

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES**

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON,  
DOUGLAS CLAYTON, DANIEL CLAYTON  
and  
BILCON OF DELAWARE**

Investors

**v.**

**GOVERNMENT OF CANADA**

Respondent

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**MEMORIAL OF THE INVESTORS**

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## **PART ONE: OVERVIEW**

1. In the fall of 2007, the Federal Minister of Fisheries, Loyola Hearn, and the Nova Scotia Minister of Environment and Labour, Mark Parent, each made decisions to reject an application for a quarry in Nova Scotia, that was made years earlier by an American company, Bilcon of Delaware, through a wholly-owned Canadian subsidiary, Bilcon of Nova Scotia ("Bilcon").
2. Unknown to the Investors, the Canadian authorities had long before determined to reject Bilcon's application for their own political purposes. In the meantime, the governments of Canada and of Nova Scotia led the Investors through an artifice of process and procedure, concocted to camouflage and delay a predetermined outcome. The long and tortuous process the Investors were compelled to endure, which was designed to masquerade as legitimate, was actually based on dishonesty, deception, and bad faith.
3. The ruse involved five steps:
  - a) The first was denial of an application for a permit to operate a quarry;
  - b) The second was the establishment of an environmental review process, which culminated in the governments' appointment of a Joint Review Panel;
  - c) The third was a public hearing conducted by the Joint Review Panel;
  - d) The fourth was the recommendations of the Joint Review Panel; and
  - e) The fifth was the actions of government ministers to complete the denial of the permit to the American Investors by rubber stamping the report of the Joint Review Panel.
4. The series of events began in April, 2002, when Nova Stone, a predecessor to Bilcon, applied for a permit to reactivate a 3.9ha aggregate quarry at Whites Point, in Digby County, Nova Scotia. There were many existing quarries in Nova Scotia at that time, and Whites Point had been used to excavate aggregate for provincial road purposes during the 1950s.
5. In Nova Scotia, an application to construct and operate a quarry of less than 4ha does not generally require a permit or an environmental assessment.



6. In anticipation of developing a larger quarry for the export of aggregate to the north east of the United States, Nova Stone entered into an agreement with the Clayton family of New Jersey. This collaboration created a new venture, which was jointly owned by Nova Stone and Bilcon. Bilcon, through Bilcon of Delaware, was owned by the Clayton family.
7. The Clayton family owned and operated a consortium of building supply companies in the United States. The companies were major users and suppliers of aggregate.
8. As was typical of environmental assessments for quarry applications in Nova Scotia, an application for a larger quarry would not be granted automatically, and Bilcon expected to go through the basic level of environmental assessment, generally known as a screening level assessment.
9. At the time, the Government of Nova Scotia was engaged in a major business development marketing campaign to attract business to Nova Scotia.
10. Gordon Balser, the local representative to the Nova Scotia legislature, was also a Minister in the Nova Scotia Cabinet. He personally favored the Whites Point Quarry, and encouraged investment from Bilcon and its American investors, the Clayton family. He invited the Clayton family to visit with him in Nova Scotia, to see firsthand the business opportunities that were available, how desirable the location was for a large quarry, and how their investment would positively impact the local economy, in a way that was also consistent with the overall economic development benefits the Province of Nova Scotia was looking for. The government of which the Minister was a member was a Conservative government. In an election held shortly thereafter, the Minister lost his seat to a local lobster fisherman, Harold Thériault, who was personally opposed to the Quarry.
11. The Federal Minister of Fisheries of the day, Robert Thibault, also came from the same local area in Nova Scotia. And he too was personally opposed to the Quarry.
12. Under the Constitution of Canada, as interpreted judicially, the federal government of Canada has some limited jurisdiction over certain environmental issues, in conjunction with the primary jurisdiction over the environment which rests with the provinces. The Federal jurisdiction, however, is restricted and narrow in scope.

13. In the case of the Bilcon Quarry, the federal government deceitfully presumed to acquire the jurisdiction to subject Bilcon to a federal environmental assessment:
  - a) By contriving with the Province of Nova Scotia to impose unnecessary and arbitrary blasting restrictions on Bilcon; and
  - b) By capriciously ignoring the exemptions in Canada's environmental regulations that exempted Bilcon's project from a comprehensive environmental assessment.

And from the outset, the government knew that it had no *bona fide* jurisdiction over Bilcon's Quarry.

14. A quarry is simply a hole in the ground, with minimal environmental impact. This is fundamentally why quarry permits are routinely granted in Nova Scotia, and other provinces of Canada, with either no environmental assessment or with the minimal environmental assessment, especially since any environmental impact can be easily remediated with simple mitigation measures.
15. In this case, however, the Federal Minister of Fisheries colluded with his cabinet level counterparts in Nova Scotia, to feign an artificial basis for federal jurisdiction over the Bilcon Quarry.
16. In Canada, in general there are four levels of environmental assessment.
  - a) The lowest is the Screening Level – ordinarily used for quarries in Nova Scotia;<sup>1</sup>
  - b) The next is known as a Comprehensive Assessment;
  - c) The third and highest level of assessment involves the establishment of a Review Panel; and
  - d) The fourth is a Joint Review Panel, which consists of concurrent federal and provincial environmental assessments in one joint process.
17. A Joint Review Panel is extraordinary, and only occurs in respect of large industrial projects, like deep sea hydrocarbon drilling, or projects involving other major components of the environment that are of such large scope and magnitude that they also involve federal jurisdiction.

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<sup>1</sup> This could be a Class I or even a Class II environmental assessment under Nova Scotia law.

18. Nonetheless, the governments of Canada and Nova Scotia decided to subject Bilcon's Quarry to this highest, most onerous, most elaborate and most expensive of processes, which was unprecedented for a quarry application in the history of Canada. And, all the while knowing that the federal government, in fact, had no actual jurisdiction to do it, and did it for the political purpose of preventing the export of Canadian aggregate to the United States.
19. To implement their scheme, the governments of Canada and Nova Scotia appointed to the Joint Review Panel individuals known to be biased anti-development activists. The Panel then proceeded to impose capricious and arbitrary demands on Bilcon in forming its Environmental Impact Study, that resulted in more delay and excessive cost. The Joint Review Panel conducted a 13 day public hearing, during which it manifestly displayed its ideological biases against Bilcon, the development of the quarry, and the commercial export of Canadian aggregate to the United States. The hearing was conducted, and used as a platform, for expressions of national prejudice and the anti-American vilification of the Investment and its Investors. The Panel's obsession with the American nationality of the Investors was aggravated by the Panel's preoccupation with the application of the NAFTA to American investors and investments in Canadian quarries.
20. At the conclusion of the public hearing, the Joint Review Panel made recommendations, in the form of a Final Report, to both of the responsible federal and provincial ministers. The Report resoundingly condemned the Bilcon Quarry, and concluded the permit should not be granted.
21. The Joint Review Panel had been constituted with Terms of Reference, under which it was required to objectively, impartially, and independently take into account specified environmental issues. Instead, the Joint Review Panel rejected the permit application for reasons that were not contained in its Terms of Reference, and had nothing at all to do with environmental considerations.
22. Unlike any other Joint Review Panel, it refused to allow for any mitigation measures.
23. When Bilcon asked the responsible federal and provincial ministers for an opportunity to meet and review the Joint Review Panel's process and decision before making formal determinations, the ministers refused, and quickly rubber-stamped the Report of the Joint Review Panel that was created as a smoke screen to cover up the politically motivated pre-determination that this project would never see the light of day.

24. The process to which the governments of Canada and Nova Scotia subjected Bilcon was replete with legal irregularities, arrogations of due process, and excessive and improper exercises of authority, which were pre-planned, pervasive and persistent. In the result, the rule of law itself was dishonored in violation of the most basic principles of international law and the requirements of the NAFTA.
25. The establishment of the Joint Review Panel for political reasons, without federal jurisdiction, and for the predetermined purpose of rejecting Bilcon's Quarry permit, was a charade of fact and law, in flagrant breach of the international law duties of transparency, due process, honesty and good faith.
26. The appointment of obviously biased panel members, their conduct of a patently biased and discriminatory public hearing, and the ministerial actions to rubber stamp and implement the decision of the Panel to complete the denial to foreign investors of an independent and fair assessment, was a violation of the most basic international law principles of fair and equitable treatment, full protection and security, and the essential duty of good faith.
27. From start to finish, it was all one big, long farce.
28. These same governmental actions also resulted in according less favorable treatment to Bilcon than that given to local Canadian companies, and to companies owned by nationals of non-NAFTA Party states, who received environmental assessment permissions under the same laws and regulations. Indeed, on many occasions, the less favorable difference in treatment imposed on Bilcon was noted in internal governmental records. Canada thereby also violated its obligations of national treatment and most favored nation treatment under the NAFTA.
29. The government measures impugned in this claim are fundamentally repugnant to the undisputed core of modern international law, which is reflected in the obligations in Section A of NAFTA Chapter Eleven. The Investors rely upon this law, which is opposed to the continuation of such actions, and which was the very reason why the NAFTA was put in place by the NAFTA Parties on its signature in December 1992.

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### CHRONOLOGY OF THE DECEIT

Date	Steps
February 6, 2002	Nova Stone begins initial environmental assessment process
April 24, 2002	Nova Stone and Bilcon form joint venture
April 26, 2002	DFO contrives improper blasting conditions against Bilcon
August 9, 2002	Joint Venture expands quarry project
April 14, 2003	DFO imposes Comprehensive Study for environmental assessment
April 25, 2003	DFO employees note concern about lack of DFO lawful authority for an environmental assessment of the quarry
May 12, 2003	DFO staff are instructed to “avoid stuff in writing” on Whites Point Quarry
June 26, 2003	DFO officials confirm Minister wants assessment process dragged out as long as possible - Referral to JRP recommended by DFO Minister Thibault
August 7, 2003	Quarry referred to JRP by Minister of Environment
April 1, 2004	Bilcon assumes the Joint Venture
November 3, 2004	JRP members appointed and Draft EIS Guidelines Released
March 31, 2005	JRP releases final EIS Guidelines
April 24, 2006	Bilcon submits EIS
June 16, 2007 – June 30, 2007	JRP hearings – Hon Robert Thibault admits political considerations against Bilcon (June 28, 2007)
October 23, 2007	JRP Final Report Issued
Fall 2007	Federal Cabinet Minister Peter MacKay urges Nova Scotia Environment Minister to “move quickly” to deny quarry
November 21, 2007	Nova Scotia Environment Minister rejects the Whites Point Quarry
December 13, 2007	Federal Government adopts JRP recommendation to reject Quarry

## **PART TWO: STATEMENT OF FACTS**

30. The statement of facts is based on the documents cited below and the witness statements and expert reports filed with this Memorial:
- a) the Expert Report of David Estrin, Certified Specialist in Environmental Law, in regard to the Regulatory Regime;
  - b) the Witness Statement of Paul Buxton, Project Manager for Bilcon of Nova Scotia, in regard to the investment;
  - c) the Witness Statement of William Richard Clayton, of Bilcon of Delaware, in regard to the impact of the measures;
  - d) the Witness Statement of John Lizak, Geologist for Bilcon of Delaware and the Clayton Group of Companies, in regard to Canada's actions to encourage investment in Nova Scotia; and
  - e) the Witness Statement of Hugh Fraser, Communications Professional, in regard to the public hearings conducted by the Joint Review Panel.
31. Following the Statement of Facts, the Memorial contains the following additional parts:
- a) Part Three considers the substantive legal issues;
  - b) Part Four considers the application of the law;
  - c) Part Five considers the deficiencies in Canada's document production;
  - d) Part Six considers jurisdictional issues in the absence of Canada's submission of a memorial in respect of jurisdiction;
  - e) Part Seven sets out the damage caused to the Investors and the relief sought; and
  - f) Appendix I sets out the proper considerations mandated by the NAFTA and international law to interpret treaty obligations in the NAFTA.

## **I. THE PARTIES**

### **A. The Investors**

32. The Clayton Group of Companies was founded more than fifty years ago with the purchase of fifteen acres of land and one truck. At the time of its Investment in Nova Scotia, it operated on over 3,000 acres of land, at twenty-five locations, with approximately 750 employees.<sup>2</sup> The Clayton Group of Companies includes Ralph Clayton & Sons, Clayton Block Company and Clayton Sand Company.<sup>3</sup> It also has interests in related building supply companies on the eastern seaboard of the United States.
33. The Clayton Companies are the largest masonry building material suppliers in the US State of New Jersey, and are principally engaged in the production and sale of ready mixed concrete and concrete block, as well as the mining, processing, and sale of sand.<sup>4</sup> The Clayton Companies have been recognized as outstanding corporate citizens, for leadership in corporate social responsibility, especially in the areas of health and education.<sup>5</sup>

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<sup>2</sup> Witness Statement of William Richard Clayton, at para. 2.

<sup>3</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, section 6.1, at 8. (*Investors' Schedule of Documents at Tab C 1*).

<sup>4</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, Section 6.1.1, at 9. (*Investors' Schedule of Documents at Tab C 1*).

<sup>5</sup> The Claytons and the Clayton Group of Companies have received various awards, including: Grand Award (2004) – New Jersey Chapter of the American Concrete Institute and New Jersey Concrete and Aggregate Association to Clayton Sand Company; Grand Award (2005) – New Jersey Chapter of the American Concrete Institute, New Jersey Concrete and Aggregate Association to Ralph Clayton & Sons; Grand Award for the Ocean Place Hilton – New Jersey Chapter of the American Concrete Institute and the New Jersey Concrete and Aggregate Association to Ralph Clayton & Sons; President's Award (2000) – New Jersey Concrete & Aggregate Association to Ralph Clayton & Sons; New Jersey Golden Trowel Award (2003) – Best in category, Municipal/Community Projects to Clayton Block Co., Inc.; New Jersey Golden Trowel Award (2003) – Best in category, Residential Projects to Clayton Block Co., Inc.; Grand Award – New Jersey Chapter of the American Concrete Institute; Charter Member (1995-1996) – American Institute of Architects; Community Service Award (1988) – presented to Clayton Block Co., Inc., William Clayton, Sr. by the Edison Sheltered Workshop, Inc.; Patron Member – Boy Scouts of America to William R. Clayton, Sr.; V.I.P. Award (Service, Leadership, Philanthropy) – Kimball Medical Centers to William R. Clayton, Sr.; New Jersey Institute of Technology (1998) – To Clayton Block Co., Inc., Appreciation for your generosity in making our school an outstanding masonry building. (EIS Appendix Vol III-Appendix 12-Clayton Awards) (*Investors' Schedule of Documents at Tab C 3*); Also see Letter from Paul G. Buxton, Bilcon of Nova Scotia to Mark Parent, Minister of the Environment, November 16, 2007. (*Investors' Schedule of Documents at Tab C 2*).

34. The Clayton Group of Companies were managed by William Ralph Clayton. Mr. Clayton's three sons are also involved in corporate operations.<sup>6</sup> Douglas Clayton, William Richard Clayton and Daniel Clayton are shareholders of Bilcon of Delaware.<sup>7</sup>
35. The Clayton Sand Company mines sand at three sites. The sand operations produce approximately 3 million tons of sand per year. The sand is used in concrete, asphalt, concrete block, masonry joints, stucco, and as construction fill.<sup>8</sup> Bilcon has had no environmental issues with its activities at any of these facilities.
36. Ralph Clayton and Sons supplies ready-mix concrete and building materials for highway, residential and commercial developments.<sup>9</sup>
37. The Clayton Block Company manufactures block, and resells masonry building materials, such as bag cement, reinforcing steel, brick, decorative stone, and tools.<sup>10</sup>
38. William Ralph Clayton, William Richard Clayton, Douglas Clayton and Daniel Clayton (the "Claytons") are all nationals of the United States of America.<sup>11</sup>
39. Bilcon of Delaware is incorporated under the laws of the US State of Delaware.<sup>12</sup> Its headquarters are in New Jersey.
40. On April 24, 2002, Bilcon of Delaware and the Clayton Group incorporated a new Nova Scotia company, Bilcon of Nova Scotia, to operate the Whites Point Quarry project to

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<sup>6</sup> Witness Statement of William Richard Clayton, at para. 3. William Ralph Clayton reduced his workload in 2008. The Clayton Sons had an interest in the Group before this time and their father's remaining interest was transferred to them in 2008.

<sup>7</sup> Witness Statement of William Richard Clayton, at para. 8

<sup>8</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, Section 6.1.1, at 9. (*Investors' Schedule of Documents at Tab C 1*).

<sup>9</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, Section 6.1.1, at 9. (*Investors' Schedule of Documents at Tab C 1*).

<sup>10</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, Section 6.1.1, at 9. (*Investors' Schedule of Documents at Tab C 1*).

<sup>11</sup> Witness Statement of William Richard Clayton, at para. 3; Copies of passport information for each of the members of the Clayton family involved in this claim establish their US nationality. (*Investors' Schedule of Documents at Tabs C 585, C 586, C 587, C 588*).

<sup>12</sup> Bilcon of Delaware Certificate of Incorporation, dated April 15, 2002. (*Investors' Schedule of Documents at Tab C 4*).



provide a steady and predictable supply of aggregates for them.<sup>13</sup> Paul Buxton is the Registered Agent of Bilcon of Nova Scotia.

41. Bilcon of Delaware, Inc. is the parent company of Bilcon of Nova Scotia. Douglas Clayton, William Richard Clayton and Daniel Clayton are shareholders and directors of Bilcon of Delaware, Inc. It owns and controls Bilcon of Nova Scotia.<sup>14</sup>
42. The Investors designed the operation of their business in Canada in conjunction with their related companies, which from the outset were an integral part of the Investors' operations.<sup>15</sup>

#### **B. The Investment**

43. The Investors have various economic interests in Nova Scotia which constitute Investment as defined by NAFTA Article 1139. Their interests include:
  - a) Bilcon of Nova Scotia, an enterprise in Canada wholly-owned by the Investors;
  - b) Real estate and other property, both tangible and intangible, including interests in lands and leases in the Province of Nova Scotia to operate a quarry;<sup>16</sup>
  - c) Tangible and intangible property "acquired in the expectation or used for the purpose of economic benefit or other business purposes" and "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory", including rights to quarry basalt aggregates for sale within Canada and for export; and
  - d) The rights to sell its exports into foreign markets, which constitute intangible property "acquired in the expectation or used for the purpose of economic benefit or other business purposes" and "interests arising from the commitment

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<sup>13</sup> Certificate of Incorporation of Bilcon of Nova Scotia, April 24, 2002. (*Investors' Schedule of Documents at Tab C 11*); Corporate Search for Bilcon of Nova Scotia, October 2, 2007. (*Investors' Schedule of Documents at Tab C 12*); Witness Statement of William Richard Clayton, at paras. 3-4 and 7.

<sup>14</sup> Witness Statement of William Richard Clayton, at para. 8; Bilcon of Nova Scotia's Memorandum of Association (*Investors' Schedule of Documents at Tab C 13*); Articles of Association (*Investors' Schedule of Documents at Tab C 14*); Solicitor's Declaration (*Investors' Schedule of Documents at Tab C 15*); Directors' Register (*Investors' Schedule of Documents at Tab C 16*); Officers' Register (*Investors' Schedule of Documents at Tab C 17*). Shareholders' Register of Bilcon of Nova Scotia, April 24, 2002. (*Investors' Schedule of Documents at Tab C 18*).

<sup>15</sup> Witness Statement of William Richard Clayton, at paras. 4 and 7.

<sup>16</sup> Bilcon Land and Leases. (*Investors' Schedule of Documents at Tabs C 19, C 20, C 21*).

of capital or other resources in the territory of a Party to economic activity in such territory”.

*i. Canadian Business Operations*

44. The Investors first considered investing in Canada in 2001. They were seeking a secure and reliable supply of aggregates to their business operations.<sup>17</sup>
45. To that end, in April 2002, a Nova Scotia company, Nova Stone Exporters Inc. (“Nova Stone”), obtained a permit from the Nova Scotia Department of Environment and Labour (“NSDEL”) to operate a 3.9ha quarry at Whites Point, in Digby County, Nova Scotia. Nova Stone then approached Bilcon to form a joint venture partnership to operate a 152ha quarry and dock at Whites Point. The quarry was to be located where Nova Stone had obtained the permit. Bilcon determined that the project was viable,<sup>18</sup> and leased property to develop the quarry.<sup>19</sup> The site had been a gravel pit in the 1940s and 1950s for the construction of provincial highways in Nova Scotia.<sup>20</sup>
46. On April 24, 2002, Nova Stone and Bilcon of Nova Scotia entered into a partnership called Global Quarry Products.<sup>21</sup> In 2004, it was acquired entirely by Bilcon and continued to operate under the name of Bilcon of Nova Scotia.<sup>22</sup>

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<sup>17</sup> Letter of Intent dated March 28, 2002. (*Investors’ Schedule of Documents at Tab C 5*); Witness Statement of William Richard Clayton, at paras. 4-7.

<sup>18</sup> Bilcon engaged a geologist, John Lizak, and a quarry manager, John Wall, to advise on the feasibility of operating a quarry at Whites Point. At the time that Bilcon entered into the partnership, it expected that the investment project would commence aggregate production by the end of 2003.

<sup>19</sup> Originally, Nova Stone Inc. (a Nova Scotia corporation) was the lessor in a Lease agreement with the Linebergers and Johnsons (the Owners) dated April 4, 2002. (Aggregate Lease Agreement between Nova Stone Exporters and Jason R. Lineberger, Lida C. Lineberger, John A. Johnson, Joan L. Johnson) (*Investors’ Schedule of Documents at Tab C 19*); After Bilcon of Nova Scotia and Nova Stone Exporters entered into a Letter of Intent to form a partnership in March 28, 2002, Nova Stone Inc. assigned the lease to the partnership. (Assignment of Lease among Jason R. Lineberger and Lida C. Lineberger, John A. Johnson, Joan L. Johnson, Nova Stone Exporters Inc. and Nova Stone Exporters Inc., and Bilcon of Nova Scotia, April 4, 2002) (*Investors’ Schedule of Documents at Tab C 20*); After the partnership dissolved, Bilcon of Nova Scotia entered into a lease on May 1, 2004 for a term of 90 years. (Lease Agreement between Bilcon of Nova Scotia and Jason R. Lineberger and Lida C. Lineberger, John A. Johnson, Joan L. Johnson, with Schedule A and Schedule B, May 1, 2004) (*Investors’ Schedule of Documents at Tab C 21*).

<sup>20</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, sections 7.4, 9.3.15 and 9.3.20.1. (*Investors’ Schedule of Documents Tab C 1*).

<sup>21</sup> See Partnership Agreement between Bilcon of Nova Scotia and Nova Stone Exporters, Inc. (*Investors’ Schedule of Documents at Tab C 22*) and Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., March 28, 2002. (*Investors’ Schedule of Documents at Tab C 5*).

47. The quarry was the Investors' first investment in Canada for the purpose of constructing and operating a basalt quarry to supply aggregate to the Clayton Group of Companies' corporate parents in the United States.<sup>23</sup>

*ii. Encouragement to Invest in Canada*

48. From the outset, the Nova Scotia Department of Natural Resources (NSDNR) encouraged the Claytons to invest in Digby Neck, Nova Scotia. The enticement was actively supported by Gordon Balser, a Minister in the Nova Scotia government.
49. Minister Balser invited William Clayton and Paul Buxton to meet with him in the summer of 2002,<sup>24</sup> and assured the Claytons that he would do everything in his power to bring jobs to the Digby area.<sup>25</sup>
50. Paul Buxton, the Investors' local representative, then had many more conversations with Minister Balser, in which Minister Balser repeatedly offered the government's support and encouragement to the Investors.<sup>26</sup>
51. Other officials of the Nova Scotia Department of Natural Resources also deliberately encouraged the Claytons to invest in the aggregate sector. This active encouragement was summed up in the marketing and promotional slogan of the Nova Scotia Government, "Nova Scotia is open for business".<sup>27</sup>

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<sup>22</sup> That dissolution was finalised in April 1, 2004; (Agreement between Bilcon of Nova Scotia and Nova Stone Exporters Inc., April 1, 2004). (*Investors' Schedule of Documents at Tab C 23*).

<sup>23</sup> Witness Statement of William Richard Clayton, at para. 7.

<sup>24</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at para. 22; Witness Statement of William Richard Clayton, at paras. 16-17.

<sup>25</sup> Meetings of William Ralph Clayton Sr., William Richard Clayton, John Wall and Paul Buxton with Gordon Balser, Minister of Economic Development, on June 24, 2002, Witness Statement of Paul Buxton, dated July 20, 2011, at para. 22.

<sup>26</sup> Meetings of June 3, June 10, June 16, June 24, July 4, July 19, August 9, August 16, October 31, November 6, November 20, November 27, December 2, December 17, December 20, 2002; Witness Statement of Paul Buxton, dated July 20, 2011, at para. 19.

<sup>27</sup> NSDNR also touted the quality of rock in the North Mountain Range. NSDNR stated that "The exceptionally massive and fresh nature of the UFU here and its location...makes this an excellent location for aggregate production", Dan Kontak (NSDNR), Jarda Dostal and Greenough, 2006, "Geology and Volcanology of the Jurassic North Mountain Basalt, Southern Nova Scotia" at 112. (*Investors' Schedule of Documents at Tab C 6*); Witness Statement of Paul Buxton, dated July 20, 2011, at para. 16; Witness Statement of John Lizak at para. 11.

52. Another of Bilcon's representatives, John Lizak, also met with officials of NSDNR on a number of occasions beginning in 2002.<sup>28</sup> In 2003, the Department flew Mr. Lizak to Digby County in a private helicopter to examine the potential for enhanced investments in quarry sites.<sup>29</sup>
53. The NSDNR also provided extensive materials to Mr. Lizak to convince Bilcon to invest in Nova Scotia. Dan Kontak, an official of NSDNR who dealt with Mr. Lizak on a regular basis, even drafted a special document to describe the high quality of the basalt located in the Digby Neck region.<sup>30</sup>
54. At the time, the Government of Nova Scotia had implemented an official policy of encouragement and support for various mining activities,<sup>31</sup> and issued public documents, specifically promoting marine quarry opportunities in Nova Scotia.<sup>32</sup> One clearly and emphatically stated:

The Government of Nova Scotia is committed to maximizing the use of these resources, and is strongly encouraging their exploration and development. To this end, the Department of Natural Resources has available a broad range of assistance, including geotechnical data and staff experience.<sup>33</sup>

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<sup>28</sup> Meetings of John Lizak with NSDNR (Dan Kontak, Garth Prime, Michael MacDonald and Phil Finck) of April 29, 2002, April 30, 2002, September 9, 2002, January 30, 2003, April 14, 2003, May 5, 2003, May 23, 2003, May 28, 2003, May 31, 2003, June 1, 2003, June 4, 2003, June 5, 2003, June 6, 2003, June 16, 2003, June 17, 2003, July 17, 2003, November 19, 2003, November 20, 2003, December 1, 2003, December 10, 2003, December 11, 2003, December 20, 2004, January 21, 2004, December 8, 2004, December 9, 2004, December 13, 2004, December 21, 2004, January 18, 2005, February 2, 2005, May 9, 2005, May 10, 2005; Witness Statement of John Lizak, at para. 9.

<sup>29</sup> Meetings of John Lizak with NSDNR of June 4 and 5, 2003, Witness Statement of John Lizak, at para. 19.

<sup>30</sup> *Internal Stratigraphy of the Jurassic North Mountain Basalt, Nova Scotia*, Dan J. Kontak (Report of Activities, 2001). (*Investors' Schedule of Documents at Tab C 364*).

<sup>31</sup> NSDNR, *"Minerals: a Policy for Nova Scotia"* (1996), which states "The Government will encourage support for and recognition of the mineral industry by including exploration and mining activities as part of its overall industrial strategy." at 7, and "The mineral industry is an important participant in the province's economic strategy, especially with its contribution to value added production and export revenue." at 3, and "The Government of Nova Scotia recognizes mineral exploration and mining as a key sector contributing to jobs, wealth and a high quality of life for Nova Scotians." at 1. (*Investors' Schedule of Documents at Tab C 7*). See also, NSDNR, Information Circular: *"Take Advantage of Mineral Exploration and Development in Nova Scotia"* (1996). (*Investors' Schedule of Documents at Tab C 8*); NSDNR Information Circular ME 20, *"Aggregate in Nova Scotia"* (1993) at 6, "Export Market". (*Investors' Schedule of Documents at Tab C 9*); NSDNR Information Circular ME 24., *"Industrial Minerals in Nova Scotia"* (1992). (*Investors' Schedule of Documents at Tab C 10*).

<sup>32</sup> "Industrial Minerals in Nova Scotia", Nova Scotia Department of Natural Resources Information Circular No. 24, dated 1991 at 10-11. (*Investors' Schedule of Documents at Tab C 10*); Witness Statement of John Lizak at para. 15.

<sup>33</sup> "Industrial Minerals in Nova Scotia", Nova Scotia Department of Natural Resources Information Circular No. 24, dated 1991 at 22-23. (*Investors' Schedule of Documents at Tab C 10*).

### **C. Government of Canada**

55. Canada is a Party to the NAFTA. In addition to its obligations under customary international law, Canada has broadly assumed international responsibility, under NAFTA Article 105, for the measures taken by subnational governments.<sup>34</sup>
56. At the federal government level, Canada principally acted through its state organs, the Canadian Environmental Assessment Agency (CEA Agency) and the Joint Review Panel on the Whites Point Quarry (JRP).
57. Other organs of the Government of Canada directly involved in what occurred include:
- a) The Department of Fisheries and Oceans (DFO);
  - b) Environment Canada;
  - c) The Department of Foreign Affairs and International Trade (DFAIT);
  - d) Transport Canada; and
  - e) Offices of various Members of Parliament, including Ministers and other members of the executive branch of the Canadian government.

### **D. Government of Nova Scotia**

58. The Government of Nova Scotia has constitutional authority over the extraction of non-renewable natural resources in the Province. Nova Scotia regulates environmental jurisdiction through the Nova Scotia Department of Environment and Labour (NSDEL). Nova Scotia also regulates mining through the Nova Scotia Department of Natural Resources.

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<sup>34</sup> The term “measure” is defined in NAFTA Article 201 to include laws, regulations, requirements, practices or policies.

## II. THE ENVIRONMENTAL ASSESSMENT REGIME IN CANADA

59. In Canada, environmental jurisdiction can overlap federal and provincial governments. Provincial governments have general authority over property and civil rights, and the regulation of natural resources in the province.<sup>35</sup> The federal government has exclusive constitutional jurisdiction over international waters, fisheries and oceans.<sup>36</sup>

### A. Permit application and environmental assessment under Nova Scotia law

60. Part IV of the Nova Scotia *Environment Act*<sup>37</sup> (NSEA) prescribes Nova Scotia's "Environmental Assessment Process". Projects are classified as either Class I or Class II Undertakings. Class I Undertakings are subject to simple assessment process. Class II Undertakings require a mandatory environmental assessment report and a public hearing. Quarry projects are classified as Class I Undertakings.

### B. The Canadian Environmental Assessment Act

61. Environmental assessments conducted by the federal government are governed by the *Canadian Environmental Assessment Act* (CEAA). The regulatory scheme prescribes what elements of a project trigger an environmental assessment, the type of assessment required, and what a decision-maker must do with respect to the assessment.
62. The policy of the legislation was proclaimed in the *Cabinet Directive on Implementing the Canadian Environmental Assessment Act*, in which the Government of Canada affirmed that it:

...is committed to ensuring that the administration of the *Canadian Environmental Assessment Act* (the Act) results in a timely and predictable environmental assessment process that produces high quality environmental assessments so that federal decisions about projects safeguard the environment and promote sustainability.<sup>38</sup>

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<sup>35</sup> *Constitution Act*, 1867, s. 92. (*Investors' Schedule of Documents at Tab C 257*).

<sup>36</sup> *Constitution Act*, 1867, s. 91. (*Investors' Schedule of Documents at Tab C 257*).

<sup>37</sup> *Nova Scotia Environment Act*, 1994-95, c. 1. (*Investors' Schedule of Documents at Tab C 258*).

<sup>38</sup> *Cabinet Directive on Implementing the Canadian Environmental Assessment Act* at 1. (*Investors' Schedule of Documents Tab C 24*).

The *Cabinet Directive* also mandated that “the Government will administer the Act in a manner that places a priority on the delivery of high quality environmental assessments in a predictable, certain and timely manner.”<sup>39</sup>

63. Transitional provisions of the 2003 amendments to the *CEAA* expressly stated that any environmental assessment of a project commenced before October 2003 shall be continued and completed as if the amendments to the *CEAA* had not been enacted.<sup>40</sup> The environmental assessment of the Bilcon project began on February 17, 2003.<sup>41</sup> Accordingly, it is governed by the pre-October 2003 provisions of the *CEAA*.

*i. Triggers Under the CEAA*

64. The *CEAA* is only triggered – and a federal government department only becomes involved – if a project submitted to a provincial authority requires an approval under section 59(f), known as the *Law List Regulations*. The *List* includes reference to section 35(2) of the *Fisheries Act* and to section 5 of the *Navigable Waters Protection Act* (*NWPA*).
65. Under section 5 of the *CEAA*, an actual environmental assessment of a project is only required where a federal authority has to grant an approval:
- a) Under section 5(1)(a) of *NWPA*, to allow work in navigable waters;
  - b) Under section 32 of the *Fisheries Act*, to allow the destruction of fish; or
  - c) Under section 35(2) of the *Fisheries Act* to allow disruption of fish habitat.

*ii. The Canadian Environmental Assessment Agency*

66. The Canadian Environmental Assessment Agency (CEA Agency) is the administrative body that coordinates the environmental assessment process. Where a review panel is appointed, the President of the CEA Agency appoints a member of the Agency to be the review panel manager. The CEA Agency is also responsible for maintaining a public registry of documents relating to an environmental assessment.

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<sup>39</sup> *Cabinet Directive on Implementing the Canadian Environmental Assessment Act* at 1. (*Investors’ Schedule of Documents Tab C 24*).

<sup>40</sup> *An Act to Amend the Canadian Environmental Assessment Act*, S.C. 2003, c. 9, in force October 30, 2003 at 20, cl. 33. (*Investors’ Schedule of Documents at Tab C 259*).

<sup>41</sup> Memo from Melinda Donovan (Navigable Waters Protection Agency) to Paul Boudreau (DFO), dated February 17, 2003, stating that the proposed project would require approval under Section 5(1) of the *NWPA*. (*Investors’ Schedule of Documents at Tab C 25*).

*iii. The Minister of the Environment*

67. The Minister of the Environment is responsible for the application and enforcement of the *CEAA*. It was the Minister of the Environment who directed the environmental assessment of Bilcon's project to a Joint Review Panel in August of 2003.<sup>42</sup>
68. If an environmental assessment of a project is compelled by section 5 of the *CEAA*, the government department involved, known as the Responsible Authority, is required to ensure that the assessment is conducted as early as is practicable in the planning stages of the project.<sup>43</sup>
69. The Responsible Authority for the Whites Point Quarry was designated to be the Department of Fisheries and Oceans.<sup>44</sup> On April 14, 2003, the DFO informed Bilcon that it would be the Responsible Authority for the environmental assessment of the Whites Point Quarry.<sup>45</sup>
70. Federal authorities with specialist or expert information or knowledge can also be involved in an environmental assessment. The CEA Agency must then coordinate their participation in the process. The expert agencies for the assessment of the Whites Point Quarry were Health Canada;<sup>46</sup> Natural Resources Canada;<sup>47</sup> and Environment Canada.<sup>48</sup>

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<sup>42</sup> Letter from David Anderson, Federal Minister of Environment, to Robert Thibault, Minister (DFO), dated August 7, 2003, stating that it had been determined that the environmental assessment of the Whites Point Quarry had been referred to Panel Review. (*Investors' Schedule of Documents at Tab C 26*).

<sup>43</sup> *CEAA*, s. 11(1). (*Investors' Schedule of Documents at Tab C 255*).

<sup>44</sup> Letter from Thomas Wheaton (DFO) to Phil Zamora (DFO), dated April 7, 2003, stating that the DFO received sufficient information to conclude that it would likely be the RA. (*Investors' Schedule of Documents at Tab C 27*).

<sup>45</sup> Letter from Phil Zamora (DFO) to Paul Buxton, dated April 14, 2003, stating that the DFO would manage the assessment as an RA under the *CEAA*. (*Investors' Schedule of Documents at Tab C 28*).

<sup>46</sup> Presentation Summary: Health Canada's Submission for the Whites Point Quarry and Marine Terminal Project, dated June 13, 2007. (*Investors' Schedule of Documents at Tab C 386*).

<sup>47</sup> Natural Resources Canada's Submission for the Whites Point Quarry and Marine Terminal Project, dated June 12, 2007. (*Investors' Schedule of Documents at Tab C 387*).

<sup>48</sup> Letter from Maria Dober (EC) to Debra Myles (CEA Agency) attaching Environment Canada's Written Submission to the Joint Review Panel, dated June 15, 2007. (*Investors' Schedule of Documents at Tab C 388*).



*iv. Types of Environmental Assessments*

71. The CEAA establishes a “two-step decision making process”:

- a) first, an environmental assessment where potentially adverse environmental effects of a project are analyzed.
- b) second, decision making and follow-up by a federal authority about whether a particular project should be authorized and what follow up measures, if any, are required to verify the accuracy of the assessment and the effectiveness of mitigation measures.<sup>49</sup>

Canadian Courts have held that environmental assessments are an “integral component of sound decision-making”.<sup>50</sup>

72. If the CEAA applies to a project, one of four types of environmental assessment is carried out: a screening report, a comprehensive study, a mediation, or a panel review.

- a) The first two options – a screening report or comprehensive study – are considered to be “self-assessment”, because they are carried out by the decision-maker itself. The other two options- mediation or panel review- are considered to be “independent” assessments, because they are conducted by persons appointed by the Minister of the Environment.
- b) Of all the assessments, a review panel is the most rigorous and time-consuming.<sup>51</sup> It is also extremely rare: Only 0.3% of projects throughout Canada have ever been referred to a panel review.<sup>52</sup> Nearly 99% of all projects in Canada are assessed through the expedited screening level of assessment.<sup>53</sup>

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<sup>49</sup> CEAA, ss. 37-38. (*Investors’ Schedule of Documents at Tab C 255*); *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, (Trial Division), at para. 14. (*Investors’ Schedule of Documents at Tab C 260*).

<sup>50</sup> *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, (Trial Division), at para. 15. (*Investors’ Schedule of Documents at Tab C 260*).

<sup>51</sup> Expert Report of David Estrin at para. 28.

<sup>52</sup> Expert Report of David Estrin at para. 8.

<sup>53</sup> Expert Report of David Estrin at para. 8.

- c) If a review panel is appointed, the panel's report must set out the "rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project".<sup>54</sup>
73. The Bilcon project was treated as being subject to section 21 of the *CEAA*. Section 21 permits a federal authority to either conduct a comprehensive study, or to refer the project to the Minister for a review panel.
74. In Bilcon's case, the DFO first recommended a comprehensive study,<sup>55</sup> and then pressed for a review panel.

v. *Scoping of the Environmental Assessment*

75. The Government of Nova Scotia had sole regulatory jurisdiction over the Whites Point Quarry. The permit to operate the original quarry was issued by the NSDEL in April of 2002. In 2003, however, in response to political pressure from interests opposed to the quarry, the DFO required the quarry to be included in the environmental assessment of a nearby dock,<sup>56</sup> without any legal justification.

vi. *Statutory Factors to be considered in an Environmental Assessment*

76. The federal government of Canada and a provincial government may agree to establish a Joint Review Panel. If they do, the agreement must oblige the Joint Review Panel to consider the specific factors set out in sections 16(1) and (2) of the *CEAA*. The factors include:
- (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
  - (b) the significance of the effects referred to in paragraph (a);
  - (c) comments from the public that are received in accordance with this Act and the regulations;

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<sup>54</sup> *CEAA*, s. 37; *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 F.C. 483, at para. 20. (*Investors' Schedule of Documents at Tab C 261*).

<sup>55</sup> Letter from Phil Zamora (DFO) to Paul Buxton, dated April 14, 2003, stating the type of assessment for the project would be a comprehensive study. (*Investors' Schedule of Documents at Tab C 28*).

<sup>56</sup> Expert Report of David Estrin at 2.

- (d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and
- (e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

77. In addition, the review panel must consider:

- (a) the purpose of the project;
- (b) alternative means of carrying out the project that are technically and economically feasible;
- (c) the need for any follow-up program; and
- (d) the capacity of renewable resources affected by the project.

78. The CEA Agency's Operational Policy Statement, dated October 1998, was intended to provide guidance on the meaning of the statutory requirements in response to concerns about the inconsistent application of the provisions by different Responsible Authorities.<sup>57</sup>

79. Where a project is referred to a review panel, the scope of the factors to be taken into consideration is determined by the Minister of the Environment, after consulting the Responsible Authority, when fixing the terms of reference of the review panel.

80. The Terms of Reference issued for the Joint Review Panel in regard to the Whites Point Quarry, include in Part III of the intergovernmental agreement, the "Scope of the Environmental Assessment and Factors to be considered in the Review", which the Panel was required to consider the following:

- 1. purpose of the Project;
- 2. need for the Project;
- 3. alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;
- 4. alternatives to the Project;
- 5. the location of the proposed undertaking and the nature and sensitivity of the surrounding area;

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<sup>57</sup> Operational Policy Statement, October 1998, OPS-EPO/2-1998. (*Investors' Schedule of Documents at Tab C 262*).

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6. planned or existing land use in the area of the undertaking;
  7. other undertakings in the area;
  8. the environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;
  9. the socio-economic effects of the Project;
  10. the temporal and spatial boundaries of the study area(s);
  11. comments from the public that are received during the review;
  12. steps taken by the Proponent to address environmental concerns expressed by the public;
  13. measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;
  14. follow-up and monitoring programs including the need for such programs;
  15. the capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future; and
  16. residual adverse effects and their significance.<sup>58</sup>
81. Included within these factors are the “environmental effects” of the project. The definition of “environmental effects” in the *CEAA* - as it was in force at the time and included:
- a) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*,
  - b) any effect of any change referred to in paragraph (a) on
    - (i) health and socio-economic conditions,
    - (ii) physical and cultural heritage,

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<sup>58</sup> See Part III of the Appendix to the *Agreement concerning The Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project between The Minister of the Environment, Canada, and the Minister of Environment and Labour, Nova Scotia*, dated November 3, 2004. (*Investors’ Schedule of Documents at Tab C 363*).

- (iii) the current use of lands and resources for traditional purposes by aboriginal persons, or
  - (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or
- c) any change to the project that may be caused by the environment.

### **C. Review Panel Process**

82. Joint Review Panels are statutory creatures of the *CEAA*. Under section 33 of the *CEAA*, the Minister appoints the panel members who must be unbiased and free from any conflict of interest in the project,<sup>59</sup> and sets the panel terms of reference. The Terms of Reference determine the scope of the assessment<sup>60</sup> and “define the jurisdiction of the panel”.<sup>61</sup>

#### *i. Decision Making*

83. After a review panel issues a report, the Responsible Authority must respond to the report.<sup>62</sup>
84. The Responsible Authority, after having considered the panel’s report, must take into account the implementation of mitigation measures. Where the project is not likely to cause significant adverse environmental effects (“SAEE”), or is likely to cause significant adverse environmental effects that can be justified in the circumstances, the Responsible Authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part.<sup>63</sup>
85. The Responsible Authority shall not exercise any power or perform any duty that would permit the project to be carried out in whole or in part, when the project is likely to cause significant adverse environmental effects, despite the implementation of any mitigation measures the Responsible Authority would consider appropriate.

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<sup>59</sup> *CEAA*, s. 33(1)(a)(i). (*Investors’ Schedule of Documents at Tab C 255*).

<sup>60</sup> *CEAA*, s. 16(3)(b). (*Investors’ Schedule of Documents at Tab C 255*).

<sup>61</sup> *The Industrial Cape Breton Community Alliance Group on the Sable Gas Project (the Alliance) v. Sable Offshore Energy Project et al*, 2000 CanLII 16338 (F.C.), at para. 20. (*Investors’ Schedule of Documents at Tab C 263*).

<sup>62</sup> *CEAA*, s. 37(1.1). (*Investors’ Schedule of Documents at Tab C 255*).

<sup>63</sup> *CEAA*, s. 37. (*Investors’ Schedule of Documents at Tab C 255*).

86. The federal response to a panel report does not supersede the report,<sup>64</sup> nor can it “cure any deficiencies in the panel report”.<sup>65</sup>

**D. CEAA Guidelines and Policies**

87. To provide guidance and direction on how to conduct environmental assessments under the CEAA, the CEA Agency published policies. For example:
- a) “A Reference Guide for the Canadian Environmental Assessment Act; Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effect” (1994);
  - b) “A Reference Guide for the Canadian Environmental Assessment Act; Addressing Cumulative Environmental Effects” (1984);
  - c) “Cumulative Effects Assessment Practitioners Guide” (1991); and
  - d) “Incorporating Climate Change Considerations in Environmental Assessments: General Guidance for Practitioners” (2003).

These policies prescribed various elements of an environmental assessment, including public involvement, environmental effects, and mitigating measures.

*i. Public Involvement*

88. Public input is stated to be limited to scientific analysis and interpretation: “Issues that are not directly linked to the scientific (including traditional ecological knowledge) analysis of environmental effects, such as long-term unemployment in a community or fundamental personal values, cannot be introduced into the determination at this step”.<sup>66</sup> A community’s “sense of belonging” or its “core values” are thereby directed to be irrelevant considerations.

*ii. Objective and enumerated environmental effects*

89. The CEA Agency *Guide On Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects* (the “SAEE Reference Guide”) states that the “central

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<sup>64</sup> *Alberta Wilderness Assn. v. Canada* (F.C.A.) (Investors’ Schedule of Documents at Tab **C 261**).

<sup>65</sup> *Alberta Wilderness Assn. v. Canada* (F.C.A.) (Investors’ Schedule of Documents at Tab **C 261**).

<sup>66</sup> *A Reference Guide for the Canadian Environmental Assessment Act: Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects*, November 1994, at 186. (Investors’ Schedule of Documents at Tab **C 384**).

test” is stated to be whether a project is “likely to cause significant adverse environmental effects”. This determination “is an objective test from a legal standpoint, which means that all decisions about whether or not projects are likely to cause adverse environmental effects must be supported by findings based on the requirements set out in the Act”.<sup>67</sup>

90. The findings must also be supported by quantitative methods, risk quantification, and determination of “confidence limits”<sup>68</sup> in relation to scientific uncertainty in determining appropriate risk levels.
91. Only environmental effects as defined in the *CEAA* can be considered in determinations of significance and the related matters.<sup>69</sup> For example, the socio-economic effects of a project can only be considered an environmental effect if the effect (such as job losses) is caused by a change in the environment.

*iii. Framework for guiding responsible authorities in determining whether an environmental effect constitutes significant adverse environmental effects*

92. The *SAEE Reference Guide* sets out three steps in determining if a proposed project presents significant adverse environmental effects:
  - a) Deciding whether the environmental effects are adverse;
  - b) Deciding whether the adverse environmental effects are significant; and
  - c) Deciding whether the significant adverse environmental effects are likely.<sup>70</sup>
93. In following those three steps, the Responsible Authority or the Minister should ensure, following the *SAEE Reference Guide*, that the proponent provides the necessary information by specifying the types of information required to determine “significance”.<sup>71</sup>
94. And, “sustainable development” is a term that “should not be used in an environmental assessment unless it is carefully defined; otherwise, the uncertainty associated with its

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<sup>67</sup> *SAEE Reference Guide*, November 1994, at 183. (*Investors’ Schedule of Documents at Tab C 384*).

<sup>68</sup> *SAEE Reference Guide*, November 1994, at 193. (*Investors’ Schedule of Documents at Tab C 384*).

<sup>69</sup> *SAEE Reference Guide*, November 1994, at 184. (*Investors’ Schedule of Documents at Tab C 384*).

<sup>70</sup> *SAEE Reference Guide*, November 1994, at 187. (*Investors’ Schedule of Documents at Tab C 384*).

<sup>71</sup> *SAEE Reference Guide*, November 1994, at 187. (*Investors’ Schedule of Documents at Tab C 384*).

meaning will later bring into question the usefulness of the environmental assessment during its interpretation by regulatory reviewers”.<sup>72</sup>

*iv. Mitigating Measures*

95. In all cases, the significance of an adverse environmental effect is stated to be determinable only after taking into account the impact of mitigating measures. In other words, no final determination can be made about the significance of adverse environmental effects until the review panel has taken into account the implementation of mitigation measures.<sup>73</sup> The CEA Agency policies expressed in the *Guide on Cumulative Effects* and the *Guide On Incorporating Climate Change Considerations in Environmental Assessments* emphasizes the importance of mitigating measures and monitoring programs.

*v. Cumulative effects*

96. A review panel is required to take into account the effects that could reasonably and foreseeably occur in the future as a result of the approval of the proponent’s project.<sup>74</sup> This calls upon the panel to engage in a form of speculation but this speculative power is heavily restricted by regulation and policy. Only projects that are already in the process of regulatory approval can be considered.
97. The *Guide On Cumulative Effects* defines narrowly which future projects are admissible in determining what contribution to cumulative effects a proposed project will have. Following the *Guide*, projects to be taken into account are only those projects that have already been approved following an environmental assessment, or for which authorizations have already been issued or for those projects in the process of regulatory approval.<sup>75</sup>

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<sup>72</sup> *Cumulative Effects Assessment: Practitioners Guide*, February 1999, at 7. (*Investors’ Schedule of Documents at Tab C 371*).

<sup>73</sup> *Reference Guide: Addressing Cumulative Environmental Effects*, July 2004, at 10. (*Investors’ Schedule of Documents at Tab C 385*).

<sup>74</sup> *Reference Guide: Addressing Cumulative Environmental Effects*, July 2004, at 4. (*Investors’ Schedule of Documents at Tab C 385*).

<sup>75</sup> *Reference Guide: Addressing Cumulative Environmental Effects*, July 2004, at 4. (*Investors’ Schedule of Documents at Tab C 385*).



98. A Joint Review Panel must also make clear to what degree the project under review is alone contributing to that total effect.<sup>76</sup>

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<sup>76</sup> *Cumulative Effects Assessment: Practitioners Guide*, February 1999, at 10. (*Investors' Schedule of Documents at Tab C 371*).

### III. THE REVIEW PROCESS IMPOSED ON THE INVESTMENT

#### A. Federal Assessment

##### i. The Blasting Test

99. In January of 2002, NSDEL showed Nova Stone a standard rock quarry permit.<sup>77</sup> The standard permit had no blasting conditions.<sup>78</sup>
100. In April of 2002, Nova Stone applied for a standard quarry permit for the Whites Point Quarry.<sup>79</sup> On April 30, 2002, it received a permit.<sup>80</sup> The permit, however, required the approval of the federal Department of Fisheries and Oceans before any blasting.<sup>81</sup>
101. When Bilcon then applied for blasting approval, the DFO repeatedly denied its applications and refused to give Bilcon any reasons.<sup>82</sup>
102. It was not until an internal DFO email was obtained as a result of the Tribunal's document production order that it became clear the decision to prevent Bilcon from carrying out test blasting came directly from the Minister's Office. In the email, a DFO official, Tim Surette, advised the Department that, instead of the ordinary review and

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<sup>77</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at para. 38.

<sup>78</sup> Fax from Danette Daveau (NSDEL) to Mark Lowe (Nova Stone) re Standard Terms and Conditions - Rock Quarry Permit Approval, January 25, 2002. (*Investors' Schedule of Documents at Tab C 29*). The document sent by NSDEL was called "Standard Conditions that apply to any Rock Quarry". There is no reference made to federal requirements such as *NWPA* applications in this document. In fact, the communication from NSDEL states "Standard conditions that apply to any Rock Quarry; such as Parker Mountain Aggregates Ltd".

<sup>79</sup> Nova Stone Application for Approval, April 23, 2002. (*Investors' Schedule of Documents at Tab C 30*).

<sup>80</sup> Approval for the Construction and operation of a Quarry at or near Little River, Digby County in the Province of Nova Scotia, April 30, 2002. (*Approval from Nova Scotia Department of the Environment and Labour to Nova Stone Exporters, Inc., April 30, 2002*) (*Investors' Schedule of Documents at Tab C 31*).

<sup>81</sup> For example, on May 22, 2002 another small basalt quarry approximately 6 km from the Whites Point quarry site in Tiverton received a quarry permit from NSDEL – a permit that did not have conditions similar to Conditions 10(h) and 10(i) of the Nova Stone quarry permit (See Letter from Bob Petrie (NSDEL) to M. Lowe, May 22, 2002) (*Investors' Schedule of Documents at Tab C 32*); See Section 10(h) of the Approval for the Construction and operation of a Quarry at or near Little River, Digby County in the Province of Nova Scotia, April 30, 2002. (See Approval from Nova Scotia Department of the Environment and Labour to Nova Stone Exporters, Inc., April 30, 2002) (*Investors' Schedule of Documents at Tab C 31*).

<sup>82</sup> Letter from Paul Buxton to Bob Petrie (NSDEL) enclosing a proposed Blast Design, October 8, 2002. (*Investors' Schedule of Documents at Tab C 33*). Witness Statement of Paul Buxton, dated July 20, 2011, at para. 42-48; Despite the fact that the Investment required a blasting permit for the 3.9ha quarry to provide adequate data for the environmental assessment of the 152ha quarry and submitted blasting plans on numerous occasions to do so, the DFO repetitively refused to allow those tests to take place and refused to give reasons for the refusal.

approval by lower-level departmental officials, the Minister's Office would have to directly review any application made by Bilcon in respect of the quarry permit granted by Nova Scotia.

I have been advised by the Minister's office (Nadine) that we are not to accept a report on the effects of blasting on Marine Mammals as per section i of item 10 of the NS Approval issued April 30<sup>th</sup> until such time as the Ministers office has reviewed the application.<sup>83</sup>

*ii. The Navigable Waters Application*

103. In February of 2002, Nova Stone applied to the Coast Guard, under section 5 of the *Navigable Waters Protection Act (NWP)*, to build a floating loading dock.<sup>84</sup> The Coast Guard was then an agency of the Department of Fisheries and Oceans.
104. A few weeks later, the DFO told Nova Stone that its application triggered a federal environmental assessment. On the same day, it was told that because of disruption of fish habitat, the application should be sent to Habitat-Management Division of the DFO.<sup>85</sup>
105. Document disclosure now reveals that in internal correspondence between the NSDEL and the DFO, the DFO expressed concern over its lack of lawful authority to require any *NWPA* application to be made by the proponent.<sup>86</sup> As a result, it contrived to assert authority over the application on the pretext of the potential effect of blasting on whales.<sup>87</sup>

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<sup>83</sup> Email from Tim Surette (DFO) to Neil Bellefontaine (DFO), dated June 26, 2002 at 801718-801719. (*Investors' Schedule of Documents at Tab C 256*).

<sup>84</sup> Application form completed by Nova Stone dated February 6, 2002. (See Application Form by Nova Stone Exporters Inc., February 6, 2002) (*Investors' Schedule of Documents at Tab C 35*).

<sup>85</sup> Letter from Norna O'Brien, (DFO) to Nova Stone Exporters Inc., dated February 25, 2002, stating that the DFO Habitat Management Division reviews and evaluates project proposals. (*Investors' Schedule of Documents at Tab C 36*). It appears that that application was sent for information only to the HMD-DFO by the *NWPA* officer that same day. (See Letter from Norna O'Brien, (DFO) to Carol Sampson, (DFO), February 25, 2002) (*Investors' Schedule of Documents at Tab C 37*).

<sup>86</sup> Journal note by Bruce Hood (DFO), April 25, 2003 at 801602-801603. (*Investors' Schedule of Documents at Tab C 284*); Journal note by Bruce Hood (DFO), at 801609. (*Investors' Schedule of Documents at Tab C 284*).

<sup>87</sup> E-mail from Brian Jollymore (DFO) to Brad Langille (DFO) dated April 22, 2002. (*Investors' Schedule of Documents at Tab C 38*). Brad Langille was the person responsible at NSDEL for the 3.9ha quarry permit while Brian Jollymore was the Habitat Evaluation Engineer at DFO.

106. Eventually, the DFO admitted that there were no real whale concerns in the Whites Point area:<sup>88</sup> “right whales are not commonly found in the immediate vicinity of the quarry” ... “there are no recorded sightings in the 3 minute survey grid cells immediately adjacent to the site”<sup>89</sup>, and blue whales “are rarely encountered in the Bay of Fundy”<sup>90</sup>.
107. Despite DFO’s full knowledge that there was no legitimate federal government authority to apply the *Fisheries Act* to restrict blasting at Whites Point on the basis of risk to whales, the DFO still required an amended blasting application from Bilcon to take into account the impact on whales that it knew did not frequent that area.<sup>91</sup>
108. It now turns out the DFO had also earlier acknowledged to the NSDEL that it did not have any legislative basis to require an environmental assessment of the quarry under the *CEAA*.<sup>92</sup>
109. In effect, DFO made a secret arrangement with the NSDEL to put conditions that it knew were outside of its jurisdiction into the quarry application.<sup>93</sup>

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<sup>88</sup> Fisheries and Oceans Comments on the Whites Point Quarry and Marine Terminal Blasting Protocol, undated (*Investors’ Schedule of Documents at Tab C 401*); Email from Phil Zamora (DFO) to Norman Cochrane (DFO) dated February 17, 2005, requesting a review of Bilcon’s proposed blasting protocol (*Investors’ Schedule of Documents at Tab C 400*).

<sup>89</sup> Response to Undertaking 31 by the Department of Fisheries and Oceans at 7. (*Investors’ Schedule of Documents at Tab C 417*).

<sup>90</sup> Response to Undertaking 31 by the Department of Fisheries and Oceans at 9. (*Investors’ Schedule of Documents at Tab C 417*).

<sup>91</sup> Fisheries and Oceans Comments on the Whites Point Quarry and Marine Terminal Blasting Protocol, undated. (*Investors’ Schedule of Documents at Tab C 401*).

<sup>92</sup> E-mail from Brian Jollymore (DFO) to Bob Petrie (NSDEL) dated April 26, 2002. (*Investors’ Schedule of Documents at Tab C 41*). The DFO anticipated that a trigger under the *CEAA* would occur once Nova Stone would apply for a permit to build a wharf. Nova Stone had already applied for a *NWPA* application to build a dock on February 6, 2002. However, Mark Lowe had advised DFO on April 9, 2002, that a revised application would be submitted, and the February 6, 2002 application was subsequently cancelled; E-mail from Brian Jollymore (DFO) to Bob Petrie (NSDEL), dated April 24, 2002. (*Investors’ Schedule of Documents at Tab C 40*).

<sup>93</sup> E-mail from Brian Jollymore (DFO) to Bob Petrie (NSDEL) dated April 26, 2002. (*Investors’ Schedule of Documents at Tab C 42*). The DFO also explained to NSDEL that Mark Lowe of Southern Stone Company had entered into a 30 year lease agreement to extract large aggregate from a 350 acre parcel of land. The DFO believed the company intended to get much larger, and this consideration appears to have prompted the DFO to request that NSDEL insert the two conditions in Nova Stone’s 3.9ha quarry permit. The DFO’s significant concern about possible blasting impact on marine mammals in the area seemed to also have played a role in its intrusion in the quarry permit approval by NSDEL.

110. Similar internal government correspondence was exchanged by departmental officials in relation to the *NWPA* floating dock application. Mark Saywood, a Forest Technician at the NSDNR, had inspected the Whites Point Quarry site. He reported to the DFO that “upon completing my inspection on the site, I can see no unique wildlife habitat”. He recommended that “If appropriate measures are taken to protect both wildlife and marine life in the area, I see no reason why this project should not proceed. I recommend this application for approval”.<sup>94</sup>
111. So, the DFO contrived internally to create another pretext that the *NWPA* dock application could justify holding an environmental assessment if the DFO purported to determine that the dock was designed to handle vessels larger than 25,000 DWT.<sup>95</sup>
112. The DFO’s scheme to send the *NWPA* application to an environmental assessment under the *CEAA* was not communicated to Bilcon until 3 months later, when the DFO told Bilcon that an environmental assessment would be required before it could issue an approval. At the time, the DFO also told Bilcon, “the type of screening *will therefore be* a Comprehensive Study”.<sup>96</sup> On that basis, Bilcon began the work to prepare for a Comprehensive Study assessment.<sup>97</sup>

*iii. Demand for Project Revision*

113. In August 9, 2002, Paul Buxton sent the expanded project description to the NSDEL.<sup>98</sup>

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<sup>94</sup> Letter from Mark Saywood (NSDNR) to Joy Dube (DFO), dated February 24, 2003, enclosing his report on the Coastal Water Application by Global Quarry Products. (*Investors’ Schedule of Documents at Tab C 45*); Letter from Paul Buxton to the Regional Superintendent, Navigable Waters Protection attaching Navigable Waters Protection Application, January 8, 2003. (*Investors’ Schedule of Documents at Tab C 43*). See also the CEA Agency Early Warning System prepared by Derek McDonald for the Whites Point Quarry project, January 21, 2003. (*Investors’ Schedule of Documents at Tab C 44*).

<sup>95</sup> E-mail from Lorelei Langille (NSDEL) to Charlet Myra (DFO) dated January 16, 2003. (*Investors’ Schedule of Documents at Tab C 46*). Note that to get such an approval, the DFO Minister must approve of the plan, pursuant to Section 5(1) of the *NWPA*.

<sup>96</sup> Letter from Phil Zamora (DFO) to Paul Buxton, dated April 14, 2003, stating the type of assessment for the project would be a comprehensive study. (*Investors’ Schedule of Documents Tab C 28*). [*emphasis added*].

<sup>97</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at para. 49.

<sup>98</sup> Fax from Paul Buxton to Helen MacPhail, (NSDEL), dated August 9, 2002, attaching a Draft Whites Point Quarry Project Description List entitled “Environmental Component Outline”. (*Investors’ Schedule of Documents at Tab C 47*); Draft WPQ Project Description, dated September 30, 2002. (*Investors’ Schedule of Documents at Tab C 48*).

114. In December of 2002, the NSDEL asked for a more detailed project description, and requested a meeting with various government departments to set the appropriate level of environmental assessment.<sup>99</sup>
115. The meeting was held on January 6, 2003 with officials of the DFO, Environment Canada, the CEA Agency and the NSDEL,<sup>100</sup> who all agreed that the level of environmental assessment would be a Comprehensive Study. Bilcon was also told that it had to submit a revised project description to initiate the environmental assessment process.<sup>101</sup>
116. On January 28, 2003, Bilcon submitted the revised Project Description.<sup>102</sup> In internal CEA Agency communications, CEA Agency officials confirmed that the “project description looks pretty good”, and that it “followed the OPS format very closely”.<sup>103</sup>
117. Yet, despite the internal approval, on February 17, 2003, the CEA Agency asked for another revision of the Project Description.<sup>104</sup>
118. On March 10, 2003, Bilcon submitted the requested Project Description,<sup>105</sup> and on March 19, 2003, the CEA Agency confirmed that the revised Project Description was sufficient to start the federal coordination process for the environmental assessment.<sup>106</sup>

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<sup>99</sup> Letter from Helen MacPhail (NSDEL) to Paul Buxton, dated December 10, 2002, requesting a revised project description and proposing a meeting between the NSDEL and the proponent. (*Investors’ Schedule of Documents at Tab C 49*).

<sup>100</sup> Notice of Meeting and list of attendees dated January 6, 2002 (sic) (*Investors’ Schedule of Documents at Tab C 50*); Notice of Meeting and Attendees, January 6, 2003 (sic) (*Investors’ Schedule of Documents at Tab C 51*); Notes from Meeting, January 6, 2003 (*Investors’ Schedule of Documents at Tab C 52*); Meeting Notes between Langille, Zamora (DFO), Jim Ross (DFO), Bill Coulter (CEA Agency), Derek McDonald (CEA Agency), Chris Daly (NSDEL), Helen MacPhail (NSDEL), Barry Jeffrey (Environment Canada), Paul Buxton, Dave Curran and Yannick Matteau (NRCAN) (by phone), January 6, 2003. (*Investors’ Schedule of Documents at Tab C 53*).

<sup>101</sup> Memorandum from Derek McDonald (CEA Agency) to unknown distribution list, attaching the proponent’s revised project description, dated February 05, 2003. (*Investors’ Schedule of Documents at Tab C 54*). No reason was provided for requiring a further description, other than to “to get things rolling”: E-mail from Derek McDonald (CEA Agency) to Barry Jeffrey (CEA Agency), Jim Ross (DFO) and Bill Coulter (CEA Agency), January 16, 2003. (*Investors’ Schedule of Documents at Tab C 55*). Bilcon was also provided, at that time, with a CEAA Guide on project descriptions.

<sup>102</sup> Letter from Paul Buxton to Derek McDonald (CEA Agency), dated January 28, 2003, enclosing a Draft Project Description. (*Investors’ Schedule of Documents at Tab C 56*).

<sup>103</sup> E-mail Derek McDonald (CEA Agency) to Bill Coulter (CEA Agency), dated February 4, 2003, stating his opinions on the revised project description submitted by the proponent. (*Investors’ Schedule of Documents at Tab C 57*).

<sup>104</sup> Letter from Derek McDonald (CEA Agency) to Paul Buxton, dated February 17, 2003, requesting another revised project description. (*Investors’ Schedule of Documents at Tab C 58*).

## **B. The DFO as Responsible Authority**

119. When the *NWPA* dock application was made in January 2003, the DFO was responsible for the *NWPA*.<sup>107</sup> To give itself authority, it concocted the position that the application triggered the requirements of the *CEAA* by characterizing the proposed dock as a “marine terminal”.<sup>108</sup> At this time, the local Member of Parliament for Digby Neck and Whites Point was the Hon. Robert Thibault.<sup>109</sup> Mr. Thibault was also the Minister of Fisheries and Oceans, and he deliberately used his authority over the administration of the *NWPA* as the basis for changing the assessment of the Whites Point Quarry from a Comprehensive Study to a Joint Review Panel.<sup>110</sup>
120. The work journals of Bruce Hood, the Chief of the Environmental Assessment and Major Projects Branch of the DFO, were produced just before the filing of this Memorial by Canada in a heavily redacted form.<sup>111</sup> Mr. Hood recorded that the DFO knew it “had no trigger for [the] quarry”,<sup>112</sup> and that political pressure was being put on the DFO by the

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<sup>105</sup> Letter from Paul Buxton, to Derek McDonald (CEA Agency), dated March 10, 2003, enclosing a further revised Draft Project Description. (*Investors’ Schedule of Documents at Tab C 59*).

<sup>106</sup> E-mail from Derek McDonald (CEA Agency) to Paul Buxton, dated March 19, 2003, confirming that there is sufficient information to begin the federal coordination process. (*Investors’ Schedule of Documents at Tab C 60*).

<sup>107</sup> The Canadian Coast Guard was the federal authority responsible for administering the *NWPA* until legislative amendments were made to the *NWPA*. Transport Canada subsequently also became a Responsible Authority in Bilcon’s project’s environmental assessment as further legislative amendments were made to the *NWPA*; Letter from Thomas Wheaton (DFO) to Phil Zamora (DFO), dated April 7, 2003, stating that the DFO received sufficient information to conclude that it would likely be the RA. (*Investors’ Schedule of Documents at Tab C 27*).

<sup>108</sup> The Canadian Coast Guard was the federal authority responsible for administering the *NWPA* until legislative amendments were made to the *NWPA*. Transport Canada subsequently also became a RA in Bilcon’s project’s environmental assessment as further legislative amendments were made to the *NWPA*.

<sup>109</sup> Letter from Phil Zamora (DFO) to Paul Buxton, dated April 14, 2003, stating that the Whites Point Quarry would require approval under s. 5(1) of the *NWPA*, thereby requiring an environmental assessment under the *CEAA*. (*Investors’ Schedule of Documents Tab C 28*).

<sup>110</sup> Letter from Robert Thibault, Minister (DFO), to David Anderson, Minister of the Environment, recommending that the White Point Quarry assessment be referred to Panel Review, dated June 26, 2003. (*Investors’ Schedule of Documents Tab C 61*).

<sup>111</sup> During the EA process for Bilcon, Bruce Hood assumed senior positions in the DFO National Headquarters. For a time he served as Senior Liaison Officer and Senior Adviser.

<sup>112</sup> Journal note by Bruce Hood (DFO), Fall 2007 noting that the DFO did not possess a valid legislative trigger which would provide jurisdiction to include the quarry within the federal environmental assessment at 801603. (*Investors’ Schedule of Documents at Tab C 365*).

CEA Agency and by the Province of Nova Scotia, to include the quarry within a federal environmental assessment.<sup>113</sup>

*i. Improper Use of Discretion*

121. The DFO was also well aware of the difference in the treatment between the environmental assessment being imposed on the Whites Point Quarry and the assessment process used for the nearby Tiverton Quarry.<sup>114</sup>
122. In his workplace journals, Mr. Hood noted the difference in treatment was caused by the political interest of the Government of Nova Scotia.<sup>115</sup>
123. Mr. Hood also noted that, while the CEA Agency and the DFO Minister were pressing for a Panel Review, senior bureaucrats, like Richard Nadeau<sup>116</sup> and himself, were uneasy with the DFO's lack of lawful authority for an environmental assessment of the quarry, and about the DFO overstepping its legal mandate.<sup>117</sup>
124. In one telling note, Mr. Hood expresses his concern with the Ministers' political interference with the proper regulatory consideration of the quarry, and expresses his exasperation to "get our Minister off this file."<sup>118</sup>
125. These comments by Mr. Hood concerning Bilcon's treatment display the subornation by certain politicians of the DFO, which has a well-documented policy of restricting the

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<sup>113</sup> Journal note by Bruce Hood (DFO), Fall 2007 noting that the DFO should not scope things in to satisfy public and other agency pressure at 801603. (*Investors' Schedule of Documents at Tab C 365*); Journal note by Bruce Hood (DFO), Fall 2007 noting that the public would be upset if the quarry was not included in the scope of the DFO's assessment at 801604. (*Investors' Schedule of Documents at Tab C 366*); Journal note by Bruce Hood (DFO), Fall 2007 stating that the CEA Agency and the NSDEL placed pressure on the DFO to include the quarry within their scoping of the Whites Point Quarry environmental assessment at 801617. (*Investors' Schedule of Documents at Tab C 367*).

<sup>114</sup> Journal note by Bruce Hood (DFO), Fall 2007 noting the different purposed of the Tiverton Quarry and the Whites Point Quarry at 801594. (*Investors' Schedule of Documents at Tab C 368*).

<sup>115</sup> Journal note by Bruce Hood (DFO), Fall 2007 making note of the interest of the province of Nova Scotia to harmonize the environment assessment of the Whites Point Quarry with the federal government at 801595. (*Investors' Schedule of Documents at Tab C 369*).

<sup>116</sup> Director, DFO.

<sup>117</sup> Journal note by Bruce Hood (DFO), April 25, 2003 at 801602-801603 (*Investors' Schedule of Documents at Tab C 284*); Journal note by Bruce Hood (DFO), at 801609. (*Investors' Schedule of Documents at Tab C 284*).

<sup>118</sup> Journal note by Bruce Hood (DFO), at 801610-801611. (*Investors' Schedule of Documents at Tab C 284*).



scope of environmental assessments to include only those projects for which it has proper legislative jurisdiction.<sup>119</sup>

*ii. Political Considerations*

126. It is also now clear DFO Minister Thibault used his position to make the Whites Point Quarry Environmental Assessment take as much time, and be as difficult and expensive as possible. Mr. Hood has noted that “Thibault wants this process dragged out as long as possible”.<sup>120</sup>

127. Mr. Hood’s note is confirmed by an internal departmental email:

[Whites Point Quarry] is in our Minister’s riding, as well as in the electoral circumscription of the provincial Minister responsible for making decisions on this project, and the announcement of a joint panel review is of the nature to take a lot of public pressure off the Ministers’ shoulders for the summer months.<sup>121</sup>

128. The CEA Agency similarly noted the Government of Nova Scotia was also pressuring the federal Environment Minister to subject the quarry to a Joint Review Panel, in light of the looming provincial election:

We run the risk of losing the harmonization of a panel level review with the province as the new government may have a different take on the need for a provincial panel level assessment.<sup>122</sup>

129. Another internal email reveals that Minister Thibault’s office extended its involvement in the Whites Point Quarry without consulting the DFO Regional directors and staff. Faith Scattolon, Regional Director for the Maritimes Region, was completely surprised to

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<sup>119</sup> Email from Cheryl Benjamin (CEA Agency) to Melanie MacLean (DFO) dated November 26, 2004, discussing the DFO’s policy to always scope to their trigger. (*Investors’ Schedule of Documents at Tab C 438*); Expert Report of David Estrin at para. 53; Email from Annette Power (DFO) to Michelle Gosse (DFO) and Al Pitcher (DFO) dated June 9, 1998, outlining the change in the proponent’s project description which removed the authorizations required under the *Fisheries Act* and the *Navigable Waters Protection Act*. (*Investors’ Schedule of Documents at Tab C 439*); Aguathuna Quarry Development, Environmental Impact Comprehensive Study Report, dated July 8, 1999 at 2. (*Investors’ Schedule of Documents at Tab C 440*); Email from Annette Power (DFO) to Michelle Gosse (DFO) and Al Pitcher (DFO) dated June 9, 1998, outlining the change in the proponent’s project description which removed the authorizations required under the *Fisheries Act* and the *Navigable Waters Protection Act*. (*Investors’ Schedule of Documents at Tab C 439*).

<sup>120</sup> Journal note by Bruce Hood (DFO), undated, disclosing a statement made by Minister Robert Thibault evidencing his use of powers to lengthen the environmental assessment of the Whites Point Quarry at 801619. (*Investors’ Schedule of Documents at Tab C 370*).

<sup>121</sup> E-mail from Richard Nadeau (DFO) to Kaye Love (DFO), dated June 26, 2003, discussing DFO Ministerial considerations. (*Investors’ Schedule of Documents at Tab C 63*).

<sup>122</sup> E-mail from Bruce Young (CEA Agency) to Paul Bernier (CEA Agency), dated July 25 2003, discussing the Ministerial considerations. (*Investors’ Schedule of Documents Tab C 64*).

discover that the Minister's Office was reviewing a project application for the Whites Point Quarry:

[T]he Minister's office is reviewing the application?<sup>123</sup>

130. Her surprise is understandable, as there was a cover-up in play. Mr. Hood notes, for example, that Richard Nadeau wanted to have an "informal" discussion and "avoid stuff in writing."<sup>124</sup>
131. And, in reference to a conversation between Minister Thibault and the Environment Minister about sending the Whites Point Quarry to a Panel Review, Bruce Hood's journal entry starts two points: "don't mention scoping" and "don't send up note."<sup>125</sup>
132. Mr. Hood's notes also clearly show why, DFO Minister Thibault was so interested in the Whites Point Quarry project: "Minister sensitive because [it's] in his riding."<sup>126</sup>

### C. Referral to Joint Review Panel

#### i. CEA Agency Opposition to a Joint Review Panel

133. In June of 2003, Derek McDonald, a professional engineer and Senior Program Officer of the Atlantic Regional Office of the CEA Agency, voiced concerns to Steve Chapman, the Project Assessment Manager at the National Office of the CEA Agency, about the pressure the DFO was putting on the CEA Agency to refer the Whites Point Quarry to a panel review.<sup>127</sup> Mr. McDonald considered a Comprehensive Study to be sufficient:

The proponent is, to my knowledge, unaware of DFO's desire to refer. I still feel that a Comp. Study (sic), with an appropriate scope and public participation plan, would be the correct path –

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<sup>123</sup> Email from Faith Scattolon (DFO) to Time Surette (DFO), dated June 26, 2003 at 801718, expressing surprise to an email from Tim Surette, Area Director for Southwest Nova Scotia. (*Investors' Schedule of Documents at Tab C 256*).

<sup>124</sup> Journal note by Bruce Hood (DFO), dated May 12, 2003 at 801615. (*Investors' Schedule of Documents at Tab C 331*).

<sup>125</sup> Journal note by Bruce Hood (DFO), unknown date at 801619. (*Investors' Schedule of Documents at Tab C 380*).

<sup>126</sup> Journal note by Bruce Hood (DFO), unknown date at 801641. (*Investors' Schedule of Documents at Tab C 381*); Journal note by Bruce Hood (DFO), unknown date at 801639. (*Investors' Schedule of Documents at Tab C 382*). December 2002 is a reasonable date to suspect as the cover page for this document notes that it is Bruce Hood's journal from December 1, 2002 to March 7, 2003. As an early entry it is likely the notation was made in December.

<sup>127</sup> Email from Derek McDonald (CEA Agency) to Steve Chapman (CEA Agency) dated June 9, 2003, stating his opinion that a properly scoped Comprehensive Study, which included a public participation plan, would be the correct path. (*Investors' Schedule of Documents at Tab C 402*).

and I have said this to Phil Zamora. To me, a referral to facilitate harmonization reflects poorly on both governments and is perhaps an undesirable precedent.<sup>128</sup>

134. Prior to receiving a response from Mr. Chapman, Mr. McDonald also raised concerns about the propriety of the CEA Agency's direction to the DFO to hold back the approval of Bilcon's initial blasting plan.<sup>129</sup>

A cynical view might be that the DFO wants to avoid making a decision on the blasting plan and the Agency is a convenient scapegoat.

135. Mr. McDonald also noted Bilcon's frustration, as well as his own frustration with the process:

The proponent is clearly frustrated, and with good reason, I think. Things are dragging. I find it frustrating myself and it's not even my money.

...

Maybe CEAA [CEA Agency] should bite the bullet, recognize the Province's jurisdiction, and chalk (sic) it up as a lesson learned.<sup>130</sup>

136. Mr. Chapman replied to Mr. McDonald with a warning: "[w]e should communicate via telephone for discussions of this nature".<sup>131</sup>

*ii. Referral of the Whites Point Quarry to a Joint Review Panel Assessment*

137. In June of 2003, the DFO wrote to the NSDEL about moving the Bilcon project out of a comprehensive study and into a joint panel review.<sup>132</sup> Shortly thereafter, Minister Thibault wrote to his cabinet colleague, the Minister of the Environment,

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<sup>128</sup> Email from Derek McDonald (CEA Agency) to Steve Chapman (CEA Agency) dated June 9, 2003, stating his opinion that a properly scoped Comprehensive Study, which included a public participation plan, would be the correct path. (*Investors' Schedule of Documents at Tab C 402*).

<sup>129</sup> Email from Derek McDonald (CEA Agency) to Steve Chapman (CEA Agency) dated June 10, 2003, voicing his concerns with the process of the environmental assessment being imposed on the proponent of the Whites Point Quarry. (*Investors' Schedule of Documents at Tab C 403*).

<sup>130</sup> Email from Derek McDonald (CEA Agency) to Steve Chapman (CEA Agency) dated June 10, 2003, voicing his concerns with the process of the environmental assessment being imposed on the proponent of the Whites Point Quarry. (*Investors' Schedule of Documents at Tab C 403*).

<sup>131</sup> Email from Steve Chapman (CEA Agency) to Derek McDonald (CEA Agency) dated June 11, 2003, stating that Whites Point Quarry related issues should not be documented. (*Investors' Schedule of Documents at Tab C 404*).

<sup>132</sup> Letter from Paul Boudreau (DFO) to Chris Daly (NSDEL), dated June 20, 2003, discussing environmental assessment options. (*Investors' Schedule of Documents at Tab C 67*).

recommending that the project be referred to a Panel Review.<sup>133</sup> He gave no basis as to why the project was switched to a Joint Review Panel, after 6 months of deciding it would be Comprehensive Study.<sup>134</sup>

138. On June 26, 2003, the Minister of Fisheries and Oceans sent the quarry and loading dock to the federal Minister of the Environment for referral to a review panel under the CEEA.
139. Bilcon was not even told of the switch. Bilcon only discovered it through media reports in July of 2003.<sup>135</sup> Bilcon then endeavored to engage both the DFO and CEA Agency about their reasons for the switch.<sup>136</sup> Bilcon did not receive an answer, and no reasons were ever given.<sup>137</sup>
140. It was not until August 28, 2003 that Paul Buxton was able to meet with representatives of the CEA Agency, the DFO and the NSDEL. Again, Bilcon asked why it was not informed about their decision to take the quarry to a Panel Review.<sup>138</sup> Mr. Chapman, the CEA Agency Project Manager, told him the recommendation process was not public.<sup>139</sup>

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<sup>133</sup> Letter from Robert Thibault, Minister (DFO), to David Anderson, Minister of the Environment, dated June 26, 2003, recommending the Whites Point Quarry for panel review. (*Investors' Schedule of Documents at Tab C 466*).

<sup>134</sup> There was no empirical evidence of any public concern. Indeed, for the Eider Rock project, a large LNG refinery (processing 300,000 barrels of oil per day) (See Memorandum to Deputy Minister prepared by Barry Jeffrey (EC), April 17, 2007) (*Investors' Schedule of Documents at Tab C 69*) across the Bay of Fundy with a greater environmental impact from shipping, DFO assessed the project to undertake a comprehensive study, notwithstanding the high level of opposition calling for a referral to a panel review and threats of legal action against the government (See Briefing note approved by Peter Sylvester (CEA Agency), October 19, 2007) (*Investors' Schedule of Documents at Tab C 70*). Eider Rock had an average of 7-8 ships dock the terminal per week (See Briefing note approved by Peter Sylvester (CEA Agency), October 19, 2007) (*Investors' Schedule of Documents at Tab C 70*), while Bilcon anticipated less than 1 per week (44-50 per year) (Whites Point Quarry JRP Report, October 22, 2007) (See Executive Summary, Joint Review Panel Report, October 22, 2007) (*Investors' Schedule of Documents at Tab C 71*). An internal Environment Canada memorandum states "[Eider Rock] will add considerable vessel traffic to Bay of Fundy shipping channels and increase the risk of environmental emergencies in an ecosystem sensitive to impacts" (See Memorandum to Deputy Minister prepared by Barry Jeffrey (EC), April 17, 2007) (*Investors' Schedule of Documents at Tab C 69*).

<sup>135</sup> "Thibault calls for full review of Digby Neck quarry plans", *The Chronicle-Herald*, dated July 7, 2003. (*Investors' Schedule of Documents at Tab C 74*); Witness Statement of Paul Buxton, dated July 20, 2011, at paras. 49, 52.

<sup>136</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at paras. 49, 50.

<sup>137</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at paras. 49, 50.

<sup>138</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at para. 54.

<sup>139</sup> Journal note by Mark McLean (NSDEL), dated August 28, 2003 at 801712. (*Investors' Schedule of Documents at Tab C 253*).

141. Several months earlier, however, DFO Minister Thibault met with several prominent members of a local advocacy group opposed to quarries and told them he was considering recommending that the project be referred to a Panel Review.<sup>140</sup> In fact, he had already done so.<sup>141</sup>
142. Bilcon was not officially informed by the CEA Agency of the decision to refer the project to a review panel until September 10, 2003.<sup>142</sup> And, despite its repeated requests, Bilcon was never informed of when, how, or why, the referral was accepted by the Minister of Environment.

*iii. Project Partnership a Casualty of Canada's Measures*

143. In November of 2003, Bilcon again wrote to the NSDEL about its dissatisfaction in not being given any explanation as to why the process was switched from a Comprehensive Study to a Panel Review.<sup>143</sup>
144. Throughout January, February and March of 2004, Nova Stone had also made repeated inquiries, and expressed grave concern with the unnecessary and constant delays in the process, as well as the lack of transparency.<sup>144</sup> Nova Stone advised the CEA Agency that

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<sup>140</sup> Journal note by Thomas Wheaton (DFO), dated June 26, 2003 at 801912. (*Investors' Schedule of Documents at Tab C 254*).

<sup>141</sup> Letter from Robert Thibault, Minister (DFO), to David Anderson, Minister of the Environment, dated June 26, 2003, recommending the Whites Point Quarry for panel review. (*Investors' Schedule of Documents at Tab C 466*).

<sup>142</sup> Letter from Steven Chapman (CEA Agency) to Paul Buxton, dated September 10, 2003, regarding the environmental assessment process. (*Investors' Schedule of Documents at Tab C 75*).

<sup>143</sup> Letter from Paul Buxton to Chris Daly (NSDEL), dated November 11, 2003, stating their displeasure with the process of the environmental assessment. (*Investors' Schedule of Documents at Tab C 76*); Witness Statement of Paul Buxton, dated July 20, 2011, at para. 49.

<sup>144</sup> E-mail from Nova Stone Exporters Inc. to Steve Chapman (CEA Agency), dated January 15, 2004, requesting an update on the Memorandum of Understanding, stating "constant delays and lack of communication" (*Investors' Schedule of Documents at Tab C 79*); E-mail from Nova Stone Exporters Inc. to Jean Crepault (CEA Agency), dated February 2, 2004, requesting an update on the announcement of the Joint Review Panel (*Investors' Schedule of Documents at Tab C 80*); E-mail from Nova Stone Exporters Inc. to Steve Chapman (CEA Agency), dated February 12, 2004, stating its opinion that the proponent has been ignored and treated unfairly (*Investors' Schedule of Documents at Tab C 81*); E-mail from Nova Stone Exporters Inc. to Steve Chapman (CEA Agency), dated March 5, 2004, stating that despite their patience, they require "definitive answers and timelines". (*Investors' Schedule of Documents at Tab C 82*); Witness Statement of Paul Buxton, dated July 20, 2011, at para. 50.

it was being treated unfairly in the process, and that the delay was causing it to suffer “huge financial burdens”.<sup>145</sup>

145. In response, the CEA Agency assured Nova Stone that the process would be conducted in a timely manner,<sup>146</sup> and that the joint agreement would be signed within a ‘few weeks’.<sup>147</sup> However, that was not to be.
146. As a result of the delay, and ongoing financial burden caused by the environmental assessment, Nova Stone withdrew from the Bilcon partnership.<sup>148</sup>
147. On May 11, 2004, the Acting Director of the CEA Agency determined that the Bilcon project would not go forward until after the federal election,<sup>149</sup> which was to be held on June 28. In the interim, the CEA Agency and NSDEL took no steps other than to nominate the Joint Review Panel members.<sup>150</sup>

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<sup>145</sup> E-mail from Nova Stone Exporters Inc. to Steve Chapman (CEA Agency), dated February 12, 2004, stating the representations previously given to the proponent by Canada. (*Investors’ Schedule of Documents at Tab C 81*).

<sup>146</sup> E-mail from Nova Stone Exporters Inc. to Steve Chapman (CEA Agency), dated February 12, 2004, stating the representations previously given to the proponent by Canada. (*Investors’ Schedule of Documents at Tab C 81*).

<sup>147</sup> E-mail from Jean Crepault (CEA Agency) to Nova Stone Exporters Inc., dated February 3, 2004, representing that the agreement was near completion. (*Investors’ Schedule of Documents at Tab C 83*); E-mail from Steve Chapman (CEA Agency) to Nova Stone Exporters Inc., dated February 13, 2004, representing that the agreement would be finalized within weeks. (*Investors’ Schedule of Documents at Tab C 84*).

<sup>148</sup> Notes of Telephone Conversation between Nova Stone and Jacqueline Cook (NSDEL), dated March 3, 2004, discussing Nova Stones dissatisfaction with the process of the assessment. (*Investors’ Schedule of Documents at Tab C 85*); That dissolution was finalized in April 1, 2004; Agreement between Bilcon of Nova Scotia and Nova Stone Exporters Inc., April 1, 2004. (*Investors’ Schedule of Documents at Tab C 23*).

<sup>149</sup> E-mail from Brian Torrie (CEA Agency) to Jean Crepault (CEA Agency), dated May 11, 2004, discussing the impact of the upcoming federal election on the process of the assessment. (*Investors’ Schedule of Documents at Tab C 87*).

<sup>150</sup> For example, on March 9 (See E-mail from Francine Richard (CEA Agency) to Chris Daily (NSDEL), dated March 9, 2004) (*Investors’ Schedule of Documents at Tab C 88*), March 10 (See E-mail Francine Richard (CEA Agency) to Chris Daly (NSDEL), dated March 10, 2004) (*Investors’ Schedule of Documents at Tab C 89*), May 18, 2004 (See E-mail Francine Richard (CEA Agency) and Helen McPhail (NSDEL) to Chris Daly (NSDEL), dated June 4, 2004) (*Investors’ Schedule of Documents at Tab C 90*); E-mail from Helen MacPhail (NSDEL) to Francine Richard (CEA Agency), dated June 1, 2004. (*Investors’ Schedule of Documents at Tab C 91*); E-mail Francine Richard (CEA Agency) and Helen McPhail (NSDEL) to Chris Daly (NSDEL), dated June 4, 2004. (*Investors’ Schedule of Documents at Tab C 92*) and again on July 23, 2004 (See E-mail Francine Richard (CEA Agency) and Helen McPhail (NSDEL) to Chris Daly (NSDEL), dated July 23, 2004) (*Investors’ Schedule of Documents at Tab C 93*); E-mail Francine Richard (CEA Agency) to Chris Daly (NSDEL), dated July 23, 2004, where the CEA Agency and NSDEL assessed and confirmed their respective list of Panel candidates. (*Investors’ Schedule of Documents at Tab C 94*).

148. While the Panel members were internally confirmed by the end of August 2004,<sup>151</sup> the Panel was not officially announced until November.<sup>152</sup>

#### **D. Joint Review Panel Assessment**

##### *i. The Selection of the Panel Members*

149. Section 33 of the *CEAA* provides that the Minister of Environment shall appoint as members of a review panel persons who have “knowledge or experience relevant to the anticipated environmental effects of the project.”<sup>153</sup>
150. The CEA Agency panel selection criteria require that candidates be: “unbiased and free from any conflict of interest relative to the project and who have knowledge or experience relevant to the anticipated environmental effects of the project”.<sup>154</sup>
151. In the appointment of the Whites Point Quarry Review Panel, there were many alarms about the patent bias of the members. The CEA Agency, for example, was aware that Robert Fournier<sup>155</sup> and Gunter Muecke<sup>156</sup> had both been Board Members of the Ecology Action Centre, a self-described environmental activist organization.
152. The Ecology Action Centre was an active and vocal opponent of the Whites Point Quarry, and then made a presentation to their own former board members at the

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<sup>151</sup> CEA Agency Memorandum to Minister, prepared by Jean Crepault (CEA Agency), dated August 30, 2004, discussing the appointment of the Joint Review Panel members. (*Investors’ Schedule of Documents at Tab C 100*).

<sup>152</sup> Letters of Appointment from Stéphane Dion, Federal Minister of the Environment, to Robert Fournier, dated November 3, 2004 (*Investors’ Schedule of Documents at Tab C 101*); Letter from Stéphane Dion, Federal Minister of the Environment to Jill Grant, dated November 3, 2004 (*Investors’ Schedule of Documents at Tab C 102*); and Letter from Stéphane Dion, Federal Minister of the Environment to Gunter Muecke, dated November 3, 2004. (*Investors’ Schedule of Documents at Tab C 103*); E-mail exchange between Brian Torrie (CEA Agency) and Jean Crepault (CEA Agency), dated December 8, 2003, discussing the delays in the appointment of the Joint Review Panel members (*Investors’ Schedule of Documents Tab C 104*); E-mail between Brian Torrie (CEA Agency) and Jean Crepault (CEA Agency) dated December 18, 2003, discussing the fact that the NSDEL Minister had not been briefed appropriately (*Investors’ Schedule of Documents Tab C 105*); E-mail from Jean Crepault (CEA Agency) to Francine Richard (CEA Agency), dated September 2, 2004, discussing delays caused by the NSDEL. (*Investors’ Schedule of Documents at Tab C 106*).

<sup>153</sup> *CEAA*, s. 33(a)(i). (*Investors’ Schedule of Documents Tab C 255*).

<sup>154</sup> *CEAA*, s. 41 (*Investors’ Schedule of Documents Tab C 255*); Section 3.3. of *Agreement concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project between the Minister of the Environment, Canada and The Minister of Environment and Labour, Nova Scotia*, November 3, 2004. (*Investors’ Schedule of Documents at Tab C 114*).

<sup>155</sup> Résumé of Robert Fournier. (*Investors’ Schedule of Documents Tab C 285*).

<sup>156</sup> Résumé of Gunter Muecke. (*Investors’ Schedule of Documents Tab C 286*).

hearing.<sup>157</sup> At the time that Professors Fournier and Muecke were appointed to the Joint Review Panel, it was a notorious public fact that the Ecology Action Centre was an active and vocal opponent of the quarry.

153. In 2002, the Faculty of Planning and Architecture of Dalhousie University, where Jill Grant was employed, together with the same Ecology Action Centre, organized a three-day conference that advocated for the “greening” of Nova Scotia. Jill Grant was a moderator at the Conference.
154. Question 8 of the CEA Agency’s Panel Interview Questions, specifically asked potential panelists to address real, potential or perceived conflicts of interest.<sup>158</sup> The candidates’ answers have not been disclosed.
155. In the meantime, John Amirault, a professional engineer in Nova Scotia, with over thirty years of professional experience with natural resource management and environmental planning was rejected by the CEA Agency as a panel member. Mr. Amirault has worked for the government of Nova Scotia in its Department of Mines and Energy, and was a member of the Trade and Environment Task Force of the International Trade Advisory Committee, which reports to the federal Minister of International Trade.<sup>159</sup>
156. In internal emails the CEA Agency concluded that Mr. Amirault was “bright and had a wealth of experience”, “but may be too much in favor of industry”.<sup>160</sup>
157. Instead, the Review Panel was constituted with three environmental activists, all from the same university.

*ii. Terms of Reference and Panel Members*

158. On November 3, 2004, a Memorandum of Understanding was concluded between the federal and provincial Ministries of the Environment to establish a Joint Review Panel

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<sup>157</sup> Joint Review Panel Public Hearing Transcript, Vol. 10, dated June 27, 2007 at 2459. (*Investors’ Schedule of Documents Tab C 109*).

<sup>158</sup> Whites Point Quarry: Panel Members, dated August 20, 2004 – Interviews. (*Investors’ Schedule of Documents at Tab C 110*); Investors’ Request For Documents from Canada, dated July 2, 2009, at No. 9.

<sup>159</sup> Curriculum Vitae of John Amirault. (*Investors’ Schedule of Documents at Tab C 390*).

<sup>160</sup> E-mail from Bill Coulter (Director, Atlantic Region, CEA Agency) to Jean Crepault (Director of the CEA Agency), dated January 19, 2004, providing opinions on the suitability of John Amirault and Anne Fouillard. (*Investors’ Schedule of Documents at Tab C 112*).



(MOU).<sup>161</sup> An annex to the MOU set specific Terms of Reference for the Joint Review Panel. The MOU also set the process that each level of government would follow on receipt of the Panel's report.

159. Section 3.3 of the MOU required that the members of the Joint Review Panel were to be unbiased, and free of any conflict of interest relative to the project, and were to have knowledge and experience relative to the anticipated environmental effects.<sup>162</sup>
160. The Terms of Reference for the Joint Review Panel set out specific requirements for the review, the specific scope of the assessment, and the factors which the Joint Review Panel was required to consider in its assessment.<sup>163</sup>
161. Part III of the Terms of Reference set out the scope of the environmental assessment, and the factors which the Joint Review Panel was required to consider:

The Minister of Environment and Labour, Nova Scotia, and the Minister of the Environment, Canada, have determined that the Panel shall include in its review of the Project, consideration of the following factors:

- a) purpose of the Project;
- b) need for the Project;
- c) alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;
- d) alternatives to the Project;
- e) the location of the proposed undertaking and the nature and sensitivity of the surrounding area;
- f) planned or existing land use in the area of the undertaking;
- g) other undertakings in the area;
- h) the environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental

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<sup>161</sup> *Agreement concerning the Establishment of a Joint Review Panel*, November 3, 2004. (*Investors' Schedule of Documents at Tab C 114*).

<sup>162</sup> See Section 3.3 of the *Agreement concerning The Establishment of a Joint Review Panel*, dated November 3, 2004. (*Investors' Schedule of Documents at Tab C 363*).

<sup>163</sup> See Part II, at Sections 4.1, 6.3, and paras. 1-7 of the Appendix to *Agreement concerning The Establishment of a Joint Review Panel*, dated November 3, 2004. (*Investors' Schedule of Documents at Tab C 363*).

effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;

i) the socio-economic effects of the Project;

j) the temporal and spatial boundaries of the study area(s);

k) comments from the public that are received during the review;

l) steps taken by the Proponent to address environmental concerns expressed by the public;

m) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;

n) follow-up and monitoring programs including the need for such programs;

o) the capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future; and

p) residual adverse effects and their significance.<sup>164</sup>

### *iii. Environmental Impact Statement Guidelines*

162. The Environmental Impact Statement (EIS) Guidelines define the basis on which a proponent is to prepare its submission to a review panel.<sup>165</sup>

163. The Draft EIS Guidelines issued by the CEA Agency and the NSDEL required the proponent to address considerations that were outside the scope of the Terms of Reference.

164. In section 3.0 of the Draft EIS Guidelines, for example, the proponent was required to consider “Traditional Knowledge”, which was not included in the applicable *CEAA*, and was not the requirement included in the Terms of Reference.<sup>166</sup>

165. The scoping meetings conducted by the Joint Review Panel also focused on issues that were well outside the Terms of Reference.<sup>167</sup>

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<sup>164</sup> See Part III of the Appendix to *Agreement concerning The Establishment of a Joint Review Panel*, dated November 3, 2004. (*Investors’ Schedule of Documents at Tab C 363*).

<sup>165</sup> EIS Guidelines takes into consideration the limited factors set out in section 16 *CEAA* and section 12 *NS Environmental Assessment Act*.

<sup>166</sup> Section 3.0, Draft Guidelines for the Preparation of the Environmental Impact Statement for the Whites Point Quarry and Marine Terminal Project, dated November 2004. (*Investors’ Schedule of Documents Tab C 169*). Memo from Melinda Donovan (Navigable Waters Protection Agency) to Paul Boudreau (DFO), dated February 17, 2003, stating that the proposed project would require approval under Section 5(1) of the *NWPA*. (*Investors’ Schedule of Documents at Tab C 25*).

166. The unbridled topics discussed at the scoping meetings included:<sup>168</sup>

- a) Public questioning of the identity of the proponent, its organizational structure, and the United States destination of the aggregate to be exported;<sup>169</sup>
- b) Public questioning of the integrity of the proponent;<sup>170</sup>
- c) Public assertions that the NAFTA would require Canada to approve subsequent quarry applications if the Whites Point Quarry was approved;<sup>171</sup>
- d) Demands that the Joint Review Panel include the Precautionary Principle in the Final EIS Guidelines;<sup>172</sup>
- e) Demands that the Joint Review Panel expand the definition of “Traditional Knowledge”, from Aboriginal issues to the knowledge of any residents in the area.<sup>173</sup>

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<sup>167</sup> See Part II, at para. 2 of the Appendix to *Agreement concerning The Establishment of a Joint Review Panel*, dated November 3, 2004. (*Investors’ Schedule of Documents at Tab C 363*); Transcript of Scoping Meeting #1 in Sandy Cove, dated January 6, 2005. (*Investors’ Schedule of Documents at Tab C 116*); Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005. (*Investors’ Schedule of Documents at Tab C 117*); Transcript of Scoping Meeting #3 in Wolfville, dated January 8, 2005. (*Investors’ Schedule of Documents at Tab C 118*).

<sup>168</sup> Email from Phil Zamora (DFO) to Derek McDonald (CEA Agency) regarding the topics and issues discussed by residents of Digby Neck at the Joint Review Panel Scoping Meetings, undated. (*Investors’ Schedule of Documents at Tab C 441*).

<sup>169</sup> Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005, at 115-116. (*Investors’ Schedule of Documents at Tab C 117*).

<sup>170</sup> Transcript of Scoping Meeting #1 in Sandy Cove, dated January 6, 2005, at 25. (*Investors’ Schedule of Documents at Tab C 116*); Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005, at 116. (*Investors’ Schedule of Documents at Tab C 117*).

<sup>171</sup> Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005, at 31, 81, 121. (*Investors’ Schedule of Documents at Tab C 117*); Transcript of Scoping Meeting #3 in Wolfville, dated January 8, 2005 at 43, 47. (*Investors’ Schedule of Documents at Tab C 118*); Transcript of Scoping Meeting #4 in Meteghan, dated January 9, 2005 at 18, 27, 30. (*Investors’ Schedule of Documents at Tab C 119*).

<sup>172</sup> Transcript of Scoping Meeting #1 in Sandy Cove, dated January 6, 2005, at 38, 39, 111, 112, 121, 122. (*Investors’ Schedule of Documents at Tab C 116*); Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005, at 120. (*Investors’ Schedule of Documents at Tab C 117*); Transcript of Scoping Meeting #3 in Wolfville, January 8, 2005, at 45. (*Investors’ Schedule of Documents at Tab C 118*); Transcript of Scoping Meeting #4 in Meteghan, dated January 9, 2005, at 100. (*Investors’ Schedule of Documents at Tab C 119*).

167. As a result of these scoping meetings, the final EIS Guidelines, produced by the Joint Review Panel on March 31, 2005,<sup>174</sup> included onerous requirements for the proponent to satisfy that were outside the Terms of Reference.

168. For example, the Joint Review Panel distorted the precautionary principle of international law<sup>175</sup> and required:

that the onus of proof shall lie with the Proponent to show that a proposed action will not lead to serious or irreversible environmental damage.<sup>176</sup>

169. And the Joint Review Panel also required the proponent to show the influence of the *NAFTA* and the *Kyoto Protocol* on the Whites Point Quarry.<sup>177</sup>

*iv. Traditional Knowledge*

170. In addition to aboriginal people, the Joint Review Panel required Bilcon to consider Acadian, and African-Canadian people, as well as United Empire Loyalist traditional knowledge in a holistic manner.<sup>178</sup>

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<sup>173</sup> Transcript of Scoping Meeting #1 in Sandy Cove, dated January 6, 2005, at 77-78, 118. (*Investors' Schedule of Documents at Tab C 116*); Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005, at 120. (*Investors' Schedule of Documents at Tab C 117*); Transcript of Scoping Meeting #3 in Wolfville, dated January 8, 2005, at 74, 81, 105. (*Investors' Schedule of Documents at Tab C 118*); Transcript of Scoping Meeting #4 in Meteghan, dated January 9, 2005, at 17, 23, 25, 29. (*Investors' Schedule of Documents at Tab C 119*).

<sup>174</sup> News Release, Whites Point Quarry and Marine Terminal Project Joint Review Panel issues final Environmental Impact Statement Guidelines, dated March 31, 2005. (*Investors' Schedule of Documents at Tab C 442*).

<sup>175</sup> *Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project*, March 2005, at s. 3.5 (*Investors' Schedule of Documents Tab C 168*); The Transitional provisions included with the October 2003 amendments to the *CEAA* expressly provided that any environmental assessment of a project commenced under the *CEAA* before October 2003 shall be continued and completed as if the amendments to the *CEAA* had not been enacted. As Bilcon project's environmental assessment officially began on February 17, 2003, it was governed by that pre-October 2003 version of the *CEAA*. Canada's officials know that the old provisions applied. See Memo from Melinda Donovan (Navigable Waters Protection Agency) to Paul Boudreau (DFO), dated February 17, 2003, stating that the proposed project would require approval under Section 5(1) of the *NWPA*. (*Investors' Schedule of Documents at Tab C 25*); See also Expert Report of David Estrin at para. 315; Witness Statement of Paul Buxton, dated July 20, 2011, at para. 54.

<sup>176</sup> *Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project*, March 2005, at s. 3.5. (*Investors' Schedule of Documents at Tab C 168*).

<sup>177</sup> *Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project*, March 2005, at s. 6.6. (*Investors' Schedule of Documents at Tab C 168*).

<sup>178</sup> *Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project*, March 2005, at s. 3.1, at 8. (*Investors' Schedule of Documents at Tab C 168*).

*v. Sustainable Development*

171. The Joint Review Panel also greatly expanded the requirements imposed on Bilcon in relation to sustainable development.<sup>179</sup> Whereas the Draft EIS Guidelines mentioned sustainable development in limited and passing references, the Joint Review Panel inserted a lengthy discussion on sustainable development that included consideration of biological diversity, ecosystem integrity, social and economic benefits of the project.<sup>180</sup>
172. Bilcon was already addressing all these factors, however the Joint Review Panel's changes imposed that a new and duplicative analysis be produced through a "sustainability lens".

*vi. Ecosystem Approach*

173. The Joint Review Panel substantially changed the ordinary ecosystem analysis<sup>181</sup> to require that Bilcon address virtually impossible considerations such as:
- the interconnections between the physical environment, the biological and the human environment;
  - the links between terrestrial, coastal zone, and oceanic processes;
  - the interchanges between the subsurface, the surface, and the atmosphere; and
  - the repercussion of potential local impacts at a regional, national, and global level.<sup>182</sup>

*vii. Cumulative Effects*

174. The Joint Review Panel also changed the ordinary criteria for a cumulative effects assessment, from a consideration of other projects that "have been or will be carried out", and imposed a new standard on Bilcon of "induced" activities.<sup>183</sup>
175. The Review Panel did not issue the final EIS Guidelines until March 31, 2005.<sup>184</sup>

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<sup>179</sup> *Draft Guidelines for the Preparation of the Environmental Impact Statement for the Whites Point Quarry and Marine Terminal Project*, November 2004, at s. 9.6. (*Investors' Schedule of Documents at Tab C 169*).

<sup>180</sup> *Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project*, March 2005 at s. 3.3. (*Investors' Schedule of Documents at Tab C 168*).

<sup>181</sup> See *Draft Guidelines for the Preparation of the Environmental Impact Statement for the Whites Point Quarry and Marine Terminal Project*, November 2004, at s. 8.0. (*Investors' Schedule of Documents at Tab C 169*).

<sup>182</sup> *Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project*, March 2005, at s. 3.4. (*Investors' Schedule of Documents at Tab C 168*).

<sup>183</sup> *Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project*, March 2005, at s. 11. (*Investors' Schedule of Documents at Tab C 168*).

*viii. DFO's Prevention of Test Blasting*

176. Bilcon repeatedly requested authorization from the DFO to conduct test blasting.<sup>185</sup> The purpose of a test blast was to collect data for the assessment.
177. Following the initiation of the environmental assessment, the proponent contacted the CEA Agency and requested approval to conduct test blasting and noted the constant delays that occurred with the DFO.<sup>186</sup>
178. Under advisement from the CEA Agency, the DFO informed the proponent that they were unable to approve the test blast as the entire project was undergoing an environmental assessment.<sup>187</sup> The DFO took this position pursuant to s. 5(2)(d) of the *CEAA*, which:

Requires that an EA of a project be completed before a federal authority “under provision prescribed pursuant to paragraph 59(f), issues a permit or license, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part”.<sup>188</sup>

The DFO withheld information from Bilcon in relation to their blasting plan for over 15 months.

179. After 15 months of delay,<sup>189</sup> the DFO told Bilcon that a setback distance from the shoreline of 500 meters would be required to protect Atlantic Salmon.<sup>190</sup> The blasting

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<sup>184</sup> Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005, with attached Environmental Impact Statement Guidelines. (*Investors' Schedule of Documents at Tab C 120*).

<sup>185</sup> Letter from Paul Buxton to Bob Petrie (NSDEL), dated September 17, 2002, regarding Nova Stone Blasting Plan (*Investors' Schedule of Documents at Tab C 121*); Nova Stone Blasting Plan, dated October 15, 2002 (*Investors' Schedule of Documents at Tab C 122*); Nova Stone Blasting Plan, dated November 18, 2002 (*Investors' Schedule of Documents at Tab C 123*); Letter from Paul Buxton, to Bob Petrie (NSDEL), dated January 28, 2003, providing comments on the DFO's concerns with previous blasting plans. (*Investors' Schedule of Documents at Tab C 124*).

<sup>186</sup> Letter from Paul Buxton, to Derek McDonald (CEA Agency), dated April 20, 2003, requesting approval to conduct test blasting on the 3.9ha test quarry. (*Investors' Schedule of Documents at Tab C 128*); Witness Statement of Paul Buxton, dated July 20, 2011, at para. 38, 43.

<sup>187</sup> Letter from Phil Zamora (DFO) to Paul Buxton, dated May 29, 2003, regarding the DFO's denial to allow test blasting. (*Investors' Schedule of Documents at Tab C 129*).

<sup>188</sup> *CEAA*, s. 5(2)(d). (*Investors' Schedule of Documents at Tab C 255*).

the DFO gave to Bilcon at the start of the consultations required a setback distance of only 30 meters.<sup>191</sup> And, an issue about setback distances or salmon had never been before raised by the DFO.

180. In light of the sudden and substantial increase in the setback distance required by the DFO, Bilcon asked for an explanation.<sup>192</sup> In a letter to Bilcon, the DFO said it would make the calculations available for examination.<sup>193</sup> The calculations were never provided.<sup>194</sup>

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<sup>189</sup> Letter from Jim Ross (DFO) to Bob Petrie (NSDEL), dated September 30, 2002, requesting further information from the proponent regarding their blasting plan. (*Investors' Schedule of Documents at Tab C 125*); Letter from Jim Ross (DFO) to Bob Petrie (NSDEL), dated October 30, 2002, requesting further information from the proponent regarding their blasting plan. (*Investors' Schedule of Documents at Tab C 126*); Letter from Jim Ross (DFO) to Bob Petrie (NSDEL), dated December 11, 2002, requesting further information from the proponent regarding their blasting plan. (*Investors' Schedule of Documents at Tab C 127*); Witness Statement of Paul Buxton, dated July 20, 2011, at paras. 42-48.

<sup>190</sup> Letter from Phil Zamora (DFO) to Paul Buxton, dated May 29, 2003, explaining, for the first time, that a setback distance of 500 meters would now be required in order to protect the IBoF Atlantic Salmon. (*Investors' Schedule of Documents at Tab C 129*).

<sup>191</sup> "Guidelines for the Use of Explosives in or Near Canadian Fisheries Waters", D. G. Wright (DFO), (1998) (*Investors' Schedule of Documents at Tab C 287*).

<sup>192</sup> Letter from Paul Buxton to Phil Zamora (DFO), dated June 6, 2003, requesting the calculations used by the DFO which led to the 500 meter setback distance. (*Investors' Schedule of Documents at Tab C 68*); Letter from Paul Buxton, to Phil Zamora (DFO), dated June 16, 2003, requesting that, prior to meeting with the DFO, if the calculations used by the DFO could be examined. (*Investors' Schedule of Documents at Tab C 107*); Witness Statement of Paul Buxton, dated July 20, 2011, at para. 47.

<sup>193</sup> Letter from Phil Zamora (DFO) to Paul Buxton, dated June 11, 2003, stating that the calculations were performed using a computer model simulation and that the results would be available for the proponent's examination. (*Investors' Schedule of Documents at Tab C 113*).

<sup>194</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at para. 47; E-mail from Phil Zamora (DFO) to Dean Stuart (DFO) and Bruce Hood (DFO), dated August 25, 2004, regarding the implications of the removal of the 3.9ha test quarry from the scope of the WPQ with respect to the *Fisheries Act*, specifically S. 32. (*Investors' Schedule of Documents at Tab C 98*); Letter from Phil Zamora (DFO) to Paul Buxton, dated November 10, 2004, stating that the "I-Blast" model was used to determine the 500 meter horizontal setback distance. (*Investors' Schedule of Documents at Tab C 188*); Notes from Meeting between the proponent and the Habitat Management Division of the DFO, dated November 2, 2004. (*Investors' Schedule of Documents at Tab C 130*); Notes from Meeting between the proponent and the Habitat Management Division of the DFO, dated December 10, 2004. (*Investors' Schedule of Documents at Tab C 131*); Notes from Meeting between the proponent and the Habitat Management Division of the DFO, dated February 7, 2005. (*Investors' Schedule of Documents at Tab C 132*); Notes from Meeting between the proponent and the Habitat Management Division of the DFO, dated May 5, 2005. (*Investors' Schedule of Documents at Tab C 133*); Notes from Meeting between the proponent and the Habitat Management Division of the DFO, dated July 29, 2005. (*Investors' Schedule of Documents at Tab C 134*); Notes from Meeting between the proponent and the Habitat Management Division of the DFO, dated October 28, 2005. (*Investors' Schedule of Documents at Tab C 135*); Letter from Phil Zamora (DFO) to Paul Buxton, dated November 24, 2005, regarding DFO's approval of the proponent's Fish Habitat Compensation Plan. (*Investors' Schedule of Documents at Tab C 136*).

181. In its Final Report, the Joint Review Panel came to the patently disingenuous conclusion that the blasting data provided by Bilcon was inadequate to support its blasting models and to satisfy the Panel's anxiety about the environmental effects of blasting.<sup>195</sup>
182. According to the notes of Thomas Wheaton, the DFO and the Joint Review Panel were fully aware of the issue two years before the Joint Review Panel Report issued its Report:

Next steps:

- DFO will go to the Panel & let them know what we have now & outline the uncertainties & let them know that a test blast may greatly reduce the uncertainties
- The Panel will then have to provide some direction<sup>196</sup>

Mr. Hood's journals similarly indicate that the DFO was well aware that a consideration of the effects on marine life could not be determined without data obtained from test blasting,<sup>197</sup> and that a test blast was necessary to obtain data for the EIS requirements Bilcon would be required to meet.

*ix. Guidelines for the Use of Explosives Near Fisheries Waters*

183. Under the *Guidelines for the Use of Explosives In or Near Canadian Fisheries Waters*,<sup>198</sup> the required set-back distances from the point of detonation to spawning habitat at Whites Point Quarry was 30 meters.<sup>199</sup>
184. The DFO purported to justify its 500 meter setback requirement for Bilcon on "historic fishing, scientific sampling and theoretic modeling" which indicated that Inner Bay of Fundy (IBoF) salmon *could* be present.<sup>200</sup> However, there was never any actual indication that IBoF salmon were present, or were likely to be present near the Whites

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<sup>195</sup> Joint Review Panel Final Report, dated October 23, 2007, at 28. (*Investors' Schedule of Documents Tab C 34*).

<sup>196</sup> Journal note by Thomas Wheaton (DFO), October 28, 2005 at 801906. Note the above quote is a transcription of the original handwritten note by T. Wheaton. (*Investors' Schedule of Documents at Tab C 283*).

<sup>197</sup> Journal note by Bruce Hood (DFO), October 26, 2005 at 801579. (*Investors' Schedule of Documents at Tab C 330*).

<sup>198</sup> *Guidelines for the Use of Explosives in or Near Canadian Fisheries Waters*. (*Investors' Schedule of Documents Tab C 287*).

<sup>199</sup> Letter from Paul Buxton to Bob Petrie, Nova Scotia Department of Environment and Labour, dated January 28, 2003, regarding White's Cove Quarry Blasting Plan. (*Investors' Schedule of Documents Tab C 288*).

<sup>200</sup> Fax from Department of Environment Yarmouth, Addendum: DFO Concerns - Potential Harmful Effects of Blasting at Whites Point, dated May 29, 2003. (*Investors' Schedule of Documents at Tab C 407*).



Point Quarry.<sup>201</sup> And, at the end of the Joint Review Panel hearing, the DFO admitted that the fish habitat around Whites Point Quarry did not contain IBoF Salmon.<sup>202</sup> In other words, the DFO always knew there was no basis of any kind to suggest the presence of IBoF salmon in the Whites Point Cove area.<sup>203</sup>

*x. Bilcon's Environmental Impact Statement*

185. Bilcon filed its Environmental Impact Statement (EIS) on April 24, 2006.<sup>204</sup> The EIS was comprised of 17 volumes of material, with an Annex that contained 28 expert reports. Bilcon's EIS was over 3000 pages long. It took Bilcon 35 months to produce, and 48 experts were involved.

a) The following experts attended the hearings:

- i.* Dr. George Alliston, a retired professional engineer and certified Wildlife Biologist from Nova Scotia, with a Ph.D. in Wildlife Science with minors in animal behavior and biometrics;
- ii.* Mr. Paul Brunelle; founder and Regional Coordinator of the Atlantic Dragonfly Inventory Program (ADIP)
- iii.* Dr. Kenneth Neil; 45 years of field experience dealing primarily with butterflies
- iv.* Ms. Ruth Newell; Botanist at Acadia University

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<sup>201</sup> Fax from Department of Environment Yarmouth, Addendum: DFO Concerns - Potential Harmful Effects of Blasting at Whites Point, dated May 29, 2003. (*Investors' Schedule of Documents at Tab C 407*).

<sup>202</sup> Response to Undertaking 31 by the Department of Fisheries and Oceans at 1. (*Investors' Schedule of Documents at Tab C 417*). In this document produced in June 2007, DFO confirmed that the amount of Inner Bay of Fundy Salmon marine habitat to be destroyed by the Whites Point project is small in relation to the available marine habitat in the Bay of Fundy and that adverse effects to the inner Bay of Fundy salmon are unlikely as a result of the Whites Point Quarry and that effective mitigation measures could also prove helpful.

<sup>203</sup> Letter from Phil Zamora (DFO) to Paul Buxton, discussing changing blasting set-back requirements, dated November 10, 2004. (*Investors' Schedule of Documents Tab C 289*).

<sup>204</sup> Letter from Paul Buxton to Robert Fournier, dated April 25, 2006, noting that the EIS was shipped on April 24, 2006. (*Investors' Schedule of Documents at Tab C 137*). Bilcon initially indicated to the Panel that it would be submitting its EIS between November 30 and December 15, 2005. (Letter from Paul Buxton to Robert Fournier, re submission of EIS, August 30, 2005) (*Investors' Schedule of Documents at Tab C 138*). However, on December 8, Bilcon advised the Panel Manager that it would be extending the date of its submission of the EIS to April 1, 2006. (Letter from Paul Buxton, to Steve Chapman, (CEA Agency), re-extension for filing EIS, December 8, 2005) (*Investors' Schedule of Documents at Tab C 139*).

- v. Ms. Gini Proulx; a local environmentalist from Annapolis County, Nova Scotia, who has been awarded the Nova Scotia Bay of Fundy Environmental Award in 2003 by the Nova Scotia Department of Environment and Labor
- vi. Dr. Michael Brylinsky; Professor in the Department of Biology at Acadia University
- vii. Claire Eunice Anne Carver; holds a M.Sc. in Biological Oceanography from Dalhousie University
- viii. Mr. Gordon Fader; Geologist;
- ix. Ms. Kristy Herron; consultant with Elgin Consulting and Research
- x. Mr. John Christian; Masters in Biology from Memorial University
- xi. Professor MJ Dadswell; Department of Biology at Acadia University
- xii. Mr. Pierre Gareau; geomatics specialist with extensive experience in ocean mapping
- xiii. Mr. David Hannay; Masters in Science specializing in Physics – Underwater Acoustics from the University of Victoria
- xiv. Mr. Denis Thompson
- xv. Mr. Dwayne Hogg, P. Eng
- xvi. Mr. David MacFarlane; Principle Hydrogeologist
- xvii. Mr. John Lizak; John Lizak, a licensed Professional Geologist
- xviii. Mr. John Walker; Dr. John Walker, a specialist holding a Ph.D. in Air Pollution Meteorology
- xix. Mr. Robert Fraser; Robert Fraser, an economist
- xx. Dr. Barry Moody; , Professor of History and Classics at Acadia University
- xxi. Ms. Susan Sherk; Senior Associate at AMEC Earth & Environment

- xxii. Dr. Charles Watrall; Archaeological Consultant and former Associate Professor in the Department of Anthropology, at University of Regina, Saskatchewan
- xxiii. Mr. David Strajt; Masters in Civil (Hydrotechnical) Engineering from the University of British Columbia

186. Before Bilcon could submit its EIS Report, it was required to conduct a series of studies. In total, Bilcon conducted 35 studies of the environmental, social and economic issues of the area.<sup>205</sup>

- i. *Results of a Survey of the Plankton Communities Located Offshore of the Proposed Quarry Site at Whites Cove, Digby Neck, Nova Scotia*, by Dr. Michael Brylinsky, an Adjunct Professor in the Department of Biology at Acadia University;<sup>206</sup>

This seasonal survey of the offshore plankton community was carried out during, the spring, summer and fall of 2004. The Survey demonstrated that the plankton community along the Whites Point shoreline is representative of other plankton in the region. When compared with other surveys, there were no unique characteristics associated with the plankton community along Whites Point shoreline.

- ii. *A Suspended Solids Survey at the Whites Point Quarry, Little River, Digby County, Nova Scotia*, by Dr. Michael Brylinsky;<sup>207</sup>

There were two objectives of this Survey: the first was to determine if significant amounts of sediment were exported from the site into the intertidal zone as a result of construction work up before the Survey; and the second was to determine baseline data on the sediment characteristics of tide pool sites after construction of the quarry. Sediment contained within the tide pools was chiefly to determine the amount of inorganic sediments. Inorganic sediment is the sediment type most harmful to aquatic organisms.

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<sup>205</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at para. 70.

<sup>206</sup> *Results of a Survey of the Plankton Communities Located Offshore of the Proposed Quarry Site at Whites Cove, Digby Neck, Nova Scotia*, Michael Brylinsky, April 2005. (*Investors' Schedule of Documents Tab C 596*).

<sup>207</sup> *A Suspended Solids Survey at the Whites Point Quarry, Little River, Digby County, Nova Scotia*, Michael Brylinsky, June 2003. (*Investors' Schedule of Documents Tab C 391*).

The Survey found no evidence of elevated total suspended solids and inorganic sediment accumulation in tide pools near the sediment pond. This indicates little/no export of sediments into the tidal pool sediments within the intertidal area. The Survey was carried out during the construction phase of the sediment pond, when maximum mobilization of sediments was to be expected.

- iii. *A Preliminary Assessment of the Risks of introducing Non-indigenous Phytoplankton, Zooplankton Species or Pathogens/parasites from South Amboy, New Jersey (Raritan Bay) into Whites Point, Digby Neck, Nova Scotia*, by Claire Eunice Anne Carver who holds a M.Sc. in Biological Oceanography from Dalhousie University;<sup>208</sup>

This Study examined the potential for transferring non-indigenous species from New Jersey to Whites Point, Nova Scotia through ballast water.

The Study determined that that the potential for introduction and establishment of invasive, foreign species is not likely, given the cold temperatures of the water, and ballast water from various United States ports frequently being discharged by commercial ships traveling to nearby ports in the Bay of Fundy.

- iv. *Erosion, Suspended Sediment and Sediment Transport Study for the Bay of Fundy*, by Gordon Fader, Geologist;<sup>209</sup>

The Study researched sediment transport and suspended sediments throughout the Bay of Fundy system. Quantities of sediment material and associated processes were compared, contrasted and assessed in relation to the potential contribution of fine-grained sediments from the development of the Whites Point basalt quarry.

The allowable permitted amount of suspended sediment in discharge is 25ppm. The proposed Whites Point quarry would generate only 2.45m<sup>3</sup> of dominantly silt-sized sediment into the Bay of Fundy per year. This is a minute quantity of material when compared to the natural erosion of the

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<sup>208</sup> *A Preliminary assessment of the risks of introducing non-indigenous phytoplankton, zooplankton species or pathogens/parasites from South Amboy, New Jersey (Raritan Bay) into Whites Point, Digby Neck, Nova Scotia*, Claire Eunice Anne Carver, October 6, 2003. (*Investors' Schedule of Documents at Tab C 392*).

<sup>209</sup> *Erosion, suspended sediment and sediment transport study for the Bay of Fundy*, Gordon Fader, March 2005. (*Investors' Schedule of Documents at Tab C 393*).

seabed, contribution from rivers, and runoff from surrounding land, and dredge disposal.

- v. *Noise and Air Quality Study at Whites Point Quarry*, conducted by Dr. John Walker, a specialist holding a Ph.D. in Air Pollution Meteorology;<sup>210</sup>

The Study assessed baseline noise levels and air quality at the site. The Study noted that noise would be reduced as transportation of the basalt would occur via ship, with local traffic noise being kept to a minimum. The Study also acknowledged Bilcon's commitment to monitoring noise through community participation, in addition to the establishment of a noise complaint process.

The Study recognized that the area had good air quality due to the maritime climate and relatively small population and industrial bases. There were also many mitigation options for potential sources including: dust suppression using a wet spray and dust traps.

For example, crushing was to be conducted in an enclosed space – ventilated through filters to outdoors. In addition, a dust control plan was to be put into place.

The Study concluded that the effects of noise and air pollution could be effectively mitigated by Bilcon.

- vi. *Economic Profile for Digby Neck/Islands*, by Robert Fraser, an economist and Vice-President of Gardner Pinfold Consulting Economists Limited;<sup>211</sup>

The Economic Profile determined that that the economy in Digby Neck/Islands was stagnant, and arguably in decline due to the challenges in the fish processing industry, lack of economic growth, and the migration of the local population to urban centers.

The economic impacts were positive. The project would act as an economic stimulant, create jobs, and pay wages. Those employed from the area would be paid more than they currently were. The Economic Profile also examined the effects of the proposed quarry on tourism. It

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<sup>210</sup> *Noise and Air Quality Study at Whites Point Quarry*, John Walker, December 8, 2005. (*Investors' Schedule of Documents at Tab C 394*).

<sup>211</sup> *Economic Profile for Digby Neck/Islands*, Robert Fraser of Gardner Pinfold Consulting Economists Ltd., February 2006. (*Investors' Schedule of Documents at Tab C 395*).

found there was little to no tourism activity in the area, little recreational boating in the area, and concluded that no loss of marine based tourism could be attributed to the proposed quarry. Hwy. 271, a scenic drive from Digby to Brier Island would not be affected, as the quarry would not be visible from the highway.

The Profile also found that the impacts of the quarry on the marine environment would be benign, with no impact to local fish stock. The construction of the marine terminal would have some localized impact on accessible lobster grounds where fishing gear could be dropped, but the impact would not be significant.

- vii. Mr. Fraser also prepared Community Case Studies for the Strait of Canso and Hantsport, Nova Scotia, as an appendix of his other study;<sup>212</sup>

The Strait of Canso is home to a major aggregate quarry at Cape Porcupine. The quarry exports a significant volume of product on an annual basis to the United States. Ocean-going vessels are similar to those that were to be used at the Whites Point quarry. The Cape Porcupine quarry is located in a prominent location and is visible to tourists. There is also interaction between the shipping industry and the lobster fishery.

Hantsport is home to Fundy Gypsum. Fundy Gypsum ships about 1.5 million tones of gypsum from the small port annually. The shipping activity has had no discernable impact on property values. Fundy Gypsum and Hantsport have a constructive working relationship. Fundy Gypsum is a strong community supporter and provides employment opportunities for the local population.

- viii. *Geological Assessment of the Whites Cove Site*, by John Lizak, a licensed Professional Geologist;<sup>213</sup>

The Study determined that the bedrock at Whites Point Quarry site was composed of Jurassic North Mountain Basalt. The quarrying that was to occur would not adversely impact the bedrock stability, thermal regime, or infrastructure within or near Whites Point.

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<sup>212</sup> *Economic Profile for Digby Neck/Islands*, Robert Fraser of Gardner Pinfold Consulting Economists Ltd., February 2006. (*Investors' Schedule of Documents at Tab C 395*).

<sup>213</sup> *Geological Assessment of the Whites Cove Site*, John Lizak, December 2002. (*Investors' Schedule of Documents at Tab C 396*).

The Study showed the quarrying would have less of an impact on the local infrastructure than the various activities already occurring in the area (residential, non-residential building, and non-building activities). In addition, the Quarry would not adversely impact the quality or the quantity of the groundwater supply or local wells.

Quarrying was to be initiated above the natural water table, requiring no dewatering or pumping. The Study also concluded that blasting would not impact the groundwater supply.

- ix. *Glacial, Post Glacial, Present and Projected Sea Levels Study for the Bay of Fundy*, by Gordon Fader, Geologist;<sup>214</sup>

The Study found that the present sea level change is slowing, but still rising at a rate of 20-30cm/century. All facilities were to be designed and constructed to anticipate a sea level rise of 30cm/century, with associated potential change in tidal heights and storm waves.

The Study found that large areas of the site had thinner overburden as a result of erosive processes from sea level changes with more bedrock exposure than would normally be expected. This indicated that minimal amounts of surface materials would need to be removed and redistributed. Excavation would be primarily of clean sand and gravel, which reduced the potential amount of fine grained particulates produced from construction activities.

- x. *Preliminary Hydrogeological Assessment, Proposed Quarry, Whites Cove, Digby Neck*, by Dwayne Hogg, a Professional Engineer and David MacFarlane, a Principle Hydrogeologist;<sup>215</sup>

The objectives of the Study were to compile and review available hydrogeological information, provide an opinion of possible impacts to nearby residential water wells, and assess the availability of water for the quarry's operation. The Study concluded that deterioration in water quality was not expected since residential wells were located up-gradient

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<sup>214</sup> *Glacial, post glacial, present and projected sea levels study for the Bay of Fundy*, Gordon Fader, March 2005. (Investors' Schedule of Documents at Tab **C 408**).

<sup>215</sup> *Preliminary Hydrogeological Assessment, Proposed Quarry, Whites Cove, Digby Neck*, Dwayne Hogg and David MacFarlane of Jacques Whitford Environment Ltd., December 6, 2002. (Investors' Schedule of Documents at Tab **C 397**).

of the quarry, and that the quarry's distance to residential wells would cause negligible water level decline. The impact of the proposed quarry on water quality was considered to be negligible.

The Study also examined the blasting effects on drilled wells located nearest to the proposed quarry that could potentially be affected. The Study found that well collapse was highly unlikely. The impacts to wells were expected to be short-term and minimal due to distance to the wells and the expected low frequency of blasting operations.

- xi. Faunal Analysis of the Proposed Whites Point Quarry Site and 2004 Breeding Bird Surveys of Whites Point Quarry Site*, by George Alliston, Ph.D.,<sup>216</sup>

The Study examined the terrestrial species of amphibians, reptiles, breeding birds, and mammals that used the proposed Whites Point Quarry site.

It identified that the Boreal Chickadee, was using the site, and concluded that it was highly unlikely that any reptile or amphibian species were at risk. While the woodlands of the property could provide marginal nesting habitat for the Long-eared Owl, better nesting habitat existed in adjacent areas, making it unlikely that the Long-eared Owl would nest at the site. The Study also concluded that no at risk bat species would likely use the site for maternity colonies.

- xii. Wintering Harlequin Ducks in the Digby Neck Long Island Area*, by George Alliston, Ph.D.,<sup>217</sup>

The Study examined the effect of the Quarry on the population of Harlequin Ducks in the area. The Canadian Wildlife Service conducted population surveys and found that there were no ducks at the shoreline of the Whites Point Quarry location.

Similarly, Dr. Alliston found no Harlequin Ducks located on the Whites Point Quarry site, and concluded there would be limited opportunities for these birds to interact with quarry operations.

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<sup>216</sup> *Faunal Analysis of the Proposed Whites Point Quarry Site and 2004 Breeding Bird Surveys of Whites Point Quarry Site*, Dr. George Alliston, January 12, 2004. (*Investors' Schedule of Documents at Tab C 409*).

<sup>217</sup> *Wintering Harlequin Ducks in the Digby Neck Long Island Area*, Dr. George Alliston, May 20, 2005. (*Investors' Schedule of Documents at Tab C 410*).



- xiii. *Wintering Waterbirds of Digby Neck and Adjacent Coastal Waters of Southwestern Nova Scotia*, by Dr. George Alliston,<sup>218</sup>

Two surveys were conducted which identified 17 species of water birds, including 10 waterfowl species. The most numerous species present was the Common Eider.

- xiv. *Odonata Survey 2005, Whites Point Property*, by Paul Brunelle, founder and Regional Coordinator of the Atlantic Dragonfly Inventory Program (ADIP),<sup>219</sup>

Odonata refer to damselflies and dragonflies. The Study concluded that the principal Odonata diversity in the area occurred in man-made habitats, there was no indication of rare Odonata in the natural bog and stream habitats present.

- xv. *Adult Butterfly Habitat and Larval Host Plant Survey of Whites Point*, by Dr. Kenneth Neil, who has 45 years of field experience with butterflies,<sup>220</sup>

The Study presented adult butterfly habitat and larval host plant observations at the proposed quarry site. Eight species of butterflies were found, with no species at risk.

- xvi. *A Report on a Botanical Survey*, by Gini Proulx, a local environmentalist from Annapolis County, Nova Scotia, who was awarded the Nova Scotia Bay of Fundy Environmental Award by the Nova Scotia Department of Environment and Labor;<sup>221</sup>

The purpose of the botanical survey was to determine if Rock Spikemoss, or any other rare or endangered plants, occur on rock outcroppings at the quarry site. The Survey found none.

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<sup>218</sup> *Use By Wintering Waterbirds of Digby Neck and Adjacent Coastal Waters of Southwestern Nova Scotia*, Dr. George Alliston, June 7, 2005. (*Investors' Schedule of Documents at Tab C 411*).

<sup>219</sup> *Odonata Survey 2005 (Damselflies and Dragonflies), Whites Point Property*, Paul Brunelle, August 17, 2005. (*Investors' Schedule of Documents at Tab C 412*).

<sup>220</sup> *Adult Butterfly Habitat and Larval Host Plant Survey of Whites Point*, Dr. Kenneth Neil, August 22, 2005. (*Investors' Schedule of Documents at Tab C 413*).

<sup>221</sup> *A Report on a Botanical Survey*, Gini Proulx, November 9, 2005. (*Investors' Schedule of Documents at Tab C 414*).

- xvii. *Plant Survey of Whites Cove Property and Addendum*, by Ruth Newell, Botanist at Acadia University;<sup>222</sup>

The Survey found there were 5 rare plant species at the site, and recommended simple mitigation measures for coastal plant communities to remain undisturbed.

- xviii. *Interpretation of a Sublittoral Benthic Survey Along the Shoreline of Whites Point*, by Dr. Michael Brylinsky;<sup>223</sup>

The Survey concluded that the sub-tidal substrate offshore of the site is composed largely of coarse sands, gravels and mollusk shell fragments overlain in many areas by small to medium size boulders heavily colonized by various types of flora and fauna.

- xix. *Results of a Sediment Survey in the Near Offshore Waters of the Proposed Quarry Site in the Vicinity of Whites Cove*, by Dr. Michael Brylinsky;<sup>224</sup>

The survey showed that much of the area sampled was composed of exposed bedrock with little overlying sediment. The sediment that did exist indicated that contaminants were low, and in all cases below the CCME Interim.

- xx. *Results of a Survey of the Intertidal Marine Habitats and Communities at a Proposed Quarry Site Located in the Vicinity of Whites Cove*, by Dr. Michael Brylinsky;<sup>225</sup>

This Study's primary objective was to describe and document the general nature of the marine habitats and plant community types present within the intertidal zone. In addition, it contained observations of two freshwater brooks that flow across the property and into the Bay of Fundy.

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<sup>222</sup> *Plant Survey of Whites Cove Property and Addendum*, Ruth Newell, July 7, 2002. (*Investors' Schedule of Documents at Tab C 415*).

<sup>223</sup> *Interpretation of a Sublittoral Benthic Survey Along the Shoreline of Whites Point*, Dr. Michael Brylinsky, February 28, 2004. (*Investors' Schedule of Documents at Tab C 416*).

<sup>224</sup> *Results of a Sediment Survey in the Near Offshore Waters of the Proposed Quarry Site in the Vicinity of Whites Cove*, Dr. Michael Brylinsky, September 2005. (*Investors' Schedule of Documents at Tab C 443*).

<sup>225</sup> *Results of a Survey of the Intertidal Marine Habitats and Communities at a Proposed Quarry Site Located in the Vicinity of Whites Cove*, Dr. Michael Brylinsky, June 30, 2002. (*Investors' Schedule of Documents at Tab C 418*).

The Study found the site was typical of the rocky shoreline areas of the lower Bay of Fundy. The predominant habitat and community type was a rockweed community, which was very well developed along the entire shoreline and was in a healthy, prolific condition. There did not appear to be any unique or extraordinary characteristics associated with the shoreline. In addition, the two small brooks did not appear to be good salmonid habitat due to their small size, steep gradient and lack of substrate suitable for spawning.

- xxi. *Marine Archaeology Offshore Digby Neck, Bay of Fundy Reference*, by Mr. Gordon Fader;<sup>226</sup>

The location of the quarry and marine terminal at the entrance to the Bay, required no deep penetration of the Bay by shipping, and has the closest deep water route to the adjacent Gulf of Maine. The area has no active faults within the bedrock and is considered to have a low seismic risk.

- xxii. *Physiography, Geography and Bathymetry of Digby Neck Area*, by Gordon Fader;<sup>227</sup>

The Study provides a description of the physiography, geography and bathymetry of the area composing the quarry site.

- xxiii. *Bedrock and Surficial Geology*, by Mr. Gordon Fader;<sup>228</sup>

This Study provides a description of the regional bedrock and surficial sediment of the quarry area, with a history of the bedrock geology. The Study also outlines the faults in the area, and comments that the bedrock will provide a stable base for the marine terminal pilings as they will be founded on exposed hard and stable bedrock, and not sediments.

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<sup>226</sup> *Marine Archaeology Offshore Digby Neck, Bay of Fundy Reference*, Gordon Fader, March 2005. (*Investors' Schedule of Documents at Tab C 419*).

<sup>227</sup> *Physiography, Geography and Bathymetry of Digby Neck Area*, Gordon Fader, March 2005. (*Investors' Schedule of Documents at Tab C 420*).

<sup>228</sup> *Bedrock and Surficial Geology*, Gordon Fader, March 2005. (*Investors' Schedule of Documents at Tab C 421*).

xxiv. *Seismic Hazard, Faults and Earthquakes*, by Mr. Gordon Fader;<sup>229</sup>

This Study provides an assessment of the seismic hazard for the area of the proposed quarry, as well as the regional and local distribution of faults and earthquakes in the Northern Appalachians Seismic Zone.

xxv. *Human Health and Community Wellness Assessment* prepared by Susan Sherk, AMEC;<sup>230</sup>

The Study showed a declining population in the Digby Neck Islands. The majority of the population was born in the area, with a low percentage of the population identifying with ethnic ties. The health status of the population is similar to other parts of Nova Scotia.

The analysis of the conditions of local health determinants and the effects of the Project on those conditions showed that the Project overall, would not have a significant adverse effect on human health and community wellness.

xxvi. *Archaeological Impact Assessment Report, Whites Point /Whites Cove Quarry Project*, by Dr. Watrall, Archaeological Consultant;<sup>231</sup>

Based on the background research and field reconnaissance studies, the Report concluded that no paleontological materials or prehistorical cultural materials were found on the site.

Video examination and sidescan sonar examination of the underwater areas that would be most impacted by development activities revealed no underwater archaeological features, and no further investigation for prehistoric materials was warranted.

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<sup>229</sup> *Seismic Hazard, Faults and Earthquakes*, Gordon Fader, March 2005. (*Investors' Schedule of Documents at Tab C 422*).

<sup>230</sup> *Human Health Community Wellness Assessment for the Whites Point Quarry and Marine Terminal*, by AMEC Earth & Environmental, dated January 13, 2006. (*Investors' Schedule of Documents at Tab C 431*).

<sup>231</sup> *Archaeological Impact Assessment Report, Whites Point /Whites Cove Quarry Project*, Dr. Charles Watrall, May 2003. (*Investors' Schedule of Documents at Tab C 432*).

- xxvii. *Sidescan Sonar Interpretation, Evaluation and Regional Integration: Offshore Digby Neck, Bay of Fundy Report*, by Mr. Gordon Fader;<sup>232</sup>

This Study provided an assessment of the local area surveyed with sidescan sonar and a sub-bottom profiler. A secondary purpose of the assessment was to determine how the site geology related to the overall surficial and nearshore geology of the Bay of Fundy. The seabed at the offshore terminal location was hard, with mostly exposed bedrock with gravel. The Study noted that if a delivery system failure or spillage from the quarry went to the seabed, the event would not change the character of the seabed.

- xxviii. *Digby Neck and Islands Community/Business Consultation Report*, by Kristy Herron;<sup>233</sup>

The Report documented the steps Bilcon took to accommodate local residents with the inquiries Bilcon received about the quarry, the construction of the quarry, and employment opportunities.

- xxix. *Whites Point Quarry and Marine Terminal Traditional Knowledge Consultation Report* prepared by Kristy Herron, a consultant with Elgin Consulting and Research;<sup>234</sup>

This Report gathered information associated with the cultural and past economic uses of the site and the surrounding area. It noted that Bilcon's efforts to provide information in a personal manner were successful, and recommended that Bilcon increase personal contacts within the community to ensure that accurate knowledge of the quarry development was provided to the local community.

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<sup>232</sup> *Sidescan Sonar Interpretation, Evaluation and Regional Integration: Offshore Digby Neck, Bay of Fundy Report*, Gordon Fader, March 2005. (*Investors' Schedule of Documents at Tab C 423*).

<sup>233</sup> *Digby Neck and Islands Individual Business Consultation Report*, Elgin Consulting Research, August 2005. (*Investors' Schedule of Documents at Tab C 601*).

<sup>234</sup> *Whites Point Quarry and Marine Terminal Traditional Knowledge Consultation Report*, Elgin Consulting Research, July 2005. (*Investors' Schedule of Documents at Tab C 425*).

- xxx. *Whites Point Quarry and Marine Terminal Individual Consultation Report*, by Kristy Herron, a consultant with Elgin Consulting and Research;<sup>235</sup>

The Report documented the steps that Bilcon took in reaching out to and accommodating local residents of Whites Point, with respect to the construction of the quarry and employment opportunities.

- xxxi. *Whites Cove Quarry Blasting: Potential Impacts on American Lobster*, by John Christian, who holds a Masters in Biology from Memorial University;<sup>236</sup>

The DFO guidelines required that peak sound pressure not exceed 100 kPa. The Report determined that the quarry blasting would likely result in peak sound pressure levels of less than 50 kPa, at ordinary high tide, and less than 25 kPa within three hours of low tide, which was well below DFO guidelines, and would have negligible effects on the lobster community in the Whites Cove area.

- xxxii. *Migration of Inner Bay of Fundy Atlantic Salmon in Relation to the Proposed Quarry in the Digby Neck Region of Nova Scotia*, by Professor M.J. Dadswell of the Department of Biology at Acadia University;<sup>237</sup>

The Study confirmed that there has never been a salmon fishery along the Fundy shore of Digby Neck, and concluded that the quarry would have no impact on salmon populations.

- xxxiii. *Whites Point Quarry Project GeoSpatial Data Comparison & Compilation*, by Mr. Pierre L. Gareau of XY GeoInformatics Services, a geomatics specialist with extensive experience in ocean mapping;<sup>238</sup>

The Study conducted a comparison and compilation of digital and geospatial data, and concluded the multibeam data is approximately 200 meters W-NW of the other data sets.

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<sup>235</sup> *Whites Point Quarry and Marine Terminal Individual Consultation Report*, Elgin Consulting Research, August 2005. (*Investors' Schedule of Documents at Tab C 424*).

<sup>236</sup> *Whites Cove Quarry Blasting: Potential Impacts on American Lobster*, John Christian, October 8, 2003. (*Investors' Schedule of Documents at Tab C 444*).

<sup>237</sup> *Migration of Inner Bay of Fundy Atlantic Salmon in Relation to the Proposed Quarry in the Digby Neck Region of Nova Scotia*, Professor M.J. Dadswell, November 2004. (*Investors' Schedule of Documents at Tab C 426*).

<sup>238</sup> *Whites Point Quarry Project GeoSpatial Data Comparison & Compilation*, Pierre L. Gareau, April 2005. (*Investors' Schedule of Documents at Tab C 427*).

- xxxiv. *Peak Pressure and Ground Vibration Study for Whites Cove Quarry Blasting Plan*, by Mr. David E. Hannay of JASCO Research Ltd. who holds a Masters in Science specializing in Physics – Underwater Acoustics, from the University of Victoria, and Mr. Denis Thomson, of LGL Limited;<sup>239</sup>

This Study analyzed the characteristics of the pressure and noise wave fields in the water column and ground vibration levels on the seafloor and the seashore.

It focused on blast locations, shock pressure waves, the waterborne pressure waves, surface reflection, ground vibrations and long range sound propagation, and concluded that expected peak pressure and vibration levels in the near-shore region adjacent to the blast sites would adhere to the limits imposed by the DFO in *Guidelines for the Use of Explosives In or Near Canadian Fisheries Waters*.

- xxxv. *Hydrologic Budget Analysis, Whites Point Quarry*, by Mr. David Strajt of Conestoga-Rovers & Associates, who holds a Masters in Civil (Hydrotechnical) Engineering from the University of British Columbia;<sup>240</sup>

The Study objectives were to assess surface water hydrology for the site, estimate losses in the hydrologic budget, determine average expected moisture surplus available at the site on a monthly basis, and estimate water storage volumes required to satisfy make-up demand during deficit periods.

Based on the average climate data, the abundant precipitation, and the size of the contributing basin, little variation in the hydrologic budget exists for the various quarry phases.

The analysis also showed that a net surplus of water is available, except in August and September. For these months, storage of approximately 22,000 m<sup>3</sup> would be required to satisfy the demand.

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<sup>239</sup> *Peak Pressure and Ground Vibration Study for Whites Cove Quarry Blasting Plan*, David E. Hannay and Denis Thomson, August 14, 2003. (*Investors' Schedule of Documents at Tab C 428*).

<sup>240</sup> *Hydrologic Budget Analysis, Whites Point Quarry*, Conestoga-Rovers & Associates, October 2005. (*Investors' Schedule of Documents at Tab C 429*).

xxxvi. *Whites Point Quarry Property Historical Background*, by Dr. Barry Moody, Professor of History and Classics at Acadia University;<sup>241</sup>

The Study examined the history of the site and concluded that it had no special historical significance. The history of the site property is similar to many properties in the County with Loyalist connections.

187. The time for public comment on Bilcon's EIS was extended to August 11, 2006 and Bilcon continued to receive comments up to August 24, 2006.<sup>242</sup>
188. The Terms of Reference permitted the Joint Review Panel to request further information from Bilcon after the close of the public comment period.<sup>243</sup>
189. On June 28, 2006, however, the Joint Review Panel issued 10 information requests to Bilcon.<sup>244</sup>
190. On July 28, 2006, the Joint Review Panel sent a 33 page letter to Bilcon, which required Bilcon to provide more information on over 50 issues.<sup>245</sup>
191. On September 22, 2006, the Panel required Bilcon to submit a Revised Project Description, before it responded to the Panel's additional Information Requests or to any of the public comments.<sup>246</sup>
192. Although taken by surprise, Bilcon complied.<sup>247</sup>

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<sup>241</sup> *Whites Point Quarry Property Historical Background*, Dr. Barry Moody, July 2002. (*Investors' Schedule of Documents at Tab C 430*).

<sup>242</sup> CEA Agency Press Release, April 27, 2006. (*Investors' Schedule of Documents at Tab C 140*); CEA Agency Press Release on August 4, 2006 regarding Whites Point Quarry and Marine Terminal Project Public Consultation, stating the Environmental Impact Statement has been extended to August 11, 2006. (*Investors' Schedule of Documents at Tab C 141*); CEA Agency Press Release, April 27, 2006. (*Investors' Schedule of Documents at Tab C 142*); Letter from Paul Buxton to Robert Fournier, dated August 18, 2006, discussing Bilcon's continued receipt of public comments. (*Investors' Schedule of Documents at Tab C 143*); E-mail from Paul Buxton to Debra Myles (CEA Agency), dated August 28, 2006, stating that the proponent continued to receive public comments. (*Investors' Schedule of Documents at Tab C 144*).

<sup>243</sup> See Part II, at para. 7 of the Appendix to *Agreement concerning The Establishment of a Joint Review Panel*, dated November 3, 2004. (*Investors' Schedule of Documents at Tab C 363*).

<sup>244</sup> Letter from Robert Fournier to Paul Buxton, providing ten information requests, pursuant to section 7 of Part II of the Terms of Reference, dated June 28, 2006. (*Investors' Schedule of Documents at Tab C 383*).

<sup>245</sup> Letter from Robert Fournier to Paul Buxton, providing further information requests on over 50 sub-issues, dated July 28, 2006. (*Investors' Schedule of Documents at Tab C 383*).

<sup>246</sup> Letter from Robert Fournier to Paul Buxton. September 22, 2006, requesting a revised project description. (*Investors' Schedule of Documents at Tab C 145*); Witness Statement of Paul Buxton at para. 62.



193. After it did so, the Joint Review Panel issued 10 more information requests to Bilcon on December 19, 2006.<sup>248</sup> Then, on January 8, 2007, the Joint Review Panel demanded even more information on 13 topics<sup>249</sup> and on February 27, 2007, the Joint Review Panel issued a fifth demand to Bilcon requiring additional information on 9 more topics.<sup>250</sup>
194. In addition to requiring Bilcon to provide a revised project description, the Joint Review Panel subjected Bilcon to over 80 additional information demands. At great cost, compounded by unreasonable delay, Bilcon responded to them all.<sup>251</sup>

### **E. Public Support**

195. There was extensive local community support for the Whites Point Quarry Project.
196. The Chair of the Community Liaison Committee, Cindy Nesbitt, explained: "The strongest argument for this Project to go ahead is undoubtedly an economy in poor shape. Many of the jobs available here are seasonal in nature, and they are not plentiful. Many year-round residents have difficulty supporting themselves year round."<sup>252</sup> Ms. Nesbitt also explained:

Take, for example, the argument against developing this Project to save the Bay of Fundy. The Bay of Fundy is bordered by two Canadian Provinces, New Brunswick and Nova Scotia. On the New Brunswick side, there's an oil refinery with a second one under construction, an LNG Terminal, a nuclear power plant, the pulp and paper industry, and the City of Saint John is currently expanding their ability to dock more and larger cruise ships there.<sup>253</sup>

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<sup>247</sup> Witness Statement of Paul Buxton at paras. 62, 64; Letter from Paul Buxton to Robert Fournier, October 5, 2006, regarding the revised project description. (*Investors' Schedule of Documents at Tab C 146*); E-mail from Josephine Lowry, Bilcon of Nova Scotia, to Debra Myles (CEA Agency), November 28, 2006, enclosing the revised White Points Quarry and Marine Terminal Project Description. (*Investors' Schedule of Documents at Tab C 147*).

<sup>248</sup> Letter from Robert Fournier to Paul Buxton, dated December 19, 2006, providing ten information requests on the proponent's Revised Project Description. (*Investors' Schedule of Documents at Tab C 433*).

<sup>249</sup> Letter from Robert Fournier to Paul Buxton, dated January 8, 2007, providing thirteen information requests. (*Investors' Schedule of Documents at Tab C 434*).

<sup>250</sup> Letter from Robert Fournier to Paul Buxton, providing nine final information requests, dated February 27, 2007. (*Investors' Schedule of Documents at Tab C 435*).

<sup>251</sup> Email from Josephine Lowry, Bilcon of Nova Scotia, to Debra Myles (CEA Agency), dated April 13, 2007, providing final responses to the Joint Review Panel's information requests. (*Investors' Schedule of Documents at Tab C 151*).

<sup>252</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 20:2102. (*Investors' Schedule of Documents at Tab C 162*).

<sup>253</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 17:2103. (*Investors' Schedule of Documents at Tab C 162*).

197. Bilcon's Environmental Impact Statement included an economic study of Digby Neck that confirmed that the economy was "stagnant" and "arguably in decline."<sup>254</sup>
198. During the Joint Review Panel Hearings, supporters of the Quarry submitted a Petition to the Federal Minister of the Environment, the Nova Scotia Minister of Environment and Labour and the Chair of the Joint Review Panel.<sup>255</sup> A criterion of the Petition was that all signers had to be full-time residents of Digby County.<sup>256</sup> There were 316 names on the Petition, and 309 of them were from the local area.<sup>257</sup> The Petition confirmed that the people actively who lived there were "of the opinion that the jobs that will be created by this project are vital to the economic future of this area given the catastrophic decline in the fishery."<sup>258</sup>
199. Cindy Nesbitt presented the Petition at the Joint Review Panel Public Hearing, and said:
- ... why go ahead with this Project? Because the year-round local people want it. We present to you this evening a petition signed by locals, not tourists who will be here once, or property owners who live elsewhere and visit occasionally. This is the real thing. There would be more signatures, but people are still living in the shadow of intimidation.<sup>259</sup>
200. Ms. Nesbitt added:
- "[t]here are a number of people that still would have signed the petition, but for one reason or another, we didn't get a chance to speak to them or they were intimidated and didn't want to sign, and they weren't sure of where these names were going to go."<sup>260</sup>
201. In her presentation to the Joint Review Panel, she also provided a small sample of the hostile actions inflicted on her because of her role as Chair of the Community Liaison Committee:

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<sup>254</sup> *Economic Profile for Digby Neck/Islands*, Robert Fraser of Garner Pinfold Consulting Economists Ltd., February 2006 at 7. (*Investors' Schedule of Documents at Tab C 395*).

<sup>255</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 18:2123. (*Investors' Schedule of Documents at Tab C 162*); See also Petition, June 2007. (*Investors' Schedule of Documents at Tab C 182*).

<sup>256</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 7:2123. (*Investors' Schedule of Documents at Tab C 162*).

<sup>257</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 12:2122. (*Investors' Schedule of Documents at Tab C 162*).

<sup>258</sup> Petition, June 2007. (*Investors' Schedule of Documents at Tab C 182*).

<sup>259</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 12:2106. (*Investors' Schedule of Documents at Tab C 162*).

<sup>260</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 13:2123. (*Investors' Schedule of Documents at Tab C 162*).

- a) "Our business has been boycotted";<sup>261</sup>
  - b) "at times I was treated like a pariah";<sup>262</sup>
  - c) "my car was keyed" and "one of our other representatives had her car keyed";<sup>263</sup>
  - d) "a lot of the tires were being slashed and the cars were being keyed, and people were not being spoken to at the grocery store;<sup>264</sup> and
  - e) "a number of people on the committee have found less than friendly responses at times from people who are opposed to the project".<sup>265</sup>
202. Despite this treatment, Ms. Nesbitt explained that the Community Liaison Committee wanted to "have an opportunity to bring transparency to the process." She expressed the hope they were "helping" to "bring this information to community", so it could "make a decision based on information instead of propaganda or fear".<sup>266</sup> The Community Liaison Committee eventually stopped meeting "because people were given a hard time over participating".<sup>267</sup>
203. Instead of appreciating the work of the Committee, the Joint Review Panel blamed Bilcon for "exacerbate[ing] this 'them and us' situation".<sup>268</sup>

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<sup>261</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 8:2125. (*Investors' Schedule of Documents at Tab C 162*).

<sup>262</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 5:2125. (*Investors' Schedule of Documents at Tab C 162*).

<sup>263</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 6:2125 and 10:2125. (*Investors' Schedule of Documents at Tab C 162*).

<sup>264</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 16:2129. (*Investors' Schedule of Documents at Tab C 162*).

<sup>265</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 11:2125. (*Investors' Schedule of Documents at Tab C 162*).

<sup>266</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 23:2125. (*Investors' Schedule of Documents at Tab C 162*).

<sup>267</sup> Joint Review Panel Public Hearing Transcript, Vol. 9, June 26, 2007 at 2:2130. (*Investors' Schedule of Documents at Tab C 162*).

<sup>268</sup> This is discussed further in Part IV of the Memorial in the assessment of community core values. The final Joint Review Panel Final Report also confirmed that both sides presented petitions to political leaders or to the Joint Review Panel to make their views public; See Joint Review Panel Final Report, dated October 23, 2007, at 70. (*Investors' Schedule of Documents at Tab C 34*).

## **F. The Public Hearing**

204. The Public Hearing portion of the environmental assessment was held in Digby from June 16 to June 30, 2007.<sup>269</sup>

205. The entire process was dominated by a hostile attitude towards Bilcon.<sup>270</sup>

### *i. Inadequate time*

206. Bilcon was allowed less than 6% of the entire hearing time<sup>271</sup> to present information to the Panel.<sup>272</sup>

207. In a letter sent to the Minister of the Environment, Bilcon's engineering services and shipping facilities consultant, Carlos Johansen, expressed frustration that the Panel asked him only one question, after he had flown across Canada to be available to the Panel.<sup>273</sup>

### *ii. Acceptance of Biased Statements*

208. The public hearing was to be a forum where Bilcon, the public and government officials were to provide information relevant to the Panel's mandate:

The Panel Chair may limit or exclude questions or comments that fall outside the mandate of the Panel, or are deemed to be repetitive, irrelevant, or immaterial.<sup>274</sup>

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<sup>269</sup> Letter from Robert Fournier to Paul Buxton, dated May 1, 2007, stating the dates of the public hearings phase of the environmental assessment of the WPQ project. (*Investors' Schedule of Documents Tab C 167*); Letter from Robert Fournier (Joint Review Panel Chair) to Paul Buxton, Bilcon of Nova Scotia, dated May 1, 2007, attaching the Procedures for Public Hearings. (*Investors' Schedule of Documents Tab C 167*).

<sup>270</sup> Letter from Bilcon's consultant, Carlos Johansen, to the Hon. John Baird, Minister of Environment, dated October 29, 2007, regarding the hostile attitude towards the proponent at the public hearings. (*Investors' Schedule of Documents at Tab C 153*).

<sup>271</sup> Joint Review Panel Public Hearing Transcripts, Volume 1 – 13 dated June 16 – June 30, 2007. (*Investors' Schedule of Documents at Tab C 154, C 155, C 156, C 109, C 157, C 158, C 159, C 160, C 161, C 162, C 163, C 164 and C 165*) (Presentation times do not include question periods throughout the hearings)

<sup>272</sup> Letter from Bilcon's consultant, Carlos Johansen, to the Hon. John Baird, Minister of Environment, dated October 29, 2007, stating the decision of the panel to not ask questions of him at the public hearings. (*Investors' Schedule of Documents at Tab C 166*).

<sup>273</sup> Letter from Carlos Johansen, Seabulk Systems Inc., to the Hon. John Baird and the Hon. Mark Parent, October 29, 2007, Mr. Johansen also pointed out that the JRP's Final Report stated that there were concerns with the level of information provided, while he was available at the hearings to provide that information. (*Investors' Schedule of Documents at Tab C 153*).

<sup>274</sup> Procedures for Public Hearings at 3. (*Investors' Schedule of Documents Tab C 167*).

209. Hugh Fraser, a former reporter who attended the public hearing on behalf of Bilcon, describes in his Witness Statement that the hearing was a highly charged venue where the Panel welcomed the inflammatory and anti-American comments that were hurled against Bilcon.<sup>275</sup>

210. Contrary to Section 1.3 of the Procedures for Public Hearings, the Panel did nothing to restrain or moderate the constant outbursts which politicized the process:

These procedures are intended to ensure that the public hearings take place in a fair and equitable manner, with maximum co-operation and courtesy. The Panel Chair will maintain order and efficiency in a structured atmosphere consistent with the procedures outlined in this document.<sup>276</sup>

211. Instead, the record is replete with rampant comments that were blatantly discriminatory to Bilcon:

In turn, Bilcon or any other large company that you should let rape our land and natural resources can then sue our Canadian Government billions of dollars, nor can our Government stop the process.<sup>277</sup>

...

For foreign business interests and far away governments to force such an industry upon a population against their will has the air-about-it of rule by a self-interested oligarchy.<sup>278</sup>

...

Also, for a foreign company to enter this magnificent area, this province, this country to freely, and I mean freely, rape it and remove the very material of which it is made and give nothing in return but a few paltry low-paying jobs is an abomination.<sup>279</sup>

...

Regarding the proposed destruction of our Fundy Shore communities by foreign-based pirates stealing our resources, contaminating our environment and threatening our livelihoods and well-

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<sup>275</sup> Witness Statement of Hugh Fraser at para. 17.

<sup>276</sup> Letter from Robert Fournier to Paul Buxton, dated May 1, 2007, Procedures for Public Hearings, at 2. (*Investors' Schedule of Documents Tab C 167*).

<sup>277</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 22:612. (*Investors' Schedule of Documents Tab C 156*).

<sup>278</sup> Joint Review Panel Public Hearing Transcript, Vol. 7, dated June 23, 2007, at 1521. (*Investors' Schedule of Documents Tab C 160*).

<sup>279</sup> Joint Review Panel Public Hearing Transcript, Vol. 7, dated June 23, 2007, at 1525. (*Investors' Schedule of Documents Tab C 160*).

bring for future generations... We are outraged with the deceptive tactics used by this invader, its local hirelings and the complicit elected officials.<sup>280</sup>

...

Will outside interest be enabled to enter our Province at will to rape and pillage our land, and we will not be able to stop them?<sup>281</sup>

212. The Panel allowed the Partnership for Sustainable Development of Digby Neck & Islands Society, a local activist group, to make two presentations in the public hearing.<sup>282</sup> During their presentations, members of the gallery applauded any comments that were negative to Bilcon.<sup>283</sup> The Panel did nothing.<sup>284</sup>
213. In the face of virulent anti-Americanism targeted directly against Bilcon and its American Investors, there was not one instance during the public hearing where the Panel even asked the presenters to refrain from making those kinds of vile and discriminatory comments. At no time during the public hearing did the Panel explain that discriminatory anti-American comments would be excluded from its considerations because they were immaterial or irrelevant to the environmental assessment process.
214. Instead, the Panel's conduct made it clear that it shared and was sympathetic to the anti-American sentiment being expressed, which it then reflected in its astonishing consideration of "community values".

*iii. Improper Considerations*

215. In the Final EIS Guidelines issued to Bilcon, the Panel required Bilcon to "describe the implications of international agreements... that may influence the Project or its environmental effects."<sup>285</sup> This was an unprecedented instruction, without any basis, as

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<sup>280</sup> Joint Review Panel Public Hearing Transcript, Vol. 13, dated June 30, 2007, at 16:3146. (*Investors' Schedule of Documents Tab C 165*).

<sup>281</sup> Joint Review Panel Public Hearing Transcript, Vol. 13, dated June 30, 2007, at 10:3177. (*Investors' Schedule of Documents Tab C 165*).

<sup>282</sup> Joint Review Panel Public Hearing Transcript, Vol. 5, dated June 21, 2007. (*Investors' Schedule of Documents Tab C 158*).

<sup>283</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at para. 74.

<sup>284</sup> Joint Review Panel Public Hearing Transcript, Vol. 5, dated June 21, 2007 at 1103, 1123, 1144, 1151. (*Investors' Schedule of Documents Tab C 158*).

<sup>285</sup> *Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project*, dated March 2005, at 16. (*Investors' Schedule of Documents Tab C 168*).

the implications of the NAFTA and other international economic law treaties are not a necessary or appropriate consideration in environmental assessment.<sup>286</sup>

216. Neither the Terms of Reference for the Panel,<sup>287</sup> which define and circumscribe its mandate, nor the EIS Guidelines<sup>288</sup> permitted the inclusion of the NAFTA as a relevant consideration in the Panel's environmental assessment process. However, its assessment continued, the Panel became pre-occupied with the implications of the NAFTA,<sup>289</sup> and took the extraordinary step of retaining its own internal advisor on the application of the NAFTA to the Whites Point Quarry.<sup>290</sup>
217. The Panel wanted to know if its approval of the Whites Point Quarry would have a precedential effect for other approvals under the NAFTA.<sup>291</sup> Emails from the CEA Agency officials confirm that Robert Fournier, the Panel's Chairman, was personally interested in the NAFTA issue.<sup>292</sup>
218. Gilbert Winham, the internal consultant retained by the Panel, was not a lawyer, but a political science professor.<sup>293</sup> In addition to asking Professor Winham to provide it with "an overview and analysis of the application and implications of the [NAFTA] to the

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<sup>286</sup> Expert Report of David Estrin at para. 213.

<sup>287</sup> *Agreement concerning The Establishment of a Joint Review Panel*, dated November 3, 2004, including the Terms of Reference for the Joint Review Panel. (*Investors' Schedule of Documents Tab C 114*).

<sup>288</sup> *Draft Guidelines for the Preparation of the Environmental Impact Statement for the Whites Point Quarry and Marine Terminal*, dated November 2004. (*Investors' Schedule of Documents Tab C 169*).

<sup>289</sup> Witness Statement of Hugh Fraser at para. 26.

<sup>290</sup> E-mail from Robert Fournier to Debra Myles (CEA Agency), dated January 22, 2007, regarding the request to Dr. Gilbert Winham to consult to the Panel with respect to the interpretation of the role of the NAFTA on the Whites Point Quarry process. (*Investors' Schedule of Documents at Tab C 172*).

<sup>291</sup> E-mail from Jill Grant to Debra Myles (CEA Agency), dated April 17, 2007, regarding the application of NAFTA Chapter 11. (*Investors' Schedule of Documents at Tab C 171*).

<sup>292</sup> E-mail from Adrian MacDonald (CEA Agency) to Debra Myles (CEA Agency), dated June 6, 2007, discussing Joint Review Panel's interest in NAFTA and possible future quarries. (*Investors' Schedule of Documents at Tab C 389*).

<sup>293</sup> E-mail from Robert Fournier to Debra Myles (CEA Agency), dated January 22, 2007, regarding the request to Dr. Gilbert Winham to consult to the Panel with respect to the interpretation of the role of the NAFTA on the Whites Point Quarry process. (*Investors' Schedule of Documents at Tab C 172*).

proposed Whites Point Quarry”,<sup>294</sup> the Panel also asked him to advise it on the EIS Guidelines, Bilcon’s EIS, and DFAIT’s review of Bilcon’s EIS.<sup>295</sup>

219. Professor Winham’s conclusion was that the NAFTA does not compel the export of additional aggregate from future coastal quarries. Professor Winham stated:

This statement is simply not correct. There is nothing in [the] NAFTA that would prevent an independent evaluation, either environmental or otherwise, of a major new commercial activity in the province... the idea that [the] NAFTA requires successive commercial ventures to be approved is simply not valid.<sup>296</sup>

220. Following the receipt of Professor Winham’s report on June 25, 2007, the Panel indicated to him that it would not be necessary for him to participate at the hearings.<sup>297</sup> The CEA Agency then advised DFAIT that the Joint Review Panel did not require DFAIT to review Professor Winham’s report.<sup>298</sup>

221. The Panel also directed DFAIT to address the NAFTA:

The Panel would like the department to present its views on environmental effects associated with the project, with specific reference to any influence that Chapter 11 of the North American Free Trade Agreement may have on the management of the project’s potential environmental effects and the siting of future coastal quarry projects.<sup>299</sup>

222. In response, the Director-General of the Environmental, Energy and Sustainable Development Bureau of DFAIT, Keith Christie, said:

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<sup>294</sup> E-mail from Debra Myles (CEA Agency) to Dr. Gilbert Winham, dated June 13, 2007, stating the issues that the JRP would like him to cover in his presentation. (*Investors’ Schedule of Documents at Tab C 173*).

<sup>295</sup> E-mail from Debra Myles (CEA Agency) to Dr. Gilbert Winham, dated June 13, 2007, stating the issues that the JRP would like him to cover in his presentation. (*Investors’ Schedule of Documents at Tab C 173*).

<sup>296</sup> “Advice on the application and implications of the North American Free Trade Agreement (NAFTA) to the proposed Whites Point Quarry and Marine Terminal Project”, submitted by Dr. Gilbert Winham to the JRP, dated June 25, 2007, at 14-15. (*Investors’ Schedule of Documents at Tab C 174*).

<sup>297</sup> E-mail from Debra Myles (CEA Agency) to Dr. Gilbert Winham, dated June 26, 2007, stating that he would not be required to present at the Joint Review Panel public hearings. (*Investors’ Schedule of Documents at Tab C 175*).

<sup>298</sup> E-mail from Debra Myles (CEA Agency) to Keith Christie (DFAIT), dated July 5, 2007, stating that DFAIT would not be asked to comment on Winham’s report. (*Investors’ Schedule of Documents at Tab C 176*).

<sup>299</sup> Letter from Robert Fournier to Keith Christie (DFAIT), dated May 11, 2007, requesting a presentation at the Whites Point Quarry public hearings. (*Investors’ Schedule of Documents at Tab C 177*).



...it is beyond the scope of this Department's participation in the hearing proceedings to take a position on the potential environmental effects associated with the Whites Point Quarry and Marine Terminal Project or the siting of any future coastal quarry projects.<sup>300</sup>

223. DFAIT had never been requested to participate in a review panel hearing under the CEAA before, nor had it previously intervened in an environmental assessment.

224. Nonetheless, Gilles Gauthier, Director of DFAIT International Trade Policy Division, presented a commentary on Canada's obligations under the NAFTA. With respect to National Treatment, he confirmed:

The object and purpose is to deal with discrimination on the basis of nationality of the enterprise. So that's what we want to avoid by this obligation, it is pure discrimination simply on the fact that the enterprise is owned by an investor of the other country.<sup>301</sup>

225. With respect to Canada's NAFTA obligation to provide Investors with fair and equitable treatment, and full protection and security, he confirmed:

A second important obligation of Chapter 11 is that you need to accord treatment in accordance with international law, including fair and equitable treatment and full protection and security. These are broad terms designed to provide a minimum standard of treatment, so it is an absolute standard. It's not a relative standard like the national treatment, but it is an absolute standard. It's not about a contract dispute of commercial nature. It has got to be anchored into international law, and even more specifically in terms of customary international law. What the jurisprudence says and how this particular test has evolved, it essentially tried to deal with instances where there is a lack of due process, there is a denial of justice, and for instance limitation on the ability of the investor to have recourse to domestic courts in case of a problem. It aims at things that are grossly unfair, you know, capricious, very arbitrary in the decisions of governments.<sup>302</sup>

226. Mr. Gauthier also directed the Panel to NAFTA Article 1105's concept of the reasonable expectations of an Investor:

There is a concept of reasonable expectation of the investor. This is aimed at dealing with situations where there is arbitrariness being invoked, and where the investor was led to believe that if they were continuing to operate under a series of conditions, they would be able to continue their investment, but suddenly there is a change in the measure and therefore that

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<sup>300</sup> Letter from Keith Christie (DFAIT) to Robert Fournier, dated June 5, 2007, discussing the scope of the presentation that DFAIT would make to the Panel at the public hearings. (*Investors' Schedule of Documents at Tab C 178*).

<sup>301</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 16:422. (*Investors' Schedule of Documents at Tab C 156*).

<sup>302</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 18:424. (*Investors' Schedule of Documents at Tab C 156*).

leads to depriving the investor of its rights. And then you have to look at the overall context and purpose of the Government taking action.<sup>303</sup>

227. The Panel Chairman, Robert Fournier, pressed him with questions about whether approval of the Whites Point Quarry would force Canada to approve applications for future coastal quarries:

The first is do provisions under the NAFTA in any way suggest that government approval of a project, such as this one, such as the White Point Quarry and Marine Terminal project, would oblige the Government to permit further coastal quarries? So approving this one, allowing it to go forward, is there implicit in that decision to allow it to go forward... Does it automatically facilitate the development of further coastal quarries?<sup>304</sup>

228. Mr. Gauthier attempted to assure him that was not so:

There is no precedent value in one particular instance versus the other. You need to apply the same framework in each and every instance, that is you have to respect the non-discriminatory obligation, you need to respect the minimum standard of treatment, you need to respect the test of expropriation in every instance. It's not because you have done it once that necessarily it will be relevant to the other.<sup>305</sup>

229. Despite the assurance, Mr. Fournier continued to press the question:

The second question that I have for you is that coastal quarries, which are owned by U.S.-based companies and which ship most of their product to the United States already exist in Nova Scotia and other parts of Canada. Do the past or ongoing environmental assessments and environmental approval of these operations influence or limit conditions of approval that may be imposed by the Whites Point Quarry assessment?<sup>306</sup>

230. Again, Mr. Gauthier answered:

I'm afraid I will probably repeat myself here. It is essentially the same answer here. The obligations of the NAFTA apply to existing projects as well as to future projects. Can you draw inference from the past to decide what to do now? You'll have to assess whether the circumstances are comparable, whether you have gone through the same set of process and

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<sup>303</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 22:428. (*Investors' Schedule of Documents at Tab C 156*).

<sup>304</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 11:434. (*Investors' Schedule of Documents at Tab C 156*).

<sup>305</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 5:435. (*Investors' Schedule of Documents at Tab C 156*).

<sup>306</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 13:435. (*Investors' Schedule of Documents at Tab C 156*).

whether at the end of the day, you feel confident that in your assessment of that particular project, that the requirements of the framework of the NAFTA have been respected.<sup>307</sup>

231. Nonetheless, the Panel concluded in its Report that establishing a coastal quarry in the Digby Neck region would likely induce the further development of quarries in Digby Neck under Canada's regulatory climate:<sup>308</sup>

In the CLC minutes, the Proponent commented that there is an "order of magnitude difference" in the difficulty of obtaining a quarry permit in the United States as compared to in Nova Scotia. If this statement is accurate, the Canadian regulatory climate may induce further development of quarries. The Panel concludes that the establishment of an expanded or additional quarry or quarries is reasonably foreseeable; such possibilities should have been considered in the cumulative effects assessment.<sup>309</sup>

*iv. Minister Thibault*

232. The former federal Fisheries Minister, the Hon. Robert Thibault, who, as DFO minister, had originally sent the Whites Point Quarry to the Panel, testified at the public hearing that he was opposed to the Whites Point Quarry because it would export Canadian rock to the United States:<sup>310</sup>

I think now is the time to look at this seriously, to see whether we want Digby Neck area to be an exporter of rock; whether we want to make that risk.<sup>311</sup>

233. Led by former Minister Thibault, this anti-American sentiment informed all governmental decisions pertaining to the Whites Point Quarry, to the shameful prejudice of Bilcon, throughout the entire environmental assessment process.

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<sup>307</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 22:435. (*Investors' Schedule of Documents at Tab C 156*).

<sup>308</sup> Joint Review Panel Final Report, dated October 23, 2007, at 83. (*Investors' Schedule of Documents at Tab C 34*).

<sup>309</sup> Joint Review Panel Final Report, dated October 23, 2007, at 83. [*emphasis added*] (*Investors' Schedule of Documents at Tab C 34*).

<sup>310</sup> Joint Review Panel Public Hearing Transcript, Vol. 11, dated June 28, 2007, at 2661. (*Investors' Schedule of Documents at Tab C 163*). Robert Thibault's government was defeated by the Conservative Party of Canada in the 2006 Federal election, although he had narrowly gained re-election by a margin of 511 votes. At the time of his presentation before the Joint Review Panel, Thibault was the Member of Parliament for West Nova, the riding where Whites Point Quarry was located; Joint Review Panel Public Hearing Transcript, Vol. 11, dated June 28, 2007, Presentation of Robert Thibault, at 8:2667. (*Investors' Schedule of Documents at Tab C 163*).

<sup>311</sup> Joint Review Panel Public Hearing Transcript, Vol. 11, dated June 28, 2007, Presentation of Robert Thibault, at 22:2663. (*Investors' Schedule of Documents at Tab C 163*).

*v. Presentation of Elizabeth May*

234. The politicization of the Panel's public hearing continued with the testimony of the national leader of the Green Party of Canada, Elizabeth May. Elizabeth May is a vocal advocate against Canada's participation in the NAFTA.<sup>312</sup> Ms. May made written submissions and gave an oral presentation to the Panel, attacking Bilcon.
235. It was unprecedented and extraordinary for a federal party leader to make submissions in an environmental assessment process. She set the tone for her presentation with a declaration at the outset:

I guess I could summarize my presentation. Since the last presenter mentioned that he was not here to condemn the project or the Proponent, I guess I will.<sup>313</sup>

236. Ms. May told the Panel that Bilcon's assessment of the NAFTA was "worthless and misleading".<sup>314</sup> When questioned, she added:

At this point, having spent a good deal of what I laughingly refer to as my free time reading their Environmental Impact Statement, I wouldn't trust Bilcon to put up an ice cream stand next to the highway in this area.<sup>315</sup>

*vi. Post-Hearing Responses to the Panel*

237. At the public hearing, the Panel and the public were able to ask Bilcon questions. Most were answered in the hearing. It also agreed to respond to 30 others after an opportunity to consider them more fully.
238. Bilcon filed a full response to all 30 in June 2007. At no time did the Panel ever ask Bilcon to further address any issue of "community core values".

**G. Joint Review Panel Report Issued**

239. On October 26, 2007, the Joint Review Panel issued its Report.

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<sup>312</sup> The Macleans.ca Interview: Elizabeth May, dated June 7, 2007. (*Investors' Schedule of Documents Tab C 179*).

<sup>313</sup> Joint Review Panel Public Hearing Transcript, Vol. 12, dated June 29, 2007, at 5:2771. (*Investors' Schedule of Documents Tab C 164*).

<sup>314</sup> Joint Review Panel Public Hearing Transcript, Vol. 12, dated June 29, 2007, at 22:2779. (*Investors' Schedule of Documents Tab C 164*).

<sup>315</sup> Joint Review Panel Public Hearing Transcript, Vol. 12, dated June 29, 2007, at 25:2800. (*Investors' Schedule of Documents Tab C 164*).

240. The Report contained a series of recommendations based on novel propositions of environmental law and policy which were totally outside the scope of its Terms of Reference and the legislative framework governing its review. Only one recommendation, that Bilcon's proposed project be rejected, actually related to the Whites Point Quarry itself.

241. All of the other 6 recommendations made by the Panel were broad public policy recommendations:

The Panel recommends that the Province of Nova Scotia develop and implement a comprehensive coastal zone management policy or plan for the Province.

...

Because of the special issues associated with coastal quarries, the Panel recommends a moratorium on new approvals for development along the North Mountain until the Province of Nova Scotia has thoroughly reviewed this type of initiative within the context of a comprehensive provincial coastal zone management policy, and established appropriate guidelines to facilitate decision-making.

...

The Panel recommends that the Province of Nova Scotia develop and implement more effective mechanisms than those currently in place for consultation with local governments, communities and proponents in considering applications for quarry developments.

...

The Panel recommends that the Province of Nova Scotia modify its regulations to require an environmental assessment of quarry projects of any size.

...

The Panel recommends that the Canadian Environmental Assessment Agency develop a guidance document on the application of adaptive management in environmental assessments and in environmental management following approvals.

...

The Panel recommends that Transport Canada revise its ballast water regulations to ensure that ships transporting goods from waters with known risks take appropriate measures to significantly reduce the risk of transmission of unwanted species.<sup>316</sup>

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<sup>316</sup> Joint Review Panel Final Report, dated October 23, 2007 at 104-107. (*Investors' Schedule of Documents at Tab C 34*).

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242. Rather than base its decision on objective environmental factors, the Panel's Report was essentially a political "public interest" analysis, based on the Panel's subjective views of the Whites Point Quarry.<sup>317</sup>
243. The essential basis of the Panel's decision was that the Quarry would have an adverse effect on what it considered to be the "core values" of the surrounding communities.<sup>318</sup>
244. Environmental expert David Estrin also observes that the Panel's Report did not address the prerequisite mitigation measures it was required to do,<sup>319</sup> since a panel can only consider the significance of environmental effects *after* a consideration of mitigation measures.<sup>320</sup>
245. Spread throughout the Report were also "additive" notes, outlined in bold boxes to highlight their prominence in the Panel's considerations:
- "You want to take out little strip of land, a unique piece of land between two beautiful bays, one and one-half miles wide, and blow it up. What have we, the people in this village, done wrong to get this brought on us twice?"<sup>321</sup>
- ...
- "My father, my grandfather, my great-grandfather and me have fished that same stretch of shore, give miles long and about a mile, a mile and a half out, and I see no reason to leave my home and my area because you want rock."<sup>322</sup>
- ...
- "This development is not consistent with our international tourism promotion and positioning as Canada's Seacoast."<sup>323</sup>
246. The Panel also unilaterally deemed itself to be governed by five guiding principles in its decision-making: public involvement, traditional community knowledge, ecosystem approach, sustainable development, and the precautionary principle.<sup>324</sup> None were

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<sup>317</sup> Expert Report of David Estrin at paras. 484, 492, 501-502.

<sup>318</sup> Joint Review Panel Report, dated October 22, 2007 at 14. (*Investors' Schedule of Documents at Tab C 71*).

<sup>319</sup> Expert Report of David Estrin at paras. 364-365, 381.

<sup>320</sup> Expert Report of David Estrin at para. 241.

<sup>321</sup> Joint Review Panel Final Report, dated October 23, 2007 at 69. (*Investors' Schedule of Documents at Tab C 34*).

<sup>322</sup> Joint Review Panel Final Report, dated October 23, 2007 at 76. (*Investors' Schedule of Documents at Tab C 34*).

<sup>323</sup> Joint Review Panel Final Report, dated October 23, 2007 at 78. (*Investors' Schedule of Documents at Tab C 34*).

<sup>324</sup> Joint Review Panel Final Report, dated October 23, 2007 at 18. (*Investors' Schedule of Documents at Tab C 34*).

contained in its Terms of Reference, in the Draft EIS Guidelines or in the governing legislation.

247. From these principles, the Panel purported to create policies that it considered applicable to the assessment process. For example, the Municipality of the District of Digby did not have a municipal planning strategy or land-use bylaw, but the Panel's Report noted that "the community and government have developed a range of planning policies and visions about the *desired* direction for future development."<sup>325</sup> Similarly, the Panel took into account the "Green Plan" that was to position Nova Scotia as "Canada's seacoast."<sup>326</sup>
248. The actual mandate of the Panel, however, was limited to recommendations based on the factors set out in s. 16 of the *CEAA*, and, Part IV of the Nova Scotia *Environment Act*.<sup>327</sup>
249. Instead, the Panel chose other factors.

*i. Precaution and Adaptive Management*

250. The Panel gave its own distorted meaning to the precautionary principle, and in the result imposed a reverse onus on Bilcon to demonstrate, with certainty, how adverse environmental effects could be avoided.<sup>328</sup>
251. The Joint Review Panel's application of the precautionary principle resulted in the Panel faulting Bilcon for providing inadequate information throughout the Panel's "adequacy analysis" discussions. Bilcon was unable to satisfy the reverse onus that was imposed on it by the Joint Review Panel and thus the Joint Review Panel found a lack of adequate information.
252. The Joint Review Panel's interpretation of the precautionary principle resulted in criticism on Bilcon's approach to adaptive management. Adaptive management

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<sup>325</sup> Joint Review Panel Final Report, dated October 23, 2007 at 19. (*Investors' Schedule of Documents at Tab C 34*) [*emphasis added*].

<sup>326</sup> Joint Review Panel Final Report, dated October 23, 2007 at 19. (*Investors' Schedule of Documents at Tab C 34*).

<sup>327</sup> *CEAA*, s. 34 (*Investors' Schedule of Documents at Tab C 255*); Cl. 6.3 of the *Agreement concerning The Establishment of a Joint Review Panel*, dated November 3, 2004, at 5. (*Investors' Schedule of Documents at Tab C 114*).

<sup>328</sup> Joint Review Panel Final Report, dated October 23, 2007, at 20. (*Investors' Schedule of Documents Tab C 34*).

recognizes that a level of uncertainty is inevitable in projects with long life cycles and intends to implement measures to deal with that uncertainty.<sup>329</sup>

253. Then, based on its premise that the Quarry would have an adverse effect on the “core values” of the surrounding communities, which in its view could not be mitigated,<sup>330</sup> the Panel disregarded Bilcon’s adaptive management approach, and led itself in outrageous arrogance to say:

The Panel believes that given the Proponent’s flawed understanding, the eventual application of these tools would potentially negate any positive intention to offset potential environmental impacts.<sup>331</sup>

ii. “Community Core Values”

254. The essential basis of the Panel’s decision was that it determined the core values of the local community were the “defining feature” of Digby Neck.
255. In a radio interview, Panel Chairman Fournier boasted that:

The one that absolutely couldn’t be adjusted was this business of core values ... It would have had such an effect on that environment that it would have changed it forever, and for us that was the determining factor ... Yes, there were people who said this was inappropriate, but I think it was only inappropriate if you judged it against previous reports, because previous reports hadn’t done this.<sup>332</sup>

256. Throughout the entire environmental assessment process, Bilcon was given no indication by the Panel that “community core values” were a factor the Panel was going to consider, let alone that it would be the key criterion on which the Panel would base its entire decision about the Quarry.
257. Reference to “community core values” is nowhere to be found in the EIS Guidelines, the Panel’s Terms of Reference, the CEAA or anywhere else in the regulatory scheme of environmental assessment.
258. The notion of community core values simply gave a group of local activists a veto over the approval of the Quarry, which is exactly what the Panel wanted to achieve. Indeed, Panel Chairman Fournier made it clear that the Panel was not considering whether the

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<sup>329</sup> Expert Report of David Estrin at para. 321, 408.

<sup>330</sup> Joint Review Panel Final Report, dated October 23, 2007, at 14. (*Investors’ Schedule of Documents at Tab C 34*).

<sup>331</sup> Joint Review Panel Final Report, dated October 23, 2007, at 92-93. (*Investors’ Schedule of Documents Tab C 34*).

<sup>332</sup> Transcription of CBC radio interview of Robert Fournier (JRP), dated December 20, 2007. (*Investors’ Schedule of Documents at Tab C 180*).



Bilcon Quarry met rigorous environmental standards, but rather whether any quarry should ever be a part of the community:

Up until now many of these decisions have been made on the basis of rocks and trees and animals, and so forth...A lot of times they have ignored the fact that people are part of that environment...This is a community that has defined itself...as environmentally oriented and it defined itself in such a way as that there really was not very much room there for a quarry.<sup>333</sup>

259. To self-righteously indulge its own ideological biases, the Panel's decision also completely muted and dismissed the views of the entire local community who supported the Quarry: those who signed a Petition in support of the Quarry project; those who participated in a pro-quarry rally; and the resident who held up the sign "Fournier, who will feed my children?"<sup>334</sup>

*iii. NAFTA Cumulative Effects*

260. The Panel concluded that approval of the Whites Point Quarry would lead to more quarries in the future:

"The Bay of Fundy is near a major market for aggregate."<sup>335</sup>  
...

"The Panel accepts the expert advice received, that NAFTA would not influence the establishment of new coastal quarries in the region or government's ability to evaluate such proposals. Nevertheless, the Panel heard evidence from NSDNR [Nova Scotia Department of Natural Resources] pointing to the likelihood of coastal quarries being established within the region."<sup>336</sup>  
...

"There was an obvious fear that establishment of the proposed quarry could lead to similar projects along the Fundy shore of Nova Scotia and possibly other locations along Canada's coasts."<sup>337</sup>  
...

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<sup>333</sup> Transcription of CBC Radio interview of Robert Fournier (JRP), dated December 20, 2007. (*Investors' Schedule of Documents at Tab C 180*).

<sup>334</sup> Petition, filed by Cindy Nesbitt on Day 9 of the Joint Review Panel Public hearings, dated June 26, 2007. (*Investors' Schedule of Documents at Tab C 182*); See also petition and pictures from a public rally in support of the Whites Point Quarry held in Digby on September 27, 2007. (*Investors' Schedule of Documents at Tab C 183*).

<sup>335</sup> Joint Review Panel Final Report, dated October 23, 2007, at 83. (*Investors' Schedule of Documents at Tab C 34*).

<sup>336</sup> Joint Review Panel Final Report, October 23, 2007, at 83. (*Investors' Schedule of Documents at Tab C 34*).

<sup>337</sup> Joint Review Panel Final Report, October 23, 2007, at 128. (*Investors' Schedule of Documents at Tab C 34*).

"Expansion or modification of the Project would likely be seen by many in the community as evidence that their interests and policy decisions are not being respected."<sup>338</sup>

...

"Establishment of other coast quarries on the Bay of Fundy would likely lead to local community responses similar to those that have occurred on Digby Neck and Islands, and could be expected to be adverse."<sup>339</sup>

261. In the result, the Panel concluded that Canada's obligations under the NAFTA would promote approval of other coastal quarries,<sup>340</sup> and cause a cumulative effect, contrary to what it arbitrarily considered to be community core values.

*iv. Use of ANFO*

262. Ammonium Nitrate Fuel Oil (ANFO) is an explosive commonly used by the mining industry.<sup>341</sup> One billion pounds of ANFO were used in the United States in 2005.<sup>342</sup> Environmental effects of ANFO are easily mitigated by appropriate blasting practices.
263. Bilcon proposed the use of ANFO for the Whites Point Quarry.
264. Gordon Revey is a professional engineer who specializes in blasting. He authored *Practical Methods to Reduce Ammonia and Nitrate Levels in Mine Water*<sup>343</sup> which the DFO gave to Bilcon to demonstrate appropriate mitigation methods for the use of ANFO.<sup>344</sup> Based on the ANFO mitigation information it received from the DFO Bilcon adopted the same protocol in its proposed blasting plan.

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<sup>338</sup> Joint Review Panel Final Report, October 23, 2007, at 83. (*Investors' Schedule of Documents at Tab C 34*).

<sup>339</sup> Joint Review Panel Final Report, October 23, 2007, at 83. (*Investors' Schedule of Documents at Tab C 34*).

<sup>340</sup> Expert Report of David Estrin at para. 436, 440.

<sup>341</sup> Assessment of ANFO on the environment: Technical Investigation 09-01, Defence Research and Development Canada, dated January, 2010 at 2. (*Investors' Schedule of Documents at Tab C 398*).

<sup>342</sup> Assessment of ANFO on the environment: Technical Investigation 09-01, Defence Research and Development Canada, dated January, 2010 at 2. (*Investors' Schedule of Documents at Tab C 398*).

<sup>343</sup> *Practical Methods to Reduce Ammonia and Nitrate Levels in Mine Water*, Gordon Revey (1996). (*Investors' Schedule of Documents at Tab C 399*).

<sup>344</sup> Notes from Meeting between the proponent and the Habitat Management Division of the DFO, dated February 7, 2005. (*Investors' Schedule of Documents at Tab C 132*).

265. When the Joint Review Panel raised concerns with Bilcon's use of ANFO, the DFO and Environment Canada said in a Joint response that there would be "little in the way of residual impacts" from the ANFO mitigation strategy proposed by Bilcon.<sup>345</sup>
266. The Panel however, rejected all of the evidence from both Bilcon and the DFO/Environment Canada, and without any factual basis, declared that adverse effects could result from the use of ANFO in blasting.<sup>346</sup>
267. At the Public Hearing, John Melick, a professional engineer who was Bilcon's blasting expert, testified as to the explosives ratio necessary to produce one ton of rock. The Panel did not accept his testimony. The Panel used the incorrect ratio information of one pound of ANFO to produce one ton of aggregate.
268. Instead, the Panel accepted the evidence of Ashraf Mahtab,<sup>347</sup> a retired mining engineer, who was actively opposed to the Quarry, and who admitted that he had no experience in blasting,<sup>348</sup> but claimed the ratio used by Bilcon was not credible.<sup>349</sup>

v. *Factual Errors*

269. The Panel's Report also contained numerous other factual errors. For example:

The Artificial Breakwater

- a) The Joint Review Panel held that the construction of an artificial breakwater at the quarry, "could seriously alter the local marine ecosystem, creating the potential for significant adverse environmental effects. The Panel believes that the sum of these burdens represents a substantial cost for those unlikely to benefit from the Project." An artificial breakwater was never proposed by Bilcon, nor by any government agency. It was simply fiction made up by the Panel and then used to condemn Bilcon's plans.

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<sup>345</sup> Undertaking No. 29 for the Joint Review Panel: to provide, following collaboration with Environment Canada, an assessment of the ecological risks associated the ammonia residuals resulting from blasting and episodic and controlled releases from the project's settling ponds, undated. (*Investors' Schedule of Documents at Tab C 437*).

<sup>346</sup> Joint Review Panel Final Report, dated October 23, 2007 at 31. (*Investors' Schedule of Documents Tab C 34*).

<sup>347</sup> Joint Review Panel Final Report, dated October 23, 2007, at 28. (*Investors' Schedule of Documents Tab C 34*).

<sup>348</sup> Joint Review Panel Public Hearing Transcript, Vol. 10, dated June 27, 2007, at 2425. (*Investors' Schedule of Documents Tab C 109*).

<sup>349</sup> Joint Review Panel Final Report, dated October 23, 2007, at 28-29. (*Investors' Schedule of Documents Tab C 34*).

### The Whites Cove Road

- b) The Joint Panel questioned the economic viability of the Quarry due to the existence of a provincially owned road on the quarry site.<sup>350</sup> Bilcon said it would have no impact on operations.<sup>351</sup> The Nova Scotia Department of Transportation said Bilcon had permission to use the road.<sup>352</sup>

### Particulate Matter

- c) The Panel held that Bilcon would require further mitigation of dust particles because:

High winds could pick up this material, keep it airborne and transport it off the quarry site with eventual deposition in the nearby marine coastal environment, where it could settle to the sea floor to interact with fauna and flora.<sup>353</sup>

This finding, however, is directly contradicted by the Panel's own conclusion that:

Based on tidal current information, the Panel predicts that it is unlikely that dust or sediment produced on the site will accumulate on the sea floor adjacent to the proposed quarry and affect nearby flora, fauna or habitats.<sup>354</sup>

## **H. Ministerial Abdication**

### *i. Provincial Abdication*

270. On October 29,<sup>355</sup> November 8<sup>356</sup> and November 16, 2007,<sup>357</sup> Bilcon wrote to the Nova Scotia Minister of Environment and Labour, Mark Parent, about its concerns with the

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<sup>350</sup> Joint Review Panel Report, dated October 23, 2007, at 13. (*Investors' Schedule of Documents at Tab C 34*).

<sup>351</sup> Joint Review Panel Public Hearing Transcript, Vol. 1, dated June 16, 2007, at 18:149, where Paul Buxton noted: "If that situation stays as it is, then of course we will live with it and we have designed around it, and we feel that we can accommodate it." (*Investors' Schedule of Documents at Tab C 154*).

<sup>352</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 463. (*Investors' Schedule of Documents at Tab C 156*).

<sup>353</sup> Joint Review Panel Final Report, dated October 23, 2007, at 54. (*Investors' Schedule of Documents at Tab C 34*).

<sup>354</sup> Joint Review Panel Final Report, dated October 23, 2007, at 55. (*Investors' Schedule of Documents at Tab C 34*).

<sup>355</sup> Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), dated October 29, 2007, requesting a meeting to discuss the recommendations in the Joint Review Panel Report. (*Investors' Schedule of Documents at Tab C 195*).

<sup>356</sup> Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), dated November 8, 2007, stating the fundamental flaws contained in the Joint Review Panel Report. (*Investors' Schedule of Documents at Tab C 196*).

Panel's processes and decisions. Bilcon asked to meet with the Minister and urged the Minister not to make a decision about the Whites Point Quarry until Bilcon had the opportunity to be heard.<sup>358</sup> The issues that Bilcon raised with the Minister included:

- a) The recommendations made by the Joint Review Panel were not in accordance with the information including expert information, provided to the Panel;
- b) The Panel ignored important scientific and other information provided by Bilcon;
- c) The Panel's recommendations went far beyond the Panel's mandate;
- d) The Panel did not apply the legal and regulatory requirements of the environmental scheme for an assessment;
- e) The Panel's conclusions were not based on science or fact;<sup>359</sup>
- f) The Panel used and applied unknown rules and standards without giving Bilcon any opportunity to address them. In particular, the Panel artificially concocted a concept of 'community core values';
- g) The Panel demonstrated no interest in considering how the project would work, and was only interested in reasons why it might not work;
- h) The Panel's lack of impartiality was reflected in the content and tone of its Report, which demonstrated that the Panel went out of its way to emphasize any possible shortcomings of the project and downplayed the benefits;

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<sup>357</sup> Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), dated November 16, 2007, providing the proponent's opinions on several aspects of the Joint Review Panel Report. (*Investors' Schedule of Documents at Tab C 2*).

<sup>358</sup> Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), dated October 29, 2007, requesting a meeting to discuss the recommendations in the Joint Review Panel Report. (*Investors' Schedule of Documents at Tab C 195*); Witness Statement of Paul Buxton at paras. 81-83.

<sup>359</sup> Letter from David and Linda Graham, Graham's Pioneer Retreat to Debra Myles, (CEA Agency), July 16, 2006. The Panel assumed that the region was untouched, yet there were other quarries in the Digby neck area, such as the Tiverton Quarry and the Roxville Quarry. (*Investors' Schedule of Documents at Tab C 197*). Further, the inbound Bay of Fundy Shipping Lanes are close to Digby Neck ([http://www.rightwhale.ca/images/shippinglanes\\_after\\_hd.jpg](http://www.rightwhale.ca/images/shippinglanes_after_hd.jpg)); See also Letter from Paul Buxton, to The Hon. Mark Parent, Nova Scotia Minister of the Environment, November 16, 2007. (*Investors' Schedule of Documents at Tab C 2*).

- i) That six of the seven recommendations made by the Panel had nothing to do with the Whites Point Quarry, but sought to recommend government policy, completely beyond its Terms of Reference;
  - j) The Panel chose to rule on the assessment, thereby removing the responsible and ministerial authorities' obligation to consider and rule on the Project;<sup>360</sup>
  - k) While the legal and functional role of the Panel was to propose mitigation measures none were recommended. It just dismissed the project completely which was not the Panel's role;
  - l) None of the panel members had qualifications in economics, business, finance or industrial organizations, yet they drew the unsupported conclusion that the project was not economically viable;<sup>361</sup> and
  - m) The Panel ignored the fact that 30 percent of the local population personally petitioned the Minister in favor of the project.
271. For these reasons, Bilcon urged the Minister not to simply 'rubber stamp' the Panel Report without giving Bilcon an opportunity to respond.<sup>362</sup>
272. Bilcon's request was supported by the President of the Mining Association of Nova Scotia, who also wrote to the Premier of Nova Scotia about the flaws in the Panel Report.<sup>363</sup>
273. The Minister refused to meet with Bilcon.

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<sup>360</sup> As Bilcon was required, in any event, to obtain approval from those authorities before a project can commence: Letter from Paul Buxton, to The Hon. Mark Parent, Nova Scotia Minister of the Environment, November 16, 2007. (*Investors' Schedule of Documents at Tab C 2*).

<sup>361</sup> Further, the Joint Review Panel made conclusions as the viability of the project, without having retained any such specialists; Joint Review Panel Final Report, dated October 23, 2007, at 13, 24, 25, 82, 96, 102. (*Investors' Schedule of Documents at Tab C 34*).

<sup>362</sup> Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), dated November 8, 2007, stating the proponent's request to respond to the Joint Review Panel Report prior to the Minister making a final decision. (*Investors' Schedule of Documents at Tab C 196*).

<sup>363</sup> Letter from Gordon Dickie, President of Mining Association of Nova Scotia to Nova Scotia Premier Rodney MacDonald, dated November 19, 2007, requesting that the Nova Scotia government review the documentation that led to the Joint Review Panel Report to see how the report was fundamentally flawed. (*Investors' Schedule of Documents at Tab C 198*).

274. It also turns out that Bilcon's request to meet with the Minister was opposed by a powerful federal Cabinet Minister, Peter MacKay, then the Deputy Leader of the governing Conservative Party of Canada, and the Regional Minister for Nova Scotia. Minister MacKay's sister was also the Executive Assistant to the Environment Minister. Bruce Hood, noted in his journals that the CEA Agency was contacted by Minister MacKay's office, and he indicated that he wanted the Nova Scotia government to "move quickly" on the recommendations of the Panel.<sup>364</sup>
275. After Bilcon's repeated requests to meet with the Nova Scotia Environment Minister, a meeting was eventually set with the Deputy Minister. However, the meeting was indefinitely deferred by the Ministry.<sup>365</sup> No explanation was ever given as to why the Minister or Deputy Minister would not meet with Bilcon.<sup>366</sup>
276. On November 20, 2007, the Nova Scotia Minister of Environment rejected Bilcon's project. No explanation was ever given to Bilcon as to why the project was rejected by the Minister,<sup>367</sup> and the Minister made no attempt to obtain any information from Bilcon, or to assess the finding of the Panel Report that the Minister blindly endorsed.<sup>368</sup>

*ii. Federal Abdication*

277. On November 21, 2007, Bilcon wrote to the federal Minister of the Environment, John Baird, urging him to meet with Bilcon to hear its stated concerns.<sup>369</sup> The Minister did not respond.<sup>370</sup>

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<sup>364</sup> Journal note by Bruce Hood (DFO), Fall 2007, at 801574. (*Investors' Schedule of Documents at Tab C 372*).

<sup>365</sup> Letter from Paul Buxton, to Nancy Vanstone, Deputy Minister (NSDEL), dated January 9, 2008, regarding a meeting that was scheduled with Bilcon. (*Investors' Schedule of Documents at Tab C 199*); Witness Statement of Paul Buxton at para. 84.

<sup>366</sup> Witness Statement of Paul Buxton at para. 84.

<sup>367</sup> Letter from Nancy Vanstone, Deputy Minister (NSDEL) to Paul Buxton, dated January 14, 2008. (*Investors' Schedule of Documents at Tab C 200*); Letter from Paul Buxton, to Nancy Vanstone, Deputy Minister (NSDEL), dated January 16, 2008. (*Investors' Schedule of Documents at Tab C 201*); Letter from Nancy Vanstone, Deputy Minister (NSDEL) to Paul Buxton, dated January 18, 2008. (*Investors' Schedule of Documents at Tab C 202*); Letter from Nancy Vanstone, Deputy Minister (NSDEL) to Paul Buxton, dated June 19, 2008. (*Investors' Schedule of Documents at Tab C 203*); Witness Statement of Paul Buxton at para. 83.

<sup>368</sup> Witness Statement of Paul Buxton at para. 83.

<sup>369</sup> Letter from Paul Buxton, to John Baird, Minister of the Environment, dated November 21, 2007, requesting that a meeting be convened to address the flaws in the Joint Review Panel Report. (*Investors' Schedule of Documents at Tab C 204*).

<sup>370</sup> Witness Statement of Paul Buxton at para. 85.

278. On December 13, 2007, the federal Governor General in Council rejected Bilcon's project on the recommendations of the Minister of Fisheries and Oceans, and the Minister of Transport, Infrastructure and Communities.<sup>371</sup> Again, no reason was ever given to Bilcon as to why the Ministers of those responsible authorities endorsed the Panel's Report without giving Bilcon an opportunity to address Bilcon's concerns.<sup>372</sup>

*iii. Federal Response and Course of Action Following the Joint Review Panel Report*

279. Under s. 37(1.1) of the CEAA, the DFO and Transport Canada – the Responsible Authorities are required to formulate a response to the Panel's Report in accordance with the Canada-Nova Scotia MOU (which established the Joint Review Panel). Section 37 of CEAA in effect at the time prescribed:

37. (1) Subject to subsection (1.1), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to paragraph 23(a), the comprehensive study report:

(a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

(i) the project is not likely to cause significant adverse environmental effects, or

(ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,

the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part and shall ensure that those mitigation measures are implemented; or

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part.

Approval of Governor in Council

(1.1) Where a report is submitted by a mediator or review panel,

(a) the responsible authority shall take into consideration the report and, with the approval of the Governor in Council, respond to the report;

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<sup>371</sup> Order in Council re Approval of the Government of Canada's response to the Environmental Assessment Report of the Review Panel, December 13, 2007. (*Investors' Schedule of Documents at Tab C 205*).

<sup>372</sup> Witness Statement of Paul Buxton at paras. 83, 85.



(b) the Governor in Council may, for the purpose of giving the approval referred to in paragraph (a), require the mediator or review panel to clarify any of the recommendations set out in the report; and

(c) the responsible authority shall take a course of action under subsection (1) that is in conformity with the approval of the Governor in Council referred to in paragraph (a).<sup>373</sup>

280. Canada's responsible authorities after taking into consideration the Panel's Report, had the discretion to permit the project to be carried out if:

(i) The project is not likely to cause significant adverse environmental effects (with or without mitigation); or

(ii) The project is likely to cause significant adverse environmental effects that can be justified in the circumstances.<sup>374</sup>

The Responsible Authorities failed to exercise the discretion they were obligated by law to exercise.<sup>375</sup>

281. Instead, the "Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project", issued on December 17, 2007, said:

The Panel found that the Project would have a significant adverse effect on a valued environmental component represented by the 'core values' of the affected communities. The Panel believes that 'core values' are shared beliefs by individuals within groups, and constitute defining features of communities. It stated that the people of Digby Neck and Islands have developed core values that reflect their sense of place, their desire for self-reliance, and the need to respect and sustain their surrounding environment. The panel concluded, based on an analysis of the burdens and benefits, that the burdens outweighed the benefits and that it would not be in the public interest to proceed with the Whites Point Quarry and Marine Terminal Development.

[...]

The Government of Canada supports the recommendation of the Panel 'that the Project is likely to cause significant adverse environmental effects that, in the opinion of the Panel, cannot be justified in the circumstances.'"

[...]

In preparation of this Government of Canada Response, DFO and TC, as the RAs under CEAA, carefully considered the report submitted by the Joint Review Panel. The Government of Canada

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<sup>373</sup> Expert Report of David Estrin at para. 529.

<sup>374</sup> Expert Report of David Estrin at para. 530.

<sup>375</sup> Expert Report of David Estrin at para. 531.

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.

282. The Federal Response gave no reason or explanation of how or why the responsible authorities concluded that the project could not be justified in the circumstances.<sup>376</sup>

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<sup>376</sup> Expert Report of David Estrin at para. 534.

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### PART THREE: SUBSTANTIVE LEGAL ISSUES

#### I. INTERNATIONAL LAW STANDARD OF TREATMENT

283. NAFTA Article 1105(1) sets out the international law standard of treatment that a Party is obliged to accord to investments of investors of another Party:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

284. NAFTA Article 1105 requires Canada to provide “fair and equitable treatment”. The international law standard is a composite standard; it subsumes within it various duties, including a duty to provide fair and equitable treatment, and a duty to provide full protection and security.<sup>377</sup>
285. The duty to provide treatment that accords with international law (the “international law standard”) is expressly set out in Article 1105. It requires “treatment in accordance with international law”, and its content is informed by international law.
286. The express wording of NAFTA Article 1105, “*in accordance with international law*”, confirms that Canada must provide investments of foreign investors treatment that accords rules and principles established by the four sources of international law as enumerated in Article 38 of the *Statute of the International Court of Justice*. The meaning behind the “international law standard” is therefore determined by reference to customary international law practices, and the many decisions of international tribunals in respect of the overarching international law obligation to act in *good faith*.<sup>378</sup>
287. The International Law Commission’s (ILC) Commentary on Article 27(3)(a) of the draft *Vienna Convention*, (which became Article 31(3)(a) of the adopted *Vienna Convention*) states that: “an agreement as to the interpretation of a provision reached after the

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<sup>377</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 2006 WL 2095870 (July 14, 2006), at para. 407. (*Investors’ Book of Authorities at Tab CA 1*); *National Grid Plc v. Argentine Republic*, UNCITRAL Arbitration, Award, 2008 WL 5819369 (November 3, 2008) at paras. 187-189. (*Investors’ Book of Authorities at Tab CA 2*).

<sup>378</sup> Appendix I to this Memorial sets out the applicable rules for the interpretation of the NAFTA.

conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation”.<sup>379</sup>

288. The Free Trade Commission (FTC) encompasses the three NAFTA State parties, and has the mandated authority to resolve disputes that may arise regarding interpretation or application of the NAFTA. NAFTA Article 1131 (2), provides that:

... An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

#### **A. The Protection of Customary International Law**

289. NAFTA Article 1105 sets out a standard of treatment that includes, at a minimum, a requirement that Canada follow customary international law.
290. By their acceptance to be bound by customary international law in NAFTA Article 1105, the NAFTA Parties accepted the international law standard of treatment. NAFTA Article 1105 incorporates the existing customary international law standard into the treaty. Determining the content of that NAFTA Article 1105 international law standard is not an issue of proving the existence of custom. It is, rather, a matter of interpreting the content of the international law standard as incorporated into the treaty by the NAFTA parties. This interpretive exercise obviously entails drawing on tribunal rulings that address the content of this obligation, which includes custom, including that custom which has been incorporated into other similarly worded treaties such as Bilateral Investment Treaties.
291. In supporting this approach, the *Mondev* Tribunal said:

... the question is not that of a failure to show *opinio juris* or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?<sup>380</sup>

292. The *Mondev* Tribunal went on to say that “the standard of treatment, including fair and equitable treatment, and full protection and security, is to be found by reference to the normal sources of international law determining the minimum standard of treatment of

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<sup>379</sup> Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999, at 1045, at para. 49 (*Investors’ Book of Authorities at Tab CA 136*); citing to *Yearbook of the International Law Commission, 1966*, Vol. II, at 221, para. 14.

<sup>380</sup> *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 2002 WL 32841359 (October 11, 2002) at para. 113. (*Investors’ Book of Authorities at Tab CA 40*).

foreigners.”<sup>381</sup> The Tribunal then drew the content of customary international law from international decisions, including the NAFTA *Azinian* decision.<sup>382</sup> The subsequent *ADF* NAFTA Tribunal specifically endorsed the *Mondev* tribunal’s conclusion that the content of customary international law can be sourced through international tribunal decisions, and that it is not necessary to specifically prove the elements of practice and *opinio juris*.<sup>383</sup>

293. International tribunal decisions are therefore a legitimate source of the content of customary international law.

294. Tribunals, NAFTA and non-NAFTA alike, have also recognized that the customary international law standard has been influenced by the many bilateral investment treaties obliging states to provide fair and equitable treatment and full protection and security. The *Mondev* Tribunal, for example, said:

In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for ‘fair and equitable’ treatment of, and for ‘full protection and security’ for, the foreign investor and his investments.<sup>384</sup>

295. The *Mondev* Tribunal’s comments echo those of the *Pope & Talbot* NAFTA Tribunal, which said:

Canada’s views on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated; however, the true number, now acknowledged by Canada, is in excess of 1800. Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties.<sup>385</sup>

296. The *CMS v. Argentina* Tribunal reached a similar conclusion, holding that the customary international law standard of treatment mandated “fair and equitable treatment”, and

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<sup>381</sup> *Mondev International*, Award, at para. 120. (*Investors’ Book of Authorities* at Tab **CA 40**).

<sup>382</sup> *Mondev International*, Award, at paras. 126- 127. (*Investors’ Book of Authorities* at Tab **CA 40**).

<sup>383</sup> *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 2003 WL 24083234 (January 9, 2003) at para. 184: “We understand *Mondev* to be saying - and we would respectfully agree with it - that any general requirement to accord ‘fair and equitable treatment’ and ‘full protection and security’ must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law.” (*Investors’ Book of Authorities* at **CA 9**).

<sup>384</sup> *Mondev International*, Award, at para. 125. (*Investors’ Book of Authorities* at Tab **CA 40**).

<sup>385</sup> *Pope & Talbot Inc v. Government of Canada*, NAFTA-UNCITRAL Investor-State Claim, Award on Damages, 2002 WL 32824211 (May 31, 2002) at para. 62 [emphasis added]. (*Investors’ Book of Authorities* at Tab **CA 39**).

“full protection and security.” The Tribunal said “... the Treaty standard of fair and equitable treatment ... is not different from the international law minimum standard and its evolution under customary law.”<sup>386</sup>

297. Judge Stephen Schwebel, former President of the International Court of Justice, has expressed the same view, stating that “when BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.”<sup>387</sup>

## **B. Fair and Equitable Treatment**

### *i. The Elements of Fair & Equitable Treatment*

298. The duty to act in good faith is “the” fundamental norm underpinning international legal responsibility.<sup>388</sup> The International Court of Justice acknowledged that the good faith principle is “one of the basic principles governing the creation and performance of legal obligations.”<sup>389</sup> Not surprisingly, the overarching duty of good faith is the touchstone for much of the content of the international law standard, including its requirements of fair and equitable treatment, and full protection and security.<sup>390</sup>
299. Governments are expected to observe their obligations in good faith. “*Pacta sunt servanda*”, Article 26 of the *Vienna Convention* provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>391</sup> The

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<sup>386</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 2005 WL 1201002 (May 12, 2005) at para. 284. (*Investors’ Book of Authorities at Tab CA 20*).

<sup>387</sup> Schwebel S., *The Influence of Bilateral Investment Treaties on Customary International Law* (2004) at 29-30. (*Investors’ Book of Authorities at Tab CA 42*).

<sup>388</sup> Franck, T. *Fairness in International Law and Institutions* (Clarendon Press, 1995) at 42 - 43. (*Investors’ Book of Authorities at Tab CA 3*).

<sup>389</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, at 268, para. 46 (“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. ... Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration”). (*Investors’ Book of Authorities at Tab CA 113*).

<sup>390</sup> O’Connor, J. F., *Good Faith in International Law* (Dartmouth: 1991) at 107. (*Investors’ Book of Authorities at Tab CA 4*).

<sup>391</sup> *Vienna Convention on the Law of Treaties* (1969) (*Investors’ Book of Authorities at Tab CA 44*).

Preamble to the *Vienna Convention* also notes: “that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.”

300. Bin Cheng has noted the *pacta sunt servanda* principle is founded in good faith. He said that the principle is “but an expression of the principle of good faith which above all signifies the keeping of faith, the pledged faith of nations, as well as that of individuals.”<sup>392</sup> Article 26 of the *Vienna Convention*, entitled “*Pacta sunt servanda*”, provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>393</sup> The *Vienna Convention* preamble notes: “that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.”

301. The duty of good faith and the duty to provide fair and equitable treatment are inter-related as fundamental principles of the international law standard. Dr. Mann draws from the fair and equitable standard’s foundations in the fundamental peremptory norm of good faith to designate it as the pre-eminent substantive standard in investment treaties:

... it is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment .... So general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that other provisions of the Agreements affording substantive protection are no more than examples of specific instances of this overriding duty.<sup>394</sup>

302. Modern investor-state tribunals have endorsed Dr. Mann’s views. The *S.D. Myers* Tribunal said of the fair and equitable treatment standard that:

Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, *obligations of good faith* and natural justice.<sup>395</sup>

303. Several Tribunals have considered the good faith principle interpreting the treaty obligation to provide the fair and equitable treatment standard:

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<sup>392</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius: Cambridge, 1987) at 113. (*Investors’ Book of Authorities at Tab CA 75*).

<sup>393</sup> *Vienna Convention on the Law of Treaties* (1969) (*Investors’ Book of Authorities at Tab CA 44*)

<sup>394</sup> Mann, F.A. “British Treaties for the Promotion and Protection of Investments”, 52 *British Yearbook of International Law* 241 (1981) at 243. (*Investors’ Book of Authorities at Tab CA 5*).

<sup>395</sup> *S.D. Myers, Inc. v. Government of Canada*, First Partial Award, 2000 WL 34510032 (November 13, 2000) at para. 134 [*emphasis added*]. (*Investors’ Book of Authorities at Tab CA 6*).

- a) The *Tecmed* Tribunal said that “the commitment of fair and equitable treatment included in Article 4(1) of the [Spain-Mexico] Agreement is an expression and part of the *bona fide* principle recognized in international law.”<sup>396</sup>
- b) The *Eureko v. Poland* Tribunal endorsed the *Tecmed* Tribunal’s reliance on the good faith principle in interpreting the obligation to provide fair and equitable treatment.<sup>397</sup>
- c) The Tribunal in *Saluka v. The Czech Republic* held that a foreign investor was entitled to expect a State:

... implements its policies *bona fide* by conduct that is, as far as it affects the investor’s investment, reasonable justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination [*emphasis added*].<sup>398</sup>

ii. *Fairness and Reasonableness*

- 304. NAFTA Article 1105 contains an explicit reference to the “fair and equitable treatment” standard, and, consequently, confirms that treatment be in accordance with the requirements of *jus aequum* – fairness and reasonableness.
- 305. The principles of fair and equitable treatment have been considered by the Appellate Body of the World Trade Organization, and the United Nations Human Rights Committee. For example, the U.N. Human Rights Committee considering application of the *International Covenant on Civil and Political Rights*, found that in order for a regulatory scheme not to be considered arbitrarily imposed, it must be specific, fair and reasonable, and its application must be transparent.<sup>399</sup>

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<sup>396</sup> *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 2003 WL 24038436 (May 29, 2003) at para. 153. (*Investors’ Book of Authorities at Tab CA 7*).

<sup>397</sup> *Eureko B.V. v. Republic of Poland*, Partial Award, 2005 WL 2166281 (19 August 2005) at para. 235: “The Tribunal finds apposite the words of an ICSID Tribunal in a recent decision that the guarantee of fair and equitable treatment according to international law means that: “ ... this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment...” (*Investors’ Book of Authorities at Tab CA 8*); *TECMED S.A.*, Award, at para. 154. (*Investors’ Book of Authorities at Tab CA 7*).

<sup>398</sup> *Saluka Investments B.V. v. Czech Republic*, UNCITRAL Arbitration Rules, Partial Award, 2006 WL 1342817 (March 17, 2006) at para. 307. (*Investors’ Book of Authorities at Tab CA 101*).

<sup>399</sup> United Nations, Human Rights Committee, *Communications No. 633/1995: Canada 05/05/99*, CCPR/C/D/633/1995 at para. 13.6. (*Investors’ Book of Authorities at Tab CA 123*).



306. In the *Shrimp –Turtle* case, the Appellate Body decided:

For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement.<sup>400</sup>

The Appellate Body further indicated that if a regulatory measure is applied too rigidly or inflexibly it may constitute “arbitrary discrimination”.<sup>401</sup>

307. The broad applicability of the fair and equitable treatment standard has, consequently, linked the standard with international law principles, and has connected the standard with other absolute principles, such as Most Favored Nation Treatment, and National Treatment. This is explicitly confirmed in NAFTA Article 102, which requires that the Tribunal elaborate the NAFTA. In their treatise on bilateral investment treaties, Dolzer and Stevens confirm that investment treaties that refer to international law, in addition to the fair and equitable treatment, “reaffirm that international law standards are consistent with, but complementary to, the provisions of the [treaty].”<sup>402</sup>
308. The concepts of fairness and equity remain at the core of international law. These concepts are applied repeatedly by judges and arbitrators. The Permanent Court of Justice opined that what are “widely known as principles of equity have long been considered to constitute part of international law, and as such they have often been applied in international tribunals.”<sup>403</sup>
309. Prof. Kenneth J. Vandeveld was an author of certain US Model Bilateral Investment Treaties which formed the drafting foundation of the NAFTA. Prof. Vandeveld wrote a

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<sup>400</sup> *United States-Import Prohibitions of Certain Shrimp and Shrimp Products (US-Shrimp)*, WT/DS58/AB/R, circulated on October 12, 1998 at para. 186 (citing Appellate Body Report, *US-Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, at 30.). (*Investors’ Book of Authorities at Tab CA 124*).

<sup>401</sup> *US-Shrimp*, at paras. 177-180. (*Investors’ Book of Authorities at Tab CA 124*).

<sup>402</sup> Dolzer, R. & Stevens, M., *Bilateral Investment Treaties* (London: Martinus Nihoff Publishers, 1995) at 60. (*Investors’ Book of Authorities at Tab CA 10*).

<sup>403</sup> Individual Opinion of Judge Hudson, *Diversion of Water from the Meuse Case* (Netherlands v. Belgium). [1937], P.C.I.J. (Ser. A/B) No. 70. at 321 (*Investors’ Book of Authorities at Tab CA 118*)

treatise examining the investment treaty practice of the United States. In relation to the NAFTA Article 1105, Prof. Vandevelde observed:

... the standard is breached not only by acts of bad faith, but by any conduct that is not fair and equitable. Even the weakest reading of the terms “fair and equitable would seem to require more than a mere avoidance of outrage and bad faith. In the absence of the reference to fair and equitable treatment, Article 1105 might have been interpreted to prohibit only outrageous conduct.”<sup>404</sup>

310. The *Pope & Talbot* Tribunal found that the “fair and equitable treatment” standard was a standard separate to that provided by international law, to be interpreted according to the ordinary meaning of those words. According to the *Pope & Talbot* Tribunal, fair and equitable treatment obliged the NAFTA Parties to provide the international law standard, as well as to act fairly and equitably.<sup>405</sup>
311. Prof. Vandevelde suggests that the principle of reasonableness “requires that host State treatment of covered investment be reasonably related to a legitimate public policy objective.”<sup>406</sup> The concept of “reasonableness” requires that treaty protection of an Investor’s interests will be violated by arbitrary, discriminatory conduct, particularly that which is motivated by animus against the Investor’s investment.<sup>407</sup>
312. The Tribunal in *Genin* clarified that “a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith” does not constitute legitimate regulatory conduct.<sup>408</sup> In *ADF Group*, the NAFTA Tribunal observed that it was examining the action of the host State for actions that are characterized as “idiosyncratic or aberrant and arbitrary” and that are deemed “grossly unfair and unreasonable.”<sup>409</sup>

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<sup>404</sup> Kenneth J. Vandevelde, *Bilateral Investment Treaties, History, Policy, and Interpretation* (Oxford: Oxford University Press, 2010) at 193. (*Investors’ Book of Authorities at Tab CA 98*).

<sup>405</sup> *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, 2001 WL 34776948 (April 10, 2001) at paras. 111 and 113. (*Investors’ Book of Authorities at Tab CA 12*).

<sup>406</sup> Kenneth J. Vandevelde, “A Unified Theory of Fair and Equitable Treatment”, 43 *New York University Journal of International Law and Politics* (2010) at 104. (*Investors’ Book of Authorities at Tab CA 103*).

<sup>407</sup> Vandevelde, “A Unified Theory of Fair and Equitable Treatment”, at 104. (*Investors’ Book of Authorities at Tab CA 103*).

<sup>408</sup> *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 2001 WL 34788584 (June 25, 2001) at para. 367. (*Investors’ Book of Authorities at Tab CA 112*).

<sup>409</sup> *ADF Group*, Award, at paras. 188,189. (*Investors’ Book of Authorities at Tab CA 9*).

313. As to the meaning of the “reasonableness” standard, the Tribunal explained in *Saluka Investments*:

The standard of “reasonableness” has no different meaning in this context than in the context of the “fair and equitable treatment” standard with which it is associated; and the same is true with regard to the standard of “non-discrimination”. The standard of “reasonableness” therefore requires, in this context as well, a showing that the State’s conduct bears a reasonable relationship to some rational policy, whereas the standard of “non-discrimination” requires a rational justification of any differential treatment of a foreign investor.<sup>410</sup>

The Tribunal concluded that in applying the “fair and equitable treatment standard” arising under an investment treaty, it would have “due regard to all relevant circumstances” to protect a foreign investor’s interests because a host State can not act in a way that is “manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions).<sup>411</sup>

314. As to conduct motivated by anti-investor animus, the NAFTA Tribunal in *Chemtura* considered that “thwart[ing] or improperly influenc[ing]” a regulatory review process would violate the international law standard of treatment under NAFTA Article 1105.<sup>412</sup>

315. The NAFTA Tribunal in the *Waste Management (II)* case provided a summary of the jurisprudence regarding the meaning of fair and equitable treatment:

...fair and equitable treatment is infringed by conduct attributable to the state and harmful to the claimant if the conduct is *arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory* and exposes the claimant to *sectional or racial prejudice*, or involves a *lack of due process* leading to an outcome that *offends judicial propriety* - as might be the case with a *manifest failure* of natural justice in judicial proceedings or a complete *lack of transparency and candour in an administrative process*. In applying this standard, it is relevant that the treatment is in breach of representations made by the host state which were reasonably relied on by the claimant.<sup>413</sup>

316. The *Biwater Gauff* Tribunal considered a dispute arising under the United Kingdom-Tanzania BIT. It held that fair and equitable treatment includes the protection of legitimate expectations, good faith, transparency, consistency and nondiscrimination.<sup>414</sup>

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<sup>410</sup> *Saluka*, Partial Award, at para. 460. (*Investors’ Book of Authorities at Tab CA 101*).

<sup>411</sup> *Saluka*, Partial Award, at para. 309. (*Investors’ Book of Authorities at Tab CA 101*).

<sup>412</sup> *Chemtura Corporation v. Government of Canada*, Ad Hoc UNCITRAL (NAFTA) Award (August 3, 2010) at para. 160. (*Investors’ Book of Authorities at Tab CA 111*).

<sup>413</sup> *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 2004 WL 3249803 (April 30, 2004) at para. 98. [*emphasis added*] (*Investors’ Book of Authorities at Tab CA 100*).

<sup>414</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22 (July 24, 2008) at para. 602. (*Investors’ Book of Authorities at Tab CA 99*).

The *Biwater Gauff* Tribunal outlined the specific components of the standard for fair and equitable treatment as comprising a number of different components:

- a. Denials of justice
- b. Protection of legitimate expectations, such as the reasonable and legitimate expectations taken into account by the foreign investor to make the investment, and were relied upon by the investor to make the investment.<sup>415</sup>
- c. Good faith, which includes the general principle as recognized in international law whereby all contracting parties must act in good faith, although a violation of this principle would not require bad faith on the part of the State.<sup>416</sup>
- d. Transparency, consistency, non-discrimination, which implies that the conduct of the State must be transparent,<sup>417</sup> consistent<sup>418</sup> and non-discriminatory, that is, “not based on unjustifiable distinctions or arbitrary.”<sup>419</sup>

317. In *Rumeli Telekom v. Kazakhstan*, the Tribunal observed that the parties had agreed that the fair and equitable treatment standard encompasses certain concrete principles:

- a. The state must act in a transparent manner;
- b. The state is obliged to act in good faith;
- c. The state’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;
- d. The state must respect procedural propriety and due process.

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<sup>415</sup> *Waste Management (II)*, Award, at para. 98. (*Investors’ Book of Authorities at Tab CA 100*).

<sup>416</sup> *Waste Management (II)*, Award (*Investors’ Book of Authorities at Tab CA 100*); *Saluka*, Partial Award, at para. 303. (*Investors’ Book of Authorities at Tab CA 101*).

<sup>417</sup> *Saluka*, Partial Award, at para. 98. (*Investors’ Book of Authorities at Tab CA 100*); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration Rules, Final Award, 2003 WL 24070172 (March 14, 2003) at para 611 (*Investors’ Book of Authorities at Tab CA 102*); *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 2000 WL 34513944 (November 9, 2000) at para. 83 (*Investors’ Book of Authorities at Tab CA 55*); *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 2000 WL 34514285 (August 30, 2000) (*Investors’ Book of Authorities at Tab CA 16*).

<sup>418</sup> *Saluka*, Partial Award, at para. 164. (*Investors’ Book of Authorities at Tab CA 101*); *CME Czech Republic*, Final Award, at para. 611. (*Investors’ Book of Authorities at Tab CA 102*).

<sup>419</sup> *Saluka*, Partial Award, at para. 164. (*Investors’ Book of Authorities at Tab CA 101*); *Waste Management (II)*, Award, at para. 98. (*Investors’ Book of Authorities at Tab CA 100*); *CME Czech Republic*, Final Award, at para. 611. (*Investors’ Book of Authorities at Tab CA 102*).

318. The *Rumeli* Tribunal also held that fair and equitable treatment also included an obligation that the State respect the investor's reasonable and legitimate expectations.<sup>420</sup>
319. International investment tribunals have interpreted the fair and equitable treatment standard as requiring adherence to five core investment treaty principles: reasonableness, security, nondiscrimination, transparency, and due process.<sup>421</sup> These five principles have been interpreted as requiring treatment consistent with *the rule of law*.<sup>422</sup>

*iii. Treatment Free from Arbitrary Conduct*

320. A state breaches customary international law obligations when it acts arbitrarily. A state, therefore, breaches its customary international law obligation when it acts on "prejudice or preference rather than on reason or fact."<sup>423</sup> As stated by the Tribunal in the *CMS v. Argentina* Award, "[t]he standard of protection against arbitrariness ... is related to that of fair and equitable treatment. Any measure that might involve arbitrariness ... is in itself contrary to fair and equitable treatment."<sup>424</sup>
321. The United States – Panama Claims Commission in the *de Sabla* case held that a country fails to accord a minimum standard of treatment to a foreign national where it imposes a measure affecting private interests that was not transparent or properly administered.<sup>425</sup> Arbitrariness either by design or in application is a hallmark of a violation of the customary international law standard of treatment owed by countries to foreign nationals operating within their territory.
322. NAFTA Tribunals have found arbitrary measures to constitute a breach of the international law standard. The *Waste Management (II)* NAFTA Tribunal surveyed

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<sup>420</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 2008 WL 4819868 (July 29, 2008) at para. 609. (*Investors' Book of Authorities at Tab CA 59*).

<sup>421</sup> Vandevelde, "A Unified Theory of Fair and Equitable Treatment", at 105 (*Investors' Book of Authorities at Tab CA 103*).

<sup>422</sup> Vandevelde, "A Unified Theory of Fair and Equitable Treatment", at 105 (*Investors' Book of Authorities at Tab CA 103*).

<sup>423</sup> *Lauder v. Czech Republic*, Final Award, 2001 WL 34786000 (3 September 2001) at para. 221. (*Investors' Book of Authorities at Tab CA 17*)

<sup>424</sup> *CMS Gas*, Award, at 290. (*Investors' Book of Authorities at Tab CA 20*).

<sup>425</sup> *de Sabla v. Panama (USA v Panama)* (1934) 28 AJIL 602; (1933) 6 RIAA 358 at 362-363. (*Investors' Book of Authorities at Tab CA 121*).

NAFTA jurisprudence on the test to constitute a breach of NAFTA. The NAFTA Tribunal stated:

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed... if the conduct is arbitrary...<sup>426</sup>

323. The *Metalclad* NAFTA Tribunal considered a claim that Mexico breached its fair and equitable treatment obligation through the actions of one of its municipalities. The municipality in question was only legally allowed to consider construction issues when granting or denying building permits. The municipality exceeded that authority when it refused the investor's permit on environmental grounds.<sup>427</sup> In finding that this conduct amounted to a breach of the fair and equitable treatment standard, the NAFTA Tribunal said:

None of the reasons [for refusing the permit] included a reference to any problems associated with the physical construction of the landfill or to any physical defects therein. The Tribunal therefore finds that the construction permit was denied without any consideration of, or specific reference to, construction aspects or flaws of the physical facility.<sup>428</sup>

324. In finding that Mexico breached the international law standard of treatment by refusing on irrelevant grounds to issue a permit to construct a landfill, the *Metalclad* NAFTA Tribunal also held that arbitrary conduct breaches international law obligation when conduct is based on *improper or irrelevant considerations*.<sup>429</sup> For example, the Tribunal noted that "the construction permit was denied without any consideration of, or specific reference to, construction aspects or flaws of the physical facility."<sup>430</sup> With respect to the importance of irrelevant considerations, the *Metalclad* NAFTA Tribunal held:

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<sup>426</sup> *Waste Management (II)*, Award, at para. 98. (*Investors' Book of Authorities at Tab CA 100*).

<sup>427</sup> The *Metalclad* tribunal said at para. 86: "Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site." *Metalclad*, Award, (*Investors' Book of Authorities at Tab CA 16*)

<sup>428</sup> *Metalclad*, Award, at paras. 92 - 93 [*emphasis added*]. (*Investors' Book of Authorities at Tab CA 16*).

<sup>429</sup> *Metalclad*, Award, at para. 86. (*Investors' Book of Authorities at Tab CA 16*).

<sup>430</sup> *Metalclad*, Award, at para. 93. (*Investors' Book of Authorities at Tab CA 16*).

... the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations ... was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site.<sup>431</sup>

The NAFTA Tribunal went on to conclude that "Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105."<sup>432</sup>

325. The *S.D. Myers* NAFTA Tribunal found that the level of treatment that violates Article 1105 occurs "when it is shown that an investor has been treated in such an *unjust or arbitrary* manner that the treatment rises to the level that is unacceptable from the international perspective."<sup>433</sup> The Award in *S.D. Myers* indicated:

In some cases, the breach of international law by a host Party may not be decisive in determining that a foreign investor has been denied '*fair and equitable treatment*', but the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favor of finding a breach of Article 1105 (emphasis in original).<sup>434</sup>

326. Other investor-state tribunals have similarly concluded that a state acts arbitrarily when it acts on the basis of prejudice or preference, and not on reason or fact.

- a) In *Lauder v. Czech Republic*, for example, the ICSID Tribunal found an arbitrary measure to be something founded on prejudice or preference rather than reason or fact.<sup>435</sup> The Tribunal held:

... The measure was arbitrary because it was not founded on reason or fact, nor on the law ... but on mere fear reflecting national preference.<sup>436</sup>

- b) The *Pope & Talbot* NAFTA Tribunal also found Canada breached the international law standard by acting on prejudice rather than on reason or fact. Canada breached the obligation by threatening the investor, denying its "reasonable requests for pertinent information" and requiring the investor "to incur

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<sup>431</sup> *Metalclad*, Award, at paras. 86 and 101. (*Investors' Book of Authorities at Tab CA 16*).

<sup>432</sup> *Metalclad*, Award, at para. 101. (*Investors' Book of Authorities at Tab CA 16*).

<sup>433</sup> *S.D. Myers*, First Partial Award, at para. 263. (*Investors' Book of Authorities at Tab CA 6*).

<sup>434</sup> *S.D. Myers*, First Partial Award, at para. 264. (*Investors' Book of Authorities at Tab CA 6*).

<sup>435</sup> *Lauder*, Final Award, at paras. 221 and 232. (*Investors' Book of Authorities at Tab CA 17*). At para 231 the Tribunal said: "The Treaty does not define an arbitrary measure. According to Black's Law Dictionary, arbitrary means 'depending on individual discretion; ... founded on prejudice or preference rather than on reason or fact'...."

<sup>436</sup> *Lauder*, Final Award, at paras. 221 and 232. (*Investors' Book of Authorities at Tab CA 17*).

unnecessary expense and disruption in meeting SLD's requests for information."<sup>437</sup>

- c) In finding that Poland failed to provide fair and equitable treatment, the Tribunal for the *Eureko B.V. v. Republic of Poland* case, said Poland "acted not for cause but for purely arbitrary reasons ..."<sup>438</sup>
- d) The *Occidental* Tribunal also found that Ecuador breached its obligation to provide fair and equitable treatment by acting in an arbitrary manner.<sup>439</sup>
- e) As observed by the *CMS Gas* Tribunal "[a]ny measure that might involve arbitrariness ... is in itself contrary to fair and equitable treatment."<sup>440</sup>
- f) The Tribunal in *National Grid v. Argentina* held that the words "arbitrary" and "unreasonable" are coterminous, and that they mean "something done capriciously, without reason."<sup>441</sup>

These cases demonstrate comprehensive support among tribunals for interpreting the fair and equitable treatment obligation as inclusive of an independent obligation not to act arbitrarily against investors from other NAFTA parties.

327. As to the factors that may include arbitrary actions, the Tribunal in *Genin* deemed the decision by the State to withdraw a license as justified. In concluding this, the Tribunal observed that a violation of the investment treaty would occur when any procedural irregularity amounted to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action.<sup>442</sup> The Tribunal did not find these factors present in the

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<sup>437</sup> *Pope & Talbot*, Award on Merits of Phase 2, at paras. 177-181. (*Investors' Book of Authorities at Tab CA 12*).

<sup>438</sup> *Eureko B.V.*, Partial Award, at para. 233. (*Investors' Book of Authorities at Tab CA 8*).

<sup>439</sup> *Occidental Production Company v. Republic of Ecuador*, UNCITRAL Arbitration Rules, Final Award, 2004 WL 3267260 (July 1, 2004) at para. 163, finding that the investor: ... was confronted with a variety of practices, regulations and rules dealing with the question of VAT. ... this resulted in a confusing situation ... it is that very confusion and lack of clarity that resulted in some form of arbitrariness ..." (*Investors' Book of Authorities at Tab CA 18*). *International Thunderbird Gaming Corporation v. United Mexican States*, Award, 2006 WL 247692 (January 26, 2006) (*Investors' Book of Authorities at Tab CA 19*); *Metalclad*, Award, at para. 99 (*Investors' Book of Authorities at Tab CA 16*); *CMS Gas*, Award at para. 290 (*Investors' Book of Authorities at Tab CA 20*); *TECMED S.A.*, Award, at para. 154. (*Investors' Book of Authorities at Tab CA 7*).

<sup>440</sup> *CMS Gas*, Award, at para. 290. (*Investors' Book of Authorities at Tab CA 20*).

<sup>441</sup> *National Grid*, Award, at para. 197. (*Investors' Book of Authorities at Tab CA 2*).

<sup>442</sup> *Genin*, Award, at para. 371 (*Investors' Book of Authorities at Tab CA 112*).



dispute, and therefore concluded that the decision by the Bank of Estonia to withdraw a banking license was not in that case arbitrary.<sup>443</sup>

328. The NAFTA Tribunal in *Metalclad* considered whether the denial of a construction permit to the Investor was a breach of the fair and equitable treatment standard. The NAFTA Tribunal observed that the “permit had been denied at a meeting of the Municipal Town Council of which Metalclad had received no notice, to which it received no invitation, and at which it was given no opportunity to appear.”<sup>444</sup>

*iv. Treatment Free from Discriminatory Conduct*

329. The Tribunal in *LG&E* found that the obligation not to discriminate against foreign investors, in the context of investment treaties, is such that “a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect.”<sup>445</sup>
330. As stated by the Chamber of the International Court of Justice in the *ELSI* case, a measure is discriminatory, if there is:
- a) an intentional treatment;
  - b) in favor of a national
  - c) against a foreign investor, and
  - d) that is not taken under similar circumstances against another national.<sup>446</sup>
331. The Tribunal in *Lauder* held that the fair and equitable treatment standard will “prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances”.<sup>447</sup>

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<sup>443</sup> The tribunal in *Genin* at para. 98 notes the comparison to *Amco Asia Corp. v. Indonesia*, Final Award of 5 June 1990, at 77-105 (following *ELSI* and finding that procedural irregularities amounted to a denial of justice in the circumstances of that case) - *Genin*, Award (*Investors’ Book of Authorities at Tab CA 112*); citing to *Elettronica S.p.A. (ELSI)*, (*United States of America v. Italy*), Judgment, I.C.J. Reports 1989 (20 July 1989) at 15, 73-77 (*Investors’ Book of Authorities at Tab CA 105*).

<sup>444</sup> *Metalclad*, Award, at para. 88. (*Investors’ Book of Authorities at Tab CA 16*).

<sup>445</sup> *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 2006 WL 2985837 (October 3, 2006) at para. 146 (*Investors’ Book of Authorities at Tab CA 104*) - citing Vandevelde, Kenneth J., *United States Investment Treaties: Policy and Practice*, Kluwer Law and Taxation, 1992, at 77.

<sup>446</sup> *ELSI*, at 61-62. (*Investors’ Book of Authorities at Tab CA 105*)

332. Iona Tudor observed that “a discriminatory treatment would be sufficient to find a breach of [fair and equitable treatment].”<sup>448</sup>
333. NAFTA Tribunals have found that NAFTA Article 1105 extends to discrimination. In *Loewen*, an arbitration arose out of prior litigation where the Canadian investor was sued by Americans in a Mississippi state court. The Claimants claimed that the “trial judge refused to give an instruction to the jury stating clearly that nationality-based, racial and class based discrimination was impermissible.”<sup>449</sup> The NAFTA Tribunal recognized the principle of non-discrimination,<sup>450</sup> and held that under NAFTA Article 1105, the United States has a duty to provide a fair trial, free of sectional or local prejudice.<sup>451</sup> The NAFTA Tribunal said:
- It is the responsibility of the State under international law and, consequently, of the courts of a State to provide a fair trial of a case to which a foreign investor is a party. It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice.<sup>452</sup>
334. In evaluating fair and equitable treatment, the NAFTA Tribunal in *Waste Management II* adopted the language in *Loewen*, and referred to a customary law prohibition on conduct that “*is discriminatory and exposes the claimant to sectional or racial prejudice*”.<sup>453</sup>

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<sup>447</sup> *Lauder*, Final Award, at para. 292 (citing U.N. Conference on Trade & Development: Fair and Equitable Treatment, Vol. III at 10, 15, U.N. Doc. UNCTAD/ITE/IIT/II, U.N. Sales No. E.99/11/D/15 (1999) (English version). (*Investors’ Book of Authorities at Tab CA 17*).

<sup>448</sup> Tudor, I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*. (Oxford: Oxford University Press, 2008) at 178. (*Investors’ Book of Authorities at Tab CA 107*); *Iurii Bogdanov, Agurdino-Invest Ltd., Agurdino-Chimia and JSC v Republic of Moldova*, SCC Arbitration, Arbitral Award, 2004 WL 235957 (September 22, 2005) at 16 (*Investors’ Book of Authorities at Tab CA 106*).

<sup>449</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 2003 WL 24065653 (June 26, 2003), at para. 4. (*Investors’ Book of Authorities at Tab CA 13*).

<sup>450</sup> Kenneth J. Vandevelde, *Bilateral Investment Treaties, History, Policy, and Interpretation* (Oxford: Oxford University Press, 2010) at 393. (*Investors’ Book of Authorities at Tab CA 151*).

<sup>451</sup> *Loewen*, Award, at para. 123. (*Investors’ Book of Authorities at Tab CA 13*).

<sup>452</sup> *Loewen*, Award, at para. 123. (*Investors’ Book of Authorities at Tab CA 13*).

<sup>453</sup> *Waste Management (II)*, Award, at para. 98. (*Investors’ Book of Authorities at Tab CA 100*).

*v. Treatment Free from Political Motivation*

335. Conduct motivated by political, discriminatory animus will violate the reasonableness principle contained in the obligation to provide fair and equitable treatment. For example, in *Eureko v. Poland*, the Tribunal found that Poland violated the fair and equitable treatment standard under the Netherlands-Poland bilateral investment treaty, because Poland refused to honor its commitment for “purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.”<sup>454</sup>
336. The NAFTA Tribunal in *Loewen* also observed that the trial court “permitted the jury to be *influenced by persistent appeals to local favoritism* as against a foreign litigant.”<sup>455</sup> The NAFTA Tribunal then held that the lower court jury trial was “improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.”<sup>456</sup>
337. Prof. Kenneth Vandeveld observed that “[t]ribunals have found violations of the reasonableness principle where the host state's conduct was politically motivated; that is, where government action was not motivated by legitimate public policy considerations, but by animus toward the investment or investor.”
338. The *Biwater Gauff* case involved a dispute about contractual performance under a water and sewage services contract for the city of Dar es Salaam. The Minister of Water and Livestock Development was campaigning at the time for the office of prime minister, and called a press conference terminating the investment's contract. Four days after this announcement, the Minister confirmed the termination at a political rally. The Tribunal held that these actions were “an unreasonable disruption of the contractual mechanisms ... and motivated by political considerations.”<sup>457</sup> The Tribunal observed that the public statements constituted “an unwarranted interference” which “inflamed the situation, and polarised public opinion still further”, thereby ensuring that the process could not follow a normal contractual course.<sup>458</sup> The Tribunal found this political action to violate the fair and equitable treatment standard.<sup>459</sup>

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<sup>454</sup> *Eureko B.V.*, Partial Award, at para. 233 (*Investors' Book of Authorities at Tab CA 8*).

<sup>455</sup> *Loewen*, Award, at para. 136 (emphasis added). (*Investors' Book of Authorities at Tab CA 13*).

<sup>456</sup> *Loewen*, Award, at para. 137. (*Investors' Book of Authorities at Tab CA 13*).

<sup>457</sup> *Biwater Gauff*, Award, at para. 500. (*Investors' Book of Authorities at Tab CA 99*).

<sup>458</sup> *Biwater Gauff*, Award, at para. 627. (*Investors' Book of Authorities at Tab CA 99*).

<sup>459</sup> *Biwater Gauff*, Award, at para. 628. (*Investors' Book of Authorities at Tab CA 99*).

339. The *Biwater Gauff* Tribunal concluded:

In the Arbitral Tribunal's view, as a matter of principle, the failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and equitable treatment standard, in that it represents a departure from BGT's legitimate expectation that an impartial regulator would be established to oversee relations between City Water and DAWASA.<sup>460</sup>

vi. *Legitimate Expectations*

340. The fair and equitable treatment obligation includes the obligation to protect legitimate expectations. Numerous tribunals interpreting modern investment treaties have affirmed that a state fails to meet the international law standard of treatment when it fails to fulfil the legitimate expectations of investors.<sup>461</sup>
341. Tribunals applying the international law obligation to protect legitimate expectations have discussed what an investor can legitimately expect from a host state. For example, the *Tecmed* Tribunal explained that an investor can legitimately expect the host State to act consistently, free from ambiguity and transparently under international law.<sup>462</sup>
342. In *Tecmed*, the Tribunal observed that the "fair expectations of the Claimant were that the Mexican laws applicable to such investment, as well as the supervision, control, prevention and punitive powers granted to the authorities in charge of managing such system, would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws."<sup>463</sup> The Tribunal reviewed the evidence on the record and noted the "inconsistencies" between this stated purpose and the governmental authority's actions.<sup>464</sup> The Tribunal said that the government's decision to not renew the investor's permit was "actually used to permanently close down a site whose operation had become a nuisance due to political reasons relating to the community's opposition expressed in a variety of forms..."

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<sup>460</sup> *Biwater Gauff*, Award, at para. 615 (*Investors' Book of Authorities at Tab CA 99*).

<sup>461</sup> See *TECMED S.A.*, Award (*Investors' Book of Authorities at Tab CA 7*), *Metalclad*, Award, (*Investors' Book of Authorities at Tab CA 16*), *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, 2004 WL 3254661 (*Investors' Book of Authorities at Tab CA 21*), *Occidental*, Final Award, (*Investors' Book of Authorities at Tab CA 18*) and *CMS Gas*, Award (*Investors' Book of Authorities at Tab CA 20*).

<sup>462</sup> *TECMED S.A.*, Award, at para. 154. (*Investors' Book of Authorities at Tab CA 7*).

<sup>463</sup> *TECMED S.A.*, Award, at para. 157. (*Investors' Book of Authorities at Tab CA 7*).

<sup>464</sup> *TECMED S.A.*, Award, at para. 163. (*Investors' Book of Authorities at Tab CA 7*).

343. Thus, the Tribunal observed that the interference with the regulatory process that is motivated by the “social and political” pressures was inconsistent with the obligation to provide fair and equitable treatment under the treaty, and was also “objectionable from the perspective of international law.”<sup>465</sup> The *Tecmed* Tribunal said that the fair and equitable provision:

... in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.<sup>466</sup>

The *Tecmed* Tribunal noted that legitimate expectations included the expectations that the state will conduct itself in a coherent manner, without ambiguity and transparently, so as to enable the investor to plan its activities, and adjust its conduct to the governing statutes, regulations, and policies, and relevant practices and administrative directions.<sup>467</sup>

344. The *Metalclad* Award supports the application of the *Tecmed* Tribunal’s description of the international law standard. The *Metalclad* arbitration arose out of Mexico’s refusal to grant a US investor, Metalclad, a permit to construct a landfill. Mexico refused to issue the permit when construction was almost completed, contrary to earlier representations. Metalclad began arbitration proceedings, claiming that Mexico’s conduct breached the international law standard. The NAFTA Tribunal found that Mexico failed to fulfil its obligation because it affected Metalclad’s basic expectations:

Mexico failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.<sup>468</sup>

345. Recent investor-state arbitration tribunal decisions have affirmed this description of the standard. In *MTD v. Chile*, after expressly adopting the *Tecmed* standard, the Tribunal

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<sup>465</sup> *TECMED S.A.*, Award, at para. 163. (*Investors’ Book of Authorities at Tab CA 7*).

<sup>466</sup> *TECMED S.A.*, Award, at para. 154. (*Investors’ Book of Authorities at Tab CA 7*).

<sup>467</sup> *TECMED S.A.*, Award, at para. 154. (*Investors’ Book of Authorities at Tab CA 7*).

<sup>468</sup> *Metalclad*, Award, at para. 99. (*Investors’ Book of Authorities at Tab CA 16*). The Metalclad Award was subsequently partially set aside by the Supreme Court of British Columbia NAFTA Chapter 18 exhaustively addressed transparency within the NAFTA. However, only the Tribunal’s incorporation of transparency in the international standard of treatment was set aside. *The United Mexican States v. Metalclad Corporation*, Judicial Review before the Supreme Court of British Columbia (May 2, 2001), at para. 72 (*Investors’ Book of Authorities at Tab CA 22*). Their remaining comments on the standard were not questioned.

found that Chile failed to meet that standard by “authorizing an investment that could not take place for reasons of its urban policy.”<sup>469</sup>

346. Similarly, the *Occidental v. Ecuador* Tribunal found that, after Occidental had made investments, Ecuador changed its tax law “without providing any clarity about its meaning and extent” and that the state’s “practice and regulations were also inconsistent with [the] changes [to the law].”<sup>470</sup> The Tribunal concluded that these actions fell below the standard established in the *Tecmed* case, and accordingly found a breach of the BIT. The *Occidental* Tribunal, therefore, recognized a state may act inconsistently with an investor’s legitimate expectations, and still breach its obligation to treat an investor fairly and equitably, by failing to follow its own laws.

vii. *Procedural Fairness*

347. In *Lauder*, the Tribunal observed that the obligation to provide full security and protection extends beyond physical security to ensure that the “judicial system has remained fully available to the claimant.”<sup>471</sup> The obligation to provide procedural fairness requires a State to act in a manner that is in accordance with its obligation of good faith as secured by treaty protections or general international law. Recently, the Appellate Body in the *Thailand-Cigarettes* elaborated upon the importance of due process when evaluating the working procedures adopted by an administrative panel:

Due process is a fundamental principle of WTO dispute settlement. It informs and finds reflection in the provisions of the DSU. In conducting an objective assessment of a matter, a panel is “bound to ensure that due process is respected”. *Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules.*<sup>472</sup>

348. Differences in the wording of the fair and equitable treatment treaty standard have also not been treated as significant by tribunals. For example, in the *Parkerings-Comagnet*

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<sup>469</sup> *MTD Equity*, Award, at paras. 114- 115, 188. (*Investors’ Book of Authorities at Tab CA 21*).

<sup>470</sup> *Occidental*, Final Award, at para. 184. (*Investors’ Book of Authorities at Tab CA 18*).

<sup>471</sup> *Lauder*, Final Award, at para. 314 (*Investors’ Book of Authorities at Tab CA 17*)

<sup>472</sup> *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*, Report of the Appellate Body, WT/DS371/AB/R (17 June 2011) , at para. 147 (*Investors’ Book of Authorities at Tab CA 120*). The Appellate Body has held that “the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU”, and that “due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings”. (Appellate Body Reports, *Canada – Continued Suspension / US – Continued Suspension*, at para. 433; and Appellate Body Report, *Thailand – H-Beams*, para. 88, respectively).

*v. Lithuania* dispute, the Tribunal said that the treaty obligation of “*equitable and reasonable*” treatment arising under the Norway-Lithuania bilateral investment treaty had the same meaning as “fair and equitable” treatment.<sup>473</sup>

349. Rather than focus on deciphering the wording of “fair and equitable”, a number of tribunals focused on whether based upon the “totality of the circumstances”, the host State provided an “orderly process and timely disposition” and a “transparent and predictable framework” for an investor’s business planning and investment, thereby, treating the investor “*fairly and justly* in accordance with the NAFTA.”<sup>474</sup> Many Awards illustrate the importance of the duty to act in good faith, with due process, transparency, candor, as well as with fairness and reasonableness.
350. The *Methanex* NAFTA Tribunal implicitly recognized that NAFTA Article 1105(1) includes due process by concluding that “[i]f Article 1105(1) had already included a non-discrimination requirement, there would be no need to insert that requirement in Article 1110(1)(b), for it would already have been included in the incorporation of Article 1105(1)’s due process requirement.”<sup>475</sup>
351. The Tribunal in *Genin* deemed the decision by the State to withdraw the license as justified. In concluding this, the Tribunal observed that a violation of the investment treaty would occur when any procedural irregularity present amounted to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action.<sup>476</sup> The tribunal did not find these factors present in the dispute, and therefore concluded that the decision by the Bank of Estonia to withdraw Genin banking license did not in that

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<sup>473</sup> *Parkerings - Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 2007 WL 5366481 (September 11, 2007) at para. 278. (Article III of the investment treaty states: Each contracting party shall promote and encourage in its territory investments of investors of the other contracting party and accept such investments in accordance with its laws and regulations and accord them *equitable and reasonable* treatment and protection. Such investments shall be subject to the laws and regulations of the contracting party in the territory of which the investments are made) (emphasis added). (*Investors’ Book of Authorities at Tab CA 110*).

<sup>474</sup> *Metalclad*, Award, at para. 91. (*Investors’ Book of Authorities at Tab CA 16*) (emphasis added).

<sup>475</sup> *Methanex Corporation v. United States of America*, UNCITRAL Arbitration Rules, Final Award of the Tribunal on Jurisdiction and Merits, 2005 WL 1950817 (August 3, 2005) Part IV, Ch.C, at para. 15. (*Investors’ Book of Authorities at Tab CA 94*). Tudor at 159 (the author noted that the tribunal in *Methanex* stated that due process is incorporated in NAFTA Article 1105(1)). (*Investors’ Book of Authorities at Tab CA 107*).

<sup>476</sup> *Genin*, Award, at para. 371, (*Investors’ Book of Authorities at Tab CA 112*).

case amount to arbitrariness under Article II(3)(b) of the US-Estonia bilateral investment treaty, and the circumstances violate the Tribunal's 'sense of juridical propriety'."<sup>477</sup>

352. The NAFTA Tribunal in *Metalclad* considered whether the denial of a construction permit to the Investor was a breach of the fair and equitable treatment standard. The NAFTA Tribunal observed that the "permit had been denied at a meeting of the Municipal Town Council of which Metalclad had received no notice, to which it received no invitation, and at which it was given no opportunity to appear."<sup>478</sup> In this light, a serious procedural shortcoming will indicate a violation of the "fair and equitable treatment" standard. When the NAFTA Tribunal reviewed the procedure applied by Mexico, it noted that beyond that requirement of transparency, the "absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit" contributed to its reasons for finding a breach of NAFTA Article 1105(1).<sup>479</sup>
353. The customary international law standard is also breached where a party acts without transparency. As stated by the NAFTA Tribunal in the *Waste Management (II)* dispute, where the "minimum standard of treatment of fair and equitable treatment is infringed ... if the conduct ... involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with ... a complete lack of transparency and candour in an administrative process."<sup>480</sup>
354. The NAFTA Tribunal in *Metalclad* defined the host State's obligation for transparency as including:

... all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable

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<sup>477</sup> The tribunal in *Genin* in note 98 notes the comparison to *Amco Asia Corp. v. Indonesia*, Final Award of 5 June 1990, at 73-105 (following *ELSI* and finding that procedural irregularities amounted to a denial of justice in the circumstances of that case) - *Genin*, Award (*Investors' Book of Authorities at Tab CA 112*); citing to *ELSI*, at 15, 73-77 (*Investors' Book of Authorities at Tab CA 105*). Salacuse, J.W., *The Law of Investment Treaties* (Oxford University Press), at 240, (*Investors' Book of Authorities at Tab CA 115*).

<sup>478</sup> *Metalclad*, Award, at para. 91. (*Investors' Book of Authorities at Tab CA 16*).

<sup>479</sup> *Metalclad*, Award, at para. 88. (*Investors' Book of Authorities at Tab CA 16*).

<sup>480</sup> *Waste Management (II)*, Award, at para. 98. (*Investors' Book of Authorities at Tab CA 100*).



of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.<sup>481</sup>

355. The NAFTA Tribunal in *Chemtura* evaluated whether the review of the pesticide at issue breached the due process rights of the Investor.<sup>482</sup> The NAFTA Tribunal considered what a complete inquiry would entail:

Such inquiry must take into account the review process as a whole, including the procedure before the Board of Review, as an additional opportunity offered to the Claimant to put forward its position. Indeed, the mechanisms for the review of regulated products, ..., as well as those applicable to the consequences of such review, are set out in a complex array of laws and regulations, the purpose of which is precisely that any decisions taken by the authorities in this context are subject to procedural checks and balances. The establishment of the Board of Review was an important component of such arrangements... . In assessing whether the alleged procedural deficiencies attributable to [Canada] involved a breach of Article 1105 of NAFTA, the Tribunal should not limit its inquiry to a specific portion of such arrangements. It must appraise any procedural deficiency in the light of the mechanisms provided... .<sup>483</sup>

356. To determine whether the protections provided by NAFTA Article 1105 of the Investor's interests were violated due to the regulatory agency's delay in issuing its special review. For the *Chemtura* Tribunal, it was critical that the "decisive reason" for the omission was the delay.<sup>484</sup> With these considerations in mind, the NAFTA Tribunal in *Chemtura* reviewed whether the time used by the regulatory agency was "excessive and discriminatory" to a point that it breached NAFTA Article 1105.<sup>485</sup> It considered whether, in light of the record as a whole, the delay was "part of a consistent pattern of unfair conduct"<sup>486</sup> and that the time used by the regulatory agency included an indication of bad faith,<sup>487</sup> abnormality,<sup>488</sup> and whether there was an economic impact directly because of the delay.<sup>489</sup>

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<sup>481</sup> *Metalclad*, Award, at para. 76. (*Investors' Book of Authorities at Tab CA 16*). This transparency obligation was vacated by a reviewing domestic law court which held that transparency was not an independent ground of the international law standard of treatment.

<sup>482</sup> *Chemtura*, Award, at para. 145. (*Investors' Book of Authorities at Tab CA 111*).

<sup>483</sup> *Chemtura*, Award, at para. 145. (*Investors' Book of Authorities at Tab CA 111*).

<sup>484</sup> *Chemtura*, Award, at para. 157. (*Investors' Book of Authorities at Tab CA 111*).

<sup>485</sup> *Chemtura*, Award, at para. 215. (*Investors' Book of Authorities at Tab CA 111*).

<sup>486</sup> *Chemtura*, Award, at para. 224. (*Investors' Book of Authorities at Tab CA 111*).

<sup>487</sup> *Chemtura*, Award, at para. 219. (*Investors' Book of Authorities at Tab CA 111*).

<sup>488</sup> *Chemtura*, Award, at para. 220. (*Investors' Book of Authorities at Tab CA 111*).

<sup>489</sup> *Chemtura*, Award, at para. 223. (*Investors' Book of Authorities at Tab CA 111*).

### C. The Law of Full Protection and Security

357. The requirement of “full protection and security” is specifically mentioned as a constituent part of the International Law Standard of Treatment in NAFTA Article 1105. Full protection and security is commonly incorporated in investment treaties. It requires a host country to exercise reasonable care to protect investments against injury by private parties.<sup>490</sup> This obligation does not impose strict liability on the host country to protect foreign investment, but requires the host country to do so with the level of “diligence” required by customary international law. In determining whether the host-state has accorded the appropriate level of diligence, international tribunals have historically taken into account several factors:

- a) whether the facts at issue were either publicly known, or had been brought to the attention of the authorities;<sup>491</sup>
- b) whether the host state conducted investigations in response to complaints by the foreign claimant;<sup>492</sup>
- c) whether the host state took adequate steps to apprehend a wrongdoer, or otherwise adequately enforce a penalty;<sup>493</sup>
- d) whether the standard of police protection for foreign nationals was less than what is provided generally for a State’s own nationals;<sup>494</sup> and

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<sup>490</sup> UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (New York: United Nations, 1998). (*Investors’ Book of Authorities at Tab CA 24*).

<sup>491</sup> See *Mexico City Bombardment Cases*, British-Mexican Claims Commission, (1930) 5 RIAA 80. (*Investors’ Book of Authorities at Tab CA 25*); *George Adams Kennedy (U.S.A.) v. United Mexican States*, US-Mexico Claims Commission, (1927) 4 RIAA 194 (*Investors’ Book of Authorities at Tab CA 26*).

<sup>492</sup> *Too v. Greater Modesto Insurance Associates and the United States of America*, US-Iran Claims Tribunal, Award No. 460-880-2, 1989 WL 663898 (29 December 1989) at para. 23. (*Investors’ Book of Authorities at Tab CA 27*).

<sup>493</sup> *Francisco Mallén (United Mexican States) v. United States of America*, US-Mexico Claims Commission, (1927) 4 RIAA 173 (*Investors’ Book of Authorities at Tab CA 28*); *Thomas H. Youmans (U.S.A.) v. United Mexican States*, 4 RIAA 110 (23 November 1926) (*Investors’ Book of Authorities at Tab CA 29*); *S.J. Stallings (U.S.A.) v. United Mexican States*, 4 RIAA 478 (22 April 1929) (*Investors’ Book of Authorities at Tab CA 30*); *Richard A. Newman (U.S.A.) v. United Mexican States*, 4 RIAA 518 (6 May 1929). (*Investors’ Book of Authorities at Tab CA 31*); *Sarah Ann Gorham (U.S.A.) v. United Mexican States*, 4 RIAA 640 (24 October 1930) 640-645. (*Investors’ Book of Authorities at Tab CA 32*); *Norman T. Connolly and Myrtle H. Connolly (U.S.A.) v. United Mexican States*, 4 RIAA 387 (15 October 1928). (*Investors’ Book of Authorities at Tab CA 33*); *Lillian Greenlaw Sewell, In Her Own Right and As Guardian of Vernon Monroe Greenlaw, a Minor (U.S.A.) v. United Mexican States*, 4 RIAA 626 (24 October 1930). (*Investors’ Book of Authorities at Tab CA 34*).

<sup>494</sup> *Too v. Greater Modesto Insurance*, Award, at para. 22. (*Investors’ Book of Authorities at Tab CA 27*).

e) whether the nearest civil or military authority was far away from the site of the crime.<sup>495</sup>

358. The very first ICSID investment treaty award, *Asian Agricultural Products Ltd. v. Sri Lanka*,<sup>496</sup> considered the meaning of the “full protection and security” obligation with respect to a shrimp farm that was destroyed during an armed conflict between the government and rebel forces. The Tribunal held Sri Lanka liable for the failure of its security officials to inform the Claimant’s management that they were about to conduct a dangerous counter-insurgency operation. Had Sri Lanka done so, the deaths of several of the Claimants’ employees could have been avoided, along with related property damage. The Tribunal found liability even though there was inconclusive evidence regarding whether the deaths and property destruction were the result of government or rebel forces.<sup>497</sup>

359. The *Asian Agricultural Products* Tribunal described the diligence standard that a host government is required to meet:

The “due diligence” is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances ...<sup>498</sup>

Liability is established by the “mere lack or want of diligence, without any need to establish malice or negligence.”<sup>499</sup>

360. In *American Manufacturing & Trading v. Republic of Zaire* the Tribunal expounded on the content of the duty of a host state. It found that the full protection and security obligation was an “obligation of vigilance.”:

[the Host State] as the receiving State of investments made by [the Investor], shall take all measures necessary to ensure the full enjoyment of protection and security of [the Investment] and should not be permitted to invoke its own legislation to detract from any such obligation.<sup>500</sup>

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<sup>495</sup> *J.J. Boyd (U.S.A.) v. The United Mexican States*, US-Mexico Claims Commission, (1928) 4 RIAA 380 (*Investors’ Book of Authorities at Tab CA 35*).

<sup>496</sup> *Asian Agricultural Products v. Sri Lanka*, ICSID Case ARB/87/3, Award, June 27, 1990, 4 ICSID Reports 246, 1990 WL 10089584, at para. 50. (*Investors’ Book of Authorities at Tab CA 36*).

<sup>497</sup> *Asian Agricultural Products*, Award, at para. 86. (*Investors’ Book of Authorities at Tab CA 36*).

<sup>498</sup> *Asian Agricultural Products*, Award, at para 77. (*Investors’ Book of Authorities at Tab CA 36*).

<sup>499</sup> *Asian Agricultural Products*, Award, at para 77. (*Investors’ Book of Authorities at Tab CA 36*).

<sup>500</sup> *American Manufacturing and Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1, Merits Award, 1997 WL 33804538 (February 21, 1997) at para 6.05. (*Investors’ Book of Authorities at Tab CA 37*).

361. The exercise of diligence needs to be reasonable in the circumstances. The *Lauder* Tribunal considered this issue and stated:

Article 11(2)(a) of the Treaty provides that “[i]nvestment (...) shall enjoy full protection and security”. There is no further definition of this obligation in the Treaty. *The Arbitral Tribunal is of the opinion that the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances.*<sup>501</sup>

362. In *Wena Hotels v. Egypt*, the Tribunal considered several factors to determine whether there had been a breach of the diligence standard. Wena, a UK investor, signed lease agreements with EHC, a state-owned company, to manage hotels in Egypt. Subsequently, the Egyptian company forcibly removed all Wena personnel from the properties and repossessed the hotels. The hotels were eventually returned to Wena by court order, but not before they were looted. The Tribunal found that Egypt had violated its obligation to provide full protection and security, because Egypt was aware of the intentions of EHC, and took no actions to prevent it, or to immediately return the property to the Investor. The Tribunal weighed the factors involved in determining liability:

- a) the delay on the part of the authorities to go to the investment to investigate;
- b) the failure to take any immediate act of protection;
- c) the delay in returning the investment to the investor;
- d) the damage to, and deterioration of, the investment;
- e) the failure of the Host State to provide compensation; and
- f) the lack of serious punishment to the perpetrators.<sup>502</sup>

363. The repetitive nature of the failure to protect is also relevant. *Eureko B.V. v. Republic of Poland* concerned a dispute that arose out of Poland’s privatization of the Polish state insurance company, PZU. A Dutch company, Eureko, purchased a minority interest in the company through a share purchase agreement with the Polish state treasury which was later amended. Poland later reneged on the agreement and it was alleged that the Investor’s management had been subject to harassment. Although the Tribunal did not find Poland liable based on its determination of facts, the Tribunal concluded, with

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<sup>501</sup> *Lauder*, Final Award, at para. 308. (*Investors’ Book of Authorities at Tab CA 17*). [emphasis added].

<sup>502</sup> *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, 2000 WL 34514091, at paras 89-95. (*Investors’ Book of Authorities at Tab CA 38*).

respect to the full protection and security obligation, that if the harassment of the investor's personnel was "repeated and sustained, it may be that the responsibility of the [Host State] would be incurred by a failure to prevent them."<sup>503</sup>

364. NAFTA Article 1105 contains an obligation upon Canada to full protection and security.<sup>504</sup> Recent tribunals have found that the obligation to provide full protection and security includes an obligation on governments to provide a stable legal and business environment to foreign investors. For example, the *Azurix v. Argentina* Tribunal noted that the obligation to provide full protection and security includes an obligation to provide a "secure investment environment".<sup>505</sup>

#### **D. The Severity of Violations of International Standards**

365. The elements of fair and equitable treatment, as well as of full protection and security, are consistent in what tribunals have decided, individually or cumulatively, constitutes the international law standard of treatment. There is also a question whether there is a threshold of gravity or severity below which acts will not attract international responsibility in customary international law.
366. The origin of the concern with gravity and severity rather than the content and character of the acts is the law of diplomatic protection of aliens.<sup>506</sup> Tribunals deciding cases of diplomatic espousal have suggested that the basis for espousal of an international claim is that the behavior of the state in question does not merely breach

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<sup>503</sup> *Eureko B.V.*, Partial Award, at para. 237. (*Investors' Book of Authorities at Tab CA 8*).

<sup>504</sup> *Azurix Corp.*, Award, at para. 408: "The Tribunal is persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security." (*Investors' Book of Authorities at Tab CA 1*).

<sup>505</sup> *Azurix Corp.*, Award, at para. 408: "The cases referred to above show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view. The Tribunal is aware that in recent free trade agreements signed by the United States, for instance, with Uruguay, full protection and security is understood to be limited to the level of police protection required under customary international law. However, when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security. To conclude, the Tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under the BIT." See para. 375 for the Tribunal's conclusion that Argentina's failure to allow Azurix to assess tariffs consistent with the concession agreement breached Argentina's obligation to provide fair and equitable treatment. (*Investors' Book of Authorities at Tab CA 1*).

<sup>506</sup> Eagleton, C., *The Responsibility of States in International Law* (New York: New York University Press, 1928) at 108. (*Investors' Book of Authorities, Tab CA 173*)

the applicable standards of conduct, but does so egregiously. There is agreement in the recent jurisprudence that the range of situations that rise to the level of seriousness engaging state responsibility is clearly larger today than was the case at the time of the origins of the law of diplomatic espousal.<sup>507</sup> However, there is a divergence about how this expansion has occurred.

367. Some tribunals have opined that this is due to an evolution of the customary international law standard of treatment.<sup>508</sup> Others have considered that this has occurred due to a shift in perception of what is acceptable by the international community.<sup>509</sup> For example the recent *Glamis* tribunal came to such a conclusion that the customary international law standard has not evolved, merely community norms and values.<sup>510</sup>
368. The notion of a threshold of severity or gravity of breach as a precondition was associated with the process of diplomatic espousal of claims. However, whether there ever was a customary rule of international law of this kind, today international responsibility in the contemporary world has been affected by human rights and the thickening of international law,<sup>511</sup> in contrast to the world of the *Lotus* case and Westphalian sovereignty.<sup>512</sup>
369. The US-Mexico Claims commission in the *Neer* case focused on the indirect nature of conduct. The main wrongful behavior was done by private individuals who murdered Mr. Neer, an American citizen in Mexico. His family brought a claim to review the failure of the Mexican justice system to take action in apprehending the murderers and prosecuting the case. The *Neer* case stated:

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<sup>507</sup> *Chemtura*, Award, at para. 121-122, 215 (*Investors' Book of Authorities*, Tab **CA 111**); *Merrill & Ring* at para. 201 (*Investors' Book of Authorities* at Tab **CA 41**)

<sup>508</sup> *Mondev International*, Award, at para. 116 (*Investors' Book of Authorities*, Tab **CA 40**); *Pope & Talbot*, Award on Merits of Phase 2, at para. 59 (*Investors' Book of Authorities*, Tab **CA 12**); *Merrill & Ring* at paras. 190, 193. (*Investors' Book of Authorities*, Tab **CA 41**).

<sup>509</sup> *Glamis Gold, Ltd v. United States of America*, UNCITRAL Arbitration, Award, 2009 WL 2389802 (June 8, 2009) at para. 612, 613. (*Investors' Book of Authorities*, Tab **CA 116**).

<sup>510</sup> *Glamis*, Award, at paras. 612, 613. (*Investors' Book of Authorities*, Tab **CA 116**).

<sup>511</sup> Teitel, Ruti G., "Humanity's Law: Rule of Law for the New Global Politics", 35 *Cornell International Law Journal* 355-387 (2002). (*Investors' Book of Authorities*, Tab **CA 174**).

<sup>512</sup> Award - *In accordance with international law of the unilateral declaration of independence in respect of Kosovo*, ICJ Advisory Opinion (July 22, 2010) and Declaration of Judge Bruno Simma at para. 3 of separate opinion (*Investors' Book of Authorities*, Tab **CA 171**).

It is in the opinion of the commission possible to go a little further than the authors quoted, and to hold (*first*) that the propriety of governmental acts should be put to the test of *international standards*

And (*second*) that the treatment of a alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so *far short of international standards* that every reasonable and impartial man would readily recognize its insufficiency.<sup>513</sup>

370. In other words, not all actions that violate primary obligations (international standards) engage state responsibility according to this approach. However, the notion that it is not enough that the governmental act falls short of the international standard was put to rest with the adoption of the ILC Articles on State Responsibility. The ILC Articles have specifically overruled this approach by providing that a state is responsible for *every* act that violates international standards regardless of *how far* short that measure is from those standards.<sup>514</sup>
371. In any case, this issue is of very limited significance on the facts of the instant case, as the conduct of Canada, pervaded by political motivation and national prejudice, would have risen to the requisite standard of gravity under the traditional law of diplomatic protection and *a fortiori* does so under contemporary international values or norms.

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<sup>513</sup> *L. F.H. Neer and Pauline E. Neer (United States.) v. United Mexican States*, (October 15, 1926) 4 UNRIAA 138 (March 14, 1927) at 61-62. (emphasis added) (*Investors' Book of Authorities*, Tab **CA 170**).

<sup>514</sup> Crawford, J. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2003) Article 12. (*Investors' Book of Authorities*, Tab **CA 76**). Article 12 of the ILC Articles on State Responsibility states "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

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## II. NATIONAL TREATMENT

### A. The Law of National Treatment

372. NAFTA Article 1102 requires the NAFTA Parties to provide national treatment to the investors of the other Party and their investments:

#### National Treatment

1. Each Party shall accord to Investor of another Party treatment no less favorable than that it accords, in like circumstances, to its own Investor with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
  2. Each Party shall accord to investments of Investor of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own Investor with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
373. There are three elements which an investor or investment must establish to prove that a NAFTA Party has breached NAFTA Article 1102:
- a) the foreign investor or investment must be in like circumstances with local Investor or investments;
  - b) the NAFTA Party treats the foreign investor or investment less favorably than it treats local investors or investments; and
  - c) the treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Examining each of these elements demonstrates that a NAFTA Party breaches Article 1102 when it fails to provide equality of competitive opportunities to investors and investments from the other NAFTA Parties.

#### *i. Like Circumstances*

374. The first step in establishing a claim under NAFTA Article 1102 is to identify investors or investments in “like circumstances”.
375. The meaning of likeness needs to be considered in the face of the activities that have been regulated and those other enterprises that would also be affected by the regulatory scheme in question.



376. An environmental assessment is a gateway to the evaluation of new or additive economic activity by an investment. In the context of environmental regulatory measures, the aspects of an investment affected by NAFTA Article 1102 would be new economic activity proposed by the investor.
377. This is exactly the process that the *Occidental* tribunal followed but without expressing the reasoned framework for its actions.<sup>515</sup> This was also what the *S.D. Myers* Tribunal did. The measure in *S.D. Myers* affected the competitive relationship of products between S.D. Myers Canada and Canadian-based competitors.<sup>516</sup> Similarly, this is the same likeness test that was followed in *Feldman* where the Mexican measure affected the elements of competition between competitors.<sup>517</sup>
378. NAFTA Chapter 14 deals with financial services. Its provisions give context and meaning to NAFTA Article 1102.<sup>518</sup> To exclude financial services from the national treatment obligations in NAFTA Chapters 11 and 12, the Parties reproduced these obligations in NAFTA Article 1405:
1. Each Party shall accord to Investor of another Party treatment no less favorable than that it accords to its own Investor, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments in financial institutions in its territory.
  2. Each Party shall accord to financial institutions of another Party and to investments of Investor of another Party in financial institutions treatment no less favorable than that it accords to its own financial institutions and to investments of its own Investor in financial institutions, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments in financial institutions in its territory.
  3. Subject to Article 1404, where a Party permits the cross-border provision of a financial service it shall accord to the cross-border financial service providers of another Party treatment no less favorable than that it accords to its own financial service providers, in like circumstances, with respect to the provision of such service.

Paragraphs 1, 2 and 3 of NAFTA Article 1405 reproduce the national treatment obligations for both investment and services in NAFTA Articles 1102(1), 1102(2) and 1202(1).

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<sup>515</sup> *Occidental*, Final Award, at paras. 171, 173. (*Investors' Book of Authorities* Tab **CA 18**).

<sup>516</sup> *S.D. Myers*, First Partial Award, at paras. 193-194. (*Investors' Book of Authorities* Tab **CA 6**).

<sup>517</sup> *Feldman*, Award, at paras. 171-172. (*Investors' Book of Authorities* Tab **CA 51**).

<sup>518</sup> See also NAFTA Article 1201(2)(a) for the services exclusion.

379. The drafters of NAFTA Article 1405 added an explanation of this national treatment obligation to provide better guidance to interpreters of these provisions in this critical sector:

5. A Party's treatment of financial institutions and cross-border financial service providers of another Party, whether different or identical to that accorded to its own institutions or providers in like circumstances, is consistent with paragraphs 1 through 3 if the treatment affords equal competitive opportunities.

NAFTA Article 1405(5) provides that the purpose of the national treatment provision is to provide "equal competitive opportunities." Enterprises compete in many ways. With the broad protection of economic actors in NAFTA Article 1102, there must be an equally broad conception of competition.

380. Canada's NAFTA *Statement on Implementation* demonstrates that the standard is not confined to Chapter 14 and investments in financial service providers. The Statement emphasizes that Chapter 14 captures "general rules" and the "principle" of national treatment.<sup>519</sup> The additional explanatory comments on the meaning of national treatment for investments in financial services were only added for greater certainty in light of the sensitivity of the sector.

381. In Annex II to the NAFTA, the Parties set out their reservations for obligations, including national treatment. For each reservation, the NAFTA Parties set out:

- a) the general sector for which the reservation is made (e.g. Transportation);
- b) the specific sub-sector involved (e.g. Water Transportation);
- c) the standard industry classification covered by the reservation (e.g. SIC 4543 Marine Towing Industry);
- d) the obligation to which the reservation is taken (e.g. national treatment);

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<sup>519</sup> *Canadian Statement on Implementation, North American Free Trade Agreement*, Canada Gazette Part 1, January 1, 1994 at 172-173: "The second objective [of Chapter 14] was to move beyond the [Canada-US] FTA by basing market access on a set of *general rules* enshrining national treatment, MFN treatment, the right of consumers to purchase financial services on a cross-border basis and the right to market access through the establishment of a commercial presence. (*Investors' Book of Authorities at Tab CA 45*). The emphasis on defining *principles*, rather than the *à la carte* approach taken in the FTA, is path-breaking of the best kind, building on progress made in the Uruguay Round negotiations in drafting a General Agreement on Trade in Services [*emphasis added*].

- e) a description of the economic activities covered by the reservation (e.g. “Canada reserves the right to adopt or maintain any measure relating to investment in or provision of maritime cabotage services”); and
- f) any existing measures covered by the reservation.

The use of specific economic sub-sectors to identify reservations to national treatment demonstrates that the identification of the precise economic sector in which the investment operates is a first step in the analysis under NAFTA Article 1102.

382. The national treatment obligation for cross-border trade in services contains the same “like circumstances” formulation as NAFTA Article 1102:

Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.

383. In the NAFTA Chapter 20 state-to-state arbitration in *Cross-border Trucking Services*, all three NAFTA Parties agreed that the meaning of “like circumstances” in NAFTA Article 1202 was the same as “like services and service providers.”:

The Panel, in interpreting the phrase “in like circumstances” in Articles 1202 and 1203, has sought guidance in other agreements that use similar language. *The Parties do not dispute that the use of the phrase “in like circumstances” was intended to have a meaning that was similar to the phrase “like services and service providers” as proposed by Canada and Mexico during NAFTA negotiations.*<sup>520</sup>

384. The language of “like services and service providers” proposed by Canada and Mexico in the NAFTA negotiations, which all three NAFTA Parties agreed was equivalent to “like circumstances”, eventually made its way into the GATS. In that agreement, the Parties again expressly confirmed that national treatment requires equality of competitive opportunities - just as the NAFTA Parties had in NAFTA Article 1405. Article XVII(1) of the GATS, entitled National Treatment, reads:

... each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.

Paragraph 3 of the same Article explains that “[f]ormally identical or formally different treatment shall be considered to be less favorable treatment if it modifies the conditions of competition ...”

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<sup>520</sup> *In the Matter of Cross-Border Trucking Services*, NAFTA Secretariat File No. USA-MEX-98-2008-01, Final Report of the Panel (February 6, 2001) at para. 249. (*Investors’ Book of Authorities at Tab CA 46*).

385. The NAFTA was negotiated concurrently with the GATS, to which all three NAFTA Parties are also party.<sup>521</sup> The meaning of NAFTA's "like circumstances" language in NAFTA Articles 1202 and 1102 must therefore be consistent with the meaning of national treatment in the GATS. The need for a consistent interpretation between NAFTA Chapter 11 and the GATS is reinforced by the fact that the GATS also applies to investments. The GATS defines "the supply of a service" to include services supplied "by a service supplier of one Member, through a commercial presence in the territory of any other Member."<sup>522</sup>

386. Under the NAFTA, the Parties chose to have service suppliers who supply through a commercial presence in the territory protected by NAFTA Chapter 11 rather than NAFTA Chapter 12.<sup>523</sup> They did so because, unlike the Members of the WTO, the NAFTA Parties had reached an agreement to provide such investments with additional protections (such as protection from expropriation).<sup>524</sup>

387. Article V of the GATS, entitled "Economic Integration," says:

This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services [such as the NAFTA] ... *provided that such an agreement ... provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII* [the GATS national treatment Article].

Article XVII of the GATS protects equality of competitive opportunities for service providers that supply services through a commercial presence. Any NAFTA Party interpreting NAFTA Article 1102 to provide less than that level of protection would breach their obligation in Article V of the GATS.

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<sup>521</sup> *General Agreement on Trade in Services (GATS)*, World Trade Organization (WTO) Status of Legal Instruments WTO/Leg/1 Supplement 3, October 2002. (*Investors' Book of Authorities at Tab CA 47*).

<sup>522</sup> *GATS*, October 2002, Article I(2). (*Investors' Book of Authorities at Tab CA 47*).

<sup>523</sup> Thus, NAFTA Article 1213(2) excludes from the definition of cross-border trade in services "the provision of a service in the territory of a Party by an investment, defined in Article 1139 (Investment - Definitions) in that territory".

<sup>524</sup> The NAFTA drafters could not have intended the national treatment protection for an Investor who supplies a service through a commercial presence in the territory of another Party to be lower under the NAFTA than under the GATS. Instead, they must have assumed that by protecting such investments under NAFTA Chapter 11 rather than NAFTA Chapter 12, they were providing a level of protection from violations of national treatment that was at least as strong as the one in the GATS. Measures that modify conditions of competition in favor of domestic service providers must therefore have been assumed to violate Article 1102.

Indeed, the NAFTA drafters were under an obligation to ensure that national treatment protection for an investor who supplies a service through a commercial presence in the territory of another Party was not lower under the NAFTA than under the GATS.

388. The *Cross-border Trucking Services* panel accordingly found that the same US measure violated the national treatment obligations contained in both NAFTA Articles 1202 and 1102. In reaching this decision, the Panel referred to “similar national treatment obligations” in GATT Article III and the *Section 337* case, which first articulated the “equality of competitive opportunities” test.<sup>525</sup> The NAFTA Chapter 20 Panel specifically discussed the interpretation of NAFTA Article 1102 by reference to “long-established doctrine under the GATT and WTO” that interprets national treatment in goods “to protect expectations regarding competitive opportunities...”<sup>526</sup>

389. In NAFTA’s Preamble, the NAFTA Parties recognized that they had negotiated the Agreement to “build on their respective rights and obligations under the General Agreement on Tariffs and Trade ...”. Similarly, in its Statement on Implementation, Canada acknowledged that:

The NAFTA and the Uruguay Round agreements cover much of the same ground and the two sets of rules are largely complementary and mutually reinforcing. In many respects, the NAFTA built on progress that had been made in the Uruguay Round while the Round in turn profited from the experience of Canada, the United States and Mexico in negotiating the NAFTA.<sup>527</sup>

390. By the time the NAFTA was negotiated, the GATT had achieved tremendous success in reducing economic protectionism in trade in goods. It did so not only by eliminating tariffs and import quotas, but also by requiring that goods receive national treatment once they crossed the border.

391. The national treatment obligation in GATT Article III countered two forms of economic protectionism. First, Article III:2 addressed discriminatory taxes. Second, Article III:4 addressed discriminatory regulation.<sup>528</sup> At the same time, the GATT allowed for

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<sup>525</sup> *In the Matter of Cross-Border Trucking Services*, Final Report, at para. 251. (*Investors’ Book of Authorities at Tab CA 46*).

<sup>526</sup> *In the Matter of Cross-Border Trucking Services*, Final Report, at para. 289. (*Investors’ Book of Authorities at Tab CA 46*).

<sup>527</sup> *Canadian Statement on Implementation of the NAFTA*, at 75. (*Investors’ Book of Authorities at Tab CA 45*).

<sup>528</sup> *General Agreement on Trade and Tariffs (GATT)*, Article III(4):

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product. (*Investors’ Book of Authorities at Tab CA 48*).

exceptions to these disciplines for both government procurement and subsidies in Article III:8.<sup>529</sup>

392. However, when negotiating provisions on trade in services and investment, there was no similar agreement to incorporate by reference. For cross border trade in services, Canada and Mexico proposed replicating the GATT Article III “like products” language with “like services and service providers.” However, the NAFTA Parties ultimately settled on “like circumstances” language in both NAFTA Articles 1102 and 1202 on the understanding that this was not materially different from that proposed by Canada and Mexico.<sup>530</sup>

393. Indeed, the structure of Article III:4 was clearly the inspiration for NAFTA Article 1102:

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

394. GATT Article III:4 and NAFTA Article 1102 have clear similarities:

- a) They compare foreign and domestic economic interests (respectively, products and investments);
- b) They require a party to accord these economic interests “treatment no less favorable”;
- c) This “no less favorable” treatment need only be afforded to economic interests that satisfy a “likeness” requirement;

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<sup>529</sup> GATT, Article III:8:

8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products. (*Investors’ Book of Authorities at Tab CA 48*).

- d) The “no less favorable” treatment must be accorded throughout the time the economic interest continues in the territory (in the case of a product, from its offering for sale through its transportation and distribution to its final use; in the case of an investment, from its establishment through its conduct and operation to its final disposition); and
  - e) The obligation is subject to exceptions and reservations explicitly negotiated by the NAFTA Parties in the Treaty.
395. The Article 21.5 Panel in the *United States – Tax Treatment for “Foreign Sales Corporations”* examined the first element of a claim under Article III:4 of the GATT 1994, namely whether the imported and domestic products at issue are “like products”. The Panel noted that the purpose of the “like product” inquiry under Article III:4 of the GATT 1994 is to ascertain “whether any formal differentiation in treatment between an imported and a domestic product could be based upon the fact that the products are different – i.e. not like – rather than on the origin of the products involved.”<sup>531</sup>
396. The Article 21.5 Panel examined the facts of the case, where the United States’ Act was a “measure of general application”, which applied horizontally to a range of possible products that could be used for the production of goods that might eventually be qualifying foreign trade property.<sup>532</sup> In observing the general applicability of the United States’ measure, the Article 21.5 Panel found that there was “no need to demonstrate the existence of actually traded like products in order to establish a violation of Article III:4.”<sup>533</sup> The Article 21.5 Panel concluded that with respect to likeness of products, evidence is not required to show a comparison between any particular classes of imported or domestic goods.<sup>534</sup> Thus, the Article 21.5 Panel concluded that where a generally applicable measure is at issue, a complaining country need not establish a “meaningful nexus” between the measure and adverse effects on competitive conditions for a like class of imported goods.<sup>535</sup>

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<sup>531</sup> *United-States - Tax Treatment for “Foreign Sales Corporations”* Recourse to Article 21.5 of the DSU by the European Communities WT/DS108/RW, 20 August 2001 at para. 8.132, at 51 (*Investors’ Book of Authorities at Tab CA 163*); citing to *EC - Measures Affecting Asbestos*, Report of AB, at para. 103 (*Investors’ Book of Authorities at Tab CA 50*).

<sup>532</sup> *United-States - FSC*, at para. 8.133, at 51. (*Investors’ Book of Authorities at Tab CA 163*).

<sup>533</sup> *United-States - FSC*, at para. 8.133, at 51. (*Investors’ Book of Authorities at Tab CA 163*).

<sup>534</sup> *United-States - FSC*, Panel Report, at 52. (*Investors’ Book of Authorities at Tab CA 163*).

<sup>535</sup> *United-States - FSC*, Panel Report, at para. 8.134, at 52. (*Investors’ Book of Authorities at Tab CA 163*).

397. Acknowledging Article 1102's origins in, and similarity to, GATT Article III:4, several NAFTA Tribunals have drawn from GATT Article III:4 jurisprudence in interpreting the elements of Article 1102.<sup>536</sup> Indeed, in applying this jurisprudence, the *Feldman* Tribunal noted that GATT Article III:4 is "analogous" to Article 1102 of the NAFTA.<sup>537</sup>
398. Article 31(3)(c) of the *Vienna Convention* states that "any relevant rules of international law applicable in the relations between the parties" "shall be taken into account". This therefore applies when interpreting NAFTA Article 1102. In addition, the *Vienna Convention* also directs tribunals that "[a] special meaning shall be given to a term if it is established that the parties so intended."<sup>538</sup>
399. Chapters 3, 12, 14 and 15 of the NAFTA are part of the context of Article 1102 while the WTO agreements are relevant rules of international law. Taken together, they establish that NAFTA Article 1102 has a special meaning. The NAFTA drafters confirmed their intention to apply this special meaning by entitling Article 1102 "National Treatment" and by including national treatment as a principle and rule of the NAFTA in Article 102(1).
400. In the *Occidental Exploration and Production Company v. Republic of Ecuador* Award, the Tribunal commented on the discussion of the meaning "like products" in respect of national treatment under GATT/WTO law. The Tribunal noted that in GATT/WTO context, "the concept has to be interpreted narrowly and that like products are related to the concept of directly competitive or substitutable products."<sup>539</sup> The *Occidental* tribunal observed that in GATT/WTO law, "no exporter ought to be put in a disadvantageous position as compared to other exporters," whereas, under bilateral

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<sup>536</sup> *S.D. Myers*, First Partial Award, at para. 244. (*Investors' Book of Authorities at Tab CA 6*). *Pope & Talbot*, Award on Merits of Phase 2, at paras. 68, 69 and footnote 68. (*Investors' Book of Authorities at Tab CA 12*). *Feldman*, Award, at para. 165: "The national treatment/non-discrimination provision is a fundamental obligation of Chapter 11. The concept is not new with NAFTA. Analogous language in Article III of the GATT has applied between Canada and the United States since 1947, and with Mexico since 1985, with regard to trade in goods." (*Investors' Book of Authorities at Tab CA 51*).

<sup>537</sup> *Feldman*, Award, at para. 165: "The national treatment/non-discrimination provision is a fundamental obligation of Chapter 11. The concept is not new with NAFTA. Analogous language in Article III of the GATT has applied as between Canada and the United States since 1947, and with Mexico since 1985, with regard to trade in goods." (*Investors' Book of Authorities at Tab CA 51*).

<sup>538</sup> *Vienna Convention on the Law of Treaties* (1969), Article 31(4). (*Investors' Book of Authorities at Tab CA 44*).

<sup>539</sup> *Occidental*, Final Award, at para. 174 (*Investors' Book of Authorities Tab CA 18*); citing Appellate Body Report, *Korea-Taxes on Alcoholic Beverages*, WT/DS84/AB/R, adopted on February 17, 1999, at para. 118. (*Investors' Book of Authorities Tab CA 160*).



investment treaties, “the comparison needs to be made with the treatment of the ‘like’ product and not generally.”<sup>540</sup> The Tribunal observed that “the reference to ‘in like situations’ used in the Treaty seems to be different from that to ‘like products’ in the GATT/WTO” because “the ‘situation’ can relate to all exporters that share such condition, while the ‘product’ necessarily relates to competitive and substitutable products.”<sup>541</sup>

401. The effect of an overly narrow interpretation of “in like circumstances” weakens the provision by unduly eliminating useful comparators. An example of an overly narrow approach may be seen in the *Methanex* Award. The *Methanex* Tribunal held, “it would be ... perverse to ignore identical comparators if they [are] available and ... use comparators that [are] less ‘like’.” NAFTA Article 1102, however, does not specify that “identical comparators” will be required before any comparison may be made.<sup>542</sup> The use of the term “identical” is, in fact, not found in NAFTA Article 1102.
402. Prof. Vandevelde noted that a narrow approach to identifying a comparator presents difficulties and stated that “ensuring competitive equality does not exhaust the purpose of a non-discrimination provision.”<sup>543</sup>
403. Based upon a review of several investment tribunal’s approaches, Prof. Vandevelde noted that the “purpose of the like circumstances requirement is not to permit the host state to engage in discriminatory action whenever no sufficiently close comparator exists.”<sup>544</sup> Rather, Prof. Vandevelde observed that the “purpose is to prevent unjustified discriminations, the assumption being that treating unlike investments differently is justifiable.”<sup>545</sup> With this in mind, he proposed that investments may be “like” if “none of the differences [are] relevant to legitimate nondiscriminatory policies of the host state.”<sup>546</sup> Prof. Vandevelde added:

The like circumstances test supports the policy behind the nondiscrimination provisions by attempting to remove from consideration comparators whose different treatment was based on

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<sup>540</sup> *Occidental*, Final Award, at para. 176. (*Investors’ Book of Authorities Tab CA 18*).

<sup>541</sup> *Occidental*, Final Award, at para. 176. (*Investors’ Book of Authorities Tab CA 18*).

<sup>542</sup> *Methanex*, Final Award, Part IV, Ch.B , at para. 17. (*Investors’ Book of Authorities at Tab CA 94*).

<sup>543</sup> Vandevelde, *Bilateral Investment Treaties*, at 341, (*Investors’ Book of Authorities at Tab CA 151*).

<sup>544</sup> Vandevelde, *Bilateral Investment Treaties*, at 385. (*Investors’ Book of Authorities Tab CA 151*).

<sup>545</sup> Vandevelde, *Bilateral Investment Treaties*, at 385. (*Investors’ Book of Authorities Tab CA 151*).

<sup>546</sup> Vandevelde, *Bilateral Investment Treaties*, at 385. (*Investors’ Book of Authorities Tab CA 151*).

legitimate, nondiscriminatory policies, but it was not intended to provide a technical defense for adverse treatment resulting from a discriminatory motive. Thus, ... even where no plausible comparator exists, the tribunal should find a violation *if the treatment of the covered investment was the result of a discriminatory motive, that is, was not in furtherance of a legitimate host-state regulatory interest.*<sup>547</sup>

404. The *Occidental* dispute exemplifies the application of the objective standard by an investment tribunal. In this dispute, the investor submitted a claim rising under the United States-Ecuador BIT. The Tribunal compared the investor, a petroleum exporter, with domestic companies that exported other products that were not in the same economic sector. The Republic of Ecuador argued “that ‘in like situations’ can only mean that all companies in the same sector are to be treated alike and this happens in respect of all oil producers.”<sup>548</sup> Furthermore, the Republic of Ecuador argued that a comparison cannot be extended to other sectors because the purpose of the government policy was “to ensure that the conditions of competition are not changed, a scrutiny that is relevant only in the same sector.”<sup>549</sup>
405. The *Occidental* Tribunal observed that “the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.”<sup>550</sup> Thus, the Tribunal promoted a broad view and concluded that “in like situations” cannot be interpreted in the narrow sense.<sup>551</sup>
406. NAFTA Article 1102 requires that the treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. An environmental assessment is a gateway to the evaluation of new or additive economic activity by an investment. In the context of environmental regulatory measures, the aspects of an investment affected by NAFTA Article 1102 would be by definition have to address the establishment, expansion, conduct or operation of economic activity proposed by the investor.
407. With respect to the operations of Bilcon, the NAFTA Tribunal should consider all enterprises affected by the environmental assessment regulatory process to be in like

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<sup>547</sup> Vandevelde, *Bilateral Investment Treaties*, at 385. (*Investors’ Book of Authorities Tab CA 151*).

<sup>548</sup> *Occidental*, Final Award, at para. 171. (*Investors’ Book of Authorities Tab CA 18*).

<sup>549</sup> *Occidental*, Final Award, at para. 171. (*Investors’ Book of Authorities Tab CA 18*).

<sup>550</sup> *Occidental*, Final Award, at para. 173. (*Investors’ Book of Authorities Tab CA 18*).

<sup>551</sup> *Occidental*, Final Award, at para. 171. (*Investors’ Book of Authorities Tab CA 18*).

circumstances with Bilcon. The environmental regulatory scheme is with respect to the establishment, acquisition, expansion and conduct of the investment.

408. In some cases, the nature of the regulatory intervention has been such that it was directed towards those aspects of economic activity that concern the investor's access to markets for the sale of its goods and or services. To that extent, in national treatment cases, the like circumstances analysis has centered on the consideration of production of like products or goods. This focuses on how the regulatory intervention affects the terms of how the investor is affected by the governmental measures.
409. The impact of the measures then assists a Tribunal in defining what needs to be considered. So if the measure addresses access to resources, this creates a different analysis than that which may occur with another type of measure concerning access to consumer markets.
410. Thus, in the *Pope & Talbot* claim, the Tribunal had to consider market access for the export of softwood lumber. The Tribunal looked at competitors in that particular marketplace in its consideration of likeness.<sup>552</sup>
411. By contrast, the governmental measure involved in the case of Bilcon was in connection to the establishment, acquisition, expansion and conduct of the investment as the environmental regulatory scheme looks at proposed new activity and its expansion of existing activity. Accordingly, all those who are subject to the consideration of such expansion related activities, including involved in environmental assessment would be in the same position as Bilcon and thus would be in like circumstances.
412. In addition to investment tribunals, the objective approach may be seen in GATT/WTO case law, as well as European Court of Justice case law. Earlier GATT 1947 jurisprudence highlights the objective approach, as several reports relied on different tariff classifications, in addition to physical differences between products to evaluate "likeness".<sup>553</sup> The European Court of Justice jurisprudence also reflects an objective approach that also took into account economic considerations when interpreting

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<sup>552</sup> *Pope & Talbot*, Award on the Merits of Phase 2, at para. 78. (*Investors' Book of Authorities* Tab **CA 12**)

<sup>553</sup> See GATT Panel Report, *Treatment by Germany of Imports of Sardines (Germany – Sardines)*, G/26, adopted 31 October 1952, BISD 1S/53, at para 13(*Investors' Book of Authorities* at Tab **CA 152**) ; GATT Panel Report, *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber (Japan – SPF Dimension Lumber)*, L/6470, adopted 19 July 1989, BISD 36S/167, at paras 5.13 ff (*Investors' Book of Authorities* at Tab **CA 153**); GATT Working Party Report, *The Australian Subsidy on Ammonium Sulphate (EEC – Animal Feed Proteins)*, GATT/CP.4/39, adopted 3 April 1950, BISD II/188, at para 4.2 (*Investors' Book of Authorities* at Tab **CA 154**)

‘similar products’ under Article 110(1) of the *Treaty on the Functioning of the EU* developed parallel to NAFTA and WTO jurisprudence.<sup>554</sup>

413. When analyzing “likeness” based upon the objective standard, the *tertium comparationis*, the basic common comparator, may consist of factors such as physical characteristics, tariff classification, end-uses or even the act of exportation.<sup>555</sup> Thus, the objective standard is dependent upon the criteria applied by the tribunal.
414. In addition to the objective approach to non-discrimination provisions, WTO panels and the Appellate Body have also interpreted “likeness” using a subjective approach. The rationale behind the subjective standard of “likeness” is “to argue that the *tertium comparationis* is defined by the regulatory purpose of the measure under scrutiny”.<sup>556</sup> The subjective approach in GATT/WTO case law has also been addressed as an “aim and effects” approach.<sup>557</sup>
415. The Appellate Body has stated that a formal distinction between imports and domestic products is not necessary to find a violation of GATT Article III:4 because the treatment must be “less favorable.”<sup>558</sup>

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<sup>554</sup> See *Commission v Denmark* [1986] ECR 833, Case 106/84: “the Court held, ‘it is necessary first to consider certain objective characteristics ..., and secondly to consider whether or not both categories of beverages are capable of meeting the same need from the point of view of consumers.’” (*Investors’ Book of Authorities Tab CA 177*)

<sup>555</sup> N. Diebold, “Non-Discrimination and the Pillars of International Economic Law”, at 5. (*Investors’ Book of Authorities Tab CA 150*).

<sup>556</sup> N. Diebold, “Non-Discrimination and the Pillars of International Economic Law”, at para 7, noting that in GATT 1947 jurisprudence this subjective standard was implemented with the “so called ‘aim and effects’ test as part of the ‘like products’ analysis (*Investors’ Book of Authorities at Tab CA 150*).”; citing to GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages (US-Malt Beverages)*, DS23/R, adopted 19 June 1992, BISD 39S/206, at paras. 5.23-5.26. (*Investors’ Book of Authorities Tab CA 155*). Notably, subsequent WTO panels and the Appellate Body have rejected the “aim and effects” test for purposes of both GATT and GATS).

<sup>557</sup> N. Diebold, “Non-Discrimination and the Pillars of International Economic Law”, at para 7 (*Investors’ Book of Authorities at Tab CA 150*).

<sup>558</sup> *Appellate Body Report, Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001 at paras. 135-137 (*Investors’ Book of Authorities Tab CA 156*); referencing *United States - Section 337 of the Tariff Act of 1930, General Agreement on Tariffs and Trade*, Report of the Panel (7 November 1989) at para. 5.11 (*Investors’ Book of Authorities Tab CA 52*).

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## B. Treatment No Less Favorable

416. The words “treatment no less favorable” were used in NAFTA Article 1102 as their meaning had been considered extensively in GATT jurisprudence. This jurisprudence had interpreted “treatment no less favorable” as requiring equality of competitive opportunities.<sup>559</sup>
417. In the 2005 WTO panel report for the *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (EC – Trademarks and Geographical Indications (US))* case, the panel examined national treatment with regard to the protection of intellectual property, and addressed whether the nationals of other WTO members are accorded “less favorable treatment” than the Respondent WTO Member’s own nationals.<sup>560</sup> The panel recalled that previous panels had found that the appropriate standard of examination under Article 3.1 of the TRIPS Agreement was the statement enunciated by the GATT Panel in *US-Section 337*, where that panel found that the “no less favorable” treatment standard under Article III:4 of GATT 1947 calls for “effective equality of opportunities” that “clearly sets a minimum permissible standard as a basis.”<sup>561</sup>
418. Affirming these findings, the panel in *EC – Trademarks and Geographical Indications (US)* concluded that although the national treatment with regard to the “protection” of intellectual property rights required a different comparator than the GATT-treatment of

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<sup>559</sup> See, for example, *United States - Taxes in Petroleum and Certain Imported Substances*, General Agreement on Tariffs and Trade, Report of the Panel (June 17, 1987) 1987 WL 421960 (G.A.T.T.) at para. 5.2.2. (*Investors’ Book of Authorities at Tab CA 49*); *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001 at para. 99. (*Investors’ Book of Authorities at Tab CA 50*).

<sup>560</sup> Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States*, (EC – Trademarks and Geographical Indications (US)), WT/DS174/R, adopted 20 April 2005, DSR 2005:VIII, at paras. 7.131, 7.132 (*Investors’ Book of Authorities Tab CA 134*). Article 3.1 of the TRIPS Agreement combines elements of national treatment both from pre-existing intellectual property agreements and GATT 1994. The panel acknowledged two important elements in the TRIPS Agreement. First, Article 3.1 of the TRIPS Agreement applies to “nationals”, and not products. Second, Article 3.1 of the TRIPS Agreement, like Article III in GATT 1994, refers to “no less favorable” *treatment*, not the advantages or rights that laws may grant, but does not refer to likeness. The panel also observed that in combination, these elements are also reflected in the TRIPS Agreement’s preamble.

<sup>561</sup> *EC – Trademarks and Geographical Indications (US)*, at para. 7.133 (*Investors’ Book of Authorities Tab CA 134*) (the panel recalled that the Appellate Body and Panel in *US-Section 211 Appropriations Act*, found that the appropriate standard was that enunciated by the GATT Panel in *US-Section 337*; See the Panel report on *US – Section 211 Appropriations Act*, at paras. 8.131-8.133 and the Appellate Body report, at para. 258; See *United States - Section 337 of the Tariff Act of 1930, General Agreement on Tariffs and Trade*, Report of the Panel, at para. 5.11. (*Investors’ Book of Authorities at Tab CA 52*).

nationals, (which requires an examination of like products or like services and service suppliers, rather than to nationals), the principle of “effective equality of opportunities” remained the same for an interpretation of “no less favorable” treatment.<sup>562</sup>

419. The examination of “aim and effects” can be seen in several other NAFTA disputes. For example, Prof. Bryan Schwartz’s concurrent opinion in *S.D. Myers* analyzed national treatment and examined both the *effect* and the *motive or intent*:

In assessing whether a measure is contrary to a national treatment norm a tribunal should, in my view, consider:

- Protectionist *motive or intent*: whether the intent of the government is to create barriers to trade;
- Whether the measure, *on its face*, appears to favor its nationals over non-nationals who are protected by the relevant treaty;
- Whether the *practical effect* of the measure is to disproportionately benefit nationals over non-nationals.<sup>563</sup>

420. Similarly, the *Merrill & Ring* NAFTA Tribunal acknowledged the combination of various approaches required to evaluate national treatment under NAFTA Article 1102, and noted:

The Tribunal in *S.D. Myers* related “treatment” to a requirement of a practical impact on the investment and not merely a motive or intent so as to produce a breach of Article 1102. While motive or intent cannot be excluded from the scope of Article 1102 beforehand, it is not an issue that arises in the instant case. To the extent that a practical impact must be shown, the Tribunal notes that the Investor has identified the adverse effects it believes arise from the treatment received, and thus also meets this particular test, subject, of course, to proving the actual extent of those effects and the adverse consequences that ensue, if any.<sup>564</sup>

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<sup>562</sup> *EC – Geographical Indications*, at para. 7.134, (the panel concluded that it would examine “whether the difference in treatment affects the ‘effective equality of opportunities’ between the nationals of other Members and the Respondent’s own nationals with regard to the ‘protection’ of intellectual property rights, to the detriment of nationals of other Members”; the panel noted that in *US – Section 211 Appropriations Act*, the Panel considered that the jurisprudence on Article III:4 of GATT 1994 may be useful in interpreting Article 3.1 of the TRIPS Agreement due to the similarity of their language: see the Panel report at para. 8.129; Appellate Body report at para. 242). (*Investors’ Book of Authorities Tab CA 134*).

<sup>563</sup> *S.D. Myers, Inc. v. Government of Canada*, First Partial Award, 2000 WL 34510032 (November 13, 2000); Dissenting Opinion of Professor Bryan P. Schwartz, at para. 144. (*Investors’ Book of Authorities Tab CA 158*).

<sup>564</sup> *Merrill & Ring Award*, at para. 80. (*Investors’ Book of Authorities Tabs CA 41*); *S.D. Myers*, First Partial Award, at para. 254. (*Investors’ Book of Authorities Tabs CA 6*).

421. In the *Feldman* dispute, the NAFTA Tribunal found evidence of discrimination.

182. However, in this case *there is evidence of a nexus between the discrimination and the Claimant's status as a foreign investor*. In the first place, there does not appear to be any rational justification in the record for SHCP's less favorable de facto treatment of CEMSA other than the obvious fact that CEMSA was owned by a very outspoken foreigner, who had, prior to the initiation of the audit, filed a NAFTA Chapter 11 claim against the Government of Mexico. Certainly, the action of filing a request for arbitration under Chapter 11 could only have been taken by a person who was a citizen of the United States or Canada (rather than Mexico), i.e., as a result of his (foreign) nationality. While a tax audit in itself is not, of course, evidence of a denial of national treatment, the fact that the audit was initiated shortly after the Notice of Arbitration (first Feldman affidavit, paras. 85-86) and the existence of the unsigned memo at SHCP noting the filing of the Chapter 11 claim in the context of the Claimant's export registration efforts, at minimum raise a very strong suspicion that the events were related, given that no similar audit action was taken against domestic reseller/exporter taxpayers at the time.<sup>565</sup>

422. In *Loewen v. United States*, the NAFTA tribunal examined whether the United States' conduct violated the NAFTA Article 1102, and noted that a "critical problem in the application of Article 1102 to the facts of this case is that we do not have an example of 'the most favorable treatment accorded, in like circumstances'."<sup>566</sup>

423. There may be some burdens that necessarily arise from objective, even-handed legal and regulatory structures, even where those structures are applied with scrupulous impartiality, objectivity, transparency and due process and without any trace of discrimination. Such incidental differential effects do not, as such, distort the conditions of competition in a manner that is inconsistent with the principle of National Treatment under NAFTA Article 1102, and thus, a careful analysis is warranted. In the *Feldman* case, having determined that the claimant was subject to *prima facie* less advantageous treatment than to domestic investors in the same sector, the NAFTA Tribunal's approach implied that Mexico could explain how the regulatory differences operate to show that, when all relevant and legitimate regulatory considerations were taken into account, the result was not, objectively, a denial of equal competitive opportunities.<sup>567</sup> In any event, Mexico did not provide such an explanation, and thus, a violation of National Treatment was found.<sup>568</sup>

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<sup>565</sup> *Feldman*, Award, at para. 182. (*Investors' Book of Authorities Tab CA 51*).

<sup>566</sup> *Loewen*, Award, at para. 140. (*Investors' Book of Authorities Tab CA 13*).

<sup>567</sup> *Feldman*, Award, at para. 178. (*Investors' Book of Authorities at Tab CA 51*).

<sup>568</sup> *Feldman*, Award, at para. 187. (*Investors' Book of Authorities at Tab CA 51*).

424. Cases decided under the WTO have determined that national treatment is not provided where a government provides differential treatment to like products. The panel report on *Section 337 of the Tariff Act of 1930* made clear that the “no less favorable treatment” standard is far more broad than merely requiring Parties to ensure that their measures apply equally to domestic foreign goods:

[The] “no less favorable” treatment requirement set out in Article III:4 is unqualified. These words are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favored nation standard, or to domestic products, under the national treatment standard of Article III. The words “treatment no less favorable” in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis. On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favorable treatment.<sup>569</sup>

425. To determine inconsistencies of treatment, the panel in *US - Section 337* concluded:

Bearing in mind the foregoing and that it is up to the contracting party seeking to justify measures under Article XX(d) to demonstrate that those measures are “necessary” within the meaning of that provision<sup>1</sup>, *the Panel considered whether the inconsistencies that it had found with Article III:4 can be justified as “necessary” in terms of Article XX(d).* The Panel first examined the argument of the United States that the Panel should consider not whether the individual elements of Section 337 are “necessary” but rather whether Section 337 as a system is “necessary” for the enforcement of United States patent laws (paragraphs 3.57-3.58). The Panel did not accept this contention since it would permit contracting parties to introduce GATT inconsistencies that are not necessary simply by making them part of a scheme which contained elements that are necessary. *In the view of the Panel, what has to be justified as “necessary” under Article XX(d) is each of the inconsistencies with another GATT Article found to exist, i.e. in this case, whether the differences between Section 337 and federal district court procedures that result in less favorable treatment of imported products within the meaning of Article III:4, as outlined above (paragraph 5.20), are necessary.*<sup>570</sup>

Based on the foregoing, the GATT Panel required that the effects of the measures should be evaluated when determining “less favorable treatment”.

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<sup>569</sup> *United States - Section 337*, at para. 5.11. (*Investors’ Book of Authorities Tab CA 52*).

<sup>570</sup> *United States - Section 337*, at para. 5.27. (*Investors’ Book of Authorities Tab CA 52*).



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### III. MOST FAVORED NATION TREATMENT

426. The concept of Most-Favored-Nation (“MFN”) treatment is one of the longest-standing principles of international economic law. Prof. John Jackson suggests that the Most Favored Nation obligation dates back to the end of the 17<sup>th</sup> century.<sup>571</sup> Bilateral investment treaties frequently included this obligation which ensures investors treatment as favorable as that given to investors from any third country. This commitment reflects long-standing trade obligations contained in numerous international agreements, including the GATT and WTO.<sup>572</sup>
427. Most Favored Nation clauses protect the expectations of early adopters of investment treaties to automatically receive the ensuing benefits negotiated in later ones. Parties to international economic treaties want to ensure that they are not compelled to renegotiate their treaties every time one of the treaty parties negotiates a new treaty with another government. Through Most Favored Nation agreement, governments have ensured that the content of their bilateral investment treaty is always maintained at the best and highest level of investment protection.
428. When combined, national treatment and Most Favored Nation requirements create an obligation on governments to provide to the investments of foreign treaty investors the best type of treatment they would provide to any investor, whether domestic or foreign.
429. NAFTA Article 1103 says:
1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
  2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
430. Due to the relevance and importance of the most-favored nation treatment, the International Law Commission, at its sixtieth session (2008), reintroduced the topic of

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<sup>571</sup> Jackson, J.H., *World Trade and the Law of GATT* (Bobbs-Merrill Company, 1969) at 249-250 (*Investors’ Book of Authorities at Tab CA 168*). Professor Jackson suggests that the Most Favored Nation obligation first appeared at the end of the 17<sup>th</sup> century.

<sup>572</sup> GATT, Article I. (*Investors’ Book of Authorities at Tab CA 48*).

“The Most-Favored Nation clause” in its work.<sup>573</sup> The co-chair of the ILC working group, Prof. D.M. McRae, presented a paper that analyzed Most Favored Nation provisions in the GATT and the WTO. The paper provided that:

“[i]n all the areas if the WTO agreements to which MFN applied – goods, services and intellectual property – MFN treatment had been treated as essential, fundamental, or as the cornerstone.”<sup>574</sup>

The application of Most Favored Nation under the WTO “seemed to be the same regardless of the different ways in which the principle had been formulated.” Moreover, the interpretation of Most Favored Nation clauses under the WTO “had been influenced more by a perception of the object and purpose of the provision, rather than by its precise wording.”

431. Treaty Parties commonly include exceptions to the scope of Most Favored Nation clauses within their treaties. The NAFTA Parties have included their limitations to the scope of Article 1103 as follows:
- a. in Annex IV of the NAFTA, where Canada has excluded international agreements, which were signed or came into force before the NAFTA (1 January 1994);
  - b. Canada has also excluded specific sectors of its economy from the scope of Article 1103;
  - c. Through Article 1108 and accompanying reservations in Annex I and II of the NAFTA
432. Environmental regulatory assessment, however, is not excluded from the operation of NAFTA Article 1103, and there are no reservations in Annex I or II addressing it. By excluding these treaties, sectors and policies from the scope of Article 1103, Canada has agreed that Article 1103 gives investors the benefit of better protection offered to non-NAFTA Party investments or investments for other NAFTA Parties.

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<sup>573</sup> See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10)*, paras. 351-352. For the syllabus on the topic, see *ibid.*, annex B. A Study group, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera, was established to discuss the scope of MFN clauses and their interpretation and application. At its 3029<sup>th</sup> meeting on 31 July 2009, the Commission took note of the oral report of the Co-Chairmen of the study Group on The Most Favored -Nation clause (*Sixty fourth Session Supplement No. 10 (A/64/10)*). (*Investors’ Book of Authorities at Tab CA 56*).

<sup>574</sup> International Law Commission, Report of the Sixty-second session (2010), A/65/10 at para. 362. (*Investors’ Book of Authorities at Tab CA 147*).

433. Tribunals considering Most Favored Nation clauses similar to NAFTA Article 1103 have also interpreted these clauses to ensure they fulfill their purpose. In *Asian Agricultural Products v Sri Lanka*, the Tribunal held that the *Sri Lanka-UK BIT* equivalent of Article 1103:

...may be invoked to increase the host State's liability in case a higher standard of international protection becomes granted to investments pertaining to nationals of a Third state.<sup>575</sup>

#### **A. Likeness**

434. One of the central issues surrounding the legal interpretation of the Most Favored Nation principle in Article I:1 of the GATT 1994 is the interpretation of the concept of "like products". The Most Favored Nation principle requires that any advantage, favor, privilege or immunity granted by an exporting country shall be accorded to the "like product" of all other exporting countries.<sup>576</sup>
435. The meaning of likeness has to be related to the aspect of the economic activity that has been regulated. The meaning of likeness needs to be considered in the face of the activities that have been regulated and those other enterprises that would also be affected by the regulatory intervention in question.
436. NAFTA Article 1103 requires that the treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. An environmental assessment is a gateway to the evaluation of new or additive economic activity by an investment. In the context of environmental regulatory measures, the aspects of an investment affected by NAFTA Article 1103 would be by definition have to address the establishment, expansion, conduct or operation of economic activity proposed by the investor.
437. The interpretation of likeness with respect to Most Favored Nation treatment must always bear in mind the object and purpose of Most Favored Nation obligation. On the Most Favored Nation obligation in the GATT, the Appellate Body has noted that the object and purpose of Most Favored Nation treatment is not exclusively to prohibit discrimination based on national origin.<sup>577</sup>

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<sup>575</sup> *Asian Agricultural Products*, Award, at para. 43. (*Investors' Book of Authorities at Tab CA 36*).

<sup>576</sup> *Canada - Certain Measures Affecting the Automotive Industry* WT/DS139/AB/R , WT/DS142/AB/R, May 31, 2000, at 26. (*Investors' Book of Authorities at Tab CA 165*).

<sup>577</sup> *Canada - Automotive*, at para. 84. (*Investors' Book of Authorities at Tab CA 165*).

438. The Article 21.5 Panel in the *United States – Tax Treatment for “Foreign Sales Corporations”* examined the first element of a claim under Article III:4 of the GATT 1994, namely whether the imported and domestic products at issue are “like products”. The Panel noted that the purpose of the “like product” inquiry under Article III:4 of the GATT 1994 is to ascertain “whether any formal differentiation in treatment between an imported and a domestic product could be based upon the fact that the products are different – i.e. not like – rather than on the origin of the products involved.”<sup>578</sup>
439. The Article 21.5 Panel examined the facts of the case, where the United States’ Act was a “measure of general application”, which applied horizontally to a range of possible products that could be used for the production of goods that might eventually be qualifying foreign trade property.<sup>579</sup> In observing the general applicability of the United States’ measure, the Article 21.5 Panel found that there was “no need to demonstrate the existence of actually traded like products in order to establish a violation of Article III:4.”<sup>580</sup> The Article 21.5 Panel concluded that with respect to likeness of products, evidence is not required to show a comparison between any particular classes of imported or domestic goods.<sup>581</sup> Thus, the Article 21.5 Panel concluded that in the case where a generally applicable measure is at issue, a complaining country need not establish a “meaningful nexus” between the measure and adverse effects on competitive conditions for a like class of imported goods.<sup>582</sup>
440. The WTO Panel in *Colombia - Ports* considered the meaning of likeness under Article GATT Article I:1. The Panel addressed whether advance customs entry clearance procedures available to goods originating from some WTO Members but not others constituted an advantage for importers from those WTO Members that allegedly were provided with the more favourable treatment. With regard to the meaning of “like products” in the GATT MFN obligation, the Panel concluded that when examining generally applicable regulation, it was *not* necessary to examine whether the better treatment was provided to the *same or similar specific goods* when coming from other WTO Members but instead whether better customs treatment was provided *generally*

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<sup>578</sup> *United-States - FSC* at para. 8.132, at 51 (*Investors’ Book of Authorities at Tab CA 163*); citing to *EC - Measures Affecting Asbestos*, Report of AB, at paras. 39-40. (*Investors’ Book of Authorities at Tab CA 50*).

<sup>579</sup> *United-States - FSC*, at para. 8.133, at 51 (*Investors’ Book of Authorities at Tab CA 163*).

<sup>580</sup> *United-States - FSC*, Panel Report, at para. 8.133, at 51 (*Investors’ Book of Authorities at Tab CA 163*).

<sup>581</sup> *United-States - FSC*, Panel Report, at 52. (*Investors’ Book of Authorities at Tab CA 163*).

<sup>582</sup> *United-States - FSC*, Panel Report, at para. 8.134, at 52. (*Investors’ Book of Authorities at Tab CA 163*).

to goods from those Members. The Panel found that the more favourable treatment provided under the regulatory scheme was afforded not on the basis of a distinction between products as such but “rather [based] on the territory from which the product arrives.”<sup>583</sup> Thus, the WTO Panel found that it was appropriate to compare the treatment provided to “hypothetical” imports arriving from Panama or the Caribbean Free Trade Zone under the customs regime with “like products” from other Members. On this basis, the Panel held that the products originating in Panama were “like products” as compared to products from other Members.<sup>584</sup> In sum, the meaning of “likeness” was understood in terms of the need to compare the treatment of products from the complaining WTO Member that could be affected by the regulation with the treatment of those products from certain other WTO Members that were also reached by the regulation, i.e. as one of general application.

#### **B. Treatment No Less Favorable**

441. The GATT Most Favored Nation obligation (Article I:1 of the GATT) does not explicitly refer to whether the Most Favored Nation obligation applies to *de facto* or to *de jure* discrimination. This issue was considered by the WTO Appellate Body in *Canada - Re: Autopact* where it stated:

In approaching this question, we observe first that the words of Article I:1 do not restrict its scope only to cases in which the failure to accord an “advantage” to like products of all other Members appears *on the face* of the measure or can be demonstrated on the basis of the words of the measure. Neither the words “*de jure*” or *de facto*” appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only “in law” or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also in fact, or *de facto*, discrimination. Like the Panel, we cannot accept Canada’s argument that Article I:1 does not apply to measures which, on their face, are “origin-neutral”.<sup>585</sup>

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<sup>583</sup> *Colombia – Indicative Prices and Restrictions on Ports of Entry, Report of the Panel, WT/DS366/R* (April 27, 2009) at para 7.355 (*Investors’ Book of Authorities* at Tab **CA 172**).

<sup>584</sup> *Colombia –Ports* at paras. 7.356-357 (*Investors’ Book of Authorities* at Tab **CA 172**).

<sup>585</sup> *Canada - Certain Measures Affecting the Automotive Industry*, at para. 78, at 25. (*Investors’ Book of Authorities* Tab **CA 165**).

442. Similarly, to prove a breach of the Most Favored Nation obligation in NAFTA Article 1103, it is not actually necessary to demonstrate that discrimination has actually occurred with respect to a particular, identifiable competitor – only that it may occur.<sup>586</sup>

### C. The Interpretive Principle of MFN

443. MFN treatment can have interpretive as well as substantive effect. Under NAFTA Article 102(1), the NAFTA Parties specifically articulated that the MFN principle was one of the principles and rules that must inform the interpretation of the NAFTA's provisions, in light of their context and the NAFTA's objectives.

#### i. MFN's Relation to Other Treaties

444. Both Article 1103 and similarly worded Most Favored Nation articles have been considered by tribunals. With regard to substantive measures directly taken in respect of the Investor or Investment, these tribunals have universally interpreted such clauses to give investors the better substantial protection offered in other treaties. For example, the *Pope & Talbot* Tribunal said that Article 1103 gives investors the benefit of better substantial protection offered in BITs to which Canada is a party. The Tribunal said:

Of course ... under Article 1105, every NAFTA investor is entitled, by virtue of Article 1103, to the treatment accorded nationals of other States under BITs containing the fairness elements unlimited by customary international law.<sup>587</sup>

445. The meaning of a Most Favored Nation clause, similar to NAFTA Article 1103, was also considered in *MTD v. Chile*.<sup>588</sup> The dispute in that case arose from the failure of an urban development in Chile. The Malaysian claimants argued that Chile breached its obligations in the *Malaysia-Chile BIT* by approving their investment in the country, even though the project was eventually deemed inconsistent with planning laws.
446. In support of their claim, the claimants relied on Article 3(2) of the *Chile-Croatia BIT*. That Article says: "When a Contracting Party has admitted an investment in its territory, it shall grant the necessary permits in accordance with its laws and regulations." The claimants argued Article 3(2) gave Croatian investors better treatment than that

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<sup>586</sup> GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, L/6627, adopted 25 January 1990, BISD 37S/86 (*Investors' Book of Authorities* Tab **CA 166**); GATT Panel (US - Malt Beverages) (*Investors' Book of Authorities* Tab **CA 155**); *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Panel Report, DS10/R, adopted 7 November 1990, BISD 37S/200 (*Investors' Book of Authorities* Tab **CA 167**).

<sup>587</sup> *Pope & Talbot*, Award on Damages, endnote at 1366. (*Investors' Book of Authorities* at Tab **CA 39**).

<sup>588</sup> *MTD Equity*, Award (*Investors' Book of Authorities* at Tab **CA 21**).

provided to Malaysian investors under the *Malaysia-Chile BIT* and that Chile had breached the MFN Article of the *Malaysia-Chile BIT* by failing to provide that better treatment. The Tribunal accepted the claimant's interpretation of the MFN clause.<sup>589</sup> The Tribunal noted the parties had excluded tax treatment and regional cooperation from the scope of the MFN clause. According to the Tribunal,

“[a] *contrario sensu*, other matters that can be construed to be part of the fair and equitable treatment of investors would be covered by the clause.”<sup>590</sup>

447. The Tribunal in *MTD Equity* also added that giving the claimants the protection offered in the Croatian treaty was consonant with the purpose of interpreting the treaty standards “in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments.”<sup>591</sup> The Tribunal eventually found Chile had not breached the MFN clause because the Croatian treaty only required Chile to issue permits in accordance with local law and issuing the permits to the Malaysian investors would have required a change of law.
448. The *Siemens* Tribunal interpreted the MFN clause in the treaty before it in a similar way. In deciding to give the investor the protection offered in the clause, the Tribunal said “the term ‘treatment’ [in the MFN clause] is so general that the Tribunal cannot limit its application except as specifically agreed by the parties.”<sup>592</sup>
449. The *Rumeli* Tribunal decided that the Respondent's international obligations assumed in other bilateral treaties, and in particular, the United Kingdom-Kazakhstan bilateral investment treaty, was applicable in this case.<sup>593</sup> As a result, the *Rumeli* Tribunal found that other obligations related to fair and equitable treatment applied in this case.<sup>594</sup>
450. The tribunal in *Bayinder v Pakistan* interpreted the MFN clause in the Pakistan-Turkey investment treaty to import the fair and equitable standard found in other treaties entered into by Pakistan, as the Pakistan-Turkey treaty did not contain a fair and equitable treatment clause. For the purposes of assessing jurisdiction, the tribunal had

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<sup>589</sup> *MTD Equity*, Award, at para. 204. (*Investors' Book of Authorities at Tab CA 21*).

<sup>590</sup> *MTD Equity*, Award, at para. 104. (*Investors' Book of Authorities at Tab CA 21*).

<sup>591</sup> *MTD Equity*, Award, at para. 104. (*Investors' Book of Authorities at Tab CA 21*).

<sup>592</sup> *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 2004 WL 3249805 (August 3, 2004) at para. 106. (*Investors' Book of Authorities at Tab CA 54*).

<sup>593</sup> *Rumeli Telekom*, Award, para. 575. (*Investors' Book of Authorities at Tab CA 59*).

<sup>594</sup> *Rumeli Telekom*, Award, para. 575. (*Investors' Book of Authorities at Tab CA 59*).

*prima facie* found that the fair and equitable treatment standard could be read into the Pakistan-Turkey treaty on the basis of the wording of the MFN clause and because the preamble referred to fair and equitable treatment standard as well.<sup>595</sup> In its final award, the *Bayinder* Tribunal reaffirmed the earlier decision on jurisdiction, and examined the ordinary meaning of the MFN treaty provision to conclude that the Parties “did not intend to exclude the importation of a more favorable substantive standard of treatment accorded to investors of third countries.”<sup>596</sup>

451. The *Bayinder* Tribunal supported its decision based on the *MTD v Chile* Award, regarding the application of MFN to import a fair and equitable treatment standard obligation.<sup>597</sup>
452. *Maffezini v Spain* also considered the application of a BIT MFN article. The ICSID Tribunal allowed the claimant to rely on the MFN clause within the Argentina - Spain BIT to claim the more favorable dispute settlement provisions within the Chile - Spain BIT. The Tribunal concluded that as long as:

the third-party treaty...relate[s] to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, then if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, *such provisions may be extended to the beneficiary of the most-favored-nation clause.*<sup>598</sup>

453. The Investor's description of the international law standard draws from precisely the same sources that the *Mondev* and *ADF* Tribunals endorsed as informing the meaning of Article 1105. The source of the standard is the obligation of governments to act in good faith - a part of customary international law, a general principle of law and, indeed, perhaps the most fundamental norm of international law.<sup>599</sup> While the precise manifestations of the obligation to act in good faith have been refined by tribunals and writings, their grounding in the customary international law obligation to act in good faith remains unchanged.

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<sup>595</sup> *Bayindir Insaat Turzim Ticaret Ve Sanayi, A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB./03/29, Decision on Jurisdiction, 2005 WL 3598900 (November 14, 2005) at paras. 205-206, 213. (*Investors' Book of Authorities at Tab CA 149*).

<sup>596</sup> *Bayindir*, Decision on Jurisdiction, at para. 157. (*Investors' Book of Authorities at Tab CA 149*).

<sup>597</sup> *Bayindir*, Decision on Jurisdiction, at paras. 158, 160. (*Investors' Book of Authorities at Tab CA 149*); citing to *MTD Equity*, Award, at para. 104 (*Investors' Book of Authorities at Tab CA 21*); The tribunal acknowledged that the FET provision, Article II(2) of the Pakistan-UK BIT, pre-dated the MFN clause in the treaty. The tribunal said that the “chronology does not appear to preclude the importation of an FET obligation from another BIT concluded by the Respondent”; *Chemtura* Award, at para. 235. (*Investors' Book of Authorities at Tab CA 111*).

<sup>598</sup> *Maffezini*, Award, at para. 56 [emphasis added]. (*Investors' Book of Authorities at Tab CA 55*).

<sup>599</sup> Franck, T. *Fairness in International Law and Institutions*, at 1. (*Investors' Book of Authorities at Tab CA 3*).



#### **PART FOUR: THE LAW APPLIED TO THE FACTS**

454. This Part of the Memorial relates how Canada's measures described in Part Two of the Memorial, were inconsistent with Canada's NAFTA Obligations described in Part Three of the Memorial.
455. Canada contravened its International Law Standard of Treatment obligation in NAFTA Article 1105.
- a) Canada did not accord the international law standard of treatment to Bilcon:
    - i.* Canada imposed a jurisdiction it did not have over Bilcon's environmental assessment;
    - ii.* Canada and Nova Scotia wrongfully imposed a Joint Review Panel assessment on Bilcon's investment;
    - iii.* The Joint Review Panel failed to follow its Terms of Reference and its governing laws and regulations;
    - iv.* Canada and Nova Scotia failed to adhere to the legal and regulatory obligations governing their consideration of the Panel's Report and recommendations; and
    - v.* The Ministerial decisions following the environmental review failed to follow the governing legal, legislative and regulatory requirements to give Bilcon an opportunity to make representations.
  - b) Canada acted in an unfair and arbitrary manner toward Bilcon:
    - i.* Canada imposed biased, needless and unfair procedures and obligations on Bilcon with an intent to cause economic harm, deprivation and delay;
    - ii.* The Joint Review Panel ignored relevant facts, and relied upon arbitrary, biased and capricious concepts and improper considerations in regard to:
      - 1. The fictitious creation of "community core values;
      - 2. The misuse of "cumulative effects";
      - 3. The misuse of "adaptive management" principles;
      - 4. The misuse of the "precautionary principle"

5. An irrelevant preoccupation with the NAFTA;
  6. Permitting and manifesting an anti-Americanism prejudice against Bilcon, and its intention to export the aggregate to the United States; and
  7. Ignoring relevant considerations such as Bilcon's expert evidence and its mitigation measures.
- c) Canada treated Bilcon in a discriminatory manner by allowing political motivations to thwart Bilcon's environmental assessment process;
  - d) Canada acted in a non-transparent manner by engaging in a course of conduct designed to cause delay and economic harm and deprivation to Bilcon and its Investors.
456. Canada contravened its Most Favored Nation Treatment obligation in NAFTA Article 1103:
- a) Canada provided treatment that was less favorable to Bilcon and its Investors than was provided to companies owned by Investors from other NAFTA Parties as well as to Investors from Non-Parties, in like circumstances; and
  - b) The measures interfered with the conduct, management, operation and expansion of the Investment.
457. NAFTA Article 1104 requires that an investor from the United States, and its investments, receive from Canada the best treatment provided in the jurisdiction under either NAFTA 1102 or 1103.
458. While full proof of damages is not required in this Phase of the arbitration, the presence of harm or damage arising from the NAFTA violation must be pleaded in a claim submitted under NAFTA Article 1116 or 1117. This does not require that proof of harm or damage be established in the merits phase of the arbitration however, some damage arising from Canada's treatment to the Investment and its Investors is set out in Part Seven of this Memorial.

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## I. INTERNATIONAL LAW STANDARD OF TREATMENT

### A. Due Process and Natural Justice; Fairness and Reasonableness

#### *i. Prior to the Joint Review Panel Process*

459. The DFO:

- a) Imposed blasting conditions that the federal level of government lacked competence to request;
- b) Unreasonably, and without a basis in law, refused to authorize Bilcon's blasting plan;
- c) Unreasonably and with no basis in law imposed an unwarranted "comprehensive study" level of environmental assessment on Bilcon; and
- d) Decided to "scope in" the quarry to the assessment without any "credible scientific link" between the quarry and harm to fish.<sup>600</sup>

460. There was no legal statutory or regulatory requirement that DFO approval needed to be obtained by Bilcon prior to blasting. The federal DFO imposed itself into the provincial process without any jurisdiction or authority.<sup>601</sup>

- a) The DFO required blasting conditions related to the effects of blasting on marine mammals, fish and fish habitat.<sup>602</sup> All blasting would take place on land, meeting or surpassing required blasting set-back distances and the DFO knew that there were no issues concerning fish.<sup>603</sup>
- b) The DFO assessment of the quarry was unusual,<sup>604</sup> unlawful,<sup>605</sup> and deliberately intended to delay and defeat the project.<sup>606</sup> The regulation of quarries is a

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<sup>600</sup> Expert Report of David Estrin at para. 109.

<sup>601</sup> Expert Report of David Estrin at para. 120.

<sup>602</sup> Expert Report of David Estrin at para. 123.

<sup>603</sup> Letter from Thomas Wheaton (DFO) to NSDEL, September 18, 2001, at 005479. (*Investors' Schedule of Documents at Tab C 477*); Expert Report of David Estrin at para. 125.

<sup>604</sup> Expert Report of David Estrin at para. 184.

<sup>605</sup> Memo from Susan Kirby, Assistant Deputy Minister, (DFO) to Robert Thibault, Minister (DFO), June 20, 2003. (*Investors' Schedule of Documents at Tab C 457*).

<sup>606</sup> Expert Report of David Estrin at para. 131.

matter of exclusive provincial jurisdiction,<sup>607</sup> and there could be no federal involvement without the fictitious claims related to a marine component.<sup>608</sup>

461. Canada failed to ensure that appropriate persons were appointed as members of the Panel. The Panel was not comprised of persons with the requisite professional credentials and experience.<sup>609</sup>
462. Canada failed to appoint candidates that were “unbiased and free from any conflict of interest relative to the project”.<sup>610</sup> Instead, Canada deliberately appointed members of the Review Panel who were manifestly biased against Bilcon. Two of the panel members, Robert Fournier and Gunter Muecke, had previous involvement with a key provincial environmental activist group, the Ecology Action Centre.<sup>611</sup> The third member, Jill Grant, was an advocate for greater community participation in environmental decision-making.<sup>612</sup>
463. Canada failed to appoint panel members who were clearly “comfortable” with standard environmental assessment processes and proceedings in the Province of Nova Scotia and Canada.<sup>613</sup>

*ii. The Panel*

464. The initial Draft EIS Guidelines were prepared by the CEA Agency and the NSDEL and set out the specific factors that the Joint Review Panel was to consider.<sup>614</sup> The Panel blatantly distorted the Draft EIS Guidelines:

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<sup>607</sup> Expert Report of David Estrin at para. 182.

<sup>608</sup> Expert Report of David Estrin at para. 181.

<sup>609</sup> Expert Report of David Estrin at para. 515.

<sup>610</sup> CEAA, s.33. (*Investors’ Schedule of Documents at Tab C 255*).

<sup>611</sup> The Ecology Action Centre was an active and vocal activist group opposed to the Whites Point Quarry. Résumé of Robert Fournier. (*Investors’ Schedule of Documents Tab C 285*); Résumé of Gunter Muecke. (*Investors’ Schedule of Documents Tab C 286*).

<sup>612</sup> As discussed in Section Five of this Memorial, Canada has inexplicably failed to provide the résumé of Jill Grant to the Investors.

<sup>613</sup> Expert Report of David Estrin at para. 514.

<sup>614</sup> Joint Canada-Nova Scotia News Release, The Public is Invited to Comment on the Draft Guidelines for the Preparation of the Environmental Impact Statement, dated November 10, 2004. (*Investors’ Schedule of Documents at Tab C 405*).

- a) As noted in the Panel Report, the Panel concluded that the Draft EIS Guidelines, as prepared by the CEA Agency and the NSDEL were insufficient because after receiving public comments, they were not to their liking.<sup>615</sup>
- b) The final EIS Guidelines that the Panel imposed on Bilcon required Bilcon, with “perfect certainty” to satisfy the Panel about issues not in its Terms of Reference, including a requirement to “identify and describe any significant adverse environmental effects caused by the Project, including situations not explicitly identified in these EIS Guidelines” like:
  - i. “Traditional Knowledge”;
  - ii. The Precautionary Principle; and
  - iii. International Agreements.

465. The Panel conducted mandatory public scoping sessions on the Draft EIS Guidelines over four days.<sup>616</sup> Under the Panel’s Terms of Reference, the purpose of public comment was to “determine whether additional information should be provided before convening public hearings.”<sup>617</sup> The Panel was thereby required to limit any additions to the relevant criteria of an environmental assessment under the *CEAA*. But, rather than confine the public scoping hearings to its statutory mandate, the Panel used the activist opinions of the public advocated to in effect dispense with the Draft EIS Guidelines entirely.<sup>618</sup> Section 16 of the *CEAA* provides that the federal Minister of the Environment, after consulting with the DFO and Transport Canada, may add factors to be considered by a Joint Review Panel, but even those additions must be included in the Terms of Reference.<sup>619</sup> The Panel’s misuse of the public scoping sessions included:

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<sup>615</sup> Expert Report of David Estrin at paras 348-349.

<sup>616</sup> Transcript of Scoping Meeting #1 in Sandy Cove, dated January 6, 2005. (*Investors’ Schedule of Documents at Tab C 116*); Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005. (*Investors’ Schedule of Documents at Tab C 117*); Transcript of Scoping Meeting #3 in Wolfville, dated January 8, 2005. (*Investors’ Schedule of Documents at Tab C 118*); Transcript of Scoping Meeting #4 in Meteghan, dated January 9, 2005. (*Investors’ Schedule of Documents at Tab C 119*).

<sup>617</sup> *Agreement concerning The Establishment of a Joint Review Panel*, dated November 3, 2004, at 7-8. (*Investors’ Schedule of Documents at Tab C 363*).

<sup>618</sup> Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, dated March 2005, at s. 6.6. (*Investors’ Schedule of Documents Tab C 168*); E-mail from Phil Zamora (DFO) to Derek McDonald (CEA Agency), undated. (*Investors’ Schedule of Documents at Tab C 441*).

<sup>619</sup> *CEAA*, s. 16(3). (*Investors’ Schedule of Documents at Tab C 255*).

- i. Disparaging the American identity of Bilcon and its organizational structure and the American destination of the aggregate;<sup>620</sup>
- ii. Questioning the integrity of Bilcon;<sup>621</sup>
- iii. Presuming the NAFTA had implications for subsequent quarry applications;<sup>622</sup>
- iv. Distorting the Precautionary Principle;<sup>623</sup> and
- v. Expanding the definition of “Traditional Knowledge” issues from Aboriginal issues to the current views of all residents in the area.<sup>624</sup>

466. The Panel also abused its discretion by altering the standard ecosystem approach analysis to compel Bilcon to address factors that were functionally impossible to address at the preliminary planning stage of the project.<sup>625</sup>

467. The Panel deviated from Canadian law and normal EIS requirements to impose a review of “cumulative effects” that forced Bilcon to examine purely hypothetical

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<sup>620</sup> Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005 at 115-116. (*Investors’ Schedule of Documents at Tab C 117*).

<sup>621</sup> Transcript of Scoping Meeting #1 in Sandy Cove, dated January 6, 2005 at 24-25. (*Investors’ Schedule of Documents at Tab C 116*); Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005 at 116. (*Investors’ Schedule of Documents at Tab C 117*).

<sup>622</sup> Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005 at 31, 81, and 121. (*Investors’ Schedule of Documents at Tab C 117*); Transcript of Scoping Meeting #3 in Wolfville, dated January 8, 2005 at 43, 47. (*Investors’ Schedule of Documents at Tab C 118*); Transcript of Scoping Meeting #4 in Meteghan, dated January 9, 2005 at 18, 27, 30. (*Investors’ Schedule of Documents at Tab C 119*).

<sup>623</sup> Transcript of Scoping Meeting #1 in Sandy Cove, dated January 6, 2005 at 38, 39, 111, 112, 121, 1222. (*Investors’ Schedule of Documents at Tab C 116*); Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005 at 120. (*Investors’ Schedule of Documents at Tab C 117*); Transcript of Scoping Meeting #3 in Wolfville, dated January 8, 2005 at 45. (*Investors’ Schedule of Documents at Tab C 118*); Transcript of Scoping Meeting #4 in Meteghan, dated January 9, 2005 at 100. (*Investors’ Schedule of Documents at Tab C 119*).

<sup>624</sup> Transcript of Scoping Meeting #1 in Sandy Cove, dated January 6, 2005 at 77-78, 118. (*Investors’ Schedule of Documents at Tab C 116*); Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005 at 120. (*Investors’ Schedule of Documents at Tab C 117*); Transcript of Scoping Meeting #4 in Meteghan, dated January 9, 2005 at 17, 23, 25, 29. (*Investors’ Schedule of Documents at Tab C 119*).

<sup>625</sup> Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, dated March 2005, s. 3.4. (*Investors’ Schedule of Documents Tab C 168*).

propositions.<sup>626</sup> The Panel cavalierly disregarded the statutory framework for assessing the cumulative effects of prior projects, and instead, imposed a spurious standard of “induced” activities.”<sup>627</sup>

468. The Panel’s insistence on specific and excessively detailed facts ignores the typical environmental assessment process, whereby project details are to evolve during and even after the Panel hearings.<sup>628</sup> The *CEAA* requires environmental assessments “to be conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made.”<sup>629</sup>
469. The Panel disregarded the well established legal standard of environmental assessment, and instead, demanded the impossible standard of “perfect certainty” from Bilcon.<sup>630</sup>
470. The term “Aboriginal Traditional Knowledge” was incorporated into the *CEAA* following an amendment to the legislation in October 2003.<sup>631</sup> Prior to this amendment, the *CEAA* did not require a review of “Community Knowledge and Aboriginal Traditional Knowledge”. The Panel used comments from the scoping sessions, where the term “Traditional Knowledge” was discussed extensively by community members who demanded that the Panel not only include Aboriginal traditional knowledge, but the Panel expand the statutory definition of “Aboriginal Traditional Knowledge” to include “people of Acadian, African-Canadian and Loyalist descent” and fishers in the area.<sup>632</sup>

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<sup>626</sup> Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, dated March 2005, s. 11. (*Investors’ Schedule of Documents Tab C 168*); *CEAA*, s. 16(1)(a) (*Investors’ Schedule of Documents at Tab C 255*).

<sup>627</sup> Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, dated March 2005, s. 11. (*Investors’ Schedule of Documents Tab C 168*); In the Final EIS Guidelines the Panel removed the standard reference to the Operational Policy Statement on “Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act”, February 1999. (*Investors’ Schedule of Documents Tab C 371*).

<sup>628</sup> Expert Report of David Estrin at para. 357.

<sup>629</sup> *CEAA*, s. 11(1). (*Investors’ Schedule of Documents at Tab C 255*).

<sup>630</sup> Expert Report of David Estrin at para. 360.

<sup>631</sup> Bill C-9: An Act to Amend the Canadian Environmental Assessment Act, s. 8 (*Investors’ Schedule of Documents at Tab C 259*).

<sup>632</sup> Transcript of Scoping Meeting #1 in Sandy Cove, dated January 6, 2005, at 77-78, 118. (*Investors’ Schedule of Documents at Tab C 116*); Transcript of Scoping Meeting #2 in Digby, dated January 7, 2005, at 120. (*Investors’ Schedule of Documents at Tab C 117*); Transcript of Scoping Meeting #3 in Wolfville, dated January 8, 2005, at 74, 81, 105. (*Investors’ Schedule of Documents at Tab C 118*); Transcript of Scoping Meeting #4 in Meteghan, dated January 9, 2005, at 17, 23, 25, 29. (*Investors’ Schedule of Documents at Tab C 119*).

471. The EIS submitted by Bilcon to comply with the demands of the panel was over 3,000 pages long. It was “exceptional” for a Review Panel to be given the discretion to “extensively revise[]” the guidelines of an environmental impact study assessment.<sup>633</sup> The usual process is that the EIS Guidelines are handed to the Joint Review Panel by the CEA Agency when the Panel is established.<sup>634</sup> The Whites Point Quarry EIS Guidelines are “the only instance” found since 1998 where the Panel was given “the discretion to hold scoping hearings which allowed it to in effect rewrite the EIS Guidelines.”<sup>635</sup> After receiving the Bilcon’s EIS, the Joint Review Panel made numerous, onerous “information requests” to Bilcon.<sup>636</sup> Then it criticized Bilcon in its Final Report for not having eliminated all uncertainty.<sup>637</sup>
472. The Panel also failed to exercise its mandate under its Terms of Reference and the *CEAA* by not questioning Bilcon’s many experts.
- a) Bilcon retained experts in each field required by the Panel, and its final EIS constituted 17 volumes, and 35 expert reports.<sup>638</sup>
  - b) Nineteen (19) of Bilcon’s experts attended the hearing.<sup>639</sup> Over the 90 hours of hearing, Bilcon’s experts testified for only 90 minutes.<sup>640</sup> For example, Carlos Johansen, a shipping expert from Vancouver, who came to provide information to the Panel, was only asked one question.<sup>641</sup>
473. By imposing a “reverse onus” on Bilcon with respect to the precautionary principle, the Panel failed to properly consider any legitimate and reasonable uncertainty of unforeseeable future effects, and this artifice facilitated the summary dismissal of

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<sup>633</sup> Expert Report of David Estrin at para. 350; Joint Review Panel Final Report, dated October 23, 2007, at 16. (*Investors’ Schedule of Documents at Tab C 34*).

<sup>634</sup> Expert Report of David Estrin at para. 350.

<sup>635</sup> Expert Report of David Estrin at para. 350 [*emphasis added*].

<sup>636</sup> Expert Report of David Estrin at para. 353.

<sup>637</sup> Expert Report of David Estrin at para. 224.

<sup>638</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at para. 70.

<sup>639</sup> Expert Report of David Estrin at para. 416-419.

<sup>640</sup> Witness Statement of Hugh Fraser at para. 14.

<sup>641</sup> Witness Statement of Hugh Fraser at para. 15.



Bilcon's adaptive management approach, which was never given fair or due consideration.

- a) The Panel was “extremely dismissive” of Bilcon’s use of “adaptive management”, though it was specifically referenced in the EIS Guidelines.<sup>642</sup> The CEA Agency adopts “adaptive management measures” under the CEAA as a planning tool that “provides flexibility to identify and implement new mitigation measures or to modify existing ones during the life of a project.”<sup>643</sup> The Panel, however, dismissed Bilcon’s use of adaptive management as “confusing and unconvincing”.<sup>644</sup>
- b) Canadian jurisprudence affirms that adaptive management “permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information...”<sup>645</sup>

474. The Panel’s most flagrant departure from the rule of law however was its reliance on “community core values”, a notion unknown to environmental assessment law and regulation in Canada.<sup>646</sup> The notion of “community core values” is not an environmental effect under the CEAA<sup>647</sup> and inconsistency with community core values “could not constitute a significant adverse environmental effect under CEAA.”<sup>648</sup> And it was, the only impact identified by the Panel as being “significant” and “adverse”.<sup>649</sup>

475. Not only did the Panel use an irrelevant consideration with no basis in law but it also manifested its lack of objectivity by confirming its personal alignment with those most opposed to the project. The Panel remained determined to shape its view of the

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<sup>642</sup> Expert Report of David Estrin at para. 407.

<sup>643</sup> Expert Report of David Estrin at paras. 408, 409 411, 412, 413; *See also* CEA Agency, Operational Policy Statement: Adaptive Management Measures under the *Canadian Environmental Assessment Act* (2009). (*Investors’ Schedule of Documents at Tab C 571*). *See also* Response documents of Bilcon relating to Comments on the EIS, Vol. 2, s. 3.6. (*Investors’ Schedule of Documents at Tab C 572*).

<sup>644</sup> Expert Report of David Estrin at para. 415.

<sup>645</sup> Expert Report of David Estrin at para. 323; *See also* *Pembina*, 2008, at paras. 32-34. (*Investors’ Schedule of Documents at Tab C 260*).

<sup>646</sup> Expert Report of David Estrin at para. 215.

<sup>647</sup> Expert Report of David Estrin at paras. 218 and 230.

<sup>648</sup> Expert Report of David Estrin at para. 231.

<sup>649</sup> Expert Report of David Estrin at paras. 215 and 229.

community and ignored Health Canada, a Federal department responsible for helping Canadians maintain and improve their health, which told the Panel that the Whites Point Quarry would not pose negative effects to “social well-being” or “quality of life”<sup>650</sup> and would not have “social, emotional, spiritual and environmental impacts.”<sup>651</sup> To the contrary, the Joint Review Panel arrogantly presumed to conclude:

The proposed injection of an industrial project into the region would undermine and jeopardize community visions and expectations, and lead to irrevocable and undesired changes of quality of life.<sup>652</sup>

476. The Panel thereby applied an inappropriate and “illegal concept of ‘cumulative effects’” to the Whites Point Quarry project.<sup>653</sup> In defiance of, or indifference to Canadian case law and the CEA Agency’s Operational Policy Statement, the Panel abused its authority by creating its own concept of “cumulative effects”, whereby the EIS Guidelines stated that Bilcon shall identify and assess the cumulative effects of the Project to a “reasonable degree of certainty should exist that proposed projects and activities will actually proceed for them to be included.”<sup>654</sup> This understanding is directly contrary to the ordinary, common sense reading of “cumulative environmental effects” that requires only a consideration of “approved projects” and not “hypothetical” ones.<sup>655</sup>
477. The Panel further abused its discretion by concluding, without any credible evidence, that adverse effects could arise from the use of ANFO in blasting. There was no evidence on the record to support it. This was entirely a matter of assertion, rumor-mongering and innuendo on the part of those vehemently opposed to the quarry. The Panel rejected the evidence of blasting expert, John Melick, and instead accepted the

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<sup>650</sup> Health Canada Presentation Summary for the Whites Point Quarry and Marine Terminal Joint Review Panel, dated June 7, 2007 (*Investors’ Schedule of Documents at Tab C 373*).

<sup>651</sup> Summary of Health Canada presentation before the Joint Review Panel, dated June 27, 2006. (*Investors’ Schedule of Documents at Tab C 187*).

<sup>652</sup> Joint Review Panel Final Report, dated October 23, 2007 at 4. (*Investors’ Schedule of Documents at Tab C 34*).

<sup>653</sup> Expert Report of David Estrin at para. 423. See Joint Review Panel Final Report, dated October 23, 2007 at 11. (*Investors’ Schedule of Documents at Tab C 34*).

<sup>654</sup> Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry & Marine Terminal, dated March 2005 at 50-51. (*Investors’ Schedule of Documents at Tab C 168*).

<sup>655</sup> Expert Report of David Estrin at para. 427.

evidence of Ashraf Mahtab, a well-known activist opposed to Bilcon, who lacked any experience in blasting, but purported that Bilcon's explosives ratios were not credible.<sup>656</sup>

478. The Panel tailored the term "cumulative effects" to commit the following violations in the environmental planning process:

a) The Panel applied an "inappropriate and indeed illegal concept of 'cumulative effects'" by importing an illogical connection between cumulative effects and "reasonably foreseeable", uncertain or otherwise hypothetical projects and activities.<sup>657</sup>

b) The Panel crafted a term that demanded that Bilcon refer to all "past, present and reasonably foreseeable projects", which led to further information requests that Bilcon examine all "hypothetical" projects.<sup>658</sup> Notwithstanding that the Panel imposed unreasonable information requests, it still notified Bilcon in its final report that it was rejecting its review of cumulative effects not for what it had covered in its EIS - but because of everything it had omitted.<sup>659</sup>

479. Similarly, the Panel failed to exercise its discretion by ignoring the "follow-up and monitoring programs" its Terms of Reference required it to consider.<sup>660</sup> The Panel did not even mention follow-up programs in its Final Report. Instead, it simply rejected Bilcon's project and said that it was not necessary to consider follow up programs.<sup>661</sup>

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<sup>656</sup> Joint Review Panel Public Hearing Transcript, Vol. 4, dated June 20, 2007 at 671. (*Investors' Schedule of Documents at Tab C 157*).

<sup>657</sup> Expert Report of David Estrin at paras. 422 and 426; *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461, at para. 41. (*Investors' Schedule of Documents Tab C 269*).

<sup>658</sup> Expert Report of David Estrin at para. 429, 430; Letter from Robert Fournier to Paul Buxton, attaching EIS Information Requests, dated July 28, 2006 at 23-24 (*Investors' Schedule of Documents Tab C 549*); Bilcon's Responses to Comments on the EIS - Vol IV. Comments on the EIS-Whites Point Quarry and Marine Terminal Project, Environmental Impact Statement, 10.0, Cumulative Effects, dated February 12, 2007 (*Investors' Schedule of Documents at Tab C 573*); Joint Review Panel Final Report, dated October 23, 2007 at 80. (*Investors' Schedule of Documents at Tab C 34*).

<sup>659</sup> Expert Report of David Estrin at para. 431; Joint Review Panel Final Report, dated October 23, 2007 at 81. (*Investors' Schedule of Documents at Tab C 34*).

<sup>660</sup> *Agreement concerning The Establishment of a Joint Review Panel*, dated November 3, 2004 at s. 1. (*Investors' Schedule of Documents Tab C 114*).

<sup>661</sup> Expert Report of David Estrin at para. 559; See Joint Review Panel Final Report, dated October 23, 2007 at 101. (*Investors' Schedule of Documents at Tab C 71*).

480. The Panel also abused its discretion by introducing a fictional breakwater to the quarry that could “alter the local marine ecosystem.”<sup>662</sup> Bilcon never proposed a breakwater, and was given no opportunity to discuss it.<sup>663</sup>
481. In total disregard for the evidence, the Panel in its Final Report questioned the economic viability of Bilcon’s project due to the presence of a provincially owned road on the quarry site.<sup>664</sup> The Panel failed to note that Bilcon testified that the road would have no impact on its operations, and that the Nova Scotia Department of Transportation had given permission to Bilcon to use the road.<sup>665</sup>

*iii. Ministerial Fettering of Discretion*

482. The Federal Minister of Environment failed to give any reasons for the decision to reject the Whites Point Quarry<sup>666</sup> and abdicated his responsibility for determining whether the project was justified in light of any environmental effects in his decision.<sup>667</sup>
483. Bilcon made numerous attempts to meet with both the federal and provincial Ministers of the Environment<sup>668</sup> to review the recommendations in the Panel’s Report. Despite these attempts, the Ministers refused to meet with Bilcon, without any explanation.<sup>669</sup>

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<sup>662</sup> Expert Report of David Estrin at para. 472; Joint Review Panel Final Report, dated October 23, 2007, at 96. (*Investors’ Schedule of Documents at Tab C 34*).

<sup>663</sup> Expert Report of David Estrin at para. 472; Joint Review Panel Report, dated October 23, 2007 at 96. (*Investors’ Schedule of Documents at Tab C 34*).

<sup>664</sup> Joint Review Panel Final Report, dated October 23, 2007, at 13. (*Investors’ Schedule of Documents at Tab C 34*).

<sup>665</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 449, 452, 463. (*Investors’ Schedule of Documents Tab C 156*).

<sup>666</sup> Expert Report of David Estrin at paras. 549.

<sup>667</sup> Expert Report of David Estrin at para. 531.

<sup>668</sup> Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), dated October 29, 2007, requesting a meeting to discuss the recommendations in the Joint Review Panel Report. (*Investors’ Schedule of Documents at Tab C 195*); Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), dated November 8, 2007, stating the fundamental flaws contained in the Joint Review Panel Report. (*Investors’ Schedule of Documents at Tab C 196*); Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), Nova Scotia Environment and Labour, dated November 16, 2007, providing the proponent’s opinions on several aspects of the Joint Review Panel Report. (*Investors’ Schedule of Documents at Tab C 2*); Letter from Paul Buxton, to John Baird, Minister of the Environment, dated November 21, 2007, requesting that a meeting be convened to address the flaws in the Joint Review Panel Report. (*Investors’ Schedule of Documents at Tab C 204*).

<sup>669</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at paras. 83 and 85.

484. Under Canadian law, a project can only be rejected if after an environmental assessment, the Responsible Authority, “taking into account the implementation of any mitigation measures” that it considers appropriate, concludes that a proposed project is “likely to cause significant adverse environmental effects that cannot be justified in the circumstances.”<sup>670</sup>
485. In this case, the environmental assessment was the Panel Review, and the Minister simply gave a “rubber stamp” to the Panel’s recommendations<sup>671</sup> and “parrot[ed] the words of the Panel Report.”<sup>672</sup> By doing so, the Minister and the Responsible Authority failed to conduct their own independent analysis, which is required under s.37(1)(b) of CEAA to include:<sup>673</sup>
- i. the “mitigation measures” that could be implemented;
  - ii. what the “environmental effects” would be;
  - iii. why the effects could not be “justified in the circumstances”;
  - iv. Involving the responsible Ministers of Fisheries and Transport in the deliberations;
  - v. undertake an independent analysis of the environmental effects of the project after the implementation of mitigation measures; and
  - vi. the “fundamental disconnect between the political decisions after the hearing and the evidence of government officials at the hearing”.<sup>674</sup>

## **B. Abuse of Process**

### *i. Prior to the Joint Review Panel*

486. The Province of Nova Scotia manipulated the domestic legal system to include the federal level of government,<sup>675</sup> because the “proposed project has been very

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<sup>670</sup> Expert Report of David Estrin at paras. 228, 538; CEAA, s. 37(1)(b) (*Investors’ Schedule of Documents at Tab C 255*).

<sup>671</sup> Expert Report of David Estrin at para. 539.

<sup>672</sup> Expert Report of David Estrin at para. 546.

<sup>673</sup> Expert Report of David Estrin at para. 539.

<sup>674</sup> Expert Report of David Estrin at paras. 540, 561, 562.

controversial and the Province is therefore anxious to have federal involvement with assessment of both the terminal and quarry.”<sup>676</sup>

487. Nova Scotia and Canada concocted an artifice to treat the dock for the quarry as “marine-based construction”<sup>677</sup> to trigger a federal process that was actually inapplicable to the project.<sup>678</sup> However, the purpose of “the proposed dock was to be used exclusively in respect of the quarry production and processing operations, it was not a “marine terminal” at all within the meaning of *CEAA*, Canada’s federal environmental authority.”<sup>679</sup>
488. The CEA Agency and Canada’s federal ministries and departments were complicit in contriving triggers<sup>680</sup> under the *CEAA* and the *NWPA* to open federal jurisdiction. Canada even considered whether calling it a “waterlot” would be sufficient, and whether the notion of “fisherman’s privilege” could serve as a gateway for a federal jurisdiction.<sup>681</sup> In the result, Canada willfully ignored the explicit regulatory exemption that excluded

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<sup>675</sup> The Province of Nova Scotia is responsible for the entire project in its Environmental Impact Assessment process; Memorandum for the Assistant Deputy Minister of Oceans, “Environmental Assessment of Proposed Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia Pre-Meeting for Meeting with Associate Deputy Minister”. (*Investors’ Schedule of Documents at Tab C 509*).

<sup>676</sup> Memorandum for the Assistant Deputy Minister of Oceans, “Environmental Assessment of Proposed Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia Pre-Meeting for Meeting with Associate Deputy Minister”. (*Investors’ Schedule of Documents at Tab C 509*).

<sup>677</sup> Fax from Paul Buxton to Helen MacPhail (NSDEL) “Whites Point Quarry Project Description Draft,” dated August 9, 2002. (*Investors’ Schedule of Documents at Tab C 47*). The Whites Point Quarry draft project descriptions indicate that the Whites Point Quarry had a marine facility. The “marine based construction” infrastructure was “required for ship loading” and included the following: (i) mooring dolphins, (ii) support structures for the loading conveyor system, (iii) conveyor system, and (iv) environmental control measures.

<sup>678</sup> Letter from Phil Zamora (DFO) to Paul Buxton, dated April 14, 2003. (*Investors’ Schedule of Documents at Tab C 504*). The *NWPA* application lodged by Global Quarry products in January 2003 authorized an assessment under s. 5 of the *NWPA*, and, therefore, an application of the *CEAA*. At the time that the Global Quarry Products submitted a *NWPA* application in January 2003, Canada’s federal ministries and departments, acting as Bilcon’s project’s Responsible Authority, asserted the position that the *NWPA* application triggered the requirements of the *CEAA* because the proposed dock constituted a marine terminal; Canada, acting through its federal departments, namely, the Coast Guard and the DFO, determined that the dock proposed by Global Quarry Products would require approval under s. 5(1) of the *Navigable Waters Protection Act* and a comprehensive study level environmental assessment pursuant to the *Canadian Environmental Assessment Act*.

<sup>679</sup> Expert Report of David Estrin at para. 164.

<sup>680</sup> Expert Report of David Estrin at paras. 153-154.

<sup>681</sup> Email from Charlet Myra (NWPA) to Derek McDonald (CEA Agency), dated April 1, 2003 re “Water lot” Investors. (*Investors’ Schedule of Documents at Tab C 594*).

marine terminals built exclusively for “production, processing or manufacturing areas”<sup>682</sup> from the scope of its authority.<sup>683</sup>

489. DFO’s false assumption of jurisdiction for the quarry gave the DFO the false authority to send it to a Review Panel.<sup>684</sup> The DFO also deliberately delayed the project by preventing test blasting on the false basis that it might interfere with animal species that the DFO later admitted it knew had no presence in the Whites Cove area.<sup>685</sup>
490. On its review of the project, the DFO simply concluded that the information it had was “adequate enough” for it to concoct a determination that it was the “likely” Responsible Authority.<sup>686</sup> The rationale for this self-determination was based solely on the following:
- i. The only noted “trigger of [Section 32 Authority]” is the DFO’s suggestion that Bilcon’s review of the effects of blasting on tidal and nearshore marine environments was “premature” and required “further assessment”.<sup>687</sup> The DFO had “suggest[ed] that until the on-site blasting information is obtained, any conclusion is premature”;<sup>688</sup>
  - ii. The DFO’s excessive emphasis of the “diverse, productive habitat and active fishery”;
  - iii. The DFO’s “opinion that a net loss of fish habitat is likely to occur from the proposal”;

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<sup>682</sup> Expert Report of David Estrin at paras. 162 and 163; See CEAA Comprehensive Study List Regulations, SOR/94-638, s. 28(c) (*Investors’ Schedule of Documents at Tab C 265*), “The proposed construction, decommissioning or abandonment of ... “a marine terminal designed to handle vessels larger than 25,000 DWT”, but the Regulations exempt marine terminals built exclusively for “production, processing or manufacturing areas.”

<sup>683</sup> Expert Report of David Estrin at para. 164.

<sup>684</sup> E-mail from Ronald L’Esperance, Deputy Minister, (NSDEL), to Bob Langdon (NSDEL), May 28, 2003, where it was stated that “intersecting jurisdiction” with the Federal Government is a ground for referral to the Joint Review Panel. (*Investors’ Schedule of Documents at Tab C 515*); Letter from Paul Buxton to Kerry Morash, Minister (NSDEL), dated October 9, 2003. (*Investors’ Schedule of Documents at Tab C 560*).

<sup>685</sup> Response to Undertaking 31 by the Department of Fisheries and Oceans at 1 and 7. (*Investors’ Schedule of Documents at Tab C 417*).

<sup>686</sup> Letter from Thomas Wheaton (DFO) to Phil Zamora (DFO), dated April 7, 2003. (*Investors’ Schedule of Documents at Tab C 27*).

<sup>687</sup> Letter from Thomas Wheaton (DFO) to Phil Zamora (DFO), dated April 7, 2003. (*Investors’ Schedule of Documents at Tab C 27*).

<sup>688</sup> Letter from Thomas Wheaton (DFO) to Phil Zamora (DFO), dated April 7, 2003. (*Investors’ Schedule of Documents at Tab C 27*).

- iv. Concern over “negligible flow alteration” of existing tidal and nearshore currents;
- v. Concern over weather conditions producing a negative impact on habitat productivity or resource in that area;
- vi. The conclusion that Bilcon’s description of surface water runoff did not mention streams within the 10-hectare area that outlet to Saint Mary’s Bay and how these streams would be characterized; and
- vii. The conclusion that Bilcon should have addressed groundwater flows as separate from surface water, despite the recognition that groundwater flows follow the same pattern as surface water, which was described properly.

491. As the self-proclaimed Responsible Authority for the project, the DFO then required that Bilcon submit a revised blasting plan on November 18, 2002, and then requested additional information on January 28, 2003 and May 28, 2003. Finally, on May 29, 2003, the DFO reported , “DFO has concluded that the proposed work is likely to cause destruction of fish, contrary to Section 32 of the *Fisheries Act*”, and that a Section 32 authorization would therefore be required before proceeding with the blasting.<sup>689</sup>
492. Canada improperly allowed the DFO to seek out information requests about Bilcon’s test blasting as a way to stall the process and prohibit any opportunity for Bilcon to effectively review the feasibility of the project and satisfy the environmental process governed by the *CEAA*.<sup>690</sup>
493. Nova Scotia approval referred only to the effects of blasting on marine mammals.<sup>691</sup> The DFO informed NSDEL that it was concerned with “fish and fish habitat” and raised specific concern about issues that were wholly unrelated to marine mammals, including “spawning nursery, feeding, shelter and migration areas” of “lobster, scallop, mussels, various species of groundfish, as well as pelagic species such as mackerel” and whether these non-mammal species may suffer “sub-lethal effects” from the blasting.<sup>692</sup> The DFO

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<sup>689</sup> Letter from Phil Zamora (DFO) to Paul Buxton, May 29, 2003. (*Investors’ Schedule of Documents at Tab C 485*).

<sup>690</sup> Expert Report of David Estrin at paras. 133, 142, 143.

<sup>691</sup> Expert Report of David Estrin at para. 129.

<sup>692</sup> Expert Report of David Estrin at para. 129; Letter from James Ross (DFO) to Bob Petrie (NSDEL), December 11, 2002, at 004717–004718. (*Investors’ Schedule of Documents at Tab C 127*).



raised a number of issues that were not related to marine mammals, and thus, should not have been reviewed by Bilcon.

494. Regarding IBoF salmon, the DFO failed to demonstrate its presence in the Whites Point Quarry area. Following this failure, the DFO reported that the Whites Point Quarry would not cause adverse effects to IBoF salmon. As a result, the DFO was forced to concede that effective mitigation measures could resolve any future IBoF Atlantic Salmon findings.<sup>693</sup>

495. Regarding North Atlantic Right whales, the DFO discovered that all sightings of the species were actually several kilometers away from the Whites Point Quarry. The DFO reported that “[r]ight whales are not commonly found in the immediate vicinity of the quarry” and that “there are no recorded sightings in the 3 minute survey grid cells immediately adjacent to the site.”<sup>694</sup>

496. It was all untrue. And the DFO knew it. There were never any salmon, whales or other marine species at risk. The DFO thereby abused its authority and discretion to deliberately disadvantage Bilcon by creating delay to have the “process dragged out as long as possible”.<sup>695</sup>

497. Canada flagrantly and persistently violated and ignored well-settled regulatory legal requirements for environmental assessment. An environmental assessment is by its nature, a preliminary and predictive exercise. As the Federal Court of Appeal recognized in *Inverhuron & District Ratepayers’ Assn v. Canada (Minister of the Environment)*, assessment, “by its very nature”, is “subject to some uncertainty.”<sup>696</sup> Throughout the environmental assessment process, however the Panel insisted on “unusual – and indeed completely unwarranted” detail and certainty from Bilcon.<sup>697</sup> The proper

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<sup>693</sup> Response to Undertaking 31 by the Department of Fisheries and Oceans at 1. (*Investors’ Schedule of Documents at Tab C 417*).

<sup>694</sup> Response to Undertaking 31 by the Department of Fisheries and Oceans at 7. (*Investors’ Schedule of Documents at Tab C 417*).

<sup>695</sup> Expert Report of David Estrin at para. 131; Journal note by Bruce Hood (DFO) , undated, disclosing a statement made by Robert Thibault, Minister (DFO), evidencing his use of powers to lengthen the environmental assessment of the Whites Point Quarry at 801619. (*Investors’ Schedule of Documents at Tab C 370*).

<sup>696</sup> Expert Report of David Estrin at para. 355; *Inverhuron & District Ratepayers’ Assn. v. Canada*, 2001 FCA 203 at para. 55. (*Investors’ Schedule of Documents at Tab C 566*).

<sup>697</sup> Expert Report of David Estrin at para. 346. Mr. Estrin notes that a more detailed regulation of the project is left to the licensing process, which follows after the environmental assessment stage.

Canadian licensing authority was not the Panel. Therefore, the Panel cannot conduct licensing-based information requests.<sup>698</sup>

*ii. The Joint Review Panel*

498. Canada misused the environmental assessment process for a purpose never intended. The Panel used the environmental assessment process not to measure the environmental effects of the Whites Point Quarry but “to evaluate whether the Project would further the goal of community self-determination, or to measure the Project’s local popularity.”<sup>699</sup> According to the Expert Report of Canadian environmental law expert David Estrin, “Neither exercise finds a statutory basis in CEAA.”<sup>700</sup>
499. The Panel concluded that the Whites Point Quarry was not “justified in the circumstances” – which is an issue that can only be considered by the government, not by a review panel.<sup>701</sup>

**C. Manifest Arbitrariness and Discrimination**

*i. The DFO*

500. Robert Thibault was Minister of Fisheries and Oceans, responsible for the DFO. He also was the local Member of Parliament for Digby Neck and the surrounding area, that included Whites Point. It was Minister Thibault who used his political position to deceive the Minister of Environment to look into a “marine terminal” that would “harmfully alter, disrupt or destroy fish habitat”, “destroy fish”, and “interfere substantially with navigation”.<sup>702</sup>
501. Concern with the electoral impact of constituencies vehemently opposed to the quarry project was a significant motivation for the politicians to interfere in the environmental assessment process against Bilcon in a discriminatory manner. Such quarry opponents came together to orchestrate a campaign of fear mongering and vilification of Bilcon,

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<sup>698</sup> Expert Report of David Estrin at para 354. Canadian law requires a more detailed regulation of a project during a licensing process. The correct licensing authorities, such as the NSDEL and the DFO, are equipped with engineers and other experts to review the technical intricacies of the project and associated mitigation measures.

<sup>699</sup> Expert Report of David Estrin at 4.

<sup>700</sup> Expert Report of David Estrin at 4.

<sup>701</sup> Expert Report of David Estrin at 5.

<sup>702</sup> Letter from Robert Thibault, Minister (DFO) to David Anderson, Federal Minister of the Environment, dated June 26, 2003. (*Investors’ Schedule of Documents at Tab C 61*).

which resulted in the politicians capitulating to political and national prejudice. There was a clear “pattern by officials making life difficult for the proponent.”<sup>703</sup>

502. As the next federal election was approaching, Minister Thibault began to curry favor with opponents of the project, without consulting other DFO regional directors and staff.<sup>704</sup> Bruce Hood was the Chief of the Environmental Assessment and Major Projects of the DFO. His notes are revealing:

“What does the Minister want ... we should talk to Minister’s staff. Every time we scope broadly to accommodate someone else we get screwed. We want to get our Minister off this file”.<sup>705</sup>

503. Mr. Hood’s notes are confirmed by an internal DFO email that noted that “the project is located in our Minister’s riding, as well as in the electoral circumscription of the Provincial Minister responsible for making decisions on this project,”<sup>706</sup> and that the DFO intended to send the project to a Panel process to “take a lot of public pressure off the Ministers’ shoulders for the summer months.”<sup>707</sup>
504. Minister Thibault and the DFO also portrayed the project as “very controversial” and “very contentious”, which signaled to a DFO bureaucrat that it was a “politically hot project”.<sup>708</sup> Minister Thibault made it abundantly clear to his colleagues that “this file is extremely important”,<sup>709</sup> and Bruce Hood noted that the “[p]ublic will likely be mad if [the] DFO doesn’t scope in [the] quarry.”<sup>710</sup>

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<sup>703</sup> Expert Report of David Estrin at 2.

<sup>704</sup> Email from Faith Scattolon (DFO) to Tim Surette (DFO). Scattolon responds with surprise to an email from Tim Surette, Area Director for Southwest Nova Scotia, June 26, 2003. (*Investors’ Schedule of Documents at Tab C 256*).

<sup>705</sup> Journal note by Bruce Hood (DFO), unknown date at 801610-801611. (*Investors’ Schedule of Documents at Tab C 284*).

<sup>706</sup> E-mail from Richard Nadeau (DFO) to Kaye Love (DFO), dated June 26, 2003, discussing DFO Ministerial considerations. (*Investors’ Schedule of Documents at Tab C 63*).

<sup>707</sup> E-mail from Richard Nadeau (DFO) to Kaye Love (DFO), dated June 25, 2003, discussing DFO Ministerial considerations. (*Investors’ Schedule of Documents at Tab C 63*).

<sup>708</sup> Expert Report of David Estrin at para. 95; Email from Joy Dube (DFO) to Wendy Morrell (DFO) regarding the political influence on the proposal Whites Point Quarry, dated April 2, 2003. (*Investors’ Schedule of Documents at Tab C 463*).

<sup>709</sup> Expert Report of David Estrin at para. 96; Email from Bruce Hood (DFO) to Richard Wex (DFO) and Richard Nadeau (DFO), June 25, 2003 at 015801. (*Investors’ Schedule of Documents Tab C 458*).

<sup>710</sup> Journal note by Bruce Hood (DFO), Fall 2007, noting that the public would be upset if the quarry was not included in the scope of the DFO’s assessment at 801604. (*Investors’ Schedule of Documents at Tab C 366*).

505. To provide cover for Minister Thibault, the DFO planned carefully to “start as [a] comprehensive study [and] refer to [a] panel then Minister of Environment determines scope [and] Minister DFO is off hook” – a plan designed so Minister Thibault “don’t have to give a reason”.<sup>711</sup>
506. While DFO officials privately acknowledged that they “shouldn’t be scoping things in to satisfy public or other agency pressure”,<sup>712</sup> there was a clear “pattern by officials making life difficult for the proponent.”<sup>713</sup> Mr. Hood compared the Bilcon environmental assessment to another one: “this is like Red Hill where DFO trigger was s.35 for realignment of a stream but we scoped in [the highway] too” and a “Judge rule[d] that we had no regulatory authority over the highway [and] therefore were abusing the CEAA process.”<sup>714</sup> His notes clearly show that the entire process, “unprecedented for such a relatively small and localized project such as a quarry,”<sup>715</sup> was politically motivated by a desire to have the “process dragged out as long as possible”.<sup>716</sup> It was as a “product of political expediency,”<sup>717</sup> to suit the political powers that be.<sup>718</sup>
507. The political motivations underlying the Ministers public statements constituted an unwarranted interference that inflamed the situation and polarized public opinion, which prevented the process from following a normal contractual course.<sup>719</sup>
508. The Expert Report of Canadian environmental law expert David Estrin, remarked that people experienced with environmental assessments understood that public hearing environmental assessment processes are designed to “provide an opportunity for those opposed to a project to have a higher profile platform and funding for attacking the

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<sup>711</sup> Journal note by Bruce Hood (DFO), at 801610-801611. (*Investors’ Schedule of Documents at Tab C 284*).

<sup>712</sup> Journal note by Bruce Hood (DFO), at 801603. (*Investors’ Schedule of Documents at Tab C 284*).

<sup>713</sup> Expert Report of David Estrin at 2.

<sup>714</sup> Journal note by Bruce Hood (DFO), at 801603, 801609. (*Investors’ Schedule of Documents at Tab C 284*).

<sup>715</sup> Expert Report of David Estrin at para. 106.

<sup>716</sup> Journal note by Bruce Hood (DFO) , undated, disclosing a statement made by Robert Thibault, Minister (DFO), evidencing his use of powers to lengthen the environmental assessment of the Whites Point Quarry at 801619. (*Investors’ Schedule of Documents at Tab C 370*).

<sup>717</sup> Expert Report of David Estrin at para. 93.

<sup>718</sup> E-mail from Richard Nadeau (DFO) to Kaye Love (DFO), dated June 25, 2003, discussing DFO Ministerial considerations. (*Investors’ Schedule of Documents at Tab C 63*).

<sup>719</sup> *Biwater Gauff*, paras. 627, 628.

project.”<sup>720</sup> Furthermore, Ms. Estrin commented that government officials selecting review panel members for a project with “manifested public opposition” understand that that would have a “more substantial influence on the outcome of the process, i.e. recommending the project not be approved, compared to a process which is managed only by government officials, meeting in offices far removed from the site of the proposed project.”<sup>721</sup>

509. Throughout the Panel hearing, the Panel was blatantly antagonistic to Bilcon and its experts.<sup>722</sup> Dr. Fournier presumed to “scold” Bilcon and, at one point, sneeringly asked if any member of Bilcon’s presentation team knew what “the scientific method” was. The team, of course, consisted entirely of experienced engineers and scientists.<sup>723</sup>
510. The Panel considered community values to be only those expressed by activists opposed to the project.<sup>724</sup> The values of the majority of community members who supported the project were ignored.<sup>725</sup>
511. The Panel considered Bilcon’s conservation plans to be hidden expansion tactics<sup>726</sup> and that “quarry creep” was “reasonably foreseeable”.<sup>727</sup> Especially disturbing is the “undercurrent of xenophobia or anti-Americanism in the quarry creep line of reasoning.”<sup>728</sup>

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<sup>720</sup> Expert Report of David Estrin at para. 103.

<sup>721</sup> Expert Report of David Estrin at para 104.

<sup>722</sup> Witness Statement of Hugh Fraser at para. 13.

<sup>723</sup> Witness Statement of Hugh Fraser at para. 13.

<sup>724</sup> Expert Report of David Estrin at para. 234.

<sup>725</sup> Letter from Cindy Nesbitt, Chair, Community Liaison Committee, to Steve Chapman (CEA Agency), dated December 7, 2004. (*Investors’ Schedule of Documents at Tab C 557*); Petition, filed by Cindy Nesbitt on Day 9 of the JRP public hearings, dated June 26, 2007. (*Investors’ Schedule of Documents at Tab C 182*); See also petition and pictures from a public rally in support of the Whites Point Quarry held in Digby on September 27, 2007 (*Investors’ Schedule of Documents at Tab C 183*); Expert Report of David Estrin at para. 234.

<sup>726</sup> Expert Report of David Estrin at paras. 303-305.

<sup>727</sup> *Agreement concerning The Establishment of a Joint Review Panel*, dated November 3, 2004. (*Investors’ Schedule of Documents Tab C 114*); Draft Guidelines for the Preparation of the Environmental Impact Statement for the Whites Point Quarry and Marine Terminal, dated November 2004. (*Investors’ Schedule of Documents Tab C 169*); Joint Review Panel Final Report, dated October 23, 2007 at 81-83. (*Investors’ Schedule of Documents at Tab C 34*); Expert Report of David Estrin at para. 432.

<sup>728</sup> Expert Report of David Estrin at para. 436; Joint Review Panel Final Report, dated October 23, 2007 at 83. (*Investors’ Schedule of Documents at Tab C 34*).

512. The Joint Review Panel compounded the arbitrariness of the concern over a “quarry creep” within Bilcon’s environmental assessment review by continuing to also question whether the “[e]stablishment of other coastal quarries on the Bay of Fundy would likely lead to local community responses similar to those that have occurred on Digby Neck and Islands, and could be expected to be adverse.”<sup>729</sup>
513. Canada’s obligations to its NAFTA trading partners are unrelated to a planning process, but the emphasis on the NAFTA in the EIS Guidelines led to multiple reviews by Bilcon and DFAIT with respect to the implications of the NAFTA upon a process that is designed to review significant and adverse environmental effects of a quarry. As the implications of the NAFTA and other international economic law treaties are not typical considerations in environmental assessment, the Joint Review Panel first sought assistance from DFAIT during the EIS review period.<sup>730</sup> Ultimately, the Panel requested a review of the implications of the NAFTA on Bilcon’s environmental assessment in three instances:
- a) On May 26, 2006, the Joint Review Panel made its first inquiry to DFAIT during the EIS review period, requesting a comment on the implications of the NAFTA as described in Bilcon’s EIS, following the release of the Final EIS Guidelines.<sup>731</sup> DFAIT confirmed at the EIS review period that Bilcon had provided a proper explanation of the implications of NAFTA on the environmental assessment, and the Canadian Government supported the NAFTA discussion in Bilcon’s EIS or its environmental effects.
  - b) On May 11, 2007, the Joint Review Panel made its second inquiry to DFAIT for a review of the NAFTA.<sup>732</sup> The Joint Review Panel requisitioned DFAIT, and asked DFAIT to make a presentation at the public hearings with respect to “its view on environmental effects associated with the project, with specific reference to any influence that Chapter 11 of the North American Free Trade Agreement may have on the management of the project’s potential environmental effects and

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<sup>729</sup> Joint Review Panel Final Report, dated October 23, 2007 at 83. (*Investors’ Schedule of Documents at Tab C 34*).

<sup>730</sup> Letter from Robert Fournier to Neil Burnham (DFAIT), dated May 26, 2006, requesting a review of Volume IV, Chapter 6 of Bilcon’s EIS. (*Investors’ Schedule of Documents at Tab C 582*).

<sup>731</sup> Letter from Robert Fournier to Neil Burnham (DFAIT), dated May 26, 2006, requesting a review of Volume IV, Chapter 6 of Bilcon’s EIS. (*Investors’ Schedule of Documents at Tab C 582*).

<sup>732</sup> Letter from Robert Fournier to Keith Christie (DFAIT), dated May 11, 2007, requesting a presentation at the Whites Point Quarry public hearings. (*Investors’ Schedule of Documents at Tab C 177*).

the siting of future coastal quarry projects.<sup>733</sup> DFAIT lacked the technical expertise as to what constitutes “environmental effects” for this environmental assessment hearing, Mr. Gilles Gauthier’s presentation merely provided a narrow understanding of Canada’s NAFTA obligations. The Panel questioned Mr. Gauthier on specific topics from his presentation. Out of the six questions posed to Mr. Gauthier, two questions focused again on the issue of whether the government approval of the Whites Point Quarry would “oblige the Government to permit further coastal quarries”.<sup>734</sup> In the first instance, the Panel wanted to know whether “it automatically facilitate[d] the development of further coastal quarries”.<sup>735</sup> Gilles Gauthier echoed Professor Winham’s report that such an assertion was manifestly incorrect, and noted that “there is no precedent value in one particular instance versus the other.”<sup>736</sup> In the fifth question to Gilles Gauthier, Robert Fournier acknowledged his repetition: “I think I know the answer to this one, but we’ll ask it anyway...”.<sup>737</sup> In Fournier’s question, specific reference was made to the Investors’ foreign-based ownership.<sup>738</sup> Again, Gilles Gauthier replied that he was “probably repeat[ing] myself here” and again, repeated that the framework of the NAFTA must be respected.<sup>739</sup>

- c) On June 13, 2007, the Joint Review Panel made its third inquiry about the applicability of the NAFTA to Bilcon’s environmental assessment by retaining Professor Gilbert Winham, an independent expert, with extensive knowledge of the NAFTA generally, to provide a report and potential presentation of his findings with respect to the implications of the NAFTA on Bilcon’s environmental

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<sup>733</sup> Letter from Robert Fournier to Keith Christie (DFAIT), dated May 11, 2007, requesting a presentation at the Whites Point Quarry public hearings. (*Investors’ Schedule of Documents at Tab C 177*).

<sup>734</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 11:434. (*Investors’ Schedule of Documents at Tab C 156*).

<sup>735</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 13:434. (*Investors’ Schedule of Documents at Tab C 156*).

<sup>736</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 5:435. (*Investors’ Schedule of Documents at Tab C 156*).

<sup>737</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 5:441. (*Investors’ Schedule of Documents at Tab C 156*).

<sup>738</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 13:435. (*Investors’ Schedule of Documents at Tab C 156*).

<sup>739</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 22:435. (*Investors’ Schedule of Documents at Tab C 156*).

assessment.<sup>740</sup> In the Joint Panel Review's request, they specifically asked that Professor Winham review DFAIT's review of Bilcon's EIS.<sup>741</sup> On June 25, 2007, Professor Winham submitted his report to the Joint Review Panel and confirmed that Bilcon provided an accurate statement of the NAFTA and commented on the inaccurate assertions raised in the scoping hearings with respect to the threat of a "quarry creep".<sup>742</sup> The next day, the Joint Review Panel informed Professor Winham that it would not be necessary for him to attend the Joint Review Panel hearings.<sup>743</sup>

d) On July 5, 2007, the CEA Agency advised DFAIT that the Joint Review Panel did not require them to comment on Professor Winham's report.<sup>744</sup>

514. The Panel's decision to withhold Professor Winham's report contributed to the continued preoccupation of the NAFTA throughout the hearings, as amplified by the many anti-American comments made throughout Bilcon's environmental assessment and is a further example of the Panel's bias approach to the record before it.
515. The Panel's preoccupation with the NAFTA and with Bilcon's American nationality was evident throughout the environmental assessment process. The involvement of DFAIT in an environmental assessment process was novel, and together with an outside independent NAFTA expert's report, emphasizes how the Joint Review Panel members' interest in the NAFTA did not stem from their own knowledge or experiences with the implications of the NAFTA and its connection to environmental assessments for quarry projects. Thus, Bilcon was entitled to have the legal and regulatory criteria, and related jurisprudence and practice, applied to it in a manner no less favorable than to domestic investors who were proponents under the regulatory scheme as well as investors who are nationals of non-NAFTA states.

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<sup>740</sup> E-mail from Debra Myles (CEA Agency) to Dr. Gilbert Winham, dated June 13, 2007, stating the issues that the JRP would like him to cover in his presentation. (*Investors' Schedule of Documents at Tab C 173*).

<sup>741</sup> E-mail from Debra Myles (CEA Agency) to Dr. Gilbert Winham, dated June 13, 2007, stating the issues that the JRP would like him to cover in his presentation. (*Investors' Schedule of Documents at Tab C 173*).

<sup>742</sup> "Advice on the application and implications of the North American Free Trade Agreement (NAFTA) to the proposed Whites Point Quarry and Marine Terminal Project", submitted by Gilbert Winham to the JRP, dated June 25, 2007. (*Investors' Schedule of Documents at Tab C 174*).

<sup>743</sup> E-mail from Debra Myles (CEA Agency) to Dr. Gilbert Winham, dated June 26, 2007, stating that he would not be required to present at the Joint Review Panel public hearings. (*Investors' Schedule of Documents at Tab C 175*).

<sup>744</sup> E-mail from Debra Myles (CEA Agency) to Keith Christie (DFAIT), dated July 5, 2007, stating that DFAIT would not be asked to comment on Winham's report. (*Investors' Schedule of Documents at Tab C 176*).



516. It fuelled the rampant anti-America hostility and prejudice in the public hearing by so called “citizen-advocates.” For example:

“Bilcon cannot build quarries and destroy their American shoreline, and that is one of the reasons that Bilcon has come to exploit our shoreline.”<sup>745</sup>

...

“Bilcon or any large company” could “rape our land [and] sue our Canadian Government billions of dollars.”<sup>746</sup>

...

“In this area, our beautiful shoreline is being targeted for a rock quarry to build roads in the U.S. and like a bad disease, if this gets approval, it has the potential to spread further along the Bay of Fundy and threaten the already struggling fishery along with the impact on quality of life and tourism.”<sup>747</sup>

...

Could it be that NAFTA and the WTO Trade Agreements, along with our complicit Governments in Ottawa and Halifax allow for coastal and rural communities to be decimated in the name of so called free trade?

...

Could it be that US state regulations for environmental protection are so onerous and demanding that the Proponent cannot meet them, so Nova Scotia becomes their chopped liver?<sup>748</sup>

...

It is another pattern of US interests being served by the compromising of Canadian resources.<sup>749</sup>

...

I also told him we are instructed by God in the Bible to preserve the earth and be good stewards not to blow up Digby Neck for the basalt rock and ship it to New Jersey to make roads.<sup>750</sup>

...

For foreign business interests and far away governments to force such an industry upon a

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<sup>745</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 11:612. (*Investors’ Schedule of Documents at Tab C 156*).

<sup>746</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 612-613. (*Investors’ Schedule of Documents at Tab C 156*).

<sup>747</sup> Joint Review Panel Public Hearing Transcript, Vol. 4, dated June 20, 2007, at 891-892. (*Investors’ Schedule of Documents at Tab C 157*).

<sup>748</sup> Joint Review Panel Public Hearing Transcript, Vol. 7, dated June 23, 2007, at 1571. (*Investors’ Schedule of Documents at Tab C 160*).

<sup>749</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 8, dated June 25, 2007 at 1832. (*Investors’ Schedule of Documents at Tab C 161*).

<sup>750</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 3, dated June 19, 2007 at 602. (*Investors’ Schedule of Documents at Tab C 156*).

population against their will has the air-about-it of rule by a self-interested oligarchy.<sup>751</sup>

...

Also, for a foreign company to enter this magnificent area, this province, this country to freely, and I mean freely, rape it and remove the very material of which it is made and give nothing in return but a few paltry low-paying jobs is an abomination.<sup>752</sup>

...

It seems to me the real CFA (come from away) here is Bilcon, a subsidiary of an American company, whose commitment to this place is to spend the next 50 years blowing up as much of it as possible and shipping it off to another country.<sup>753</sup>

...

How could foreign interests be allowed to come into our country and blast our precious, irreplaceable Fundy rock into gravel for roads in New Jersey? Preposterous.<sup>754</sup>

...

So I'd like to approach this by talking about several categories, and the first is how it feels to be member of a community that has been targeted by corporate America.<sup>755</sup>

...

I feel that that at least raises some questions about trusting whether the community's best interests will be taken exclusively to heart by a foreign owned company, so we know that such risks are inherent in hard rock mining.<sup>756</sup>

...

Two million tonnes of basalt rock, reportedly, will be removed from Digby Neck annually over 50 years, perhaps longer, and shipped to the US, which already has its own basalt deposits. So what's the attraction for Nova Scotian basalt? Could it be that the price is right with minimum royalties, under-funded monitoring and complicit Governments in Ottawa and Halifax?<sup>757</sup>

...

Regarding the proposed destruction of our Fundy Shore communities by foreign-based pirates

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<sup>751</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 7, dated June 23, 2007 at 1521. (*Investors' Schedule of Documents at Tab C 160*).

<sup>752</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 7, dated June 23, 2007 at 1526. (*Investors' Schedule of Documents at Tab C 160*).

<sup>753</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 8, dated June 25, 2007 at 1580. (*Investors' Schedule of Documents at Tab C 161*).

<sup>754</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 8, dated June 25, 2007 at 1867. (*Investors' Schedule of Documents at Tab C 161*).

<sup>755</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 10, dated June 27, 2007 at 2370. (*Investors' Schedule of Documents at Tab C 109*).

<sup>756</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 11, dated June 28, 2007 at 2539. (*Investors' Schedule of Documents at Tab C 163*).

<sup>757</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 7, dated June 23, 2007 at 1570. (*Investors' Schedule of Documents at Tab C 160*).

stealing our resources, contaminating our environment and threatening our livelihoods and well-being for future.<sup>758</sup>

517. The anti-NAFTA and anti-American sentiment was also fuelled by the politicians who testified at the public hearing.

Robert Thibault himself criticized the project because the basalt was to be exported to the United States,<sup>759</sup>

...

Ms. Elizabeth May, the leader of the Green Party of Canada, spoke out during the hearings and provided a commentary of the implications of ways foreign investors can trigger the NAFTA, in general, and the threat of future Chapter 11 suits.<sup>760</sup>

...

William Lang, the Deputy Leader of the Green Party of Nova Scotia, commented that "it would be unethical to approve the Project ..."<sup>761</sup>

...

Harold (Junior) Thériault, the Liberal Member of the Legislative Assembly for the Digby-Annapolis region of Nova Scotia appeared at the hearings, as did his wife, to make presentations that they were against the development of the project.<sup>762</sup> Mr. Thériault used his time presenting to also note that "he won the election, and displaced former Conservative MLA Gordon Balser, based on his stance against the Project."<sup>763</sup>

518. In addition to the "citizen advocates" and attending political leaders, the Panel seemed equally fixated on the corporate nationality of Bilcon of Nova Scotia, including its American parent company.<sup>764</sup> For example:

- a) Robert Fournier asked:

Does Clayton have any other additional international interest? I realize they're involved in something in New Brunswick, but aside from that are they involved in anything else internationally?<sup>765</sup>

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<sup>758</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 13, dated June 30, 2007 at 3146. (*Investors' Schedule of Documents at Tab C 165*).

<sup>759</sup> Witness Statement of Hugh Fraser at para. 42.

<sup>760</sup> Witness Statement of Hugh Fraser at para. 36.

<sup>761</sup> Witness Statement of Hugh Fraser at para. 38.

<sup>762</sup> Witness Statement of Hugh Fraser at paras. 39 and 40.

<sup>763</sup> Witness Statement of Hugh Fraser at para. 41.

<sup>764</sup> Witness Statement of Hugh Fraser at paras. 18-20.

b) Gunter Muecke then added:

And to my knowledge, there are rock types which are for aggregate mining. So perhaps just to answer my question as to why Nova Scotia as opposed to the U.S. coast?

...

Okay. Thank you for that. And so what you are saying is that the transportation costs and the quality of the rock were the main determinants in locating where you are at the present time.<sup>766</sup>

519. The Hon. Robert Thibault, the MP formerly responsible as Minister for the DFO, asked:

"What is in our national interest?"

...

"Is there some huge problem with our trading partners that we have to solve? Is there a lack of aggregates within the United States that their economy will tumble if we don't provide it to them?"<sup>767</sup>

520. Former Minister Thibault's comments were "critical of the Project, particularly because the basalt was to be exported to the United States."<sup>768</sup> The Member of Parliament's participation in the hearing was extraordinary. He testified as an advocate or *parti pris*. Clearly the testimony of MP Thibault provides a clear indication of the predisposition of Minister Thibault when he was carrying out his ministerial duties earlier in relation to Bilcon's environmental assessment.

#### **D. Delay**

521. The DFO knew that a decision to scope in the quarry was contrary to environmental assessment practices across Canada, but decided to do so in order to "share the grief" with the Province of Nova Scotia.<sup>769</sup>

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<sup>765</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 1, dated June 16, 2007 at 132. (*Investors' Schedule of Documents at Tab C 154*).

<sup>766</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 1, dated June 16, 2007 at 136 and 138. (*Investors' Schedule of Documents at Tab C 154*).

<sup>767</sup> Transcript, Volume 11, June 28, 2007, Presentation of Robert Thibault, at 2662. (*Investors' Schedule of Documents at Tab C 163*). This last statement of the Mr. Thibault translated essentially as "Yankee go home!". It was heard that way by the public and likely intended to be so heard.

<sup>768</sup> Witness Statement of Hugh Fraser at para. 42.

<sup>769</sup> Journal note by Bruce Hood (DFO), Fall 2007, stating that the CEA Agency and the NSDEL placed pressure on the DFO to include the quarry within their scoping of the Whites Point Quarry environmental assessment at 801617. (*Investors' Schedule of Documents at Tab C 367*).

522. The DFO involvement was designed to delay the environmental assessment process, and carefully planned to “start as [a] comprehensive study [and] refer to [a] panel then Minister of Environment determines scope [and] Minister DFO is off hook” – a plan designed so the Minister Thibault “don’t have to give a reason”.<sup>770</sup>
523. The known purpose of the delay and the resort to a Joint Review Panel was to “take a lot of public pressure off the Ministers’ shoulders for the summer months.”<sup>771</sup> Driven by a personal political agenda, Minister Thibault used the DFO and the Joint Review Panel to have the “process dragged out as long as possible”.<sup>772</sup>
524. Derek McDonald, a professional engineer and Senior Program Officer of the Atlantic Regional Office of the CEA Agency, voiced concerns to Steve Chapman, the Project Assessment Manager at the National Office of the CEA Agency. Mr. McDonald was concerned about DFO’s pressure on the CEA Agency to refer the Whites Point Quarry to a panel review.<sup>773</sup>

The proponent is, to my knowledge, unaware of DFO’s desire to refer. I still feel that a Comp. Study, with an appropriate scope and public participation plan, would be the correct path – and I have said this to Phil Zamora. To me, a referral to facilitate harmonization reflects poorly on both governments and is perhaps an undesirable precedent.<sup>774</sup>

525. Mr. McDonald was also concerned about the propriety of the CEA Agency’s direction to the DFO to hold back the approval of Bilcon’s proposed blasting plan:<sup>775</sup>

The proponent is clearly frustrated, and with good reason, I think. Things are dragging. I find it frustrating myself and it’s not even my money.<sup>776</sup>

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<sup>770</sup> Journal note by Bruce Hood (DFO), at 801610-801611. (*Investors’ Schedule of Documents at Tab C 284*).

<sup>771</sup> E-mail from Richard Nadeau (DFO) to Kaye Love (DFO), dated June 25, 2003, discussing DFO Ministerial considerations. (*Investors’ Schedule of Documents at Tab C 63*).

<sup>772</sup> Journal note by Bruce Hood (DFO), Fall 2007 disclosing a statement made by Minister Robert Thibault evidencing his use of powers to lengthen the environmental assessment of the Whites Point Quarry at 801619. (*Investors’ Schedule of Documents at Tab C 370*).

<sup>773</sup> Email from Derek McDonald (CEA Agency) to Steve Chapman (CEA Agency) dated June 9, 2003 (*Investors’ Schedule of Documents at Tab C 402*).

<sup>774</sup> Email from Derek McDonald (CEA Agency) to Steve Chapman (CEA Agency) dated June 9, 2003 (*Investors’ Schedule of Documents at Tab C 402*).

<sup>775</sup> Email from Derek McDonald (CEA Agency) to Steve Chapman (CEA Agency) dated June 10, 2003, stating his concerns with the environmental assessment process being imposed on the proponent of the Whites Point Quarry. (*Investors’ Schedule of Documents at Tab C 403*).

### **E. Full Protection and Security**

526. Canada failed to provide full protection and security to Bilcon by not taking steps to protect it, and its Investors, from discriminatory and arbitrary treatment in the environmental regulatory process.
527. Canada also failed to provide full protection and security to Bilcon by not following its own laws with respect to governmental regulatory authority over Bilcon's proposed quarry, and by the failure of the Joint Review Panel's failure to accord Bilcon a fair hearing and reasonable decision.
528. In addition, the Canadian Department of Foreign Affairs and International Trade (DFAIT) was directed by the Joint Review Panel to provide "an assessment of the accuracy and completeness of this information provided by Bilcon particularly as it relates to the North American Free Trade Agreement."<sup>777</sup> As the implications of the NAFTA and other international economic law treaties are not proper or relevant considerations in environmental assessment of a gravel quarry, Canada (DFAIT) should have been immediately put on notice by the unusual demand of the Joint Review Panel that its proceedings and deliberations were being influenced by unlawful factors related to the nationality of the Investors and their Investment.<sup>778</sup>
529. Nonetheless, DFAIT conducted its own review of Bilcon's Environmental Impact Statement. The EIS Guidelines had directed Bilcon to describe the implications of the NAFTA on the project or its environmental effects,<sup>779</sup> and DFAIT informed the Joint Review Panel that it "must be guided by NAFTA as a whole".<sup>780</sup>
530. In view of the ideologically charged nature of these proceedings, however, Canada should have been well aware that the Panel's focus on the nationality of the Investors

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<sup>776</sup> Email from Derek McDonald (CEA Agency) to Steve Chapman (CEA Agency) dated June 10, 2003, stating his concerns with the environmental assessment process being imposed on the proponent of the Whites Point Quarry. (*Investors' Schedule of Documents at Tab C 403*).

<sup>777</sup> Letter from Robert Fournier to Neil Burnham (DFAIT), dated May 26, 2006, requesting a review of Bilcon's EIS with respect to section 6.6 of the EIS Guidelines. (*Investors' Schedule of Documents at Tab C 582*).

<sup>778</sup> Letter from Robert Fournier to Neil Burnham (DFAIT), dated May 26, 2006, requesting a review of Bilcon's EIS with respect to section 6.6 of the EIS Guidelines. (*Investors' Schedule of Documents at Tab C 582*).

<sup>779</sup> Letter from Rachel McCormick (DFAIT) to Debra Myles (CEA Agency), undated, providing a review of Bilcon's EIS with respect to section 6.6 of the EIS Guidelines. (*Investors' Schedule of Documents at Tab C 581*).

<sup>780</sup> Letter from Rachel McCormick (DFAIT) to Debra Myles (CEA Agency), undated, providing a review of Bilcon's EIS with respect to section 6.6 of the EIS Guidelines. (*Investors' Schedule of Documents at Tab C 581*).

would result in serious prejudice to the security of their investment, by creating an open invitation to convert the proceedings into a nationalistic and xenophobic political theatre.

531. At no time did DFAIT ever take steps to ensure that the Joint Review Panel protected the fairness, integrity and due process rights of the Investors and the Investment, nor did it ever advise the Joint Review Panel to ensure that discriminatory or unfair evidence was not to be used.

532. Instead, DFAIT's participation in the Joint Review Panel's public hearings fueled the anti-Americanism that prevailed throughout Bilcon's environmental assessment:

The Panel would like the department to present its views on environmental effects associated with the project, with specific reference to any influence that Chapter 11 of the North American Free Trade Agreement may have on the management of the project's potential environmental effects and the siting of future coastal quarry projects.<sup>781</sup>

533. DFAIT had never been requested to participate in a review panel hearing under the CEAA before. It had never intervened or participated in environmental assessments, its Environmental Bureau Director-General, Keith Christie advised that it was improper to do so:

...it is beyond the scope of this Department's participation in the hearing proceedings to take a position on the potential environmental effects associated with the Whites Point Quarry and Marine Terminal Project or the siting of any future coastal quarry projects.<sup>782</sup>

534. The presentation by Gilles Gauthier of DFAIT during the Joint Review Panel hearings compounded the irrelevant pre-occupation with the NAFTA by failing to provide a complete and proper overview of Canada's obligations under the NAFTA. As a result, DFAIT's participation served only to fuel the anti-American tone promoted by the "citizen advocates" who opposed the quarry, the government officials in attendance, and at times, by the Joint Review Panel members themselves.

535. DFAIT's participation facilitated and endorsed the Joint Review Panel's pre-occupation with the impacts of the NAFTA on Bilcon's project and amplified the obsession of the environmental activists who promoted an anti-American tone, against Bilcon's American parent company, and the export of aggregate to the United States, thus depriving Bilcon

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<sup>781</sup> Letter from Robert Fournier to Keith Christie (DFAIT), dated May 11, 2007, requesting a presentation at the Whites Point Quarry public hearings. (*Investors' Schedule of Documents at Tab C 177*).

<sup>782</sup> Letter from Keith Christie (DFAIT) to Robert Fournier, dated June 5, 2007, discussing the scope of the presentation that DFAIT would make to the Panel at the public hearings. (*Investors' Schedule of Documents at Tab C 178*).

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of a secure investment environment which Canada was obligated by the NAFTA to provide in its environmental assessment of Bilcon's project.

**F. Conclusion**

536. While the actions taken by the Government of Canada, the province of Nova Scotia and their various organs are on their own inconsistent with Canada's obligations under NAFTA Article 1105, together these measures are a breach of Canada's obligations pursuant to NAFTA Article 1105. Indeed, to even the most casual observer Canada's flagrant disregard of its international obligation cannot be viewed as anything less than an egregious breach, grossly unfair treatment with elements of a willful neglect of duty.
537. The Investors, and their Investment, have been harmed as a result of Canada's failure to meet its obligation to provide treatment in accordance with international law standards as required by NAFTA Article 1105.<sup>783</sup>

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<sup>783</sup> Witness Statement of William Richard Clayton, at paras. 31 – 33; See also Part Seven in this Memorial



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## II. NATIONAL TREATMENT

538. Canada has acted inconsistently with its National Treatment obligation in NAFTA Article 1102:

- a) There are Canadian investors and investments in like circumstances with Bilcon and its Investors;
- b) Canada accorded Bilcon and its Investors treatment that was less favorable than the treatment accorded to Canadian companies in like circumstances;
- c) The impugned measures interfered with the conduct, management, operation and expansion of Bilcon.

### A. Likeness

539. The Canadian environmental assessment scheme is of general application. Therefore, the universe of investors and investments that are in like circumstances includes in principle the general class of proponents under the scheme.

540. An environmental assessment is a gateway to the evaluation of new or additive economic activity by an investment. In the context of environmental regulatory measures, the aspects of an investment affected by NAFTA Article 1102 would be new economic activity proposed by the investor, e.g. “expansion”.

541. With respect to Bilcon, the NAFTA Tribunal should consider all enterprises affected by the environmental assessment regulatory process to be in like circumstances with Bilcon. The environmental regulatory scheme is with respect to the establishment, acquisition, expansion and conduct of the investment.

542. The impact of the measures then assists a Tribunal in defining what needs to be considered in defining the universe of investors “in like circumstances”. So if the measure addresses access to resources, this creates a different analysis than that which may occur with another type of measure addressing disposition of investments or concerning access to competitive markets.

543. Thus, in the *Pope & Talbot* claim, the Tribunal had to consider market access for the export of softwood lumber. The Tribunal looked at competitors in that particular marketplace in its consideration of likeness.<sup>784</sup> This was also what the S.D. Myers

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<sup>784</sup> *Pope & Talbot*, Award on Merits of Phase 2, at para. 78. (*Investors’ Book of Authorities at Tab CA 12*).

tribunal did. The measure in *S.D. Myers* affected the competitive relationship of products between *S.D. Myers Canada* and Canadian-based competitors.<sup>785</sup> Similarly, this is the same likeness test that was followed in *Feldman* where the Mexican measure affected the elements of competition between competitors.<sup>786</sup>

544. By comparison, the governmental measure involved in the case of *Bilcon* was in proposed relation to pre-assessment of new or expanded activity from an environmental perspective.
545. Accordingly, the universe of investors in like circumstances consists of those concerns affected in this way by the application of the environmental regulatory scheme. This is exactly the approach that the *Occidental* tribunal followed but without expressing a reasoned framework for its actions.<sup>787</sup>

#### **B. Canada Provided Better Treatment**

546. Canada provided the worst level of treatment possible to the Investors and their Investment. By comparison, Canada provided more favorable treatment to Canadian investors and their investments in like circumstances. For example:
- i. Tiverton Quarry;
  - ii. Tiverton Harbour Development;
  - iii. Aguathuna Quarry Project;
  - iv. Crushed Granite Rock Quarry (“Belleoram”);
  - v. Deltaport Third Berth Project;
  - vi. Bear Head Project;
  - vii. Keltic Petrochemical Project;
  - viii. Voisey’s Bay Mine and Mill Project (“Voisey’s Bay”); and
  - ix. Eider Rock Project

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<sup>785</sup> *S.D. Myers*, First Partial Award, at paras. 193-194. (*Investors’ Book of Authorities at Tab CA 6*).

<sup>786</sup> *Feldman*, Award, at paras. 171-172. (*Investors’ Book of Authorities at Tab CA 51*).

<sup>787</sup> *Occidental*, Final Award, at paras. 171, 173. (*Investors’ Book of Authorities at Tab CA 18*).

*i. Tiverton Quarry*

547. The Tiverton Quarry is an example of a domestic Canadian investment that sought environmental permits in like circumstances with Bilcon, and received better treatment.
548. The Tiverton Quarry is located 10 km away from Whites Point in Tiverton, Nova Scotia. The proponent of Tiverton Quarry was Parker Mountain Aggregates, a Canadian corporation.<sup>788</sup> The Tiverton Quarry was a proposal of the Government of Canada (the Department of Fisheries & Oceans) to develop a new harbor facility at Tiverton, Nova Scotia.<sup>789</sup>
549. The Tiverton Quarry is an open pit rock quarry mine, the same product and subject to the same regulatory process as Bilcon's Whites Point Quarry.
550. The "proximity and similarity" between Whites Point Quarry and Tiverton Quarry was noted by DFO. An internal memorandum refers the "need to apply a consistent approach" in light of this similarity.<sup>790</sup> The Tiverton Quarry and Whites Point Quarry were assessed by the very same DFO assessment officer, who conducted the assessments in the same year.<sup>791</sup>
551. However, there was no consistency of treatment between that provided by Canada to the Tiverton Quarry and the Whites Point Quarry. The administrative discretion and other treatment received by the Tiverton Quarry was far more favorable than the treatment received by the Whites Point Quarry:
- a) **Scope and Level of Assessment** – Tiverton was not ever subjected to a comprehensive study review. Whites Point was escalated to a Joint Review Panel.

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<sup>788</sup> Environment and Labour Briefing Note, Nova Stone Exporters Inc. - White's Cove quarry, Parker Mountain Aggregates - Tiverton quarry, dated November 5, 2003. (*Investors' Schedule of Documents Tab C 305*); See also search results from Nova Scotia Registry of Joint Stock Companies for "Parker Mountain Aggregates" (*Investors' Schedule of Documents Tab C 584*).

<sup>789</sup> Expert Report of David Estrin at para. 59.

<sup>790</sup> Environment and Labour Briefing Note, Nova Stone Exporters Inc. - White's Cove quarry, Parker Mountain Aggregates - Tiverton quarry, dated November 5, 2003. (*Investors' Schedule of Documents Tab C 305*).

<sup>791</sup> Email from Paul Boudreau (DFO) to Peter Winchester (DFO) regarding plans for blasting at WPQ, dated May 28, 2003. (*Investors' Schedule of Documents Tab C 306*).

- b) **Duration** – Tiverton was assessed in an expedited three month process while the Whites Point took over 5 years at great cost and effort to Bilcon and its Investors.
- c) **Discretion** – The Tiverton Quarry was allowed to separate the marine aspect from the quarry. The Whites Point Quarry was not offered or allowed the same split.

552. In contrast to the Tiverton Project, the DFO identified IBoF salmon as a “key issue”<sup>792</sup> for the Whites Point.<sup>793</sup> Despite being only 10 kilometers away, on the same body of water, the very same DFO assessment officer, did not consider or assess the potential presence of IBoF salmon before the Tiverton permit was issued.

*ii. Tiverton Harbour*

553. Tiverton Harbour was a marine project on the same body of water as the Whites Point Quarry project. Tiverton Harbour required underwater blasting. It thus had a much greater potential for disruption and destruction of fish habitat than the Whites Point Quarry, where no underwater blasting would take place.<sup>794</sup>
554. Tiverton Harbour was, however, assessed by a minimal screening process.
555. Despite the in-water blasting at Tiverton Harbour, DFO noted that there was no reason to believe there would be negative effects on such species surrounding Tiverton Harbour, like the IBoF salmon.<sup>795</sup>

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<sup>792</sup> Notes from Meeting between the Habitat Management Division of the DFO and Bilcon of Nova Scotia, dated November 2, 2004. (*Investors’ Schedule of Documents Tab C 130*).

<sup>793</sup> Notes from Meeting between the Habitat Management Division of the DFO and Bilcon of Nova Scotia, dated December 10, 2004. (*Investors’ Schedule of Documents Tab C 131*).

<sup>794</sup> Expert Report of David Estrin at para. 63. Namely, 20,445 m<sup>2</sup> of fish habitat. Spreadsheet containing email correspondences between members of DFO regarding environmental concerns for Tiverton Harbour Development, at 8 of 21. (*Investors’ Schedule of Documents Tab C 309*).

<sup>795</sup> E-mail from Rod Bradford (DFO) to Tammy Rose (DFO) regarding effects of Tiverton Harbour on Diadromous Marine species, dated December 9, 2003. (*Investors’ Schedule of Documents Tab C 309*); Even more surprisingly, a habitat study conducted by DFO of the local area and “farther out into the Bay of Fundy” discussing migratory marine life makes no mention of IBoF salmon whatsoever; Habitat Characterization of Tiverton, Digby County, Nova Scotia, dated September 8, 2003. (*Investors’ Schedule of Documents Tab C 311*).

*iii. Aguathuna Quarry Project*

556. The Aguathuna Quarry in Newfoundland was a joint venture between two Canadian proponents; Mosher Limestone Limited, from Nova Scotia, and Mid-Atlantic Minerals Inc., a Quebec company.<sup>796</sup> The project consisted of re-opening a previously abandoned limestone quarry, and was projected to generate up to an annual production of 500,000 tons per year.<sup>797</sup> The project included a deep-water loading facility that could accommodate panamax sized vessels (just as the proposed dock at the Whites Point Quarry).<sup>798</sup>

- a) **Scope and Level of Assessment** – The project was assessed through a Comprehensive Study.
- b) **Duration** – The review process took 15 months.<sup>799</sup>
- c) **Discretion** – After a project description revision by the proponent, the DFO removed itself as the lead Responsible Authority and was replaced by the ACOA, which was contributing financially to the project.<sup>800</sup> The quarry aspect of the project was assessed solely through the provincial assessment process; while the marine aspect of the project was assessed under the CEAA.<sup>801</sup>

Precautionary Principle

557. The assessment of the Aguathuna Quarry was conducted prior to the 2003 amendment to the CEAA; therefore the precautionary principle was not required to be considered in the analysis of the project. While the Whites Point Quarry was subject to the same legislative regime, the precautionary principle was applied in its environmental assessment.

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<sup>796</sup> Aguathuna Quarry Development, Environmental Impact Comprehensive Study Report, dated July 8, 1999 at 1. (*Investors' Schedule of Documents Tab C 440*).

<sup>797</sup> Aguathuna Quarry Development, Environmental Impact Comprehensive Study Report, dated July 8, 1999 at 1. (*Investors' Schedule of Documents Tab C 440*).

<sup>798</sup> Aguathuna Quarry Development, Environmental Impact Comprehensive Study Report, dated July 8, 1999 at 1. (*Investors' Schedule of Documents Tab C 440*).

<sup>799</sup> Expert Report of David Estrin at para. 55

<sup>800</sup> Expert Report of David Estrin at para. 53

<sup>801</sup> Expert Report of David Estrin at para. 53

*iv. The Belleoram Quarry Project*

558. The Belleoram quarry project in Newfoundland and Labrador is a coastal quarry similar to the Whites Point Quarry. The proponent is Continental Stone Limited, a Canadian corporation.<sup>802</sup> The Government of Canada noted the similarity between Belleoram and the Whites Point Quarry.<sup>803</sup>
559. The Belleoram Quarry was 900 hectares in size, substantially larger than the 152 hectare Whites Point Quarry. Yet it received a much quicker and much less onerous assessment. Belleoram also had a larger marine component<sup>804</sup> than the Whites Point and caused significant lobster habitat destruction.<sup>805</sup>
- a) **Scope and Level of Assessment** – The marine aspect of this project was assessed through a Comprehensive Study. The quarry was excluded from the assessment. The *CEAA* was used only to study the impacts of the marine terminal.<sup>806</sup>
  - b) **Duration** – The environmental assessment process for Belleoram did not require a Review Panel, and took only 1.5 years, The Whites Point Quarry Joint Review Panel Process took almost 5 years.<sup>807</sup>
  - c) **Discretion** – DFO's decision to assess the land-based component of the Whites Point Quarry was purportedly based on the potential effects of blasting on marine animals. However, at the Belleoram Quarry, DFO did not assess the land-

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<sup>802</sup> Belleoram Marine Terminal Project, Comprehensive Study Report, dated August 23, 2007 at 4. (*Investors' Schedule of Documents Tab C 190*).

<sup>803</sup> An internal Environment Canada (EC) e-mail shows that WPQ "appears to be very similar to the Belleoram project." (*Investors' Schedule of Documents Tab C 189*); There were also indications that the two projects were supposed to be treated in a similar manner. In one internal correspondence (Barry Jeffrey (EC) to Glenn Troke (EC)), EC notes that the scoping of Belleoram will need to be discussed "in light of [Environment Canada's] submission on [the] Digby quarry and marine terminal." (*Investors' Schedule of Documents Tab C 312*); The rate of shipping for Belleoram, at once every 5-7 days, is similar to the shipping rate for WPQ; Production would be 6 million tonnes per year at Belleoram, and 2 million per year at WPQ. Both projects would last for 50 years.

<sup>804</sup> Draft Comprehensive Study Report for Belleoram Crushed Rock Export Quarry, dated June 29, 2007. (*Investors' Schedule of Documents Tab C 313*).

<sup>805</sup> Belleoram Marine Terminal Project, Comprehensive Study Report, August 23, 2007, at 6. (*Investors' Schedule of Documents Tab C 190*).

<sup>806</sup> Expert Report of David Estrin at para. 41.

<sup>807</sup> Expert Report of David Estrin at para. 45.

based component of the quarry, despite the fact that blasting occurred at the shore.<sup>808</sup>

560. Until a late stage of the environmental assessment of Belleoram, Atlantic Canada Opportunities Agency had responsibility to scope the entire project, both the marine and land based components. However, Canada removed the quarry from its review after the Belleoram proponent expressed concern about delays associated with assessment of the quarry.<sup>809</sup>

*v. Deltaport Third Berth Project*

561. The Canadian investor of the Deltaport Third Berth Project was the Vancouver Port Authority. The Vancouver Port Authority is a government agency, created by the federal government to manage federal port lands in the Vancouver region<sup>810</sup>, which includes the pristine Fraser River Estuary<sup>811</sup>.
562. Deltaport Marine Terminal which was slated to be the largest and busiest port in Canada, with high levels of public opposition,<sup>812</sup> was not referred to Joint Review Panel.
563. The project involved the expansion of the Roberts Bank Port facility; a massive undertaking,<sup>813</sup> requiring the construction of a new wharf to accommodate a third berth, as well as an expanded storage container yard.<sup>814</sup>

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<sup>808</sup> Belleoram Comprehensive Study Report, August 23, 2007 (*Investors' Schedule of Documents Tab C 190*); This favorable treatment to Belleoram can be simply explained: a federal government agency, the Atlantic Canada Opportunities Agency, provided funding for the Belleoram project; Email from Randy Decker (Transport Canada) discussing the comprehensive study for Belleoram Rock Quarry, dated August 30, 2006. (*Investors' Schedule of Documents Tab C 314*).

<sup>809</sup> Email from Randy Decker (Transport Canada) updating members of CEA Agency, DFO, ACOA and NF/LAB about the assessment for Belleoram Rock Quarry, May 31, 2007. (*Investors' Schedule of Documents Tab C 315*).

<sup>810</sup> Comprehensive Study Report: Deltaport Third Berth Expansion Project, dated July 5, 2006 at 26. (*Investors' Schedule of Documents Tab C 316*).

<sup>811</sup> DFO concluded that the Fraser River Estuary was a unique ecosystem absolutely necessary for the spawning of Pacific Salmon and other marine creatures, see Draft Briefing Note for the DFO Minister regarding the Roberts Bank Container Terminal Expansion Project, undated (*Investors' Schedule of Documents Tab C 317*). Several petitions as well as hundreds of letters of concern and opposition to the Deltaport project were submitted related to these environmental issues.

<sup>812</sup> Letter from Alex and Marrion Grant to Dave Carter (CEA Agency), dated August 27, 2006 (*Investors' Schedule of Documents, Tab C 72*); Letter from Ivan Bulic (Society Promoting Environmental Concern) to Prime Minister of Canada, the Right Hon. Paul Martin, November 19, 2004. (*Investors' Schedule of Documents Tab C 73*).

- a) **Scope and Level of Assessment** – The project was assessed through a Comprehensive Study.
- b) **Duration** – The entire review process took 2 years and 5 months.<sup>815</sup> The Whites Point Quarry was subjected to a drawn-out 5 year process.
- c) **Discretion** – Federal Environment Minister, Rona Ambrose, despite concern from opposition groups<sup>816</sup> demanding that the project be referred to a panel review, approved the mitigation measures in the Comprehensive Study submitted by the proponent. The DFO refused to expand its scope of assessment on the issue of air pollution, even though it was admitted that there was widespread public scrutiny on this issue and no legal impediment.<sup>817</sup>

#### Cumulative Effects and Precautionary Principle

564. The DFO did not require the proponent to include, in its cumulative effects assessment, an expansion that the proponent had openly discussed with federal authorities, on the basis that the project was in the design phase, and that proposed expansion did not have a registered project description.<sup>818</sup> In contrast, the Joint Review Panel for the

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<sup>813</sup> The project involved the construction of a wharf and the creation of approximately 22ha of new land using material dredged from the ocean floor, the deepening of the existing shipping channel, lengthening of adjacent railway lines and the upgrade of existing roads.

<sup>814</sup> Preliminary Project Description for the Roberts Bank Container Expansion Program – Deltaport Third Berth Project, dated June 8, 2004 at 9. (*Investors' Schedule of Documents Tab C 318*).

<sup>815</sup> The proponent submitted their preliminary project description on June 8, 2004 – see Preliminary Project Description for the Roberts Bank Container Expansion Program – Deltaport Third Berth Project, dated June 8, 2004 at 9 (*Investors' Schedule of Documents Tab C 318*); A decision approving the mitigation proposed in the Comprehensive Study was given by Minister Rona Ambrose on November 3, 2006 - see To be added to Collected Documents

<sup>816</sup> Letter from Susan Jones, Director of the Boundary Bay Conservation Committee to federal Minister of the Environment, Rona Ambrose, noting faults in the assessment of the Deltaport Third Berth Project, dated April 6, 2006. (*Investors' Schedule of Documents Tab C 319*).

<sup>817</sup> Email from Brad Fanos (DFO) to Michael Crowe (DFO) demonstrating that the DFO refused to include issues within their jurisdiction, without a legal impediment, dated May 5, 2005. (*Investors' Schedule of Documents Tab C 320*).

<sup>818</sup> Deltaport Third Berth Expansion – Scope of the Cumulative Effects Assessment, undated (*Investors' Schedule of Documents Tab C 321*).



Whites Point Quarry included hypothetical projects in its cumulative effects analysis, without objection from the DFO.<sup>819</sup>

565. The assessment of the Deltaport Project was subject to the 2003 amendments to the *CEAA*, therefore the precautionary principle was required to be considered. There is no mention of it in the Comprehensive Study submitted by the proponent.

*vi. The Bear Head Project*

566. The Bear Head LNG Terminal in Nova Scotia received treatment far favorable than Whites Point Quarry. The Bear Head Project was proposed by Access Northeast Energy Inc., a Canadian company located in Nova Scotia.<sup>820</sup>

- a) **Scope and Level of Assessment** – The project was reviewed as a screening level assessment.
- b) **Duration** – The entire review process took less than 9 months.<sup>821</sup> This is in stark contrast to the assessment of the Whites Point Quarry review panel process that took over 5 years.
- c) **Discretion** – The Government of Canada considered and applied<sup>822</sup> a legislative exemption from the *Comprehensive List Study Exemptions* for the Bear Head project. Canada applied no such exemption for the Whites Point Quarry, although it was entitled to an exemption as a matter of law.

Comprehensive Study List Exemption

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<sup>819</sup> Joint Review Panel Final Report, dated October 23, 2007, at 90. (*Investors' Schedule of Documents Tab C 34*). Letter from Susan Jones, Director of the Boundary Bay Conservation Committee to the Office of the Auditor General, exposing the DFO's advisement of the proponent to circumvent parts of the cumulative effects analysis required by the *CEAA*, dated May 25, 2006. (*Investors' Schedule of Documents Tab C 322*).

<sup>820</sup> ANEI Bear Head Terminal LNG Terminal Environmental Assessment, dated May 2004 at 1-3. (*Investors' Schedule of Documents Tab C 591*).

<sup>821</sup> DFO Briefing Note, regarding the Environmental Assessment of proposed Bear Head Liquid Natural Gas Terminal, stating that Access Northeast Energy Inc. submitted a project description on October 31, 2003, undated (*Investors' Schedule of Documents Tab C 449*); Letter from Minister Kerry Morash (NSDEL) to Sylvester Swierzy, Access Northeast Energy Inc., providing approval for the proposed Bear Head project, dated August 9, 2004. (*Investors' Schedule of Documents Tab C 450*).

<sup>822</sup> Email from Reg Sweeney (DFO) to Maya Bevan (EC) regarding the Environmental Assessment for Bear Head, dated December 15, 2003. (*Investors' Schedule of Documents Tab C 323*).

567. As a matter of Canadian law, the application for a dock at the Whites Point Quarry should not have triggered an environmental assessment on the comprehensive study track, as it did not fall within the definition of “marine terminal” under the *Comprehensive Study List Regulations*.<sup>823</sup> The *Comprehensive Study List Regulations* specifically exempted from Comprehensive Study “production, processing or manufacturing areas that include docking facilities used exclusively in respect of those areas.”<sup>824</sup> Whites Point Quarry therefore was entitled to an exemption. Instead, the Governments of Canada and Nova Scotia applied the *Comprehensive Study List Regulations* in an arbitrary manner that was inconsistent with Canadian law.
568. In the assessment of the Bear Head LNG Terminal, also located in Nova Scotia, Canada applied an exemption under section 28 (c) of the *Comprehensive Study List Regulations*.<sup>825</sup>
569. For that project, Canada actually considered the applicable exemption, to prevent the Bear Head LNG Terminal from being assessed as a comprehensive study, and concluded that it should be a less onerous screening level assessment.<sup>826</sup> In contrast, Canada, did not consider the applicable statutory exemption for the Whites Point Quarry.

vii. *The Keltic Project*

570. The Keltic petrochemical project in Nova Scotia received treatment far more favorable than Whites Point Quarry.
571. Keltic Petrochemicals Inc.<sup>827</sup> proposed a mega-project in Goldboro, Nova Scotia that involved the construction of Liquefied Natural Gas facilities on an area similar in size to

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<sup>823</sup> CEAA Comprehensive Study List Regulations, SOR/94-638. (*Investors’ Schedule of Documents at Tab C 265*).

<sup>824</sup> CEAA Comprehensive Study List Regulations, SOR/94-638, s. 2. (*Investors’ Schedule of Documents at Tab C 265*).

<sup>825</sup> Section 28, *CEAA Comprehensive Study List Regulations*, SOR/94-638 reads that a comprehensive study is required for... (c) a marine terminal designed to handle vessels larger than 25 000 DWT unless the terminal is located on lands that are routinely and have been historically used as a marine terminal or that are designated for such use in a land-use plan that has been the subject of public consultation. (*Investors’ Schedule of Documents at Tab C 265*).

<sup>826</sup> E-mail from Bruce Hood (DFO) to Reg Sweeney (DFO), dated December 9, 2003, discussing the application of the appropriate exemption as provided in the *Comprehensive Study List Regulations*. (*Investors’ Schedule of Documents at Tab C 62*).

<sup>827</sup> Keltic Petrochemicals Inc. is a private Canadian company. It is incorporated under the laws of Alberta and registered to do business in Nova Scotia under the Nova Scotia Corporations Registration Act; See also search results from Nova Scotia Registry of Joint Stock Companies for “Keltic Petrochemicals Inc.” (*Investors’ Schedule of Documents at Tab C 592*).

that of the Whites Point Project.<sup>828</sup> The scale of the project created widespread opposition in the local community, resulting in 90% of local residents signing a petition requesting a joint panel review to assess the project.<sup>829</sup>

- d) **Scope and Level of Assessment** – The project was assessed through a Comprehensive Study.
- e) **Duration** – The entire review process took 3 years and 6 months,<sup>830</sup> substantially less than the 5 years of assessment for the Whites Point Quarry.
- f) **Discretion** – Despite the magnitude of the project, the potential for significant adverse environmental effects, and calls by the public for a panel review, the lead Responsible Authority, DFO, refused to consider a broad scope for the project. This resulted in a unique Track Decision, whereby there were two separate scopes: a narrow one for which DFO was responsible, and a broad one for which Environment Canada and Transport Canada were responsible.<sup>831</sup>

572. After Keltic Inc. announced an additional dam component to the original LNG project, DFO advised the proponent on how to avoid a panel review. DFO suggested that if Keltic asked for the dam to be scoped in with the LNG project, public concern would surely push the project to a panel review. Instead DFO advised that the dam undergo a separate screening level EA, thereby saving Keltic from a more onerous and time consuming panel review process.<sup>832</sup>

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<sup>828</sup> Namely, 240ha of land. For a detailed description of the various components associated with the project see: Keltic Petrochemicals Inc., *Comprehensive Study Report – Final Report*, October 2007 at pp. 2-5 – 2-17. Accessed at: [http://www.ceaa.gc.ca/050/documents\\_staticpost/pdfs/23818-02E.pdf](http://www.ceaa.gc.ca/050/documents_staticpost/pdfs/23818-02E.pdf). (*Investors' Schedule of Documents at Tab C 115*).

<sup>829</sup> Letter with attached petition from concerned citizen to federal Minister of the Environment Stéphane Dion, requesting that the Keltic Project undergo a panel review. (*Investors' Schedule of Documents Tab C 324*).

<sup>830</sup> Submission of Project Description to Canadian Environmental Assessment Agency – Keltic Petrochemicals Inc., a Petrochemical Plant and LNG Facilities, Goldboro, Nova Scotia, dated August 2004 (*Investors' Schedule of Documents Tab C 449*); CEA Agency News Release stating that the Minister of Environment, John Baird, approved the project as proposed, dated March 7, 2008. (*Investors' Schedule of Documents Tab C 452*).

<sup>831</sup> Environmental Assessment Track Report For The Petrochemical and Liquefied Natural Gas Facilities at Goldboro, Nova Scotia, dated October 14, 2005 (*Investors' Schedule of Documents Tab C 327*); Briefing Note for the Director General Habitat Management (DFO) regarding the Keltic Liquefied Natural Gas Terminal at Goldboro, Nova Scotia, undated (*Investors' Schedule of Documents Tab C 328*).

<sup>832</sup> Memorandum for the Minister (DFO) regarding Keltic Petrochemicals Inc. Proposal (*Investors' Schedule of Documents Tab C 329*).

*viii. Voisey's Bay*

573. The Voisey's Bay project was proposed by Voisey's Bay Nickel Company, a joint company between two Canadian companies; Diamond Field Resources and Inco Limited.<sup>833</sup>
574. The project involved a nickel-copper-cobalt mine and facilities, and also a shipping dock.<sup>834</sup>
- a) **Scope and Level of Assessment** – The project was assessed through a Joint Review Panel.<sup>835</sup>
- b) **Duration** – The proponent submitted a draft project description on September 27, 1996.<sup>836</sup> The review panel was formed on January 31, 1997, and its decision was released on April 1, 1999.<sup>837</sup> The entire process took 2 years and 6 months. In contrast the Whites Point Quarry project assessment spanned over five years.

Cumulative Effects and Precautionary Principle

575. The analysis required of the proponent for the Voisey's Bay project, in relation to cumulative effects, was limited to the "environmental effects of the Undertaking in combination with other projects or activities that have been, or will be, carried out".<sup>838</sup>
576. Government agencies in the Voisey's Bay assessment interpreted the meaning of the *CEAA* language of cumulative effects to mean "imminent projects or activities occurring over a certain period of time and distance. It is therefore recommended that when

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<sup>833</sup> CEA Agency Memorandum to Minister regarding the Voisey's Bay Mineral Development, dated February 7, 1996. (*Investors' Schedule of Documents at Tab C 599*).

<sup>834</sup> The project is located on the coast of Labrador

<sup>835</sup> Letter from Minister Fred Mifflin (DFO) to Minister Sergio Marchi (Environment Canada) requesting that the Voisey's Bay project be referred to a panel review, dated November 8, 1996. (*Investors' Schedule of Documents Tab C 358*). Minister Mifflin stated that the project would require authorizations under s. 35(2) of the *Fisheries Act* and s. 5(1) of the *NWPA*, and that the project faced opposition from the public, specifically aboriginal peoples.

<sup>836</sup> Minister's Briefing Note, prepared by Richard Nadeau (DFO) stating that the proponent for the Voisey's Bay project delivered its project description, dated October 8, 1996. (*Investors' Schedule of Documents Tab C 359*).

<sup>837</sup> CEA Agency News Release – Panel Recommends Project Under Certain Conditions, dated April 1, 1999. (*Investors' Schedule of Documents Tab C 360*).

<sup>838</sup> Environmental Impact Statement (EIS) Guidelines for the Review of the Voisey's Bay Mine and Mill Undertaking, dated June 20, 1997. (*Investors' Schedule of Documents Tab C 361*).

evaluating cumulative effects...only those projects and activities that are imminent at the time of the assessment be considered.”<sup>839</sup>

577. The EIS Guidelines for the Voisey’s Bay project also required the review panel to “consider the extent of the application of the precautionary principle to the Undertaking”<sup>840</sup> because it was clearly included in the Terms of Reference for the review panel.<sup>841</sup> In contrast, the Terms of Reference for the Whites Point Quarry review panel made no mention of the application of the precautionary principle to the Investment.<sup>842</sup>

1. A reasonable level of certainty for future projects was required in the cumulative effects assessment

578. The CEEA requires a Joint Review Panel to consider cumulative environmental effects that are likely to result from a project “in combination with other projects or activities that have been or will be carried out.”<sup>843</sup> This language was also confirmed in the Terms of Reference.<sup>844</sup>
579. The ordinary and common-sense reading of this language requires a high degree of certainty that “other projects or activities...will be carried out” in order for such projects to be included in a cumulative effects assessment.<sup>845</sup>
580. The Cumulative Effects Practitioners Guide prepared by the Cumulative Effects Assessment Working Group for the CEA Agency, notes that temporal boundaries for

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<sup>839</sup> Letter from Ian McCracken (Environment Canada) to Briad Torrie (CEA Agency), dated April 28, 1997. (*Investors’ Schedule of Documents Tab C 378*).

<sup>840</sup> Environmental Impact Statement (EIS) Guidelines for the Review of the Voisey’s Bay Mine and Mill Undertaking, dated June 20, 1997. (*Investors’ Schedule of Documents Tab C 361*).

<sup>841</sup> Annex to Schedule 1 – Memorandum of Understanding on Environmental Assessment of The Proposed Voisey’s Bay Mining Development, dated January 31, 1997. (*Investors’ Schedule of Documents Tab C 362*).

<sup>842</sup> Terms of Reference for the Joint Review Panel, Appendix to the *Agreement concerning the Establishment of a Joint Review Panel*, dated November 3, 2004. (*Investors’ Schedule of Documents Tab C 363*).

<sup>843</sup> CEEA, s. 16(1)(a). (*Investors’ Schedule of Documents at Tab C 255*).

<sup>844</sup> *Agreement concerning the Establishment of a Joint Review Panel*, dated November 3, 2004. (*Investors’ Schedule of Documents at Tab C 363*).

<sup>845</sup> Expert Report of David Estrin at para. 425.

“Future Case” projects “extends no further than including known (i.e., certain) actions.”<sup>846</sup>

581. The EIS Guidelines for the Whites Point Quarry made clear that Bilcon was not expected to address the cumulative effects of purely hypothetical or conjectural projects.<sup>847</sup>

2. The Joint Review Panel arbitrarily required consideration of and based its decision on unknown projects

582. Despite the required degree of certainty, the Joint Review Panel arbitrarily faulted Bilcon for not taking into account hypothetical future quarry projects in the Digby Neck area. These future projects were based on unknown expressions of interest that had been made to the Government of Nova Scotia.<sup>848</sup>
583. The Joint Review Panel concluded that these unknown business inquiries were held to likely “induce further extraction activities in the region”<sup>849</sup> and that such future quarries would be adverse to the local community.<sup>850</sup>
584. The finding of future quarries in the region also further strengthened and buttressed the Joint Review Panel’s “community core values” finding, and as such, was central to the rejection of the Whites Point Quarry. In coming to this conclusion, the Joint Review Panel could not cite an example of a quarry that had been approved or that had submitted to a regulatory approval process to support its arbitrary treatment.
585. What is troubling is the Nova Scotia Department of Natural Resources itself had no concrete information or figure on the number of companies inquiring into business opportunities. The Nova Scotia Department of Natural Resources first stated that the number of inquiries may be six, and later stated the number may be four or seven.<sup>851</sup>
586. When a representative of Nova Scotia Department of Natural Resources was asked by the Joint Review Panel to expand on these inquiries, it was stated:

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<sup>846</sup> Cumulative Effects Assessment: Practitioners Guide, dated February, 1999 at 3.2.3.2. (*Investors’ Schedule of Documents at Tab C 371*).

<sup>847</sup> Expert Report of David Estrin at para. 429.

<sup>848</sup> Joint Review Panel Final Report, dated October 23, 2007, at 83. (*Investors’ Schedule of Documents Tab C 34*).

<sup>849</sup> Joint Review Panel Final Report, dated October 23, 2007, at 83. (*Investors’ Schedule of Documents Tab C 34*).

<sup>850</sup> Joint Review Panel Final Report, dated October 23, 2007, at 83. (*Investors’ Schedule of Documents Tab C 34*).

<sup>851</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, June 19, 2007 at 556, 576. (*Investors’ Schedule of Documents at Tab C 156*).

... I was not dealing specifically with any proposals or any projects that I'm aware of that have been proposed. That was simply companies that have expressed some interest in business development within the Province.<sup>852</sup>

587. The Department of Natural Resources was however clear on one point: these expressions of interest were not specific to the Digby Neck area, but were rather expressions of interest towards quarrying province wide.<sup>853</sup> Little to no information was available to the Department of Natural Resources, let alone Bilcon, as to what, if any, inquiries had been made with respect to other future projects.
588. On this arbitrary basis, the Joint Review Panel required that Bilcon undertake a full cumulative effects analysis, and consequently, reached its own conclusion that the Whites Point Quarry would likely induce further quarry developments in the area. Moreover, the Joint Review Panel noted a concern over the inducement of foreign-owned quarry developments in the area.
589. Such an approach was not open to the Joint Review Panel as there was no certainty surrounding these illusory projects<sup>854</sup> and these projects were certainly not “reasonably foreseeable” as the Joint Review Panel suggested.<sup>855</sup>
590. Bilcon had no notice of these illusory projects, and requiring Bilcon to comment on the nature, scope, duration and anticipated environmental effects of imaginary projects, as Bilcon would have been required to do for a cumulative effects assessment, is a simply impossible and fundamentally unfair task.
591. The Joint Review Panel invented such projects with the goal of creating another artificial roadblock for Bilcon to overcome in its environmental assessment process.

*i. Eider Rock Project*

592. The Eider Rock Liquefied Natural Gas Terminal was, like the Whites Point Quarry, located on the Bay of Fundy. The Eider Rock cumulative effects assessment used the required CEAA standard of “projects or activities that have been or will be carried out”:

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<sup>852</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, June 19, 2007 at 576. (*Investors’ Schedule of Documents at Tab C 156*).

<sup>853</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, June 19, 2007 at 556. (*Investors’ Schedule of Documents at Tab C 156*). [*emphasis added*]

<sup>854</sup> Expert Report of David Estrin at para. 432.

<sup>855</sup> Expert Report of David Estrin at para. 432.

Environmental effects from reasonable foreseeable projects (Future Case) include those future projects, activities or actions that will occur with certainty, including projects that are in some form of regulatory approval process or have made a public announcement to seek regulatory approvals.<sup>856</sup>

593. The Final EIS Guidelines for Eider Rock similarly state that cumulative effects must take into account “other past, present, or likely (imminent) future projects or activities.”<sup>857</sup>

*ii. Belleoram Coastal Quarry*

594. The Belleoram Quarry in Newfoundland was, like the Whites Point Quarry, a coastal quarry which the Government of Canada acknowledged as very similar to the Whites Point Quarry.<sup>858</sup>

595. However, the standard of cumulative effects at Belleoram quarry were far more favorable than the Whites Point Quarry and were limited to:

...environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out.<sup>859</sup>

596. The Comprehensive Study Report for Belleoram also confirmed that the only “other activities in the area as well as those activities that will occur in the foreseeable future”<sup>860</sup> will be considered.

**C. Establishment, Expansion, Conduct and Operation**

597. NAFTA Article 1102 requires that the treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. An environmental assessment is a gateway to the evaluation of new or additive economic activity by an investment. In the context of environmental regulatory measures, the aspects of an investment affected by NAFTA Article 1102 would be by definition have to address the establishment, expansion, conduct or operation of economic activity proposed by the investor.

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<sup>856</sup> Eider Rock Environmental Impact Assessment Report, Chapter 10 – Freshwater Aquatic Environment, dated August 24, 2009. (*Investors’ Schedule of Documents at Tab C 374*).

<sup>857</sup> Final Guidelines for an Environmental Impact Statement: Petroleum Refinery (Project Eider Rock), dated June 4, 2007. (*Investors’ Schedule of Documents at Tab C 375*).

<sup>858</sup> E-mail from Kevin Blair (Environment Canada) to Jeanette Goulet (Environment Canada), dated December 6, 2006. (*Investors’ Schedule of Documents Tab C 189*).

<sup>859</sup> Belleoram Comprehensive Study Report, August 23, 2007. (*Investors’ Schedule of Documents Tab C 190*).

<sup>860</sup> Belleoram Comprehensive Study Report, August 23, 2007. (*Investors’ Schedule of Documents Tab C 190*).



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#### **D. Conclusion**

598. Canada has failed to meet its obligations under NAFTA Article 1102 as a result of the provision of better treatment to Canadian investments or Canadian investors who are in like circumstances to the Investors or their Investment, Bilcon.
599. The Investor and its Investments are in like circumstances in the general class of applicants applying for consideration under the environmental assessment schema in Canada. All applicants come before the government authorities in similar circumstances and in relation to this treatment, must be considered to be in like circumstances.
600. Canada has acted inconsistently with its national treatment obligation in Article 1102 by not treating the Investors and their Investment as favorably as investors and investments of investors from Canada.
601. Rather than providing the best treatment available, Canada actually provided the worst level of treatment possible to the Investors and their Investment. By comparison, and as described in this Part of the Memorial, Canada provided more favorable treatment to the Canadian investments.
602. While the Investors do not believe that it is proper to consider general public policy considerations in the analysis of national treatment other than those considerations explicitly placed in the NAFTA in NAFTA Article 1108 and the NAFTA Annexes, there are no general public policy reasons that would justify the special level of gross unfairness and the lack of due process that hallmarked the treatment provided to Bilcon.
603. The Investors, and their Investment, have been harmed as a result of Canada's failure to meet its national treatment obligation.<sup>861</sup>
604. The treatment with respect to an environmental assessment is always offered in relation the establishment, expansion, management, conduct or operation of investments.
605. Thus Canada has failed to meet its NAFTA Article 1102 obligation to provide national treatment.

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<sup>861</sup> Witness Statement of William Richard Clayton, at paras. 31 – 33.; See also Part Seven of this Memorial.

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## **I. MOST FAVORED NATION TREATMENT**

606. Canada did not ensure that it provided treatment as favorable as that provided to Investments of Investors from other NAFTA Parties or Non NAFTA Parties who were in like circumstances to Bilcon. As a result, Canada did not meet its obligation to provide Most Favored Nation Treatment to the Investment and to its Investors.

### **A. Likeness**

607. The Canadian environmental assessment scheme is of general application. Therefore, the universe of investors and investments that are in like circumstances therefore includes in principle the general class of proponents under the scheme.

608. An environmental assessment is a gateway to the evaluation of new or additive economic activity by an investment. In the context of environmental regulatory measures, the aspects of an investment affected by NAFTA Article 1103 would be new economic activity proposed by the investor.

609. With respect to the operations of Bilcon, the NAFTA Tribunal should consider all enterprises affected by the environmental assessment regulatory process to be in like circumstances with Bilcon. The environmental regulatory scheme is with respect to the establishment, acquisition, expansion and conduct of the investment.

610. The impact of the measures then assists a Tribunal in defining what needs to be considered. So if the measure addresses access to resources, this creates a different analysis than that which may occur with another type of measure addressing disposition of investments.

611. Thus, in the *Pope & Talbot* claim, the Tribunal had to consider market access for the export of softwood lumber. The Tribunal looked at competitors in that particular marketplace in its consideration of likeness.<sup>862</sup> This was also what the *S.D. Myers* Tribunal did. The measure in *S.D. Myers* affected the competitive relationship of products between S.D. Myers Canada and Canadian-based competitors.<sup>863</sup> Similarly, this is the same likeness test that was followed in *Feldman* where the Mexican measure affected the elements of competition between competitors.<sup>864</sup>

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<sup>862</sup> *Pope & Talbot*, Award on Merits of Phase 2, at para. 78. (*Investors' Book of Authorities at Tab CA 12*).

<sup>863</sup> *S.D. Myers*, First Partial Award, at paras. 193-194. (*Investors' Book of Authorities at Tab CA 6*).

<sup>864</sup> *Feldman*, Award, at paras. 171-172. (*Investors' Book of Authorities at Tab CA 51*).

612. By comparison, the governmental measure involved in the case of Bilcon was in connection to the establishment, acquisition, expansion and conduct of the investment. The environmental regulatory scheme looks at proposed new or expanded activity.
613. Accordingly, the universe of investors in like circumstances consists of these concerns affected in this way by the application of the environmental regulatory scheme. This is exactly the approach that the *Occidental* Tribunal followed but without expressing the reasoned framework for its actions.<sup>865</sup>

**B. Canada Provided Better Treatment**

614. Canada provided better treatment to foreign investors operating investments in Canada than that provided to an American investor. Canada is required to extend such beneficial treatment to American investors as it has offered to Canadians.
615. Tribunal awards on MFN treatment, confirm that, under the terms of an MFN clause, investors are entitled to rely upon better treatment accorded in investment protection treaties to investors from any third country. If the Tribunal accepts that the FTC Note of Interpretation limits Article 1105 to customary international law, the NAFTA's MFN obligation in NAFTA Article 1103 ensures that the Investor and its Investment receives the protection of all the sources of international law.
616. Non-Party project proponents that underwent environmental assessment received treatment more favorable than the Whites Point Quarry. These non-Party investments include:
- i. Southern Head Project;
  - ii. Victor Diamond Mine;
  - iii. Sechelt Carbonate Project;
  - iv. Surface Gold Mine at Moose River Gold Mines;
  - v. NWT Diamonds Project; and
  - vi. Diavik Diamonds Project

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<sup>865</sup> *Occidental*, Final Award, at para. 171, 173. (*Investors' Book of Authorities at Tab CA 18*).

*i. Southern Head Project*

617. The Southern Head project, located on the southeastern coast of Newfoundland, included as investors:
- a) Altius Resources Inc., a Canadian national corporation based in Newfoundland and Labrador;
  - b) Dermot Desmond, an individual investor based in Dublin, Ireland;
  - c) D.H.W. Dobson, a Scottish born entrepreneur and financier; and
  - d) Stephen Posford, a private venture capitalist based in the United Kingdom.<sup>866</sup>
618. The project involved the construction and operation of a refinery and marine terminal, with associated storage facilities. The main products of the refinery were to include gasoline, kerosene/jet fuel, sulphur diesel, liquefied nitrogen gas, sulphur and petroleum coke.<sup>867</sup>
- a) **Scope and Level of Assessment** – the environmental assessment of the Southern Head project was limited to the marine terminal, and conducted as a Comprehensive Study.
  - b) **Duration** – The project was assessed in less than 19 months. The project description was submitted by the proponent on October 16, 2006<sup>868</sup>, and federal Minister of the Environment, John Baird, approved the project on May 1, 2008<sup>869</sup>.
  - c) **Discretion** – Transport Canada, the principle Responsible Authority, considered an exemption, which was also applicable to the Whites Point Quarry, contained in s. 28(c) of the *Comprehensive Study List Regulations*. Transport Canada used the applicable exemption to remove the refining and processing facilities from

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<sup>866</sup> Project Registration for Newfoundland & Labrador Refinery Project at Southern Head at the Head of Placentia Bay, NL, dated October 16, 2006 at 5-6. (*Investors' Schedule of Documents Tab C 332*).

<sup>867</sup> Project Registration for Newfoundland & Labrador Refinery Project at Southern Head at the Head of Placentia Bay, NL, dated October 16, 2006. (*Investors' Schedule of Documents Tab C 332*).

<sup>868</sup> Project Registration for Newfoundland & Labrador Refinery Project at Southern Head at the Head of Placentia Bay, NL, dated October 16, 2006. (*Investors' Schedule of Documents Tab C 332*).

<sup>869</sup> CEA Agency News Release: Southern Head Marine Terminal and Associated Works related to Crude Oil Refinery Development Proposal Decision, dated May 1, 2008. (*Investors' Schedule of Documents Tab C 333*).

the scope of the Comprehensive Study, thereby leaving those structures to be assessed through a separate provincial assessment.<sup>870</sup> However, the Whites Point Quarry was not afforded the same exemption, nor is there any evidence that the applicable exemption was ever considered.

#### Cumulative Effects and Precautionary Principle

619. Despite statements from the CEA Agency that the cumulative effects analysis would be important for this project, due to the proximity of an operational transshipment terminal, as well as a proposed refinery and terminal<sup>871</sup>, the analysis of cumulative effects, approved by the Minister of Environment was limited to future projects that:

- a) Have a reasonable possibility of occurring;
- b) Have been registered with either the NL (Newfoundland and Labrador) Department of Environment and Conservation and/or CEA Agency; and
- c) Should reflect the most likely future scenarios.<sup>872</sup>

620. The Guidelines for Environmental Impact Statement/Comprehensive Study Report took the following cumulative effects into account:

“Consideration of any cumulative effects on valued ecosystem components that are likely to result from the project in combination with other projects that have been or will be carried out (e.g., existing and proposed shipping and industrial activity in Placentia Bay) will be discussed in the EIS/CSR.”<sup>873</sup>

621. The environmental assessment of the Southern Head project took place after the 2003 amendments to the *CEAA*, therefore consideration of the precautionary principle was required in relation to the project. However, in the Comprehensive Study submitted by

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<sup>870</sup> Letter from Margie Whyte (TC) to Maria Dober (EC) explaining Transport Canada’s decision to include only the marine terminal in the scope of the Comprehensive Study, while leaving the assessment of the refinery to the separate provincial assessment, dated January 18, 2007. (*Investors’ Schedule of Documents Tab C 334*).

<sup>871</sup> CEA Agency Advice to Minister, regarding the status of the Southern Head project, including media lines, dated January 8, 2008. (*Investors’ Schedule of Documents Tab C 335*).

<sup>872</sup> Comprehensive Study Report for the Southern Head Marine Terminal, dated September 27, 2007 at 187. (*Investors’ Schedule of Documents Tab C 336*).

<sup>873</sup> Guidelines for Environmental Impact Statement/Comprehensive Study Report, dated June 18, 2007, at 17 of 24. (*Investors’ Schedule of Documents at Tab C 376*).

the proponent of the Southern Head project, there is no mention of the precautionary principle.<sup>874</sup>

*ii. Victor Diamond Mine Project*

622. The proponent of the Victor Diamond Mine was DeBeers Canada, a wholly owned subsidiary of the Luxembourg-based DeBeers Family of Companies.<sup>875</sup> It was the "first development in a pristine region of northern Ontario"<sup>876</sup>, where listed *Species at Risk Act* species, such as the Woodland Caribou, were present,<sup>877</sup> and with a significant public opposition, expressing concern about environmental impacts of the mine and the need for a panel review. A Joint Review Panel was not required.<sup>878</sup>

- a) **Scope and Level of Assessment** - The Victor Diamond Mine was assessed in a Comprehensive Study, not a review panel.
- b) **Duration** - The Victor Diamond Mine environmental assessment process that took a 2 years and 4 months.
- c) **Discretion** - Despite the Victor Diamond Mine having significant public opposition,<sup>879</sup> the same factors that allowed the same Minister of Fisheries to escalate the Whites Point Project to a Joint Review Panel, the Minister chose to proceed merely to a Comprehensive Study.<sup>880</sup>

Cumulative Effects and Precautionary Principle

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<sup>874</sup> Comprehensive Study Report for the Southern Head Marine Terminal, dated September 27, 2007. (*Investors' Schedule of Documents Tab C 336*).

<sup>875</sup> Living Up To Diamonds, Report to Society of 2010 Summary Review. (*Investors' Schedule of Documents at Tab C 583*).

<sup>876</sup> Memorandum from Richard Nadeau (DFO), 2003 (*Investors' Schedule of Documents Tab C 192*).

<sup>877</sup> Letter from the Wildlands League to federal Minister of the Environment Stéphane Dion, dated July 21, 2005 discussing environmental impacts of Victor Diamond Mine 2003. (*Investors' Schedule of Documents Tab C 193*).

<sup>878</sup> Letter from the Wildlands League to federal Minister of the Environment Stéphane Dion, dated July 21, 2005 discussing environmental impacts of Victor Diamond Mine 2003. (*Investors' Schedule of Documents Tab C 193*).

<sup>879</sup> Letter from the Wildlands League to federal Minister of the Environment Stéphane Dion, dated July 21, 2005 discussing environmental impacts of Victor Diamond Mine 2003, in which at least 928 letters from the public expressed concern about the large-scale environmental impacts of the mine and the need for Joint Panel Review (*Investors' Schedule of Documents Tab C 193*).

<sup>880</sup> Letter from the Wildlands League to Minister Stéphane Dion, Minister of the Environment, dated July 21, 2005 discussing environmental impacts of Victor Diamond Mine. (*Investors' Schedule of Documents Tab C 193*).

623. Cumulative effects were limited to existing projects and “projects within the regulatory process on the day these guidelines are issued.”<sup>881</sup>

*iii. Sechelt Carbonate Project*

624. The Sechelt Carbonate Project is located approximately 50 kilometers north west of Vancouver, British Columbia. It was proposed by Pan Pacific Aggregates Ltd., a wholly owned subsidiary of Pan Pacific Aggregates plc, a United Kingdom national.<sup>882</sup>

625. The Sechelt Carbonate Project was an open-pit mine that involved the construction and operation of a marine terminal, with very similar processing infrastructure to the Whites Point Quarry. The proposed project included the construction and operations of a conveyer belt which would connect the open-pit mine to a marine terminal.<sup>883</sup>

a) **Scope and Level of Assessment** - The Sechelt Carbonate Project was assessed in a Comprehensive Study, not a panel review.

b) **Discretion** - Despite the Sechelt Carbonate Project having significant public opposition,<sup>884</sup> which was one of the factors that escalated the Whites Point Quarry to a panel review process, the environmental assessment of the Sechelt Carbonate Project was conducted as a Comprehensive Study.<sup>885</sup> In contrast to the Whites Point Quarry Project, the DFO used its discretion to consider the exemption under s.28(c) of the *Comprehensive Study List Regulations*.<sup>886</sup> That was not the case for Bilcon of Delaware. The scope of the Whites Point Quarry assessment included the marine terminal and quarry; the Responsible

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<sup>881</sup> Victor Diamond Project Draft Comprehensive Study Guidelines, November 17, 2003. (*Investors' Schedule of Documents Tab C 191*).

<sup>882</sup> About Pan Pacific Aggregates. (*Investors' Schedule of Documents at Tab C 584*).

<sup>883</sup> Sechelt Carbonate Project Description, dated June 9, 2006. (*Investors' Schedule of Documents Tab C 337*).

<sup>884</sup> The following non-governmental organizations objecting to the project: The Friends of the Sechelt Peninsula; The Sunshine Coast Conservation Society; The Save Our Sunshine Coast Group; The Area A Quality Water Association; The Sechelt Indian Band; the local government; and residents of the area. (*Investors' Schedule of Documents Tab C 338*); (*Investors' Schedule of Documents Tab C 339*).

<sup>885</sup> DFO Memorandum, prepared by Mike Engelsfjord (DFO), sent to Adam Silverstein (DFO) regarding the DFO's scope for the Sechelt Carbonate Mine Project, dated February 23, 2007. (*Investors' Schedule of Documents Tab C 340*).

<sup>886</sup> DFO Memorandum, prepared by Mike Engelsfjord (DFO), sent to Adam Silverstein (DFO) regarding the DFO's scope for the Sechelt Carbonate Mine Project, dated February 23, 2007. (*Investors' Schedule of Documents Tab C 340*); In this case however, the DFO chose not to apply that exception, but it remains that it was at least considered in that project, leading to better treatment.

Authorities<sup>887</sup> in the Sechelt Carbonate Project chose to narrowly scope the project to include only the marine terminal and the nearby waterways. In contrast to the Whites Point Quarry project, neither the quarry nor the conveyor belt were subjected to the assessment.<sup>888</sup>

#### Cumulative Effects

626. Pan Pacific received better treatment through a lesser standard of review. The standard policy on addressing cumulative effects assessment, as referenced in the Operational Policy Statement on “Addressing Cumulative Environmental Effects under the *Canadian Environmental Assessment Act*.” were applied.<sup>889</sup> Cumulative effects were limited to “effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out.”<sup>890</sup> In contrast, the Joint Review Panel for the Whites Point Quarry environmental assessment removed any reference to the Operational Policy Statement in its final EIS Guidelines, and imposed a novel standard to include “induced” activities.<sup>891</sup>

#### *iv. Surface Gold Mine*

627. The investor of the Surface Gold Mine was Atlantic Gold NL, an Australian resource exploration company.<sup>892</sup>
628. The project, also located in Nova Scotia, involved the construction and operation of an open-pit mine and processing facilities, in the vicinity of two protected wilderness areas,<sup>893</sup> protected by Nova Scotia legislation.<sup>894</sup>

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<sup>887</sup> Transport Canada and the DFO are the Responsible Authorities for the environmental assessment. The Responsible Authorities used the same legislative triggers that were used in the assessment of the Whites Point Quarry: s. 5(1) of the NWPA and s. 35(2) of the Fisheries Act, respectively.

<sup>888</sup> Email from Adam LaRusic (EC) to Mandy Sarfi (CEA Agency) regarding EC’s opinion on the scope of the Sechelt Carbonate Project, dated June 4, 2007. (*Investors’ Schedule of Documents Tab C 341*).

<sup>889</sup> Operational Policy Statement on Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act, February 1999. (*Investors’ Schedule of Documents at Tab C 371*).

<sup>890</sup> Draft Comprehensive Study Scoping Document for the Sechelt Carbonate Project, undated (*Investors’ Schedule of Documents Tab C 342*).

<sup>891</sup> s. 5.11, Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, dated March 2005. (*Investors’ Schedule of Documents at Tab C 168*).

<sup>892</sup> Letter from Denise Saulnier, Acting Manager, Nova Scotia Natural Resources to Wally Bucknell, Director, Atlantic Gold NL, dated January 5, 2006. (*Investors’ Schedule of Documents at Tab C 600*).



- a) **Scope and Level of Assessment** - The project was assessed through the Nova Scotia Environmental Agency only as a Class 1 Screening, the least onerous assessment under that legislation.
- b) **Duration** - The Surface Gold Mine was assessed in 14 months.
- c) **Discretion** - Despite the existence of protected wilderness areas, NSDEL Minister Mark Parent, the same Minister who rejected the Whites Point Quarry, required the assessment to be conducted as a Class 1 Screening.<sup>895</sup> In contrast the constraints imposed by the NSDEL in relation to Bilcon<sup>896</sup>, the NSDEL did not require the DFO to approve the proponent's blasting plan, nor was any condition placed on blasting in general.<sup>897</sup>

#### Cumulative Effects and Precautionary Principle

629. There is no analysis of cumulative effects<sup>898</sup> and there is no mention of the precautionary principle.

#### v. NWT Diamonds Project

630. The proponent for the NWT Diamonds Project, Broken Hill Proprietary Company Ltd. (BHP), is an international mining corporation headquartered in Australia.<sup>899</sup>

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<sup>893</sup> Tangier Grand Lake Protected Wilderness Area and the Ship Harbour-Long Lake Candidate Wilderness Area: see *Nova Scotia Wilderness Areas Protection Act, 1998, c. 27*; see *Memorandum, prepared by Protected Areas Branch, NSDEL, dated December 23, 2007. (Investors' Schedule of Documents Tab C 343)*; Further, the area was described as "having unrepresented ecosystems, significant ecosites, outstanding wilderness recreation values, and a large natural patch with a significant connectivity zone for wildlife": see letter from Mark Parent (Minister of NSDEL) to DDV Gold Limited regarding the level of assessment of the Surface Gold Mine project, dated April 10, 2007. (*Investors' Schedule of Documents Tab C 344*).

<sup>894</sup> *Nova Scotia Wilderness Areas Protection Act, 1998, c. 27*; see *Memorandum, prepared by Protected Areas Branch, NSDEL, dated December 23, 2007. (Investors' Schedule of Documents Tab C 343)*.

<sup>895</sup> Letter from Mark Parent (Minister of NSDEL) to DDV Gold Limited regarding the level of assessment of the Surface Gold Mine project, dated April 10, 2007. (*Investors' Schedule of Documents Tab C 344*).

<sup>896</sup> Approval for the Construction and Operation of a Quarry, at or near Little River, Digby County, in the Province of Nova Scotia; Approval Holder: Nova Stone Exporters, Inc., dated April 30, 2002. (*Investors' Schedule of Documents Tab C 31*).

<sup>897</sup> Environmental Assessment Approval – Touquoy Gold Project, dated February 1, 2008. (*Investors' Schedule of Documents Tab C 345*).

<sup>898</sup> Focus Report – Touquoy Gold Mines, Moose River Gold Mines, Nova Scotia, dated November 2007. (*Investors' Schedule of Documents Tab C 346*).

631. The NWT Diamonds Project was the first diamond mine operation in Canada and resulted in substantial destruction of fish habitat and affecting a wide variety of flora and fauna.<sup>900</sup> Although the Department of Indian and Northern Development was the lead Responsible Authority, DFO played a direct role in the environmental assessment.
- a) **Level of Assessment** - The project was assessed by a Joint Review Panel, as it was the first diamond mine to be constructed in Canada.
  - b) **Duration** - The review panel process took 14 months to complete.<sup>901</sup>
  - c) **Discretion** - the Department of Indian and Northern Development, the lead Responsible Authority, actively lobbied the promotion of diamond mining in the North West Territories to other departments, including the DFO, and convinced it to agree to a more efficient process.<sup>902</sup> The DFO accepted a Fish Habitat Compensation Plan in relation to fish habitat, accepted money from the proponent to bolster fish stocks in other areas of the territory.<sup>903</sup>

#### Cumulative Effects and Precautionary Principle

632. The review panel for the NWT Diamonds Project refused to consider hypothetical mining developments that could occur, as those developments would require their own environmental assessment under *CEAA*. The review panel noted that the *CEAA* requires that the cumulative effects analysis is to take into account other projects or activities that have been or will be carried out; therefore, it would fall to the responsible authority in the future projects to ensure the cumulative effects in relation to the NWT Diamonds Project are considered.<sup>904</sup>

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<sup>899</sup> NWT Diamonds Project, Report of the Environmental Assessment Panel, dated June 1996, at 17. (*Investors' Schedule of Documents at Tab C 351*).

<sup>900</sup> Letter from David Livingstone (NWT Regional Environmental Review Committee) to Warren Johnson (DIAND), April 29, 1994. (*Investors' Schedule of Documents Tab C 347*).

<sup>901</sup> CEA Agency News Release: Panel Report of NWT Diamonds Project Released, dated June 21, 1996. (*Investors' Schedule of Documents Tab C 348*).

<sup>902</sup> Letter from Ronald Irwin (DIAND) to Brian Tobin (DFO), November 29, 1994. (*Investors' Schedule of Documents Tab C 349*).

<sup>903</sup> Briefing Note prepared by R. Stevens (DFO), unknown date. (*Investors' Schedule of Documents Tab C 350*).

<sup>904</sup> Report of the Environmental Assessment Panel for the NWT Diamonds Project, dated June 1996 at 73. (*Investors' Schedule of Documents Tab C 351*).

633. Similar to the Victor Diamond Mine, the NWT Diamonds Project was not subject to the post-2003 CEAA amendments; therefore the review panel did not consider the precautionary principle in its analysis of the project. In contrast, the Whites Point Quarry had the precautionary principle unlawfully applied in its environmental assessment.

*vi. Diavik Diamond Project*

634. A joint venture between Diavik Diamond Mines Inc. and Aber Diamond Mines Ltd. proposed the Diavik Diamond Project. Diavik Diamond Mines Inc. was a wholly owned subsidiary of Rio Tinto PLC, an international mining company based in the United Kingdom.<sup>905</sup> Aber Diamond Mines Ltd. was a wholly owned subsidiary of Aber Resources Ltd., a mineral exploration company based in Vancouver, British Columbia.<sup>906</sup>
635. The project involved the construction and operation of four open-pit mines, associated processing facilities and a two kilometer long airstrip. As the proposed location of the four open-pit mines, similar to the NWT Diamonds Project, was underneath Lac de Gras, the project would require the construction of dikes and a substantial diversion of water tributaries.<sup>907</sup>
- a) **Scope and Level of Assessment** -The project was assessed as a Comprehensive Study.
  - b) **Duration** - The review panel for the Diavik Diamond Mine was named on March 6, 1998.<sup>908</sup> The federal Minister of the Environment, David Anderson, the same Minister who referred the Whites Point Quarry to a review panel assessment, approved the Diavik Diamonds Project on November 1, 1999.<sup>909</sup> The entire process took 1 years and 8 months.

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<sup>905</sup> Comprehensive Study Report: Diavik Diamonds Project, dated June 1999 at 28. (*Investors' Schedule of Documents Tab C 352*).

<sup>906</sup> Comprehensive Study Report: Diavik Diamonds Project, dated June 1999 at 28. (*Investors' Schedule of Documents Tab C 352*).

<sup>907</sup> Comprehensive Study Report: Diavik Diamonds Project, dated June 1999 at 28. (*Investors' Schedule of Documents Tab C 352*).

<sup>908</sup> Diavik Diamond Mine – CEA Agency Website stating that the start date of the assessment was dated March 6, 1998. (*Investors' Schedule of Documents Tab C 353*).

<sup>909</sup> Letter from David Anderson, Minister of the Environment, to Bob Nault, Minister of Indian Affairs and Northern Development, approving the Diavik Diamonds Project, dated November 1, 1999. (*Investors' Schedule of Documents Tab C 354*).

- c) **Discretion** – Despite the presence of public opposition,<sup>910</sup> a factor that Minister David Anderson was to refer the Whites Point Quarry to a panel review, Minister Anderson declined to do the same in the Diavik Diamond Project, allowing the assessment to be conducted through a less onerous Comprehensive Study.

#### Cumulative Effects and Precautionary Principle

636. The proponent's Comprehensive Study Report, which was approved by the federal government, stated that the scope of the cumulative effects analysis was limited to:
- a) All activities in operation up to and including 1996, the year the project was proposed; and
  - b) All projects in operation or proposed as of August 26, 1998, a date defined in that project's Guidelines.<sup>911</sup>
637. In contrast, the Joint Review Panel for the Whites Point Quarry project required Bilcon undergo an examination of hypothetical projects.<sup>912</sup>
638. Similar to the Victor Diamond Mine, the NWT Diamonds Project was not subject to the post-2003 *CEAA* amendments; therefore the review panel did not consider the precautionary principle in its analysis of the project. However, the Whites Point Quarry had the precautionary principle unlawfully applied in its environmental assessment.

#### C. Establishment, Expansion, Conduct and Operation

639. NAFTA Article 1103 requires that the treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. An environmental assessment is a gateway to the evaluation of new or additive economic activity by an investment. In the context of environmental regulatory measures, the aspects of an investment affected by NAFTA

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<sup>910</sup> Letter from NDP MP Rick Laliberte to Minister David Anderson requesting that the Diavik Diamond Project be referred to panel review, dated September 28, 1999. (*Investors' Schedule of Documents Tab C 355*); Letter from John Crump, Executive Director of the Canadian Arctic Resources Committee to MP Dennis Miller requesting that the Diavik Diamond Project be referred to panel review, dated September 16, 1999. (*Investors' Schedule of Documents Tab C 356*); Letter from MP Dennis Miller to Minister David Anderson, forwarding John Crump's letter requesting the Diavik Diamond Project be referred to panel review, dated September 22, 1999. (*Investors' Schedule of Documents Tab C 357*).

<sup>911</sup> Comprehensive Study Report: Diavik Diamonds Project, dated June 1999 at 93. (*Investors' Schedule of Documents Tab C 352*).

<sup>912</sup> Joint Review Panel Final Report, dated October 23, 2007, at 90. (*Investors' Schedule of Documents Tab C 34*).

Article 1103 would be by definition have to address the establishment, expansion, conduct or operation of economic activity proposed by the investor.

#### **D. Conclusion**

640. Canada has failed to meet its obligations under NAFTA Article 1103 as a result of the provision of better treatment to investments of investors from another NAFTA Party or Non-Parties who are in like circumstances to the Investment.
641. Canada has acted inconsistently with its Most Favored Nation treatment obligation in Article 1103. Canada has not met its Most Favored Nation obligation by not treating the Investor and their Investment in Bilcon in accordance with the most favorable treatment that Canada accords to investors from non-NAFTA Party investors or with the investments of investors from any other NAFTA Party or a Non-Party.
642. The Investors and their Investment are in like circumstances in the general class of applicants applying for consideration under the environmental assessment schema in Canada. All applicants come before the government authorities in similar circumstances and in relation to this treatment, must be considered to be in like circumstances.
643. Canada provided the worst level of treatment possible to the Investors and their Investment. By comparison, and as described in this Part of the Memorial, Canada provided more favorable treatment to the investments owned by investors from other NAFTA Parties or from investments owned by investors from a Non-Party.
644. The Investors, and their Investment, have been harmed as a result of Canada's failure to meet its most favored nation treatment obligation.<sup>913</sup>
645. The treatment, by definition, offered by a government in relation for an environmental assessment is always taken with respect to an investment's establishment, expansion, management, conduct or operation.
646. Canada has failed to meet its obligation to provide most-favored nation treatment. Canada did not provide the Investments with treatment no less favorable as that accorded to its own investments in like circumstances with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

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<sup>913</sup> Witness Statement of William Richard Clayton, at paras. 31 – 33.; See also Part Seven of this Memorial.

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## PART FIVE: DEFICIENCIES IN CANADA'S DOCUMENT PRODUCTION

### A. Withholding Disclosure

647. *Procedural Orders Nos. 7 and No. 8* ordered Canada to produce documents relevant to the Investors' Document Requests. The Investors made requests to Canada for the production of certain classes of documents on October 23, 2009. Following a lengthy document production phase, which took ten months longer than originally anticipated,<sup>914</sup> Counsel for Canada certified the completion of production of all Category A documents on February 22, 2011:

Please be advised that the production of non-privileged Category A documents, as described in Annex 1 of Procedural Order No. 9, is now complete.

On June 8, 2011, Canada disclosed more Category A documents that had not been produced. On June 20, 2011, Canada produced some additional documents, and again provided certification that Canada's Category A production of all non-privileged documents was complete.

648. Despite these certifications, however, Canada has not actually produced all documents that are relevant to the Document Requests.
649. The circumstances of Canada's failure to produce documents also raises a *prima facie* presumption that Canada has not reasonably conducted its required due diligence with respect to document identification and disclosure.
650. Accordingly, the Investors respectfully request that the Tribunal order Canada to explain its conduct, and to draw an adverse inference against Canada wherever any conflict, insufficiency, or uncertainty occurs in the evidence adduced.

### B. Examples

#### *i. Tiverton Quarry and Harbour Development*

651. Documents pertaining to Tiverton Harbour Development and Tiverton Quarry were sought on October 23, 2009, in Document Request No. 4 (relating to Canadian Comprehensive Study level assessments), and *4bis* (relating to Nova Scotia Screening level assessments). These projects were located approximately ten kilometers away from the Bilcon Investment, and ostensibly induced similar assessment criteria.

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<sup>914</sup> Canada's document production was originally supposed to be completed no later than April 26, 2010 (Letter from the Tribunal, dated December 14, 2009).

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652. The Tiverton environmental assessments occurred at the same time as the Whites Point Quarry. The Tiverton Harbour Development assessment, for which the DFO was the proponent, was completed in less than four months. The Tiverton Quarry assessment was completed in two months. In contrast, the assessment of the Whites Point Quarry subjected the Investors to a five year process.
653. The Investors' Document Requests required Canada to produce documents relating to these projects. Examples of relevant documents, which were clearly stated in the document requests, include:
- a) documents evidencing the scope of the project to be assessed;
  - b) factors to be applied in the assessment;
  - c) advice to Ministers;
  - d) briefing papers;
  - e) emails; and
  - f) notes of internal meetings.
654. Canada produced only 23 documents relating to the Tiverton Harbour Development, and only 22 documents relating to the Tiverton Quarry. As the scant production from Canada seemed unreasonably low, counsel for the Investors made an application under *The Nova Scotia Freedom of Information and Protection of Privacy Act* for documents relating to the Tiverton Quarry project.
655. The application returned close to 300 documents relating to the Tiverton Quarry. The vast majority of them were responsive to Document Request 4*bis*. For instance:
- a) notes from NSDEL employees of telephone calls which specifically reference the Whites Point Quarry;<sup>915</sup>
  - b) NSDEL Briefing Notes regarding the project;<sup>916</sup>

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<sup>915</sup> Notes from NSDEL discussing the issues of blasting at the Whites Point Quarry, dated March 18, 2003. (*Investors' Schedule of Documents at Tab C 206*); Notes from NSDEL discussing the difference in blasting at Tiverton and at the Whites Point Quarry, dated March 24, 2003. (*Investors' Schedule of Documents at Tab C 207*); Notes from NSDEL discussing blasting at the Whites Point Quarry, dated March 26, 2003. (*Investors' Schedule of Documents at Tab C 208*).

<sup>916</sup> NSDEL Briefing Note, prepared by Jacqueline Cook (NSDEL), regarding the application for a quarry at Tiverton by Parker Mountain Aggregates, dated March 4, 2003. (*Investors' Schedule of Documents at Tab C 209*).

- c) inter-governmental correspondence regarding the analysis of the project proposed;<sup>917</sup>
- d) approvals from the NSDEL to the proponent permitting the operation and construction of a quarry;<sup>918</sup> and
- e) the terms and conditions of the approvals.<sup>919</sup>

Of the 300 documents obtained, only 5 had been previously disclosed by Canada.

656. The easy discovery of the existence of such a large amount of relevant evidence not produced by Canada of necessity raises serious and disturbing questions about the appropriateness and adequacy of Canada's conduct with respect to document disclosure, and how many other documents Canada has deliberately, recklessly, or negligently ignored or withheld.
657. Canada's document production reveals other instances where relevant documents were blatantly not produced, in relation, for example, to:
- a) the Joint Review Panel;
  - b) Ministerial discussions relating to the Whites Point Quarry;
  - c) documents from government officials;
  - d) project documents; and
  - e) other specific documents.

### **C. Deficiencies Regarding the Joint Review Panel**

658. In response to Document Request No. 9, Canada produced only a few documents from both the CEA Agency and the NSDEL which discussed the vetting, selection and

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<sup>917</sup> Letter from P.J. Winchester (DFO) to NSDEL regarding the DFO's analysis of the proposed project and determination that the project would not require HADD authorization, dated April 25, 2003. (*Investors' Schedule of Documents at Tab C 210*).

<sup>918</sup> Letter from Bob Petrie (NSDEL) to Parker Mountain Aggregates regarding their approval to construct and operate a Quarry at Tiverton, dated March 24, 2003. (*Investors' Schedule of Documents at Tab C 211*); Letter from Bob Petrie (NSDEL) to Parker Mountain Aggregates regarding their approval to construct and operate a Quarry at Tiverton, dated March 16, 2004. (*Investors' Schedule of Documents at Tab C 212*).

<sup>919</sup> Terms and Conditions of NSDEL Approval No. 2003-032388, undated (*Investors' Schedule of Documents at Tab C 213*).



appointment of prospective Joint Review Panel candidates. These documents make it clear that there are many other relevant documents that Canada did not disclose.

*i. Résumé of Jill Grant*

659. An NSDEL Briefing Note produced by Canada states that the résumés of NSDEL's proposed candidates to sit on the Joint Review Panel are attached.<sup>920</sup> Canada produced the résumés of both Robert Fournier and Gunter Muecke in separate, unrelated documents; however it did not disclose the résumé of Jill Grant.

660. This omission is significant in that the appointment of members of the Joint Review Panel is required to be based on their knowledge or experience relevant to the anticipated environmental effects of the project.<sup>921</sup> No evidence of how Ms. Grant satisfied the government of this requirement was produced, yet the briefing note had her résumé attached, as she was a preferred Nova Scotia candidate.

*ii. Identification and Vetting of Potential Joint Review Panel Members*

661. The first reference of potential Joint Review Panel Members occurs on July 15, 2003, when the CEA Agency members discuss Gunter Muecke and John Amirault as candidates.<sup>922</sup> The document states that the CEA Agency was approached by Mr. Muecke and Mr. Amirault, but Canada has not provided any related documents.

662. There is also a clear lack of documents relating to the vetting of Jill Grant as a potential Joint Review Panel Member. In sharp contrast to the other eventual Joint Review Panel Members, Muecke and Fournier, there are no documents discussing Jill Grant as a possible candidate. Jill Grant's name simply appears in an NSDEL Briefing Note, prepared by Helen MacPhail (NSDEL), on April 14, 2004.<sup>923</sup>

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<sup>920</sup> NSDEL Briefing Note, prepared by Helen MacPhail (NSDEL) stating the nominees for the Whites Point Quarry Joint Review Panel by the NSDEL, dated April 14, 2004. (*Investors' Schedule of Documents at Tab C 214*).

<sup>921</sup> CEAA, s. 33(1)(a)(i). (*Investors' Schedule of Documents at Tab C 255*).

<sup>922</sup> E-mail from Bill Coulter (CEA Agency) to Bruce Young (CEA Agency) and Paul Bernier (CEA Agency) regarding Whites Point Quarry Joint Review Panel candidates, dated July 15, 2003. (*Investors' Schedule of Documents at Tab C 215*).

<sup>923</sup> NSDEL Briefing Note, prepared by Helen MacPhail (NSDEL) stating the nominees for the Whites Point Quarry Joint Review Panel by the NSDEL, dated April 14, 2004. (*Investors' Schedule of Documents at Tab C 214*).

*iii. Selection and Qualifications of Joint Review Panel Members*

663. Canada has disclosed documents relating to the qualifications of the prospective Joint Review Panel members, especially Jill Grant. From the few documents that were disclosed by Canada, it is clear that the 5 short-list candidates for the Joint Review Panel were interviewed on August 26 and 27, 2004.<sup>924</sup>
664. No related documents have been disclosed. For example:
- a) documents relating to internal government discussion regarding the suitability of the five short-list potential Joint Review Panel members;
  - b) documents by the attending CEA Agency or NSDEL members from those interviews; and
  - c) documents relating to the basis for the decision, made by two levels of government, to appoint the three Joint Review Panel members.

*iv. Joint Review Panel Communications*

665. In response to Document Request No. 11, Canada has disclosed less than 160 documents relating to communications between the Joint Review Panel members. These documents relate directly to the basis of the Joint Review Panel's Report and recommendations.
666. From the small sample of documents that were disclosed, it appears that members of the Joint Review Panel Secretariat were usually copied,<sup>925</sup> which makes disclosure by Canada even more important in view of the claims from the members of the Joint Review Panel that their communications have been destroyed from their personal computers.

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<sup>924</sup> Canada-Nova Scotia document regarding Whites Point Quarry Joint Review Panel Interviews, date unknown (*Investors' Schedule of Documents at Tab C 216*).

<sup>925</sup> E-mail from Jill Grant (JRP) to Gunter Muecke (JRP), Robert Fournier (JRP), Steve Chapman (CEA Agency), and Peter Geddes (NSDEL) regarding a press release on the Whites Point Quarry, dated November 24, 2004. (*Investors' Schedule of Documents at Tab C 217*); E-mail from Robert Fournier (JRP) to Jill Grant (JRP), Gunter Muecke (JRP), Debra Myles (CEA Agency), Deborah Hendricksen (CEA Agency) and Adrian MacDonald (CEA Agency) regarding a revised project description from the proponent, dated November 27, 2006. (*Investors' Schedule of Documents at Tab C 218*).

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#### **D. Documents Relating to Ministers and Ministerial Decisions**

667. John Baird was the federal Minister of the Environment when the Joint Review Panel submitted its final Report. Mark Parent was the Nova Scotia Minister of the Environment and Labour during the same time frame. Document Request No. 24 specifically requested documents relating to Minister Baird and Minister Parent, as well as their personal staff and advisors.
668. The documents disclosed by Canada in response do not include any documents relating to communications by and between either Minister, their Deputy Ministers, or any of their staffs, regarding the Joint Review Panel's final Report, or the reasons for rejecting the Whites Point Quarry. And, there are no documents relating to "core values".
669. It is also patently clear that Canada has deliberately fooled with its document production. For example, Canada only produced 183 documents in relation to Minister Baird. Of those, 155 are peripherally relevant at best. For instance:
- a) form-letter responses to citizens from Minister Baird;<sup>926</sup>
  - b) form-letter responses to citizens from other Ministers, which were copied to Minister Baird;<sup>927</sup> and
  - c) fax-cover sheets and routing slips that do not include attached documents.<sup>928</sup>
670. The document production relating to Minister Parent is the same. Canada produced 384 documents relating to Minister Parent. Of those, 336 are totally peripheral. For example:

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<sup>926</sup> Letter from John Baird (Minister of Environment) to public citizen providing a form-letter response, dated August 7, 2007. (*Investors' Schedule of Documents at Tab C 219*).

<sup>927</sup> Letter from Loyola Hearn (Minister of DFO) to public citizen providing a form-letter response, dated November 2, 2007. (*Investors' Schedule of Documents at Tab C 220*).

<sup>928</sup> Fax Cover Sheet addressed to Minister John Baird, dated November 3, 2007. (*Investors' Schedule of Documents at Tab C 221*); Fax Cover sheet addressed to John Baird, dated November 13, 2007. (*Investors' Schedule of Documents at Tab C 222*); Departmental Routing Slip, dated November 14, 2007. (*Investors' Schedule of Documents at Tab C 223*); E-mail from Sandra Blandin to Minister John Baird, dated November 8, 2007. (*Investors' Schedule of Documents at Tab C 224*).

- a) form-letter responses to citizens from Minister Parent;<sup>929</sup>
- b) form-letter responses from other Ministers, where Minister Parent was copied;<sup>930</sup>
- c) fax-cover sheets and government routing slips that do not include attached documents;<sup>931</sup> and
- d) a photocopy of an envelope.<sup>932</sup>

*i. Recommendations of the Responsible Authorities*

671. Before a Responsible Authority can recommend to the Governor in Council that a project not be approved, section 37(1)(b) of the *CEAA* requires the Responsible Authority to consider appropriate mitigation measures:

where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part<sup>933</sup>

672. Canada has not disclosed any documents relating to the discharge of those statutory duties. There obviously must be a substantial number of documents from the Responsible Authorities, the DFO and Transport Canada, relating to:

- a) What mitigation measures, either proposed by Bilcon or the Joint Review Panel, that the DFO or Transport Canada considered to be appropriate;
- b) A review of the mitigation measures, and consideration of what the potential “significant adverse environmental effects” would be;

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<sup>929</sup> Letter from Minister Parent (Minister of NSDEL) to public citizen providing a form-letter response, dated August 3, 2006. (*Investors’ Schedule of Documents at Tab C 225*).

<sup>930</sup> Letter from David Morse (Minister of NSDEL) to public citizen providing a form-letter response, dated December 18, 2002. (*Investors’ Schedule of Documents at Tab C 226*).

<sup>931</sup> Departmental Routing Slip, dated December 14, 2006. (*Investors’ Schedule of Documents at Tab C 227*); Departmental Routing Slip, dated November 14, 2007. (*Investors’ Schedule of Documents at Tab C 228*); Cover E-mail from Lois Connor to Minister Parent, dated August 13, 2007. (*Investors’ Schedule of Documents at Tab C 229*).

<sup>932</sup> Envelope addressed to Minister Parent, undated (*Investors’ Schedule of Documents at Tab C 231*).

<sup>933</sup> *CEAA*, s. 37(1)(b). (*Investors’ Schedule of Documents at Tab C 255*).

- c) The criteria used to determine that the environmental effects could not be “justified in the circumstances”; and
  - d) Briefing notes to the Minister of the DFO and the Minister of Transport Canada regarding these issues.<sup>934</sup>
673. In the absence of any such documents, it can only be assumed that the Responsible Authorities simply “rubber-stamped” the final Report of the Joint Review Panel, and failed to conduct their own independent review as required by the *CEAA*.<sup>935</sup> It also confirms that Canada used the environmental assessment process, specifically the Joint Review Panel, as a smoke screen for its political rejection of the Whites Point Quarry project.<sup>936</sup>

#### **E. Documents from Government Officials**

##### *i. Hon. Robert Thibault*

674. Robert Thibault, the local MP for Whites Point, was the Minister of the DFO at the time the Whites Point Quarry was referred to a Panel Review in June of 2003. Document Request Nos. 22 and 24 requested documents of Minister Thibault, including documents of his personal staff and advisors,<sup>937</sup> relating to the Whites Point Quarry.
675. Canada’s document disclosure for Minister Thibault, similar to the disclosure for Minister Baird and Minister Parent, has either been self-censored, ignored, or disregarded. Canada disclosed only a few memos or briefing notes addressed to Minister Thibault or his Deputy Minister, Larry Murray, and no documents relating to communications between Minister Thibault and his staff, or political advisers, or other Ministers.
676. Following the pattern of production for Minister Baird and Minister Parent, Canada’s disclosure for Minister Thibault consists of 106 documents, of which 101 are totally peripheral. For example:

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<sup>934</sup> Expert Report of David Estrin at para. 540.

<sup>935</sup> Expert Report of David Estrin at paras. 529-548.

<sup>936</sup> Expert Report of David Estrin at paras. 93, 101, 106, 107.

<sup>937</sup> EA – Duncan Hills; Senior Policy Advisor – Kirk Cox; Director of Comm. – Jennifer Savoy; Personal and Scheduling Asst. – Sylvie Labelle; Special Asst. – Pacific Bilal Cheema and Patrick Fraser

- a) form-letter responses to citizens from Minister Thibault;<sup>938</sup>
  - b) fax-cover sheets and government routing slips that do not include attached documents;<sup>939</sup> and
  - c) email distribution lists that include Minister Thibault as a participant.<sup>940</sup>
677. In response to Document Request No. 23 pertaining specifically to the DFO Deputy Minister Larry Murray, Canada disclosed only 22 documents, an obviously incomplete amount considering his position in the Responsibly Authority.
- ii. Hon. Kerry Morash*
678. Canada has failed to produce documents relating to Nova Scotia Environment Minister Kerry Morash and his correspondence with his staff and advisors with respect to the Whites Point Quarry. These documents were within the scope of Document Request No. 24.
679. There is a profound eight month gap in the production of documents relating to Minister Morash. Canada disclosed 10 undated documents, one dated January 7, 2003,<sup>941</sup> with the remaining 149 dated August 21, 2003 and beyond. The gap in production coincides with the timing of critical decisions by NSDEL, CEA Agency and the DFO to determine the scope of the Whites Point Quarry application, to determine the appropriate assessment level, and to refer it to a panel review.
680. Again, Canada disclosed only 160 documents, of which 120 are at best peripheral. For example:
- a) form-letter responses from Minister Morash;<sup>942</sup>

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<sup>938</sup> Letter from Minister Thibault (Minister of DFO) to public citizen providing a form-letter response, dated November 22, 2002. (*Investors' Schedule of Documents at Tab C 232*).

<sup>939</sup> Departmental Routing Slip, dated March 10, 2003. (*Investors' Schedule of Documents at Tab C 233*); Departmental Routing Slip, dated April 14, 2003. (*Investors' Schedule of Documents at Tab C 234*).

<sup>940</sup> E-mail Distribution List, dated May 25, 2003. (*Investors' Schedule of Documents at Tab C 235*).

<sup>941</sup> Letter from Kerry Morash (Minister of NSDEL) to public citizen providing a form-letter response, dated January 7, 2003. (*Investors' Schedule of Documents at Tab C 236*).

<sup>942</sup> Letter from Kerry Morash (Minister of NSDEL) to public citizen providing a form-letter response, undated. (*Investors' Schedule of Documents at Tab C 237*).

- b) form-letter responses from other Ministers, to which Minister Morash was copied;<sup>943</sup>
- c) cover email that does not include attached documents;<sup>944</sup> and
- d) a photocopy of an envelope.<sup>945</sup>

*iii. Gordon Balser*

681. Gordon Balser was the Provincial Member of the Nova Scotia Legislative Assembly (MLA) for the constituency where the Whites Point Quarry was located. He had numerous meetings with representatives of Bilcon during his tenure as the local MLA. Yet, Canada did not disclose any documents relating to the numerous conversations and meetings that Mr. Balser had with Bilcon representatives. At least 15 meetings took place in 2002, and at least 6 meetings took place in 2003.<sup>946</sup>
682. Documents from these meetings clearly come within the scope of Document Request No. 16.
683. Canada disclosed 429 documents in response to the Investors' Document Request. 400 are again totally peripheral. For example:
- a) 103 draft and final versions of letters written by Minister David Morse, to which Gordon Balser was copied;<sup>947</sup>
  - b) form-letter responses from other Ministers, to which Gordon Balser was copied;<sup>948</sup> and

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<sup>943</sup> Letter from Ronald Russell (Minister of NSTPW) to public citizen providing a form-letter response, dated January 5, 2004. (*Investors' Schedule of Documents at Tab C 238*).

<sup>944</sup> E-mail from Bob Petrie (NSDEL) to Kim MacNeil (NSDEL), dated November 21, 2003. (*Investors' Schedule of Documents at Tab C 239*).

<sup>945</sup> Envelope addressed to Kerry Morash (Minister of NSDEL), undated (*Investors' Schedule of Documents at Tab C 240*).

<sup>946</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at para. 19.

<sup>947</sup> Letter from David Morse (Minister of NSDEL) to public citizen providing a form-letter response, dated August 15, 2002. (*Investors' Schedule of Documents at Tab C 241*); Draft Letter from David Morse (Minister of NSDEL) to public citizen providing a form-letter response, dated October 22, 2002. (*Investors' Schedule of Documents at Tab C 242*).

<sup>948</sup> Letter from Ronald Russell (Minister of NSDEL) to public citizen providing a form-letter response, dated April 11, 2003. (*Investors' Schedule of Documents at Tab C 243*).

- c) fax cover sheets and departmental routing slips that do not include attached documents.<sup>949</sup>

## **F. Relevant Projects**

### *i. Sable Gas*

684. The Sable Gas project, involved an offshore natural gas development in the vicinity of Sable Island, Nova Scotia. The large scale of the Sable Gas project stands in stark contrast to the small Whites Point Quarry. Sable Gas is Nova Scotia's largest construction project. The project is one of three Joint Review Panel assessments that have occurred in the Province of Nova Scotia: Whites Point Quarry and the Sydney Tar Ponds project being the only others. Robert Fournier was also the Chairman of the Sable Gas review panel.
685. The level of document production, pertaining to the Sable Gas project, by Canada was clearly not complete. Canada disclosed only 24 documents. For every other project under Document Request No. 3, which specifically involved Joint Review Panel assessments, Canada disclosed an average of about 200 documents.
686. Due to the increase in the level of assessment and the requirements commensurate with an environment assessment by a Joint Review Panel, the Investors reasonably expected Canada to disclose a larger number of documents for each project in Document Request No. 3 than it disclosed for the less complicated reviews of projects listed in Document Requests No. 4 and *4bis*. By comparison, Canada disclosed over 100 documents for the Surface Gold Mine Project, which was a Class 1 screening assessment in Nova Scotia, and only 24 documents for the Joint Review Panel assessment in Sable Island. The withholding of documents in relation to Sable Gas is astonishing.

### *ii. Belleoram*

687. The Belleoram project in Newfoundland, which was included in Document Request No. 4, involved the assessment of a marine terminal and quarry, which was approximately six times the size of the proposed quarry in the Whites Point Quarry. After a Track Report was released, which included the assessment of the marine terminal and quarry, the proponent made a funding application to the Atlantic Canada Opportunities Agency, one of three Responsible Authorities for the project, along with Transport Canada and the DFO. This application for funding resulted in the scope of the joint assessment being

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<sup>949</sup> Fax Cover Sheet, dated July 10, 2002. (*Investors' Schedule of Documents at Tab C 244*); Departmental Routing Slip, dated November 12, 2002. (*Investors' Schedule of Documents at Tab C 245*).



limited to the marine terminal, as the funding application was related only to that portion of the project.

688. Internal Environment Canada correspondence<sup>950</sup> shows that a decision to scope the quarry and the marine terminal had already been made, and that the funding did not permit “interim scoping”. That correspondence also expressly casts doubt on the appropriateness of a panel review assessment of the Whites Point Quarry:

As it stands, the federal-provincial panel of the whole of the Whites Point quarry and marine terminal chugs along based on only TC and DFO law list triggers for the marine works and a Minister’s decision on referral of whole project.<sup>951</sup>

689. Due to the gravity of the implications, it is not reasonable to presume that this issue was not followed up and documented. The failure to disclose the missing documents is substantially prejudicial to the Investors, as they clearly and directly relate to policy decisions on how terrestrial and marine projects, like the Whites Point Quarry, are assessed in Canada.

*iii. Mining and Milling the Midwest Uranium Project*

690. In respect of the Mining and Milling the Midwest Uranium project, an internal DFO email<sup>952</sup> indicates that the project should be assessed by a panel review due to an expected high level of public concern. Despite this concern, the project was assessed through a Comprehensive Study.
691. In this case, a high level of public concern was used as one of the basis to refer the Whites Point Quarry to a panel review assessment. Canada has not disclosed any documents relating to the level of public concern in the Mining and Milling the Midwest project. The missing documents were within the scope of Document Request No. 4 of the Investors.

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<sup>950</sup> E-mail from Barry Jeffrey (EC) to Glenn Troke (EC) regarding the change in scoping for the Belleoram project, dated June 1, 2007. (*Investors’ Schedule of Documents at Tab C 246*).

<sup>951</sup> E-mail from Barry Jeffrey (EC) to Glenn Troke (EC) regarding the change in scoping for the Belleoram project, dated June 1, 2007. (*Investors’ Schedule of Documents at Tab C 246*).

<sup>952</sup> E-mail from Bev Ross (DFO) to Glen Hopky (DFO), Dave McAllister (DFO) and Ginny Flood (DFO) regarding the expected public concern with respect to the Mining and Milling the Midwest project, dated December 12, 2006. (*Investors’ Schedule of Documents at Tab C 247*).

## **G. Other Production Issues**

### *i. The Scope of the Whites Point Quarry Assessment*

692. On September 17, 2003, Cheryl Benjamin of the NSDEL confirmed that approval had been given to include the 3.9ha quarry within the scope of the Whites Point Quarry assessment.<sup>953</sup> There is no follow-up to Ms. Benjamin's email, nor is there any indication of who provided that approval.
693. On August 25, 2004, the CEA Agency, in the exercise of its discretion, determined that the 3.9ha quarry application would not be included in the scope of the Whites Point Quarry assessment. This caused concern among members of the DFO, evidenced in an internal DFO email.<sup>954</sup> In a letter to the proponent on May 29, 2003,<sup>955</sup> the DFO stated it had determined that 3.9ha quarry would require authorization under S. 32 of the *Fisheries Act*. The removal of the smaller quarry from the scope of the Whites Point Quarry assessment removed the DFO's legislative trigger under that section of the *Fisheries Act*.
694. It is preposterous to suggest there was no follow-up that was documented.

### *ii. Documents Used by Whites Point Quarry Panel in Relation to Glensanda Quarry*

695. Gunter Muecke had previously served on a Joint Review Panel of the Kelly's Mountain project. Shortly after the Joint Review Panel for the Whites Point Quarry was formed, Mr. Muecke offered to share with the other Joint Review Panel Members the information collected by the Kelly's Mountain panel from a trip to the Glensanda quarry in Scotland.<sup>956</sup>

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<sup>953</sup> E-mail from Cheryl Benjamin (NSDEL) to Steve Chapman (CEA Agency) regarding the inclusion of the 3.9ha quarry in the scoping of the Whites Point Quarry, dated September 17, 2003. (*Investors' Schedule of Documents at Tab C 248*).

<sup>954</sup> E-mail from Phil Zamora (DFO) to Dean Stuart (DFO) and Bruce Hood (DFO) regarding the implications of removing the 3.9ha quarry from the scope of the Whites Point Quarry, dated August 25, 2004. (*Investors' Schedule of Documents at Tab C 98*).

<sup>955</sup> Letter from Phil Zamora (DFO) to Paul Buxton requiring the proponent to obtain authorization under S. 32 of the *Fisheries Act*, dated May 29, 2003. (*Investors' Schedule of Documents at Tab C 249*).

<sup>956</sup> E-mail from Gunter Muecke (JRP) to Jill Grant (JRP), Robert Fournier (JRP), Steve Chapman (CEA Agency) and Peter Geddes (NSDEL) regarding the Glensanda Quarry in Scotland, dated December 7, 2004. (*Investors' Schedule of Documents at Tab C 250*).

696. These documents were never placed on the Public Registry and were never disclosed to Bilcon. However, the Joint Review Panel used the information to question Bilcon on related issues during the public hearing.<sup>957</sup>
697. Canada has not disclosed the documents that the Joint Review Panel used in its analysis of the Glensanda quarry. The documents were within the scope of Document Request No. 11.

*iii. The Keltic Petrochemical and LNG Terminal Project*

698. Peter MacKay, acting as Minister of DFAIT and Minister of the Atlantic Canada Opportunities Agency, wrote to Jim Cormier of Transport Canada requesting that he take action in favor of a Canadian owned proponent, Keltic Petrochemicals Inc.<sup>958</sup> Minister MacKay requested that Transport Canada accept a harmonized environmental assessment document from the proponent which met both federal and provincial requirements.
699. Canada did not disclose any documents relating to the reasons for Minister MacKay's actions. Such documents would be expected when a Minister requests that another branch of the government diverge from its ordinary course. The documents were within the scope of Document Request No. 4.

**H. Impact on Expert Report of David Estrin**

700. Canada's failure to comply with its document production obligations has substantially prejudiced the ability of the Investors' to fairly and completely present their case to the Tribunal. David Estrin notes in his Expert Report<sup>959</sup> that Canada did not produce the types of documents generally expected to be in an environmental assessment file, like emails or internal communication between the Minister of Fisheries and Oceans and Minister of the Environment, between the Ministers and their staffs, between the Nova Scotia Minister of Environment and his staff.

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<sup>957</sup> Joint Review Panel Public Hearings Transcript, Vol. 2, dated June 18, 2007, at 276. (*Investors' Schedule of Documents at Tab C 155*).

<sup>958</sup> Letter from Minister Peter MacKay (DFAIT and ACOA) to Jim Cormier, Transport Canada, requesting that Transport Canada accept a harmonized document from the proponent in order to make the process more efficient, dated March 10, 2005 (date is likely a typographical error, real date was most likely March 10, 2006) (*Investors' Schedule of Documents at C 252*).

<sup>959</sup> Expert Report of David Estrin at 10.

701. Mr. Estrin also notes that Canada's failure to disclose relevant documents directly affects several central issues:

- a) Considerations of government agencies to subject the Whites Point Quarry to a Joint Review Panel;
- b) The selection of the three members of the Joint Review Panel;
- c) The establishment of the Terms of Reference of the Joint Review Panel; and
- d) The governmental response to the final Report of the Joint Review Panel.<sup>960</sup>

## **I. Conclusion**

702. The resulting prejudice to the Investors from Canada's failure to disclose relevant documents is substantial, and permits the Tribunal to draw an adverse inference, against Canada, wherever there is any conflict, insufficiency, or uncertainty in the evidence adduced. Despite Canada's certification that production was complete, it is clear that Canada has deliberately, recklessly, or negligently failed to disclose documents which are relevant, were within the scope of the Document Requests, and over which Canada did not claim privilege.

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<sup>960</sup> Expert Report of David Estrin at 10.

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## PART SIX: JURISDICTION AND PRELIMINARY OBJECTIONS

### A. Tribunal Has Jurisdiction

#### *i. The Joint Review Panel is Part of the Government of Canada*

703. The Joint Review Panel is an integral part of an organ of the Government of Canada. As such, the measures taken by the members of the Joint Review Panel are covered under Canada's state responsibility as a Party to the NAFTA.

704. NAFTA Article 105 sets out the obligation of NAFTA Parties to give effect to the NAFTA:

The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance ... by state and provincial governments.

705. Article 4 of the International Law Commission Draft Articles on State Responsibility (ILC Articles) establishes Canada's responsibility for actions taken by the Joint Review Panel:

#### **Article 4: Conduct of Organs of a State**

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

Under ILC Article 4, the actions of a state organ, whether it exercises legislative, judicial, executive, or any other functions, are attributable to the state. An organ includes any entity which has the status of a state organ under the internal law of the state.<sup>961</sup>

706. The CEA Agency is an organ of the Government of Canada that exercises regulatory and advisory authority to Ministers at both levels of Canadian government, federal and provincial.<sup>962</sup> The Joint Review Panel is an instrument of the CEA Agency. The members of the Joint Review Panel were individually and collectively agents of the CEA Agency, and the internal law of Canada has expressly recognized the Joint Review Panel itself as an organ of the State.

707. Canada's courts have determined that a Joint Review Panel is an integral part of the government apparatus of Canada. A Joint Review Panel is a creature of the *Canadian*

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<sup>961</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, at 40, para. 6. (*Investors' Book of Authorities at Tab CA 76*).

<sup>962</sup> CEAA, ss. 61-70. (*Investors' Schedule of Documents at Tab C 255*).

*Environmental Assessment Act*.<sup>963</sup> Its powers are derived from the *Act*, and it exercises an executive function. A panel report is an “essential...step”<sup>964</sup> in the environmental assessment process, and a Minister cannot issue an authorization without a panel report.<sup>965</sup>

708. In *Pembina Institute for Appropriate Development*,<sup>966</sup> the Federal Court of Canada judicially reviewed a Joint Review Panel report to determine if the panel committed reviewable errors. The Court found that the Joint Review Panel report was deficient and remitted the report back to the Panel with directions. A similar decision, in *Alberta Wilderness Assn. v. Canada (Attorney General)*,<sup>967</sup> decided that the process followed by a Joint Review Panel could be judicially reviewed.

709. In these decisions, the Canadian judiciary has confirmed that a Joint Review Panel comes within the meaning of a “federal board, commission or other tribunal” under the *Federal Courts Act* of Canada.<sup>968</sup>

710. The Canadian judiciary has thereby determined the role of the Joint Review Panel is an integral part of the executive branch of the Canadian government. This is determinative of the Joint Review Panel being an organ of Canada under ILC Article 4. It is also noteworthy that Canada did not appeal either of the decisions and did not contest that the Joint Review Panels involved were organs of Canada.

711. It is therefore clear that as a matter of Canadian internal law, and on the basis of the functions it performs, that the Joint Review Panel is an organ of the Government of Canada.

*ii. The Joint Review Panel Exercises Governmental Authority*

712. Canada would be responsible for the Joint Review Panel under ILC Article 5 in the event that the Tribunal concludes that Article 4 does not apply.

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<sup>963</sup> CEAA, s. 33 (*Investors’ Schedule of Documents at Tab C 255*).

<sup>964</sup> *Alberta Wilderness Assn. v. Canada* at 7 (F.C.A.) (*Investors’ Schedule of Documents at Tab C 261*).

<sup>965</sup> *Alberta Wilderness Assn. v. Canada* at 7 (F.C.A.) (*Investors’ Schedule of Documents at Tab C 261*).

<sup>966</sup> *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302. (*Investors’ Schedule of Documents at Tab C 260*).

<sup>967</sup> *Alberta Wilderness Association v. Canada (Attorney General)*, 2008 FC 1061 (*Investors’ Schedule of Documents at Tab C 597*).

<sup>968</sup> *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(1)-(5) (*Investors’ Schedule of Documents at Tab C 266*).

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713. Article 5 of the ILC Articles provides that the conduct of a state entity is attributable to the state if it is empowered by the law of the state to exercise elements of governmental authority. The conduct of a state entity may also be attributable to the state where the functions it exercises are of a public character akin to that of a state organ. The acts of such an entity are attributable to the state even if the entity operates with independent discretion, and its conduct was not under the control of the state.<sup>969</sup>
714. The Joint Review Panel exercises government authority and is of a public character. The Joint Review Panel is required to hold public hearings,<sup>970</sup> and a Joint Review Panel report is an “essential...step” before a Minister can make a final determination.<sup>971</sup>
715. The Joint Review Panel is authorized by the *Act* to summons any person to appear as a witness, and to order any witness to give evidence and produce any documents and things the panel considers necessary for the assessment of the project.<sup>972</sup> Moreover each of the subject acts and omissions of the Joint Review Panel was in the purported exercise of governmental authority, such as its determination of the agenda for the hearings, the calling of witnesses, the allocation of time for witnesses, the questioning of witnesses, the control of the hearings, and the activities involved in making recommendations to which the Ministers involved were compelled by law to respond.
716. The Joint Review Panel has no purpose or existence apart from its legally-mandated role in the decision-making process of the government concerning matters of high public policy. The Joint Review Panel performs no commercial or non-governmental function of any kind.
717. The Joint Review Panel therefore exercises governmental authority of a public character. It is an organ of the state under the internal law of Canada, and the acts and omissions of the Joint Review Panel are attributable to Canada under ILC Article 5.

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<sup>969</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, at 43, para. (7) (*Investors’ Book of Authorities at Tab CA 76*).

<sup>970</sup> CEAA, s. 41(e) (*Investors’ Schedule of Documents at Tab C 255*).

<sup>971</sup> *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 F.C. 483 (F.C.A.) at 7 (*Investors’ Schedule of Documents at Tab C 261*).

<sup>972</sup> CEAA, s. 35. (*Investors’ Schedule of Documents at Tab C 255*).

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## **B. The Investors and the Investment Have Standing**

### *i. Bilcon is a US Investor with Investments in Canada*

718. NAFTA Article 1139 defines an investor to include an enterprise of a NAFTA Party that “makes, seeks to make or has made an investment.” The term “investment” is further defined in NAFTA Article 1139 as, among other things, “an enterprise,” “an interest in an enterprise that entitles the owner to share in income or profits of the enterprise,” or “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.”<sup>973</sup>
719. NAFTA Article 201 states “enterprise of a Party means an enterprise constituted or organized under the law of a Party”. The term “enterprise” is further defined as “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation ...”
720. Bilcon entered into a joint venture with Nova Stone to form Global Quarry Products in April of 2002.<sup>974</sup> Bilcon assumed the partnership in April 2004 when it acquired Nova Stone’s interest.<sup>975</sup> The joint venture became an enterprise of a Party when it was formed, and all measures taken by Canada in contravention of NAFTA Chapter Eleven can be the subject of a claim.
721. Bilcon meets the definition of “investment” in NAFTA Article 1139.

## **C. The Claim Is Timely**

722. NAFTA Article 1116(2) states:

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 incurred loss or damage.

723. NAFTA Article 1137(1)(c) provides that “[a] claim is submitted to arbitration under this Section when the notice of arbitration given under the UNCITRAL Arbitration Rules is

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<sup>973</sup> NAFTA Article 201 states “enterprise of a Party” means “an enterprise constituted or organized under the law of a Party”. The term “enterprise” is further defined as “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation ...”

<sup>974</sup> Partnership Agreement between Bilcon of Nova Scotia and Nova Stone Exporters Inc. (*Investors’ Schedule of Documents at Tab C 22*); Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., March 28, 2002. (*Investors’ Schedule of Documents at Tab C 5*).

<sup>975</sup> Agreement between Bilcon of Nova Scotia and Nova Stone Exporters Inc., April 1, 2004. (*Investors’ Schedule of Documents at Tab C 23*).



received by the disputing Party.” The effective date of receipt of Bilcon’s Notice of Arbitration is June 17, 2008. Article 1116(2) allows a claim if the Investor first acquired, or should have first acquired, knowledge of the breach and knowledge that it incurred damage after June 17, 2005.

724. In this case, the Investors only contest measures occurring after June 17, 2005:

- a) measures that continued after June 17, 2005, and are continuing today; and
- b) measures occurring entirely after June 17, 2005.

a. Continuing Measures

725. The International Law Commission has confirmed that time limit rules do not prohibit claims challenging acts that are still continuing, because time limits only begin at the end of a continuing act.<sup>976</sup> Professor Joost Pauwelyn confirmed this principle in his *British Yearbook of International Law* study of continuing acts. In that study, he stated that “[t]he general principle is that a claim can only be inadmissible on the ground of lapse of time once the breach has ceased to exist, that being the earliest date from which any time limit can possibly start to run.”<sup>977</sup>

726. International tribunals have consistently refused to bar claims challenging acts that are still continuing. In finding that a claim challenging a provision of the Belgian Penal Code, passed many years before, was not time barred by the six month limitation in the *European Convention on Human Rights*, the European Commission on Human Rights, for example, said:

... when the Commission receives an application concerning ... a permanent state of affairs ... the problem of the six months period specified in Article 26 can arise only after this state of affairs

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<sup>976</sup> *Report of the International Law Commission on the Work of its Thirtieth Session: 8 May - 28 July 1978*, Document A/33/10, 1978 Yearbook of the International Law Commission, at 91, n. 437: “... in the case of a ‘continuing’ wrongful act, however, this *dies [a quo]* of the time limit can be established only after the end of the time of commission of the wrongful act itself.” (*Investors’ Book of Authorities at Tab CA 77*).

<sup>977</sup> Pauwelyn, J., “The Concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems”, 66 *The British Year Book of International Law* 415 (1996) at 431. (*Investors’ Book of Authorities at Tab CA 78*).

has ceased to exist; whereas in the circumstances, it is exactly as though the alleged violation was being repeated daily thus preventing the running of the six months period.<sup>978</sup>

The Commission concluded that Article 123 of the Belgian Penal Code was a continuing act.<sup>979</sup> The Commission rejected Belgium's argument that the claim was time barred because, even though the Code was enacted earlier, it was still in force at the time of the application.

727. International tribunals have confirmed that, maintaining a law is a continuing act when finding that claims challenging laws beginning before the treaty's entry into force do not violate the rule against retroactivity. The European Commission on Human Rights, for example, has consistently accepted jurisdiction over claims challenging legislation passed before the Convention came into force.<sup>980</sup>

728. The United Nations' Human Rights Committee has also consistently held that maintaining a law is a continuing act. In *Ibrahima Gueye et al. v. France*, for example, the Human Rights Committee considered the Claimant's argument that French legislation breached Article 26 of the International Covenant on Civil and Political Rights by racially discriminating against Senegalese members of the French army. France objected that the Covenant did not enter into force with respect to France until after the Act came into force. The Committee rejected this argument, concluding:

...it remained to be determined whether there had been violations of the Covenant subsequent to the said date, as a consequence of acts or omissions related to the continued application of laws and decisions concerning the rights of the applicants.<sup>981</sup>

729. Similarly, in *Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic*, the applicants claimed before the Human Rights Committee that Czech legislation also

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<sup>978</sup> *De Becker v. Belgium*, European Court of Human Rights Application No. 214/56 (9 June 1958) at 244. (*Investors' Book of Authorities at Tab CA 79*). See also the decisions of the European Court and Commission of Human Rights in: *McDaid and others v. the United Kingdom*, European Court of Human Rights Application No. 25681/94 (9 April 1996) at 6 (*Investors' Book of Authorities at Tab CA 80*); "Insofar as the applicants complain that they are victims of a continuing violation to which the six month is inapplicable, the Commission recalls that the concept of a "continuing situation" refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims"; *Hilton v. United Kingdom*, European Court of Human Rights Application No. 12015/86 (6 July 1988) at 13 (*Investors' Book of Authorities at Tab CA 81*): "The Commission further observes that the six months rule does not apply... to a complaint [which] concerns a continuing situation."

<sup>979</sup> *De Becker v. Belgium*, at 232. (*Investors' Book of Authorities at Tab CA 79*).

<sup>980</sup> See, for example, *Marckx. v. Belgium*, European Court of Human Rights Application No. 6833/74 (13 June 1979) at para. 41. (*Investors' Book of Authorities at Tab CA 82*).

<sup>981</sup> *Ibrahima Gueye v. France*, Human Rights Committee Communication No. 196/1983 (3 April 1989) at para. 5.3. (*Investors' Book of Authorities at Tab CA 83*).

breached Article 26 of the International Covenant on Civil and Political Rights because it was discriminatory. The Committee concluded that because the Act represented a continuing violation of the Covenant, they had jurisdiction to hear the dispute, despite the fact that the Covenant only came into force with respect to the Czech Republic two years after the Act was passed.<sup>982</sup>

730. In *Sandra Lovelace v. Canada*, the Human Rights Committee concluded that a Canadian Act coming into force one hundred years before the International Covenant on Civil and Political Rights created a continuing situation that could still breach the Covenant.<sup>983</sup>

731. The Inter-American Commission on Human Rights has also found that laws create continuing situations. In *Andres Aylwin Azocar and Otros v. Chile*, the Inter-American Commission on Human Rights refused to time bar a claim challenging provisions of the Chilean constitution enacted eight years before.<sup>984</sup> In so doing, it stated:

... in relation to the grounds of inadmissibility contained in Article 46(1)(b) of the Convention, which was alleged by the Chilean State and referred to the six-month period for submitting the complaint, the Commission indicated that the consequences or the legal and factual effects of the Constitutional provisions that have been called into question, as well as their invariable and continuing application ... since 1990, extend to the date of submission of the complaint and even afterwards, which definitely makes the provisions of the American Convention invoked by petitioners applicable to this situation.<sup>985</sup>

732. International tribunals do not apply limitation provisions to continuing acts because prohibiting a claim while the wrongful government action continues would not serve the purposes behind such limitations. Tribunals and commentators generally recognize that time limits, such as NAFTA Article 1116(2), have two main purposes: to enable the respondent to collect evidence in its defence and to provide certainty and stability.<sup>986</sup>

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<sup>982</sup> *Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic*, Human Rights Committee Communication No. 516/1992 (31 July 1995) at paras. 4.5 to 5. (*Investors' Book of Authorities at Tab CA 84*).

<sup>983</sup> *Sandra Lovelace v. Canada*, Human Rights Committee Communication No. R.6/24 (29 December 1977) at para. 7.3. (*Investors' Book of Authorities at Tab CA 85*).

<sup>984</sup> *Andres Aylwin Azocar and Otros v. Chile*, Inter-American Commission on Human Rights Case 11,863 (1999) at para. 27. (*Investors' Book of Authorities at Tab CA 86*).

<sup>985</sup> *Andres Aylwin*, at para. 27. (*Investors' Book of Authorities at Tab CA 86*).

<sup>986</sup> Mew, G., *The Law of Limitations*, 2nd ed. (Markham: Butterworths, 2004), at 12. (*Investors' Book of Authorities at Tab CA 87*). *Peter Blaine v. Jamaica*, Inter-American Court of Human Rights Case 11,827 (1998) at para. 52. (*Investors' Book of Authorities at Tab CA 88*); *Wena Hotels, Award*, at paras. 102-105. (*Investors' Book of Authorities at Tab CA 38*).

733. Prohibiting claims challenging continuing acts fulfils neither of these purposes. The continuing action continually generates new evidence and the state's continuing breach of its treaty obligations undermines certainty and stability.

b. NAFTA Article 1116(2)

734. NAFTA Article 1116(2) is consistent with the international law rule that time limit provisions do not bar claims challenging continuing acts. Both the *Feldman* and *UPS* NAFTA Tribunals refused to apply Article 1116(2) to bar claims challenging acts that were still continuing. The Tribunals refused to bar the claims because international law accepts that in continuing an action inconsistent with international law, a state is taken to repeat that action every day and, therefore, commits a separate breach of international law every day. The claimant becomes aware of this separate breach every day and, therefore, cannot be time barred while the state continues to breach its obligation.

735. Hence, the *UPS* NAFTA Tribunal said:

...continuing courses of conduct constitute continuing breaches of legal obligations and *renew* the limitation period accordingly.<sup>987</sup>

736. The *UPS* Tribunal went on to say:

This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. The use of the term 'first acquired' is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquired further information confirming the conduct or allowing more precise computation of loss. The *Feldman* tribunal's conclusion on this score buttresses our own.<sup>988</sup>

737. The *Feldman* NAFTA Tribunal reached the same conclusion. In that case, the Tribunal considered a claim that Mexico had breached its NAFTA obligations by failing to rebate tax expenses to the investor. Mexico first refused to rebate the taxes in 1990, but continued to refuse to rebate until the investor brought a claim in 1999. Even though the investor claimed more than three years after the measure began, the Tribunal

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<sup>987</sup> *UPS*, Award, at para. 28. [*emphasis added*]. (*Investors' Book of Authorities at Tab CA 89*).

<sup>988</sup> *UPS*, Award, at para. 28. (*Investors' Book of Authorities at Tab CA 89*).

rejected Mexico's argument that the claim was time barred and went on to find that Mexico's continuing act breached the NAFTA.<sup>989</sup>

738. These decisions are consistent with the landmark decision of the European Commission on Human Rights in *De Becker*. In that case, the Commission said that, because the act was continuing, "it is exactly as though the alleged violation was being repeated daily thus preventing the running of the six months period."<sup>990</sup> Dozens of subsequent decisions of the European Commission and Court of Human Rights,<sup>991</sup> as well as academics and the ILC,<sup>992</sup> have referred to *De Becker* as authority on the effect of continuing acts.
739. As a result, it is clear that NAFTA tribunals have consistently followed the well-established doctrine of continuous breach.

*i. The Impugned Measures*

740. NAFTA Article 1101(1) defines the scope and coverage of NAFTA Chapter 11. Article 1101 provides that the obligations of NAFTA Chapter 11 apply to "measures adopted or maintained by a Party *relating to*" an investor or investment.<sup>993</sup>

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<sup>989</sup> The *Feldman* Tribunal said: "The inescapable fact is that the Claimant has been effectively denied IEPS rebates for the April 1996 through November 1997 period, while domestic export trading companies have been given rebates not only for much of that period but through at least May 2000 ..." The Tribunal went on to say, "...the factual pattern in this case ... demonstrates a pattern of official action (or inaction) over a number of years, as well as de facto discrimination that is actionable under Article 1102"; *Feldman*, Award, at paras. 187-188 (*Investors' Book of Authorities at Tab CA 51*).

<sup>990</sup> *De Becker v. Belgium*, at 244. (*Investors' Book of Authorities at Tab CA 79*).

<sup>991</sup> See, for example, *Thomas McFeeley and Others v. United Kingdom*, European Court of Human Rights Application 8317/78 (15 May 1980) at paras. 24-26. (*Investors' Book of Authorities at Tab CA 90*).

<sup>992</sup> Paulwelyn, J., "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems" at 431. (*Investors' Book of Authorities at Tab CA 78*). Crawford, J., *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, at 136. (*Investors' Book of Authorities at Tab CA 91*).

<sup>993</sup> NAFTA Article 1101(1) provides:

"This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;
- (b) investments of investors of another Party in the territory of the Party; and
- (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party."

741. NAFTA Article 102(2) states that NAFTA provisions must be interpreted in light of NAFTA's objectives and in accordance with the applicable rules of international law. NAFTA's objectives include the facilitation of the cross-border movement of services, substantially increasing investment opportunities and promoting conditions of fair competition.<sup>994</sup>
742. NAFTA Article 201(1) broadly defines a "measure" as "any law, regulation, procedure, requirement or practice."<sup>995</sup> Canada's measures easily fit this definition by arising directly and exclusively out of a government requirement that is implemented through governmentally administered practice by government officials.
743. *Black's Law Dictionary* defines "relate" as "to have bearing or concern."<sup>996</sup> The drafters of NAFTA did not limit "relating to" with prefixes like "directly" or "substantially." Canada's *Statement on Implementation* supports the interpretation that NAFTA Article 1101 was intended to broadly bring foreign Investors and investments within Chapter 11's protection. This statement, issued on the coming into force of the NAFTA, says:
- Article 1101 states that Section A covers measures by a Party (i.e., any level of government in Canada) that *affect*:
- Investors of another Party (i.e., the Mexican or American parent company or individual Mexican or American investor);
  - investments of Investors of another Party (i.e., the subsidiary company or asset located in Canada); and
  - for purposes of the provisions on performance requirements and environmental measures, all investments (i.e., all investments in Canada).<sup>997</sup>
744. The term "affect" is synonymous with "to have bearing or concern."<sup>998</sup> In *US-Subsidies on Upland Cotton* the WTO Appellate Body considered this term:

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<sup>994</sup> NAFTA Article 102(2) provides: "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."

<sup>995</sup> NAFTA Article 201(1) provides: "For purposes of this Agreement, unless otherwise specified:.. "measure includes any law, regulation, procedure, requirement or practice."

<sup>996</sup> *Black's Law Dictionary*, 5th Edition (St Paul: West Publishing Co, 1979) at 1158. (*Investors' Book of Authorities at Tab CA 92*).

<sup>997</sup> *Canadian Statement on Implementation*, NAFTA, at 148. [*emphasis added*]. (*Investors' Book of Authorities at Tab CA 45*).

<sup>998</sup> *Black's Law Dictionary*, 5th Edition, at 262: "Concern" means "to affect the interest of". (*Investors' Book of Authorities at Tab CA 92*).

We agree with the Panel that the word “affecting” refers primarily to “the way in which [measures] relate to a covered agreement.” As the Appellate Body stated in *EC – Bananas III*, “[t]he ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on’” something else.<sup>999</sup>

745. The *Methanex* NAFTA Tribunal found “the phrase ‘relating to’ ... signifies something more than the mere effect of a measure on an investor or an investment...”<sup>1000</sup>, and said that “relating to” “requires a legally significant connection between”<sup>1001</sup> the measure and the investment and investor.
746. Methanex challenged the Governor of the State of California’s Executive Order banning the use of the chemical MTBE in gasoline. The claimant supplied methanol to producers of MTBE, who then supplied MTBE to gasoline makers. While MTBE producers were, therefore, directly affected by the Order, Methanex was not. It was among a group of suppliers of the ingredients of MTBE who were only indirectly affected.
747. In this case, there is a direct and significant connection between Canada’s measures and their impact on the Investors and its investments.
748. NAFTA tribunals have interpreted Article 1101 consistently with its ordinary meaning and NAFTA’s objectives by deciding that a measure “relates to” an investor or investment if it affects the investor or investment. Partly relying on Canada’s *Statement on Implementation*, the *Pope & Talbot* Tribunal rejected Canada’s arguments that the term required the measure to be “primarily directed” at the investor or investment, accepting that “it is also a measure relating to investment insofar as it might affect an enterprise owned by an investor of a Party.”<sup>1002</sup>
749. The NAFTA Tribunal in *GAMI Investments v Mexico* also rejected arguments that a measure must have a direct link to the investor or investment to be “relating to” it. In that case, GAMI, the US investor, claimed damages to its minority shareholding in a Mexican company, which owned five sugar mills. GAMI claimed that Mexico damaged its investment through general measures affecting the sugar industry.

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<sup>999</sup> *United States - Subsidies on Upland Cotton*, Report of the Appellate Body, WT/DS267/AB/R (3 March 2005) 2005 WL 524967 (W.T.O.) at para. 261. (*Investors’ Book of Authorities at Tab CA 93*).

<sup>1000</sup> *Methanex Corporation v. United States of America*, UNCITRAL Arbitration Rules, First Partial Award, 2002 WL 32824210 (August 7, 2002) at para. 147. (*Investors’ Book of Authorities at Tab CA 164*).

<sup>1001</sup> *Methanex*, First Partial Award, at para. 147. (*Investors’ Book of Authorities at Tab CA 164*).

<sup>1002</sup> *Pope & Talbot Inc. v. The Government of Canada*, Award Concerning “Measures Relating to Investment” Motion, 2000 WL 34510241 (January 26, 2000) at paras. 33 and 34. (*Investors’ Book of Authorities at Tab CA 58*).

750. This NAFTA jurisprudence is consistent with jurisprudence from tribunals considering other international treaties. In *Indonesia - Automobiles*, the WTO panel considered a claim that Indonesia breached Article 2.1 of the WTO Trade Related Investment Measures (TRIMs) Agreement. That Article says: "... no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994."
751. In considering this WTO case, the Panel had to determine whether the impugned measures were "trade related investment measures" and, therefore, whether the measures "related to" trade. The Panel said:

We now have to determine whether these investment measures are "trade-related." We consider that, if these measures are local content requirements, they would necessarily be "trade-related" because such requirements, by definition, always favor the use of domestic products over imported products, *and therefore affect trade*.<sup>1003</sup> [emphasis added]

a. Continuing Measures

752. Bilcon's claim raises at least four continuing measures, that arose before and continued after June 17, 2005. These measures are acts of a continuing character and constitute a continuous breach.
753. The continuous breach measures include:
- a) The conduct of the federal Department of Fisheries and Oceans in relation to the request for permits, which adversely and unfairly impacted the operation of the Investment's Environmental Assessment after June 17, 2005. This measure includes:
    - i. *The ongoing effect of arbitrary, abusive and non-transparent impositions of blasting conditions on the Investment;*
    - ii. *The unreasonable and abusive taking of jurisdiction by the Department of Fisheries and Oceans to address questions outside of the purported marine issues; and*
    - iii. *The ongoing effect of the capricious and arbitrary requirement to subject the Investment to a Comprehensive Study.*
  - b) The result of these abusive actions to compel the Investor and the Investment to seek approval from the Joint Review Panel resulted in ongoing harm and damage

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<sup>1003</sup> *Indonesia - Certain Measures Affecting the Automobile Industry*, Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) at para. 14.82. (*Investors' Book of Authorities at Tab CA 96*).



to the Investors after June 17, 2005, and continues to this day. This measure includes:

- i. *The ongoing impact of the unfair and inequitable requirement that the Investment be referred to the Joint Review Panel;*
- ii. *The arbitrary and improper application of the relevant domestic rules by failing to apply the binding transitional provisions of the Canadian Environmental Assessment Act to the Investment's permit application.*

**D. Continuous unlawful and unilateral actions of the Department of Fisheries and Oceans**

754. Canada's unlawful actions had an ongoing and direct effect on the Investment which lasted until the ministerial decision to not provide the required permissions to the Investment by the Minister of Fisheries and Oceans on December 17, 2007.<sup>1004</sup> The effects of the loss of the Whites Point Quarry upon the Investment and its Investors continue to this day.

*i. Unlawful imposition of Blasting Conditions*

755. The DFO acted unfairly and arbitrarily when it took illegitimate and non-transparent measures to have another level of government impose regulations on the Investment which went beyond the Department's lawful authority. The DFO could not lawfully impose any conditions on the Investment, but secretly arranged to have the provincial government impose blasting conditions on the Investment to feign a justification base for DFO involvement in Bilcon's Whites Point Quarry permit application.<sup>1005</sup>

756. The DFO's involvement was even more unfair as the Nova Scotia government had previously represented to Bilcon that no blasting conditions would be necessary for

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<sup>1004</sup> "The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project (the Project)", dated December 17, 2007 (*Investors' Schedule of Documents at Tab C 589*).

<sup>1005</sup> E-mail from Brian Jollymore (DFO) to Bob Petrie (NSDEL) dated April 26, 2002. (*Investors' Schedule of Documents at Tab C 42*). The DFO also explained to NSDEL that Mark Lowe of Southern Stone Company had entered into a 30 year lease agreement to extract large aggregate from a 350 acre parcel of land. The DFO believed the company intended to get much larger, and this consideration appears to have prompted the DFO to request that NSDEL insert the two conditions in Nova Stone's 3.9ha quarry permit. The DFO's significant concern about possible blasting impact on marine mammals in the area seemed to also have played a role in its intrusion in the quarry permit approval by NSDEL.

approval,<sup>1006</sup> and another marine quarry and harbour in the vicinity of the Whites Point Quarry did not have the same onerous blasting conditions imposed.

757. The DFO's unlawful imposition of blasting conditions had an ongoing and prejudicial effect on the Investment, as the blasting conditions allowed the DFO to continue to refuse permission to Bilcon to undergo test blasting throughout the remainder of the Environmental Assessment. The lack of test blasting was relied on by the Joint Review Panel as a reason to recommend against the approval of the Investment's quarry<sup>1007</sup> on October 23, 2007, and this recommendation was adopted by the relevant ministers in their respective decisions in November<sup>1008</sup> and December of 2007.<sup>1009</sup>

*ii. Unlawful Determination to Scope*

758. The imposition of blasting conditions allowed the DFO to unlawfully appropriate to itself a jurisdiction beyond its authority based on the limited maritime aspects of the Whites Point Quarry project. The reason for this abusive action was to clothe Fisheries Minister Thibault with authority that would not otherwise be within his jurisdiction. He ultimately exercised that authority in 2007.
759. The Minister of Fisheries and Oceans was advised by his officials that the Department did not have the legislative authority to carry out the minister's desire to control this environmental review.<sup>1010</sup> This same note made reference to political considerations that were completely extraneous to the environmental protection questions at issue (they related to the timing of a provincial election in Nova Scotia that could result in a

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<sup>1006</sup> Fax from Danette Daveau (NSDEL) to Mark Lowe (Nova Stone) re Standard Terms and Conditions - Rock Quarry Permit Approval, January 25, 2002. (*Investors' Schedule of Documents at Tab C 29*). The document sent by NSDEL was called "Standard Conditions that apply to any Rock Quarry". There is no reference made to federal requirements such as *NWPA* applications in this document. In fact, the communication from NSDEL states "Standard conditions that apply to any Rock Quarry; such as Parker Mountain Aggregates Ltd" – the proponent of the Tiverton Quarry.

<sup>1007</sup> Joint Review Panel Report, dated October 23, 2007, where the Panel notes "The Proponent was unable to provide empirical evidence to support its assertion that ANFO residues could be eliminated" at 31. (*Investors' Schedule of Documents at Tab C 34*).

<sup>1008</sup> Letter from Mark Parent (Minister, Nova Scotia Department of Labour and Environment) to Paul Buxton, dated November 20, 2007. (*Investors' Schedule of Documents Tab C 541*).

<sup>1009</sup> "The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project (the Project)", dated December 17, 2007. (*Investors' Schedule of Documents at Tab C 589*).

<sup>1010</sup> DFO Briefing Note to Minister Robert Thibault, recommended the referral of the WPQ to a panel review assessment, dated June 2003. (*Investors' Schedule of Documents at Tab C 251*).

change of government).<sup>1011</sup> These unfair measures caused ongoing prejudice to Bilcon throughout the Environmental Assessment process, as the politically based scoping decision enabled the DFO to inequitably refer the Whites Point Quarry permit application to a more expensive and expansive comprehensive study process. Eventually this comprehensive study was made ever more onerous by referral to the Joint Review Panel.

760. Accordingly, every measure that arose from the unfair appropriation of jurisdiction by the DFO against the interests of the Investment, such as the improper referral of the Investment's application to a comprehensive study and then to the Joint Review Panel process, forms a part of this continuous breach.

*iii. Unlawful DFO Decision to subject Quarry to Comprehensive Study*

761. The International Law Commission has recognized that omissions are a form of continuing breach. The 1988 ILC Preliminary Report on State Responsibility states:

As long as it is protracted beyond the date within which such an obligation is due to be performed, non-compliance with an *obligation de faire* is a wrongful act of a continuing character.<sup>1012</sup>

762. The DFO's unlawful imposition of blasting conditions, and its improper non-transparent taking of authority beyond its purported marine trigger, directly led to the DFO declaring itself as the Responsible Authority. This abusive action was then used to enable the DFO to unlawfully refuse to apply the exemptions contained in the *Comprehensive Study List* to which Bilcon was entitled as a matter of domestic law.
763. The failure to apply the exemption had a continuing and ongoing effect as it manifested itself at every stage of the Environmental Assessment process thereafter, through the entirety of the Joint Review Panel process to the ultimate refusal of the Investment's application by Canada.

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<sup>1011</sup> DFO Briefing Note to Minister Robert Thibault, recommended the referral of the WPQ to a panel review assessment, dated June 2003. (*Investors' Schedule of Documents at Tab C 251*).

<sup>1012</sup> *Preliminary Report on State Responsibility (1988)*, Mr. Gaetano Arangio-Ruiz, ILC Special Rapporteur UN Doc A/CN.4/416 at para. 42: "The Special Rapporteur is inclined to believe that omissive wrongful acts may well fall (as well as, and perhaps more frequently than commissive wrongful acts) into the category of wrongful acts having a continuing character. As long as it is protracted beyond the date within which such an obligation is due to be performed, non-compliance with an *obligation de faire* is a wrongful act of a continuing character." (*Investors' Book of Authorities at Tab CA 97*).

### **E. Unlawful Measures of the Joint Review Panel**

764. The unlawful referral of the Whites Point Quarry to the Joint Review Panel adversely affected Bilcon from the time of recommended referral until the time that the Government of Canada rejected the application in December 2007. It was all one continuous process.
765. Canada breached its obligations to provide the international law standard of treatment every day since its unlawful, arbitrary, non-transparent and politically-motivated referral of the Investment's application to the Joint Review Panel. Every act or omission of Canada after the date related to the referral, through the entire Joint Review Panel process to Canada's rejection of Whites Point Quarry in December 2007 could not have occurred without the Joint Review Panel Final Report, and constitutes an on-going and continuous breach of the Investors' NAFTA rights.
766. In addition to Canada's referral of the Whites Point Quarry to the Joint Review Panel, the Joint Review Panel process itself was illegal and arbitrary. Despite Canada explicitly directing the Joint Review Panel that new *CEAA* amendments must not apply to the Environmental Assessment, Canada breached its NAFTA obligations when it failed to prevent the Joint Review Panel from applying an unlawful legislative regime. Throughout the entire continuous process, Bilcon was arbitrarily required to address impermissible legal standards, such as the Tribunal's novel and unauthorized application of some purported concept of the precautionary principle, constitutes a continuous breach of the Investors' right to be assessed on the applicable law. The application of this unlawful scheme was all directly related to the ultimate rejection of the Whites Point Quarry by the Joint Review Panel, and by Canada in 2007.
767. These measures constitute a continuous breach of the Investors' rights under the NAFTA. Canada's objection to jurisdiction is therefore completely without merits, and should be summarily dismissed.

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## PART SEVEN: DAMAGES AND RELIEF REQUESTED

### I. DAMAGES

768. The Tribunal has ordered the bifurcation of issues of damage from the merits of the claim, in paragraph 1.2 of *Procedural Order No. 3*. As a result, it is not necessary for the assessment of damage to be calculated in this phase of the arbitration.
769. However, the Investors and their Investment have clearly been caused extensive harm directly as a result of Canada's measures, which prevented the Investors from being able to operate and expand a quarry located at Whites Point, Nova Scotia.
770. The evidence of William Richard Clayton sets out that the Investors sought to obtain a stable and secure supply of aggregates from the Whites Point Quarry to supply their business operations in the United States.<sup>1013</sup> The unlawful prevention of their Investment caused harm and loss to the Investors.<sup>1014</sup>
771. As a result of Canada's measures which resulted in a denial of approvals to permit the Whites Point Quarry to operate, the Investors lost the value of their investment in Nova Scotia, as well as harm naturally arising to their related corporate interests in the United States.<sup>1015</sup>
772. In addition, the impact of the discrimination, irrelevant political considerations and the failure to provide full protection and security to the Investment and its Investors has resulted in a total loss of goodwill for Bilcon of Delaware, the Investors and their Investment in Canada.
773. The Investors were forced to endure a needlessly long, unfair, arbitrary and abusive environmental regulatory process that exceeded the authority of the government and its regulators, where the scientific evidence required from the Investors was ignored, and where government ministers acted beyond their legal authority. The deliberately excessive cost of this unfair process has directly resulted in loss, harm, and damage to the Investors and its Investment.
774. When examining Canada's less favorable and unfair treatment of Bilcon during the environmental assessment, Canadian environmental law expert David Estrin concluded

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<sup>1013</sup> Witness Statement of William Richard Clayton, at para.4.

<sup>1014</sup> Witness Statement of William Richard Clayton, at paras. 31-34.

<sup>1015</sup> Witness Statement of William Richard Clayton, at paras 31-33.

that “this approach resulted in a more lengthy and expensive process for the proponent than was necessary.”<sup>1016</sup>

775. David Estrin has looked at the treatment provided to Bilcon by Canada in the environmental assessment. He concluded that:

Our examination of government records prior to the referral of the WPQ to a Review Panel indicates that in exercising statutory powers, officials often made choices that were least advantageous to the proponent.<sup>1017</sup>

776. Mr. Estrin continued by noting specific examples of less favorable treatment provided to Bilcon. He noted:

This is illustrated by various decisions made by the federal Department of Fisheries and Oceans (“DFO”) in the lead-up to the referral of the project to a Panel. In particular, there are four decisions that stand out as being unusual and unfair, particularly in relation to similar projects:

- a) DFO’s decision to become involved with imposing blasting conditions in Bilcon’s provincial quarry permit
- b) DFO’s refusal to authorize Bilcon’s blasting plan
- c) DFO’s imposition of a “comprehensive study” level of environmental assessment when this was not legally authorized (before ultimately referring the project to a Joint Review Panel)
- d) DFO’s decision to “scope in” the quarry in the environmental assessment, despite there being no credible scientific link between quarry activities and potential harm to fish.<sup>1018</sup>

777. The witness statement of William Richard Clayton sets out that the cost for this needless exercise was in excess of USD\$ 4.25 million dollars.<sup>1019</sup> Where the Investors have suffered other loss, the value of all of this needless regulatory investment has been lost as a result of the measures taken and imposed by Canada.

778. The Investors have, in addition, been subjected to more damage and loss as a result of the conduct of the Government of Canada in this arbitration. Canada’s conduct has caused further loss and damage from unreasonable delays, suppression of evidence, and the non-production, partial production, and late production of relevant documents that has resulted in further prejudice to the Investor and has added unnecessary cost.

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<sup>1016</sup> Expert Report of David Estrin at para. 109.

<sup>1017</sup> Expert Report of David Estrin at 2.

<sup>1018</sup> Expert Report of David Estrin at 2.

<sup>1019</sup> Witness Statement of William Richard Clayton, at paras. 29 and 33.

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## II. RELIEF SOUGHT

779. The Investors respectfully request the following relief:

- a) A declaration that Canada has acted in a manner inconsistent with its Chapter 11 obligations of national treatment, most favored nation treatment, and international law standards of treatment, in breach of its obligations under NAFTA Articles 1102, 1103 and 1105;
- b) A declaration dismissing Canada's jurisdictional objections;
- c) A declaration that the claim proceed forthwith to the Quantification of Damages;
- d) Damages arising from the delays, suppression of evidence, and non-production of documents by Canada; and
- e) An award in favor of the Investors' for all costs, disbursements and expenses incurred in the merits phase of the arbitration for legal representation and assistance, plus interest, and costs of the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Appleton & Associates International Lawyers

Date: July 25, 2011

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## APPENDIX I - INTERPRETATION OF THE NAFTA

### I. RELEVANT PROVISIONS OF NAFTA

780. In the *Canadian Marketing Practices* case, the NAFTA Chapter Twenty panel addressed the principles to be applied in the interpretation of the NAFTA, by stating:

The Panel also attaches importance to the trade liberalization background against which the agreements under consideration must be interpreted. Moreover, as a free trade agreement, the NAFTA has the specific objective of eliminating barriers to trade among the three contracting Parties. The principles and rules through which the objectives of the NAFTA are elaborated are identified in NAFTA Article 102(1) as including national treatment, most-favored nation treatment and transparency. Any interpretation adopted by the Panel must, therefore, promote rather than inhibit the NAFTA's objectives.<sup>1020</sup>

781. NAFTA Article 102(2) sets out the manner in which this Agreement is to be interpreted and applied by the Parties:

**Article 102: Objectives**

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

Coupled with the objectives set out in NAFTA Article 102, the NAFTA preamble forms an integral part of the NAFTA and must be given meaning in the interpretation of the NAFTA.

782. NAFTA Article 1131(1) confirms that Tribunals constituted under Section B of Chapter 11 of NAFTA "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."
783. The *Vienna Convention on the Law of Treaties* sets out the applicable rules of international law for the interpretation of treaties.<sup>1021</sup> Canada's *Statement of Implementation* provides that NAFTA Article 102(2) affirms "a basic provision of customary international law regarding the interpretation of international agreements as set out in the *Vienna Convention on the Law of Treaties*."<sup>1022</sup>

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<sup>1020</sup> NAFTA Arbitration Panel Established Pursuant to Article 2008, *In the Matter of Tariffs Applied by Canada to Certain U.S. – Origin Agricultural Products* (Secretariat File No. CDA-95-2008-01). Final Report of the Panel, December 2, 1996 at para. 122. (*Investors' Book of Authorities at Tab CA 126*).

<sup>1021</sup> *Vienna Convention on the Law of Treaties* (1969). (*Investors' Book of Authorities at Tab CA 44*).

<sup>1022</sup> *Canadian Statement on Implementation*, North American Free Trade Agreement, Canada Gazette Part 1, January 1, 1994, at 76. (*Investors' Book of Authorities at Tab CA 45*).



784. In the *Ethyl* claim, the NAFTA Tribunal noted that “Canada is a party to the *Vienna Convention*” and that “the United States accepts it as a correct statement of customary international law.”<sup>1023</sup> The Tribunal concluded that “given that 84 States are parties to the *Vienna Convention* (as of 15 April 1998), and that Articles 31 and 32 ‘were adopted without a dissenting vote’, [the Articles of the *Vienna Convention*] clearly ‘may be considered as declaratory of existing law.’”<sup>1024</sup>

785. All of the objectives of the NAFTA, critical to the interpretive task, are set out in Article 102(1), as follows:

**Article 102: Objectives**

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
  - (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
  - (b) *promote conditions of fair competition in the free trade area;*
  - (c) *increase substantially investment opportunities in the territories of the Parties;*
  - (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
  - (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
  - (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement. [*emphasis added*]

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<sup>1023</sup> *Ethyl Corp v. Canada* (Jurisdiction) at para. 52 (See *The Islamic Republic of Iran v The United States of America*, Doc No. 32-A18-FT (6 Apr. 1984), reprinted in 5 Iran-U.S. Cl. Trib. Rep. 251, 259 (1984) (*Investors’ Book of Authorities at Tabs CA 127 and CA 128*), where U.S. courts look to the Convention when interpreting the text of a treaty, see, e.g. *Kreimerman v. Casa Veerkamp*, A.S. de C.V. 22 F.3d 634, 638 (5<sup>th</sup> Cir. 1994), cert. den’d, 115 S.Ct. 577 (1994) (*Investors’ Book of Authorities at Tab CA 129*); *Day v. Trans World Airlines, Inc.* 528 F.2d 31, 33 (2d Cir. 1975), cert. den’d. 429 U.S. 890 (1976)) (*Investors’ Book of Authorities at Tab CA 130*).

<sup>1024</sup> *Ethyl*, at para. 52 (citing *De Aréchaga, International law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 42 (1978) (*Investors’ Book of Authorities at Tabs CA 127 and 131*) (“Legal rules concerning the interpretation of treaties constitute one of the Sections of the Vienna Convention which were adopted without a dissenting vote at the Conference and consequently may be considered as declaratory of existing law”).

## II. INTERPRETATION IN ACCORDANCE WITH THE VIENNA CONVENTION ON THE LAW OF TREATIES

786. Article 31 of the *Vienna Convention* reflects customary international law, when interpreting treaties, including the NAFTA.<sup>1025</sup> The International Court of Justice has had occasion to hold that customary international law found expression in Article 31 of the *Vienna Convention*.<sup>1026</sup>

787. Article 31 provides the general rules of interpretation of treaties. Article 32 relates to supplementary means of interpretation. Article 31 of the *Vienna Convention* provides, as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

788. The Tribunal in *Siemens v Argentina* said:

Both parties have based their arguments on the interpretation of the Treaty in accordance with Article 31(1) of the *Vienna Convention*. This Article provides that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The Tribunal will adhere to these rules of interpretation in considering the disputes provisions of the treaty.<sup>1027</sup>

789. The *Methanex* Tribunal stated that Article 31(1) of the *Vienna Convention* is comprised of three separate principles:

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<sup>1025</sup> *Vienna Convention on the Law of Treaties*, art. 31(1), 1155 UNTS 331 (signed May 1969, entered into force January 27 1980) [hereinafter *Vienna Convention*] (*Investors’ Book of Authorities at Tab CA 44*); see A.D. McNair, *The Law of Treaties* at 465. (Oxford: Clarendon Press, 1986) (*Investors’ Book of Authorities at Tab CA 53*).

<sup>1026</sup> See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, at 21, para. 41 (*Investors’ Book of Authorities at Tab CA 132*); see *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), at 812, para. 23. (*Investors’ Book of Authorities at Tab CA 133*).

<sup>1027</sup> *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004 at para. 80. (*Investors’ Book of Authorities at Tab CA 54*).

- a) The first general principle, good faith;
- b) The second general principle, interpretation in accordance with the ordinary meaning of a term; and
- c) The third general principle, the term is not to be examined in isolation or in abstracto, but in the context of the treaty and in the light of its object and purpose.<sup>1028</sup>

790. In addition to context, a Tribunal may also have to consider the application of Articles 31(3) and 32 of the *Vienna Convention*:

Article 31(3): There shall also be taken into account, together with the context:

- i. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- ii. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- iii. any relevant rules of international law applicable in the relations between the parties.<sup>1029</sup>

Article 32: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

791. The ordinary meaning of the term “context” is set out in Black’s Law Dictionary: “The context of a particular sentence or clause in a statute, contract, will, etc., comprises those parts of the text which immediately precede and follow it. The context may sometimes be scrutinized, to aid in the interpretation of an obscure passage.”<sup>1030</sup>

792. Article 31(2) of the *Vienna Convention* also indicates that the “context” for treaty interpretation shall include treaty text, including its preamble and annexes, as well as (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.<sup>1031</sup>

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<sup>1028</sup> *Methanex*, Final Award, Part II, Ch. B, at para. 16. (*Investors’ Book of Authorities at Tab CA 94*).

<sup>1029</sup> *Vienna Convention on the Law of Treaties* (1969), arts. 31(3), 32. (*Investors’ Book of Authorities at Tab CA 44*).

<sup>1030</sup> *Black’s Law Dictionary*, 5<sup>th</sup> ed., at 290. (*Investors’ Book of Authorities at Tab CA 135*).

<sup>1031</sup> *Vienna Convention*, art. 31.2. (*Investors’ Book of Authorities at Tab CA 44*).

793. When States adopt a treaty that encompasses areas previously covered by customary law, “it is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties”.<sup>1032</sup> However, this does not imply an automatic extinction of prior customary law, including the rules regarding treaty interpretation.<sup>1033</sup> The International Law Commission (ILC) commented:

... Nor does the fact that agreements often set aside prior customary law translate into any automatic presumption in favor of later law. In fact it would be wrong to assume that there is a stark opposition between custom and treaty. On the one hand, treaties may be a part of the process of the creation of customary law. On the other hand, customary behavior undoubtedly affects the interpretation and application of treaties and may, in some cases, modify treaty law. Because, as explained above, there is no general hierarchy of sources in international law, the relationship between a particular treaty and a particular customary norm will always remain to be decided on a case-by-case basis.<sup>1034</sup>

794. The ILC noted that the potential to “modify treaty law” “is presumed in a minimal way by Article 31(3)(b) [of the *Vienna Convention*] that obliges the interpreter to have regard to the subsequent practice of treaty parties.”<sup>1035</sup> Another case is that of inter-temporal

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<sup>1032</sup> *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* I.C.J. Reports 1969 at 42, para. 72. (*Investors’ Book of Authorities at Tab CA 137*) See also *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Merits)* I.C.J. Reports 1982 at 38, para. 24. (*Investors’ Book of Authorities at Tab CA 138*).

<sup>1033</sup> “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” Report of the Study Group of the International Law Commission, finalized by Martii Koskenniemi, Fifty-eighth session, Geneva, 13 April 2006, A/CN.4/L.682, at para. 224. (*Investors’ Book of Authorities at Tab CA 139*) (citing, *see especially* Hugh Thirlway, *International Customary law and Codification* (Leiden: Sijthoff, 1972), at 95-108).

<sup>1034</sup> “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” Report of the Study Group of the International Law Commission, finalized by Martii Koskenniemi, Fifty-eighth session, Geneva, 13 April 2006, A/CN.4/L.682, at para. 224. (*Investors’ Book of Authorities at Tab CA 139*).

<sup>1035</sup> “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” Report of the Study Group of the International Law Commission, finalized by Martii Koskenniemi, Fifty-eighth session, Geneva, 13 April 2006, A/CN.4/L.682, at para. 224, note 288 (*Investors’ Book of Authorities at Tab CA 139*); ILC citing to Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999), at 172-180.

law, where “subsequent custom affects the interpretation of the open-ended or “mobile” terms of the treaty.”<sup>1036</sup>

### III. DIFFICULTIES ARISING FROM THE EXPANSION OF INTERNATIONAL LAW

795. One question which arose in the course of developing treaty interpretation was whether the term of a treaty should be interpreted at the time of the conclusion of the treaty, or if it should be interpreted in a broader sense to include future notions.<sup>1037</sup>
796. The ILC opined on the difficulties in proper treaty interpretation because of the diversification and expansion of international law.
797. Articles 31(3)(a) and (b) of the *Vienna Convention* designates subsequent agreement and subsequent practice as the key tools for determining the interpretation of the treaty or the application of its provisions. The following are open issues since the ILC completed its work on the Law of Treaties in 1968:
- a) The ability of subsequent agreement and practice to represent a methodology for interpreting treaties;
  - b) What constitutes “practice” and how to ascertain “agreement” from practice, and how both affect NAFTA obligations.<sup>1038</sup>
798. In the *Costa Rica v Nicaragua* case, the International Court of Justice had to determine whether the meaning of specific words used in a treaty was the meaning at the time the treaty was concluded, or the current meaning, which was significantly different. The

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<sup>1036</sup> “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” Report of the Study Group of the International Law Commission, finalized by Martii Koskenniemi, Fifty-eighth session, Geneva, 13 April 2006, A/CN.4/L.682, at para. 224, note 288. (*Investors’ Book of Authorities at Tab CA 139*); ILC citing to Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999), at 172-180.

<sup>1037</sup> The issue was raised in the ILC’s “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” Report of the Study Group of the International Law Commission, finalized by Martii Koskenniemi, Fifty-eighth session, Geneva, 13 April 2006, A/CN.4/L.682, at para. 224, note 289. (*Investors’ Book of Authorities at Tab CA 139*).

<sup>1038</sup> At its sixtieth session, in 2008, the ILC decided to include the topic “Treaties over time” in its programme of work, on the basis of the recommendation of a Working Group on the long-term programme of work, and to establish a Study Group. See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), at para. 353 (*Investors’ Book of Authorities at Tab CA 56*); At its sixty-second session in 2010, the Study Group on Treaties over time was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of ad hoc jurisdiction. See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), at paras. 218-219. (*Investors’ Book of Authorities at Tab CA 57*).

Court concluded that it was important “to remain true to the intent of the drafters of the Treaty; and determining that intent is the main task in the work of interpretation.”<sup>1039</sup> The Court opined as to the interpretation of the terms used in a treaty:

63. It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties’ common intention, which is, by definition, contemporaneous with the treaty’s conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties’ common intention. The Court has so proceeded in certain cases requiring it to interpret a term whose meaning had evolved since the conclusion of the treaty at issue, and in those cases the Court adhered to the original meaning<sup>1040</sup> ... on the question of the meaning of “dispute” in the context of a treaty concluded in 1836, the Court having determined the meaning of this term in Morocco when the treaty was concluded,<sup>1041</sup>
64. This does not however signify that, where a term’s meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.<sup>1042</sup>

799. The Court found that while the subsequent practice of the treaty parties, within the meaning of Article 31(3)(b) of the *Vienna Convention*, may depart from the “original intent on the basis of a tacit agreement between the parties”, there were situations where the parties’ intent following the conclusion of the treaty, “was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving”.<sup>1043</sup> In these instances, to respect the parties’ common intention at the time of the conclusion of the treaty, the Court believed that “account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.”<sup>1044</sup>

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<sup>1039</sup> *Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment (July 13, 2009) at para. 58. (*Investors’ Book of Authorities at Tab CA 140*).

<sup>1040</sup> For example, the Judgment of 27 August 1952 in the *Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)* (I.C.J. Reports 1952, at 176) (*Investors’ Book of Authorities at Tab CA 141*).

<sup>1041</sup> See Judgment of 13 December 1999 in the *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)* (I.C.J. Reports 1999 (II), at 1062, para. 25) in respect of the meaning of “centre of the main channel” and “thalweg” when the Anglo-German Agreement of 1890 was concluded). (*Investors’ Book of Authorities at Tab CA 136*).

<sup>1042</sup> *Costa Rica v Nicaragua*, at paras. 63, 64. (*Investors’ Book of Authorities at Tab CA 140*).

<sup>1043</sup> *Costa Rica v Nicaragua*, at para. 64. (*Investors’ Book of Authorities at Tab CA 140*).

<sup>1044</sup> *Costa Rica v Nicaragua*, at para. 64. (*Investors’ Book of Authorities at Tab CA 140*).

800. An example of this reasoning is found in the Court's 1978 judgment in the case concerning *Aegean Sea Continental Shelf (Greece v. Turkey)*, which was affirmatively cited in the *Costa Rica v Nicaragua* Judgment.<sup>1045</sup> In the *Aegean Sea Continental Shelf* case, the Court was called upon to interpret a State's treaty reservation that excluded from the Court's jurisdiction "disputes relating to territorial status" of that State. The parties disputed over the meaning of the term "territorial status". In response to this contestation, the Court said:

Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession [to the General Act of 1928] as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law.<sup>1046</sup>

801. The WTO Appellate Body has followed the interpretation of the International Court of Justice in *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*. The Appellate Body said:

More generally, we consider that the terms used in China's GATS Schedule ("sound recording" and "distribution") are sufficiently generic that what they apply to may change over time. In this respect, we note that GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995.

802. In a footnote, the Appellate Body affirmed the International Court of Justice Judgment in *Costa Rica v. Nicaragua*, where the Court "found that the term 'comercio' ... contained in an 1858 [Treaty] between Costa Rica and Nicaragua, should be interpreted as referring to both trade in goods and trade in services, even if, at the time of the conclusion of the treaty, such term was used to refer only to trade in goods."<sup>1047</sup>

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<sup>1045</sup> *Aegean Sea Continental Shelf (Greece v. Turkey)* Judgment, I.C.J. Reports 1978, at 3. (*Investors' Book of Authorities at Tab CA 142*)

<sup>1046</sup> *Greece v Turkey* I.C.J. Reports 1978, at 32, para. 77; This was affirmatively quoted by the Court in *Costa Rica v Nicaragua*, at para. 65. (*Investors' Book of Authorities at Tabs CA 140 and CA 142*)

<sup>1047</sup> Appellate Body Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010 at para. 396. (*Investors' Book of Authorities at Tab CA 143*) (citing *Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment (July 13, 2009). (*Investors' Book of Authorities at Tab CA 140*).

803. With this in mind, the NAFTA must be interpreted according to the rules set out in the *Vienna Convention*, such as the following:

- a) Interpretation in Good Faith in Accordance with Ordinary Meaning;
- b) Context; and
- c) Object and Purpose.

Collectively, this analytic framework provides a commonsense approach to NAFTA provisions.

*i. The NAFTA Free Trade Commission Interpretation*

804. The FTC has issued several statements concerning the interpretation of some Chapter 11 provisions, including, a Statement on Interpretation of Certain Chapter 11 Provisions (the FTC Note), and Statements of the NAFTA Free Trade Commission on the Operation of Chapter 11.<sup>1048</sup> The FTC Note was adopted to “clarify and affirm the meaning of certain Chapter 11 provisions”, whereas the latter Statements were adopted to “enhance the transparency and efficiency of Chapter 11 and *provide guidance* to investors and to Tribunals constituted under Section B of the Chapter.”<sup>1049</sup>

805. Prof. Salacuse noted that the distinction between these objectives “is especially important in the light of Article 31(3)(a) of the *Vienna Convention*”.<sup>1050</sup>

806. To provide a single method for interpretation of the terms “fair and equitable treatment” and “full protection and security” as contained in Article 1105(1) to NAFTA Tribunals, the FTC Note provided, as follows :

Minimum Standard of Treatment in Accordance with International Law

- 3. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to

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<sup>1048</sup> Statement on Interpretation of Certain Chapter 11 Provisions, 31 July 2001. (*Investors’ Book of Authorities at Tab CA 43*); Statements of the NAFTA Free Trade Commission on the Operation of Chapter 11. (*Investors’ Book of Authorities at Tab CA 95*).

<sup>1049</sup> Statements of the NAFTA Free Trade Commission on the Operation of Chapter 11. (*Investors’ Book of Authorities at Tab CA 95*).

<sup>1050</sup> Salacuse, at 149. (Salacuse noted that in comparison, while the FTC Note was debated as “an amendment” or “a subsequent agreement”, the Statements of the NAFTA Free Trade Commission on the operation of Chapter 11 represent “mere ‘recommendations’ and thus lack binding character”). (*Investors’ Book of Authorities at Tab CA 115*).



investments of investors of another Party.

4. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
5. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).<sup>1051</sup>

807. In the Award on jurisdiction, the NAFTA Tribunal in the *UPS* case recognized that "in any event the FTC's interpretation is binding on Chapter 11 Tribunals including this one."<sup>1052</sup>

808. The level of due diligence required of the NAFTA state may also correlate with the resources of the NAFTA state in question. In the *Pantechniki v. Albania* case, Jan Paulsson, the sole arbitrator, noted that the host State's responsibility to the investor and its investments should bear some proportion to its resources. Mr. Paulsson quoted the recent Investment Treaty treatise by Newcombe and Paradell, saying:

Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as relevant circumstance in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.<sup>1053</sup>

809. Based upon NAFTA Article 1131(1), the FTC Note must be applied "in accordance with... applicable rules of international law."

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<sup>1051</sup> Notes of Interpretation of Certain Chapter 11 Provisions, Part B. (*Investors' Book of Authorities at Tab CA 43*)

<sup>1052</sup> *United Parcel Service of America*, UNCITRAL, Decision on Jurisdiction rendered on 22 November 2002 (Keith, Fortier, Cass), para. 96. (*Investors' Book of Authorities at Tab CA 144*)

<sup>1053</sup> *Pantechniki v. Albania*, Award, 20 July 2009, at para. 81 (quoting A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties* 310 (2009)). (*Investors' Book of Authorities at Tab CA 148*).

810. Canada's *Statement on Implementation* provides that Canada always intended that the *Vienna Convention* apply to all "Notes" to the NAFTA.<sup>1054</sup> Article 31(3) of the *Vienna Convention* requires that treaty interpreters shall *take into account, together with the context of the treaty*, all subsequent agreements, subsequent practice, relevant rules of international law applicable as between the NAFTA State parties regarding the interpretation and application of the NAFTA. Thus, when interpreting the FTC Note, NAFTA Tribunals are bound to take into account, *together with the context of the treaty*, all NAFTA provisions in the light of the objectives and in accordance with applicable rules of international law.

811. Article 1 of the *ILC Articles on State Responsibility* confirms that mere failure to provide the international law standard of treatment is a breach of international law. The Article says:

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 12 of the *ILC Articles on State Responsibility* states:

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

812. In *Pope & Talbot*, the Tribunal said:

Canada considers that the principles of customary international law were frozen in amber at the time of the *Neer* decision. It was on this basis that it urged the Tribunal to award damages only if its conduct was found to be an "egregious" act or failure to meet internationally required standards. The Tribunal rejects this static conception of customary international law for the following reasons: First, as admitted by one of the NAFTA Parties, and even by counsel for Canada, there has been evolution in customary international law concepts since the 1920's...Secondly, since the 1920's, the range of actions subject to international concern has broadened beyond the international delinquencies considered in *Neer* to include the concept of fair and equitable treatment....<sup>1055</sup>

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<sup>1054</sup> *Statement on Implementation*, at 76 ("Paragraph 2 of article 102 affirms a basic provision of customary international law regarding the interpretation of international agreements as set out in the *Vienna Convention on the Law of Treaties*. The Parties shall interpret and apply the provisions of the Agreement in the light of its objectives and in accordance with applicable rules of international law. For example, the "Notes" to the Agreement that follow the main body of the text set out agreed interpretations on various provisions of the Agreement, and thus are essential to an accurate understanding of the text.") (*Investors' Book of Authorities at Tab CA 45*).

<sup>1055</sup> *Pope & Talbot, Damages Award*, May 31, 2002 at para. 57-65. (*Investors' Book of Authorities at Tab CA 39*). A similar conclusion was reached in *S.D. Myers Partial Award*, November 12, 2000 at para. 259. (*Investors' Book of Authorities at Tab CA 6*).

813. The *Mondev* Tribunal followed a similar approach. The Tribunal rejected the application of the *Neer* standard to investment protection cases because *Neer* did not deal with foreign investment but rather a state's duty to investigate crimes:

The Tribunal would observe, however, that the *Neer* case, and other similar cases that were cited, concerned not the treatment of foreign investment as such but the physical security of the alien. Moreover the specific issue in *Neer* was that of Mexico's responsibility for failure to carry out an effective police investigation into the killing of a United States citizen by a number of armed men who were not even alleged to be acting under the control or at the instigation of Mexico. In general, the State is not responsible for the acts of private parties, and only in special circumstances will it become internationally responsible for a failure in the conduct of the subsequent investigation. Thus, there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the *Neer* principle in respect of the duty of protection against acts of private parties affecting the physical security of aliens present on the territory of the State, are confined to the *Neer* standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself.<sup>1056</sup>

814. The Tribunal also rejected the *Neer* standard as being inapplicable to contemporary international law. The Tribunal stated:

Secondly, *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms - had they been current at the time - might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.<sup>1057</sup>

The *Mondev* Tribunal's rejection of Canada's argument was subsequently approved in *Tecmed*<sup>1058</sup> and was also followed by the NAFTA Tribunal in *Merrill & Ring v. Canada*.<sup>1059</sup>

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<sup>1056</sup> *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 2002 WL 32841359 (October 11, 2002) at para. 115. (*Investors' Book of Authorities at Tab CA 40*).

<sup>1057</sup> *Mondev* at para. 116. (*Investors' Book of Authorities at Tab CA 40*).

<sup>1058</sup> *Tecmed* at para. 154. (*Investors' Book of Authorities at Tab CA 79*).

<sup>1059</sup> *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL Arbitration, Award (March 31, 2010) (*Investors' Book of Authorities at Tab CA 41*).