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

BETWEEN:

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

Claimants

- and -

GOVERNMENT OF CANADA

Respondent

ARBITRATION HELD BEFORE
JUDGE BRUNO SIMMA (PRESIDING ARBITRATOR),
PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ
held at ASAP Reporting Services Inc.,
Bay Adelaide Centre, 333 Bay St., Suite 900,
Toronto, Ontario
on Thursday, October 31, 2013 at 9:00 a.m.

VOLUME 8A - PUBLIC

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Toronto, Ontario

--- Upon resuming on Thursday, October 31, 2013 at 9:00 a.m.

PRESIDING ARBITRATOR: I think we're all set. Good morning to everybody. I will open the eighth and last day of hearing. There doesn't seem to be any procedural issue to be decided or, right now, so without further ado I give the floor to the claimant. Mr. Nash, you have the floor.

SUBMISSIONS BY MR. NASH:

MR. NASH: Thank you, Mr. President, Members of the Tribunal and good morning.

During the course of my presentation, which will focus on the facts of this case, we will be putting some slides up on the screen and hard copies of those slides will be provided to you subsequently.

Mr. President, Members of the Tribunal, the testimony of the witnesses you have heard over the last seven days confirms that everything we said in our opening was true.

And the story of what happened to Bilcon is not only true, it's clear and simple. We

said in our opening that the Bilcon story is a story of arbitrary standards selectively enforced in the service of political expediency, rather than public integrity.

Taken alone, any part of the factual matrix we have seen may appear to be innocent. Taken together, the parts lose the veneer of a regulatory process motivated by laudable federal-provincial cooperation and harmonization, and paint what we submit is a disturbing picture of systemically unfair and unlawful regulatory conduct.

The evidence before you shows unequivocally and conclusively what was really going on. And what really happened.

Canada has portrayed the claimants' case as being a tall tale. It is far from a tall tale.

Canada's picture confuses political expediency with lawful harmonization. And respectfully, it confuses what was actually going on with a simple 3.9 hectare quarry with what was contemplated for a possible future larger quarry.

It confuses a contrived

interpretation of the word "project", and I say that in quotes, with actual legislative and constitutional authority.

And it also confuses the ordinary statutory authority of public officials to do specific things in specific circumstances in good faith with a carte blanche licence to do anything they want, to withhold information at will, and to abuse the authority entrusted to them.

But overall what Canada does say is much less important, we submit, than what it does not say.

Canada is conspicuously silent on the two fundamental issues of this case.

First, Canada ignores the fundamental legal duty and responsibility of all public servants who exercise any statutory or discretionary authority, to do so fairly, reasonably, and in good faith.

The second thing Canada ignores is the constitutional limitations on all federal and provincial legislative authority. These are not issues of technicality or semantics; these two omissions in Canada's presentation go to the heart of this case, and both of these omissions go to the

heart of the rule of law.

The rule of law, which as we've heard is the bedrock of international law, is also the bedrock of all Canadian law. It applies at all times to all public servants, be they elected officials or civil servants.

And the rule of law in international law and domestic law is what this case is fundamentally about. I will address it first in the context of domestic law where it forms a critical part of the factual matrix of the case, and my colleague, Mr. Appleton, will then address it in the context of the law applicable to the resolution of the case under the NAFTA.

At its essence, the rule of law is as simple as the basic facts of the case. It applies to the exercise of all public authority. It says that no public authority, no matter how discretionary it may be, is unfettered.

Put simply, the rule of law requires that all public authority must be exercised fairly and in good faith, on the basis only of relevant considerations assessed reasonably, honestly, objectively, transparently, and impartially, and only for the purpose for which

the authority was granted.

Anything else or anything less is an abuse of authority and an abuse of public trust. That makes any resulting act or decision a breach of jurisdiction, and is therefore ultra vires.

The unquestionable meaning and practical application of these bedrock principles was eloquently reviewed in these proceedings by Professor Rankin. They not only emanate from the Supreme Court of Canada, but are clearly reflected in the Values and Ethics Code for the Public Sector of the Government of Canada and the Values, Ethics, And Conduct Code for Nova Scotia's Public Servants.

And every one of Canada's witnesses acknowledged that these bedrock principles prescribed what was at all times expected of them and indeed of all public servants.

What these basic principles of fairness, reasonableness and good faith required of all public servants is the first fundamental fact in this case that Canada ignores. The second fundamental fact that Canada ignores is that the Canadian Constitution divides legislative authority between the federal and provincial governments.

The basic corollary is that one level of government cannot usurp or trench on the legislative authority of the other and neither can give to itself or confer on the other a legislative authority it does not actually have.

Applied to this case, this fundamental constitutional principle means that each government could only conduct an environmental assessment of a project or an undertaking if it, or any component of it, lawfully claimed within its legislative authority.

The basic principle is clearly explained in the federal government officials, to the federal government officials in their annotated guide to the Canadian Environmental Assessment Act, referred to by Professor Rankin and accepted as an authority yesterday by Mr. Smith.

As the CEAA guide explains, industrial activity that affects rivers and oceans which are habitat for fish and marine life generally comes under federal legislative authority, and industrial activity on land generally comes under provincial legislative authority.

Since a marine terminal requires

construction in the water, the federal government in this case had three possible triggers for an environmental assessment of the marine terminal. One was under the Navigable Waters Protection Act for a permit to construct the marine terminal, section 5 of that Act.

The other two were under sections 32 and 35 of the Fisheries Act, if the marine terminal would, respectively, kill fish or destroy fish habitat.

Since the quarry was on land, the federal government had prima facie no legislative authority over the quarry. Theoretically, it might have had two possible triggers to conduct an environmental assessment of the quarry. Also, under sections 32 and section 35 of the Fisheries Act, if -- but only if -- some land-based activity on the quarry would kill fish or destroy habitat, fish habitat.

Otherwise, it could not lawfully include the quarry in its environmental assessment of the marine terminal and that is a fundamental point to the submissions of the claimants in this case.

As reviewed in detail by both

Professor Rankin and Mr. Estrin in their expert reports and in their testimony, Canadian jurisprudence regarding constitutional jurisdiction is conclusive and unequivocal. The existence of actual triggers -- both federally and provincially -- must in fact be real. The Supreme Court of Canada and the Federal Court of Canada in the Red Hill case made it absolutely clear that no pretext of a trigger is sufficient.

And any action taken by public officials on the pretext of a trigger is unlawful and ultra vires. And I quote from the Red Hill's case:

> "The federal government may not use 'the pretext of some narrow ground of federal jurisdiction to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction.'
>
> "The Environment Minister's decision to refer this project was not supported by a valid head of power and

thus was ultra vires."

For its part, Nova Scotia could only conduct an environmental assessment of the quarry if it had a trigger under its provincial legislative authority.

As we've heard, quarries under four hectares were exempted from environmental assessments, pursuant to the provisions of the Nova Scotia Environment Act.

Mr. Petrie's evidence and the Nova Scotia proponent's guide and other documents are clear. Nova Scotia could only commence an environmental assessment of a quarry larger than four hectares once the registration document was registered under the Act.

At the time Minister Anderson referred the Bilcon marine terminal and the Bilcon quarry to a joint review panel, federal officials in both the DFO and CEAA knew that no lawful basis had been established to include the quarry in a federal environmental assessment of the marine terminal.

And since Bilcon had not yet registered any quarry under the Nova Scotia environment act, the Nova Scotia officials involved

also knew that there was no lawful environmental assessment of the quarry underway in Nova Scotia and that they had no lawful trigger under provincial legislation to start one.

The 3.9 hectare quarry was exempt and no registration for the larger quarry was filed until 2006.

Canada chooses, respectfully, to overlook these facts and to ignore the basic underlying fact of the constitutional infrastructure that governed the legislative jurisdiction of Canada and Nova Scotia in this case.

Canada also, I say respectfully, chooses to ignore the basic underlying fact that regardless of what federal or provincial legislative authority the public officials involved purported to act under, all of their actions and all of their decisions were subject to an absolute legal duty to exercise their public authority fairly, reasonably, and in good faith.

The manifest failure of the public officials involved to respect and adhere to these two fundamental principles that Canada has tellingly chosen in this arbitration to ignore

makes everything done by these public officials unlawful, ultra vires at each and every step of the way.

I will turn to step 1 which is the insertion of conditions 10(h) and (i) into the approval for the 3.9 hectare quarry.

Step 1 was when Mr. Petrie imposed conditions 10(h) and (i) into his otherwise ordinary industrial approval of the 3.9 hectare quarry at the behest and request of the DFO. As I've said, quarries in Nova Scotia under four hectares were entirely exempt from any kind of environmental assessment under Nova Scotia's Environmental Act.

Mr. Petrie knew it and the DFO knew it, too, they also knew that Nova Scotia did not have any legislative authority to regulate over fish or marine mammals.

They also knew that Canada did not have a legislative trigger for an environmental assessment until a wharf was applied for. And that was clear in an email we will cite in this opening when we deliver the annotated copy.

Condition 10(h) required blasting to conform with the published federal blasting

guidelines, the Dennis Wright guidelines, which required a blasting setback of 35.6 metres and we saw the calculation of that under the guidelines, 35.6 metres under the shoreline, from the shoreline.

The Nova Scotia blasting guidelines only required a setback of 30 metres.

While condition 10(h) was not unreasonable or inappropriate taken in and of itself, it was nonetheless superfluous as Bilcon was proceeding responsibly and had always intended to comply with all lawful federal and provincial blasting guidelines and conditions.

And the blasting plan it submitted for what Mr. Petrie acknowledged in an email was a "test blast" clearly showed that it was in full compliance with both the provincial conditions and the federal blasting guidelines.

Condition 10(i), however, was clearly ultra vires. It required Bilcon to prove by way of a report -- not to Nova Scotia, but to the DFO in advance of any blasting -- that the blasting would have no adverse effect on marine mammals. And the DFO had to provide written acceptance before blasting could commence.

That turned out, in this case, to be check mate.

Apart from the practical impossibility of proving such a negative, Mr. Petrie thereby not only fettered his discretion but he completely abdicated all of his discretion and responsibility to the federal DFO.

Mr. Petrie thereby gave a veto to DFO to prevent any blasting on an ordinary Nova Scotia 3.9 hectare quarry, when he knew and DFO knew that the federal government had no legislative authority whatsoever over the quarry, and when compliance with the only lawful provincial conditions in the April 30th, 2002 approval was readily achievable.

The DFO veto was much later confirmed to Mr. Buxton by the then Nova Scotia Minister of Environment and Labour who wrote in reference to conditions 10(h) and (i) that and I quote:

> "...it would not be appropriate to remove these conditions without DFO's consent."

And the Tribunal will recall that

DFO officials were told that condition 10(i) meant what it said, and moreover, that they could not accept a blasting plan from Bilcon unless the Minister's office approved.

> "I have been advised by the Minister's office that we are not to accept a report..."

I am quoting here from Mr. Surette.

> "...a report on the effects of blasting on marine mammals as per section (i) of item 10 of the Nova Scotia approval issued April 30th until such time as the Minister's office has reviewed the application."

While there was, with respect, a modest and self-serving retraction in a subsequent email by Mr. Surette, the message could not have been clearer. The climate was clearly established and the temperature had been set.

The Tribunal will also recall that Mr. Petrie was asked by the DFO to insert condition 10(i) into his approval of a 3.9 hectare quarry on

the basis and only on the basis that Mr. Conway, the DFO's marine mammal expert, had expressed a concern about the effect that blasting at the quarry might have on marine mammals.

It was rather interesting during the course of this hearing to hear testimony in this proceeding that Mr. Conway's credentials were somehow not quite sufficient to allow him to declare that condition 10(i) had been satisfied, when his concern was all that was required to have the condition imposed.

Mr. Petrie testified here that he himself then expanded the DFO request and you will recall the handwritten note on the email from Mr. Jollymore, which is April 26th, 2002, where Mr. Petrie added words to the condition which, when read fairly, absolve him from any responsibility for ever allowing blasting on the 3.9 hectare quarry by deferring completely to the DFO.

Mr. Petrie also confirmed at this proceeding that condition 10(i) was designed to deal exclusively with concerns about marine mammals and had nothing to do with fish.

From that moment forward, however, the federal DFO used Mr. Petrie's condition 10(i)

to prevent the Bilcon quarry from proceeding. As Neil Bellefontaine testified, the DFO viewed and treated Bilcon's 3.9 hectare quarry more stringently based on the fact that someday it might become a larger quarry.

But Bilcon was never informed that from the very beginning the DFO was conducting a stealth environmental assessment of its test quarry and again without any legal authority.

It is a basic axiom, we submit, of delegated authority that the person to whom the authority is delegated must himself fairly, reasonably, and in good faith exercise the discretion delegated to him. The deferral of the exercise of discretion to another authority, let alone to another government, is a fetter on the necessary personal exercise of discretion and is fatal to the legal validity of any resulting act or decision.

By his own conduct and his desire to avoid responsibility, Mr. Petrie not only fettered but totally abdicated all of the discretion he was required to personally exercise resulting in a fundamental breach of lawful provincial jurisdiction from the very beginning of

the Bilcon saga.

I will turn now to the second step, which we entitle: "Deception and concealment."

The next unlawful step was the deliberate deception and concealment by DFO and CEAA officials which, from the outset, obviated lawful federal jurisdiction as well.

Within two weeks of Mr. Buxton submitting the first blasting plan in September of 2002, Dennis Wright, the DFO blasting expert and co-author of the federal blasting guidelines, had provided Mr. Ross with mitigation measures that would have permitted Bilcon to commence blasting immediately at the 3.9 hectare quarry.

Mr. Wright wrote:

> "The explosive guidelines are designed chiefly to protect fish. The easiest mitigation is -- if whales are present within visual limits (about 1 kilometre) the blast is to be delayed until the whales vacate that perimeter."

Following Mr. Wright's

recommendations for mitigation, Bilcon should have been allowed, at a minimum, to conduct monitored test blasts on the 3.9 hectare quarry starting on October 1st, 2002.

By December 2nd, 2002 Mr. Conway confirmed to Mr. Ross that he had no concern about the effect that blasting at the quarry might have on marine mammals. He wrote simply and clearly that:

> "In respect to the Whites Cove blasting plan, based on the information provided and the undertakings that the proponent is prepared to take, I have no concerns in respect to marine mammal issues in respect to this specific proposal."

Without any doubt, then, by December 2002 there were, in fact, no legitimate lingering DFO concerns about blasting at the quarry.

But instead of transparently sharing the information from Mr. Wright and Mr. Conway with Mr. Petrie and Mr. Buxton that the

information the DFO had that there was, in fact, no concern about the effect that blasting at the quarry might have on marine mammals, the DFO repeatedly asked Bilcon for more and more information, setting up one road block after another in Bilcon's way in the conduct of their stealth environmental assessment.

None of this was about an open, transparent, honest and fair process. It was all about hindrance, obstruction and delay.

And it all of course culminated in the establishment of the 500 metre setback which appears, on the very limited evidence Canada has made available, to have been concocted in a matter of days.

To justify the 500 metre setback the DFO purported to have a computer simulation, a model which Mr. Buxton was told he could review. This is in June of 2003. Despite his repeated requests -- and there were three of them; one on June 6th, one on June 16th, and one on July 21st, which Mr. Buxton was told he could review, but despite his repeated requests the calculations generated by the model were never provided to him, and were not produced in this arbitration. They

have never been produced -- it is telling that Mr. Wright, apparently the most authoritative federal official on blasting near Canadian waters, was not the official who, at the critical time, in June, May-June of 2003 doing the modelling and calculations during that period, after having provided his frank advice and recommendations earlier in September 2002.

However, in the event, we now know that he advised the DFO that the I-Blast model -- which the DFO told Mr. Buxton it was relying on -- was not appropriate because it was designed for blasting in water, not on land.

He was satisfied that a setback of about 100 metres would be sufficient to account for the possible presence of iBoF.

But once again, the DFO withheld this critical information from Bilcon.

In the result, the DFO and CEAA knew, before the Bilcon quarry was referred to a Joint Review Panel, that it had not established, on any remotely scientific basis, that there was a lawful trigger for any federal environmental assessment of the quarry.

To be lawful, the actions and

decisions of the federal officials involved had to be made fairly, reasonably, and in good faith, on the basis of objective, measurable and transparent science.

Canada invites the Tribunal to suspend your disbelief and to conclude that DFO officials actually had the science to support their professed conclusions, but there is no evidence whatsoever in this arbitration on the record of any science to support the so-called "conclusions or beliefs" DFO officials had or had made to support their referrals by Minister Thibault and by Minister Anderson.

The absence of any evidence of science and scientific assessment compels one to draw one of two possible conclusions: Either Canada had evidence of scientific analysis and assessment and chose not to disclose it; or there never was any real science.

One suspects the latter, but in any case, Canada has not satisfied the burden on it to show that DFO officials had a reasonable, good faith basis on which to conclude that there was a real possibility of any significant adverse environmental effects from the quarry engaging a

federal interest, or, frankly, from the marine terminal, let alone any significant adverse environmental effects that could not be mitigated.

Their actions and their decisions and Ministerial decisions which followed were, therefore, also wholly unlawful and ultra vires.

Excuse me for a moment, Mr. President. I turn now to step 3, I will come back to the completion of step 2 in a moment.

Step 3 is the referral to the Joint Review Panel. The third unlawful step was the referral of the Bilcon quarry to a Joint Review Panel. At the time the referral to a Joint Review Panel was being concocted, both the federal and provincial officials knew:

That the 3.9 hectare quarry was not subject to any environmental assessment at all in Nova Scotia, because it was smaller than four hectares;

That blasting at the quarry with appropriate mitigation measures would in fact have no adverse effect on marine mammals;

That a 500 metre setback for blasting was wrong and completely unnecessary, and that a 100 metre setback was entirely sufficient;

That there was no scientific basis on which to conclude that any iBoF salmon would be harmed by blasting beyond the 100 metre setback from the shoreline;

That there was no reasonable good faith basis on which to refer the marine terminal to a federal review panel, because there was no basis, even without taking mitigation measures into account, to conclude that the marine terminal would cause significant adverse environmental effects;

That the federal government had no reasonable good faith basis to scope the quarry into any environmental level of environmental assessment of the marine terminal;

That a federal assessment of the quarry was "required", and we saw that word used throughout the documents, that there would need to be a requirement for a federal assessment;

That Nova Scotia was responsible for the assessment of the larger quarry, that an environmental assessment in Nova Scotia of a larger quarry than four hectares was commenced by registration, and that no registration of a larger 158 hectare quarry or any quarry had taken place and did not take place until 2006;

That Nova Scotia therefore had no legislative authority to initiate an environmental assessment of the large quarry;

That there was in fact no environmental assessment of the quarry going on in Nova Scotia, and that the federal government had no legislative trigger for any environmental assessment of the quarry;

That Nova Scotia had not fulfilled the statutory preconditions to enter into an agreement with Canada pursuant to sections 47 and 48 of the Nova Scotia Environment Act;

With the result that there was no lawful basis, either federal or provincial, for any referral to a Joint Review Panel.

And the agreement between the Ministers purportedly made under section 42 -- 40, 2 of the Canadian Environmental Assessment Act and sections 47 and 48 of the Nova Scotia Environment Act could not remedy that fatal flaw.

As Mr. Rankin, as Professor Rankin explained, and I quote:

> "The federal government's involvement under CEAA must be related to a federal

> trigger. If ... they knew there was no such trigger and yet they still proceeded to a Joint Review Panel, that would be improper in the extreme. There would be no basis for it."
>
> "QUESTION: And can an agreement between Ministers create jurisdiction?
>
> "ANSWER: Absolutely not."

The legal test under the CEAA for referral to a review panel was the same for the federal officials proposing or endorsing the referral as it was for the federal Ministers making the referral.

The statute required that "after taking mitigation measures into account" it was likely that the project would cause significant adverse environmental effects and the rule of law required that the decisions of the Ministers, as well as the decisions of the officials, were made fairly, reasonably, and in good faith under, and under legislative authority that was within their legislative jurisdiction.

The law also required that the science justifying a referral to a Joint Review Panel had to be real and not illusory, as the Federal Court wrote in Red Hill:

> "This is not to say that scientific certainty is required ... for a referral to a panel review to be properly grounded. However, there must be a valid basis on which to conclude that a real possibility exists that a panel would be able to conclude that, in this case, there would be a significant adverse effect on migratory bird preservation. In this case there would be a significant adverse environmental effect on fish or fish habitat caused by blasting or other activity on the quarry. That necessary condition to engage the process was absent. The

> necessary relevant information was noted to likely be unavailable for a long time and might never be available."

I am quoting there from the Red Hill case.

The evidence in our case is replete to the contrary.

The federal officials in the DFO and CEAA knew that the only trigger the federal government had was to undertake an environmental assessment of the marine terminal, and that an environmental assessment of a marine terminal was ordinarily a comprehensive study. Indeed, in the history of Canada, there has never been an environmental assessment of a marine terminal alone that was referred to a review panel.

DFO and CEAA officials also knew that the law required and their policy mandated that they scope to their trigger, which was limited to the marine terminal, and that since they had no trigger for the quarry, there was no legislative authority to include the quarry in any federal environmental assessment.

Examples of extracts from the documents and evidence show the DFO and/or CEAA officials confirming:

> "This is like Red Hill where DFO trigger was section 35 for realignment of a stream but we scoped in Hwy too ... Judge ruled we had no regulatory authority over the highway & therefore were abusing the CEAA process."
>
> "We have NWPA, FA section 35 & probably section 32 trigger for marine terminal but no trigger for quarry. Therefore limit scope of project to terminal."
>
> "...it is easy to explain why quarry isn't scoped in i.e. we don't have the legal mandate to keep it in -- no trigger."
>
> "Don't need to scope-in the quarry no DFO triggers. ...scope to our

triggers -- would be wharf and what they need to do to build it."

"In fact, DFO has since revised its blasting calculations and determined that it does not have a section 32 trigger."

That quote is from Mr. McDonald's journal on August 13th, 2003.

This was not a debate going on with DFO as it's been portrayed here. It was a clear expression of DFO's practice and a clear expression of the law.

The evidence is also clear that the reason for the federal officials doing what they did and for which they had no good basis or reason or legislative authority, was political. They supported and expedited Minister Thibault's referral to a Joint Review Panel to "take pressure off the Minister's shoulders during the summer months in view of the upcoming provincial election in Nova Scotia."

"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, and the announcement of a joint panel review is of the nature to take a lot of public pressure off the Minister's shoulders for the summer months."

There is no evidence that the DFO and CEAA officials ever told Minister Thibault or Minister Anderson that the information they were relying upon for the referral to a Joint Review Panel was either wrong, the 500 metre setback, or did not exist.

According to Mr. Chapman, Minister Anderson was, in any event, simply a conduit who had no choice but to do what Mr. Chapman and the DFO had set him up to do.

He said this was because section 21(b) of the Canadian Environmental Assessment Act contained no express standards for a referral by the Minister to a JRP. Therefore, it goes,

regardless of there being wrong or no science, regardless of whether there was a trigger for the quarry or not, the Minister had no choice to make -- and I am referring here to Minister Anderson -- in his assessment.

Not only do we submit that defies common sense and the evidence of Mr. Connelly and Mr. Smith, it also defies the absolute legal requirement of fairness, reasonableness and good faith and plainly defies the statute itself.

Section 21(b) is not to be read in a vacuum. It provides for a referral to the Minister. The Minister's obligations are then prescribed in section 3, sorry, 23. As Mr. Estrin clearly explained:

> "QUESTION: So section 21 gets it to the Minister of Environment?
>
> "ANSWER: Correct.
>
> "QUESTION: Section 23 gets it to the review panel?
>
> "ANSWER: Yes."

In the result, there was no lawful basis for either the federal government or the Nova Scotia government to refer an environmental

assessment of the quarry to a Joint Review Panel. As Professor Rankin answered clearly, an agreement between the Ministers could not confer upon either the federal or provincial government a legislative or constitutional authority they did not have. From start to finish, the referral to the Joint Review Panel was, therefore, unlawful and ultra vires.

The decision in the MiningWatch case made no change to the constitutional infrastructure of legislative authority. MiningWatch does not stand for the proposition that the federal government can go beyond its legislative authority to scope in a quarry that is not within its legislative jurisdiction. Indeed it stands for the opposite. It simply affirms another basic jurisdictional axiom, which is that delegated authority must actually be exercised by those to whom it is delegated.

And those to whom it is delegated have no discretion to change the authority delegated to them.

Since the proposed project in Mining Watch was by regulation on a list of projects requiring comprehensive study, the DFO

could not decide that it only wanted to do a screening.

This hearing has also made clear that the story of what happened in this case has only partly been told, and it calls for an explanation from the officials who were actually dealing with the quarry.

In addition to providing no evidence of any real science to support the purported conclusions of the DFO, it is instructive that Canada has sheltered from this arbitration the bureaucrats and scientists who could shed light on what actually happened in the process. To cite a number of names by way of example, Jim Ross, Derek McDonald, Tim Surette, Phil Zamora, Paul Boudreau, Jerry Conway, Brian Jollymore, and Jim Leadbetter, and there are many, many others have not provided any evidence to this Tribunal as to what science they had and why they did what they did.

From DFO we have heard from Mr. Hood, Mr. Bellefontaine, and Mr. McLean, none of whom were actually dealing with the issues at hand. Mr. Hood was in Ottawa receiving information from the region which he said he relied upon. Mr. Bellefontaine, I will describe by way of

summary was at 30,000 feet.

The officials on the ground have not been here. In fact, Mr. McLean, although he refers to "we at DFO", had one contact with this file during his exchange from NSDEL.

The real players have not been available for cross-examination and Canada's witnesses who have appeared have repeatedly told the Tribunal that only DFO scientists could provide an explanation for concerns raised by the DFO about adverse effects of fish and marine mammals at the quarry.

The investors can be forgiven for asking: Where are the scientists? Where are the documents? Please show us the science.

Step 4 in our submission is the panel process. The panel's review process and resulting report then itself became unlawful and ultra vires. The test which the review panel was required to apply to its assessment of the Bilcon quarry was mandated by its terms of reference and the legislative infrastructure from which those terms were derived.

As the Tribunal heard, Mr. Chapman acknowledged, the panel was required to assess

whether the Bilcon quarry would result in any "significant adverse environmental effects" that could not be mitigated with appropriate mitigation measures.

And, of course, the same universal rule of law principles required the panel to give effect to its mandate fairly, reasonably, and in good faith.

Both the conduct of the panel in the course of its review and the panel's report manifestly failed to give effect to these mandatory principles.

The environmental impact study prepared by Bilcon was composed of 35 expert reports, seven volumes of detailed responses to additional information requests from the panel, and two volumes of undertakings made to the panel in the course of its hearing process, as well as a summary of expert findings and impact summary and a commitment table.

It cost millions of dollars to put together that EIS, millions of dollars. Nineteen of the experts attended the public hearings to answer any questions from the panel.

Contrary to Mr. Smith's evidence

yesterday, AMEC prepared an extensive report which was filed with the EIS specifically on socioeconomic conditions.

The socioeconomic analysis was prepared by a leading expert, Susan Sherk. In its report the panel largely ignored the facts and science presented to it, and did not base its report on any scientific or objective assessment of the information provided to it, instead basing its recommendations on a subjective view of what it described as core values or beliefs and its purposeful view that the Government of Nova Scotia should change its legislative policy and implement a coastal zone policy, prohibiting any quarries on the coast line.

The notions of core values and beliefs are unknown, are not standards or factors known to environmental law. And they were not in the panel's terms of reference.

The panel gave no notice to Bilcon that it would consider core values or beliefs, and the panel gave Bilcon no opportunity ever to address these notions.

Core community values was not in the panel's terms of reference and is not a

measurable and mitigable environmental effect within the meaning of either the Canadian Environmental Assessment Act or the Nova Scotia Environment Act.

The panel's recommendations came down to personal beliefs about philosophy and politics, and in the result, the panel's report failed to give effect to its legal mandate, and its recommendations were outside the scope of the panel's terms of reference, which were themselves unlawful and ultra vires.

It is ironic that the panel chairman also chaired the panel that approved the major Sable Gas pipeline project which we heard about yesterday. There he insisted on actual evidence of adverse effects on the community and the panel concluded they were entirely mitigable.

> "The panel appreciates the high value that rural residents place on their lifestyle, and the fear that the pipeline could undermine this lifestyle. However, the Panel is not convinced that a properly designed,

constructed and maintained pipeline would have the significant adverse effects that some intervenors fear."

Throughout the hearing process the panel was, also manifested a profound bias against the Bilcon quarry and against Bilcon as an American company. It demonstrated its palpable disdain for Bilcon to everyone present and the panel chairman swivelled his chair and turned his back to Mr. Buxton when Mr. Buxton was speaking.

Former Minister Thibault himself appeared at the panel's hearings and made it clear that a reason for his opposition to the quarry was that Nova Scotia rock would be exported to the United States.

The panel's bias against Bilcon as an American company was apparent during the panel's conduct of the hearing, and the panel ignored supporters of the quarry and, in the end, upheld the anti-American bias of the Minister who had unlawfully referred the quarry to a panel review in the first place.

In the result, not only was the panel's report ultra vires the scope of its

mandate, ultra vires the scope of its mandate, but the conduct of the hearings was in itself unfair unreasonable and lacking in good faith.

I will turn now to step five, the Minister's decisions.

The final unlawful steps in the Bilcon saga were the decisions of the federal and provincial Ministers to accept the recommendations of the panel and to respectively deny their approval of the Bilcon quarry.

Before the provincial and federal Ministers made their decisions to deny approval, Bilcon asked each of them for an opportunity to make representations about the fundamental procedural and substantial flaws in the panel's process and the errors in the panel's report.

Both Ministers denied Bilcon the opportunity to make those representations.

Before the provincial Minister decided to not approve the Bilcon quarry, on the basis of accepting the panel's report and recommendations, his own officials had prepared a presentation for him showing that six of the seven panel's recommendations were "outside the scope of the panel's terms of reference".

The provincial Minister nonetheless made his decision without giving the claimants an opportunity to make representations about this vital decision affecting their rights and their investment.

As Professor Rankin observed, the federal and provincial Ministers were the actual statutory decision-makers and for them,

> "...not to give the opportunity to be heard, in these circumstances, strikes me as contrary to natural justice. Simply writing a couple of letters and having the Minister, provincial, say that I've read them carefully, isn't natural justice."

It is an elementary principle of administrative law that the rules of natural justice apply to the Minister's decisions.

They would of course not apply directly to other participants in the panel's public hearings as the hearings were about the proponent's proposal. They were not a general

public debate about policy.

In the result, the decisions of both Ministers were also fatally flawed in law and ultra vires.

And I will turn now to a discussion of what we call step 6, which is the result.

And we submit that an abuse of discretion, however, can never be justified or form the basis of a reasonable policy. As Professor Rankin put it in his testimony to this Tribunal:

> "Rule of law is one of the fundamental components, the cornerstones of the Canadian Constitution. The rule of law requires consistent behaviour and people being able to plan for their lives on the basis of decisions that are made within jurisdiction and in good faith. Good faith is understood to be what the rule of law connotes. Otherwise, it is an abuse of

discretion that the courts have been resolute, ever since Roncarelli v Duplessis, is one of the cornerstones of our democracy."

Every year, the federal government conduct thousands of basic screenings on environmental matters. From 1995 to 2003 there were approximately 60,000 environmental assessments conducted by the federal government.

Of those, only 11 were referred to joint review panels, including the Sable Gas project involving offshore platforms and hundreds of kilometres of pipelines in the ocean and across two provinces.

Those are the kind of projects which are intended to be dealt with at the highest, most complex level of environmental assessment.

Any sort of review by a panel is rare. A Joint Review Panel is rare in the extreme.

Aside from the Bilcon quarry, under the CEAA there has never been a marine terminal and quarry referred to a Joint Review Panel and there has never been, in Canada, a marine terminal alone referred to a review panel. And

there has never been a quarry in Canada referred to a review panel.

One cannot imagine greater serendipity to underscore the different way the Bilcon quarry was treated by DFO and NSDEL in the same environmental assessment regulatory regime than to compare it to Tiverton, located a mere ten kilometres down the road from Whites Point.

In 2003, both quarries had approvals for quarries under four hectares. Both involved blasting on land near Canadian fisheries waters. Blasting at Tiverton commenced before the approval was given; blasting was never allowed on the Whites Point 3.9 hectare quarry.

At Tiverton, the officials expressed no concerns about whales or iBoF in blasting for the Tiverton quarry. Nor did the DFO request the inclusion of whale- or fish-related conditions in the provincial approval to give them a veto over the project or insist on a 500 metre setback requirement.

The Tiverton harbour project ultimately involved blasting in the water and the destruction of 21000 square metres of fish habitat for constructing a breakwater that was

approximately 213 metres long, five metres wide at the crest, and approximately 50 metres wide at the base compared to in Whites Point 130 affected metres for the marine terminal.

Unlike Whites Point, though, Tiverton involved federal funding. So bureaucrats from both levels of government rushed to meet the funding deadline, ignoring all applicable scientific and procedural considerations.

The decisive difference between these two projects is that for Tiverton Minister Thibault called asking if there was anything he could do to speed up the process. At Whites Point Minister Thibault wanted the process dragged out as long as possible.

At the time the Whites Point quarry and marine terminal was being assessed by the DFO, its policy defended repeatedly aggressively and successfully right up to the Supreme Court of Canada was to scope to the trigger.

That meant, regardless of whether the proposed project was listed on the Comprehensive Study List, the DFO would only review those specific components that engaged its

jurisdiction, typically only conducting a screening.

For example, in Prairie Acid Rain Coalition and Canada, the proponent TrueNorth announced its plan for an oil sands mine. The proposal revealed that the project would divert a creek bed, causing the destruction of fish habitat.

Rather than scoping the entire tar sands project which was listed on the Comprehensive Study List into its review, the DFO merely conducted a screening of the creek. This was challenged by environmental activists groups, but the DFO successfully defended its decision in court.

Before this Tribunal, however, Mr. Hood suggested that the DFO was somehow engaging in an internal debate about different opinions on scoping policy. In fact, with the exception of Red Hill, between 1995 when the CEAA came into effect and the referral of the Bilcon quarry to a JRP, the Tribunal will look in vain to find a single case where the DFO did not scope to its trigger and none has been cited to you by Canada.

Mr. Hood himself articulated DFO

policy at the time in reference to the Bear Head LNG project -- which we discussed yesterday:

> "There is no requirement for DFO approvals of the land-based LNG plant and therefore no CEAA trigger for DFO to conduct an assessment of this portion of the proposal.
>
> "Based on the above, and our present practice of project scoping to DFO legislative authority, our recommendation is that you restrict the scope of project to the marine infrastructure portion of the proposal and that a screening level assessment of this portion be conducted."

That quote is from an email which is a mere four or five months after the referral of the Whites Point quarry to a joint panel review.

And this policy was faithfully applied by the DFO to Belleoram, Eider Rock, Southern Head, and Keltic petroleum projects as

well. The projects had adjacent marine terminals that were assessed under comprehensive studies, but the processing areas were not included in the scope of the project.

Like Whites Point, Belleoram was a rock quarry with marine terminal designed to ship rock to foreign markets. Both quarries were going to have a 50-year lifespan. While the Whites Point environmental assessment dragged on for nearly five years, Belleoram was permitted in only, permitted in only 1.5 years. The stark difference in treatment is all the more striking given it was recognized early on in the Belleoram project process by the federal officials that "many of the environmental issues will be similar" to the Whites Point quarry, and that some of the same federal officials were involved with both projects at this time.

Belleoram was also going to produce three times the amount of aggregate per year as Whites Point, and the project received federal government funding. Moreover, even though the DFO had found fish habitat on the quarry site in Belleoram, and stated that it would require a HADD, it still refrained from scoping in the

quarry.

The Aguathuna quarry and marine terminal project also bears remarkable similarities to the WPQ project.

The proponent proposed to develop a quarry that produced 500,000 tons of aggregates per year with an adjacent deepwater marine terminal designed to export rock to foreign countries. But unlike Whites Point, Aguathuna also received government funding. The DFO only reviewed the marine terminal in a comprehensive study and did not require an environmental impact statement.

Keltic petrochemicals proposed a land-based complex situated on approximately 300 hectares of land that included a petrochemical complex, an LNG importation storage and vapourization facility, an electric coal generation plant with a marine terminal, and water supply empowerment with the marine terminal. The estimated capital cost of the project was 45 to 50 million dollars.

The federal EA was scoped to focus on the LNG terminal, marine transfer pipelines, LNG storage tanks, the marginal wharf, temporary marine facilities and structures, docking and deberthing

of vessels, and despite the scale of the project, it was only assessed in a comprehensive study.

Bilcon, of course, was treated differently.

From start to finish the decisions made by federal and provincial officials are all the more disturbing in light of the red carpet treatment that the Nova Scotia Department of Natural Resources and Gordon Balser, the Minister of Economic Development, rolled out for Bilcon. The Tribunal will recall that Minister Balser had numerous meetings with Mr. Buxton and courted the Claytons. The Minister assured them that Nova Scotia was open for business, had a friendly business environment, and welcomed foreign investment.

As the Tribunal heard, Mr. Lizak thought he had gone, he "had died and gone to geologist heaven"; he had found the "gem in the Crown".

Another rich irony in this case is that at the very same time one arm of the provincial government, Natural Resources, was squiring Mr. Lizak around the province by helicopter, another arm, NSDEL, was plotting with

DFO to put the quarry into a JRP. And that is in early June of 2003.

Nova Scotia was historically a resource extraction province where quarries were a vital part of the provincial economy. The province had long established policies and marketing programs to encourage investment in marine quarries, which it was proud to share with Mr. Lizak.

This quarry was situated on a former quarry site. It is designated on geological maps as a quarry.

The quarry could not be seen from any homes in the area and was located on the Bay of Fundy, a major shipping route, through which 800 to 900 large industrial ships moved every year. I think tankers, or perhaps bulk carriers.

The quarry would have provided Bilcon with a secure supply of high quality aggregate for over 50 years and that is what Bilcon was led to expect when it was invited and encouraged by the Government of Nova Scotia to come to the province and invest in a quarry

That is what Bilcon did expect, and that is what Bilcon was entitled to expect.

What Bilcon did not expect was to be led down the garden path for five years and to arrive, millions of dollars later in Never Never Land, and it certainly did not expect to be beset by thugs and vandals along the way.

As Mr. Buxton wrote to the Minister:

> "We have had and no doubt will continue to have..."

I am quoting here.

> "...problems with site security. Three of our boreholes were vandalized making it impossible to carry out hydrogeological work in these holes until we get a drill rig in to reopen them. A tree was felled across the Whites Cove Road while the CLC was on site last year and yesterday all of our hay bales were deliberately set on fire. The Minister of Agriculture and Fisheries constituency assistant, who

lives in Mink Cove, has had to replace six slashed tires and cannot get mail delivered due to continuous vandalism of her mail box. We have equipment on site which has to be driven off site every evening..."

Throughout, the Claytons and Bilcon acted in good faith. They spared no expense to satisfy all of the regulatory requirements, and to be a good corporate citizen of Nova Scotia and Canada.

Mr. Buxton believed that the science would ultimately prevail, and there is nothing more and nothing better that he or Bilcon could possibly have done.

Until these proceedings, they had no idea of the parallel universe of deception and concealment that was occurring behind their backs to deprive them of fairness and equality.

Their only recourse is to seek redress from this Tribunal under the NAFTA.

Bilcon always wanted to do monitored test blasts to provide empirical data,

and asked repeatedly to do test blasts over many years. And yet what is now clear is that in 2002 the DFO was conducting a stealth environmental assessment under cover of condition 10(i) without giving notice to Mr. Buxton that it was doing so, all the while withholding critical information that Mr. Buxton could have used in order to conduct test blasts to gather valuable data for the purpose of proceeding to a fair and scientifically-based assessment of its project.

A condition initially inserted, purportedly out of a concern that blasting might cause harm to marine mammals and, in particular, to endangered North Atlantic Right Whales -- I say, parenthetically, when in fact there is evidence that there had been no sightings of North Atlantic Right Whales near Whites Point in over 25 years -- was used to establish a bar which officials ensured that Bilcon could never possibly meet.

We can all ask ourselves this question. In any of our own dealings with government and government officials, would any one of us feel that we had been treated fairly if government officials knowingly, arbitrarily, and for no proper purpose, in fact for an improper

purpose, concealed critically important information preventing us from doing what we are otherwise entitled to do?

And providing us with new devastating information which very shortly thereafter they knew to be erroneous, the 500 metre setback?

And then concealing that from us, arriving at a further conclusion, the 100 metre setback, and concealing that from us?

And then failing to bring the true facts to the attention of the highest officials in the land, all to take pressure off them and their provincial counterparts for the summer months?

In this context, I ask the Tribunal respectfully to carefully consider the chronology of events and statements made by officials during the period from May 29, 2003, the date of Mr. Zamora's letter to Mr. Buxton saying that the DFO had concluded the proposed work, blasting on the quarry, was likely to cause the destruction of fish.

From May 29th, 2003 to August 28th, 2003, the date of the meeting between Mr. Chapman, Mr. Buxton and others, when

Mr. Chapman knew that the 500 metre setback was wrong, and sat there in the same room across the table from Mr. Buxton allowing Mr. Buxton to continue to believe that the 500 metre setback was still valid, and all of that almost two months after Mr. Thibault had distributed his recent Cabinet confidence letter to the press, two days before provincial election.

By the time of Mr. Chapman's meeting with Mr. Buxton, almost two months had passed and Bilcon had still not received the courtesy of a letter informing it that the quarry project it had been working on for a year and a half had been referred to the highest, most complex, most elaborate, most onerous, and most expensive forum of environmental assessment in the country.

This whole process was not carried out in good faith. This was not honesty. This was not fairness. This process, in my respectful submission, was infused with raw politics and abuse of authority.

And what was it intended to do? It was intended to send Mr. Clayton and his brothers and his father and Bilcon packing, back to

New Jersey where they came from, much to the satisfaction of the quarry's detractors; presumably less to the families of the 400 people who applied for jobs.

The Claytons and Bilcon came to Canada expecting a fair process, a legitimate environmental assessment for this project, of course. But they did not come expecting the system to be rigged against them.

Public concern is not mob rule. It is not intimidation tactics, it's not vandalism, ostracization and thuggery, whether on Digby Neck or anywhere else in this country. It cannot be allowed to win the day, and politicians and officials whose highest duty is to preserve the rule of law cannot be allowed to abuse the system entrusted to their care, to use the full power and resources of the state to run roughshod over the rights of investors we welcome to this country to invest in legitimate projects and to whom the NAFTA guarantees fair and equitable treatment.

Thank you.

QUESTIONS BY THE TRIBUNAL:

PROFESSOR SCHWARTZ: Excuse me. I was just going to ask some questions.

PRESIDING ARBITRATOR: All right. So Mr. Schwartz, Professor Schwartz has a question, I also have a question with regard to the, because we are supposed to have a coffee break, a short coffee break in ten minutes. Would you, then, want to be interrupted? Or would you, should we have the coffee break now and you go on in one, to the end? I leave that to you.

MR. APPLETON: Mr. President, I actually addressed this with the secretary this morning and we agreed on where would be an appropriate break. And we also confirmed that the break was not at a specific time, but a convenient time. I also discussed it with the court reporter.

So if the understanding is incorrect and it is a fixed time, I would like to know that, because I would like to be able to get underway and then take a break where I think would be an appropriate spot. I am in your hands, but that would be my preference.

Now with respect, you had a question for Mr. Nash? So I will turn back to Mr. Nash and then we will come back. I will just confirm while we're at it that of course our unused rebuttal time, or sorry, our unused time for the

presentation would be reserved over to our rebuttal time up to the 30-minute amount.

PRESIDING ARBITRATOR: Just so I understood you correctly, you would prefer, after Mr. Nash has replied to the question, to start and then at some moment we have to the coffee break?

MR. APPLETON: I would like to proceed as soon as you will allow me to, Mr. President.

PRESIDING ARBITRATOR: Okay.

MR. APPLETON: And I will stand here while you are questioning Mr. Nash; but Mr. Nash, thank you. You did a wonderful job. Please come back for an encore.

MR. NASH: I did have, my notes were mixed up and I may put a few more comments into the record, if I may, but please.

PROFESSOR SCHWARTZ: Good morning, Mr. Nash.

MR. NASH: Good morning.

PROFESSOR SCHWARTZ: If any of these questions are ones where you would like some more time they can be answered later; they can be deferred to Mr. Appleton. I know this is very extensive documentary record and period of time

we're dealing with.

But I was thinking yesterday, I am interested in the relationships between the various stages.

MR. NASH: Yes.

PROFESSOR SCHWARTZ: The project that was referred to the joint panel, as I understand it was not the original 3.9 hectare quarry.

The project in the joint panel mandate was the big project.

MR. NASH: Correct.

PROFESSOR SCHWARTZ: So even if mistakes had been made at stage 1 about holding up the 3.9 hectare quarry, what was actually referred was this much larger joint project which was in effect a series of four hectare quarries carried out over a whole series of years.

MR. NASH: That part I don't believe is correct. There was one 3.9 hectare quarry. It was within the larger 155 hectare property. And the larger project, the 155 hectare quarry and the marine terminal, were referred to the joint panel review.

PROFESSOR SCHWARTZ: I am just

looking at the project description. It talks about approximately four hectares of new quarry would be opened each year.

MR. NASH: Oh, in terms of the operation of the quarry?

PROFESSOR SCHWARTZ: Yes.

MR. NASH: I misunderstood the import of your question. That is what I understand as well. I think it was a little less. It shifted, but it was a small portion of the quarry that would actually be quarried over the 50-year period.

PROFESSOR SCHWARTZ: Okay. Now, in terms of carry-forwards, if any, from stage 1 to stage 2, I understand there had been a desire to generate data at stage 1. Then I think you said over many years Bilcon requested to be able to do blasting tests.

MR. NASH: Yes.

PROFESSOR SCHWARTZ: Did those years include the period of time after the joint panel was commissioned?

MR. NASH: Yes. Yes.

PROFESSOR SCHWARTZ: Is that somewhere in the record?

MR. NASH: We will get that for you. But what happened is that there was a meeting with DFO officials and Mr. Buxton in November of 2004, I believe just before the JRP was empanelled. I'm summarizing and we will get the document but he expressed a desire to collaborate with DFO to conduct test blasts on the quarry site, in collaboration with DFO.

In other words, to do them, if not together, certainly in consultation with one another so that a test blast or test blasts could be conducted under the auspices, in effect, of the DFO. I am using that term broadly, but at least in collaboration with them, so that they were satisfied at DFO that there would be no adverse effects on fish, marine mammals and so on coming within their jurisdiction.

DFO said, if it becomes necessary -- again I am paraphrasing -- we will do that. At this point it is not necessary.

There was then another communication in 2005 on the issue of test blasts and, then it went into the JRP and it just faded away.

We -- when I say we, Bilcon,

always wanted to do test blasting because they believed that if they could get the data from the test blasts which would be monitored, that they could show that there would be no adverse environmental effects that could not be mitigated either on land or on water.

PROFESSOR SCHWARTZ: Thank you. As I understand it --

MR. APPLETON: Excuse me, Professor Schwartz.

PROFESSOR SCHWARTZ: Sure.

MR. APPLETON: My colleague might not have been aware -- just to finish off what he was saying, there is another document in the record that might assist you. It is identified as C-842, and this is a document sent from Robert Fournier to Debra Myles -- Debra Myles is the panel manager -- copied to the other members of the JRP, Jill Grant and Gunter Muecke. And it says at point 2 of that letter that:

> "What is the status of the two letters that were to be sent to DFO regarding our request for permission for test blasts?

So you can see that the issue, again, about the test blast is still going on. This is an email dated January 22, 2007.

So this issue of the test blast from the beginning permeates its way through and it is because the 3.9 hectare quarry is an integral part of this whole process and the issues from the beginning continue to arise, again and again, as a continuum throughout this entire process.

Sorry; I did not mean to interrupt, but since there was another piece, I thought we would keep it altogether in one spot in the record.

PROFESSOR SCHWARTZ: Thank you. Now, Canada already assisted us and provided us with a document about whether there was eventual disclosure to Bilcon about the mistake about the 500 metre setback as opposed to 100 metre setback.

MR. NASH: Yes.

PROFESSOR SCHWARTZ: I recall receiving a document that said that disclosure was made.

MR. NASH: Yes.

PROFESSOR SCHWARTZ: Not immediately, but was in fact disclosed to the

investor.

MR. NASH: Yes.

PROFESSOR SCHWARTZ: So any lack of disclosure in the initial stage, whatever we make of that, at least it was disclosed later.

Another issue was potential impact on marine mammals, especially whales, as I understand it. And I asked, but at that point the witness I asked didn't have the information immediately at hand. Of course Canada has it; they're certainly welcome to provide it to me. But was there a later disclosure about the DFO assessment concerning mitigation risks and whales? Because that was another complaint about non-disclosure, immediate, lack of immediate disclosure at the 3.9 hectare quarry stage.

MR. NASH: Answering your first question first, timing is everything.

And in the fall of 2002, had the information been provided to Mr. Buxton at that time, blasting could have commenced when the North Atlantic Right Whale was not even in the area. They had gone south. And blasting could have commenced after Jerry Conway's December 2nd, 2002 email to Mr. Ross saying he had no concerns.

It could have commenced through December, January, February, March and probably into April. All in collaboration, all under the watchful eye of DFO to ensure that there would be no adverse effects.

The 500 metre setback question comes at a critical point in time because the -- it is not clear, because Mr. Zamora did not come to give evidence before the Tribunal, but as of May 29th, 2003 he is asserting that he has got calculations that require a 500 metre setback.

That information apparently is used to justify the June 26th, 2003 referral letter by Minister Thibault to Minister Anderson.

We know from Derek -- from Dennis Wright's email on July 29th, 2003 that is the latest point at which Fisheries and likely CEAA know that the 500 metre setback is based upon an erroneous calculation. That is over a week before Minister Anderson actually makes the referral.

And it was then known by DFO that blasting could occur safely on the site without risk of adverse consequences to fish and marine mammals, so long as it was beyond the 100 metre setback.

So before the actual referral by Minister Anderson and quite possibly the evidence to support and the evidence to show that before the referral by Minister Thibault to Minister Anderson, the information was available to DFO, but it was not available to the proponent.

The information on a ground which I just simply fail to understand is not then immediately provided to Bilcon and Bilcon would have had a number of options at that point if it had known. Perhaps if it had been timely advised of the JRP's appointment, it could have made submissions to Minister Anderson and said, you know, this is not as complex an issue. It may have had other options.

That information was not provided until November of 2004, after the JRP is actually appointed.

And so, yes, it finally receives, 14 or 15 months later, the information that was in the hands of the DFO at the time of the referral, and perhaps referrals, but by that time it is in this complex web of an environmental assessment conducted at the most complex level in the country.

So, yes, it received it, but it

received it at a time when it had waited around for it for now 14 months.

And remember, there was -- there was no agreement at all between the federal government from August 7th and the provincial government from August 7th, 2003 to November 3rd, 2004. There was nothing. There was a referral by Minister Anderson to a Joint Review Panel, but no agreement had been entered into by the two jurisdictions.

So timing is everything and, in our submission, the concealment of that information did the trick for what was desired by the officials.

PROFESSOR SCHWARTZ: Thank you very much.

PRESIDING ARBITRATOR: Break.

MR. APPLETON: I think we had better take a break, but I believe that Mr. Nash said there was something he wanted to add, just to complete his part of the --

MR. NASH: I apologize to the Tribunal.

PRESIDING ARBITRATOR: Are you ready to do that now?

MR. NASH: I am. My notes were out of order and I missed some of the submission.

PRESIDING ARBITRATOR: Yes, go ahead.

MR. NASH: And that is this.

The evidence before the Tribunal is more than sufficient for the Tribunal to conclude that the officials' conduct was driven by political considerations which were irrelevant to the objective science and completely outside the purpose for which discretionary authority in respect to fisheries and the environment was delegated to them.

The Tribunal will recall that DFO and CEAA officials knew full well that, to quote but a few examples and I will quote:

> "This file is extremely important to the Minister...the Minister may invoke an inquiry into this matter."
>
> "This is such a politically hot file that I don't want to make any wrong decisions."
>
> "Thibault wants process

dragged out as long as possible."

"Then Minister of Environment determines scope & Min DFO is off hook."

Mr. Hood's journal is replete with references to: What does the Minister want? And descriptions of the intrigue being carried on behind the scenes.

As Mr. Bellefontaine the DFO's regional director so succinctly put it before the Tribunal and this is a direct quote: "The Minister is God", and that is exactly what the Minister is.

There can be no doubt that the evidence in this case shows that the Minister was God and what the Minister wanted the Minister got.

As Mr. Smith explained, in addition to being under a microscope from the Minister, the DFO was also motivated by another political purpose, which was to refer the Bilcon quarry to a Joint Review Panel so as to avoid court action by the environmental activist groups in the Minister's riding, it is apparent that political machinations were at work in the province, as well, but provincial officials were in a quandary since

Bilcon had not filed any registration documents for the quarry, Nova Scotia had no legislative basis to conduct an environmental assessment.

And those are my final comments. I thank you for your attention.

PRESIDING ARBITRATOR: Thank you, Mr. Nash. So we're going to have a coffee break now. It is on my watch it is 10:21 so we will reconvene again at 10:36. Please keep to the time, because...thank you, 10:36. Thank you.

--- Recess at 10:20 a.m.

--- Upon resuming at 10:35 a.m.

PRESIDING ARBITRATOR: So it is now 37 to 38, and the arbitrators are ready to continue.

MR. APPLETON: And so is counsel for the claimants.

PRESIDING ARBITRATOR: Yes. So will we please all make an effort to keep to the time, because otherwise we won't really find enough time today within the time, let's say, amount of time that we have allocated.

Let me just say, with regard to how we handle the questions, maybe we weren't 100 percent clear yesterday about how the time used for

Tribunal questions and answers would be handled. We don't intend to handle it minute by minute, in a minute-by-minute way, but a bit by playing it by ear.

But I think the principle should be that short questions and short answers would be within the time allocated to the parties, but if a question would be particularly comprehensive and the answer, too, then we will see what we have to do. But maybe it is also a bit of a, let's say, getting to, let's say, succinct answers to our questions, just to remind you of the time frame that we are in.

Okay, with that, I give the floor to Mr. Appleton.

SUBMISSIONS BY MR. APPLETON:

MR. APPLETON: Thank you very much, President Simma.

This case is about serious improprieties, omissions and irregularities in the application of the law. It is about manifest unfairness in the regulatory process. At the outset, the investors reiterate that they are not challenging any laws of general application either of Canada or of Nova Scotia.

We'll start with Article 1105, the international law standard of treatment. Article 1105 includes fair and equitable treatment and full protection and security. In addition to these two particular heads, there are other well-known expressions of the standard which have been addressed in the pleadings.

What amounts to a violation of fair and equitable treatment standard is necessarily specific to each case. However, there are clear patterns, in that there are certain kinds of improper conduct attributable to government that have been repeatedly found, either singularly or cumulatively, by arbitral panels of distinguished jurists to violate the obligation of fair and equitable treatment.

For instance, conduct tainted by or connected to political interference or manipulation of the regulatory process and/or by national prejudice or discrimination have consistently been held to violate the standard, as has misrepresentation of material legal and regulatory facts to the investor and to their investments.

Such conduct in and of itself

represents serious impropriety. Today contemporary notions of administrative fairness and due process of law form part of the content of that customary standard.

Now, I would like to turn, briefly, to full protection and security. It requires governments to provide a stable legal and business environment to foreign investors, and full protection and security in itself includes protection of the rule of law and fundamental fairness.

It also requires that where government has influence or control over non-governmental actors, then it takes at least reasonable measures in the circumstances to ensure that the conduct does not result in physical or serious material economic insecurity for the investment.

At the very minimum, there is an obligation not to contribute to or to support actions of non-governmental actors that undermine the physical or material economic security of the investor.

Now, I would like to give some real attention to the protection against the abuse

of rights, which we talked about in the opening.

The RDC and Guatemala tribunal considered situations of abuse of rights in the administrative context and related issues to the applicable standards of treatment under the equivalent to Article 1105 of the NAFTA.

In that case, the state imposed circular requirements that an investor meet certain conditions as a prerequisite for other conditions, and then the state refused to allow the investor to meet the first prerequisite conditions. It was, as we say in English, a catch 22.

This same reasoning and standard applies to Canada's treatment of Bilcon. The lack of transparency and candour were the norm, not the exception, and this lack was most glaring where the investors had the most at stake.

The situation in which Bilcon has been subjected is arbitrary and unfair, in addition to lacking in transparency and candour.

The jurisprudence supports the conclusion, on the issue of protection against arbitrary and discriminatory behaviour, that in order not to be arbitrary restrictive measures must some basis in domestic law and be accessible and

foreseeable.

For example, in Thunderbird, the NAFTA tribunal spoke of a failure to provide due process, constituting an administrative denial of justice. The protection against discrimination is an essential element that is inherent in the concept of fair and equitable treatment.

In Waste Management II, the tribunal adopted the language used in the Loewen case when it referred to a customary law prohibition on conduct that is discriminatory and exposes the claimant to sectional or racial prejudice.

The prohibition against discrimination is a longstanding obligation under classical international law. Conduct that violates the protection against discrimination is conduct that leads to an unfair, arbitrary or unreasonable distinction.

Many tribunals have found that the guarantee of full protection and security exists beyond physical security and is similar to the protections provided by fair and equitable treatment, and is meant to ensure a stable environment for investors.

For example, the tribunal in Eureko found that the Government of Poland, quote, "acted for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character".

Furthermore, the Biwater Gauff tribunal held that in the content of full protection and security standards may extend to matters other than physical security.

For Bilcon, the failure of Canada to ensure that the Joint Review Panel provides the legal protection afforded by following established legal criteria is clearly a violation of full protection and security.

As was indicated by Mr. Chapman in his testimony before you yesterday, Canadian officials guided the JRP members concerning the legal and regulatory criteria that they were to apply and how they should deal with the public in the hearings.

Officials from the Government of Canada had the opportunity to advise the JRP that continuing to entertain public expressions of anti-American hostility and bias were improper and that it needed to be explained to the public that

these were not the kind of "public concerns" that could properly enter into the JRP's deliberations concerning its recommendations on the project.

Similarly, they had the opportunity and duty to indicate to the JRP that there was no basis in the legal and regulatory framework to determine that their recommendation that the project be rejected outright, based on community core values, in a process not designed and conducted as an adversarial one, where legal counsel are not regularly present, the duty of diligence on the part of the government officials to provide advice and guidance on keeping the panel process could be expected to be particularly high.

The failure to do so is a manifest violation of the obligation of full protection and security owed to the investor. It is also unfair.

Canada contends that none of the conduct in question rises to the level of a breach of the international law standard of treatment, but clear examples of just some of the wrongs committed by officials in this case include the following: Failing to remove blasting condition 10(i) from the approval of the 3.9 hectare quarry at a time when there was demonstrably no scientific or legal basis

for such a condition and effectively blocking any ability for Bilcon to blast on that site, depriving Bilcon of an ability to acquire the baseline information necessary for the environmental assessment process; withholding information that DFO scientists had no continuing concerns over marine mammals, leading Bilcon to believe that there was a valid legislative trigger and jurisdiction to assess the quarry when this was known not to be the case; withholding for 14 months information that would have permitted Bilcon to adjust its setback distances and commence blasting on the smaller quarry site; improperly raising its environmental assessment to the level of a JRP, without any basis for doing so; affording Bilcon experts only 19 minutes out of 90 hours, taking into account irrelevant considerations such as NAFTA testimony, otherwise exceeding jurisdiction by addressing benefits and burdens, the public interest and community core values, all of which find no grounding in the terms of reference for the Joint Review Panel; accepting a factually erroneous JRP report as the basis for rejecting the project; accepting the panel report without providing Bilcon with the opportunity to present its case to the

relevant decision makers, through the instrumentality of the Joint Review Panel, disposing of the investor's project by reference to criterion with no basis in law or regulatory practice, namely, community core values, rather than the legally required basis of likely environmental or socioeconomic effects, something which is measurable and mitigatable, rather than subjective beliefs, and the Ministers adopting this fundamental departure from the rule of law without any independent consideration, repeatedly deviating to Bilcon's detriment from consistent past regulatory practice without any objective basis for doing so; countenancing through the instrumentality of the Joint Review Panel considerations of the investor's American nationality and, indeed, national bias and prejudice entering into the proceedings that resulted in a negative disposal of the investor's project; pervasive political interference in the ordinary working of the regulatory process, with key decisions such as whether or when to refer to a JRP, and the protection of the electoral interests of particular politicians with political staffers and handlers regularly running interference hither and dither

with the normal channels of regulatory decision making and giving normal hierarchical processes whereby officials give independent advice and information to Ministers through the established hierarchy of the civil service; and consistently ignoring or not acting upon the advice of the government's own experts and scientists when it pointed in favour of the possibility of Bilcon operating its project in an environmentally sound manner.

Both independently and, even more, cumulatively, the wrongs committed by Canada constituted breaches of Canada's obligations under NAFTA Article 1105.

I would like to turn now to most-favored nations treatment. In Canada's opening statement, Mr. Little sought to have the Tribunal consider NAFTA Article 1103 and Article 1102 together as if they were interchangeable obligations. However, it is absolutely clear that they are two separate obligations.

Usually in the case of investment obligations, the issue of most-favored nation treatment arises when an investor seeks to rely on a provision in one treaty, usually an investment

treaty, with more favourable substantive and most often procedural provisions.

In this case, we are primarily concerned with better material treatment of the investors relative to investors from foreign countries.

This issue arises in the first instance because, amongst the concerns that affected Minister Thibault in the treatment of the investors and the kind of sentiments that influenced the behaviour of the officials toward the investors, was the American nationality of the investors and the aversion to the export of Canadian natural resources or primary materials to the United States.

This was an important difference with other better-treated permit seekers, such as Tiverton, whose aggregate was not going to the United States.

The concern with exports going to the United States was a specific subject of inquiry by the Joint Review Panel, which led to questions about whether, if a quarry were approved, Canada could impose export restrictions under the NAFTA.

The Joint Review Panel, given

these concerns, did not distance itself in any way from the frequent anti-American comments by participants in the hearings.

This is an impermissible consideration under both fair and equitable treatment, which deals with some aspects of national bias or prejudice, but also under the MFN obligation of the NAFTA, as well.

There is little jurisprudence on MFN in the sense of detrimental material treatments under investment treaties. A leading case is Parkerings and Lithuania, which has been filed in this case.

The tribunal in the Parkerings case said that:

> "Discrimination is to be ascertained by looking at the circumstances of the individual cases.
>
> "However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be

> inapposite or excessive to achieve an otherwise legitimate objective of the State."

We emphasize here that the expression "legitimate objective", and explicit preference against a particular NAFTA country or the investors or investments from a particular NAFTA country is not legitimate given the objectives and the principles of the NAFTA.

And what makes the Bilcon case particularly egregious is not that only there is no objective justification, but there is actual evidence of anti-American concerns in the way the investors' proposal would be dealt with in the regulatory process.

Less favourable treatment does not mean that Bilcon's environmental assessment needed to produce identical results to those in like circumstances, such as an approval.

Bilcon did not receive less favourable treatment because its project was rejected. Bilcon received less favourable treatment because of how its project was assessed as compared to projects of investors from third

countries in like circumstances.

Treatment by regulators must be even-handed towards the investor in relation to all like investors and investments. This means the investor is entitled to the most favorable treatment granted to any investor or investment that is in like circumstances from Canada or from a third country.

The WTO appellate body in Clove Cigarettes held a technical regulation should be applied in an even-handed manner. When the appellate body in Cloves acknowledged that a member country could provide regulations that would fulfil certain legitimate public policy objectives, these same regulations could not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

I would now like to turn to national treatment in Article 1102. Here also there is evidence the nationality of the investor was a consideration, which is of great significance. Had Bilcon been a Canadian company servicing a Canadian home market with aggregate, it would not have been treated in this way.

In his uncontroverted witness statement, Hugh Fraser noted the pervasive influence of the American nationality of the investors in this case. Paul Buxton, who testified before, you confirmed that the nationality of the investors was a factor that was frequently raised.

The Joint Review Panel even went so far as to retain its own expert on the NAFTA in an environmental assessment.

In addition, the Joint Review Panel asked the Department of Foreign Affairs and International Trade to send an official to provide a statement on the meaning of the NAFTA. It sent Gilles Gauthier, the director of the investment trade policy division, as well as some other counsel from the division, to explain the proper meaning to be given to the obligations of Chapter 11 of the NAFTA.

I would remind the Tribunal that Canada has never directly challenged witnesses or affidavit evidence of anti-Americanism presented by the investor. They have never offered into evidence any explanation of why NAFTA was brought in that would be consistent with a non-discrimination obligation.

The obvious reason that NAFTA was a matter of focus was because of the American nationality of Bilcon of Delaware and the Clayton family.

We have common ground with Canada, though, on some aspects of how national treatment contained in NAFTA Article 1102 should be interpreted, and we thought it might be helpful to try to narrow down these areas.

So, first, we agree that national treatment is a standard obligation that we find in just about every trade and investment agreement. This is the position that has been taken by Mr. Gauthier advancing the Government of Canada's official position before the JRP.

So with respect to this, we would say that NAFTA Article 1102 reflects an acquis of international economic law, and, in light of the official position that Canada took before the JRP regarding the standard nature of NAFTA Article 1102 as a provision of international economic law, it is puzzling that Canada in some of their pleadings in this case seemed to suggest that Article 1102 is somehow a self-contained lex specialis to the NAFTA.

Secondly, we agree, as Mr. Little put it, that: We aren't saying circumstances have to be identical, just like. That was from the opening at the beginning of this hearing.

Where the nature and magnitude -- sorry. Third, we agree the national treatment obligation only prohibits less favourable treatment on the basis of nationality. Where the nature and magnitude of differential treatment between the investments can be fully accounted for on the basis of objective considerations unrelated directly or indirectly to the investor's nationality, there is no violation of national treatment. We disagree with Canada as to how to determine whether nationality is the basis.

Fourth, as stated by Mr. Gauthier, Article 1102 prohibits both de facto and de jure discrimination.

Those are four areas we agree on. Now let's address where we might have some disagreements.

First, likeness. Canada purports to restrict these factors that might objectively justify different treatment to the determination of likeness, rather than the analysis of whether

treatment is less favourable.

Yet here, where there is the regulatory process of a general application itself that is the focus of concern and not classifications of laws or regulations, it is appropriate to view all entities, domestic and foreign, because the same legal and regulatory framework for determining the process applies to all of them.

The NAFTA tribunal in Grand River, a case in the material, said, and I quote:

> "The identity of the legal regime(s) applicable to a claimant and its purported comparators is to be a compelling factor in assessing whether like is indeed being compared to like for purposes of articles 1102 and 1103."

As noted by the Occidental tribunal assessing like comparators, they said this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.

Bilcon was seeking regulatory

permission under both federal and provincial environmental legal regimes. Those other NAFTA party or non-NAFTA party investors, in like circumstances with Bilcon, are those who require to submit to the determination under federal or provincial laws as to whether and in what manner an environmental assessment by one or both, or jointly by both, levels of government may be necessary as a precondition to moving forward with their project.

Now, Canada wishes to restrict likeness to those identically situated projects subject to a joint Canada-Nova Scotia Joint Review Panel. This is, however, inconsistent with the application of the law and ends up confusing the concepts of likeness and treatment.

Bilcon, however, challenges amongst other things the very decision to subject it to a Joint Review Panel as lacking in evenhandedness and being politically motivated.

To say that Bilcon's treatments can only be compared with other projects subject to a JRP is to exclude ab initio one of Bilcon's most important claims of a lack of evenhandedness; namely, that this project was not comparable at all to the exceptional projects that had triggered in

the past the rare mechanism of a Joint Review Panel.

The Joint Review Panel is no more than a type or track of an environmental assessment. It is as capricious as saying that the only possible comparators are other quarries on Digby Neck. This is simply absurd.

National treatment allows a regulatory process to produce different outcomes, as long as the process demonstrably treats the parties with evenhandedness. To ensure that investments are granted equal opportunities, to be evenhanded the treatment need not be identical.

NAFTA Article 1102(3) makes clear that best in jurisdiction needs to be provided.

Now, emails evidence that discussions took place between officials where they regularly considered and compared government treatment to different proponents seeking regulatory permissions from them.

For example, there are documents where officials are comparing the difference in decisions about scoping, or blasting setbacks, or even the type of environmental assessment.

In all of these documents the

government officials followed Bilcon's suggested approach to likeness and considered all proponents seeking environmental permissions as being like with respect to treatment under the regulatory regime.

So why is our approach then preferable to that which has been offered by Canada?

In our view, Canada does violence to the very text and structure of NAFTA Article 1102, where the core obligation is that of evenhanded treatment. Canada would have those very considerations that need to be taken into account and scrutinized to be determined whether treatment is less favourable that is not evenhanded, converted into the factors establishing unlikeness rather than likeness.

This would simply cut off at the pass the inquiry by this Tribunal as to whether there is a lack of evenhandedness in the treatment of the investor or its investments.

Now, this goes to the second disagreement with Canada, which is how we get to a conclusion that the treatment is on the basis of nationality.

Canada has suggested that the investor must prove that subjective national bias was the motivation of the different treatment.

In other words, there must be proof of national favouritism.

There is of course no question that such favouritism is an impermissible purpose under NAFTA Article 1102. There is to our knowledge not a single decision of any tribunal in over 50 years of interpreting this standard obligation that is said that the complainant must always prove discriminatory motivation or subjective intent in order to establish a violation of national treatment.

For example, the NAFTA tribunal in Feldman held that there was no such language in Article 1102 of the NAFTA when that tribunal considered that very question.

Secondly, to return to Canada's official statements about the meaning of NAFTA Chapter 11 to the Joint Review Panel, de facto discrimination is covered by NAFTA Article 1102.

This by no means detracts from the strict scrutiny that tribunals often engage when there is evidence of national bias or favouritism

coming into the picture or lurking behind the scenes. And this is certainly the situation that we are dealing with here in the Bilcon situation.

This leads to the issue of burden of proof. Common to NAFTA tribunals, and most especially the Feldman tribunal and recent decisions of the WTO appellate body on national treatment, is the notion that once the nature and magnitude of the difference of treatment between likes has been established by the claimant, the burden shifts to the respondent's state to show that this difference, both its nature and its magnitude, can be fully accounted for by legitimate regulatory considerations. That is non-nationality-related considerations.

In the present case, not only has Bilcon established the nature and magnitude of the difference of treatments, we've also shown how considerations of nationality lay below the surface and sometimes came up to the surface in relation to Bilcon.

There were questions raised by panel members during the Joint Review Panel process concerning the nationality of the proponents, expressions of anti-Americanism from participants,

and, not insignificantly, in his presentation before the Joint Review Panel, Minister Thibault spoke about Canada's national interests and questioned US interests in the quarrying of basalt from Whites Point.

He said: Is there a lack of these aggregates within the United States, that their economy will tumble if we don't provide it to them?

When one examines the less favourable treatment Bilcon received in this case on issues from blasting, to scoping, to decision to refer to the JRP, the Minister's office played a crucial role in these decisions.

In these circumstances, it is clearly reasonable to require a full demonstration on Canada's part that all differences of treatment between the investor and the Canadian entity subject to the same regulatory processes are fully accountable on objective regulatory considerations, unrelated to nationality. And this is simply something that Canada has not done.

Now, due to the difficulties with the discovery process in this case, and the volume of redacted material that have been produced to the claimants, the claimants can only partially infer

what were the internal deliberations of governments that reveal the exact range and relative weight of considerations that affect the treatment they received.

This is a strong reason for putting the onus on the responding state to establish that objective, legitimate considerations can fully account for the difference in treatment.

Now I would like to speak a little bit about some of the facts as they apply to most-favored nation treatment and national treatment. While the obligations are different, there are some similarities, so I am going to try to group them together just to make this as easy as we can.

NAFTA Article 1102 requires Canada to provide treatment no less favourable than it provides Canadian investors and their investments who are in like circumstances with the claimants.

Likeness must be considered for all those who seek such regulatory permissions. The test for likeness in this case that we have expressed must address all those who seek such governmental permissions for projects, where there could be a potential environmental

review in connection with the permission.

So, for example, Bilcon was required to seek permission under the Navigable Waters Protection Act and the Fisheries Act. Both of these federal regulatory regimes could potentially involve an environmental assessment under the CEAA. All those who seek similar permissions would be in like circumstances.

In addition, since there were Nova Scotia approvals required for quarries of this size, for those seeking permissions from Nova Scotia that involved potential environmental review, they would also be in like circumstances.

The investors have made reference to a number of Canadian investments and investors who were in like circumstances to Bilcon, such as the nearby Tiverton quarry and Keltic.

A similar likeness requirement is involved in the consideration of the most-favored nation treatment obligation.

And examples of investors or investments of investors from non-NAFTA parties or other NAFTA parties who are in like circumstances would include Rabasca and Miller's Creek.

Canada is required to provide

treatment no less favorable to Bilcon than it provided to Canadian investors and their investments. The requirement to provide better treatment is limited to providing the best treatment offered by the jurisdiction where those measures are offered.

Thus, Canada must provide the best treatment that the federal government provides anywhere in the territory of Canada to those who are in like circumstances.

Similarly, Nova Scotia must provide treatment as favourable as it provides to others within the territory of Nova Scotia. Nova Scotia need not provide more favourable treatment in its own regulatory measures than other provinces do. That means it doesn't have to go outside its territory with respect to that, but it must provide treatment to Bilcon as favourable as it provides to the best-treated investment or investor within Nova Scotia who was in like circumstances. That's the test.

An examination of the treatment of those in the universe of like investors and investments shows that the treatment of Bilcon was more strict and more severe than many others within

the universe of likes.

As Mr. Rankin noted in his testimony, there were 28 quarry proposals in Nova Scotia between 2000 and 2011. One was the subject of a public review hearing. One was rejected, recommended for a rejection, and ultimately the Ministers chose to reject it.

Indeed, since the CEAA has come into force in 1995, no quarry in Canada has ever been referred to a review panel, let alone a Joint Review Panel; not one quarry across Canada, other than Bilcon.

And with respect to federal government treatment under the Fisheries Act, the following were provided with better treatment: Both Eider Rock and the Belleoram projects, where the Department of Fisheries did not scope the main project in with the marine terminal, unlike the treatment provided to Bilcon; Tiverton, where the office of DFO Minister Thibault had asked if there was anything he could do to speed up the process, rather than the clear obstacles and delays that DFO put in the way of Bilcon.

And the similar approach to speed up the process was also taken by DFO in the Bear

Head case; Keltic, where there was a marine terminal, petrochemical facilities, a dam and a highway, yet the study only underwent a federal comprehensive study in conjunction with a Nova Scotia provincial panel review.

In the case of Keltic, DFO's approach was to actively advise the proponents about how to avoid the onerous federal panel review of an EA, and in the result, despite numerous significant adverse environmental effects of the Keltic project, the federal comprehensive study and the Nova Scotia review panel recommended approval of the project with appropriate mitigation measures.

With respect to treatment provided by investors and investments of investors from non-NAFTA parties and other NAFTA parties, for example, Rabasca, where the JRP recommended mitigation measures, rather than where the project simply be rejected.

And with respect to treatment provided to investments of investors from non-NAFTA parties or other NAFTA parties with respect to provincial government treatments, the following were provided with better treatment: Miller's

Creek where, just after the Joint Review Panel of the Bilcon quarry was concluded, the Miller's Creek mine extension in Nova Scotia was also approved by the Province of Nova Scotia without referral to a review panel.

So we have covered each of the areas with respect to like and likeness. We have covered each of the areas with respect to the level of jurisdiction to deal with the treatment. In each and every one of the situations, there is better treatment provided to Canadian investments or Canadian investors - that's with respect to national treatment - and there is better treatment that was provided to the investments of investors from non-NAFTA parties, or other NAFTA parties pursuant to the most-favored nation treatment obligation, both by the federal level of government and by the provincial level of government.

And there are other examples and more details of considerably less severe, less strict and otherwise more favourable treatment of Canadian and third country investors and investments in the relevant universe of likes, and these are all detailed in the Bilcon pleadings.

But the overall picture is best

described by Mr. Estrin in his expert testimony, based on the treatment of others in the universe of likes. He says:

> "It would have been a total shock and surprise for the proponent of this quarry and that project would have been referred to a review panel."

That being said, there is considerable evidence in the pleadings and the testimony that suggest that the differences in treatment in question cannot easily be explained by objective factors. In the case of Tiverton, for example, Canada points to the larger size of Bilcon's 152 hectare proposed quarry.

Yet, as Mr. Rankin indicates in his expert testimony, the actual factor that bore most directly and dramatically on the diametrically opposed treatment of Tiverton and Bilcon was not the size difference - that is, relative differences in environmental effects in relation to matters of federal jurisdiction that would stem from the size of the project - but something entirely different.

While it was in the Minister's perceived political interest to block Bilcon, it

was at the same time in the Minister's perceived political interest to push Tiverton through as soon as possible. And on that basis, the Minister intervened and diverted the regulatory process from its normal course.

Indeed, as Mr. Rankin has testified, potential effects on the marine environment might well have objectively justified stricter treatment of Tiverton than Bilcon's project. He said:

> "Tiverton involved blasting on the ocean floor... here we had a quarry and a marine terminal, which didn't have nearly that kind of impact on the ocean floor."

You will recall in the opening we took you to a video of the blasting, or similar to the blasting that would have taken place in that harbour over by Tiverton.

Further, there were larger and more complex projects than Bilcon's that were treated less strictly or severely allowed to go forward with mitigation. The other considerations suggested by Canada to explain the considerably

more severe or strict treatment of Bilcon in comparison with Canadian and third party country investors in a universe of likes is public concern.

Properly defined, public concern are a legally mandated consideration in determining the kind of environmental review to which a proponent is to be subjected.

But of course the public concerns in question must be related to perceived environmental effects and those effects must be within federal jurisdiction.

The mere fact there is a fierce lobby or faction in the community with high political connections and influence is not an objective consideration of the kind contemplated by the statute that could vastly alter the nature of the environmental review from what would be objectively justified on scientific and related considerations connected to environmental risks.

Further, the national treatment and MFN obligations of NAFTA protected investors from deleterious treatment based on concerns related to its nationality.

Canada has not denied that the public concerns that were at issue with Bilcon

included concerns with the investor's nationality. Indeed, in the testimony at the JRP hearing, Minister Thibault legitimated the consideration of nationality, in particular, Bilcon exporting to its home market in the United States.

Now, in any event, there were projects where consideration of legitimate public policy concerns were at play, and the treatment of the proponent in the universe of likes with Bilcon was considerably less strict or severe.

For example, in Rabasca, there was significant public concern as Mr. Estrin set out in his report.

Now, given the stark differences in treatment of Bilcon relative to investments and investors of Canadian nationality, it would be up to Canada to demonstrate that the difference is entirely due to objective, rational considerations unrelated to nationality. This, Canada has not done.

Canada has also purported that a difference with others in the universe of likes that was an objective consideration of the treatment of Bilcon was the proposed quarry site was in a pristine, protected eco zone.

As our pleadings and the evidence, including the video evidence, presented to the Tribunal, indicates, this was not true, although certainly some of the local residents would have liked it to be true. This was an industrial area, home to other quarries and a marine zone characterized by constant heavy shipping traffic.

In any case, if we were dealing with a pristine and protected eco zone, the lack of caution and precaution in the treatment of nearby Tiverton would be utterly inexplicable. None of the purported differences alleged by Canada between Bilcon's project and others in the relevant universe of likes comes close to meeting Canada's burden to prove the actual considerations that led to the considerably more severe or stricter treatment of Bilcon were of an objective, rational, fact-based nature and unrelated to the nationality of the investor, either as a foreigner generally under national treatment, or specifically as an American under the most-favored nation obligation.

Now, I would like to turn to the Free Trade Commission notes of interpretation. Canada contends that the Free Trade Commission note was issued pursuant to Article 1131(2) of the

NAFTA, and therefore is a definitive interpretation of Article 1105 that requires no more or no less than the customary international law standard of treatment of aliens.

An interpretation by its very nature cannot add or subtract from the rights or obligations in the treaty. Only an amendment can do that, or some other particular device like a waiver or a reservation which may or may not be provided for in the text of a particular treaty.

The Vienna Convention on the Law of Treaties provides:

> "An amendment to a treaty shall follow any agreed rules within the treaty for amendments."

Canada asserts a legal effect to the interpretive note that it would prevent this Tribunal from considering sources of international law other than custom in determining the content of fair and equitable treatment.

Now, this would clearly truncate the ordinary meaning of NAFTA Article 1105, which refers to treatment in accordance with international law, without any restricting or

qualifying language.

The ordinary meaning of international law is, at a minimum, those sources of law included in Article 38 of the statute of the International Court of Justice.

In sum, either some different import than that suggested by Canada must be given to the interpretive note, or, alternatively, the parties to the NAFTA violated both the Vienna Convention and the NAFTA in attempting to amend the NAFTA other than in conformity with the amending procedures in the NAFTA itself.

The full constitutional and legislative processes of the NAFTA parties was used to bring the NAFTA into force, and the NAFTA includes explicit rules about how modifications or additions to the treaty can be made.

In particular, NAFTA Article 2202 requires each NAFTA party to respectively complete a process of constitutionally mandated legislative approvals before modifications or additions to the treaty can be made.

This is further supported by NAFTA Article 601, which confirms the full respect of the NAFTA parties of their domestic constitutional

arrangements.

None of these domestic approvals were obtained, and the democratically elected members of national legislative bodies of the NAFTA parties were not consulted before the notes were issued.

They are therefore limited to interpretations that do not amend the treaty. For the treaty to be amended all of the NAFTA parties need to formally agree in the manner that is set out by NAFTA Article 2202.

By contrast, an interpretation is merely a clarification or an elaboration of a NAFTA provision. The commission notes of interpretation, however, cannot have the effect of amending the NAFTA. Where the notes merely interpret a treaty provision, rather than modifying it, thereby they must be applied.

However, within the entire customary international law framework of treaty interpretation, and particularly the norms codified in Article 31 of the Vienna Convention, but any note that is in effect an amendment is ultra vires and suffers a democratic deficit by not allowing members of parliament to be engaged in that process

to modify the treaty as this treaty empowers them to do and which they are entitled to do.

Now, Canada has raised issue -- sorry, go back. We have also raised an issue with respect to another approach of the most-favored nation treatment obligation, and that deals with better treatment provided by Canada and other investment treaties.

Canada is a party to many bilateral investment treaties with non-NAFTA member states. These treaties state a fair and equitable treatment obligation in terms that are similar or even broader than NAFTA Article 1105. However, Canada and the other parties to these treaties have not negotiated interpretive notes or other instruments that are claimed to narrow the meaning of fair and equitable treatment in the treaty itself.

If and to the extent that this Tribunal might accept the invocation of the notes of interpretation, as suggested by Canada, to actually operate to narrow Article 1105 obligations to provide lesser treatment, then that same invocation would result in less favourable treatment being provided by Canada to the investor

under NAFTA than to investors of non-NAFTA state parties, in violation of the most-favored nation obligation in NAFTA Article 1103.

We set out this argument in paragraphs 97 to 101 of the investors' response to the Article 1128 submission, and here we set out 13 investment treaties where Canada provides a better level of international law standard of treatment to investments of foreign investors.

We should have a slide here that sets out a list of Canada's treaties with these particular formulations. All of these treaties are in force, and the Canadian treaty office has confirmed the validity of these treaties and these obligations.

So the application of the MFN clause in this way is consistent with the object and purpose of the NAFTA. That has a comprehensive economic integration, such as the Pope & Talbot tribunal noted, could not be consistent with a lower standard of treatment under treaties with states with much less close and less interdependent economic relations.

Now, I would like to turn to the issue of the threshold for a breach. In light of

the facts in this claim, there are clearly violations of NAFTA that are inconsistent with the obligations contained in NAFTA Article 1105, even under the narrow and erroneous NAFTA analysis presented by Canada.

Canada contends that this Tribunal should apply the test as reflected in Glamis to Article 1105.

The test from Glamis is effectively that of the 1920s decision of the US Mexico claims commission in Neer, that a breach only amounts to a breach if it is egregious and shocking, but the Glamis tribunal noted that the conduct that might be found shocking or egregious today could be different than from the time of Neer.

So for Glamis, it is a contemporary community standard of propriety that govern, even on what we would find to be an impossible view that customary international law has not evolved from that time.

We don't have time for me to -- this is one of my favourite topics. I gave a lecture in it earlier this year at the European University Institute. You could get me really

rolling. I am going to contain myself, because you have imposed time limits on me.

However, Canada's position does not take into account any of the more recent interpretations of NAFTA Article 1105. NAFTA practice reflecting Article 1105 is identified by the Tribunal in Waste Management II, which expressed the standard as being one that does not require a claimant to reach the Neer level of egregious and shocking. Instead, relying on numerous previous NAFTA awards, the tribunal endorsed a standard commensurate with the international law standard we have articulated.

It is one that protects a claimant from conduct that is arbitrary, grossly unfair, unjust or idiosyncratic, or involves a lack of due process leading to an outcome which offends judicial propriety.

In following the Waste Management II standard, this Tribunal should consider the facts as they have been presented in the evidence and render a simple determination. Was the process that Bilcon was subjected to a fair and equitable exercise of Canada's environmental regulatory authority, or was it a politicized process where

science was disregarded, which flew in the face of not only the written legislation, but established norms of environmental review?

The Waste Management standard has been identified and adopted by numerous other NAFTA tribunals, such as the Cargill tribunal, the Pope & Talbot tribunal, Mondev, Merrill & Ring and Chemtura.

Now, on several occasions in its memorial Canada suggested there should be some form of inference drawn from the failure of the investors to seek redress in a domestic court of Canada.

Canada has only raised this issue in connection with NAFTA Article 1105. Canada has rightly not asserted that the exhaustion of local remedies is a condition precedent to the invocation of dispute settlement under NAFTA Chapter 11.

Where a special international dispute settlement provision gives an investor direct access to redress at the international level without the need to exhaust local remedies, it is up to that investor to assess the strategy that best serves its needs, and that is likely to be the most fruitful.

It was clear from the witness testimony of Lawrence Smith that the proponents were not necessarily better off seeking judicial review. Mr. Smith was in error, though, when he said there could be an appeal, as there could be no appeal from a Minister's decision with respect to the consideration of environmental assessment of a Joint Review Panel report.

What there can be is a judicial review, which is what I assume really that he was referring to, a judicial review which, in Canada, is a limited procedure which would, at best, not result in anything other than remitting the matter to be done again and cannot result in compensation for the losses incurred from the wrongful behaviour.

So besides the practical considerations raised by Mr. Smith as to why a proponent might not engage in a domestic legal challenge, there are significant legal impediments that are unique to the Canadian system, and would not arise in other legal regimes in such circumstances, that also would be of some effective consideration in this matter.

Now, I would like to turn to

jurisdictional issues. A number of jurisdictional questions have been raised, but none prevent the investors bringing a meritorious claim pursuant to NAFTA Chapter 11.

The first is jurisdiction over the 3.9 hectare quarry. Canada suggests that the measures imposed on the 3.9 hectare quarry do not relate to Bilcon. The 3.9 hectare quarry permit was expressly integrated into the April 24th, 2002 partnership agreement between Nova Stone and Bilcon.

The 3.9 hectare permit was made in contemplation of the 152 hectare project and became a pool of partnership assets, and partnership is defined within the term "enterprise" in the NAFTA, and so it is an investment of an American investor for the purposes of NAFTA Chapter 11.

The requirement of NAFTA Article 1101 is easy to meet. The failure to grant a licence to operate a 3.9 hectare quarry on April 30, 2002 constitutes a measure, which relates directly to the investors and their investments, and there is a legally significant connection between the investors and the measure as described by the Methanex tribunal.

So the failure to obtain a permit was directly and specifically related to the investments, and the failure to obtain the permits proved to be fatal to the business of the investors.

Let's talk about time. Article 14(2) of the ILC articles on state responsibility provides that:

> "The breach of an international obligation by an act of state having a continuing character extends over the entire period which the act continues and remains not in conformity with the international obligation."

Canada's continuous measures extended over the duration of the environmental assessment process beginning with the 3.9 hectare application, all the way to the application for the approval of the quarry when the JRP report was adopted.

The critical connection between the smaller and the larger quarries is not contested. From the outset, the primary purposes

of the 3.9 hectare quarry was to gather data about a larger quarry that it was contemplating.

As Mr. Buxton stated in his testimony:

> "That is what we were trying to do for about six years was simply conduct a test blast to provide good, sound empirical data."

Bilcon was still continuously hamstrung by regulators and willing to entertain this request to test blast to gather the requisite scientific data that lasted well into January 2007.

Bilcon's numerous attempts to obtain the test blast were repeatedly obstructed throughout the entire environmental assessment. When the request ultimately was before the JRP in 2007, Bilcon had been trying to obtain the data for five years.

It was, in effect, a continuous catch 22, which made it impossible for the investor to ever meet the government-imposed standard of the effects of blasting.

You have heard evidence that the Claytons came to Nova Scotia to start a quarry and

that the loss of the quarry was not known until December 2007. Continuous and cumulative breaches are of such a nature that only at the end of the series, when the ultimate fate or consequences for an investor or an investment become clear and certain, does the harm or loss from the entire pattern of conduct vest and become known.

Indeed, the fate of Bilcon's investment was not known until the regulatory process concluded with the Ministers' respective decisions in 2007.

Now, under NAFTA Article 1116(2), a claim cannot be brought after three years once the investor acquires actual or constructive knowledge of the breach, as well as knowledge of the loss.

So the complaining party raising a technical defence or as the complaining party raising such a technical defence, Canada has the burden to demonstrate that the investor has acquired knowledge and can be said that the limitation period has begun to run.

Canada has not discharged this burden of showing that, prior to June 17, 2005, Bilcon had any actual knowledge of the resulting

breach and knowledge of the loss.

It is only at the time of the decision by the Minister to deny the Bilcon quarry, with the approval by Canada of the JRP report, that the harm and subsequently the loss or damage could be known. The quarry approval process continued, and the investors had every reason to believe, until 2007, that the environmental assessment process would be carried out in good faith and lead to a successful conclusion.

Now I would like to turn to the Joint Review Panel. The actions by the Joint Review Panel are attributable to Canada through its status as an organ of Canada under Article 4 of the articles on state responsibility.

Notably, the JRP's appointment by the Government of Canada under statute, the grant of statutory powers, and authority, all relate to ILC Article 4. In addition, Canada's adoption of the JRP's actions and omissions result in responsibility under ILC Article 11. Two different grounds.

Canadian courts have also confirmed the Joint Review Panel comes within the meaning of a federal board, commission or other

tribunal under the Federal Courts Act of Canada.

The Canadian environmental assessment legislation mandates the Minister to consider the JRP report before making its decision.

The Canadian Cabinet accepted the JRP report as a final disposition of the investor's proposal without comment or modification.

This was an unambiguous adoption of the JRP report within the meaning of ILC Article 11, thereby "acknowledging and adopting the conduct in question as its own".

Canada acknowledges that it accepted and supported the ultimate recommendations made by the JRP. The result of this acceptance is an adoption of the JRP's report's principal recommendation to reject the investor's application for a quarry at Whites Point.

Now I would like to turn to the issue of mootness. Professor Rankin has addressed this issue of mootness. On day 2, he said, there are two decisions, one federal, one provincial.

And the argument was made by Mr. Smith, as I understood it, that after the provincial government had made its decision, no quarry, there really was no point. That is this

question of mootness, that it was all decided by Nova Scotia.

As Arbitrator Schwartz correctly identified, section 37 of the CEAA would enable the Federal Minister to obtain clarifications from the panel. Bilcon wrote to the Minister to have clarifications in light of the clear factual errors in the report and other serious other procedural concerns.

Concerns of natural justice and fairness must be addressed in some way. The CEAA process requires a decision by the Minister. The Minister is obligated to make it, and Bilcon is entitled to receive it.

Canada could have asked the JRP to turn its mind to specific mitigation measures and their costs and benefits, not dogmatically or sweepingly assuming that all mitigation would be ineffective.

Canada's omission to do this and, instead, its unqualified and unconsidered adoption of the JRP report, caused significant harm to the investor. Canada closed off the possibility of a modified JRP report on the basis of which a range of alternative options might have arisen that would

have not required the investor simply to get out of the country.

Based on the modified report with a detailed analysis of mitigation, and its costs and benefits, both levels of government might have reconsidered and might have accepted the project to go ahead on a conditional, limited or modified basis until all the relevant environmental and related effects were better understood with requirements for monitoring and review.

Indeed, in almost every case, this has been exactly what has happened where the JRP has identified significant environmental risks.

Now, during day 4 of the hearing, if you will recall, Canada first raised an issue as a point of procedure about William Clayton, Sr., not being a director of Bilcon.

I would like to turn to that. If this is indeed to be a jurisdictional defence by Canada, which it appears that it is, then the UNCITRAL arbitration rules provide that all jurisdictional defences must be raised not later than the filing of the statement of defence.

Paragraph 3 of Article 21 of the UNCITRAL rules states:

> "A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the statement of defence or, with respect to a counterclaim, in the reply to the counterclaim."

Of course Canada didn't make a counterclaim in this case, so Article 21 required Canada to file any jurisdictional challenges on this point by its statement of defence.

Canada filed the statement of defence on December 18th, 2009. So it is almost four years too late to raise this new argument. In any event, we note for the Tribunal that information about corporate officers and directors is a matter of public record that was always available to Canada.

Also, Canada had the ability to make interrogatories and used the ability to make interrogatories in this case, chose not to make an interrogatory in this area.

The evidence is also clear that this was a family business run by William Clayton, Sr., for the benefit of his children.

Mr. Clayton, Jr., testified that Mr. Clayton, Sr., funded the investment in Nova Scotia and he continues funding the ongoing operation, and that his father was involved.

The documents on the record also indicate that the government was aware that the investment was being made by the Clayton family: For example, the letter of intent from Ralph Clayton and sons to Nova Stone, which is document C-5; the letter from Ralph Clayton and sons to the Honourable Gordon Balser of August 2002, which was Exhibit 2 to Mr. Buxton's witness statement; a letter to Minister Morash, which is Exhibit 9 of Bill Clayton, Jr.'s, witness statement and that is October 24th, 2003.

There is also evidence from Mr. Buxton on the transcript of day 1 at page 226 and from Mr. Lizak's testimony that Bill Clayton, Sr., met with Minister Balser in Nova Scotia. This is also on the record in the affidavit of William Clayton, Jr., at paragraph 16 and 17.

Now, the term "investment in the NAFTA" is in Article 1139 of the NAFTA. It provides a long list of items that can constitute an investment. Canada has only focussed on one of

many items in that long list.

An investment includes an equity shareholding; a loan to an enterprise where the enterprise is an affiliate of the investor; real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other purpose.

It is a broad definition, and the term is clear that it was always intended to be broad. We know this was a family business. Mr. Clayton, Sr., has investments that would qualify under NAFTA Article 1139. He is an American investor with an investment defined in NAFTA Article 1139.

To the extent that this issue is about the damage suffered by Mr. Clayton, Sr., this is in our view a matter to be considered in the damages phase.

Now, it is not, though, a jurisdictional objection and it is entirely inappropriate for such an issue to be brought in the middle of the witness phase of this hearing at such a late date, and, in our view, cannot under the UNCITRAL arbitration rules be considered at this time.

I will conclude, Mr. President and Members of the Tribunal, that the damage suffered by the Clayton family is indeed substantial and was caused entirely by Canada failing to accord them the protection of fairness and equality, and the protections that we get from NAFTA Article 1102 and 1103. These are all protections of the NAFTA guarantees to American investors operating in Canada.

With that, I thank you very much for your attention today. I am happy to take any questions that you might have.

PRESIDING ARBITRATOR: Thank you, Mr. Appleton, are there any questions:

QUESTIONS BY THE TRIBUNAL:

PROFESSOR SCHWARTZ: You have spoken about the atmosphere at the hearings, and so on and so forth, but in the substantive report issued by the JRP there is some discussion of relative benefits and burdens with respect to the investor as opposed to the local community and the region.

Is it your view that that substantial analysis is outside of a proper environmental assessment or that it constitutes an

1102 or 1103 breach?

MR. APPLETON: Professor Schwartz, I am going to think about that and I will deal with it in the rebuttal.

I will point out that, of course, one of the other parts of this process was that, in the cumulative effects, the cumulative effects that are raised by the panel is the cumulative effect of a foreign investor being able to operate and having the benefit of being a foreign investor in the NAFTA, and to the tribunal that would mean that all types of future effects would take place.

Now, we know, because we know what NAFTA means and that could not be correct. The government told them that couldn't be correct. The JRP had its own expert that told them that couldn't be correct.

But despite hearing that again and again, they then use a totally impermissible, discriminatorily-based focus on the foreign nationality of this investor and the investment to be able to base that.

But I will look at that particular section and come back to you with respect to that in the rebuttal phase.

PROFESSOR SCHWARTZ: Now, I understand at this stage, if there were any damages -- if there was a wrong and if there were any damages -- we would not quantify them, but we would address principles of damages; right?

MR. APPLETON: That would be my understanding, as well.

PROFESSOR SCHWARTZ: If there was a process failure, is it possible that the guiding principle of damages would be the money lost on an improperly-conducted process, rather than speculating whether the outcome would have been positive?

MR. APPLETON: The issue of damages is in its own world or its own set of issues.

It would seem to us certainly, applying the standard principles of the calculation of damages, that there would be an area of damage that would result to an improper process. There also would be an area of damages that would result from the inability to be able to operate, and that could be dealt with by way of discounted cash flows and other types of scenarios.

So there are people who are

significantly smarter than me who spend their lives worrying about such matters, and should we have that opportunity, I am sure they would love to educate all of us as to how to deal with it.

But the answer is the process would be, generally, but for the action, what would the damages have been? That is the general principle of reparation here, and so we think that would probably be -- this is really an issue to be discussed at another time.

But I understand the consideration, and, yes, certainly we would have damages with respect to this process, I am sure.

PROFESSOR SCHWARTZ: Thank you.

PROFESSOR MCRAE: Mr. Appleton, you mentioned this question of this jurisdictional issue about the 3.9 hectare quarry, and I heard your arguments and obviously the Tribunal has to make a decision.

I am asking a bit of a hypothetical, but I think it is something that is worth considering, and that is, most of the blasting and the setback issues relate to the 3.9 hectare quarry.

If the Tribunal was to conclude

that it did not have jurisdiction in respect to the 3.9, does that rule out all of this material relating to blasting, or is that in some other way still relevant to the rest of the case?

MR. APPLETON: Why don't we -- it is a very good question. Why don't we consider a little bit about this and come back to you.

I think I know what my answer is, but I think we would like to talk about it.

PROFESSOR MCRAE: Okay, thank you.

PRESIDING ARBITRATOR: That gets us to the very short lunch break that we are going to have. It is 11:50 on my watch. So we will start again, and please be back in time at 12:20. 12:20, and we will go to the respondent's closing argument statement. Thank you.

--- Luncheon recess at 11:49 a.m.

--- Upon resuming at 12:20 p.m.

PRESIDING ARBITRATOR: Okay. I think we are ready. Kathleen, we are fine? Thank you. So, Mr. Little, you have the floor.

SUBMISSIONS BY MR. LITTLE:

MR. LITTLE: Thank you, Judge Simma.

I want to take the opportunity,

first, on behalf of our team and the Government of Canada to thank each member of the Tribunal, Mr. Pulkowski and Ms. Claussen for all of the work that has been put into the hearing. We recognize the many hours that have been devoted to the case and we appreciate the interest and the thoughtful questions that the Tribunal has asked.

Thank you also to Ms. Forbes, our court reporter, and her team for staying with us through some long days and who did a superlative job in ensuring that the transcripts were turned around to the parties as quickly as possible; and finally, thank you to the Arbitration Place and its technical staff for hosting such an efficiently run hearing.

I want to also now briefly provide you with an overview of Canada's closing argument, but before I do so, I want to turn back to those three overarching considerations that I asked you to keep in mind on the very first day of this hearing, and to recall them in light of the evidence that's been presented over the past seven days.

You can see those considerations on the screen.

With respect to the first overarching consideration, whether the claimants have proven the facts they must to make out their claim, well, the claimants have now had the opportunity to cross-examine six of Canada's fact witnesses who swore affidavits to explain the decisions made in the Whites Point EA process. They have also had the opportunity to cross-examine Canada's expert witness, Mr. Smith, who has provided his opinion as an EA practitioner that all of these decisions were reasonable and fair.

Now, the cross-examinations honed in on a remarkably small selection of documents, and implied that government decision-making in the Whites Point EA was infected by Ministerial meddling and improper political considerations imposed from above.

But the claimants ignored the crucial facts. The claimants chose not to cross-examine the one person they appear to orchestrating the predetermined outcome for Whites Point EA, former Minister Robert Thibault.

Mr. Thibault swore an affidavit in the arbitration, testifying that he never directed or interfered with the work being conducted on the

EA, and that his only interest was in a full and fair EA that strictly complied with the rules.

While the claimants did cross-examine Mr. Neil Bellefontaine, the former Regional Director-General of DFO in the Maritimes who liaised with former Minister Thibault frequently on the Whites Point project, they chose not to even question Mr. Bellefontaine on his sworn evidence that Minister Thibault never provided Mr. Bellefontaine or his staff with any instruction as to decisions that were to be made in the Whites Point EA.

They also chose not to question Mr. Bellefontaine on all of the various scientific concerns that he testified both he and his staff had over the Whites Point project.

Now, beyond their clear avoidance of the facts Canada has put before you relating to Minister Thibault's role in the EA, the claimants simply ignore a fundamental and bigger picture facts relating to the size and duration of the Whites Point project, its likely adverse environmental impacts on the biophysical and human environment of the Digby Neck, and the significant public concerns that it engaged.

Now, the fundamental facts -- sorry, the Digby Neck was simply not, as Mr. Appleton claims, an industrial zone, characterized by heavy marine traffic. And I explained why in my opening. And the fundamental facts that I just listed off explain why the Whites Point project was assessed as it was by a Joint Review Panel.

Finally, the claimants ignore that the decision in the Whites Point project would, in the end, not be approved was also based upon factually reasonable and legitimate findings arrived at through the workings of a JRP process, that is that the project would result in a mitigable adverse environmental effects on the Digby Neck environment.

Now, in the end the claimants' unfounded assertions are no substitute for all of the uncontroverted facts that Canada has proffered in the arbitration and today we'll explain why.

Now, with respect to the second overarching consideration, that the claimants have focussed on a host of alleged controversies that really don't matter in the end. I noted last Tuesday that we anticipated the claimants would

devote considerable attention in this hearing to decisions made over the course of the Whites Point EA that were absolutely irrelevant to the issue of whether or not the Whites Point project could proceed.

And we were correct. Now, in this regard, you were presented and provided with four days of cross-examination of Canada's witnesses focussing almost exclusively on decisions made regarding blasting on Nova Stone's small 3.9 hectare quarry that wasn't the Whites Point project.

Strangely, earlier today Mr. Nash described these decisions made in 2000 and 2003 as checkmate in the Whites Point EA process, which was not concluded until December of 2007.

Now, when cross-examination didn't focus on decisions regarding blasting on the 3.9 hectare quarry, it fixated on this allegation that the federal government over stepped its constitutional authority in making its preliminary decision that the quarry element of the Whites Point project would be included in the scope of project for the purposes of the Whites Point EA.

This was also a central

preoccupation of the claimants' expert witnesses, Mr. Rankin and Mr. Estrin. There was nothing improper about DFO's decisions regarding blasting on the 3.9 hectare quarry or its scope of project decisions. But as I noted in our opening statement and I have noted just now, these decisions were of no consequence because they had no bearing whatsoever on the outcome of the Whites Point EA.

So as we were at the beginning of last week, we're left today questioning why the claimants have spent so much time and effort questioning these decisions when there were so many other decisions that were germane to the outcome of this process.

Finally, the third overarching consideration we wanted you to keep in mind was whether the measures that the claimants complain of can possibly amount to NAFTA violations.

Whether made in their pleadings or over the course of the past eight days, the claimants' complaints are, at the most, in the words of Mr. Rankin, "questions of Canadian administrative law".

The measures in issue were neither wrongful nor a violation of Canada's NAFTA

obligations. At the most, they might be the subject matter of a domestic judicial review in Canadian courts. And as you described it yesterday, Judge Simma, the elephant in the room is why, if the claimants take such issue with the decisions that were made in the Whites Point EA process, they didn't pursue their judicial remedies in the Canadian courts.

The measures under attack in this case simply don't belong in this forum, a NAFTA arbitration, and we will explain why in greater detail when we address the claimants' Article 1105 claims.

So as we asked you at the outset of this case, please keep these three overarching considerations in mind as we proceed through our closing statement.

Now I would like to provide you with an overview of Canada's closing statement. Now, as I indicated, in Canada's opening statement, the legal issues to be decided by the Tribunal in this case fall under three general categories. And we will address these three general categories in our closing as follows.

As you can see on the screen,

we're going to first explain why many of the claimants' claims in this arbitration are subject to jurisdictional bars in light of certain threshold provisions of the NAFTA.

My colleagues, Mr. Douglas and Mr. Spelliscy will be addressing these jurisdictional bars.

We will then turn the claimants' claims under Articles 1102 and 1103. Here I will explain why the claimants have failed to discharge the burden that they must in making out a claim under these provisions; that is, of demonstrating they were accorded treatment less favourable than other EA proponents that were in like circumstances to them.

My colleagues Mr. Hebert and Mr. Spelliscy will then respond to the claimants' claim that the government decisions and acts of the JRP, taken in the course of the Whites Point EA, breached Canada's minimum standard of treatment obligation under Article 1105.

And with reference to the suggestion made by Professor Schwartz yesterday, I will note here that our 1105 submissions will indeed address those three stages of the Whites

Point EA in the order that was articulated by Professor Schwartz.

In the end our request is going to be that this Tribunal must dismiss the claimants' claims in their entirety with the costs of this arbitration to be awarded to the Government of Canada.

So I will now turn things over to Mr. Douglas and Mr. Spelliscy who will address the jurisdictional bars to many of the claimants' claims. Thank you.

PRESIDING ARBITRATOR: Thank you, Mr. Little. Mr. Douglas, you have the floor.

SUBMISSIONS BY MR. DOUGLAS:

MR. DOUGLAS: Thank you very much, Judge Simma. The claimants chose not to spend much time on jurisdiction in their opening. I am not going to be as short, but I will move quickly, I think more quickly than I would usually for the sake of time, but if you have any questions at all please by all means interject and ask.

There are four jurisdictional issues the Tribunal must consider: First, whether Nova Stone's 3.9 hectare quarry permit is a measure relating to the claimants under Article 1101(1);

Second, whether certain measures that the claimants allege breach the NAFTA are time-barred under Article 1016(2) because they occurred prior to June 17th, 2005;

Third, whether this Tribunal has jurisdiction under Article 1116(1) to consider measures that could not have caused the claimants any losses;

And, finally, whether the JRP is an organ of the state such that its actions are attributable to the Government of Canada.

I will address the first three of these issues. The fourth will be addressed by my colleague, Mr. Spelliscy.

Before we turn to these, I would like to clear up the issue of burden. Mr. Appleton alleged in his opening that Canada has the burden because it is asserting jurisdictional arguments as technical defences.

This is incorrect. If you look at Article 1122 of the NAFTA, it is the Article dealing with consent to arbitration, and it clearly states that Canada only consents in accordance with the procedures set out in the agreement.

The claimant bears the burden of

proving that it has complied with these procedures and that the tribunal has jurisdiction to hear the claims submitted. Numerous awards have confirmed this conclusion.

I refer you to the decision in Gallo on this point at paragraph 87.

Thus, the first issue we must look at is whether Nova Stone's 3.9 hectare quarry permit is a measure relating to the claimants under Article 1101.

Pursuant to NAFTA Article 1101, a tribunal only has jurisdiction to consider measures relating to investors of another party or their investments. Measures that do not relate to investors or their investments cannot be subject, cannot be the subject of a claim under Chapter 11.

Now, what does "relating to" mean?

As the claimants acknowledged in their opening and in their reply memorial, the Methanex decision is the governing law on this question.

And the tribunal in Methanex found that the phrase "relating to" requires a legally significant connection between the measure and the investment or the investor.

Thus, the question is whether Nova Stone's 3.9 hectare quarry is a measure that has a legally significant connection to Bilcon of Delaware or its investment, Bilcon of Nova Scotia.

Now I am going to talk briefly about some confidential information, so I didn't know whether the live feed should be turned off for a moment and perhaps we could turn it back on.

PRESIDING ARBITRATOR: Give us a second.

--- Upon commencing confidential session under separate cover at 12:34 p.m.

--- Upon resuming public session at 12:36 p.m.

MR. DOUGLAS: We can go back.

PRESIDING ARBITRATOR: We are back.

MR. DOUGLAS: Thank you. So let me be clear. We have Nova Stone Enterprises on the one hand and we have their permit on the one hand, and we have Bilcon on the other.

The only connection between Bilcon and the permit is clause 3(c). And this dynamic continued you throughout the life of the permit until it was terminated on May 1st, 2004.

This fact tells us four

significant things. First, the letter of intent was signed after the permit was granted. This means that there was no possible connection between Bilcon and the permit when conditions 10(h) and (i) were created.

Second. Nova Stone's 3.9 hectare quarry permit was a Canadian investment. Nova Stone is a Canadian company. The 3.9 hectare quarry permit was not a foreign investment made by Bilcon. As Mr. Clayton stated in his testimony, Bilcon of Delaware did not invest in Canada to own and operate a 3.9 hectare quarry.

Third, the letter of intent is not a partnership agreement between Nova Stone and Bilcon. And there never was a partnership agreement between Nova Stone and Bilcon.

Fourth, and finally, Bilcon had no rights, no privileges under the permit at any time. The permit was granted to Nova Stone and Nova Stone alone. In fact, Nova Stone was not ever allowed to transfer the permit to Bilcon without Ministerial approval. This is pursuant to section 59(1) of the Nova Scotia Environment Act.

And it was for this reason that Mr. Petrie testified that at all times when the

province and DFO were engaged in a review of blasting under conditions 10(h) and 10(i), they were dealing with Nova Stone, and Nova Stone alone.

Now, despite all of this, the claimants assert that measures taken pursuant to Nova Stone's 3.9 hectare quarry permit were measures relating to the claimants.

We heard over the course of the arbitration, the claimants made this assertion that DFO used conditions 10(h) and 10(i) in the 3.9 hectare quarry permit to establish a trigger on the larger quarry EA process.

This, however, is not correct. Conditions 10(h) and 10(i) were not used by DFO to establish a trigger at the larger quarry. DFO did find a trigger on the smaller 3.9 hectare quarry site belonging to Nova Stone. And at that time, the claimants had filed a project description that had swallowed Nova Stone's 3.9 hectare quarry site.

A finding of a trigger on the -- a finding of the trigger on the first, the smaller site by necessity meant that there had to be a trigger on the second, the larger quarry. However, this does not mean that conditions 10(h) and (i) in Nova Stone's 3.9 hectare quarry permit relate to

the claimants.

As the record makes clear, the permit with the conditions was granted to Nova Stone and Nova Stone alone.

The claimants have next argued throughout the course of the past couple of weeks that the 3.9 hectare quarry permit is a measure relating to Bilcon because DFO withheld setback distances in its evaluation pursuant to conditions 10(h) and 10(i), but these setback distances were not withheld from Bilcon. They were not withheld from Global Quarry Products. They were withheld from Nova Stone Exporters.

Consider this. If DFO did approve blasting pursuant to the 3.9 hectare quarry permit, who would get the benefit of that blasting? It would not be Bilcon. It would not be Global Quarry Products. It would be Nova Stone, because the permit belonged to Nova Stone.

Bilcon had no rights or privileges under Nova Stone's permit at any time.

So the operative document is the letter of intent of May 2nd, 2002 between Bilcon and Nova Stone Exporters. This document merely states that Nova Stone intended to transfer the 3.9

hectare quarry permit to the partnership. That is the extent of the relationship between Bilcon and Nova Stone's 3.9 hectare quarry permit.

In Canada's view, the mere intention to transfer the permit was not enough to establish a legally-significant connection between Bilcon and Nova Stone's 3.9 hectare quarry permit. It is for this reason the Tribunal does not have jurisdiction to hear Bilcon's claims relating to the permit pursuant to Article 1101(1).

Now I am going to move on to the next jurisdiction issue which deals with time bar.

The parties dispute the timeliness of four measures in this case. First, the 3.9 hectare quarry permit, which was terminated on May 1st, 2004; second was the scoping decision of April 14th, 2003; third was the comprehensive study decision, also of April 14th, 2003; and finally, the referral, pardon me, that the quarry and marine terminal be referred for referral to a JRP, and this occurred on June 26th, 2003.

NAFTA Article 1116 provides the right to investors to sue directly a party to the NAFTA. Without the Article, the right does not exist.

But the Article limits the exercise of that right. And it says that the investor has to act within three years of having first acquired knowledge of breach and loss arising from that breach.

And in this case the relevant cutoff date is June 17th, 2005.

Now, the claimants state in their reply memorial at paragraph 733, and I quote:

> "Article 1116 (2) recognizes the interest of the NAFTA parties not to be subject to potentially limitless claims by a foreign investor for measures taken too far back in the past."

Now, Canada agrees with that statement. Canada agrees with that statement. But let's think about that for a moment in the context of this case. In preparation for my closing today I went through the claimants' indices to their cross-examination binders that they used in their cross-examination with our witnesses. I looked at Mr. Petrie, Mr. McLean, Mr. Hood, Mr. Bellefontaine, Mr. Daly and Mr. Chapman and I

looked through to see how many documents they referred to that post-date 2004.

Out of the hundreds of documents they took to Canada's witnesses, two of them post-dated 2004. And how many times did we hear over the past two weeks for both the claimants' witnesses and Canada's witnesses that the witness could not remember events being questioned because they transpired too far in the past? I didn't look through the transcript to count, but I think it was often.

This situation is precisely as the claimants themselves state, what Article 1116(2) is designed to prevent.

Now, let's turn to the claimants' arguments. They advance three arguments as to why their claims are not time-barred. First, they argue that the four measures at issue under Article 1116(2) are each continuing measures; second, they argue that continuing measures can toll the limitation period under 1116 (2); and finally, they argue that they did not have knowledge, nor should they have had knowledge, that they incurred loss or damage from these measures until the JRP released its recommendations.

And I will address each one of these arguments in turn.

First, are the four measures at issue continuing measures?

Mr. Appleton argued in his opening -- and the claimants made the same argument in their response to the United States' 1128 submission -- that a continuing measure is one where the consequences of the measure are not known. In other words, they argue that a measure continues until its consequences are known. This, however, is not the law.

Article 14, 1 of the ILC Articles on state responsibility states that a completed act occurs at the moment when the act is performed, even though its effects or consequences may continue.

The commentary to this ILC Article makes the point more clear. An act does not have a continuing character merely because its effects or consequences extend in time.

And this was adopted by the NAFTA tribunal in Mondev.

The claimants are, therefore, wrong. The ongoing effect or ongoing impact of a

measure does not give that measure a continuing character.

In Canada's submission, none of the four measures at issue are continuing and I will briefly go through each one.

The first measure is Nova Stone's 3.9 hectare quarry permit. Nova Stone terminated the permit on May 1st, 2004. This fact is not in dispute.

In fact, Mr. Buxton in his testimony acknowledged that it was on this date that the permit became, and I quote, "a dead issue." How could a permit that became a dead issue be a continuing measure?

It can't.

The termination of the 3.9 hectare quarry permit came well before June 17th, 2005. This Tribunal therefore has no jurisdiction under Article 1116 to hear claims relating to that permit.

Now, the claimants tried to get around this fact through a variety of arguments, and I would like to address one here.

And they make this argument in their memorial at paragraph 757, and have made it

in their oral submissions, as well. That is that the lack of test blasting pursuant to Nova Stone's 3.9 hectare quarry permit was relied on by the Joint Review Panel as a reason to recommend against the approval of the investments' quarry.

There are three things wrong with this statement.

First, the lack of test blasting on the 3.9 hectare quarry was not relied upon by the Joint Review Panel as a reason to recommend against the approval of the Whites Point project. The project's inconsistency with community core values was the reason underlying the panel's recommendation.

This was confirmed by both Mr. Rankin and Mr. Estrin in their testimonies, and it was conceded by Mr. Appleton in his opening statement.

Second. The claimants did not need a 3.9 hectare quarry permit to conduct a test blast. In fact, Mr. Buxton testified that they did not seek to have Nova Stone transfer them the permit, pardon me, transfer the permit to Bilcon precisely so they could explore the possibility of conducting a test blast during the EA process.

Moreover, he testified that the claimants did not need to ask DFO for permission to conduct a test blast.

And finally, he testified to this Tribunal and to the JRP that Bilcon decided not to make a request to conduct a test blast during the EA process.

This has been confirmed by Mr. Chapman in his testimony and by other evidence as well.

Moreover, I note that Mr. McLean swears the same at paragraph 44 of his first affidavit. He was present over the course of the entire JRP process, and yet the claimants chose not to cross-examine Mr. McLean on this paragraph last Friday.

Final point is that it must be remembered that the 3.9 hectare quarry approval was not for a test blast, but it was for quarrying. Thus, the claimants' assertion that they were prevented from conducting a test blast on the 3.9 hectare quarry site is disingenuous. They did not need an industrial approval to conduct a test blast, and the 3.9 hectare quarry approval was for quarrying. Not test blasting.

Thus, despite the claimants' best efforts they have not been able to show that the measures taken pursuant to Nova Stone's 3.9 hectare quarry permit are continuing, there is no connection between the 3.9 hectare quarry permit and the EA process for the larger quarry.

The permit terminated on May 1st, 2004, well before the cutoff date.

Now, let me look at the three other measures that are at issue here, to determine and see whether they are continuing. I will deal with them altogether. This is the scoping decision made on April 14th, 2003, the comprehensive study decision made on the same date, and the referral made on June 16th, 2003.

The claimants allege in their pleadings that each of these decisions in and of themselves constitute a breach of the NAFTA.

They also argue that they suffered effects and consequences from these decisions. However, the continuing effect of these decisions does not make them continuing measures.

Each of these decisions are one-time measures, distinct, instantaneous and completed well in advance of June 17th, 2005.

Now, yesterday, Judge Simma, you asked a question about the elephant in the room, to bring it up again: Why were these decisions not judicially reviewed in domestic court? Both Mr. Smith and Mr. Rankin testified that each of these decisions referenced above are justiciable.

More importantly, they both testified that under domestic law the limitation period for reviewing these decisions has run its course. The claimants chose not to have these decisions judicially reviewed.

The role of a NAFTA Chapter 11 is not to provide a legal backup or safeguard to an investor from the consequences of making this choice.

If the time limitation period is up domestically, how is it that the time limitation period would not be up internationally?

So just by way of summary on this point, it is Canada's position that none of the four measures are continuing measures.

And the claimants confuse that with continuing effects.

Now, turning to the claimants' second argument, and here we have to assume for

this second argument that the measures are in fact continuing. Even if they are, continuing measures do not toll the limitation period under Article 1116(2).

Now, in their pleadings the claimants cite the UPS case and the Feldman case to support them, for the sake of time I am not going to go through those decisions. The UPS case is wrong and the Feldman decision does not support the claimants' position. I refer you to paragraphs 239 to 248 of Canada's counter-memorial.

The point I would like to make is this: The United States, Mexico, and Canada have made it abundantly clear that the decision in UPS is wrong and that continuing measures do not toll the limitation period.

Up on the slide this is a submission made by the United States pursuant to NAFTA Article 1128 in another NAFTA case called Merrill & Ring. It was supported by Mexico and Canada in that case. The United States has reaffirmed its position in this arbitration, also pursuant to Article 1128.

Leave that up there for a moment.

Article 31, sub 3, sub (a) of the

Vienna Convention mandates that this Tribunal shall take into account subsequent agreement of the parties. The three NAFTA parties have reached a subsequent agreement on the issue of continuing measures and Article 1116(2).

Continuing measures do not toll the limitation period.

This is a reasonable interpretation of Article 1116(2), which uses the term "first acquired knowledge", not "last acquired knowledge."

Moreover, the claimants in this case had advance notice of the NAFTA parties' subsequent agreement which was made back in 2008.

In fact, I believe counsel for the claimants in this case was also counsel for Merrill & Ring.

For this reason, Canada submits that the Tribunal should give significant weight to the subsequent agreement of the NAFTA parties. Thus, even if this Tribunal believes that the measures at issue under Article 1116(2) are continuing measures, those measures are nonetheless time-barred by Article 1116(2) because continuing measures do not toll the limitation period.

I would like to turn to the claimants' last argument with respect to time bar, and the final argument they raise is that under Article 1116(2) they did not incur loss or damage until the JRP made its final decision.

Now, you will recall that the test under 1116(2) is about knowledge and that is whether the claimants did know, or should have known that they incurred loss as a result of the breach.

The claimants argue in their reply memorial that what is required by Article 1116(2) is concrete knowledge of actual loss. And what I take them to mean by that and what I take Mr. Appleton to mean in his opening was that, because they did not incur the full extent of their losses until the JRP reached its decision, they did not have the requisite knowledge of breach and loss until that decision was made.

This, however, is not the law. The tribunal in Grand River made it clear that damage or injury may be incurred even though the amount or extent may not become known until some future time.

And the decision in Grand River is

the seminal decision on Article 1116(2).

Again, all three NAFTA parties agreed with this interpretation in Merrill & Ring. This also constitutes a subsequent agreement between the parties and should be applied here.

Moreover it is abundantly clear from the record that the claimants did have knowledge of breach and loss prior to June 17th, 2005. Again, going to the measures themselves.

With respect to the 3.9 hectare quarry permit it was terminated by Nova Stone on May 1st, 2004. Whatever loss or damage incurred from that measure had to be known by the claimants on that date. In fact, Mr. Buxton wrote to NSDEL on June 25th, 2003, advising that there had been "serious financial consequences" for not being able to blast on the 3.9 hectare quarry site.

And there are other examples of this, as well.

I am going to discuss some confidential information again so perhaps, just briefly.

--- Upon resuming confidential session under separate cover at 12:56 p.m.

--- Upon resuming public session at 12:48 p.m.

MR. DOUGLAS: Thank you. Now, the third and final jurisdictional issue the Tribunal must consider is whether it has jurisdiction under Article 1116(1) to consider measures that could not have caused the claimants any losses. I won't spend long on this, but refer you to Canada's pleadings which is paragraphs 298 to 302 of our counter-memorial, and paragraphs 81 to 87 of our reply memorial.

Article 1116(1) provides the claimants, provides, pardon me, that investors may only submit their claim to arbitration if the investor has incurred loss or damage by reason of or arising out of the alleged breach of the NAFTA.

It follows that a measure not capable of causing loss or damage may not be considered by the Tribunal.

The claimants allege that the federal government's December 17th, 2007 determination to accept the recommendation of the JRP wasn't lawful.

However, the federal government's acceptance of the recommendation was incapable of causing the claimants' loss or damage because one month earlier, on November 20th, 2007, Nova

Scotia's Minister of Environment and Labour already rejected the proposal to construct and operate the quarry and marine terminal.

Now, the claimants have advanced a number of arguments that Nova Scotia's rejection was not dispositive of their application.

However, it is clear from the testimony, documents and expert reports that there is no evidence to support this assertion.

The claimants offered no credible argument to the contrary.

For this reason, a federal decision was not a measure capable of causing damages to the claimants, and this Tribunal has no jurisdiction to hear that claim pursuant to Article 1116(1).

Now, if there are no further questions, I will turn it over to my colleague, Mr. Spelliscy.

PRESIDING ARBITRATOR: Professor McRae?

QUESTIONS BY THE TRIBUNAL:

PROFESSOR MCRAE: I have one question arising out of what you said, Mr. Douglas. You talked about a subsequent agreement evidenced

in the submissions of the NAFTA parties in the Merrill & Ring case. What is the difference between that kind of subsequent agreement and another interpretation? Are they exactly the same thing? Is this another way of doing a note of interpretation, just to all agree on a submission to the, in particular NAFTA case?

MR. DOUGLAS: No, it would be Canada's submission that under Article 1131 a note of interpretation is binding and that a tribunal must follow that.

Under a subsequent agreement the language of the Vienna Convention is "the tribunal shall take into account". Now with the passage of time, Canada argues there is a solidification of that agreement.

So it would be our submission that the more reasonable that agreement is, based on the wording of the provision and the more notice a claimant has about that agreement, then the more binding it should be on a tribunal when interpreting the relevant Article.

PROFESSOR MCRAE: So we are free to attribute whatever weight we think is appropriate as to subsequent -- as a so-called

subsequent agreement?

MR. DOUGLAS: It would be Canada's interpretation or submission, at least in this case, in respect, with respect to this subsequent agreement, that given that it has been there since 2008, given that it is a very reasonable interpretation of Article 1116(2), that it's very persuasive.

PROFESSOR MCRAE: Thank you.

PROFESSOR SCHWARTZ: Just one point about this whole question of the interpretive note, and so on. I think the parties have probably agreed on this; I just want to confirm.

My understanding is note of interpretation says that the 1105 standard is the minimal standard of customary international law.

And functionally everybody seems to argue how to interpret that on the basis of, largely on the basis of an accumulated body of international arbitral decisions.

Now as I understand it, judicial opinions are a legitimate subsidiary source of determining customary international law. So even though the idea is minimum standard under state practice, there is no question of the

appropriateness of considering arbitral decisions, and so on, as a source of understanding what the minimal standard is in customary law; is that correct?

MR. DOUGLAS: Do you know who -- I don't want to trump him up too much, but you know who knows a lot about this is my colleague, Mr. Hebert.

PROFESSOR SCHWARTZ: Okay, fine.

MR. DOUGLAS: Who will be discussing the legal aspects of Article 1105. Now I have set you up for this. So if you wouldn't mind holding on to your question, I am sure Mr. Hebert will be happy to address it.

PROFESSOR SCHWARTZ: Thank you.

PRESIDING ARBITRATOR: Thank you, Mr. Douglas. Mr. Spelliscy, you have the floor.

MR. SPELLISCY: Thank you, and good afternoon. I thank Mr. Douglas.

--- Laughter

SUBMISSIONS BY MR. SPELLISCY:

MR. SPELLISCY: I would like to now transition over to those acts over which the Tribunal has no jurisdiction for a different reason than Mr. Douglas was talking about, and those are

because they are not the acts of the Government of Canada.

Now, the claimant in its argument touched on this really in passing, but as it is an important matter of international law, I hope the Tribunal will afford me some time to do this in a more careful and structured manner so that we understand exactly what legal obligations we're talking about here. So I am going to take a little bit more time.

Under Article 1101 of the NAFTA, and there appears to be no dispute here, the obligations in Chapter 11 apply only to measures that are adopted or maintained by a party, in this case, Canada.

So the question that this Tribunal has to ask itself when measures are challenged, when actions are challenged, is: Are those measures of the Government of Canada?

Now before we launch into a discussion of what the international law is with respect to when measures can be attributed to a state, I do want to pause just to highlight what we are and are not disputing here.

We do not dispute that the

government decisions that Mr. Douglas just spoke about, these are measures attributable to the Government of Canada.

And because it was raised briefly in the claimant's submission, we also to make clear we do not dispute that the Government of Canada is responsible for both it and Nova Scotia's deciding not to allow this project to proceed or not to issue the authorizations based on the conclusion, based on the determination of those government decision-makers, that the project was inconsistent with community core values. We don't challenge that, of course, they can bring a claim against that decision.

However, the claimants in their written submissions, at least, have also challenged other actions of the Joint Review Panel and we have heard about them here. They have challenged the way the JRP organized and conducted the written and oral phases of the information-gathering process that it was asked to do, and they also challenged how the JRP made its recommendations, how it drafted its report.

They have challenged those as -- in the pleadings, at least, characterized as

breaches themselves of the NAFTA.

They are not breaches because they are not, those actions are not attributable to Canada.

So now let me go and explain in a little more detail, in terms of the international law on this, why.

The general grounds for attributing conduct to a state or often referred to as described in the International Law Commission's Articles on state responsibility.

Now, for the purposes of this claim, at least in their submissions, the claimant had identified four potential Articles. Today they only identify two. Today they mentioned Article 4, which is conduct of organs of a state, and Article 11 which is conduct acknowledged and adopted by a state as its own.

In their written submissions they also referred to Article 5, which is conduct of persons or entities exercising elements of governmental authority, and Article eight, which is conduct directed or controlled by a state.

And actually I think some of the facts that were being raised by the claimants are

actually more relevant to a consideration of some of those other Articles than they are to Article 4 and Article 11, so I am going to turn, even though only Article 4 and 11 were addressed today, I am going to take this in more of a structured approach. I will take us through each one of these various Articles and the international law obligations it creates.

So if we start with Article 4. Article 4 establishes the default rule in international law that a state is responsible for the acts of its organs.

Now, an organ is a concept at international law that is left undefined, and intentionally so, because it is not considered possible to define all the ways in which a state may internally organize itself. But we do know from the jurisprudence of the International Court of Justice there are generally two types, de jure organs and de facto organs.

The former, de jure organs, is generally what is thought of as described in paragraph 2 of the ILC Articles:

> "An organ includes any person or entity which has that

status in accordance with the internal law of the state."

It seems that the claimants, although I am not sure that I was clear, are primarily focussing on this aspect of whether or not the JRP is an organ of Canada.

First let me just say, the mere fact that an entity is created by a statute does not in and of itself make it an organ of government.

The claimants' main arguments here seem to focus on the fact that the JRP must be considered a de jure organ of Canada, based on the fact that Canadian courts are entitled under Canadian law to review its decisions.

We don't dispute that. It is well known. In fact, as has constantly been discussed, there is a question in this case as to why it wasn't done. However, at Canadian law the Supreme Court itself has recognized that merely because an entity is subject to judicial review in Canada does not mean that it is a part of government.

If we look at the McKinney case, this is a quote we see. And it is talking about a university being a statutory body created by

statute performing a public service, but it may be to judicial review.

And if we look at the very last sentence of that, it says:

> "The basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers."

It says:

> "The fact that a university performs a public service does not make it part of government."

So we would submit to you that the mere fact that an entity is subject, that the Canadian legal system has chosen to make an entity subject to judicial review does not make that entity an organ, a de jure organ of the Government of Canada.

The second class of organs what are referred to as de facto organs, and the ICJ, the International Court of Justice, explained this concept in the genocide convention case.

It explained, a de facto organ is an entity that may be equated with a de jure organ because, and if we go to that case, it acts in such complete dependence on the state and under its essentially complete control, meaning it is merely an instrument of that state's policy.

In this context, the International Court of Justice explained that a finding of something as a de facto organ would only occur in exceptional circumstances.

Now let's consider the Joint Review Panel. The Joint Review Panel is not in complete dependence on Canada, and nor is Canada in complete control. In fact, a relationship of such complete dependence and complete control would be antithetical to the very nature of joint review panels, which are supposed to be independent bodies from government.

And if we look at some of the evidence that has come out in this case, Mr. Chapman confirmed in his testimony that the panel in this case acted independently. He said that they developed all of their own questions, had particular views on everything from the schedule for the scoping meetings that were held to the

appropriateness of the room.

And he further confirmed that it was his understanding, while he wasn't involved, but his understanding that these panel members wrote the report themselves.

This is not a relationship of dependence and control sufficient to meet the test to be a de facto organ at international law.

Now, where an organ is not -- where an entity is not an organ of government, international law imposes relatively strict conditions on when its acts will be attributable to the state.

Here I want to turn now to Article 5 of the International Law Commission's rules, even though it wasn't mentioned today.

Under Article 5, the acts of a private entity are attributable to the state if is it exercising delegated governmental authority, and the act is done in the exercise of that authority.

In this case, the claimants, in their written submissions at least, have alleged that the Joint Review Panel was performing the information-gathering stage of the EA and therefore that that is an exercise of governmental authority

and its acts are attributable to Canada under this test.

They are wrong.

In particular, if we look at what they have alleged, they said that the governmental -- and this is a slide from paragraph 715 of their memorial -- that the governmental authority exercised in this case related to the determination of the agenda, the calling of witnesses, the allocation of time for witnesses, control of the hearings, and the activities involved in making recommendations.

Here, I think it is important to distinguish between an entity that performs a public service and an entity that exercises governmental authority.

I think this distinction was best explained or at least appropriately explained in the Jan de Nul v. Egypt in which that considered measures of the Suez Canal Authority in Egypt.

As that Tribunal explained, what matters is not the service publique element, but the use of the prérogatives de puissance publique, or governmental authority.

There is a distinction between

these concepts.

Now, there is no question that the JRP was performing a valuable and needed public service in undertaking the steps that it did in the EA process.

That included evaluating the information that came in and making a recommendation to government.

But this service was not an exercise of governmental authority, not in the exercise of the public power.

And to think about that, in this case there is no dispute that the ultimate public power here was the issuance of authorizations requested, or the assurance of the permit under Nova Scotia to proceed. That final decision was made by government. The Joint Review Panel did not exercise delegated governmental authority in that regard.

As Mr. Rankin in his testimony confirmed yesterday:

> "The Ministers make the decision under this legislation. All they get is a recommendation."

Now, in its oral submissions today, the claimant made reference to the fact that, in fact, the government is mandated to consider the Joint Review Panel report and that somehow this was relevant to the question of attribution.

Again, it is not.

They are not mandated to accept it. It is simply a recommendation. The JRP exercises no delegated governmental authority in regards to governmental decision-making.

And I think here, to understand a little bit about the distinction between public service and governmental authority, if we turn to section 35 of the Canadian Environmental Assessment Act, we will see whether where, in fact, JRPs are delegated certain aspects of governmental authority.

In this section, the government delegates to a Joint Review Panel the power, for example, to summon witnesses and to enforce those summons as if it was a court of law.

And you see that enforcement powers in paragraph 35(2) there:

"A review panel has the same

power to enforce the attendance of witnesses and to compel them to give evidence as a court of record."

Now, forcing witnesses to attend a hearing and forcing subpoenas, forcing summonses, this is a classic example of public power, of governmental authority.

Organizing proceedings, determining sequence of talking, that is not an exercise of governmental authority.

None of the acts complained about that, we looked at the paragraph from the claimants' memorial, none of the acts complained about relate to any of the elements of this delegated governmental authority. Why? Because this Joint Review Panel didn't exercise it.

The Joint Review Panel never issued a summons. It never issued a subpoena. So these are the elements of delegated governmental authority.

And accordingly, because they were not exercised, because they are not challenged as a breached, Article 5 doesn't apply here.

The claimants claim for the first time in their reply -- and seem to drop it here -- but that also Canada is responsible for the acts of the ICJ, or sorry, of the JFP -- too many acronyms -- because of Article 8 of the Rules on State Responsibility, which is the Article relating to acting under the instructions or effective control.

Now again, this Article was expressly considered in the genocide convention case by the International Court of Justice, where it explained that:

> "In order to meet this test, it would have to be shown that the entity in question acted under the effective control of the government and that such control or instructions were given in respect of each operation in which the alleged violations occurred."

Again, we've heard discussion about how the JRP didn't -- acted in violation of international law by violating the minimum standard

of treatment by not talking about mitigation measures, that it acted in violation of international law by not controlling the participants, by not shutting them down.

There is no evidence of any government instruction of the Joint Review Panel in that regard. We heard mention just a few hours ago or an hour or so ago about guidance or instructions.

The Joint Review Panel, it had a term of reference. No question. But terms of reference are the sort of generalized instructions that are not enough under international law to accord state responsibility. There has to be specific instruction with respect to the acts in question.

Finally, the claimants also argued for the first time in their reply and here today, that Canada has acknowledged and adopted the conduct of the Joint Review Panel as its own.

Again, the relevant Article here is Article 11 of the International Law Commission's Articles.

That Article relates to basically a catch-all, if in fact you acknowledge -- and it

says: "acknowledge and adopt the conduct in question as its own." So there is two points. It has to be the conduct in question.

Again, what we're talking about here and now we have to look at what was accepted in the report. And I would say that the mere fact that Canada and Nova Scotia accepted the recommendation with respect to the impact on community core values, the fact that it accepted it, is not an acknowledgement and adoption of the Joint Review Panel's conduct in reaching that recommendation in all of the aspects complained about by the claimants. That is not even mentioned in the government decision-making.

If we look to the commentaries were provided on this ILC Article, they specifically say at the end that the language of adoption carries with it the idea that the conduct, the conduct, is acknowledged by the state as, in effect, its own.

That did not happen here.

Again, we're not talking about the government decision with respect to refuse to issue the authorizations. That is a government decision.

But the Joint Review Panel

process, there is no acknowledgement and adoption of any of the conduct which the claimants claim, in that information-gathering process was, in fact, a breach of Canada's obligations under NAFTA.

Accordingly it would be our submission there is no basis at international law for the Tribunal to find that the acts of this independent Joint Review Panel of which the claimants complain are attributable to Canada such that they could constitute a breach of NAFTA Chapter 11.

Now, before I ask if there are any questions, I do want to acknowledge that you have heard the claimants' response to our challenge to the inclusion of Clayton, Bill Clayton, Senior in this claim. You have our submission on this. I don't think that I need to say anything in response to what I have heard. If you have questions, I would be happy to answer those as well, but you have our submission. I don't intend to say anything else on it. So now, if there are no other questions on attribution...?

PRESIDING ARBITRATOR: Do we have...colleagues have questions on attribution?

I don't have a question on

attribution, but I have an uneasy feeling; I just thought that if a state managed under the same regime, under the same limits, et cetera, to establish not a Joint Review Panel but some, a body in order to kill political opponents, I would rather start my, let's say, march through Articles 4 to 1 anew.

You know, if you took the substance out of the JRP, which of course the substance is great. I mean you look into the question of whether damage would occur, et cetera, if you give it an evil purpose and apply the same legal regime around it and argued as you did, you probably would have a bad conscience, wouldn't you?

MR. SPELLISCY: I am not sure you would have a bad conscience. We have to remember what international law is doing here and the limits we want to place on actions of private entities that are in fact attributable to states.

So I think, in the example in question, it would depend very much on what, in fact, the instructions or the guidance of the state was. If this body was created, guided, instructed by a state, then yes; I think we would say that in those specific acts it is responsible.

PRESIDING ARBITRATOR: So we would follow Nicaragua, in the sense that even the court came out and said the US is not responsible for the Contras in the sense they were not their own organs. But of course the US did not exercise due diligence, or you know, kind of -- so that would be the analogy?

MR. SPELLISCY: I think it is not just Nicaragua in that case. I think it is also similar in the genocide convention case where there were similar bodies looked at and the court applied the same analysis to say, look, we have to look at the rules because international law is trying to do something very specific when it is attributing conduct of private actors to states.

So I think in the case it is always going to be fact-specific, but it would very much depend.

And there is no question that international law, there are cases where such bodies have been, you know, involved with states and have been found not to be attributable to states.

I think in Nicaragua and in the genocide convention cases those were both instances

of that.

PRESIDING ARBITRATOR: Okay, thank you. Follow-up?

PROFESSOR MCRAE: That has prompted me, I suppose. The government has a responsibility to hear and consider a proponent, and they do it through an EA process. And in the course of the EA process they set up the JRP.

But suddenly what is part of a process, it starts as a government act in setting up the JRP, ends in a government act in a decision, and yet somehow, apart from summonsing witnesses what happens in between escapes the government act.

So it seems like there is sort of a way out, of avoiding responsibility by setting up this independent body.

And is, would you say, at least the recommendation at the end is the government act, because it is called on to perform that, as in a part of a process that starts government, ends government? Then we simply carve this centre piece out?

MR. SPELLISCY: I guess I will answer that in two ways. No I would not say that the recommendation is a government act. I think a

similar issue was considered in the Fireman's Fund case, where there was a recommendation by a body actually composed by government officials that was made and it was not considered to be attributable in that case, because it was just a recommendation.

And I would say that it is not that there is a gap or not that there is a way out. The government is still responsible for its own decision-making at the end. That is the decision that has the effect on the process.

Now, if the government looks at the process, knows that the process is somehow corrupt or tainted and the government decides to accept anyways, that act then is attributable to the government and that act can be the source of a wrong.

But the Joint Review Panel's acts in and of itself are not attributable to government. You get the beginning and you get the end.

I think one thing, way to think about it this is we heard about comprehensive studies, for example. Comprehensive studies are reports often delegated to proponents. They perform that part of the environmental assessment

process.

Just because they are performing an information-gather part of the environmental assessment process doesn't make them, doesn't delegate them as an organ of government. They are still a proponent there. So when you delegate to somebody to perform an information-gathering process, that doesn't turn them into acts of government in what they do in that process.

PROFESSOR MCRAE: Oh, thank you. I understand.

PRESIDING ARBITRATOR: Just again to speak to a very quick follow-up. Let's just form the hypothesis.

If the conclusion was or the result was that the process within the JRP as an autonomous entity had led to illegalities and the government kind of accepted the recommendations that were arrived at on the basis of some let's say process of -- violations of due process, whatever, that would make the government's decisions illegal too? Or would it?

MR. SPELLISCY: I'm not necessarily sure I would agree with that. When we look at the issue of a process tainted by

illegality it then goes to government decision-makers. They may look at the process, may understand that something went wrong, but may make a decision based on legal grounds in and of themselves, and that is the decision that then can be challenged.

So it may be the case in certain factual circumstances that there could be a taint implied, but I don't think that that is necessarily always the case, because that government decision is an independent decision. The report of the JRP, the report of a body like this, it is a factor in it.

But if we look, for example, at the letter from the Nova Scotia Minister, he said he considered all factors. He looked at a number of factors including the report. He looked at the claimants' letters. He agreed with some of the claimants' criticisms. The mere fact he agreed with the claimants' criticisms but still accepted the recommendation shows the independent nature of the government decision-making. And that is the government decision-making that should be challenged, in our view.

PRESIDING ARBITRATOR: Thank you

very much. Thank you, Mr. Spelliscy. Now is it the turn of Mr. Little, yes. Mr. Little, you have the floor.

Mr. Little.

MR. LITTLE: I think I can probably be done with 1102 and 1103 before we need a break. I think it would be in the realm of 25 minutes, 20 to 25 minutes.

PRESIDING ARBITRATOR: (microphone not activated)

CONTINUED SUBMISSIONS BY MR. LITTLE:

MR. LITTLE: All right. So as we can see, we're going to turn now to Canada's response to the claimants' claims made under Articles 1102 and 1103.

Canada's argument here is quite simple. The titles of Article 1102 and 1103 are respectively national treatment and most-favored nation treatment. And what they are designed to protect against is nationality-based discrimination, and there appears to be some agreement on this point.

Article 1102, the national treatment provision. It requires that the treatment Canada accords to US investors and

investments must be no less favourable than that which it accords in like circumstances to its domestic investors and investments.

Article 1103, the most-favored nation provision, requires that the treatment Canada accords to US investors or investments must be no less favourable than that which it accords in like circumstances to investors and investments of any other party or a non-party to the NAFTA.

It must be emphasized here that the potential comparators under Article 1103 are investments or investors of a non-party or of any other party to the NAFTA, i.e., in this case, Mexican investors.

So in other words, a US claimant cannot found a MFN claim on the basis of allegedly more favourable treatment that has been accorded to another US investor. This interpretation would render the MFN clause meaningless.

Now, it is Canada's position that no decision made in the Whites Point EA process breached the obligations contained under Articles 1102 or 1103. There is not a shred of evidence that the claimants suffered nationality-based discrimination.

No evidence of xenophobia on the part of officials administering the EA, and this was a basic fact that was agreed to by Mr. Estrin in his cross-examination.

There is no evidence that officials had the improper objective of throwing up road blocks to the export of aggregate from the Digby Neck to the United States.

There was no evidence that the decisions made in the Whites Point EA were anything but reasonable and lawful.

Now, the claimants' theory, if I understand them, is that Articles 1102 and 1103 provide for a broad protection against any measure taken during the Whites Point EA process that differs from measures taken in other EA processes.

And that, they say, has some negative impact on them, regardless of the regulatory context or the reasons underlying why the measure was taken.

But this theory would convert the national treatment and MFN obligations into instruments of deregulation instead of what the NAFTA parties negotiated under Articles 1102 and 1103, that is a non-discriminatory obligation that

is owed to NAFTA investors, investments when they invest in a NAFTA country.

Now, as is illustrated by the United States Article 1128 submission that has been filed in this case, all three NAFTA parties have agreed that the national treatment obligation is intended to protect against nationality based discrimination.

This interpretation has been adopted by past NAFTA tribunals, including the Feldman tribunal, that you can see on the screen, and the Loewen tribunal.

So a simple identification of differences in treatment accorded in the course of two EA processes don't cut it in making out a claim under NAFTA Articles 1102 and 1103, the claimants must demonstrate that they have been discriminated against on the basis of nationality.

I want to make one point clear, and it arises from something that was stated earlier today in the claimants' submissions.

Canada has never asserted that the claimants must prove a subjective intent to discriminate on the part of regulators in the Whites Point EA. Proof of subjective intent, if it

can be shown to exist, might well be relevant to establishing discrimination on the basis of nationality.

But all Canada is saying is that the national treatment and the MFN obligations require objective evidence that they have been discriminated against by reason of their nationality. To do this they must discharge a legal burden that I am going to now turn to.

So in a nutshell, to demonstrate that they suffered nationality-based discrimination, what must the claimants do?

The ADM tribunal explained that Article 1102 prohibits treatment which discriminates on the basis of the foreign investor's nationality. Nationality discrimination is established by showing that a foreign investor has unreasonably been treated less favourably than domestic investors in like circumstances.

In short, breaking this down, the claimants have to satisfy the following legal test.

First, they must demonstrate that Canada accorded them treatment with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of

investments.

Second, they have to demonstrate that they were accorded less favourable treatment than other EA proponents, be they Canadian EA proponents or EA proponents of other NAFTA-party or non-NAFTA party.

And third, and most critical to the case, the claimants must demonstrate that the treatment in issue was accorded "in like circumstances".

Now, contrary to what the claimants allege, these are all the claimants' burdens to discharge. As the UPS tribunal which you can see on the screen stated:

> "Failure by the investor to establish one of those three elements will be fatal to its case. This is a legal burden that rests squarely with the claimant."

The burden never shifts to the responding party, here Canada. For example, it's not for Canada to prove an absence of like circumstances.

Now, as I noted in Canada's

opening statement last Tuesday, the claimants have failed to discharge each one of these burdens and I am going to explain for you why.

But, before doing so, let's look at the many alleged measures that the claimants have challenged in their 1102 and 1103 claims.

Now this chart that you can see on the screen shows the alleged government measures that the claimants say breached Canada's national treatment and MFN obligations. They fall into seven broad categories, as you can see, including the scope of project determination, the type of EA, the duration of the EA, blasting authorizations or conditions, factors to be considered in the scope of the EA, and application of the alleged Comprehensive Study List exemptions, and finally, an acceptance of a compensation plan.

We have also set out the comparator EA projects in that chart for you.

While as Mr. Spelliscy has already explained, the claimants' complaints about the acts of the JRP are beyond this Tribunal's jurisdiction, the chart that you now see on the screen sets out the acts of the JRP that are alleged to have violated Articles 1102 and 1103.

We heard basically nothing about them over the course of this hearing, but they fall into the following five broad categories: Application of the precautionary principle; the cumulative effects analysis conducted by the JRP; the application of adaptive management principle, whether the EA approval should be subject to mitigation measures; and the issuance of information requests.

Now, we can't possibly review each and every one of the claimants' allegations in respect of these allegations and the comparator EAs to which they relate, but I will cite to a few of them in explaining how and why the claimants have failed to discharge the burden that they must. So let's now turn to that.

First, the claimants as I said must establish treatment.

Now, regarding the requirement to establish or demonstrate treatment, Canada doesn't dispute that at least for many of the government decisions made in the Whites Point EA, these measures clearly constitute treatment.

Indeed, the claimants have also identified government decisions made in other EAs

that constitute treatment.

But there is a threshold issue that needs to be met before two instances of treatment can be compared. And this threshold issue has been no better articulated than by the tribunal in the Merrill & Ring case.

In this case the tribunal explained that treatment accorded to foreign investors by the national government needs to be compared to that accorded by the same government to domestic investors, subject to meeting that requirement that it is in like circumstances, just as the treatment accorded by a province ought to be compared to the treatment of that province in respect of like investments.

Now, there is good reason for this rule. As I have noted, Articles 1102 and 1103 prevent against nationality-based discrimination.

And for discrimination to occur, it must be the same government actor affording the more favourable and less favourable treatment.

Differences in treatment accorded by different levels or different combinations of government actors, they're both inevitable but they're also essential in a federal state like

Canada. So they shouldn't serve as the basis of a NAFTA claim.

Let's give this principle just a little bit of illustrative application.

Canada prepared the exhibit that you see on the screen with its counter-memorial to provide you with an idea of the locations in Canada of the comparator EAs being put forward by the claimants in support of their 1102 and 1103 claims. Now, more comparator EAs were added in the claimants' reply, but this map will serve the purposes for what I want to discuss.

We can see from the map that while some of the comparator EAs were conducted in Nova Scotia, the claimants, they're attempting to compare treatment accorded in the Whites Point EA to treatment accorded in other EAs that are quite literally all over the proverbial map throughout Canada.

Now, this is where we get into the problem identified by the Merrill & Ring tribunal.

The majority of these non-Nova Scotia based projects were subject to some form of EA at both the federal and provincial level and were hence accorded treatment by other provincial

governments.

While differences in the treatment accorded in these EAs relative to that accorded in the Whites Point EA can certainly be identified, they can't be considered discriminatory as the treatment was accorded by different government actors, all of whom have their own policy objectives to fulfil.

Now, this, it is a fact of life in a federal state like Canada and it can't serve as the foundation for a breach of an Article 1102 or 1103 claim. So as a threshold matter, none of the instances of treatment raised by the claimants in EAs conducted in these other provinces are, in our view, relevant to the claimants' Articles 1102 or 1103 claims.

Now let's move to the second burden that the claimants must discharge, establishing that they were subjected to less favourable treatment than that accorded to other EA proponents.

Now, again, we can agree the claimants might have identified differences in treatment across EA processes, but different is not presumed to be unequal, or less favourable.

Nor is there any burden on Canada to show that the differential treatment is less favourable. As the UPS tribunal stated, this is the claimants' burden.

And in Canada's view the claimants haven't discharged this burden. They've spent the entire hearing complaining and cross-examining over differences that really had no practical effect on the claimants.

For example, one of the central differences, is the treatment that the claimants appear to be focussed on, was the fact that DFO scoped the quarry elements of the project into the Whites Point EA.

Now, as I noted in Canada's opening statement, this decision had no practical effect on the claimants and hence can't be considered an instance of less favourable treatment. Why? We have explained: Because the decision was rendered moot just several months later by a reasonable and lawful decision that the Whites Point project would be referred to a Joint Review Panel.

Now, as a result of the referral to the Joint Review Panel, the scope of project for

the purposes of the Whites Point at the very minimum had to include both the marine terminal and the quarry. So in the end this scope of project decision carried no practical significance.

Now another one of the claimants' complaints appears to be that the Whites Point project was referred to a review panel when other projects were not.

But as Mr. Smith explained yesterday, the referral of the Whites Point project to a review panel in the face of other projects not being subject to a review panel simply does not equate to less favourable treatment.

Now, in fact under the circumstances of the Whites Point EA, Mr. Smith's view was that the referral carried with it some benefits. Mr. Smith, as we can see testified:

> "I can tell you I wouldn't have taken the decision to put this into a joint panel to court. In fact, I said in my evidence I think it was -- the best thing they could do was eliminate all the segmentation risks, all of

the potential litigation over scope of project.

"Mr. Rankin agrees and I agree with him, that the amount of detail you have to put out in a comprehensive study and a joint panel is not that different. The process can take a little longer, but there is finality.

"The problem at that time was, if you got to the ends of a comprehensive study and they decided that this needed to be looked at further, it should have an oral hearing -- which, you know, is fully justified on the record -- then you could be thrown into the oral hearing later".

Now, beyond the testimony that you see here, Mr. Smith provided several other reasons why he felt the Joint Review Panel approach

actually benefitted the claimants.

Now, I have only touched on two instances of treatment here in the interest of time, the scope of project determination and the referral to the JRP. But after the past seven days, it is clear that these it would appear to be the most important instances of treatment to the claimants' case.

But neither measure can just blithely be characterized as less favourable because it's not been demonstrated that they had any practical effect on the claimants, the Whites Point project, or the outcome of the EA process.

Now, let's move on to the third burden that must be discharged by the claimants. And this, in our view, is the most important one.

In order to distinguish between cases of legitimate regulatory distinction and cases of nationality-based discrimination, the tribunal has to properly consider whether or not the treatment was accorded in like circumstances.

Now we heard the claimants' proposed approach today. It's that all of those who, like them, seek regulatory permission from governments are in like circumstances. And that

this is the class of investors and investment whose treatment must be considered. But the like circumstances analysis cannot be confined to this single factor.

It can't be carried out with complete disregard to the facts that determine the course and conduct of each EA.

More is required than the claimants' simplistic approach which would really result in a vacuum, and eviscerate the environmental assessment process of any meaning, any purpose, or any utility.

Now, as Mr. Smith testified just yesterday, he reminded everyone:

> "The important thing is it depends on the project. It depends on the facts. You know, the point I raised in my report... is that I had direct involvement with LNG projects that have been screened that have gone to comp studies and that have gone to panels. I have been involved in pipeline projects

which have been screened, which have gone to comp studies, which have which have gone to joint panels. It depends on the facts...one of the big facts is location".

Now, to be clear, Canada is not saying that what places two investors in like circumstances or not is the way Canada treats them, as the claimants have alleged in their reply.

In other words, Canada is not saying that two EA proponents are not in like circumstances merely because Canada has treated them differently.

Rather, it is the circumstances underlying the way in which Canada treats two EA proponents that will be determinative of whether or not the treatment was accorded in like circumstances.

For example, if differences in treatment accorded two EA proponents were the result of specific facts or reasonable and legitimate policy objectives, then it will likely not have been accorded in like circumstances for

the purposes of a NAFTA claim.

Now, this is why it is inappropriate for the claimants to claim a NAFTA violation due to the alleged treatment accorded in other EAs conducted under other legal regimes and engaging other EA considerations.

For example, the claimants allege violations of Articles 1102 as a result of treatment accorded in the EAs of the Belleoram and the Aguathuna projects which were carried out in the province of Newfoundland.

Now these are projects that appear on their face to have some similarities to the Whites Point project but their EA engaged entirely different circumstances that have been outlined in Canada's counter-memorial and rejoinder and the expert reports of Lawrence Smith.

These circumstances included the fact that they were subject to the Newfoundland, not the Nova Scotia, EA regime. Here I would suggest that the emphasis of the Grand River tribunal cited by Mr. Appleton this morning was actually that differences in legal regimes applicable to investors, could result in unlike circumstances.

Now, other differences with the Belleoram and Aguathuna EAs included the fact that they were not proposed in an environment as sensitive as the Digby Neck and the Bay of Fundy and as integral to the well-being of the local economy.

Now, the fact that the province in these EAs took a different approach than the Province of Nova Scotia in the Whites Point EA to the carrying out of the EA of these projects that it had to under provincial law, as we heard from Mr. Daly, the province's clear desire in the Whites Point case was to work hand in hand with the federal government in the form of a harmonized assessment. And this just is not the way that the provincial and federal EA processes unfolded in the Belleoram and Aguathuna cases.

Another marked difference between these two projects and the Whites Point project is the absolute lack of public concern engaged by both of these projects, which appears to be admitted by both sides in this case.

So while the Belleoram and Aguathuna projects may on their face seem similar to the Whites Point project, in assessing like

circumstances, one has to take a closer look.

Now, Mr. Smith made the importance of this point clear in the context of an EA conducted under Nova Scotia law yesterday when Mr. Nash questioned him on the science that was available to officials prior to the referral of the Whites Point project to a review panel.

Mr. Smith explained: Well, let's go to the science, Mr. Smith said.

> "But don't lose sight of the socioeconomic, the location, land use, which is a very significant component under the Nova Scotia legislation".

So these policy objectives of the Nova Scotia legislation played an integral role in decisions made in the EA of the Whites Point project from the very outset all the way to the Nova Scotia government decision that the project would not be approved.

Now, Canada has laid out in great detail in both its counter-memorial and rejoinder why the various measures that the claimants complain of were not accorded in like circumstances in this case.

Specifically, Canada has explained why the treatment that was accorded in the EAs of the Keltic, the Bear Head, the Rabasca, Miller's Creek, and Eider Rock EAs, which were all mentioned today, was not accorded in like circumstances to that accorded in the Whites Point project.

As we heard little about these EAs in the hearing, I am not going to discuss them here.

But I would like to briefly touch on some of the testimony that was offered during the hearing and that is relevant to the issue of whether the treatment being complained of in this case was accorded in like circumstances to that accorded to some other EA proponents.

As a simple starting point, let's start with Mr. Estrin's comments on the Kelly's Mountain quarry and marine terminal project which was a Nova Scotia project very similar to the Whites Point project that, as we know, was referred to a Joint Review Panel under predecessor EA regimes to the NSEA and CEAA.

Now, Mr. Neil Bellefontaine cited to the Kelly's Mountain project in his affidavit merely to illustrate the fact that the nature of

some projects and the environment for which they're proposed will impact the manner in which they're treated in the EA process.

Now, for his part, Mr. Estrin wouldn't accept that treatment accorded to this project was, in any way, relevant to treatment accorded to the Whites Point project.

As we can see from the slide on the screen, Mr. Estrin testified:

> "Well, let me tell you why I think that the Kelly's Mountain is not very helpful in terms of comparison. I think, first of all, it was under legislation that we're not dealing with in both cases, okay. Secondly, Kelly's Mountain was -- I have some statistics at hand. It was going to be the third-largest open pit mine in the world. It was going to be, I think, ten times the size of Whites Point quarry in terms of the area, and

three times the amount of gravel taken out."

So it seems that Mr. Estrin would agree with Canada's position that the claimants cannot compare the treatment accorded to the Whites Point project under the NSEA and the CEAA to the treatment accorded subject to EA proponents subject to other EA regimes of other projects, which I note is the case with the majority of the claimants' comparator EAs.

It would also appear from this testimony that Mr. Estrin doesn't dispute that the size and the duration of two projects might make them less relevant comparators due to the different circumstances that they engage.

This point gets us to the Tiverton quarry and harbour projects, relative to the Whites Point EA, much smaller and shorter-term projects down the Digby Neck from Whites Point to which the claimants have devoted so much attention.

Now, the claimants' expert Mr. Rankin stated the following, with respect to the Tiverton projects at paragraph 74 of his expert report.

Mr. Rankin stated:

"Although no two projects are ever identical, where projects were as obviously similar in scope and location as the Tiverton and Whites Point projects were, and were acknowledged as such by key officials, the law requires approvable and demonstrably appropriate justification for treating them differently. If not, it must be inferred that an abuse of discretion has occurred."

Now, Mr. Rankin added in testimony in relation to the Whites Point project the following.

"Here we have a situation where, in my judgment, the Tiverton quarry and the Tiverton harbour projects ten miles away were so similar -- not identical, and there is many things to distinguish them -- that it was

remarkable, unusual, that there would be such a difference in treatment for these two projects".

Now, what Mr. Rankin ignores is that the same statutes and regulatory approaches that were applied to the review of the Whites Point project were applied equally to the review of the Tiverton projects. Any differences in the treatment accorded were based on differences in the projects themselves, i.e., based on differences in the circumstances presenting themselves to government officials.

They were not based on the interjection of Minister Thibault in the Tiverton review process, nor does the one document cited by the claimants in support of their contention that he did so intervene or interject offer any support for their position.

Now, looking at the Tiverton projects more closely. With respect to NSDEL's initial review of the application for the 1.8 hectare quarry at Tiverton.

Mr. Petrie clearly testified that he applied the same approach as he did at Whites

Point in connection with Nova Stone's 3.9 hectare quarry. Specifically, what did he do? He reached out for initial input on the application from a DFO official who had knowledge of the location of the Tiverton project.

The transcript of Mr. Petrie's redirect on his review of the Tiverton quarry project provides as follows:

> "QUESTION: Did you discuss the issue at Nova Stone and marine mammals with Mr. Winchester?
>
> ANSWER: Answer: Certainly. I wanted to make it clear why the amply application was being referred, and the concerns regarding marine mammals that had been engaged in Nova Stone just down the road. I wanted to make sure that he was aware of that perspective and was able to apply that lens to it, if he saw the need."

Mr. Petrie conducted the very same initial outreach at Tiverton as he did at Whites Point.

Any differences in how the two proposals were treated from this point forward were based upon differences not in the nationality of

the proponents, but in the judgment of officials on what was being proposed at each site. And this is not the type of judgment that is to be second-guessed in this forum.

Now I would add that in his redirect Mr. Petrie then provided the Tribunal with a long list of differences between the proposed quarrying activities at Tiverton and Whites Point which include differences in the size of the projects, their duration, their production volume, their location, the intensity and frequency of blasting, and public concern.

These all played into the differences and the treatment accorded to the Whites Point and Tiverton projects.

Now, the marine components of the Whites Point project and the Tiverton harbour were also treated equally, approached equally under the CEAA.

However, again, differences in the projects led to differences in the treatment that was accorded.

For example, because it was capable of handling post-Panamex-sized vessels, the Whites Point marine terminal, it was listed on the

Comprehensive Study List regulations and it required a comprehensive study under the CEAA.

The Tiverton harbour, given its size, did not. Now, this led to a screening being conducted of the Tiverton harbour and under the implementation of workable and effective mitigation measures through the unfolding of that screening process.

So this fundamental difference resulted in differences in the level of EA applied to each project.

This was just one factor justifying the differences in how these projects were assessed.

Now, for his part, Mr. Rankin expressed a whole range of reactions to the differences in the treatment of the Whites Point and Tiverton projects. He called them remarkable. He called them utterly staggering. He called them dramatic. And he called them surprising, but putting Mr. Rankin's surprise aside, there were quite simply differences in these projects which explain the differences in the treatment that they were accorded.

Now, finally let's consider some

of the other Nova Scotia projects that have been raised by the claimants.

In his expert report, Mr. Estrin prepared the chart that you can see on the screen.

Are you looking at time, Judge Simma?

PRESIDING ARBITRATOR: I am just looking at the expression on the face of our court reporter but I think she, she hopes or she is convinced that you are going to take just a few more minutes.

--- Laughter

PRESIDING ARBITRATOR: I mean it is just a matter of the coffee break.

MR. LITTLE: Absolutely. I would say I am probably about five more minutes, five to six more minutes.

PRESIDING ARBITRATOR: Okay, thank you.

MR. LITTLE: Okay. In his expert report, Mr. Estrin prepared the chart that you can see on the screen, setting out 28 quarry proposals that were assessed in Nova Scotia since 2000.

Now, Mr. Estrin in his reply expert report noted that the chart he compiled

revealed that the Whites Point project was the only quarry to have been sent to a hearing and the only one to have been rejected since the year 2000.

Mr. Spelliscy and Mr. Rankin had the following exchange regarding Mr. Estrin's chart:

> "QUESTION: In terms of commenting very briefly on some of these other projects, you didn't actually review any of the other documents associated with those, the primary documents associated with those projects; correct?
>
> ANSWER: Counsel, to be totally frank, I can't remember at this stage. I might have looked at a couple of them just in scanning them, but I frankly don't recall. But I do know that he looked at 28 environmental assessments for quarries between 2000 and 2011, and only one was subject to a public review hearing and that was Whites Point quarry. And, you know, I think that standing back from the trees and looking at the forest it is pretty, pretty staggering, because some of them were bigger than this one."

Now, Mr. Rankin could offer nothing more than the fact that from his vantage points -- which was standing back from the trees and looking at the forest -- he was once again staggered by the differences in treatment accorded to the Whites Point project.

But the chart that you see on the screen now prepared by Lawrence Smith and attached to appendix two to his rejoinder expert report explains three basic differences between the projects Mr. Estrin describes and the Whites Point project.

First, none of these quarry projects included the construction of a marine terminal.

Second, none were located on the Digby Neck, on the Bay of Fundy.

And third, the majority of these projects were expansions of an existing operation.

Standing back from the trees and looking at the forest, the approach taken by the claimants' experts is the opposite of what a like circumstances analysis requires under Articles 1102 and 1103.

With respect to Mr. Rankin, he had

to look closer at just a few of the trees, because they clearly explain the differences between how the Whites Point project and all of these other projects were treated.

So in sum. The claimants, as I have noted, have been able to identify some differences in the treatment accorded to the claimants in the EA of the Whites Point project relative to that accorded to proponents of other EAs.

This isn't surprising. The claimants' document requests required Canada to produce close to 25,000 documents from 74 other environmental assessments carried out across Canada. But the differences in treatment that they have identified didn't really result in any real disadvantage or lost opportunity to the claimants.

Moreover, each of the EAs that have been invoked by the claimants simply engaged different circumstances than were engaged by the Whites Point project and regard must be had to these.

In the end, what the claimants have provided you does not provide adequate grounds for a finding of a breach under either Articles

1102 or 1103.

And subject to any questions, we will now happily move to a break, thank you.

PRESIDING ARBITRATOR: Any unhappy questions?

--- Laughter

PRESIDING ARBITRATOR: No.

MR. LITTLE: Thank you.

PRESIDING ARBITRATOR: Thank you, Mr. Little. We will have our break, coffee break until 2:15.

--- Recess at 2:00 p.m.

--- Upon resuming at 2:15 p.m.

PRESIDING ARBITRATOR: Everybody seems to be here, everybody of importance, if I may say so. Mr. Hebert, vous avez la parole.

SUBMISSIONS BY MR. HEBERT:

MR. HEBERT: Merci beaucoup, Mr. President.

My presentation this afternoon will address the legal standard set out in Article 1105. That is the customary international law minimum standard of treatment or customary MST.

My colleague, Mr. Spelliscy, will then discuss the specific facts of this case and

show that even if Mr. Douglas's confidence in my ability is misplaced and I do a disastrous job with this argument and you accept the claimants' arguments with respect to the standard under 1105, then Mr. Spelliscy will show why, even on the facts -- because of the facts of this case, the claimants' Article 1105 claim must still fail.

Now, in the interest of time, I will go through briefly the first few slides. I know my good friend, Mr. Spelliscy, is itching to come back up.

There is no dispute here between the disputing parties that Article 1131 of the NAFTA contains the governing law, and it requires that the Tribunal decide the issues in accordance with this agreement and applicable rules of international law.

It further provides that a binding interpretation of the Free Trade Commission must be followed by a NAFTA Chapter 11 tribunal.

Now, Article 1105 is obviously part of the NAFTA and -- sorry, I am going a bit too fast here. It provides that:

> "Each party shall accord to investments of investors of

another party treatment in accordance with international law..."

I have underlined here the words "in accordance with international law" because there is much disagreement between the disputing parties as to what those words mean. The claimants allege that these words serve to expand the standard of treatment guaranteed by NAFTA Article 1105 beyond that which is provided in customary international law.

Canada argues that it does not. Canada's interpretation is that these -- of these words is supported in this arbitration by the United States, which has filed non-disputing party submissions pursuant to Article 1128.

Although Mexico has not filed a similar submission in this arbitration, the position it has adopted in other Chapter 11 disputes, notably in the Cargill dispute, is also consistent with the interpretation adopted by Canada and the United States.

Now, fortunately for this Tribunal, the Free Trade Commission clarified the precise meaning of these words over 12 years ago.

In its 2001 note of interpretation that you now see on the screen, the FTC clarified that Article 1105 requires no more and no less than the customary international law minimum standard of treatment. The FTC further clarifies that 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 MST.

And the third provision provides that a determination, if 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 1105.

Now, this note of interpretation is binding on NAFTA investor state tribunals pursuant to the provision we just saw, Article 1131(2). The French version uses the verb "liera" and the Spanish version uses the expression "sera obligatoria".

The plain and ordinary meaning of these words leave no room and no scope for the application of customary international rules of treaty interpretation.

The claimants urge this Tribunal to ignore the unambiguous wording of Article

1131(2) and the binding nature of the note of interpretation. They are swimming directly against a strong current of NAFTA awards that have all recognized the binding nature of the FTC note.

I would also like to point out that a NAFTA Tribunal has no inherent jurisdiction to override a binding interpretation of the FTC. Its role is limited to determining whether an FTC interpretation satisfies the material conditions of Article 1131(2). In other words, the Tribunal should limit its analysis to determine whether the interpretation does, in fact, emanate from the FTC.

This has been accepted by numerous Chapter 11 tribunals, such as the ADF, Methanex, Mondev and Mondev tribunals. Even the two Tribunals that have been critical of the FTC note, the Pope & Talbot decision and the Merrill & Ring tribunal, ultimately agreed that it was binding on them.

Now that we have established the source of the standard referenced in Article 1105, I would like to turn to the content of the standard.

Previous NAFTA Chapter 11 tribunals have confirmed that Article 1105

represents a minimum threshold below which the treatment of foreign investors may not fall.

NAFTA investors are given no greater protection than that which customary international law requires, and the standard is one that guards only against grossly unfair or manifestly arbitrary actions by the state.

Again, numerous NAFTA awards establish this threshold and, again, the claimants find themselves swimming against the strong current of consistent NAFTA awards.

I won't discuss all of them. One, it would take too long, and secondly, the exercise has already been done recently in the decision on liability rendered by the Mobil tribunal in 2012.

But I still want to take a little bit of time to briefly review three awards.

The first one is the S.D. Myers decision, and it is always a bit awkward to discuss cases where members of the Tribunal have participated in drafting it, but here I go.

--- Laughter

MR. HEBERT: So the S.D. Myers tribunal served that:

"A breach of Article 1105

> occurs only 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 it is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."

And the Tribunal explained the rationale for this high threshold by pointing out that NAFTA tribunals do not have an open-ended mandate to second-guess government decision making, and I submit that this rule or principle is particularly true with respect to the types of government decisions that were made in this case.

PROFESSOR SCHWARTZ: I couldn't have said that better myself.

--- Laughter

MR. HEBERT: Touché.

The next award I wanted to briefly look at is the Mobil award. The recent Mobil decision, as I said, conducted an extensive review of the NAFTA awards that have interpreted Article 1105, and this review may be found at paragraphs 138 to 151 of the award.

And in light of its review, the Tribunal summarized the applicable standard as follows, and I won't read all of it, but on the second paragraph it describes the type of treatment that would breach Article 1105 as treatment that was arbitrary, grossly unfair, unjust or idiosyncratic or discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.

The other award I would like to briefly touch on is the Cargill award and, more precisely, its finding at paragraph 296, where it also aptly summarized the minimum standard of treatment under custom and the analysis a tribunal should conduct when it interprets Article 1105.

And, again, it wrote using

language that is very similar, that 1105 would be breached by actions that are:

> "... grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive."

Now, there is a thread flowing through all of these cases, of course, and that thread is that Article 1105 contains or prescribes a very high threshold for liability.

Now, the claimants have expressed great dissatisfaction with both the Mobil and Cargill awards, as well as the Glamis decision, which endorses essentially the same standard.

And, in fact, the claimants seek to dismiss the relevance of the Mobil and Cargill

awards on the basis of an alleged agreement between the disputing parties as to the relevance of customary international law.

As Canada understands the claimants' argument is that the claimants seem to be arguing the disputing parties in those cases contracted out of NAFTA and decided to apply a form of private lex specialis.

Such an interpretation of the Mobil and Cargill awards cannot be sustained. The fact that the claimants in those disputes recognized the binding nature of the FTC note, a fact that should be by now obvious to all, can obviously not have had any bearing on the law that these tribunals applied. This is because disputing parties are powerless to agree to a governing law other than that provided by Article 1131(1).

The claimants also argue that even if Article 1105(1) is to be interpreted as referring to customary MST, customary MST has evolved and has now converged with the autonomous, fair and equitable treatment standard found in some other investment treaties.

The claimants' allegations is entirely unsubstantiated.

As Canada explains in its counter-memorial at paragraph 313, the claimants clearly bear the burden of proving that the rules they are alleging are rules of customary international law. This burden cannot be passed on to the Tribunal, and it certainly cannot be passed on to the respondent state.

The claimants have simply failed to meet their burden of proof on this issue. Merely pointing to the existence of over 2,580 bilateral investment treaties is not enough. Customary international law cannot be proven by merely counting BITs.

And there are essentially two reasons for that. First, UNCTAD in 2012 updated its series dealing with fair and equitable treatment and conducted a stock-taking exercise of BIT practice. And what UNCTAD's survey reveals is there is no such thing as a standard fair and equitable clause.

On the contrary, treaties reveal a wide variety of clauses with important substantive differences. As a result it is simply not possible to argue that these BITs represent the type of consistent and general state practice required by

customary international law.

And here on the slide you will see that UNCTAD has sort of grouped in five categories the results of its survey of BIT practice, and I am sure that if one were to put their minds to it, you can come up with many different types of categories.

Secondly, and more importantly here, the inclusion of fair and equitable treatment clauses in BITs is not sufficient to establish a change in the minimum standard of treatment of customary international law, because such an inclusion could equally show the contrary.

And the International Court of Justice in the Diallo case was faced with a similar argument. In that case, the court ruled that the fact that bilateral investment treaties and investment contracts, for that matter, now typically allow foreign investors to bring derivative claims, such as the one brought here, where a foreign investor brings a claim on behalf of a foreign incorporated company, was not enough to show a change in the customary international law of diplomatic protection.

And here the court reasoned that

these BITs and investment contracts, you know, instead of showing a change of customary international law, could also be used to show that the understanding of states that -- to contract out a -- out of customary international law.

As an alternative to state practice, the claimants rely on the decisions of some non-NAFTA arbitral awards which have applied very different treaty provisions than the one found in Article 1105.

Sorry. The Glamis and Cargill tribunals provided a detailed and persuasive analysis as to why CMS Gas and other non-NAFTA awards, such as the Azurix and Rumeli awards, relied upon by the claimants are not helpful to establish the content of customary MST.

First and foremost, the Glamis and Cargill tribunals pointed out that the non-NAFTA arbitral awards relied on by the claimants were based on the interpretation of autonomous, fair and equitable treatment clauses which contained no reference to customary MST.

The Glamis and Cargill tribunals pointed out rightly, in Canada's view, that the only arbitral awards that are of direct relevance

to a NAFTA 1105 analysis are those which apply the same standard as set out in Article 1105; that is, customary MST.

Inasmuch as the CMS Gas, Rumeli and Azurix awards and others have held that the minimum standard of treatment has evolved to converge with the autonomous, fair and equitable treatment standard, Canada agrees with the Glamis tribunal that this convergence theory is an overstatement.

Moreover, it is an overstatement that is not based on any analysis of state practice or opinio juris, and should therefore not be adopted by this Tribunal.

Accepting the theory of convergence would be accepting that customary international law has evolved dramatically within the span of a mere 12 years since the issuance of the FTC notes to render these notes essentially ineffective. Yet the claimants have not offered any proof of such a dramatic and rapid evolution.

Now, the claimants this morning have advanced the proposition that NAFTA Article 1105 imposes on a state an obligation to act transparently, in good faith and in a non-arbitrary

manner. Article 1105 does no such thing.

First, with respect to transparency, it is true that NAFTA does contain certain specific transparency provisions relating to the publication of laws and regulations of general application.

These obligations are substantially similar to the ones one may find in the GATT, the GATS and various other agreements. However, these rules and obligations are set out in a separate chapter altogether of the NAFTA, namely, Chapter 18, which is beyond the scope, beyond the jurisdiction of this Tribunal.

The Metalclad tribunal of course ruled that Article 1105 did contain an obligation of transparency and that Mexico in that case had breached that obligation when local governments refused a US investor to a operate hazardous waste landfill even though it had obtained permits from the federal government.

However, the award was set aside by Mr. Justice Tysoe of the Supreme Court of British Columbia on this very same point, and I submit that the Metalclad decision is therefore of very limited relevance.

Also, the claimants have adduced no evidence of state practice or opinio juris supporting the proposition that customary international law now includes a general obligation of transparency, but even assuming for the sake of argument that customary international law contained an obligation of transparency, the intensity of that obligation cannot possibly be that which the claimants allege.

Indeed, civil servants cannot be expected to operate in a fish bowl at all times, and it is simply unreasonable to expect that all civil servants will render immediately publicly available every single piece of communication that they exchange in conducting their daily activities.

Now, with respect to the non-discriminatory obligation, in the context of NAFTA Chapter 11 these obligations are specifically set out in Articles 1102 and 1103, and it would be wrong to import them into Article 1105. Indeed, the FTC note of interpretation has clarified that a breach of another provision of the NAFTA doesn't establish a breach of Article 1105.

In any case, in the context of this arbitration, the debate is largely academic,

because the claimants have specifically claimed a breach of Articles 1102 and 1103.

Their claims of discrimination must therefore stand or fail on the basis of those provisions.

With respect to legitimate expectations, Article 1105 does not guarantee a self-standing obligation to protect legitimate expectations. This was recently reaffirmed by the Mobil tribunal at paragraph 152 of its decision on liability.

Moreover, to make out a claim of the legitimate expectations, a claimant must establish that it was given specific assurances on which it could reasonably rely to make an investment.

With respect to the claimants' arguments concerning full protection and security, Canada's position is that the obligation is limited to instances of physical security and obligation to provide police protection. It doesn't extend to the type of guarantee that the claimants described this morning.

Finally, with respect to the good faith principle, I mean, it is always dangerous to

be -- I mean, one cannot be against motherhood and apple pie, but I submit to you good faith is not a stand-alone obligation under Article 1105; rather, it is a principle which bears upon the application of other substantive principles, and this principle has been consistently recognized by NAFTA tribunals, most notably by the ADF Tribunal.

Lastly, I must say a few words of the claimants' argument fleshed out for the first time in its response to the United States' non-disputing party submission to the effect that the MFN obligation found in Article 1103 of the NAFTA serves to import treaty standards found in Canada's FIPAs, and, more particularly, standards that contain allegedly autonomous, fair and equitable treatment standards.

The claimants' argument must be rejected for three main reasons. First, nothing in the terms of Article 1103 suggests that it can be invoked to import a standard provided for in a different treaty that may potentially or theoretically result in a more favourable treatment of an investor from another party.

The provision is concerned with treatment, not standards. On this count,

Mr. Little has already explained why the allegations that the claimants were discriminated against, in any form, has no factual foundation.

Secondly, in the Chemtura arbitration involving Canada, the three NAFTA parties, through their pleadings and non-disputing party submissions, firmly opposed the possibility of importing an autonomous, fair and equitable treatment standards from one of Canada's FIPAs.

Finally, and perhaps more importantly, the standard of treatment guaranteed in Canada's post-NAFTA FIPAs is no different from customary MST. The claimants have failed to explain why the FIPAs in question - and they have alleged a bunch, and they all contain substantially similar language to NAFTA Article 1105 - should be interpreted any differently.

In summary, Canada urges this Tribunal to hold that the standard of treatment guaranteed by Article 1105 is one that protects against egregious state conduct, such as conduct that is manifestly arbitrary, grossly unfair, unjust or idiosyncratic.

Canada also urges the Tribunal to reject the claimants' attempts to impose a lower

threshold for state liability, as they have failed to prove that their alleged dramatic -- they have failed to prove their alleged dramatic evolution of customary international law.

And in closing, I would like to point out the systemic implications of the claimants' arguments in this case. If we stand back again from the trees and look at the forest, as Mr. Rankin would say, the Tribunal will note the striking similarities between the legal standard the claimants allege is applicable before Canadian courts -- sorry, I will just go through here.

So the Tribunal will note the striking similarities between the legal standard the claimants allege is applicable before Canadian courts tasked with deciding judicial review applications and the one they claim NAFTA tribunals should apply under Article 1105.

In fact, Mr. Rankin has argued that a Canadian court seized of a judicial review application of the Ministerial decisions at issue would have applied a standard of reasonableness, which is precisely the same standard that Mr. Appleton and the claimants are asking you to apply under NAFTA Article 1105.

In essence, the claimants are asking you to perform the same task that would have been performed by a Canadian court sitting in judicial review of the decisions of the Governor-in-Council and of the Nova Scotia Minister of the Environment and Labour to reject the Whites Point project.

That is simply not the role of NAFTA Tribunals. In any event, even if you do decide to reject Canada's arguments on this point and accept the claimants' interpretation of Article 1105, my colleague Mr. Spelliscy will now explain why you should nevertheless dismiss the claimants' claim on the facts of this case.

Thank you.

PRESIDING ARBITRATOR: Thank you, Mr. Hebert.

MR. HEBERT: I am happy to answer any questions you may have.

PRESIDING ARBITRATOR: Oh, yes, are there any questions?

PRESIDING ARBITRATOR: No. Thank you.

PRESIDING ARBITRATOR: Mr. Spelliscy, you have the floor again.

CONTINUED SUBMISSIONS BY MR. SPELLISCY:

MR. SPELLISCY: Good afternoon, again. Thank you, Mr. Hebert, for, I think, the quality introduction which will lighten my load as to what I have to show here.

What I want to focus on here is something that Mr. Hebert was just explaining. The claimants in this case have alleged that Canada and Nova Scotia have violated the minimum standard of treatment, and we have heard what that means at the international law, what that conduct requires, manifestly arbitrary, grossly unfair, unjust, idiosyncratic.

Now, in this hearing, instead of focussing on proving a breach of this standard, the claimants have instead argued this case like it is a judicial review.

In fact, what we saw in their closing argument this morning is that they identified two fundamental principles, two fundamental questions, whether civil servants acted in accordance with domestic codes of conduct - and I would point out here that not only did they all acknowledge that such codes existed, they all confirmed that to the best of their belief everyone

acted in accordance with those codes of conduct.

And, second, the question they have asked this Tribunal is: Did the federal government exceed the constitutional limits on its federal legislative authority?

They are asking this Tribunal to wade into arguments about the constitutional limits of federal jurisdiction in Canada.

They have asked you to decide issues of Canadian administrative law, like, for example: What is or is not a marine terminal under the Comprehensive Study List Regulations; when an environmental assessment starts in Nova Scotia, is it the registration or is it something earlier?

They have asked you to interpret what certain Canadian court decisions mean, Red Hill Creek, MiningWatch. We have heard differing opinions. They have asked you to interpret what those mean.

On some of these issues, the claimants' own expert offering the opinion admitted the answers were in fact uncertain and unclear.

On others, the claimants' own two experts appeared to disagree and, on most, it seemed Canada's two experts disagreed with the

claimants' two experts.

These issues may all be complex and difficult issues of Canadian law, but this Tribunal is not a Court of Appeal. It is not a judicial review court. The claimants had that remedy available to them. They could have sought judicial review of each and every one of the decisions that now form the basis of their challenge, and the Canadian courts would have been well placed to deal with them.

This is not an argument about exhaustion of remedy. This is an argument about whether this Tribunal is -- if the job of this Tribunal is to interpret complex issues of Canadian law and figuring out whether or not they are complied with in an international setting when the question is a minimum standard of treatment.

And in these circumstances where a judicial review wasn't sought, I think we do have to ask ourselves about the credibility of the assertions of errors of Canadian law that are being asked now and being advocated for by the claimants' counsel, being advocated for by Mr. Rankin and Mr. Estrin.

What we submit this Tribunal needs

to do is to focus on what the 1105 standard requires. And, again, as Mr. Little highlighted at the beginning of this hearing and in the opening remarks to this closing statement, the question is: Have the claimants proven the facts needed to make out that claim, not a claim that there was somehow an error of Canadian administrative law.

So now let's turn to the measures that the claimants have challenged and what we have learned at this hearing.

And in what follows, I want to show three things. One, the decisions of the Governments of Nova Scotia and Canada, prior to the constitution of the Joint Review Panel, were consistent with Article 1105.

Two, the information-gathering done by the Joint Review Panel during its process, if attributable to Canada, was consistent with Article 1105.

And, three, the decisions of the Government of Nova Scotia and the Government of Canada after the issuance of the JRP report were consistent with Article 1105.

So it has taken us perhaps all afternoon to get there, but we have finally got the

structure I think that Professor Schwartz was looking for, so I am hopeful that this will be helpful.

Let's start with the area that was really the entire focus of the claimants' case, and that is the decisions of the Governments of Nova Scotia and Canada prior to the constitution of the Joint Review Panel.

And we spent seven days essentially on this in terms of cross-examination, so there is a lot to cover here and so you are going to see I am going to break this down and break it down again. I am going to talk about an additional six points in this context.

What I will show is that Nova Scotia imposed conditions on blasting by Nova Stone to for the purpose of protecting marine mammals.

I will show that DFO's consideration of Nova Stone's blasting plan for the 3.9 hectare quarry was done in good faith and was based on legitimate concerns.

Third, I will show that the claimants' proposed project required environmental assessments under both Nova Scotia and federal law.

Fourth, I will show that the

determination that the scope of project to be assessed would be the project as proposed by the claimants, which was the quarry and marine terminal combined, was appropriate and right.

Fifth, I will show that the decision of the Minister of Fisheries and Oceans to refer this project to the Minister of the Environment for a referral to a review panel was also appropriate and justified in the circumstances.

And, finally, as a last step before we get to the actual Joint Review Panel, I will show that the appointment of the particular members of this Joint Review Panel was also entirely appropriate in these circumstances.

So let's start with the first. Nova Stone imposed the conditions that it did -- or Nova Scotia imposed the conditions that it did on Nova Stone with respect to blasting for the purpose of protecting marine mammals.

Now, the claimants have taken issue with the Department of Fisheries and Oceans even being consulted on Nova Stone's industrial approval. Here, this morning, they seemed to argue that Mr. Petrie was somehow in dereliction of his

duties to ask for assistance from DFO.

But as we have confirmed in this hearing, the evidence is to the contrary. Nova Scotia requested DFO expertise on the effects of blasting next to the Bay of Fundy because of good faith concerns over the possibility of effects on marine mammals.

Why? As Bob Petrie explained:

> "Basically the province doesn't want to be in a position of approving a facility that is going to generate adverse effects, whether it be in a surface watercourse or in the Bay of Fundy."

It cannot be that a decision to seek help, to seek guidance, to seek to ensure the protection of species, including endangered species, from relevant experts is a violation of the minimum standard of treatment.

Let's move to the second one, DFO's consideration of Nova Scotia Nova Stone's blasting plans for the 3.9 hectare quarry.

Again, this is an example of

officials acting in good faith to the best of their abilities based on legitimate concerns. Now, there's been a lot made of this topic, so I am going to subdivide it yet again. I promise I will try to keep track of where we are.

I am going to talk about four more points here. First, DFO's initial concerns about marine life being affected by the blasting were legitimate.

Second, DFO continued to have science-based concerns about the proposed blasting throughout the winter and spring of 2002 and 2003.

Third, the scientific concerns of DFO during the winter and spring of 2002 and 2003 were right for it to consider in the context of the proposed blasting.

And, fourth, DFO's determinations and decisions about the information on setback distances were entirely appropriate.

So, again, let's start at the beginning on DFO's concerns about marine life being affected by the blasting. In their reply, the claimants allege that DFO's concerns about blasting were nothing more than, to use their words, spurious aquatic issues.

The facts are to the contrary. As confirmed in Canada's evidence, the Bay of Fundy is home to one of the most important fisheries in Canada and the world. It is a rich and diverse ecosystem full of unique and endangered or threatened species. Effects on such an area are not spurious aquatic issues.

The claimants seem to want to suggest that these issues were spurious because of the fact that there are other quarries in Nova Scotia and that there are other marine terminals around, and around Canada, and that there is already shipping in the Bay of Fundy.

But the facts are that there were no similar projects anywhere else on the Neck, no quarries, no large marine terminals, and when we look to what the specific scientific expertise and evaluation is with respect to the evaluation, we have to remember the location of the project.

Putting a marine terminal and a quarry of this size on the Digby Neck raised a whole host of environmental concerns that were simply not present for other quarries and other marine terminals in other locations.

Now, DFO -- I have moved to the

second point, DFO's science-based concerns about the blasting throughout the winter and spring of 2002 and 2003.

In this hearing, the claimants have seemed to suggest that even if the concerns weren't spurious from the beginning, DFO should have had no concerns about the blasting by no later than December of 2002.

What have they pointed to? They pointed to comments made by Jerry Conway and Dennis Wright. In reality, what we have learned at this hearing, Jerry Conway and Dennis Wright are but two individuals in the Department of Fisheries and Oceans. Their opinions are valued, but they are not definitive, and they certainly weren't considered definitive for this particular project for good reasons.

With respect to Jerry Conway, the claimants have tried to insinuate that he was "the marine mammal scientist" at the DFO. That we know is not true.

Mr. McLean explained Mr. Conway's role in his testimony. He said:

> "No, mainly because Jerry Conway is -- I have to

explain the role of the marine mammal advisor. Under a fisheries management program within DFO, we have advisors for each of the critical species that we would assess, things like advisors for lobster, ground fish and things like. So the marine mammal advisor isn't necessarily an expert on marine mammals, noise, blasting, those things. He would be an advisor regarding things like quotas on seals, protection measures under the marine mammal regulations, expert. Any of the expertise related to noise propagation, marine mammals would come from DFO science branch".

Mr. Bellefontaine also confirmed for the record that Mr. Conway was not himself a scientist.

With respect to Dennis Wright, the

claimants have tried to insinuate that his opinion on the blasting effects on marine mammals and how those effects might be mitigated should have been definitive. We know from the evidence why they were not.

As Mr. Bellefontaine explained, Mr. Wright may have been an expert in blasting, but he was not an expert in marine mammals and certainly not in large whales.

Further, Mr. Bellefontaine, who was a Regional Director-General of this region and with decades of experience there, explained exactly why the mitigation measures suggested by Mr. Wright, which the claimants suggest were so important to know, would not have worked in the Bay of Fundy. Again, the mitigation measures suggested were sighting whales.

Mr. Bellefontaine said:

> "You have to recall at that time, if you realize, the Bay of Fundy, the inner Bay of Fundy where these whales frequent, quite often it is covered with fog cover and cloud cover, and the whales

aren't that visible to anybody".

Now, this is exactly why it was the opinion of DFO, as an organization -- that is relevant -- the expertise that DFO as an organization can bring, not individual scientists.

And in this regard the science was being collected and coordinated by the Habitat Management Division of DFO's regional office in Nova Scotia. The person collecting at the beginning was Jim Ross, it changed to Phil Zamora, both of whom are retired, of course.

And the documents show and the evidence in this case shows that these individuals, scientists themselves, were relying on the opinions of numerous other scientists who were feeding into the process.

As Mr. Hood explained in his testimony, there were hundreds of scientists in the appropriate regional office.

Now, the claimants have said that there is no evidence in the record of any science being done. That is simply not true.

The record contains multiple examples of evidence of science being done. It is

unclear what the claimants are actually looking for here.

We have to remember where we are in the environmental -- in the assessment process. This is a search for whether or not there are potential concerns that might trigger federal jurisdiction. It is not the conclusive search that the claimants suggested.

We have evidence on the record. We have heard about the work of scientists who were doing science on this particular project, the concerns they had, including those of Mr. Cochrane and Mr. Stephenson. There were others, they are in the record, including the expert on the endangered inner Bay of Fundy salmon, Peter Amiro.

And in suggesting that we look at the opinions of only two individuals, the claimants also ignore the basic nature of science. It is an iterative and a collaborative process that does not depend on the individual opinion of any one person.

As Mr. McLean explained in his testimony:

> "There is no one individual that would actually provide the unequivocal answer. It

would be a collection of information from various sources."

And as Mr. Bellefontaine similarly confirmed:

"Normally when you have a scientific review, a collective approach or a final approach would come from all of this dialogue between scientists."

Now, we have heard again and again insinuations from the claimants that because these scientific opinions weren't shared -- the buildup to what would be the final opinion wasn't shared with other departments, with the proponents, that somehow it probably wasn't done.

Again, that is not true. The witnesses that we had here have confirmed that they would not normally share scientific opinions before they were final, and that as a proponent and as proponent's counsel, Mr. Smith confirmed he would not normally expect to receive an opinion before it was final.

I think if you think about why

that is, it is important, because again you could have individual opinions that disagree. That is also the nature of science and that is how it results in the best possible conclusion.

Now, the claimants in their closing openly considered why Mr. Conway's opinion was enough to trigger the inclusion of conditions 10(h) and (i) in the Nova Stone permit, but his opinion was not enough to remove it, and they have suggested that that is somehow wrongful.

I submit to you that is in fact entirely appropriate. When one has a precautionary approach to science, especially when endangered species are involved, one has a precautionary approach. It is entirely appropriate for one individual to flag a concern, but for that concern not to be removed until all individuals are convinced that that concern is not real.

Now, let's talk about the scientific concerns that DFO had and whether it was right for DFO to consider them in the context of the proposed blasting, which is -- I believe I am on number 3.

The claimants have suggested that DFO was acting wrongfully and in excess of its

authority at this stage because -- and we're talking in this time period -- because condition 10(i) in the Nova Stone permit related specifically to marine mammals.

And, relatedly, they seem to suggest that DFO should not have looked beyond that, because there was no federal environmental assessment. No application to DFO related to blasting on the quarry, they say, had been made.

Now, there is no question from the record that what triggered the concerns and what triggered the inclusion and what 10(i) is about is about marine mammals. That was what initially triggered the concern.

But let's stop to think about what the claimants are suggesting here about the minimum standard of treatment. It is obvious from the record and from the science done that the DFO officials and scientists started to have concerns about the possibility of significant adverse effects from the blasting on fish, and in fact on endangered iBoF salmon, in the winter and spring of 2003.

The documents show and Mr. Hood himself testified on the basis of his notes that at

least four scientists had specifically identified concerns about the effects of blasting on swim bladders of fish.

Should scientists from DFO simply have ignored those concerns and allowed blasting to go on because a permit from Nova Scotia only spoke about marine mammals?

As Mr. Bellefontaine has explained, that would have been an abdication of their responsibility as officials and scientists. The minimum standard of treatment does not require officials to wear blinders and ignore the potential harm that a project may cause simply because new concerns that were previously unforeseen have arisen. That is also the nature of science and the nature of assessment.

Now, I want to come to DFO's determinations and decisions regarding the setback distances.

Much has been made of this, of course, but let's look at what the conclusions of the work of these scientists was. And much has been made of the May 29th letter from Mr. Zamora to Mr. Buxton.

What we know from the record --

and we have seen it and it's in the notes of Mr. Hood and it is in emails among DFO scientists -- is that the conclusion that these scientists were able to reach at the end of 2003, the precautionary approach based on the information they had, was that the blasting as proposed by the claimants was going -- would likely have resulted in the death of fish.

And in good faith, and there is no evidence otherwise, Fisheries officials used a computer model to suggest a setback to protect iBoF salmon of 500 metres from the shore.

Again, much has been made of this setback distance and how it was arrived at. Today, in their closing statement, the claimants said it was concocted.

But there's been no evidence of some sort of contrivance or intentional action or arbitrary decision. A model was used.

Other times, the claimant has described this as an error or a mistake. Well, a mistake is not a violation of the minimum standard of treatment.

Now, the claimant has put great emphasis on this information, and they have

consistently insinuated it was wrongful that it not be shared immediately with the claimants.

They have in fact at times today and at times in the past alleged that DFO was aware -- prior to the DFO Minister requesting that the project be referred or referring the project for referral to a review panel in 2003, that the DFO Minister knew or should have known or officials knew that the blasting setback calculations were wrong.

The fact is that that assumption is wrong, and the documents show it.

Next slide. In early July of 2003, that is when Mr. Zamora wrote to Mr. Wright, and he says:

> "Dennis, this is a follow-up to my conversation and Brian Jollymore's with you re Digby quarry blasting plan."

Then he provides him the documents, including the blasting plan, iBoF Atlantic Salmon proximity and habitat preferences from Peter Amiro, science branch, some of the science that was being done.

Three and four:

"The I-Blast results we ran for Atlantic Salmon post smolt size fish."

What does he ask him on July 3rd:

"Would you please look at the results? Are we too conservative?"

Now, there is no evidence from that time frame that that communication was had earlier. There is an email from the following year that was put into the record where Mr. Zamora recalls a year later that that conversation might have been in June of 2003, but it was not. It was in July after the DFO Minister had made his referral.

And when is the response? July 29th, 2003. And what does Mr. Wright say? He says:

"Further to our telephone conversation this morning, I have a few comments and thoughts concerning the explosives use issue associated with the Whites Point quarry."

Here I want to stop, because I want to come back to the idea that this was a fraud or that it was concocted. Why would DFO scientists on their own follow up with other DFO scientists if they had just concocted this 500 metre setback? Why would they go through the hassle? Why would they go through the work? Most of all, why in 2004 would they disclose to the claimants that in fact the calculation was in error?

Now, again, there's been a lot made of why this information wasn't shared, and I think the explanation was aptly given by Mr. Chapman, and that is that, in his opinion, in Mr. Chapman's testimony, that it would have been inappropriate to discuss -- next slide, please:

> "It would have been inappropriate to discuss this because the project had been referred and we were very concerned with the integrity of the environmental assessment process."

And so I want to stop here again for another reality check. The purpose of environmental assessment is to allow the

governments to consider the environmental effects of proposed projects during EA.

This case, a proposed project, was a 3.9 hectare quarry, and Mr. Clayton has confirmed that the intention was to start blasting. We heard that again this morning from the claimants' counsel.

Mr. Clayton also said it was the first phase of the larger project, and there was the difficulty. In their project description submitted in March, which is what the federal officials had before them, they said they would develop ten acres or four hectares a year.

So what was the plan here? To use a provision of Nova Scotia's regulations that is for small quarries and use it to allow the claimants to develop the first phase of their larger quarry, thereby avoiding the entire purpose of EA, which is to assess the effects before the project begins.

The minimum standard of treatment does not require the government to countenance such behaviour.

Now, I know my time is short, so I want to move quickly through some of the other

factors here.

I want to come to the claimants' proposed project required EAs under both Nova Scotia and federal law, so if we can bring that slide up.

In their written submissions, the claimants suggested that in fact this had all been contrived, that there was no federal jurisdiction.

And in their submissions here, they seem to be suggesting that in fact there was no Nova Scotia jurisdiction simply because a registration document had not been filed.

However, the evidence at this hearing, confirmed by the claimants' own experts, is before this quarry could actually begin operation, before the marine terminal could begin operation, an EA was required. We can argue about the formalities.

And we have heard about this registration document, and the claimants had a Nova Scotia environmental assessment officer, Mr. Daly, here. He could have testified to it. They didn't ask them. If they had, he would have explained a registration document of that sort is not needed in a Joint Review Panel process.

Let's turn quickly to the scope of the project to be assessed. The claimants are pushing a theory that the decision of DFO to scope in the quarry was a violation of Article 1105, and in this regard they are arguing, it seems to be, two things: One, that it was unconstitutional for DFO to scope beyond its triggers, and DFO knew it; and, second, that it was contrary to DFO's practice.

The evidence doesn't support those assertions, but it also misses a fundamental point. First, as Mr. Chapman confirmed, once this was referred to a Joint Review Panel, it is the Minister of the Environment that determines scope, and he has to scope with his counterpart in Nova Scotia to include all of the elements of the project.

And, second, as described above, DFO did determine that there were likely to be triggers on the quarry. Mr. Hood and Mr. McLean both testified to that.

The claimants may not have liked that determination, but that is the determination that they came to with the blasting plan that was actually proposed by the claimants at the time.

Even if we ignore those two facts, though, their arguments are still not supported by the evidence.

Now, again, this is where we get into questions of constitutional law. With respect to their argument that it was not constitutional, both Mr. Hood and Mr. Chapman explained that the good faith view of officials at DFO and CEAA was that they were fully entitled to scope a project in a manner which included interrelated aspects of the project even if there were no triggers.

If we could go to the next slide there; keep going. And so you say -- keep going.

And this was the testimony of Bruce Hood. It was his understanding in 2003 that the government had the discretion to do it. Mr. Smith -- and Mr. Chapman had the same -- if we move through the slides, Mr. Smith, an expert that Canada has presented, and in fact said from his perspective, the ability to scope is not contingent.

Now, I don't want to get into a constitutional debate with my colleague, Mr. Nash, but I think he has MiningWatch wrong. MiningWatch, as Mr. Rankin confirmed, was a case where the

Supreme Court was faced with a question of whether, under the same language of CEAA applicable here, the federal government should have scoped a project to include areas over which it had no triggers, and it said "yes".

We cannot assume that the court in MiningWatch was dumb to the constitutional question. They were not telling the government to do something that was unconstitutional. This is really an issue, I think, of Canadian law, and maybe one day the Supreme Court will even address it.

I also want to point out, on scope of triggers, it was not in fact the consistent practice of DFO at the time to scope to those triggers. We heard from Mr. Chapman of this fact, that he said that there was a marine terminal, an LNG terminal, that at the same time in fact did have -- was scoped with triggers.

We heard from Mr. Smith about the Jackpine and Horizon oil projects scoped broader than their triggers on exactly the same day that the Whites Point project was referred.

Now let's come quickly to the decision of the Minister of Fisheries and Oceans to

refer this project to the Minister of the Environment for referral to a review panel.

Now, the claimants seem to allege that the decision to do so was inappropriate. Again, the evidence is to the contrary. There's evidence in the record that there was concerns about significant adverse environmental effects arising not just from the quarry, not just from the blasting on the quarry, but from the marine terminal and from other aspects of the quarry.

There is evidence in the record that this was on the Comprehensive Study List, and, as a result as being on the Comprehensive Study List, it could be referred to a review panel for that exact reason.

Indeed, the claimants' own expert -- and I will see if Chris can keep up with me, where I am -- Mr. Rankin confirmed that there was ample authority under CEAA for the marine terminal to be referred to a review panel.

It is actually a few slides further down there, and that is at transcript volume 2, on page 601, lines 4 to 8.

Now, the claimants have made some importance of the fact that public concern was not

mentioned when this project was being referred. But we've already heard from Mr. Hood and Mr. Chapman why that is unimportant.

Mr. Hood and Mr. Chapman explained that it is unimportant for a simple reason. Everybody knew about the public concern. It wasn't important to put in a letter what everybody knew, especially since this was being referred to under -- referred for a referral under section 21, which didn't require anything to be said.

And conscious of my time, I will now come to very quickly the appointment of the particular members of the review panel, because there was some discussion on this. And we have heard from Mr. Chapman exactly why these people were selected. We have heard the claimants have suggested they were manifestly biassed, but these facts are baseless.

We have heard from Mr. Estrin that while he didn't challenge the actual scientific expertise, he challenged the fact that there wasn't enough regulatory experience. Why? Because Dr. Fournier at the end of the Sable hearings had the modesty to suggest that he learned something. That is not a credible challenge to somebody on a

Joint Review Panel in terms of their expertise.

Now let's turn to the second point overall, which is the information-gathering done by the JRP during its process, even if attributable to Canada, was consistent.

Fortunately, I can be much briefer here, because very little hearing time was actually spent on these issues. What we want to emphasize is that the Joint Review Panel provided the claimants with due process at all times during the information-gathering phase of the EA, and, in making its recommendations, it acted in accordance with the mandate given to it.

On the adequate notice point, a lot has been made about the notice and the requirements of natural justice, and it's been alleged that the JRP did not provide Bilcon an adequate opportunity to be heard by failing to provide a presentation, by not asking questions of its witnesses.

The evidence in the record is that the JRP wanted the claimants' participation. They solicited it. They asked for it. The claimants were there. The claimants decided not to participate in a substantial way.

Their decision to sit on their hands is one which Mr. Smith has testified was certainly abnormal.

Now, the record shows why they were content to sit on their hands; because they saw the EA process as nothing more than hoops to jump through.

If we look at the individual claims, as this Tribunal knows, sometimes experts come to a hearing; sometimes there are no questions to ask.

We heard again today about the fact that Dr. Fournier turned his back at a time on Mr. Buxton during his presentation. As this Tribunal knows sometimes your books are located behind you. There is no evidence as to why he turned his back.

Now, a Tribunal's determination that it has no questions to ask, the way it conducted itself, there has been no breach we would say of Article 1105 here.

There has also been allegations of bias against the Joint Review Panel. I don't want to get into these, but what I would commend for the Tribunal to do is to simply read the record. The

transcripts are available. The report of the Joint Review Panel is available.

Were certain people against the project? Certainly. Were uncomfortable questions asked? Certainly. But it is not the role of a Joint Review Panel in a public hearing to shut down public participation. When it got out of hand, Dr. Fournier did, but otherwise the public has to be allowed to participate. That is something that was in fact recognized by both Mr. Estrin and Mr. Smith.

Now, let's get quickly to the mandates and how the JRP acted in accordance to the mandate, because this is where we get community core values, which one would think would be the focus of this hearing, and there's been a lot of evidence that I would have to go through otherwise.

I don't want to spend the rest of my time on this, but it is important, because a Joint Review Panel decided on the basis of the community's core values. There's been a lot of discussion about whether or not that is an appropriate thing to consider in an environmental assessment in Canada.

Here, again, we have disagreement

among the experts. The experts seem to agree that socioeconomic effects can be considered. In his report, Mr. Estrin took it a bit further and said that community core values is a pure socio-economic effect.

Mr. Smith in his reports agreed with Mr. Estrin. Mr. Rankin at this hearing and in his reports did not, and last week things got even more confused, because Mr. Rankin confirmed that he disagreed with Mr. Estrin, and Mr. Estrin then appeared to disagree with himself and what he had written, saying that when he wrote it was a socio-economic effect not once, but numerous times, he had really he meant just add a "not" in front of each one of those times.

In contrast, Mr. Smith addressed in his testimony -- Mr. Smith has consistently explained why these sort of human environmental effects, values, are appropriate to consider in an EA in Canada, and particularly in Nova Scotia.

And he walked you through the guidelines and he walked you through the terms of reference, and we can see directly from there the links.

Now let's turn to the last topic,

which is the decision of Nova Scotia and Canada to accept the Joint Review Panel recommendation.

PRESIDING ARBITRATOR: For which you have exactly five minutes.

MR. SPELLISCY: All right.

Now, here again, I think it is important to understand the role of the Joint Review Panel and the role of government. As we heard, the Joint Review Panel makes a recommendation. Governments decide. The recommendation is one input.

So in looking at the decisions of government, we have to look at them as distinct decisions. In attacking these decisions, the claimants suggested that this was an abdication of responsibility by Ministers.

Now, that is false, and I want to focus on what they said at this hearing and what they seemed to focus on here, which was that the failure to meet with the Ministers face to face was a denial of natural justice.

Now, they of course admit letters were sent, and they of course admit that from the evidence in the record those letters were read.

Mr. Smith had it, I think, exactly

right. Canadian law and natural justice requires one hearing, not two. And, interestingly, of course if they had wanted a second hearing, they had one. It was a judicial review in Canadian courts.

Now, I will take probably the remaining two minutes I have for a summary here. The claimants' 1105 claim essentially asks this Tribunal to forget what the standard for Article 1105 is. They want this Tribunal to assume the role of a Canadian court reviewing as a matter of Canadian law whether each of the decisions made during the course of the EA were correct.

But in any process, EA process, anywhere in the world, there will be dozens of decisions made. Many of those decisions the proponents of a project will not like. Many they will not agree with. Some they may even challenge in local courts.

The claimants could have taken these claims to Canadian court and challenged their compliance with Canadian law, but instead they have challenged their compliance with Canadian law in front of this Tribunal.

However, these decisions, without

more, do not rise to the sort of egregious conduct breaching the customary standard of international law.

So what do the claimants ask you to do? They ask you to assume a conspiracy, a conspiracy orchestrated apparently by a Minister they chose not to cross-examine even though he was available, a conspiracy which is completely improbable given the range of actors involved, the fact that it went to a Joint Review Panel over which the conspirators would have no control, a conspiracy that everyone who testified here has denied.

And, as a result, what they are essentially asking you to conclude is that all of the witnesses presented here by Canada are lying. There's no reason why these civil servants, many of them long since retired, as well, would lie in these public hearings.

The claimants have offered no reason why, and the claimants have also offered no reason why, if it was all concocted from the beginning and everyone knew that, why DFO would come back and revise some of its conclusions. Why would they rethink their blasting calculations?

Why would they rethink the science as part of the Joint Review Panel process? Why would they come to the conclusions ultimately they did? Why not keep the ruse up to the end, if that is what it was?

The fact is that it was not.

What the claimants are really asking this Tribunal to do is second guess the judgment and good faith decision-making of officials and scientists. That is not the role of this Tribunal.

The claimants may have come believing that this was a slam-dunk, that EA in Canada was merely a permitting process, not an assessment process. They may have been disappointed they were wrong, and they are now looking to this Tribunal to provide them with insurance against a bad business decision to locate a quarry and marine terminal in a place where it had little business being, a bad business decision to ignore the community and seek to run roughshod over their rights.

Article 1105 is not crafted for these purposes. Stepping even further back, more generally, the claimants' other complaint seem to be based on the fact that their project was subject

to an EA that didn't look identical to other EAs. Mr. Little has explained why.

But, ultimately, what we ask you to conclude here is that there has been no breach of any of the provisions of Chapter 11.

And I thank you for your attention, and if there are no questions -- I am happy to answer questions now, but, if not, subject to our right of reply, this will serve as a close to Canada's closing statement.

PRESIDING ARBITRATOR: Thank you. It looks like...

PROFESSOR SCHWARTZ: Just one question, and it could be dealt with in sur-rebuttal, if any.

When I was looking through the Nova Scotia Environment Act, and I might very well be misreading it, it looked to me, in 26(2) of the regs that there is:

> "The proponent shall be provided reasons in writing by the Minister when an undertaking is rejected."

That is section 26(2) of the Nova Scotia Regs. We haven't had any input on this. I

am just wondering whether that is applicable here. If you want to just briefly mention it in sur-rebuttal, that is --

MR. SPELLISCY: I can find out whether it is applicable, but I guess, in essence, there was a response in writing from the Nova Scotia government. There was reasons. There was also a courtesy phone call in advance.

For the claimants to suggest they didn't understand what the reasons were I think is not credible. There was that writing. Now, there is no indication of how long or how lengthy those reasons have to be, but the Nova Scotia Minister did give reasons.

PROFESSOR SCHWARTZ: Thank you very much.

PRESIDING ARBITRATOR: Thank you. That gets us to the break, and we are going to have a break of 30 minutes now in preparation for the rebuttals and the sur-rebuttal.

I think I am right.

MR. PULKOWSKI: That's right.

PRESIDING ARBITRATOR: The break will last until 3:50. It is a few minutes shorter, 3:50.

--- Recess at 3:24 p.m.
--- Upon resuming at 3:53 p.m.
PRESIDING ARBITRATOR: Okay. We are on the record and I will give the floor to Mr. Nash for the rebuttal.
REPLY SUBMISSIONS BY MR. NASH:
MR. NASH: Thank you, Mr. President. I will be speaking on just one aspect. It relates to the question of the test blasting, and the overall position can be summarized in this, that the prevention of Bilcon and its partner from doing test blasting on the 3.9 prevented it from gathering valuable scientific data that it could use for the purpose of developing the larger parcel.
So in doing test blasting on the 3.9, there was a linkage, a clear linkage, between that and the larger parcel.
And perhaps I could just summarize very quickly the short history of it. We've seen the submission of various blasting plans. We've seen the repeated requests for further information. That culminates in the letter of May 29th of 2003, which is Exhibit C-129, and that is the letter in which Mr. Zamora says to Mr. Buxton that DFO has

concluded the proposed work is likely to cause destruction of fish and says, You need a section 32 authorization.

And on the second page of that document, Mr. Zamora explains that, "The 3.9 hectare quarry", I am at the top of the page is:

> "... within the larger area of the proposed Whites Point quarry and Marine Terminal, which is currently undergoing an environmental assessment."

Then on the middle of the page, the full paragraph:

> "A Fisheries Act Section 32 Authorization is in the Law List Regulations of CEAA and therefore DFO would not be able to issue a section 32 Authorization for the four-hectare blasting plan until the CEAA assessment for Whites Point Quarry and Marine Terminal Nova Scotia has been completed."

Now we are subsumed into the

environmental assessment of the whole larger parcel, but there's still a reference to the 3.9.

There is, then, the referral, and all of this goes to scoping, jurisdiction, and the whole question of the referral to the JRP, because it's based -- it appears to be based, at least, upon some belief, we say a thin belief, that there is an actual section 32 authorization required.

The next document that I would like to draw your attention to is Exhibit C-490, where Mr. Zamora writes, again, this time to Mr. Steve Chapman. It is dated September 17th, 2003, and there is a reference to the final agreement for the JRP. Mr. Zamora states:

> "The draft agreement states that the project consists of a 120 hectare basalt quarry and associated deepwater marine terminal. DFO recommends that the 3.9 ha test quarry associated with this project be included in the scope of the project. The rationale for this recommendation is as follows:

> "The 3.9 ha test quarry is located within the proposed 120 ha quarry. DFO has determined that the blasting plan for the 3.9 ha test quarry, which was submitted to DFO for review, is likely to have a Fisheries Act section 32 trigger."

So here, in September, it is still being maintained, after what we've seen, that there is still a section 32 trigger:

> "The environmental effects of the operation of the 3.9 ha test quarry are expected to be the same as the environmental effects of the proposed 120 ha quarry."

So it gets subsumed into the environmental assessment of the larger territory. And we cited this morning some of the further correspondence between DFO and the proponent with respect to doing a test blast, and, as we've said, Bilcon always wanted to do a test blast.

And then, finally, at Exhibit

C-34, which is the JRP report, at page 64, here we are now years later, five years after the first approval has been given. In the first full paragraph on the right-hand column:

> "The effects of blasting plan on marine mammals are poorly understood. The potential impact is difficult to characterize with a reasonable degree of certainty without the benefit of a test blast and greater clarity as to the exact nature of the planned operational blasting. Very little is known about the deleterious effects of exposure to noise and marine mammals."

So there is this continuous effect of the original prevention of Bilcon being able to conduct a test blast going right through the piece all the way to the end of the JRP report.

And those are my submissions, unless you have any further questions.

Thank you.

MR. APPLETON: Those are our submissions.

MR. NASH: Those are mine.

MR. APPLETON: Okay.

PRESIDING ARBITRATOR: Mr. Appleton.

REPLY SUBMISSIONS BY MR. APPLETON:

MR. APPLETON: Thank you. I didn't want you to think we were finished with you. Of course we appreciate your patience with us and for giving us the opportunity to be able to address some points.

I had a particular order that I thought would be helpful and I have, in the brief break, reorganized my notes by throwing them up in the air. So I will do my best, but if there is -- I don't want you to think this is some masterful plan to be able to get things organized. It is exactly the opposite. It is a bit of disorganization.

But there were many points that were raised and a number of items that merit some discussion, and some very good questions that merit some discussion, as well.

And of course I invite you, if you have some questions, this is a good opportunity to be able to raise those, as well.

I think we might first want to start with the issue of jurisdiction. Can you pass me that so I can keep track of time?

So there was some discussion about the partnership between Nova Stone and Bilcon. I think it would be important that we're able to discuss that.

So I think maybe we might put on the screen, there is partnerships agreement that is in the record. The witnesses were taken through this partnership agreement.

The agreement says that it spoke from a date; I believe the date is April 24th, 2002. Could you take us to that part, if you know where that is?

MR. DICKSON-SMITH: Sorry, Mr. Appleton, is this confidential?

MR. APPLETON: It is, but I think that we might be in the position to waive this confidentiality by now, this particular.

MR. PULKOWSKI: This version is not confidential.

MR. APPLETON: This is the non-confidential version. We tried to make this as easy as we can, because I would like to make sure those people who are watching at home are able to be able to see transparency in action, and we think that is very important here.

And so if we look here, you can see that it says Bilcon and NSE formed a partnership on April 24, 2002. If you look -- so it is very clear that there is a partnership. The partnership was formed and it has a name and style, Global Quarry Products.

So there is an agreement. There is an agreement that is addressed. It takes some time sometimes for some of the other formalities to come. A partnership is well known to be an issue; we look at conduct. We look at what the people do.

So we have this. It was made under the local Nova Scotia Partnership Act. This is all on the record.

When you have a partnership, the assets of the partners are commingled. That is the fundamental nature of partnership.

And then NAFTA itself says something about partners. It says partners and

joint venturers are enterprises, and that is covered in Article 201 of the NAFTA, which defines enterprise.

So just to explain this for a moment, NAFTA Article 1139 sets out the definitions for NAFTA Chapter 11. It sometimes refers you to another definition in the treaty, and so it says, with respect to this chapter, that you look at Article 201, which is the general definition of "enterprise".

So 1139 sends you to 201, and 201 says:

> "Enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association."

It is an exceptionally broad and encompassing type of idea, because the idea of the NAFTA is to be able to give this type of

protection, to protect a wide and broad range of investments, actually highly influenced by the case law of the US-Iran Claims Tribunal, which was occurring in a very significant way just before the NAFTA was coming through, and so a lot of those ideas were brought in to bear when they were drafting and negotiating the NAFTA itself.

So it is clear that we have a partnership in April 2002. The permit is, therefore, held in for the benefit of the partnership. We see that there is money that comes in, and what is the role of Nova Stone is to be able to deal with this permit. That is its job. It is not a transfer. It is a commingling.

And this definition in Article 1139 makes clear that it applies to a person who -- sorry, I should be more precise. If you could put 1139 up, the definition of investor, that an investor is a party or state enterprise thereof, or a national or enterprise of such party, and here are the key words, "that seeks to make, is making or has made an investment".

So, in fact, whether you're seeking to make or whether you have already made, it makes little difference, in this case actually,

they will have made the investment at the time before the acts come together, but whether you just intend to make or whether you are making.

So this is all clear. Now, let's look at the issue about the end of the partnership. Canada admits that there is an intimate link between the smaller and the larger quarries. The trigger on the 3.9 hectare quarry under section 32 led to a trigger for the new larger quarry. This is all a continuing act.

I am going to talk about continuing acts a little bit later, but it is important that we see the interrelationship. One fed into another. They are all related.

And so it is one inextricable link, and we know that the purpose for this quarry, this was not a quarry that Mr. Clayton or the Clayton family came to Nova Scotia to be able to deal with the existing brownfield site. There was an existing facility there, but they came to do something more because of the quality of the mineral deposit that was there.

So they wanted to do this to have a test, to have the information, to be able to understand how to deal with the operation. What

would be the best way to go? What types of issues would you want to mitigate?

These are experienced people, as we heard from Mr. Clayton. Mr. Clayton had mentioned to you about other operations that they have in New Jersey in the Pine Barrens. I think that is what they were called, another UNESCO site, again, with quarries and mines, because UNESCO biosphere sites are large areas that respect these type of activities. It is part of the activities that are respected in a UNESCO biosphere, and that is important to understand.

It is not that they are excluded. It is part of the protected heritage that fits into a biosphere.

So the effects of not blasting on the 3.9 hectare quarry resonated throughout this decision to scope. The trigger under DFO, and thereby the 152 hectare quarry, was the basis upon which this 152 hectare project was referred to the JRP. We see this all interconnected and see that is how it all comes together.

Now, I would like to be able to talk about the JRP, but I am missing my note -- oh, thank you very much -- on the JRP. Thank you.

So, oh, I see someone has summarized it. Thank you. So we have a couple of points about the Joint Review Panel.

First, I would like to talk about anti-American bias. Canada has not provided either affidavit testimony or any witness who was actually involved as an official in the actual JRP process, apart from Mr. Chapman, who testified that his involvement ended with the terms of reference and that he was not involved in advising the JRP during the process.

We have had no opportunity to hear from any Canadian official who was involved in the actual JRP proceeding or developing the JRP record or the JRP report. We find that all very troubling.

With respect to the issue of state responsibility in the JRP, Arbitrator McRae had made some very good points about the problems that can ensue if you have a situation where you have a structure or an entity that isn't, in essence, subject to review or to the connections of international law that you could create. In Canada, sometimes we call them off-balance sheet entities, boards and commissions that wouldn't have

state responsibility, but yet could carry out some function.

In this context, though, we know that there are specific functions by the Joint Review Panel, and these functions are actually very much in the flavour of governmental types of functions. These are why we believe that these are actually issues covered by ILC Article 4.

Now, it is dangerous, whenever we want to talk about the ILC articles on state responsibility, to have members of the ILC that you're appearing before, but I will take a stab at this, trying to hope that I understand. And I have been taken to task in the past by the special rapporteur, James Crawford, who says I sort of understand, so I am going to do my best. He says that a lot.

--- Laughter

MR. APPLETON: In this situation, the reason why we have a governmental organ is that it is an integral part of the governmental process, a process where decisions are made by a Minister, but where a recommendation by the JRP or by the panel is a requirement for that to be made.

And look at the powers.

Mr. Spelliscy took us to paragraph 715 of the investor's memorial, and then to section 35 of the CEAA Act. We saw that the panel has powers of subpoena. It is not that they use the power of subpoena. It helps us to understand the rule and the function of that body within the structure of the state to understand its role.

Private individuals do not have the power to compel persons to attend. Those are the powers of a state. Those are the powers of quasi-judicial or police powers. They are not the private powers that you would expect a private company to have.

And so these are the types of emoluments of power, the types of issues we would expect to see from some entity that is an organ of the state and why we would say this is not a delegated power. They didn't delegate to them the powers to deal with this. They granted them the powers in the function that they have because they are part of the state. They are part of the executive branch of the state. It is not legislative and it is not really judicial.

So it is an executive power, but how, in light of these powers, could the JRP be

considered private? This is a governmental process, a governmental role, and the Federal Court would not be able to have jurisdiction in Canada to be able to review something that is not a part of Canada. And yet the Federal Court, and we put it in the materials, has found jurisdiction and has treated this under the rubric of a Federal Court tribunal and agency, I believe is the expression that they use.

So we think this is pretty clear, and we thought it would be important to focus for the time before the Tribunal on these relevant issues, which is why we discussed particularly ILC Article 4, and also ILC Article 11, which we also think is relevant.

And it would be troubling if entities with this type of power to compel attendance, to have coercive force, were to be able to be outside of the rule or outside of the scope for international law, that somehow you could privatize this coercive power of the state.

I would find that very troubling generally. And so that, to me, is what Article 4 of the ILC articles is really about, to capture that type of function.

I just have to say that I am just troubled by the -- separate topic now. I am troubled by the interpretation that Canada has given to Article 31(3)(A) of the Vienna Convention. My colleagues don't want me to go there, because they are worried I won't have enough time, but I find if the idea of there being this concept of subsequent agreement, there must be some certainty. There must be some length of time. There needs to be a structure to deal with that.

If different litigation positions taken in different court cases could be lined up a little bit like going to a slot machine, and if you have a cherry on one side, and maybe the next spin you get another cherry and the third time you get a cherry, that doesn't mean you win. You have to have them all together at the same time and in the same place, and then you can take note of this.

That's what the Vienna Convention says. That is what treaty practice is about. You take note of that. It doesn't mean that it is binding. It means that you can take into consideration what it means.

And there is a lot of this where that you see, you know, somebody refers to

something else at some other time and maybe they can go -- in fact, very often the parties have expressed different positions, depending on the case, that could be contrary. They don't express that to you either. They just say where it lines up and they don't disclose the rest.

So the parties can deal with items by way of agreements. They know how to do agreements. They have made agreements. So if they make an agreement, we can see how that is and we can adjust it, but what is important here is that Article 1131 of the NAFTA, which has two aspects, it says that we look at the NAFTA and we look at international law, and they both have to be able to have a function.

And the rules of international law are important. Similarly, the rules of international law not only are brought in through Article 1131, but they are also bought in by Article 31(3)(c) of the Vienna Convention, which is important, and I simply point out, because of my love of Article 31(3)(c), that there are international human rights treaties that have been adopted by the three NAFTA parties that would be relevant to take into account here.

I made reference to the international covenant in --

PRESIDING ARBITRATOR: 31(3)(c) is a very, very dangerous lover.

--- Laughter

MR. APPLETON: You are absolutely right, and I have seen from decisions how that could be, and from writing, I understand.

And I hope you come to the panel that we're going to have at the American Society of International Law at the next annual meeting on this topic. We might even use your title now.

But the fact of the matter is it integrates and harmonizes the law to stop fragmentation, and that is the principle that we're looking at. But to have an interpretation that would make one part inutile is what we want to avoid, and that would be the risk and that is what we are significantly concerned about.

With respect to the meaning of Article 1105, Canada put up an UNCTAD report. I believe I was actually a special advisor to this UNCTAD report that they put up about fair and equitable treatment. Our words were very particular. We said in the opening that there were

more than 1,000 treaties that had the substantive wording of fair and equitable treatment that we're using here, or actually of the international law standard with fair and equitable treatment and full protection and security.

Substantively that is what is there, not all 2,870-some-odd treaties. I'm the editor of Westlaw's international investment treaty service, so I have a pretty good idea of what is in these treaties.

But there is consistent, ongoing understanding. It is used a lot in this formulation. It must have some meaning, and there is meaning that is here. And so we think that is important and we don't want to have that lost.

There is also the reference to municipal law. It is very common for international tribunals of various types to have to look at questions of municipal law. That is a function regularly that international tribunals do, and they look to see whether the municipal law is consistent with obligations of international law.

Sometimes states will plead that municipal law is the reason why they didn't do something that there was a requirement that they

were to do in international law, and we know that is not a good defence. But that is just a function that international tribunals have.

It is not something that you should shy away from. It is just part of the job that comes with it.

In this case, we're actually pleased that rule of law is the fundamental cornerstone of international law and a fundamental cornerstone of Canadian law. That should make it easier, but it doesn't mean we're asking this tribunal to be an appellate court, and we're not asking this tribunal to substitute in the place of a judicial review.

There are different obligations. They have different functions. There are different remedies. That is what we're looking for.

I would like to respond to two more points. I think first, where is the science? My colleague, Mr. Nash, had referred to this before. Where are the scientists? Where are the people that could tell us in this case? Surely there is a duty of evenhandedness on the government. Surely they have the information. They control the people. They brought people here

who were retired as experts to this panel, Mr. Connelly, for example.

So there are people here who are retired. They could give this type of testimony, but they didn't bring them. There's something that you can infer from the lack of that. There's something we can infer from the lack of all of this information.

Investors and investments would expect transparency. They would expect fairness. They would expect to know of items that would fundamentally affect their rights. The WTO has called this legal security, that you know your position vis-à-vis others. It is a fundamental due process and fairness norm.

It is absent here, and the science is absent. And I point out to you that Exhibit R-220, which we can put up, is the reference guide for Canadian Environmental Assessment Act. It is entitled "Determining whether a project is likely to cause significant adverse environmental effects."

And this is what the document states. It says:

"The central test in the Act

> is 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, 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."

I am going to turn, finally, to -- you can draw an adverse inference. You can draw an adverse inference. It is within your abilities to deal with that. We have already pointed out documents in the record that we've been able to obtain that came to us that were not produced by Canada. There's been a history of that in this case, and you can draw an adverse inference from the failure to have this production. And we think that is important here.

I would like to turn, though, to the questions raised by Professor Schwartz with my

final minutes.

Oh, sorry, first I would like to say that Canada said they could scope in even if they had no trigger. And this is contrary to what the court said in Red Hill. I really would like to make sure we underscore that. I was going to give you another quote in Red Hill, but I won't be able to do that. Perhaps I can add that in the transcript so it is in the record, and we can annotate to the point I wanted you to know. But Red Hill is very clear that is not acceptable.

So the last point is Professor Schwartz' question. You asked about socio-economic effects. Socio-economic factors must be measurable and mitigatable. That was really what I took from the testimony and the expert reports that we heard.

It is something that we can tell and know. That is not what we ended up seeing in this case. Socio-economic effects on the community have to be related to and derivative from environmental effects.

These can be considered, but they have to be evidence of some type of measurable effect, not simply assertions of values and beliefs. Otherwise, we can have all types of

discrimination that we're not allowed to have. And evidence-based determinations of costs to the community, that is fine, but that is not what was going on with this concept of community core values.

And so it is fine to differentiate. If your question is, Can you differentiate with an investor? The answer of course is, yes, but it has to be evenhanded. It has to be related to the task at hand. It has to follow those very same values and approaches that we have been asking about throughout this entire hearing.

And that is what was missing in this case, and that led to tremendous negative effects, and that is why we're seeking the assistance of the Tribunal to be able to find a remedy.

Finally, I point out to the other question Professor Schwartz had that of course the issue of damages is bifurcated, and so Canada had raised an issue about why there hasn't been proof of damage with respect to one of the issues, that there shouldn't be a merits finding in the absence of damage. That is because damages have been

bifurcated. Damages are for another time.

There must be damage and there must be proof of damage if there's going to be an award of costs, if there's going to be an award of damages, if there's going to be an award at all. In fact, in this case there may very well be moral damages, too, from what we heard in this hearing.

All of these issues are issues that would be addressed at that time, but it is just not the right time to be able to go and do that now.

So I probably have used up my time. I want to thank you all for your consideration, and unless you have other questions, I am sure it is Canada's turn.

QUESTIONS BY THE TRIBUNAL:

PRESIDING ARBITRATOR: A question.

PROFESSOR SCHWARTZ: Perhaps I didn't frame the question clearly enough. My question wasn't about socio-economic in general versus core values. My question was that the joint panel talks about relative distribution of benefits and burdens vis-à-vis the local level, regional level, and the investor.

There is evidence, and you have

alluded to it again, about the atmosphere at the hearing. I was wondering what the position of the investor was, at least seeking clarification of the position of the investor, on whether that relative burdens and benefits analysis that we ask how much goes to the community, how much of the benefit goes to the international investor, whether substantively that is part of your complaint about the Joint Review Panel deliberations and whether it raises 1102 or 1103 issues from the point of view of the investor.

MR. APPLETON: All right. The difficulty that one has generally is that we understand that there is an interrelationship here. The JRP is not meeting in isolation. They are meeting together in a place, and there is an endemic ongoing set of issues that are about anti-Americanism, Yankee, go home. There is a whole spirit and approach. They are focussed on these questions. They are focussing on the NAFTA issue.

That's not an environmental effect that is in any of the various environmental assessments that I have seen.

So when they look at these issues,

they are not in isolation. They didn't look at this issue of burdens and benefits in isolation from those questions, but with that. In other words, it is tainted. The whole issue is tainted because of these other inappropriate determinations.

And without having the members of the Panel with us, without having someone who was actually there, without having that information, we don't actually know more than what we see. But it is quite likely that, in general, it may be fine, but in this particular case it is probably not.

In this particular case, where we see the percolation of these discriminatory considerations and the irrelevant considerations and the deviation from the terms of reference that they were supposed to follow, these are the problematic issues.

I am hoping that this sort of captures the type of issues that you wanted to address in your question. If not, I can sit down and think about it again, but I am sure that Canada would like to get on and have their comments.

But does that sort of express where our position is on this issue?

PROFESSOR SCHWARTZ: Yes. Thank you very much.

PRESIDING ARBITRATOR: Okay. Thank you. Mr. Appleton. Mr. Nash, you wanted --

MR. NASH: Just at the very end.

PRESIDING ARBITRATOR: Oh, at the very end, okay. Just a verbal thanks. I mean, the same thing that, Mr. Little, you have done at the outset of the afternoon.

MR. APPLETON: Yes.

PRESIDING ARBITRATOR: So Mr. Nash would like to say words of thanks at the end of this exercise. I think we don't have a problem with that. I am going to read out my own thanks to everybody, so that means that this brings to an end the rebuttal.

MR. APPLETON: Yes.

PRESIDING ARBITRATOR: You said by the end, you mean later on?

MR. NASH: Exactly.

MR. APPLETON: Yes, at the very end.

MR. LITTLE: I have just one point of procedure. Canada prepared a set of slides providing an overview of all of its submissions

today, and also there was some reference to testimony in those slides.

Due to time, Mr. Spelliscy couldn't get to every single one of their slides and we're mindful of that, and that is why we didn't hand it out immediately. We are in your hands. We can take our package of slides home with us and pull out those which were not directly referenced by Mr. Spelliscy, and then provide them to my friends and to yourself later on, or we can hand them up now, but I just wanted to get that issue clarified.

PRESIDING ARBITRATOR: Let me ask Mr. Appleton if he agreed to us getting the complete set of slides, or whether the --

My mic is on. Okay. Whether you would agree for us getting the complete pack of slides, even though Mr. Spelliscy didn't get to discuss a few of them, or whether they should be kind of taken out, redacted. That's the word.

MR. APPLETON: Mr. President, we are in your hands. Whatever you would like to have we are prepared to deal with. On the assumption they were the slides that were brought here and there is not going to be something new, and I am

sure that is exactly -- that is not a problem. We would have no objection to whatever the Tribunal would like to have in any way.

PRESIDING ARBITRATOR: I think the Tribunal, even after two weeks of hearing, is still very curious -- sorry, the Tribunal, even after two weeks of hearing, is still curious to see whatever you put before us. So we get the slides.

MR. LITTLE: We will hand them up to Mr. Pulkowski, then, right now.

PRESIDING ARBITRATOR: Yes. So we have a break --

MR. APPLETON: We would like a copy as well, of course.

PRESIDING ARBITRATOR: Of course, you are going to get a copy.

MR. LITTLE: Absolutely.

PRESIDING ARBITRATOR: I think that let's say if we start at 4:45 sharp, that will be... we would be very grateful for that.

--- Recess at 4:27 p.m.

--- Upon resuming at 4:43 p.m.

PRESIDING ARBITRATOR: Welcome back.

MR. DOUGLAS: Thank you.

PRESIDING ARBITRATOR:

Mr. Douglas.

REPLY SUBMISSIONS BY MR. DOUGLAS:

MR. DOUGLAS: We have a couple of matters in sur-rebuttal and then my friend Mr. Spelliscy will make some comments as well.

This is the point of the partnership between, or so-called partnership between Nova Stone and Bilcon, the claimants took you to C-22 as evidence that the claimant formed a partnership on April 24th, 2002.

That is up on the screen there under paragraph 1. Forming a partnership does not mean signing a partnership agreement. Mr. Appleton argues that when the partnership was formed there was an automatic commingling of assets.

In other words, he argues that on April 24th, 2002 Bilcon took on the benefits and liabilities of the 3.9 hectare quarry permit.

Well, let's take a look at the partnership registration document of April 24th, 2002. It is respondent Exhibit 291. And you will see there is a registration of a business name, there is a general description of the business activities, and if you flip through the document,

you will see the names Bilcon of Nova Scotia, and you will see Nova Stone Exporters.

This is not a partnership agreement.

There is no discussion in this document of the commingling of any assets.

Now, let's go back and take a look at claimants' Exhibit 22 for a moment. You will see under paragraph C -- I'm sorry, this is a lot of flipping back through, apologies for that.

Under paragraph C, there is a reference to schedule A which is a letter of intent. However, claimants' Exhibit 22 does not attach schedule A. There is a document missing to this document. And we're going to get to that in just one moment. But before we do, if I could just go down to paragraph 3 of this document.

You will see that it states that Bilcon and Nova Stone shall enter into a formal partnership agreement that incorporates the terms of the letter of intent.

This document is not evidence of a partnership agreement. If anything, this document is evidence that a formal partnership agreement had not yet been entered into, as of the date.

Now, schedule A establishes the date of this document. And schedule A is at claimants' Exhibit 5.

Now you will see there it is dated March 28th, 2002, but that the signature on the back is in fact May 2nd, 2002.

It was, I will just wait for that.

This is the document that was taken, that Mr. Clayton was taken to in testimony and it was based on this document that he said that the partnership, at this time, was still in formation.

Moreover, there is no further document on the record establishing a relationship between Bilcon and Nova Stone. Clause 3 of this document, clause 3(c) of this document, if you recall, discusses the intention of Nova Stone to transfer its permit to the partnership. This never happened.

And it is Canada's submission that the mere intention to transfer a permit to a partnership is not enough to establish a legally significant connection between Bilcon and the permit pursuant to article 1101 of the NAFTA.

Those are my comments, and I will

pass it off to Mr. Spelliscy.

PRESIDING ARBITRATOR: Thank you.

MR. DOUGLAS: You're welcome.

REPLY SUBMISSIONS BY MR. SPELLISCY:

PRESIDING ARBITRATOR:

Mr. Spelliscy. As long as you don't take us to blasting, it's okay.

--- Laughter

MR. SPELLISCY: Oh...

I just have two brief points to make. One, I just want to, I don't even want to respond, but there was an assertion again about document production, an insinuation that Canada has withheld documents or withheld evidence in this case. We definitively reject this assertion. The arguments are in our counter-memorial and we reject it and I don't want to mention it further.

What I do really want to come to is the conversation that happened at the end which was about values and beliefs and their role in the context of environmental assessment in Canada, this was an exchange between Mr. Appleton and Professor Schwartz, I think, at the end.

And there has been this assertion that somehow consideration of values and beliefs in

environmental assessment is inappropriate because they can't be measured or they're not mitigable.

What I think it is useful to turn to here is one of the foundational documents in environmental assessment; not just in Canada, but in fact respected around the world and it is referred to in paragraph 77 of Mr. Connelly's report. A paragraph that in fact the claimants' expert Mr. Rankin took us to and described the report as excellent.

It is an older document. It is a report that was prepared by Beanlands and Duinker. It is at R-21, if we can just pull it up. If we can go to the relevant page, please.

It talks in the context of environmental assessment and again this is one of the seminal works, early seminal works on environmental assessment about social importance. And it reads:

> "Any consideration of the significance of environmental effects must acknowledge that environmental impact is an inherently anthropocentric concept. It is centered on

> the effects of human activities and ultimately involves a value judgment by society of the significance or importance of these effects.
>
> "Such judgments, often based on social and economic criteria, reflect the political reality of impact assessment in which significance is translated into public acceptability and desirability."

This, again, is one of the foundational documents of what EA is about.

And in his comments, my colleague Mr. Appleton referred specifically again and tried to link it back, the whole idea back to the specific language in CEAA about environmental effects leading up to socioeconomic effects.

In our opening presentation we explained that while that is how socioeconomic effects are brought in through CEAA, is not the case through Nova Scotia. It is not the case

through Nova Scotia.

And what it's talking about here we have valued ecosystem components. "Valued ecosystem components" is actually language that is used in the Nova Scotia statute.

What do these authors in the seminal work say about valued ecosystem components? It says:

> "Each of the environmental attributes or components identified as a result of a social scoping exercise is referred to as a valued ecosystem component. These may be determined on the basis of perceived public concerns related to social, cultural, economic or aesthetic values. They may also reflect the scientific concerns of the professional community as expressed through social scoping procedures (i.e., public hearings, questionnaires,

interviews, workshops, media reports, et cetera)."

We would submit to you that environmental assessment in Canada does consider values and beliefs, and that it is appropriately so.

And unless there are any other questions, those are my submissions.

PRESIDING ARBITRATOR: Thank you very much. Any further statement on the part of Canada?

MR. LITTLE: No further statement. We just want to repeat our thank yous to everyone for hosting, running, administering and presiding over the hearing. It has been a pleasure.

PRESIDING ARBITRATOR: Thank you, Mr. Little. And I think Mr. Nash wants to do something similar.

MR. NASH: I would like to reflect Mr. Little's comments and thank everybody. We're coming to the end of our epic experience here, our shared experience together, and we're all in this room, participants, together.

First I would like to thank Mr. Pulkowski for everything he has done to make

this go smoothly; his colleague, Ms. Claussen; our excellent court reporter, who has been getting the product out to us late at night, and has been very, very helpful.

All of the technical people here at Arbitration Place, the whole group.

Of course Mr. Appleton's excellent team has been of enormous assistance to me.

And our experts on both sides -- Mr. Estrin, Mr. Connelly, Mr. Smith, and Professor Rankin.

And of course I would like to congratulate Canada on their very polished and excellent presentation, the quality of their advocacy. It has been a pleasure dealing with them throughout this hearing.

And then finally, I would like to thank Members of the Panel, Mr. President, Members of the Panel for being extremely patient and attentive and diligent and obviously engaged with the whole process. It's been a terrific pleasure appearing before you. I appreciate it. Thank you.

PRESIDING ARBITRATOR: Thank you, Mr. Nash.

It's going to be a bit repetitive

now.

--- Laughter

PRESIDING ARBITRATOR: I think I can really agree with you. I think that the Tribunal really feels that the parties have been -- have really made, the performance was excellent. The quality of the arguments was excellent. And the parties were disciplined and I think you were as cooperative as the adversarial nature of the process which, of course, is always there, allows.

So you have done a good job and I think you have facilitated the work of the Tribunal substantially.

But let me just also thank the persons responsible for the smooth running of this exercise.

First there is a lady back at The Hague, Willemijn van Banning. Maybe some of you know her. She is the case manager of this file at the PCA and she has organized much of the logistics of this hearing, and put together the Tribunal's electronic hearing bundles. So our thanks. I think everybody's thanks going to her.

Then our court reporter, Teresa, Ms. Forbes. We are grateful for your flexibility

and indulgence in bearing with us for longer hours than is usual.

The staff of the Arbitration Place has been very helpful through the past two weeks, responding to smaller and larger requests. I remember I asked for the possibility of some warm food on the first day, and since then, we have been fetched with chili and all kind of soups --

--- Laughter

ARBITRATOR: -- so I am sure I gained a couple of pounds, which is probably not -- people say, endurance like that, I lost four kilos. So my wife will say, What were you complaining about?

--- Laughter

PRESIDING ARBITRATOR: And let me also thank the sound and media engineers, that is Mike Dawson, Steve Thom, and Mike Bailey, who have so reliably provided and operated the technology in the hearing room. Thanks to everybody. We will do our best to provide you with an award as quickly as possible and have good flights home, and bye-bye.

MR. APPLETON: Thank you very much.

MR. LITTLE: Thank you.

--- Whereupon the hearing concluded at 4:56 p.m.