-9.

> In the WPQ project, since the RA and GIC both reached a decision under section 37(1) of CEAA, they both necessarily must have taken the position that this condition precedent had been met, *i.e.*, that the JRP report satisfied the requirements of CEAA and that additional information was not required in order to make a decision.[265]

293. As Mr. Estrin also notes, what Canada's witnesses purport to say in their reports is not only contrary to actual ordinary practice, it is contrary to their own practice:

> The facts and documents from these proceedings speak for themselves in demonstrating that the opinions that Mr. Connelly and Ms. Griffiths have filed with this Tribunal, stated to be based on their "personal experience", are untenable. They are contradicted by their actual practices and experience, as JRP chairs, in which they solicit, and listen, to such expert government opinions as to the significance of likely impacts. In some cases they rely on them in their panel recommendations (Ms. Griffiths and Mr. Connelly) or are part of the process in the provision of such opinions (Mr. Geddes). Put simply, their actual experience in soliciting and evaluating, and in some cases relying on expert assessment advice from government experts in CEAA review panels, is diametrically opposite to the what they suggest is their "personal experience" in their witness statements.[266]

B. THE MINISTERS WERE LEGALLY COMPELLED TO APPROVE THE QUARRY

294. In its Counter-Memorial, Canada posits the notion that because Ministers are elected officials, they have some residual discretion to do anything they want. The notion is abhorrent to the rule of law. In *Reference re Secession of Quebec*,[267] the Supreme Court of Canada conclusively disavowed that notion:

> 70. The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, *supra*, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the

[265] Expert Reply Report of David Estrin, dated August 21, 2017, paras. 18-19.
[266] Expert Reply Report of David Estrin, dated August 21, 2017, para. 62.
[267] [1998] 2 SCR 217 (***Investors' Authorities*, Tab CA816**).

> country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.
>
> 71. In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the *Manitoba Language Rights Reference* itself. A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference*, *supra*, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.[268]
>
> [Emphasis added]

295. The Tribunal has also already determined that the Ministers merely adopted the JRP's recommendation,[269] noting they simply "accepted the conclusion of the JRP that the Project likely would have significant adverse effects on 'community core values' and rejected it."[270]

296. The Tribunal also held that the *CEAA* required that socio-economic effects must be tied to an ecological effect, and that "community core values" is a consideration outside the scope of both the *CEAA* and the *NSEA*:

> A general observation on "community core values", no matter which interpretation is adopted of the JRP's approach to them, concerns the compatibility of the concept with the *CEAA* requirements that there be a biophysical pathway to effects that are assessed. The Tribunal agrees with Mr. Estrin's analysis that incompatibility with "community core values" absent some ecological impact is not within the scope of what is assessable under the terms of the *CEAA*.[271]

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[268] [1998] 2 SCR 217 (***Investors' Authorities*, Tab C816, paras 70-71)**
[269] Award on Jurisdiction and Liability, dated March 17, 2015, paras. 321-324.
[270] Award on Jurisdiction and Liability, dated March 17, 2015, para. 584.
[271] Award on Jurisdiction and Liability, dated 17 March 2015, para. 525 (Emphasis added).

...

> Mr. Estrin and Mr. Rankin both testified, however, that "community core values" as used by the JRP were not within the scope of environmental assessment contemplated by the Nova Scotia as well as federal Canada statute. They were matters of philosophical belief, not effects that could be addressed and mitigated. Although the point about the Nova Scotia statute is not decisive in the present case, the Tribunal agrees. The statutes are concerned with effects on actual biophysical and socioeconomic conditions rather than with matters of political or philosophical belief, such as that a local community should have a veto over a project even if the law does not so provide.[272]
>
> [Emphasis added]

297. Despite the Tribunal's clear decision, Canada's witnesses still presume to argue that the Ministers enjoy a "political override" to reject a project in the absence of a finding of a significant adverse environmental effect.

298. Dean Sossin, the preeminent scholar of ministerial discretion in Canada, disagrees:

> I disagree with the assertion in the Reply Expert Opinion of Mr. Connelly (specifically at paras. 20, 48, 51-59) that the Ministers retained some residual discretion to deny approval even if the factor of "community core values" were removed from consideration in the JRP.[273]
>
> [A]bsent any evidence in the record of significant adverse environmental effects that could not be mitigated, the Ministers could not reasonably have denied approval to the Whites Point Quarry project, in light of their legislative mandate under the *Canadian Environmental Assessment Act* (CEAA) and the *Nova Scotia Environment Act* (NSEA). While each of the statutory schemes employs slightly different language, the effect of the statutory framework for the decision on the project is to authorize the Ministers to exercise their discretion only on the basis of the evidentiary record before them (as set out in the findings of the JRP).[274]
>
> 22. Where there is no evidence of such significant adverse environmental effects, a Minister does not retain discretion to nevertheless deny approval to a project ... If the project does not give rise to significant

[272] Award on Jurisdiction and Liability, dated 17 March 2015, para. 528.
[273] Expert Reply Opinion of Lorne Sossin, dated August 3, 2017, para. 32.
[274] Expert Reply Opinion of Lorne Sossin, dated August 3, 2017, para. 8.

> adverse environmental effects, in other words, there is no provision in CEAA that would allow the Responsible Authority ("RA") (or GIC) to turn it down for reasons of political expediency, policy preference, economic reasons, or in response to public opposition.
>
> 23. The fact that there is no such discretion to be found in the legislation is hardly surprising. The statutory ability for decision-makers to override a finding that there are no significant adverse environmental effects in a particular project for political, policy or economic reasons would have been a feature of the legislative scheme that every proponent like Bilcon would have had to be aware of from the start of the process. If such a provision had indeed existed, why would proponents like Bilcon invest millions of dollars on experts, in preparing an environmental impact statement and in participating before the joint review panel? It is unreasonable to expect that proponents like Bilcon would nevertheless participate if they thought that final political decision-makers could nevertheless act for any reason, even if no SAEE were found to exist. It is hard to imagine that proponents would make these expenditures and take the time to participate fully in such circumstances. .[275]
>
> [Emphasis Added]

299. As Dean Sossin unequivocally concludes, if the Minsters could not deny, they had to approve:

> ... it is my opinion in all the circumstances that the Ministers acting reasonably, were legally compelled to approve the Whites Point Quarry project.[276]

C. THERE WAS NO PERMITTING RISK

300. Canada does not challenge the irrefutable evidence that Bilcon would have received all industrial permits required to operate the project. It is to be recalled that Canada made the following stipulation:

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

[275] Expert Reply Opinion of Lorne Sossin, dated August 3, 2017, paras. 22-23 [Emphasis added]
[276] Expert Reply Opinion of Lorne Sossin, dated August 3, 2017, para. 62.

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

301. Likewise, Nova Scotia confirmed in the JRP hearings:

> "Undertaking 45: To advise on the number of projects approved through the environmental assessment process but subsequently refused a Part V authorization.
>
> The Department has no record of any project that has received an Environmental Assessment approval, but was subsequently denied approval under Part V of the Environment Act. A number of projects have received EA approval, but never received Part V approvals for other reasons, including decisions by proponents not to proceed."[277]

302. In the words of David Estrin:

> 265. In my professional opinion, it is not only unreasonable but indeed irrational to articulate arguments as to why WPQ would have had doubtful approvability based on factors raised by these witnesses for Canada, when these same witnesses do not consider nor comment on the fact that such issues did not in fact affect the recommendation of the expert CEA Agency to have Canada approve the BPQ, nor did such issues affect the approval of the BPQ by the Nova Scotia Environment Minister. In other words, the similar issues on which these witnesses base their prognostications that cast doubt upon the approval of the WPQ did not in fact affect the approvability of BPQ.
>
> ...
>
> 300. It is important for this Arbitration Tribunal to note that, under the NSEA, prior to the WPQ, no applications for EA approval of a quarry, mine or similar type project in Nova Scotia had ever been required to prepare an Environmental Assessment Report, Rather, all such applications were processed based on the Nova Scotia Department of Environment standard EA application practice, as outlined in the Guides described above.
>
> 301. This standard practice is essentially to require only a Registration Document (with technical supporting studies, and occasionally

[277] Responses to Undertakings, Undertaking 45 (***Investors' Schedule of Documents*, Tab C550**).

> with the proponent preparing a "focus report" in respect of a specific issue) and the review of that paperwork by government EA reviewers, who consider the material submitted by the proponent and any comments received from government officials, as well as the public, in respect of the proposed project. The standard process for quarries has, to date, never included the preparation of a more formal Environmental Assessment Report and has never involved the referral of such a project to the Environmental Assessment Board for a panel review.
>
> ...
>
> 320. For quarries and marine terminals, assuming proponents have studies prepared that address issues that typically need to be addressed in these kinds of projects, and assuming the studies submitted include reference to the use of mitigation measures that have been accepted in the past, the probability of the proponent obtaining EA approval is extremely high. Indeed, based on the last 16 years, approval is a virtual certainty in Nova Scotia, assuming the project is of the same nature as the other projects previously approved.
>
> ...
>
> 321. Neither Ms. Griffiths nor Dr. Blouin have identified any unique, distinguishing aspect or factor about the WPQ that would place it in a different category than the typical quarries and mines that have consistently received EA approval in Nova Scotia.
>
> 322. Moreover, they have ignored their own experience as review panel chairs in not recommending against EA applications because of missing information or uncertain results, as they have overcome these issues by recommending terms and conditions. In casting doubts on the approvability of the WPQ, they simply have ignored their previous experiences and practice.[278]

303. To the same conclusion, Peter Oram in the Expert Report of GHD Limited confirmed that the Investors would have received all industrial permits necessary

[278] Expert Reply Report of David Estrin, dated August 21, 2017 at paras. 265, 300, 301, 320, 321, 322.

to build and operate the Whites Point Quarry.[279] The Expert Report of SNC Lavalin confirmed the same with regard to the marine terminal.[280]

V. RES JUDICATA

304. In its Award in the merits phase of the arbitration, the Tribunal decided issues and made findings of fact that Canada in its Counter-Memorial is now attempting to re-open and re-litigate in the damages phase of this arbitration.

305. For example, the Tribunal held that the Federal and Nova Scotia Ministers each adopted the JRP's recommendation to reject the Whites Point Quarry on the basis of "community core values". The Tribunal also confirmed that a significant adverse environmental effect requires an actual ecological effect, and that "community core values" was outside the scope of both the *CEAA* and the *NSEA*.

306. It is not open to Canada to now reargue these issues, or to challenge the findings of fact that have been conclusively made by the Tribunal. The factual findings the Tribunal has made, and the issues that Canada wants to relitigate, are *res judicata*, and the basic principles of procedural fairness, natural justice, and abuse of process require that Canada not be allowed to reargue them.

1. The Tribunal has already determined that the Ministers each adopted the JRP Recommendation

307. The Tribunal has found that the Ministers each adopted the Joint Review Panel Report recommendations as their own. While the Tribunal noted that the Ministers could have denied approval of the Quarry independently from the JRP's recommendation, the Tribunal underscored that this did not happen:

> It is possible to imagine a case in which a government arrives at the same conclusion as a recommendatory body, but in which the government does so by pursuing investigations and reasoning that are so distinctly its own

[279] Expert Report of GHD Limited (Peter Oram), dated December 6, 2016, p. 4; Reply Witness Statement of Paul Buxton, dated August 18, 2017, para. 9.
[280] Reply Expert Report of Bill Collins (SNC-Lavalin), dated August 14, 2017, pp. 1-2.

> that it might not be viewed as acknowledging and adopting the conduct of the recommendatory body. On the facts of the present case, however, Article 11 would establish the international responsibility of Canada even if the JRP were not one of its organs.[281]

308. The Tribunal specifically added:[282]

> The Government of Canada's response to the JRP Report noted that the government had studied the Report "carefully" and concluded in its next sentence that "[t]he Government of Canada accepts the conclusion of the Joint Review Panel that the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances." In his expert report commissioned by the Government of Canada, Mr. Smith proposed the general proposition, that "the Panel Report will provide ample analysis and reasoning for its recommendation. If accepted by the governments, the reasons for doing so are manifest on the face of the Panel Report." Mr. Smith's general proposition is applicable in the circumstances of this case. The JRP only made a specific finding of likely significant adverse effects after mitigation in respect of "community core values", and the reasonable inference is that the Government of Canada agreed with both the recommendation and the "community core values" approach that was at its foundation. There is no indication in the evidence of a level of independent fact-finding, legal analysis or other deliberation by the Government of Canada that would be inconsistent with the view that Canada was acknowledging and adopting the essential reasoning and conclusions of the JRP.
>
> The Nova Scotia Minister for the Environment informed Mr. Buxton by telephone that he had accepted the first recommendation of the JRP. In a separate letter of the same date, 20 November 2007, Minister Parent Stated that the decision was ultimately for him to make as Minister, but that he had carefully considered the JRP Report and concluded that the project would have likely significant adverse effects after mitigation. Here again, the Tribunal concludes that the link between the findings and recommendations of the JRP and the Minister's final decision would be sufficient to constitute an acknowledgement and adoption for the purposes of Article 11 of the ILC Articles.[283]
>
> [Emphasis added]

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[281] Award on Jurisdiction and Liability, dated March 17, 2015, para. 322.

[282] Canada's Counter-Memorial on Jurisdiction and Liability, para. 363; Award on Jurisdiction and Liability, dated March 17, 2015, paras. 323-324.

[283] Award on Jurisdiction and Liability, dated March 17, 2015, paras. 323-324.

309. Canada, however, now raises the issue again. In its Counter-Memorial, Canada says that, "the Government decisions to reject the Whites Point project, not the JRP's acts that breached NAFTA, were the reason that the Whites Point project did not proceed."[284]

310. To fuel an inappropriate reconsideration, Canada relies on what can only be described as contrivances in the reports of Robert Connelly, Peter Geddes, and Lesley Griffiths.

2. The Tribunal has already determined that community core values is outside the scope of the governing statutes

311. In addition to holding that "community core values" was outside the scope of the *CEAA* and the *NSEA*, the Tribunal found that they required socio-economic effects to be tied to an ecological effect:

> A general observation on "community core values", no matter which interpretation is adopted of the JRP's approach to them, concerns the compatibility of the concept with the *CEAA* requirements that there be a biophysical pathway to effects that are assessed. The Tribunal agrees with Mr. Estrin's analysis that incompatibility with "community core values" absent some ecological impact is not within the scope of what is assessable under the terms of the *CEAA*.[285]
>
> . . .
>
> Mr. Estrin and Mr. Rankin both testified, however, that "community core values" as used by the JRP were not within the scope of environmental assessment contemplated by the Nova Scotia as well as federal Canada statute. They were matters of philosophical belief, not effects that could be addressed and mitigated. Although the point about the Nova Scotia statute is not decisive in the present case, the Tribunal agrees. The statutes are concerned with effects on actual biophysical and socioeconomic conditions rather than with matters of political or philosophical belief, such as that a local community should have a veto over a project even if the law does not so provide.[286]
>
> [Emphasis added]

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[284] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 59.
[285] Award on Jurisdiction and Liability, dated March 17, 2015, para. 525.
[286] Award on Jurisdiction and Liability, dated March 17, 2015, para. 528.

312. Despite this clear finding, Canada attempts to resurrect these issues in the damages phase.

3. The Tribunal is Functus Officio with Respect to Factual Findings it has Already Made

313. The principle of *functus officio* is recognized in most national legal systems, and has been recognized by investor-state arbitration tribunals.[287]

314. In *Five Oceans Salvage Ltd.* v. *Wenzhou Timber Group Company*,[288] the English High Court cited with approval the following passage from Mustill and Boyd's *The Law and Practice of Arbitration in England* 2nd Edition:[289]

> (1) "Functus officio"
>
> When an arbitrator makes a valid award, his authority as an arbitrator comes to an end and, with it, his powers and duties in the reference: he is then said to be functus officio. This at least, is the general rule, although it needs qualification in two respects: First, if the award is merely an interim award, the arbitrator still has authority to deal with the matters left over, although he is functus officio as regards matters dealt with in the award. Second, if the award is remitted to the arbitrator by the Court for reconsideration, he has authority to deal with the matters on which the award had been remitted and to make a fresh award.
>
> Apart from these two cases, however, nothing which the arbitrator does after he has made his award can have any effect on the rights of the parties to the reference. For instance, if, after making his award he issues a document setting out the reasons for his decision, it forms no part of his award and cannot be used to support an application to challenge the award even if it contains an error of law.
>
> In practice the most important consequence of the arbitrator becoming functus officio after making his award is that he has no power to alter the award without the consent of the parties. If he does so, his altered award is a nullity.

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[287] *Gold Reserve*, Decision Regarding the Claimant's and the Respondent's Requests for Corrections, 15 December 2014 (***Investors' Authorities*, Tab CA346**).
[288] [2011] EWHC 3282 (Comm) (***Investors' Authorities*, Tab CA347**).
[289] [2011] EWHC 3282 (Comm) (***Investors' Authorities*, Tab CA347, para. 24**).

315. The ILA also recognizes that *functus officio, res judicata*, and by extension, issue estoppel, apply "within a single arbitral tribunal, as may be the case of a tribunal facing the inconsistencies of a previous partial award,"[290] further clarifying, "[i]t has been confirmed conclusively that a valid partial final award is *res judicata* and gives rise to issue estoppel, and the tribunal becomes *functus officio* in respect of the issue decided in the partial award."[291]

316. In the damages phase of this arbitration, therefore, the findings of fact and conclusions of law the Tribunal has already made cannot be reopened for further argument. In its Counter-Memorial, Canada is urging the Tribunal to do just that.

4. *Res Judicata* Includes Issue Estoppel

317. The principle of *res judicata* includes the principle of issue estoppel, which also precludes relitigating an issue of fact or law already decided between the parties to an arbitration.

318. The principles are well-established in the international law,[292] which applies to these proceedings pursuant to NAFTA's governing law provision.[293] As early as 1905, the French-Venezuelan Mixed Claims Commission recognized:

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[290] International Law Association (ILA), "Interim Report: Res Judicata and Arbitration" (Berlin Conference 2004) **(*Investors' Authorities*, Tab CA359, p. 3-4).**

[291] International Law Association (ILA), "Interim Report: Res Judicata and Arbitration" (Berlin Conference 2004) **(*Investors' Authorities*, Tab CA359, p. 11).**

[292] *Waste Management, Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection concerning the Previous Proceedings, para. 39 (June 26, 2002) (citing Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals 366-72* (1987 rep) and authorities there cited) [RLA-279] **(*Investors' Authorities*, Tab CA349)**. *Res judicata* is so well established as a general principle of law that "it was even one of the examples cited by Lord Phillimore of the Advisory Committee of Jurists to describe the possible content of the provision in article 38(3) of the PCIJ Statute referring to the PCIJ's power to resort to 'general principles of law' as a source of international law." Chester Brown, *A Common Law of International Adjudication* 155 (2007) (quoting PCIJ/Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee of Jurists 335 (1920)) [RLA-280] **(*Investors' Authorities*, Tab CA350)**

[293] NAFTA art 1131(1) ("A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law"). NAFTA Article 1136(1) states that [a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case." This provision, which mirrors the language of Article 59 of the ICJ Statute (and the Statute of

> The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed.[294]

319. Over the ensuing century, international courts and tribunals have continued to apply this general principle to promote the twin goals of efficiency and finality. These include the Permanent Court of International Justice (*e.g. Chorzow Factory*), the International Court of Justice (*e.g. Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*[295]), interstate arbitral tribunals (*e.g. United Kingdom v. France*[296]), and investor-State arbitral tribunals (*e.g. AMCO* v. *Republic of Indonesia*).[297]

320. Even when the term issue estoppel is not expressly used, it is consistently understood to be encompassed in the principle of *res judicata*.[298] For example, Umpire Plumey's award in the *Claim of Company General of the Orinoco Case*, held that:

> [E]very matter and point distinctly in issue [...] and which was directly passed upon and determined in said decree, and which was its ground and basis, is confirmed by said judgement, and the claimants [...] are

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the PCIJ), does not preclude the *res judicata* effect of the *Bilcon et al* award here. Rather, the language simply "makes clear that the rule of *stare decisis* does not apply to awards rendered under Chapter 11." Kinnear, Bjorklund et al, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11*, "Article 1136- Finality and Enforcement of an Award, at 1136-3 (March 2008 Supplement) **(*Investors' Authorities*, Tab CA351)**.

294 Company General of the Orinoco Case, Award (July 31, 1905), 10 UNRIAA 184, 276 (citing *Southern Pacific Railroad Co.* v. *United States*, 168 SCR 1) ("*Orinoco*") **(*Investors' Authorities*, Tab CA352)**. This passage was also cited in the *Amco* v. *Indonesia (Resubmission: Jurisdiction)* Award, rendered under the auspices of ICSID: "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed." 89 International Law Reports 552, p. 560. **(*Investors' Authorities*, Tab CA353, p. 560)**.

295 International Court of Justice - Reports of Judgments, Advisory Opinions and Orders - *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* **(*Investors' Authorities*, Tab CA379)**.

296 *United Kingdom* v. *France (1977, 1978) 18 R.I.A.A. 3, 271* **(*Investors' Authorities*, Tab CA132).**

297 *AMCO* v. *Republic of Indonesia*: Resubmitted Case Decision on Jurisdiction, ICSID Review - Foreign Investment Law Journal, **(*Investors' Authorities*, CA353, p. 166)**.

298 See, e.g., *Grynberg* v. *Grenada*, ICSID Case No. ARB/10/7 (Award) at 7.1.2: "It is also not disputed that the doctrine of collateral estoppel is established as a general principle of law applicable in the international courts and tribunals such as this one", **(*Investors' Authorities*, Tab CA355)** citing *Amco Asia Corporation* v. *Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction (Re-submitted Case) (10 May 1988) **(*Investors' Authorities*, Tab CA353)**; *Company General of the Orinoco Case* **(*Investors' Authorities*, Tab CA352, para. 30).**

> forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in the said decree.[299]

321. Thus, "[i]t is not necessary that a particular Finding be 'executed' by the ordering of action in implementation of the *dispositif*. It is enough that the Finding be clearly a 'determination' by the Tribunal."[300]

322. Similarly, in *The Pious Fund of Californias, United States* v. *Mexico*, the Tribunal found that an umpire's award in a prior mixed claims commission proceeding had *res judicata* effect. In so doing, the Tribunal held that it must consider the earlier award in its entirety in order to determine the *res judicata* effect of its *dispositif*:

> Considering that all the parts of a judgement or a decree concerning the points debated in the dispute enlighten and mutually supplement each other, and that they all serve to render precise the meaning and bearing of the *dispositif* (the decisory part of the judgement), to determine the points upon which there is *res judicata* and which therefore cannot be put in question;[301]

323. The recent *Apotex* v. *United States of America* award, made under Chapter 11 of the NAFTA, explicitly affirms that in international law *res judicata* encompasses issue estoppel:

> In this Tribunal's view, that operative part as a "*dispositif*" can and should be read with the relevant "motifs" or reasons for that operative part, as decided above. Hence, the Tribunal concludes, for the purpose of *res judicata*, that Paragraph 358(a) of the operative part is to be applied together with the reasons applicable to that paragraph
>
> . . .
>
> In the Tribunal's view, it is impossible to dismiss those reasons as mere 'obiter dicta' or to read one passage in isolation from those reasons as a whole. Those reasons under both NAFTA Article 1139(g) and 1139(h) were essential to the operative part and thereby distinctly determined matters

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[299] *Claim of Company General of the Orinoco Case*, Report of French-Venezuelan mixed Claims Commission of 1902 (1906, Ralston, Jackson H., ed.) **(*Investors' Authorities*, Tab CA352, p. 55).**

[300] *See, e.g.*, Vaughan Lowe, "*Res Judicata* and the Rule of Law in International Arbitration", 8 Afr J Intl' & Comp L 38 1996 **(*Investors' Authorities*, Tab CA354).**

[301] *The Pious Fund of Californias, United States* v. *Mexico*, Award, (1902), IX RIAA 1, ICGJ 409 (PCA 1902), 14 October 1902, Permanent Court of Arbitration. **(*Investors' Authorities*, Tab CA356).**

> distinctly [*sic*] in the Apotex I & II arbitration. It is also impermissible to parse the two sets of claims in the two arbitrations, so as artificially to distinguish one case from the other. The purpose of the *res judicata* doctrine under international law is to put an end to litigation; and it would thwart that purpose if a party could so easily escape the doctrine by 'claim-splitting' in successive proceedings.[302]
>
> [Emphasis added]

324. *Res judicata* requires the identity of the parties, object, and cause.[303] Issue estoppel, by contrast, has a lower threshold:

> Issue estoppel is narrower than *res judicata*, and its requirements are less stringent. The doctrine applies where the previous decision is final; the issue raised in both proceedings is the same; the parties in the two proceedings are the same or privies; and the issue of fact or law is an 'essential element' in the previous cause of action or defence and/or in the previous decision. In contrast with *res judicata*, issue estoppel applies even if the causes of action in the two proceedings are different.[304]

325. This principle was adopted in *Grynberg* v. *Grenada*, where an ICSID tribunal expressly applied the doctrine of issue estoppel:

> Under that doctrine a question may not be re-litigated if, in a prior proceeding: (a) it was put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.[305]

326. The principles are also consistent with the conditions set out by the International Law Association in its Final Report on *Res Judicata and Arbitration*:

> To accept issue preclusion, it is required that a particular issue of fact or law has actually been arbitrated and determined by the award and that

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[302] *Apotex* v. *United States of America,* ICSID Case No. ARB (AF)/12/1 (Award) dated 25 August 2014, paras. 7.42, 7.58 (***Investors' Authorities*, Tab CA357).**

[303] In the *Chorzow Factory* case Judge Anzilotti spoke about "three traditional elements for identification, persona, petitum, causa petendi." *Interpretation of Judgements Nos 7 &8 Concerning the Case at the Factory of Chorzow*, 1927 PCIJ (Ser A) No 11, 23 (dissenting opinion of Judge Anzilotti) (***Investors' Authorities*, Tab CA327**).

[304] Brooks Allen, Tommaso Soave, "Chapter 3: Jurisdiction in WTO Dispute Settlement and Investment Arbitration" in Jorge A Huerta-Goldman, Antoine Romanetti, et al (eds) (***Investors' Authorities*, Tab CA358**).

[305] *Grynberg* v. *Grenada*, ICSID Case No. ARB/10/7 (Award) (***Investors' Authorities*, Tab CA353, para. 4.6.4)**

> the determination of the issue was essential or fundamental to the arbitral award.
>
> ...
>
> Issue estoppel, under the conditions above, not only applies regarding the same claim but also regarding different claims in further arbitral proceedings.[306]

327. Professor Howell expresses that the doctrine succinctly:

> [It] is founded on the principle of public policy that the public interest is served by finality in litigation, and on the rule of private justice that a defendant should not have to fight the same issue again. Issue estoppel is therefore not a mere rule of evidence. It operates as a complete bar to prevent the party estopped from calling evidence to show that the assertion which is the subject of the estoppel is incorrect. The existence of the estoppel results in there being "no issue" in the subsequent civil proceedings to which such evidence would be relevant.[307]
>
> [Emphasis added]

328. In the damages phase of this arbitration, all of the conditions are satisfied to stop Canada from resuscitating arguments already raised and disposed of in the merits phase of the arbitration and from attacking the findings of fact made by the Tribunal in the merits phase.

329. The earlier findings of a Tribunal in a bifurcated arbitration have *res judicata* effect,[308] As the Tribunal in *ConocoPhillips Petrozuata BV* v. *Bolivarian Republic of Venezuela* clearly explained:

> As noted, the Respondent characterizes the Decision as "interim" or "preliminary" and, accordingly, capable of being reconsidered, perhaps on an informal basis. The only reason suggested in its submissions is the temporal one: a further stage in the proceedings, relating to *quantum*, remains. The Decision does not however take an interim or preliminary form in respect of the matters on which it rules

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[306] ILA Final Report on *Res Judicata* and Arbitration, *Report of the seventy-first Conference*, International Law Association, 2004, 826-861, (***Investors' Authorities*, Tab CA359, paras. 56-57**).

[307] D. Howell, "Issue Estoppel Arising out of Foreign Interlocutory Court Proceedings in International Arbitration" in International Arbitration', Journal of International Arbitration, 2003, Volume 20 Issue 2b 153 (***Investors' Authorities*, Tab CA382, p. 154).**

[308] Gaillard and Savage, edg, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Wolters Kluwer 1999) (***Investors' Authorities*, Tab CA360, p. 741**).

...

> Those decisions in accordance with practice are to be incorporated in the Award. It is established as a matter of principle and practice that such decisions that resolve points in dispute between the Parties have *res judicata* effect. "They are intended to be final and not to be revisited by the Parties or the Tribunal in any later phase of their arbitration proceedings."[309]
>
> [Emphasis added]

330. It also does not matter how the same issues are raised from one phase to another. For *res judicata* and issue estoppel, all that is required is "not literally, but substantially identical issues".[310]

5. Using Bifurcated Proceedings to Justify Relitigating Matters Already Decided is an Abuse of Process

331. In its Written Submissions on Procedural Matters, Canada contended that bifurcating this arbitration would be more efficient:

> Canada proposes that the Tribunal proceed with this arbitration in two separate and distinct phases. In the first phase, Canada proposes that the Tribunal hear arguments concerning its jurisdiction and merits of the Claimants' allegations. Canada further proposes that the Tribunal should proceed to the second phase, in which it would hear arguments with respect to the alleged damages suffered by the Claimants, if and only if, it finds that there has been a breach of the NAFTA. As is explained in more detail below, this approach represents the most efficient method of conducting this arbitration.
>
> ...
>
> In deciding whether or not to bifurcate a proceeding, the primary consideration is whether or not it would result in a more efficient arbitration. Factors that should be considered include: (1) whether bifurcation will reduce the cost and length of the proceedings; (2) whether it will result in a material reduction of the proceedings in the damages phase; and (3) whether the facts and issues to be addressed in the liability phase are so distinct from the facts and issues of the damages phase that having a single proceeding would not result in savings of cost and time.

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[309] *ConocoPhillips Petrozuata BV* v. *Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30 (***Investors' Authorities*, Tab CA361, para. 20**).

[310] *CME Czech Republic BV (The Netherlands)* v. *The Czech Republic*, ICSID Arbitration Proceedings – Quantum Proceedings dated 20 June 2002 (***Investors' Authorities*, Tab CA362, p. 24**).

> Each of these factors favours bifurcation of the liability and damages phase in this arbitration.[311]

332. Bifurcation does not allow Canada to "split its case." Doing so is not only contrary to basic procedural fairness and elementary natural justice, it is an abuse of process. Canada cannot use the damages phase as a second opportunity to relitigate what has already been decided in the merits phase.

333. In his Commentary on the Statute of the International Court of Justice (ICJ), Zimmermann describes "abuse of process" as:

> [...] a special application of the prohibition of abuse of rights, which is a general principle of international law as well as in municipal law. It consists of the use of procedural instruments or rights by one or more parties for purposes which are alien to those for which the procedural rights were established, especially for a fraudulent, procrastinatory, or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process or for the purpose of pure propaganda.[312]
>
> [Emphasis added]

334. The doctrine of abuse of process has been referred to by the Permanent Court of International Justice, the International Court of Justice and the WTO Appellate Body, and has been described as a general principle of international law.[313]

335. In its Counter-Memorial, Canada is illegitimately using the bifurcation of proceedings for purposes not just alien, but directly counter to, the reason this arbitration was bifurcated.

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311 Canada's Written Submissions on Procedural Matters, dated 20 March 2009, paras. 37, 40.

312 Zimmerman et al, The Statute of the International Court of Justice: A Commentary, Oxford University Press 2006, (***Investors' Authorities*, Tab CA363, p. 831**); Also: Emmanuel Gaillard, "Abuse of Process in International Arbitration" in *ICSID Review*, (2017) (***Investors' Authorities*, Tab CA364, pp. 1-21).**

313 Michael Byers, 'Abuse of Rights: An Old Principle, A New Age, 47 McGill L J 389 (2002), 397 (***Investors' Authorities*, Tab CA365**); *Abaclat and others (Case formerly known as Giovanna a Beccara and Others)* v. *Argentine Republic* (ICSID Case No ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, para. 646 (***Investors' Authorities*, CA366**).

6. The Sabotage of Potentially Contradictory Findings

336. The potential for contradictory findings between the merits phase and the damages phase risks undermining the soundness and integrity of the entire arbitration. As Jeffrey Waincymer explains, "[w]here reasoning is internally contradictory, not only is it illogical but it can become impossible to know just what the reasons were. Hence, in substance, it is as if there was no reasoning provided."[314] Similarly, the tribunal in *Malicorp Limited* v. *The Arab Republic of Egypt* accepted that:

> As for "contradiction of reasons," it is in principle appropriate to bring this notion under the category "failure to state reasons" for the very simple reason that two genuinely contradictory reasons cancel each other out. Hence the failure to state reasons. The arbitrator's obligation to state reasons which are not contradictory must therefore be accepted.[315]

337. More generally, on the sufficiency of reasons in investment arbitration, the *Ad hoc* Annulment Committee for the *Maritime International Nominees Establishment v Republic of Guinea* case declared:

> In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.

338. Canada's Counter-Memorial is a patent attempt to undermine the legitimacy of the Arbitration.

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[314] Waincymer, *Part III: The Award, Chapter 16: The Award* in Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) **(*Investors' Authorities*, Tab CA367, pp. 1263-1348)**; Landau, 'Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration' in Albert Jan van den Berg (ed, 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, Volume 14 (Kluwer Law International 2009) **(*Investors' Authorities*, Tab CA368, pp. 187-205).**

[315] *Malicorp Limited* v. *The Arab Republic of Egypt*, ICSID Case No ARB/08/18 (Decision on the Application for Annulment of Malicorp Limited) dated 3 July 2013 **(*Investors' Authorities*, Tab CA369, para. 41)**, citing *Klöckner Industrie-Anlagen GmbH and others* v. *United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No ARB/81/2), Decision on Annulment, 3 May 1985, para. 116.

VI. ARTICLES 1116 AND 1117

A. THE INVESTORS HAVE STANDING UNDER ARTICLE 1116

339. In Section II of its Counter-Memorial, Canada challenges the Investors' standing to recover the damages they seek, on the basis that (1) Article 1116 of NAFTA – under which the Investors have brought their claim in this arbitration – does not permit investors to claim for losses incurred by an enterprise owned and controlled by the investor (in contradistinction to Article 1117, which specifically does permit a claim for such loss), and (2) the Investors are seeking to recover the losses incurred by Bilcon of Nova Scotia, an enterprise they owned and controlled. This argument, which Canada has made numerous times in prior NAFTA arbitrations, is misguided and unavailing.

340. First, the factual premise of Canada's argument is wrong. The Investors are seeking to recover damages for the loss *they* incurred, namely the loss in value of *their* interest in Bilcon of Nova Scotia. The references to Bilcon of Nova Scotia in the damages analysis are therefore perfectly normal, and relate to the valuation of that loss.

341. Second, Canada's interpretation of Article 1116 is wrong. Article 1116, read in context, entitles an investor to claim for loss or damage to an interest in an enterprise, and thus for reflective or derivative loss. Not surprisingly, this is the consistent interpretation given to Article 1116 by other NAFTA tribunals considering the matter.

342. In the alternative, if the Tribunal decided to depart from the settled interpretation of Article 1116, and to conclude that Article 1116 precludes recovery of reflective loss, then it should treat the Investors' claim as made under Article 1117. As the tribunal in *Mondev International* v. *United States of America* correctly observed, "[i]nternational law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced

where a merely procedural defect is involved."[316] It would be particularly important to adhere to such a principle if the "procedural defect" were caused by a change in the settled interpretation of Article 1116, on which it was reasonable for the Investors to rely.

B. THE LOSSES INCURRED BY THE INVESTORS

343. The premise of Canada's Article 1116 argument – that the Investors are improperly seeking damages for losses incurred by Bilcon of Nova Scotia – confuses the nature of the claimed loss with the valuation of the loss. While Canada musters multiple references to Bilcon of Nova Scotia in the Investors' Memorial and especially in Mr. Rosen's Expert Report,[317] it fails to recognize the express purpose of those references in the analysis, which is to value the loss incurred *by the Investors themselves.*

344. To this end, the references in the Investors' Memorial on Damages speak to the demonstrable NYSS, New York City, New Jersey, and United States East Coast markets for Whites Point aggregate, as well as to the appropriate interest rate to apply in the calculation of damages.[318]

345. Mr. Rosen states the purposes of his assignment very clearly in the introduction to his report:

> I have been asked by the Investors and its counsel ... to provide my 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.[319]
>
> [Emphasis added]

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[316] *Mondev International* v. *United States of America* (ICSID Case No. ARB (AF)/99/2) ("*Mondev*"), Award dated 11 October 2002, ***(Investors' Authorities*, Tab CA40, para. 86)**.

[317] Canada's Counter-Memorial on Damages, dated June 9, 2017, paras. 29-30.

[318] Investors' Damages Memorial, dated March 10, 2017, paras. 194-6, 204-207, 252.

[319] Expert Report of FTI Consulting (Howard Rosen), para 1.4; also, para. 2.1: ("I have undertaken an analysis to determine the quantum of damages suffered by the Investors as a result of the Respondent's breaches of its obligations under the Treaty") (emphasis added).

346. In order to sustain its mischaracterization of the nature of the claimed loss Mr. Rosen evaluates in his report, Canada isolates one component of Mr. Rosen's valuation analysis, and ignores the others. Canada focuses on the starting point for Mr. Rosen's valuation analysis, which is the calculation of the lost profits of Bilcon of Nova Scotia.[320]

347. Canada fails to acknowledge or address the next steps in Mr. Rosen's analysis, which includes consideration of the money that the Investors would have received from the quarry operations, and the loss of foreign tax credits that would have otherwise been available to the Investors when the quarry's discretionary after-tax cash flows are repatriated to the United States.[321] Mr. Rosen summarizes this further analysis of the damages suffered by the Investors:

> Foreign tax credits that are otherwise available to the Investors are not available from a damages award. Consequentially, the Investors are subject to higher taxes when they receive an award of damages as opposed to when they receive money from quarry operations. To ensure the Investors are placed in the same economic position that they would have been in but for the Respondent's breaches, I grossed up the lost profits of Bilcon of Nova Scotia (or money distributable to the Investors). The gross-up effectively eliminates additional taxes levied on an award of damages.[322]

348. In the end, Canada is forced to concede that the Investors are indeed claiming for their losses under Article 1116.[323] Canada is merely taking issue with the fact that such losses are "reflective," in the sense that they are derived from the loss in value of the underlying investment in which the Investors held an interest. As explained below, however, Article 1116 permits recovery of such loss.

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[320] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 30 (focusing on references to Bilcon of Nova Scotia in connection with inputs for the analysis of lost profits).
[321] Expert Report of FTI Consulting (Howard Rosen), dated December 15, 2016, paras. 2.5-2.6.
[322] Expert Report of FTI Consulting (Howard Rosen), dated December 15, 2016, para. 2.6.
[323] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 31 (acknowledging that the Investors "seek to recover their reflective losses under Article 1116") (emphasis added).

C. REFLECTIVE LOSS IS RECOVERABLE UNDER ARTICLE 1116

349. Although legitimate controversies remain over the interpretation of several provisions in the NAFTA, the interpretation of Article 1116 is settled. According to the settled interpretation of Article 1116, which is based on the straightforward application of Article 31 of the *Vienna Convention on the Law of Treaties*, reflective loss is recoverable.

1. The Ordinary Meaning of Article 1116

350. As Canada rightly explains,[324] Article 1116 provides a right for an investor of a Party to bring a claim on its own behalf on the grounds that "the investor has incurred loss or damage." Canada is wrong, however, when it asserts that the ordinary meaning of Article 1116 excludes claims by an investor for reflective loss. In fact, Article 1116 does not limit or qualify the concept of loss or damage in any way. Nothing on the face of Article 1116 suggests that it was meant to exclude the reflective loss incurred by an investor as a shareholder with an interest in an enterprise.

351. That such reflective loss is clearly included within the scope of damages recoverable under Article 1116 is confirmed by reading Article 1116 together with Article 1121(1), its companion provision. Article 1121(1) lists the conditions precedent to submission of a claim to arbitration under Article 1116, and specifically contemplates that an investor's claim under Article 1116 can include a claim "for loss or damage to an interest in an enterprise that the investor owns or controls directly or indirectly."[325] In other words, a claim under Article 1116 can include an investor's claim for reflective or derivative loss.

352. Article 1121(1)(b) specifies that where a claim under Article 1116 includes a claim for this kind of loss (i.e., for reflective loss), both the investor and the enterprise must waive their right to initiate or continue any proceedings with respect to the

[324] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 14.
[325] NAFTA Article 1121(1)(b).

impugned measure (subject to the exceptions listed therein). Accordingly, in this arbitration, consistent with the requirements of Article 1121(1)(b) for a claim under Article 1116 that includes a claim for reflective loss, a waiver was executed by all of the Investors and by Bilcon of Nova Scotia.[326]

353. Further support for the conclusion that reflective loss is included in the loss recoverable under Article 1116 is found in Article 1117(3), which contemplates that the same events may give rise to a claim under both Article 1117 (for the loss incurred by the enterprise) and Article 1116 (for the loss incurred by the investor in the enterprise). In that case, Article 1117(3) provides that the claims should be heard together before the same tribunal.

354. Canada is thus wrong to invoke Article 1117 in support of a notion of "strict separation"[327] between Articles 1116 and 1117 that would bar recovery of reflective loss under Article 1116. While there are important distinctions between Article 1116 and 1117, they do not affect the ability of an investor to claim reflective loss under Article 1116.

355. Reading Article 1116 in the context of both Article 1117 and Article 1121, it is evident that an investor with an interest in an enterprise has several options following a breach that has harmed the enterprise and affected the value of the investor's interest: (1) a claim under Article 1116 for reflective loss and any other losses suffered by the investor; (2) a claim under Article 1117, on behalf of the injured enterprise, for losses incurred by the enterprise (available only if the investor owns or controls – directly or indirectly – the enterprise); or (3) a claim under both Article 1116 and 1117 (assuming the investor meets the same condition).

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[326] Consent and Waiver of William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, attached as Exhibit 1 to the Notice of Arbitration; and the waiver of Bilcon of Nova Scotia, attached as Exhibit 2 to the Notice of Arbitration.

[327] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 20.

356. Canada contends that permitting investors to use Article 1116 to recover damages for losses incurred by their enterprise "would eliminate the distinction between Articles 1116 and 1117," and that "[i]gnoring this distinction would render Article 1117 redundant." the Investors acknowledge that permitting recovery of reflective loss under Article 1116 could lead to the redundancy of Article 1117, but only in those cases where an investor brings claims under both Articles 1116 and 1117. Under such circumstances, monies paid to the investment should flow through to the investor, and the investor would have to demonstrate a separate head of damages to recover directly.[328] By contrast, where investors bring a claim only under Article 1116, there is no such bar to recovering reflective loss and there is thus no credible concern of rendering Article 1117 redundant.

357. Furthermore, Canada's contention minimizes the important differences between Article 1116 and 1117 that remain when they are properly interpreted, and which ensure that each provision serves a distinct purpose in appropriate circumstances.

358. Article 1117 provides to domestic enterprises a remedy for violations of section A of Chapter 11 of NAFTA, conditional on the claim being made on their behalf by an investor of another NAFTA Party.[329] In doing so, it allows for some level of derogation from the principle of non-responsibility, whereby a national has no standing to make an international claim against its own State. Article 1117 is also a very helpful or useful option where the enterprise remains a going concern, with contractual obligations to multiple stakeholders, and the controlling shareholder wishes to restore the *status quo ante* for the benefit of all stakeholders. Damages claimed under Article 1117 are awarded directly to the enterprise itself, which helps to achieve this objective.

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[328] See Bjorklund, "NAFTA Chapter 11" in Chester Brown ed., *Commentaries on Selected Model Investment Treaties* (Oxford Commentaries on International Law) (Oxford University Press, 2013), p. 501 **(*Investors' Authorities*, Tab CA370).**

[329] See Kinnear, Bjorklund & Hannaford, *Investment Disputes under NAFTA*, 1116-5, 1117-4 **(*Investors' Authorities*, Tab CA372).**

359. But in a situation where the enterprise is not operational, such as where the state has destroyed the enterprise or its project, it makes little sense for the controlling shareholder to bring a claim on behalf of the enterprise under Article 1117, since the award of damages would need to be made either to an entity that no longer exists or that continues to exist, but is possibly under the control of the expropriating State. This is consistent with Article 1121(2)(a) requiring consent by both the investor and the enterprise to bring a claim under Article 1117, and with Article 1121(1)(a) providing that merely the investor's consent is sufficient to bring a claim under Article 1116.

360. Canada also contends that its interpretation of Article 1116, precluding claims for reflective loss, is required to achieve the object and purpose of NAFTA. As the Tribunal in the *Canadian Cattlemen for Fair Trade* v. *United States* case observed, however, Chapter 11 of NAFTA need not bear "the whole weight of the diverse purposes set out in Article 102":[330]

> Those purposes, it is clear, apply to the treaty in its complex entirety, and some are wholly irrelevant to Chapter Eleven. As one Chapter Eleven Tribunal, the *ADF Tribunal*, has stated, the NAFTA's overall purpose clause is akin to a *lex generalis*, while the particular chapter is a *lex specialis*. [...] The corollary is that particular segments of the treaty may reflect a much more limited set of purposes than the overall purposes clause sets forth. As Chapter Eleven lacks its own object and purpose clause, as a stand-alone investment treaty would likely have, its meaning must be discerned principally from textual analysis of the *lex specialis* and other relevant context.[331]

361. The same Tribunal concluded in that case that "all of the evidence adduced by the Parties contemporaneous with the adoption of NAFTA ... characterize purely Chapter Eleven in conventional terms as analogous to a bilateral investment treaty, with the purpose of encouraging the protection of foreign investment."[332] And as one of Canada's own sources observes, the interpretation of a provision

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[330] *Canadian Cattlemen for Fair Trade* v. *United States, Award on Jurisdiction, IIC 316 (2008), 28 January 2008, Ad Hoc Tribunal* (UNCITRAL) ("*Canadian Cattlemen*") **(*Investors' Authorities*, Tab CA371, para. 166).**

[331] *Canadian Cattlemen* Award on Jurisdiction, para. 166.

[332] *Canadian Cattlemen* Award on Jurisdiction, para. 168.

like Article 1116 as allowing recovery for reflective loss "improves investor protection for potential claimant shareholders in many situations."[333]

362. Moreover, a predictable commercial framework is served by applying the settled meaning of Article 1116, not an interpretation based on inapposite principles of corporate law that are frankly irrelevant to the interpretation of Article 1116. The Investors submit that allowing claims for reflective loss, which leave investors with more options and thus better protected when their enterprise has been injured by unlawful state conduct, also serves to better fulfil the object and purpose of increasing opportunities for investment than if an interpretation is adopted that precludes claims for reflective loss.

363. The ordinary meaning of Article 1116, in its context, and in light of the object and purpose of NAFTA Chapter 11, conclusively supports the recoverability of an investor's reflective loss.

2. Article 1116 Allows For Recovery of Reflective Loss

364. Canada's opposition to the recovery of reflective loss under Article 1116 is not new. Canada raised the same argument over fifteen years ago in *Pope & Talbot Inc.* v. *Canada*,[334] where it was flatly rejected on the basis of the ordinary meaning of Article 1116, properly interpreted in its context:

> Damages under Articles 1116 and 1117
>
> 74. This claim is submitted by the Investor under Article 1116[.]
>
> 75. Canada submitted an argument along the following lines: Article 1116 provides for claims for loss or damage incurred by an investor, whereas Article 1117 addresses claims for loss or damage incurred by an investment owned or controlled by an investor. Because, as noted, the sole basis for the claim here was Article 1116, the Investor may not recover

[333] D. Gaukrodger, *Investment treaties as corporate law: Shareholder claims and issues of consistency*. A preliminary framework for policy analysis, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division (***Canada's Index of Authorities*, RA-0118**).

[334] Canada's Counter-Memorial in *Pope & Talbot*, submitted with Canada's Statement of Defence dated 18 August 2001, paras. 49-54 (***Investors' Authorities*, CA-279**).

damages due to injuries to its Investment, and any elements of its claims that are derivative from injuries suffered by the Investment must be disallowed. They would be recoverable under Article 1117, but that claim had not been made.

76. Canada based its contention on –

the customary international law prohibition on shareholders recovering from injuries suffered by a corporation – the so-called *Barcelona Traction* rule. It is well established in customary international law that corporations have a legal existence separate from that of their shareholders. Article 1116 enables investors (those that own or control an investment) to seek relief for injuries that are direct but not derivative.

77. Canada also asserted that Article 1117 on the other hand provides –

a remedy for injuries to enterprises that would otherwise be barred from bringing a claim by the customary international law rule prohibiting claimants from filing international claims against their own governments. It supplements customary international law by creating a derivative right of action for the benefit of an investor.

78. The submission by Canada was thus that claims under Articles 1116 and 1117 are mutually exclusive, at least in the sense that while an investor might be able to claim by arbitration under Article 1116 when it claimed to have suffered loss and damage directly (so seeking to distinguish its loss from loss to the investment), it could not claim under that Article losses it incurs indirectly by virtue of damages to its investment.

79. The difficulty for Canada's position is in the language of the NAFTA. First, Article 1117 is permissive, not mandatory, in its language "may submit to arbitration." It is prohibitory only in that Article 1117(4) states: "An investment may not make a claim under this Section."

80. Of greater significance is the language of Article 1121(1):

A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) ...

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue [any other dispute settlement procedures].

> In the view of the Tribunal it could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise, which is a juridical person that the investor owns. In the present case, therefore, where the investor is the sole owner of the enterprise (which is a corporation, and thus an investment within the definitions contained in Articles 1139 and 201), it is plain that a claim for loss or damage to its interest in that enterprise/investment may be brought under Article 1116. It remains of course for the Investor to prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of. But for immediate purposes the important point is that the existence of Article 1117 does not bar bringing a claim under Article 1116.

365. Canada raised the same argument based on Articles 1116 and 1117 in *SD Myers Inc* v. *Government of Canada*[335] In that case, the United States likewise brought an Article 1128 submission in which it sought an interpretation of Articles 1116 and 1117.[336] The Tribunal ignored both countries' arguments, and reframed the issue as one of causation.[337]

366. Undeterred, Canada raised the argument again in the subsequent *United Parcel Service* v. *Government of Canada*[338] case. The Tribunal in UPS also rejected Canada's argument:

> Article 1116 v. Article 1117
>
> 32. Canada urges us to find that the Tribunal lacks jurisdiction because UPS brought its claims under NAFTA article 1116 (respecting harm to investors) rather than under NAFTA article 1117 (respecting harm to investments of investors). In brief, Canada's argument is that any harm flowing from the conduct complained of primarily affects UPS Canada rather than UPS.
>
> 35. We agree with UPS that the claims here are properly brought under article 1116 and agree as well that the distinction between claiming under article 1116 or article 1117, in the context of this dispute at least, is an

[335] *See* Counter-Memorial (Damages Phase) in *SD Myers*, dated 7 June 2001, paras. 106-110. (***Investors' Authorities*, Tab CA384).**

[336] Submission of the United States of America in *S.D. Myers*, dated 18 September 2001 (***Investors' Authorities*, Tab CA385**).

[337] *S.D. Myers* (Second Partial Award), dated 21 October 2002, paras. 143-152 (***Investors' Authorities*, CA383**).

[338] *United Parcel Service* v. *Government of Canada*, ICSID Case No. UNCT/02/1 (***Investors' Authorities*, Tab CA89**).

> almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. [...] Whether the damage is directly to UPS or directly to UPS Canada and only indirectly to UPS is irrelevant to our jurisdiction over these claims. That is clearly the same position taken by the tribunal in the *Pope & Talbot* proceeding.
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> [Emphasis added]

367. The two other NAFTA Parties have also failed in their respective attempts to derail Article 1116 claims on the basis that reflective loss is unrecoverable under that provision.

368. In *Mondev Ltd.* v. *United States*, the United States argued that, under Article 1116, Mondev could only claim for damages it suffered directly, but that in its Notice of Arbitration, Mondev had alleged no damages that it suffered independent of those suffered by its enterprise Lafayette Place Associates (LPA). The United States contended that Mondev should have brought a claim on behalf of LPA, which it owned and controlled, under Article 1117.[339] The Tribunal rejected the position of the United States that NAFTA creates a strict separation between Articles 1116 and 1117, based on principles of customary international law distinguishing between claims by a company and claims by shareholders:[340]

> 79. [...] [NAFTA] distinguishes between claims by investors on their own behalf (Article 1116) and claims by investors on behalf of an enterprise (Article 1117). Under Article 1116 the foreign investor can bring an action in its own name for the benefit of a local enterprise [*sic*][341] which it owns and controls; by contrast, in a case covered by Article 1117, the enterprise is expressly prohibited from bringing a claim on its own behalf (Article 1117(4)). Faced with this detailed scheme, there does not

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[339] *See* Kinnear, Bjorklund & Hannaford, *Investment Disputes under NAFTA*, 1116:8-1116:9 (describing the arguments and outcome in the *Mondev* case) **(*Investors' Authorities*, Tab CA338)**.

[340] *See* Rejoinder on Competence and Liability of Respondent United States of America in the *Mondev* case, dated 1 October 2001, p 60 (citing *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (I.C.J. Reports 1970) **(*Canada's Index of Authorities*, RA110)** Second Phase, Judgment, 5 February 1970, the U.S. argued: "It is well established in international law that no claim on behalf of a shareholder is cognizable for injury to a corporation. It is equally well established that *direct* injury to a shareholder is cognizable. Article 1116 was drafted with these principles in mind.").

[341] The tribunal must be referring to the ability, under Article 1116, for an investor to make a claim in respect of loss or damage to an interest in a local enterprise, as provided for in Article 1121(1)(b).

> seem to be any room for the application of any rules of international law dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders. The only question for NAFTA purposes is whether the claimant can bring its interest within the scope of the relevant provisions and definitions.

369. The Tribunal concluded that Mondev was entitled to bring a claim under Article 1116 based solely on its interest in its enterprise, LPA, which constituted its investment in the United States:

> 80. In the present case, in the Tribunal's view, Mondev's claims involved "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" as at 1 January 1994, and they were not caught by the exclusionary language in paragraph (j) of the definition of "investment", since they involved "the kinds of interests set out in subparagraphs (a) through (h)". They were to that extent "investments existing on the date of entry into force of this Agreement", within the meaning of Note 39 of NAFTA.
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> ...
>
> 82. Accordingly, there were subsisting interests relating to Mondev's investment in the project as at 1 January 1994. It is true that these interests were held by LPA, but LPA itself was "owned or controlled directly or indirectly" by Mondev, and these interests were an "investment of an investor of a Party" as defined in Article 1139. It may be noted that the United States did not really contest Mondev's standing under Article 1116, subject to the question whether it has actually suffered loss or damage. In the Tribunal's view, it is certainly open to Mondev to show that it has suffered loss or damage by reason of the decisions it complains of, even if loss or damage was also suffered by the enterprise itself, LPA.
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> 83. For these reasons, the Tribunal concludes that Mondev has standing to bring its claim concerning the decisions of the United States courts by virtue of Article 1116 of NAFTA in conjunction with paragraph (h) of the definition of "investment" in Article 1139.
>
> [Emphasis added]

370. The *Mondev* tribunal noted that the principal difference between a claim under Article 1116 and a claim under Article 1117 relates to the treatment of any damages recovered: "If the claim is brought under Article 1117, these must be

paid to the enterprise, not to the investor (see Article 1135(2))."[342] The Tribunal also made various other observations about claims brought under Article 1117,[343] but none of these undermine the tribunal's finding that an investor may bring a claim under Article 1116 based solely on damages derived from its interest in an enterprise it owns or control.

371. Accordingly, after discussing the particularities of claims under Article 1117, the Tribunal concluded that it need not make any decision in respect of Article 1117, "since the case can be resolved on the basis of Claimant's standing under Article 1116."[344]

372. In *GAMI Investments, Inc.* v. *The Government of the United Mexican States,*[345] Mexico also failed in its effort to preclude a claim for reflective loss under Article 1116. The claimant (GAMI) was a U.S. investment corporation (incorporated in Delaware) with a 14.18% equity interest in Mexican company *Grupo Azucarero México SA de CV* (GAM). GAM, whose primary operations consisted of five mills, was one of Mexico's largest sugar producers. In 2001, Mexico formally expropriated 22 sugar mills in the country, including all five of GAM's mills. GAM challenged the expropriation of the mills in the Mexican administrative courts, and three mills were eventually returned to the company; GAM would receive compensation from the Government of Mexico for the two other mills. GAMI brought a claim against Mexico under Article 1116 for breach of Articles 1102, 1105 and 1110 of NAFTA. As the Tribunal explained:

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[342] *Mondev* Award, 11 October 2002, para. 84 (***Investors' Authorities,* CA40, para. 84).**

[343] *See Mondev* Award, 11 October 2002, para. 85 ("In addition, if a claim is brought under Article 1117, both the investor and the enterprise must waive the right to initiate or continue local proceedings (Article 1121(2)"); para. 86 ("[I]t is clearly desirable in future NAFTA cases that claimants consider carefully whether to bring proceedings under Articles 1116 and 1117, either concurrently or in the alternative, and that they fully comply with the procedural requirements under Article 1117 and 1121 if they are suing on behalf of an enterprise.") (***Investors' Authorities,* CA40, para. 84**).

[344] *Mondev* Award, 11 October 2002 (***Investors' Authorities,* CA40, para. 86**).

[345] *GAMI Investments, Inc.* v. *The Government of the United Mexican States,* UNCITRAL ("*GAMI*") (***Investors' Authorities*, Tab CA374**).

> A fundamental feature of GAMI's claims is that they are derivative. GAMI does not claim that Mexican governmental measures were directed against its shareholding in GAM. Its grievance is that the value of its shareholding was adversely affected by measures which caused GAM's business to suffer.[346]

373. Mexico challenged the jurisdiction of the Tribunal on the basis that GAMI was not entitled to bring a claim based on its derivative prejudice (or reflective loss) as a shareholder.[347] The United States devoted its entire Article 1128 submission in the case to the interpretation of Articles 1116 and 1117.[348] Consistent with the prior awards in *Pope & Talbot* and *Mondev*, and the later *UPS* award, the *GAMI* Tribunal rejected Mexico's jurisdictional defense and the submission of the United States that supported it:

> 29. The United States in its written observation before this Tribunal accepts that Article 1116 entitles minority shareholders to bring a claim for loss or damage on their own behalf. It argues however that Article 1116 does not reflect "an intent to derogate from the rule that shareholders may assert claims only for injuries to their interests and not for injuries to the corporation." It refers to *Barcelona Traction* as authority for the rule. It cites a US Statement of Administrative Action from 1993 as evidence that "at least one of the Parties" to NAFTA understood Article 1116 to cover only direct injury to an investor while Article 1117 envisages injury caused to a local corporation owned or controlled by an investor.
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> 30. The Tribunal however does not accept that *Barcelona Traction* established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection. The ICJ itself accepted in *ELSI* that US shareholders of an Italian corporate entity could seise the international jurisdiction when seeking to hold Italy liable for alleged violation of a treaty by way of measures imposed *on that entity*.
>
> . . .
>
> 33. The Tribunal does not accept that directness for the purposes of NAFTA Article 1116 is a matter of form. The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss

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[346] *GAMI* Final Award, 15 November 2004, (***Investors' Authorities*, Tab CA15, para. 23**).

[347] See *Escrito de Dúplica de Los Estados Unidos Mexicanos Sobre Excepciones de Incompetencia in the GAMI case*, dated 30 June 2003, paras. 17, 23, 26 ff.

[348] *See* Submission of the United States of America in the *GAMI* case, dated 30 June 2003 (***Canada's Index of Authorities*, RA117**).

> or damage in respect of a given investment. Whether GAM can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.[349]

374. Canada cites the GAMI Final Award in its Counter-Memorial, incorrectly implying that it supports their position.[350] In reality, the GAMI Tribunal's comments relate only to the specific facts of GAMI, including the fact that:

a) GAM never paid dividends to GAMI;[351] and

b) GAMI chose to make a claim for expropriation even though its shares were never expropriated, and the expropriation of GAM's mills was, in large measure, reversed by the Mexican administrative courts.[352]

375. These facts made the GAMI case particularly complicated on the merits. But the resolution of GAMI's standing to bring a claim under Article 1116 was straightforward. In short, Canada is confusing merits issues with jurisdictional issues.

376. There is no doubt, therefore, that tribunals have developed a consistent interpretation of Article 1116 that supports the recoverability of reflective loss. Although there is no binding precedent in investment arbitration, it has become common practice for tribunals to consider the consistent interpretation of treaty provisions as having a highly persuasive value.[353] Such practice is justified by policy reasons, as the consistent interpretation of rules is necessary for the predictability of investments and the credibility of the dispute resolution system.[354] The need for certainty and a predictable normative environment favours according great deference to the interpretation of Article 1116 that has emerged in the Jurisprudence.

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[349] *GAMI* Final Award, 15 November 2004, **(*Investors' Authorities*, Tab CA15, paras. 29-30, 33).**
[350] Canada's Counter-Memorial on Damages, dated June 9, 2017, para. 23.
[351] *GAMI,* **(*Investors' Authorities*, Tab CA374, para. 120)**.
[352] *GAMI,* **(*Investors' Authorities*, Tab CA374, para. 120)**.
[353] See Dolores Bentolila, *Arbitrators as Lawmakers* (Kluwer Law International, 2017) **(*Investors' Authorities*, Tab CA375, paras. 406, 460)**.
[354] See, e.g. Kaufman-Kohler, "Arbitral Precedent: Dream, Necessity, or Excuse?", adapted from the Freshfields lecture given on 14 November 2006 **(*Investors' Authorities*, Tab CA376, p. 376).**

377. Professor Brower put it this way:

> ... a NAFTA tribunal, while recognizing that there is no precedential effect given to previous decisions, should communicate its reasons for departing from major trends present in previous decisions, if it chooses to do so. As our recently departed colleague, Thomas Wälde, stated in his separate opinion to *International Thunderbird Gaming Corp.* v. *Mexico*:
>
> > In international and international economic law – to which investment arbitration properly belongs – there may not be a formal *'stare decisis'* rule as in common law countries, but precedent plays an important role. Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can and should not respect well-established jurisprudence. WTO, ICJ and in particular investment treaty jurisprudence shows the importance to tribunals of not 'confronting' established case law by divergent opinion – except if it is possible to clearly distinguish and justify in-depth such divergence. The role of precedent has been recognised de facto in the reasoning style of tribunals, but can also be formally inferred from Art. 1131 (1) of the NAFTA – which calls for application of the 'applicable rules of international law'...
> >
> > ... [B]ut regardless of whether the particular line of reasoning was argued to the tribunal, it is our view that the tribunal should indicate its reasons for departing from a major trend of previous reasoning. This reasoning is partially apparent in this Award's evidentiary approach to the requirement of fair and equitable treatment under Article 1105.[355]
>
> [Emphasis added]

3. Subsequent Agreement and Practice is Unavailing

378. Against this unbroken line of authority, and the sound reasoning on which it is based, Canada resorts to referring to the losing submissions of the various NAFTA Parties as representing "subsequent agreement" or "subsequent practice" within the meaning of Article 31(3)(a) and (b), respectively, of the *Vienna*

[355] Charles H. Brower II, in *Glamis Gold, Ltd.* v. *United States*, Award, 8 June 2009: A contribution by the ITA Board of Reporters (***Canada's Index of Authorities*, RA29**).

Convention on the Law of Treaties.[356] The Tribunal ought to summarily reject this attempt by Canada to bootstrap an incorrect interpretation, rejected each time it has been raised, into the conclusive interpretation.

379. The appropriate mechanism for the NAFTA Parties to reach agreement on a matter of interpretation is the Free Trade Commission. Per Article 2001 of NAFTA, it is the Commission, comprising cabinet-level representatives of the Parties, that "shall resolve disputes that may arise" regarding interpretation or application of NAFTA, and it is only an interpretation of a provision by the Commission that is binding on a tribunal established under Chapter Eleven.[357]

380. For these reasons, in the absence of a binding Commission statement to the contrary, the Tribunal should apply the settled interpretation of Article 1116, which permits recovery of reflective loss.

4. Policy Considerations

381. Canada's additional arguments in favour of a strict separation between Article 1116 and Article 1117 have little to contribute to the exercise of interpreting the ordinary meaning of Article 1116 in its context, and in light of the object and purpose of NAFTA. Indeed, David Gaukrodger, the author of the series of recent OECD papers that Canada cites as the source for its policy arguments concedes that provisions in investment treaties have generally been interpreted by tribunals to allow shareholders to claim for reflective loss, independent from whatever recourse the company might have:

> Numerous ISDS tribunals have found that direct or indirect shareholders can claim for reflective loss. Tribunals have in effect found that covered

[356] Canada's Counter-Memorial on Damages, dated June 9, 2017, paras. 27-28 (in note 50, Canada refers to the U.S. position in *Mondev*, the Mexican and U.S. position in *GAMI*, and the Canadian position in *Pope & Talbot*, *UPS* and *S.D. Myers*).

[357] NAFTA Article 1131(2).

> shareholder claimants can disregard the corporate entity in which they have invested for the purposes of their treaty claims.[358]

382. He expressly takes no position on whether these interpretations by investment tribunals "are correct with regard to BITs in general or any particular treaty."[359] Instead, his papers are meant to provide a policy framework to assist governments as they consider their investment law policy in light of these issues, including consistency (or inconsistency) between the shareholder claims regime in their investment treaties and the equivalent regime under their domestic law.[360]

383. Gaukrodger makes the following observation in his initial 2013 paper:

> While governments have challenged these reflective loss claims in a number of cases, many ISDS arbitral tribunals have found that shareholders are entitled to recover for reflective loss in ISDS. This case law improves investor protection for potential claimant shareholders in many situations. It can be seen as a success story from the point of view of consistency of legal interpretation. A number of commentators have treated the issue as one of settled law under a typical BIT.[361]

384. A shareholder claim for reflective loss is particularly important, notes Gaukrodger, where "the company has no real recourse, such as where a government expropriates all of the company's assets."[362] He concludes that

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[358] D. Gaukrodger, Chapter 8, *The impact of investment treaties on companies, shareholders and creditors*, OECD Business and Finance Outlook 2016 (Gaukrodger, 2016) (***Canada's Index of Authorities*, RA120, p. 229**); Also: D. Gaukrodger, *Investment treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis*, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division (Gaukrodger, 2013) (***Canada's Index of Authorities*, RA118, p. 8**); D. Gaukrodger, Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law, OECD Working Papers on International Investment, No. 2014/2, OECD Publishing (Gaukrodger, 2014) (***Canada's Index of Authorities*, RA119, p. 8, note 11**).

[359] Gaukrodger, 2013, (***Canada's Index of Authorities*, RA118, p. 8, note 3**); Gaukrodger 2014, (***Canada's Index of Authorities*, p. 8, note 11**).

[360] *See* Gaukrodger 2016 (***Canada's Index of Authorities*, RA120, ch 8, p 234**); Gaukrodger 2013 (***Canada's Index of Authorities*, RA118 p. 11**); Gaukrodger 2014 (***Canada's Index of Authorities*, RA119, p. 30**). (considerations raised in the paper "may help governments decide about the appropriate trade-offs between different interests in formulating their policies").

[361] Gaukrodger 2013 (***Canada's Index of Authorities*, RA118 p. 11**).

[362] Gaukrodger 2013 (***Canada's Index of Authorities*, RA118 p. 10**).

"[g]iven the variety of situations, a general rule with regard to shareholder claims may not be appropriate."[363]

385. If Canada nevertheless concludes that the various policy considerations identified by Gaukrodger that militate against shareholder recovery of reflective loss outweigh the benefits of investor protection for potential claimant shareholders, then it could focus its efforts on expressly barring shareholder claims for reflective loss, whether through amendments to existing treaties or by including appropriate language in new treaties. Such policy considerations, however, are irrelevant to interpreting provisions in existing treaties whose meaning is clear and settled, such as Article 1116 of NAFTA.

D. CLAIM UNDER ARTICLE 1117

386. As discussed above, the meaning of Article 1116 is clear, and its interpretation by NAFTA tribunals has been consistent. It allows the Investors to bring a claim for reflective loss, and thus to recover damages calculated on the basis of the lost profits of Bilcon of Nova Scotia. [redacted]

387. If, however, the Tribunal decided to depart from the settled interpretation of Article 1116, and to conclude that Article 1116 precludes recovery of reflective loss, then the Investors' claim can be treated as made under Article 1117. As noted by the *Mondev* Tribunal, if – for whatever reason – a claim should have been brought under Article 1117 instead of Article 1116, a tribunal should simply treat such a claim "as in truth brought under Article 1117, provided there has been clear disclosure in the Article 1119 notice of the substance of the claim, compliance with Article 1121 and no prejudice to the Respondent State or third

[363] Gaukrodger 2013 (***Canada's Index of Authorities*, RA118 p. 10**).

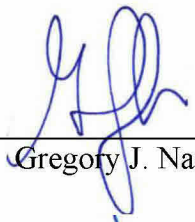
parties."[364] That is the case here. As in *Mondev*, the Investors' included an Article 1121 waiver not only on their own behalf, but also on behalf of their enterprise, Bilcon of Nova Scotia. The substance of the claim has been disclosed from the start, and there would be no prejudice to Canada or third parties.

388. Nor have the Investors been negligent or careless in bringing their claim under Article 1116 only. Given the clear and settled meaning of Article 1116, the claim by the Investors for their losses in respect of their interest in their enterprise Bilcon of Nova Scotia should be admissible on the basis of the Investors' standing under Article 1116, just as the *Mondev* tribunal decided it could resolve Mondev's claim in respect of its interest in its enterprise, LPA, under Article 1116.

389. Should the Tribunal choose to alter the settled meaning of Article 1116, it would be manifestly unfair to preclude the Investors' claim on the basis that it should have included a claim under Article 1117. As the *Mondev* Tribunal correctly observed, "[i]nternational law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved."[365] It would be particularly important to adhere to such a principle if the "procedural defect" were caused by a change in the settled interpretation of Article 1116, on which it was reasonable for the Investors to rely.

[364] *Mondev* Award, (***Investors' Authorities*, Tab CA40, para. 86**).
[365] *Mondev* Award, (***Investors' Authorities*, Tab CA40, para. 86**).

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23RD DAY OF AUGUST 2017.



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