
**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH
AMERICAN FREE TRADE AGREEMENT (“NAFTA”) AND THE 1976 UNCITRAL
ARBITRATION RULES**

between

RESOLUTE FOREST PRODUCTS INC.

Claimant

and

GOVERNMENT OF CANADA

Respondent

(PCA CASE NO. 2016-13)

PROCEDURAL ORDER NO. 4

DECISION ON BIFURCATION

ARBITRAL TRIBUNAL:

Judge James R. Crawford, AC (President)

Dean Ronald A. Cass

Dean Céline Lévesque

18 NOVEMBER 2016

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1. PROCEDURAL HISTORY

- 1.1 The Claimant submitted its Notice of Arbitration and Statement of Claim on December 30, 2015. Pursuant to Procedural Order No. 1, the Respondent submitted its Statement of Defence on September 1, 2016. In its Statement of Defence, the Respondent proposed that these proceedings be bifurcated into two phases and noted:

The Claimant has agreed to consider Canada's bifurcation proposal and to advise the Tribunal by September 16, 2016, whether it will consent to bifurcation with respect to Canada's objections described above. Should the Claimant not consent to bifurcation, the Disputing Parties have agreed that Canada will submit a Request for Bifurcation setting out the rationale supporting bifurcation in greater detail by September 29, 2016.

- 1.2 By letter of September 14, 2016, the Claimant stated that it was "unable to consent to bifurcation on the basis of the proposal set out in Canada's Statement of Defense."
- 1.3 In accordance with the Disputing Parties' agreement, the Respondent submitted its Request for Bifurcation on September 29, 2016 and the Claimant submitted its Opposition to Respondent's Request for Bifurcation on October 13, 2016.
- 1.4 As notified to the Disputing Parties on October 19, 2016, and in Procedural Order No. 3 dated November 3, 2016, the Tribunal held a hearing on bifurcation via teleconference on November 7, 2016. During that hearing Mr Luz made submissions on behalf of the Respondent and Dr Feldman and Mr Valasek made submissions on behalf of the Claimant.
- 1.5 The Tribunal has considered all the points presented by the Parties in their written and oral submissions, and summarises the key positions below. The Tribunal stresses that its considerations and decisions regarding bifurcation should in no way be understood to prejudice the substance of the preliminary objections or the submissions on the merits.

2. RESPONDENT'S POSITION

- 2.1 In its Request for Bifurcation, the Respondent submits that these proceedings should be bifurcated to address in a preliminary phase its jurisdictional objections under NAFTA Articles 1101(1), 1116(2), 1117(2) and 2103 and its admissibility objection under Article 1102(3). The Respondent notes that "these objections are discrete, succinct and ripe for determination without need for expert or witness testimony or delving into the merits of the Claimant's Article 1102, 1105 or 1110 claims against the Nova Scotia

measures.”¹ The Respondent emphasises the potential time and cost savings that could be achieved by the Disputing Parties if its motion for bifurcation is granted.²

2.2 The Respondent recalls Article 21(4) of the 1976 UNCITRAL Arbitration Rules (“**UNCITRAL Rules**”) which, in its submission, creates “a presumption in favour of bifurcating jurisdictional questions that should be declined only if, in the circumstances of the particular case, the Tribunal determines that it would be inefficient or would cause prejudice to a disputing party.”³ The Respondent submits that it has done enough to enliven that presumption and that the Claimant now carries the burden of rebutting that presumption.⁴ The Respondent cites a number of NAFTA cases in which jurisdiction was decided as a preliminary matter and makes particular reference to *Philip Morris v Australia*.⁵ In that case, the Tribunal (operating under the 2010 UNCITRAL Arbitration Rules) “considered bifurcation to be appropriate when: (i) the objection is *prima facie* serious and substantial, (ii) the objection can be examined without prejudging or entering the merits, and (iii) the objection, if successful, could dispose of all or an essential part of the claims raised.”⁶ The Respondent adopts these criteria when analysing its objections to jurisdiction and admissibility.

Jurisdictional objection under Article 1101(1): The Nova Scotia Measures do not “relate to” the investor or the investment

2.3 In summary, the Respondent argues that “Resolute’s claim cannot even pass through the gateway to [NAFTA] Chapter Eleven because the measures adopted by Nova Scotia are not relating to the Claimant’s investment in Quebec.”⁷ The Respondent submits, first, that the Tribunal has no jurisdiction in respect of the Nova Scotia Measures because they do not “relate to” the Claimant nor its investment in Québec and therefore fall outside of the scope and coverage of NAFTA Chapter 11 as required by Article 1101(1). The Respondent submits that the Nova Scotia Measures “at most, ‘affected’ [the Laurentide mill] in an indirect and remote manner” do not provide a sufficient legal nexus to bring the claim within Article 1101. This constitutes in its view a “*prima facie* serious and substantial” objection.⁸ The Respondent also contends that the disagreement between

¹ Request for Bifurcation, para 3.

² Request for Bifurcation, para 2.

³ Request for Bifurcation, para 4; Bifurcation Hearing Transcript 7:9-17.

⁴ Bifurcation Hearing Transcript 30:14-20.

⁵ *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014.

⁶ Request for Bifurcation, para 6 citing *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, para 109; Bifurcation Hearing Transcript 7:18-8:7.

⁷ Bifurcation Hearing Transcript 10:1-5.

⁸ Request for Bifurcation, para 9.

the Disputing Parties as to the proper test to be applied – the Respondent favouring the “legally significant connection” test espoused in *Methanex*⁹ and the Claimant preferring the “causal connection test” adopted by the Tribunal in *Cargill v Mexico*¹⁰ – in assessing the preliminary objection speaks to the fact that this objection is serious and substantial.¹¹

2.4 Second, adjudication of the Article 1101 objection will not require prejudgment of or entry into the merits since, even if the Tribunal accepted the allegation that the Nova Scotia Measures contributed to the closure of the Laurentide mill, there would still not be a “legally significant connection”¹² so as to pass the threshold set by Article 1101(1).¹³

2.5 Third, if this objection were successful, it would dispose of all of the Claimant’s claims in respect of the Nova Scotia Measures, leaving only the claims in respect of the Federal Measures for determination.¹⁴

Jurisdictional objection under Articles 1116(2) and 1117(2): Time bar

2.6 The Respondent challenges the Tribunal’s jurisdiction *ratione temporis* pursuant to Articles 1116(2) and 1117(2). In short, the Respondent submits that the Nova Scotia Measures were all adopted more than three years prior to the date of the Notice of Arbitration and, therefore, the Claimant’s claims in respect of the Nova Scotia Measures are time-barred if the Tribunal finds that “Resolute knew or should have known of the breach and loss before December 30, 2012.”¹⁵

2.7 First, the objection is *prima facie* serious and substantial since the Nova Scotia Measures were adopted between three and fifteen months before the relevant cut-off date of December 30, 2012.¹⁶ Therefore, the claims would be time-barred since NAFTA tribunals have historically “applied the time-bar limitation strictly”.¹⁷ At the Hearing on Bifurcation, the Respondent further submitted that the fact that the Claimant’s “Objection

⁹ *Methanex Corporation v United States of America* (UNCITRAL) Partial Award, 7 August 2002.

¹⁰ *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009.

¹¹ Bifurcation Hearing Transcript 11:1-4.

¹² *Methanex Corporation v United States of America* (UNCITRAL) Partial Award, 7 August 2002, para 147.

¹³ Request for Bifurcation, para 10; Bifurcation Hearing Transcript 13:8-13.

¹⁴ Request for Bifurcation, para 11; Bifurcation Hearing Transcript 14:24-15:4.

¹⁵ Request for Bifurcation, para 12; Bifurcation Hearing Transcript 16:24-17:1.

¹⁶ Request for Bifurcation, para 13.

¹⁷ Request for Bifurcation, para 13.

to Bifurcation is dedicated almost entirely to arguing why Canada's legal interpretation of time bar is wrong... shows that the objection is *prima facie* serious and substantial."¹⁸

- 2.8 Second, assessment of the time-bar objection only requires an assessment of the "dates on which the Claimant first had knowledge of the measures alleged to violate NAFTA Chapter Eleven and that it had suffered some cognizable loss."¹⁹ Such an assessment will not require the Tribunal to prejudge or consider the merits of the Claimant's substantive allegations.²⁰ At the Hearing on Bifurcation, the Respondent relied on Exhibit R-081 to Canada's Statement of Defence, Resolute's original draft NAFTA Notice of Intent, to demonstrate that "Resolute took the position that it suffered damage starting in 2012", putting it on the wrong side of the time-bar.²¹ In Respondent's submission, the question of knowledge is "wholly separate and unrelated to the merits of whether there has been an expropriation, a breach of national treatment, or a breach of the minimum standard of treatment" and is a simple factual inquiry appropriate for bifurcation.²²
- 2.9 Third, if this objection were successful, the entirety of the claim based on the Nova Scotia Measures would be time-barred thereby "drastically reduc[ing] the scope of the arbitration and eliminat[ing] any need to delve into any of the highly complex questions that will be involved in determining the merits of the Claimant's national treatment, minimum standard of treatment and expropriation claims."²³

Jurisdictional objection under Article 2103: claims under NAFTA based on taxation measures

- 2.10 The Respondent objects to the Tribunal's jurisdiction on the basis that Article 2103 provides that "nothing in this Agreement shall apply to taxation matters," other than as set out in Article 2103 itself.²⁴ The Respondent submits that Article 2103 does not refer to Article 1105 and, additionally, Article 2103(6) specifies that "any claim that a taxation measure constitutes an expropriation must be submitted to the competent taxation authorities of the NAFTA Parties at the time of filing the Notice of Intent to Submit a Claim to Arbitration."²⁵ The fact that NAFTA specifically provides for a mechanism to be followed in respect of taxation matters means that this is a *prima facie* serious and

¹⁸ Bifurcation Hearing Transcript 18:10-20.

¹⁹ Request for Bifurcation, para 14.

²⁰ Request for Bifurcation, para 14.

²¹ Bifurcation Hearing Transcript 19:6-20:15.

²² Bifurcation Hearing Transcript 20:20-24.

²³ Request for Bifurcation, para 16; Bifurcation Hearing Transcript 23:14-25.

²⁴ Request for Bifurcation, para 18.

²⁵ Request for Bifurcation, para 18.

substantial objection to the jurisdiction of this Tribunal to determine whether any alleged “discounted property taxes” amount to a breach of Article 1105.²⁶

- 2.11 Second, the hearing of this objection will, according to the Respondent, solely require determination of whether Article 2103 permits expropriation claims under Article 1105 and, in respect of the claim under Article 1110, “whether the Claimant submitted the measure to the NAFTA Parties’ taxation authorities at the time of its [Notice of Intent to Submit a Claim to Arbitration].”²⁷ The determination of these questions will not require examination or prejudgment of the substantive claims.
- 2.12 Third, if the Article 2103 objection is successful, the discounted property tax elements of the Article 1105 and 1110 claims could be disposed of, saving the Tribunal from “delv[ing] into the difficult terrain of whether, how and to what extent the taxation measure at issue provided a financial benefit to Port Hawkesbury at all and whether or not it played any cognizable role in the Claimant’s decision to close its Laurentide mill in October 2014.”²⁸
- 2.13 At the Hearing on Bifurcation, the Respondent conceded that “Canada would not have proposed holding a separate preliminary phase to deal solely with this objection” but considers it appropriate to consider the objection in a preliminary phase if other preliminary objections are also to be determined.²⁹

Admissibility objection under Article 1102(3): The meaning of “treatment” under NAFTA across State or Provincial borders

- 2.14 Even though the Respondent’s objection to admissibility does not fall within the ambit of Article 21(4) of the UNCITRAL Rules, the Tribunal is permitted to consider the objection as a preliminary matter pursuant to Article 15(1) since, under that provision, the Tribunal is entitled to “conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceeding each party is given a full opportunity of presenting its case.”³⁰ The Tribunal in *Philip Morris v Australia* deemed it unnecessary to classify Australia’s Temporal Objection as one

²⁶ Request for Bifurcation, para 18.

²⁷ Request for Bifurcation, para 19.

²⁸ Request for Bifurcation, para 20.

²⁹ Bifurcation Hearing Transcript 28: 16-29:1.

³⁰ Request for Bifurcation, para 21.

relating to jurisdiction or admissibility on the basis of corresponding provisions in the 2010 UNCITRAL Arbitration Rules.³¹

- 2.15 Applying the criteria used to assess the Respondent's jurisdictional objections, the Respondent submits that its admissibility objection under Article 1102 is, first, *prima facie* serious and substantial given that Article 1102(3) defines "treatment" as referring to "in-jurisdiction treatment, not treatment accorded across multiple jurisdictions."³² At the Hearing on Bifurcation, the Respondent noted that this is an exceptional case given that "there has never been a NAFTA case where an investor in one province seeks to challenge the measures adopted by a provincial government in a different province in which the investor has no investment."³³ Second, it can be assessed without prejudging or entering the merits as the Tribunal can assess the objection by answering one question alone: does the Claimant have a supercalendered paper investment within the jurisdiction of Nova Scotia?³⁴ Third, if the objection were successful, the Tribunal could dispose of the Claimant's Article 1102 claim, would not be required to consider "Canada's procurement and subsidies defences based on Articles 1108(7)(a) and (b)", and would not be required to analyse whether the Port Hawkesbury and Laurentide mills were "in like circumstances".³⁵

Claims against the Federal Measures are not prejudiced by bifurcation

- 2.16 The Respondent submits further that the Federal Measures claims are "separate and factually distinct" from the Nova Scotia Measures claims and there is "no intrinsic overlap between the facts necessary to dispose of the Nova Scotia Measures as against the Federal Measures." For this reason, there is no prejudice to the Claimant in bifurcating the proceedings and hearing the Respondent's objections to jurisdiction and admissibility in respect of the Nova Scotia Measures in a preliminary phase.³⁶

3. CLAIMANT'S POSITION

- 3.1 In its Opposition to Respondent's Request for Bifurcation, the Claimant "agrees with Canada that bifurcation could, in some cases, serve purposes of fairness, efficiency and economy."³⁷ The Claimant submits that the Respondent's motion should be judged

³¹ *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, para 118.

³² Request for Bifurcation, para 23; Bifurcation Hearing Transcript 25:4-22.

³³ Bifurcation Hearing Transcript 26:8-15.

³⁴ Request for Bifurcation, para 24; Bifurcation Hearing Transcript 26:21-23.

³⁵ Request for Bifurcation, para 25; Bifurcation Hearing Transcript 27:9-22.

³⁶ Request for Bifurcation, paras 27-29.

³⁷ Opposition to Respondent's Request for Bifurcation, para 2.

against these three criteria. By doing so, the Claimant contends that bifurcation of these proceedings “would be unfair, inefficient, and costly” because “issues of liability and measures of damages are bound up in Canada’s theories for dismissal”, leading to duplication of effort and requiring the Tribunal to “prejudge[e] or [enter] into the merits” in the preliminary phase.³⁸ The Claimant adopts the test espoused in *Philip Morris v Australia* and relied upon by the Respondent and argues that the Respondent’s objections to jurisdiction and admissibility do not satisfy the *Philip Morris* criteria.³⁹

Response to objections under Articles 1101(1) and 1102(3)

- 3.2 The Respondent’s objections under both Articles 1101(1) and 1102(3) will require the Tribunal to consider the same fact, “that the Nova Scotia Measures were deliberately aimed at giving Port Hawkesbury Paper an advantage over competitors located outside Nova Scotia.”⁴⁰ This fact, the Claimant says, is “fundamental to the merits of Resolute’s claim”, thereby making bifurcation inconvenient.⁴¹ In respect of the Respondent’s objections under both Article 1101(1) and 1102(3), the territorial limitation advanced by the Respondent is unmaintainable in this case because the measures in question are not ordinary legislative or regulatory measures, but were specifically intended to have effect beyond the borders of Nova Scotia.⁴² The Claimant also contends that these objections do not satisfy the *Philip Morris* test.⁴³

Objection under Article 1101(1)

- 3.3 First, the “legally significant connection” test relied upon by the Respondent in respect of Article 1101(1) has been criticised and subsequently recalibrated by other NAFTA tribunals.⁴⁴ The Claimant relies on the “causal connection” test espoused in *Cargill v Mexico*⁴⁵ and endorsed by the tribunal in *Mesa Power Group v Canada*.⁴⁶ On that test, the term “related to” in Article 1101(1) must be understood as requiring “only some connection and [not requiring] that the measure be adopted with the express purpose of

³⁸ Opposition to Respondent’s Request for Bifurcation, para 2.

³⁹ Opposition to Respondent’s Request for Bifurcation, para 4; Bifurcation Hearing Transcript 32:12-18.

⁴⁰ Opposition to Respondent’s Request for Bifurcation, para 5; Bifurcation Hearing Transcript 34:7-10.

⁴¹ Opposition to Respondent’s Request for Bifurcation, para 5.

⁴² Bifurcation Hearing Transcript 36: 3-25.

⁴³ Opposition to Respondent’s Request for Bifurcation, para 6.

⁴⁴ Opposition to Respondent’s Request for Bifurcation, para 8; Bifurcation Hearing Transcript 35:18-24.

⁴⁵ *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009.

⁴⁶ *Mesa Power Group LLC v Government of Canada*, PCA Case No 2012-17, Award, 24 March 2016.

causing loss.”⁴⁷

- 3.4 Second, the Claimant relies on “substantial evidence” which demonstrates that the Nova Scotia Measures were intended to have effects beyond the province of Nova Scotia and were not, as the Respondent suggests, “aimed solely at facilitating the sale of the Port Hawkesbury mill in Nova Scotia.”⁴⁸ The Claimant contends that the stated goal of the Nova Scotia Measures was to give the Port Hawkesbury mill a competitive advantage so as to make it “the most efficient paper producer in the world.”⁴⁹ Therefore, the Claimant submits that the Respondent “cannot credibly argue that the [Nova Scotia] Measures had no legally significant effect on other supercalendered paper producers, outside Nova Scotia, nor that it did not know they would.”⁵⁰ This, in the Claimant’s view, “demonstrates a *prima facie* case” that the Nova Scotia Measures “relate to” the Claimant and so the jurisdictional objection under Article 1101(1) is unmaintainable and is not appropriate for bifurcation as it requires assessment and prejudgment of the merits.⁵¹

Objection under Article 1102(3)

- 3.5 The Claimant contends that the Respondent’s Article 1102(3) objection similarly fails the *Philip Morris* test. First, the plain words of the NAFTA text do not support the Respondent’s contention that Article 1102(3) only relates to intra-state treatment by a state or province.⁵² The Claimant submits that the Respondent’s interpretation would require one to “actually modify or... [read] into 1102(3) additional language.”⁵³ The Claimant notes that the Respondent does not cite any other authority in support of this contention. Given the lack of authority in the NAFTA text or otherwise, the Claimant submits that this objection cannot be considered serious or substantial.⁵⁴ The Claimant further submits that the Respondent’s assertion that it is impossible for the claim to succeed given Article 1102(3) demonstrates that the objection is not a limited legal inquiry, but rather requires exploration of the merits of the case.⁵⁵
- 3.6 Second, the Tribunal will be required to enter into and prejudge the merits to determine

⁴⁷ Opposition to Respondent’s Request for Bifurcation, para 10 citing *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009, para 57.

⁴⁸ Opposition to Respondent’s Request for Bifurcation, paras 13-16.

⁴⁹ Opposition to Respondent’s Request for Bifurcation, para 17.

⁵⁰ Opposition to Respondent’s Request for Bifurcation, para 22.

⁵¹ Opposition to Respondent’s Request for Bifurcation, para 15; Bifurcation Hearing Transcript 38:5-22.

⁵² Opposition to Respondent’s Request for Bifurcation, para 26; Bifurcation Hearing Transcript 43:3-4.

⁵³ Bifurcation Hearing Transcript 43:11-15.

⁵⁴ Opposition to Respondent’s Request for Bifurcation, para 27.

⁵⁵ Bifurcation Hearing Transcript 46:12-47:5.

whether the Claimant and the Port Hawkesbury mill are “in like circumstances”, whether Nova Scotia knew its measures would have a prejudicial effect on foreign investors outside of Nova Scotia and whether other remedies are available to investors in Canada as are available to US competitors who have not invested in Canada.⁵⁶

- 3.7 Third, the assessment of all of these matters is “inseparable from the merits”, fails to dispose of the claims under Articles 1105 and 1110, and therefore bifurcation “would be costly and inefficient.”⁵⁷

Response to objections under Articles 1116(2) and 1117(2)

- 3.8 As a starting point, the Claimant notes that the Respondent’s objection under Article 1116(2) and 1117(2) relies solely on the date the Nova Scotia Measures were adopted and “ignor[es] almost entirely the question of when Resolute acquired knowledge that the [Nova Scotia] Measures caused it loss.”⁵⁸ In the Claimant’s submission, this analysis is only possible with reference to the merits and damages portions of the claim.⁵⁹

- 3.9 Adopting the *Philip Morris* analysis again, the Claimant submits that this objection is not serious and substantial as it has ignored half of the standard set out in Article 1116(2). Relevantly, Article 1116(2) provides: “An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have [first] acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.” The Claimant notes that the Respondent’s objection emphasises the first half of this standard, but not the second half; that is, when the Claimant knew or should have known that it had incurred loss or damage.⁶⁰ This knowledge must relate to damage actually suffered, not predicted future damage.⁶¹ According to the Claimant, “the standard... as a matter of law is for a Claimant to have acquired knowledge that it has incurred loss or damage.”⁶² In the Claimant’s submission, this objection “cannot be segregated” but must be joined to the merits so it “may be

⁵⁶ Opposition to Respondent’s Request for Bifurcation, paras 28-31.

⁵⁷ Opposition to Respondent’s Request for Bifurcation, paras 34-35.

⁵⁸ Opposition to Respondent’s Request for Bifurcation, para 36.

⁵⁹ Opposition to Respondent’s Request for Bifurcation, para 36.

⁶⁰ Opposition to Respondent’s Request for Bifurcation, paras 37, 43.

⁶¹ *Pope & Talbot v Canada* (UNCITRAL), Award in Relation to Preliminary Motion By Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim From the Record, 24 February 2000; see also Meg Kinnear, Andrea Bjorklund et al, “Article 1116 – Claim by an Investor of a Party on its Own Behalf” in *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, Supplement No 1, March 2008 (Kluwer 2006) 1116-36c – 1116-36d.

⁶² Bifurcation Hearing Transcript 49:12-14.

considered in connection with the parties' evidence on loss and damages."⁶³ The Claimant emphasises that "the realities of commerce and the market" mean that it was impossible to know at the time the Nova Scotia Measures were implemented whether the Port Hawkesbury mill would succeed and take market-share from other competing supercalendered paper mills.⁶⁴ Accordingly, it is incorrect to assume that the Claimant knew or should have known of its loss at the time suggested by the Respondent.

3.10 In response to the Respondent's reliance on Exhibit R-081, the draft NAFTA Notice of Intent, the Claimant explains that this is a "non-paper", provided as a courtesy to the Government of Canada and not intended to be a final document.⁶⁵ Accordingly, the Claimant suggests that the document "has no substance or meaning in context."⁶⁶

3.11 Further, the Claimant submits that even if this objection were successful, it would not dispose of the entirety of the claim against the Nova Scotia Measures as suggested by the Respondent. Rather, the Claimant submits that its expropriation claim only crystallized upon the closure of the Laurentide mill in October 2014 and its claims in respect of continuing violations would similarly not be time-barred.⁶⁷ Given that these remaining claims would require the analysis of the "very same issues that would be relevant to the analysis of the claims under Articles 1102 and 1105", there is no time or cost saving achieved by bifurcation.⁶⁸

Response to objection under Article 2103

3.12 The Claimant submits that the Respondent's objection under Article 2103 is misconceived as: first, Article 2103(6) only refers to expropriation claims where such expropriation takes place through the impugned tax measure, not in circumstances where a tax measure forms part of a series of measures which "contributed to the constructive expropriation of Resolute's Laurentide mill";⁶⁹ and second, given that the Respondent concedes that Article 2103 does not preclude its national treatment claim under Article 1102 and its minimum standard of treatment and expropriation claims under Articles 1105 and 1110 respectively encompass more than just the tax-related measures, a successful objection would not dispose of the claims and therefore would not lead to greater fairness, efficiency or economy.⁷⁰ At the Hearing on Bifurcation, the Claimant

⁶³ Opposition to Respondent's Request for Bifurcation, para 45; Bifurcation Hearing Transcript 50:2-4.

⁶⁴ Bifurcation Hearing Transcript 58:15-60:5.

⁶⁵ Bifurcation Hearing Transcript 56:3-57:7.

⁶⁶ Bifurcation Hearing Transcript 56:22-57:1.

⁶⁷ Opposition to Respondent's Request for Bifurcation, para 46.

⁶⁸ Opposition to Respondent's Request for Bifurcation, para 46.

⁶⁹ Opposition to Respondent's Request for Bifurcation, para 48.

⁷⁰ Opposition to Respondent's Request for Bifurcation, paras 49-51.

submitted further that the purpose of the Article 2103(6) exception is to “deny claims that taxes might have been used as a tool to expropriate”, not deal with circumstances such as these where tax relief afforded to a third party gives that third party a competitive advantage.⁷¹ To interpret Article 2103(6) in the manner suggested by the Respondent would “distort the exception’s intent.”⁷²

4. THE TRIBUNAL’S CONSIDERATIONS

4.1 The Respondent asks the Tribunal to bifurcate these proceedings in order to rule on four of Canada’s objections to jurisdiction and admissibility as preliminary questions pursuant to the general rule in Article 21(4) of the UNCITRAL Rules.

4.2 As summarised in detail above, these objections are that:

- (1) the claims in respect of the Nova Scotia Measures are time-barred under Articles 1116(2) and 1117(2);
- (2) the Nova Scotia Measures do not “relate to” the Claimant nor its investment in Québec as required by Article 1101(1);
- (3) Article 1102(3) should be understood as relating only to intra-State “treatment” where measures are taken by State or Provincial governments; and
- (4) Article 2103(6) requires NAFTA claims based on taxation measures to be “submitted to the competent taxation authorities of the NAFTA Parties at the time of filing the Notice of Intent to Submit a Claim.”

4.3 As a starting point, Article 21(4) of the UNCITRAL Rules provides that “[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.” This creates a presumption in favour of bifurcation, subject to the Tribunal exercising discretion to deal with jurisdictional pleas together with the merits in appropriate circumstances. Thus, both Disputing Parties acknowledge that in some cases bifurcation can serve purposes of fairness, efficiency and economy but that “bifurcation is not appropriate in every case.”⁷³ The Disputing Parties also agree that for a Tribunal to determine whether bifurcation is appropriate in a given case, it is helpful to apply the

⁷¹ Bifurcation Hearing Transcript 53:5-15.

⁷² Bifurcation Hearing Transcript 53:4-5.

⁷³ Request for Bifurcation, para 3; Opposition to Respondent’s Request for Bifurcation, para 2. Bifurcation Hearing Transcript 71:3-10.

three-part test applied in *Philip Morris v. Australia*, which posed the following questions:

- (1) Is the jurisdictional objection *prima facie* serious and substantial?
- (2) Can the objection be examined without prejudging or entering the merits?
- (3) Could the objection, if successful, dispose of all or an essential part of the claims raised?⁷⁴

4.4 The determination of the first part of the test, namely whether an objection is “*prima facie* serious and substantial” should not, in the Tribunal’s view, entail a preview of the jurisdictional arguments themselves. Rather, at this stage the Tribunal is only required to be satisfied that the objections are not frivolous or vexatious. In respect of the four objections that Canada seeks to have resolved on a preliminary basis,⁷⁵ the Tribunal is satisfied that they are each credible and brought in good faith and cannot be excluded on a *prima facie* basis. The Tribunal emphasises however that such an assessment should in no way be understood to prejudice how the Tribunal will resolve the substance of the preliminary objections themselves, or any issues on the merits.

A. Time Bar Objection under NAFTA Articles 1116(2) and 1117(2)

- 4.5 The Tribunal will first consider the time bar objection under NAFTA Articles 1116(2) and 1117(2).
- 4.6 As a matter of NAFTA practice, time bar issues are normally decided as preliminary questions.⁷⁶ The same approach would normally be taken in domestic proceedings as well.
- 4.7 Under Article 1116(2) and 1117(2), an investor may not make a claim if more than three years have elapsed from the date on which the investor (or the enterprise on whose behalf the claim is made) first acquired or should have first acquired, knowledge of the alleged breach and knowledge that the investor (or enterprise) has incurred loss or

⁷⁴ Both parties embrace the test enunciated in *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014: Bifurcation Hearing Transcript 7:18-23; Request for Bifurcation, para 6; Opposition to Respondent’s Request for Bifurcation, para 2.

⁷⁵ Canada does not seek a preliminary determination on its jurisdictional objection that the challenged electricity rate negotiated between PWCC and NSPI is not attributable to Canada and thus not a measure “adopted or maintained by a Party”. Respondent’s Statement of Defence, para 75; Bifurcation Hearing Transcript 74:4-15.

⁷⁶ See, e.g., *Grand River Enterprises Six Nations, Ltd., et al v United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, para 29.

damage. The relevant 3-year cut off in this case is December 30, 2012.

- 4.8 The Tribunal considers that its assessment of Canada's objection under Articles 1116(2) and 1117(2) in this case would entail a factual enquiry of limited scope. The date of the alleged breaches—the Nova Scotia Measures—are uncontested. Rather, the Tribunal's enquiry will turn on the question of when the Claimant first knew – or ought to have known – that it incurred loss or damage. Canada contends that the reappearance onto the market of the Port Hawkesbury mill is sufficient evidence of when loss or damage ought to have been known to Resolute. In support of this contention, Canada describes as “telling” a sentence in a draft Notice of Intent given by the Claimant to the Respondent that “Resolute's market share for all SC Paper has declined from 2012 to 2014.”⁷⁷ The Claimant indicated that while evidence as to its acquisition of knowledge of damage was “not yet on the record”, it expected it could be shown that “probably only in January, February [2013] after we have the quarterly data and can see what in fact is going on in that quarter will we have any real knowledge that there is a loss taking place.”⁷⁸
- 4.9 The above-referenced exchanges with the Parties during the Hearing suggest that the evidentiary enquiry that the Tribunal will need to undertake to decide the time bar is a rather limited one. A bifurcated hearing would give the Disputing Parties the opportunity to put evidence on the record as to what the Claimant knew (or ought to have known) and when, and allow the Tribunal to decide the jurisdictional objection on the basis of that evidence. Such a limited enquiry would not involve the Tribunal prejudging or entering the merits of the claims.
- 4.10 If successful, the time bar objection could dispose of all claims relating to the Nova Scotia Measures, which constitute a substantial and discrete part of the Claimant's case.
- 4.11 Canada's time bar objection accordingly meets the criteria for bifurcation enunciated in *Philip Morris v. Australia*, which were accepted by both Disputing Parties as the relevant standard.
- 4.12 In circumstances where it is appropriate to bifurcate the proceedings for the purpose of hearing Canada's time bar objection, it would be procedurally efficient to deal with the three other objections to jurisdiction and admissibility in a bifurcated proceeding, even if the Tribunal might not have ordered bifurcation on the basis of any of those other objections alone. Having so decided, it is unnecessary for the Tribunal to determine whether the Respondent's other objections would justify bifurcation. Nonetheless and for completeness, the Tribunal considers below the appropriateness of bifurcating for the

⁷⁷ Exhibit R-081 to the Respondent's Statement of Defence, para. 19; Bifurcation Hearing Transcript 23:2-12.

⁷⁸ Bifurcation Hearing Transcript 60:21-61:2.

remaining objections.

B. Applicability of NAFTA and the definition of “relating to” in Article 1101(2)

- 4.13 Canada objects to the Tribunal’s jurisdiction over claims relating to the Nova Scotia Measures because the measures adopted or maintained by Nova Scotia did not, within the meaning of Article 1101 of NAFTA, “relat[e]” to Resolute or its investment, which was located in Québec. The indirect economic effect of the measures in the form of the alleged loss of market share was, according to Canada, too remote and lacks sufficient legal significance, to pass the “gateway” provision of Article 1102 of NAFTA.⁷⁹ Canada submits that Resolute’s claim fails the “legally sufficient connection” test in *Methanex*.⁸⁰
- 4.14 Canada stated in its written and oral submissions that it is prepared to accept, for purposes of resolving this preliminary objection, that Resolute’s allegations are true *pro tem*.⁸¹ Even if the Tribunal has to consider whether the *Methanex* standard is at odds with tests adopted by other tribunals,⁸² the Tribunal considers that resolving this aspect of the preliminary objection would entail only a question of interpretation and would not involve an extensive duplicative or factual enquiry or prejudice the merits.
- 4.15 If successful, the Article 1101 objection would dispose of the claims relating to the Nova Scotia Measures, which constitute a substantial and discrete part of the claims raised by Claimant.
- 4.16 In light of the above, Canada’s Article 1101(2) objection also meets the accepted criteria for bifurcation enunciated in *Philip Morris v. Australia*.

C. Scope of application of Article 1102(3) in respect of measures taken by a state or provincial government

- 4.17 Respondent’s preliminary objection on the basis of Article 1102(3) requires the Tribunal

⁷⁹ Respondent’s Statement of Defence, para 74; Bifurcation Hearing Transcript 10:1-5.

⁸⁰ Bifurcation Hearing Transcript 10:9-18; *Methanex Corporation v United States of America* (UNCITRAL) Partial Award, 7 August 2002, para 139 (“There must [be] a legally significant connection between the measure and the investor or the investment. With such an interpretation, it is perhaps not easy to define the exact dividing line, just as it is not easy in twilight to see the divide between night and day. Nonetheless, whilst the exact line may remain undrawn, it should still be possible to determine on which side of the divide a particular claim must lie”).

⁸¹ Respondent’s Request for Bifurcation, para 10; Bifurcation Hearing Transcript 13:8-13.

⁸² For example: *Bayview Irrigation District and others v United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award on Jurisdiction, 19 June 2007; *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015.

to accept that the national treatment protection only applies in respect of provincial measures where the complaining investor has an investment within that province. Article 1102(3) provides:

The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4.18 The arguments put forward by the Parties on this issue⁸³ indicate that its resolution at the preliminary objection phase will involve a distinct and relatively straightforward question of treaty interpretation. The Disputing Parties acknowledge that this case is novel in as far as it is the first NAFTA case that deals with measures by a provincial government which are said to affect an investment not in that province⁸⁴ and accordingly raises a novel issue of NAFTA interpretation.

4.19 Resolving the preliminary objection will not entail a factual assessment of whether the two mills were in “like circumstances”. Therefore it will involve no prejudgment of the merits nor deprive the Claimant the opportunity to fairly present its case in respect of the existence (or not) of “like circumstances”.⁸⁵ If successful, the objection would dispose of an essential part of the claim.

D. Claimant’s requirement to raise a claim in respect of “tax measures” otherwise in accordance with Article 2103

4.20 Canada conceded that it would “not have proposed holding a separate preliminary phase to deal solely with this objection,” but submitted that if a preliminary phase were held to deal with Article 1101(1) and the time bar, then Canada’s objection relating to Article 2103 is “straightforward enough to merit inclusion in the preliminary phase.”⁸⁶ Canada submitted that doing so “will provide clarity for both Parties.”⁸⁷

4.21 In light of this concession, in circumstances where the Tribunal has determined it appropriate to bifurcate the proceedings for the purpose of hearing Canada’s other objections, it would be procedurally efficient also to deal with this objection in the bifurcated proceeding, even if the Tribunal might not have ordered bifurcation on this basis alone. The exercise would not entail prejudging the merits; and may help narrow

⁸³ Bifurcation Hearing Transcript: 24:10-27:20; 42:18-47:23.

⁸⁴ Bifurcation Hearing Transcript 26:8-15; 44:6-7.

⁸⁵ Bifurcation Hearing Transcript 47:1-5; Opposition to Respondent’s Request for Bifurcation, para 30.

⁸⁶ Bifurcation Hearing Transcript 28:16-29:1.

⁸⁷ Bifurcation Hearing Transcript 28:22-25.

the issues for the merits phase.

E. Conclusion

- 4.22 Based on the above, the Tribunal considers it appropriate to order bifurcation of the proceeding covering all four grounds raised in Canada's motion to bifurcate.
- 4.23 In so ordering, the Tribunal reiterates that any views expressed in this decision are without prejudice to any findings of fact or law that the Tribunal will make on the preliminary objections or any issues on the merits.
- 4.24 Accordingly, the schedule set out at paragraph 5.2 of Procedural Order No. 3 issued on November 3, 2016 applies. The Tribunal recalls that pursuant to paragraph 4.4 of Procedural Order No. 3, the Disputing Parties are welcome to consult and agree upon adjustments to the calendar.

5. DECISION

- 5.1 The Tribunal determines that the Respondent's objections to jurisdiction and admissibility under:
- (1) Articles 1116(2) and 1117(2) in respect of time-bar;
 - (2) Article 1101(1) in respect of whether the Nova Scotia Measures "relate to" the Claimant's investment;
 - (3) Article 1102(3) in respect of the applicability of NAFTA to "treatment" by a provincial government where such measures have extra-provincial effects; and
 - (4) Article 2103(6) in respect of claims relating to taxation measures,
- shall be treated as preliminary questions and the proceedings shall be bifurcated for the purposes of determining such objections.
- 5.2 The Tribunal adopts Schedule A of paragraph 5.2 of Procedural Order No. 3, subject to the Disputing Parties submitting any agreed amendments to such schedule.

Date: 18 November 2016

For the Arbitral Tribunal

A handwritten signature in blue ink that reads "James Crawford". The signature is written in a cursive, flowing style.

Judge James R. Crawford, AC