Federal Court  Cour fédérale

Date: 20180502

Docket: T-1000-15

Citation: 2018 FC 436

Ottawa, Ontario, May 2, 2018

PRESENT: The Honourable Madam Justice Mactavish

IN THE MATTER OF SECTIONS 5 AND 6 OF THE *COMMERCIAL ARBITRATION ACT*, R.S.C. 1985, C. 17 (2ND SUPP.)

IN THE MATTER OF ARTICLES 1, 6, AND 34 OF THE *COMMERCIAL ARBITRATION CODE* SET OUT IN THE SCHEDULE TO THE *COMMERCIAL ARBITRATION ACT*

AND IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE *NORTH AMERICAN FREE TRADE AGREEMENT* (*NAFTA*)

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

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

Respondents

and

SIERRA CLUB CANADA FOUNDATION AND EAST COAST ENVIRONMENTAL LAW ASSOCIATION (2007)

Interveners

JUDGMENT AND REASONS

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I. Introduction

[1] The Government of Canada seeks an order setting aside an arbitral award in favour of the Respondents made by the majority of a tribunal constituted under Chapter Eleven of the *North American Free Trade Agreement* (*NAFTA*). The majority of the Tribunal concluded that Canada had violated certain of its *NAFTA* obligations when a federal-provincial environmental assessment panel recommended that the Respondents' proposed quarry and marine terminal project in Nova Scotia should not go forward. Based upon the findings of this assessment, the federal and Nova Scotia governments subsequently refused to approve the project.

[2] Canada argues that the majority of the Tribunal erred in finding that Canada had breached its obligations under *NAFTA* by basing its liability finding on its conclusion that the environmental assessment was not carried out in accordance with applicable federal and provincial legislation. The majority's liability finding was also based on its determination that the assessment was carried out in a manner that did not comply with the level of procedural fairness required by Canadian administrative law.

[3] Canada notes that *NAFTA* tribunals do not sit in review of judicial or administrative decisions made by State Parties, and that they have only been empowered to decide questions of international law. While the majority of the Tribunal purported to base its decision on international law principles, Canada submits that it instead decided questions of Canadian law that are reserved for this Court. According to Canada, this wrongful appropriation of jurisdiction requires that the Award be set aside.

[4] The Respondents observe that the authority of this Court to interfere with international arbitral decisions is strictly limited by the provisions of the *Commercial Arbitration Act*, which precludes the Court from reviewing the merits of an arbitral tribunal's decision. The Court may only intervene where an arbitral tribunal decides a matter that is beyond the parties' submission to arbitration, or where one of the five other enumerated grounds for setting aside an arbitral decision is met. The Respondents submit that no such jurisdictional error was committed by the majority of the Tribunal in this case, and that its liability finding was not based on Canada's domestic laws, but on the international law principles that are embedded in the relevant articles of *NAFTA*.

[5] According to the Respondents, Canada is endeavouring to fabricate a jurisdictional issue where none exists, in what they say is a transparent attempt to re-argue the merits of the case. In the absence of a true issue going to the jurisdiction of the Tribunal, the Respondents say that the application should be dismissed.

[6] For the reasons that follow, I have concluded that Canada's application to set aside the Tribunal's Award cannot succeed as the errors attributed to the majority of the Tribunal do not involve true questions of jurisdiction. What Canada takes issue with are findings of fact made by

the Tribunal majority, or its application of the law to the facts as it has found them. In the absence of a true jurisdictional error on the part of the Tribunal, this Court has no power to intervene. Consequently, the application will be dismissed.

II. The Investors

[7] The Respondent Bilcon of Delaware, Inc. is a U.S. corporation. The Respondents William Ralph Clayton, William Richard Clayton, Douglas Clayton and Daniel Clayton are American citizens. Bilcon of Delaware, Inc. and certain of the Claytons own or control a subsidiary company incorporated in Nova Scotia, known as Bilcon of Nova Scotia (Bilcon). For the purposes of these reasons, the Respondents shall be referred to collectively as "the Investors".

III. The Project

[8] The Investors incorporated Bilcon in 2002 for the purpose of developing a basalt quarry, processing facility, ship loading facility and marine terminal at Whites Point, Nova Scotia (the Project). Whites Point is a community adjacent to the Bay of Fundy.

[9] The Bay of Fundy is an important feeding and breeding ground for many different marine animals, including a number of species that are protected by the *Species at Risk Act*, S.C. 2002, c. 29. In 2001, the United Nations Educational, Scientific and Cultural Organization designated the area a "biosphere reserve": that is, an ecosystem that promotes biodiversity, conservation, and sustainable resources.

[10] The Investors' proposed Project consisted of two principal components. The first was a 152-hectare quarry to be located one kilometre west of the village of Little River, where rock

would be blasted, crushed, washed and stockpiled. The second main component of the project was a 170-metre long marine terminal where bulk carrier ships of up to 230 meters in length could moor to be loaded with processed aggregate. It was intended that Bilcon would ship 40,000 tons of high quality Nova Scotia stone from Whites Point to the United States each week (or 2,000,000 tons annually) for a period of 50 years.

[11] Relying upon the encouragement that they say they received from "the highest levels of government", the Investors invested many years and millions of dollars in pursuing the Project, only to have the federal and provincial governments ultimately refuse to approve it.

IV. The Federal-Provincial Joint Review Panel

[12] The Project was subject to two environmental assessment regimes, the *Nova Scotia Environment Act*, S.N.S. 1994-95, c. 1 (*NSEA*) and the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*CEAA*), as well as the regulations promulgated under each statute. The completion of a federal environmental assessment was a precondition for the Investors to receive the necessary permits from various branches of the federal and provincial governments to allow the Project to proceed.

[13] The provincial and federal governments decided to harmonize these assessments, and, in 2004, they established a federal-provincial Joint Review Panel (JRP) to carry out an environmental assessment of the Project. The Investors do not dispute that an environmental assessment was required in this case. They do, however, take issue with the way that the assessment was carried out.

[14] Before the *NAFTA* Tribunal, the Investors objected to the decision to refer the Project to a JRP for assessment, rather than subjecting it to a less intensive form of environmental review. They also took issue with the composition of the JRP itself. The Tribunal refused to consider these claims on the basis that they were brought outside of the three-year limitation period provided for in Article 1116 of *NAFTA*, and these arguments are not at issue in this application.

[15] Under the *NSEA*, the JRP had to consider whether the Project would cause adverse effects or environmental effects that could not be mitigated. To this end, the *NSEA* mandated a broad inquiry into the Project's potential effects on both the biophysical and human environments. The *NSEA* defines "environment" broadly to include "air, land and water", in addition to "socio-economic conditions … environmental health, [and] physical and cultural heritage." It defines "environmental effect" as including "any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, [or] physical and cultural heritage…". The *NSEA* Regulations provided that the JRP was to make recommendations on these factors to the Nova Scotia Minister of Environment and Labour, whose responsibility it was to either approve the project (with or without conditions) or reject it.

[16] Pursuant to the *CEAA*, the JRP was required to give consideration to the environmental effects of the Project and their significance. Like the *NSEA*, the *CEAA* required consideration of both biophysical and socio-economic effects. The *CEAA* defines "environmental effect", in part, as "any change that the project may cause in the environment" and "any effect of any change [in the environment] on (i) health and socio-economic conditions, (ii) physical and cultural heritage, [or] (iii) the current use of lands and resources for traditional purposes by aboriginal persons…".

The *CEAA* also required a consideration of "measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project".

[17] After almost three years of work, the JRP submitted its report to the governments of Canada and Nova Scotia on October 22, 2007. The JRP recommended that the Project not be permitted to proceed on the basis that it was likely to cause significant adverse environmental effects that could not be justified in the circumstances.

[18] While the JRP expressed many concerns over the potential biophysical and socio-economic effects of the Project, the primary conclusion underlying its recommendation that the Project be rejected was that it "would have a significant adverse effect on a Valued Environmental Component represented by the 'core values' of the affected communities". As the JRP explained, the "injection of an industrial project into the region would undermine and jeopardize community visions and expectations, and lead to irrevocable and undesired changes of quality of life".

[19] A primary consideration influencing the JRP's decision to recommend rejection of the Project was the adverse impact that the project would have on the people, communities and economy of Digby Neck and Islands. It observed that this region of Nova Scotia "is unique in its history and in its community development activities and trajectory", and that "[i]ts core values, defined by the people and their governments, support the principles of sustainable development based on the quality of the local environment".

[20] The JRP went on to note that "[l]ocal residents are deeply embedded within and dependent on the terrestrial and marine ecosystems of the region" and that "human health and

well-being is intrinsically linked with the viability of the ecosystem". The JRP was of the view that the Project "would undermine community-driven economic development planning and threaten an area recognized and celebrated as a model of sustainability by local, regional, national and international authorities". It further found that "[t]he Project is inconsistent with many government policies and principles at local, provincial and national levels", and that it would not make a net contribution to sustainability, and would be likely to have a significant adverse environmental effect on the people and communities that comprise Digby Neck and Islands.

[21] The JRP chose not to provide any recommendations regarding measures that could be taken to mitigate the environmental impact of the Project, in the event that government decision-makers decided to approve it. This was because it concluded was that the Project's impact on "community core values" was a significant adverse environmental effect that could not be mitigated.

[22] Once the JRP submitted its report, decision-makers had to consider whether to take action under federal and provincial statutes to enable the Project to go ahead. In November of 2007, Nova Scotia issued a decision refusing to allow the Project to proceed. Canada followed suit the next month, issuing a separate decision denying the Investors permission to proceed with the Project.

V. The Submission to Arbitration

[23] Although they have identified what they say are numerous procedural and substantive errors in the JRP process and Report, the Investors did not seek judicial review of the JRP Report, either in this Court or in the Nova Scotia Courts, nor did they seek to challenge the

governmental decisions denying them permission to proceed with the Project in either jurisdiction.

[24] Instead, on February 5, 2008, the Investors filed a Notice of Intent to refer a claim for damages to arbitration under the investor-state dispute resolution provisions of Chapter Eleven of the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (*NAFTA*).

[25] On May 26, 2008, the Investors issued a Notice of Arbitration under *NAFTA*, claiming damages for Canada's breaches of Article 1102 (National Treatment), Article 1103 (Most-Favored Nation Treatment), and Article 1105 (Minimum Standard of Treatment) of *NAFTA*.

[26] In support of their claim for damages, the Investors asserted that Canada's environmental regulatory regime had been applied to them in an arbitrary, unfair and discriminatory fashion. Amongst other things, the Investors claimed that the evaluation standard employed by the JRP in assessing the environmental impact of the Whites Point Project was outside its mandate under Canadian law. The Investors further contended that by relying on a flawed environmental assessment in refusing to approve the Project, the decisions of the federal and provincial governments were fundamentally arbitrary and unfair and breached the above-noted Articles of *NAFTA*.

VI. The Relevant Provisions of *NAFTA*

[27] Chapter Eleven of the *NAFTA* deals with investments made by investors from one *NAFTA* Party in the territory of another *NAFTA* Party. It was intended to further the *NAFTA*

objective of increasing investment opportunities in the territories of the three signatories to the Treaty.

[28] Section A of Chapter Eleven of *NAFTA* sets out specific obligations owed by each Party to investors from other *NAFTA* countries. Amongst other obligations, State Parties are required to treat investors from another *NAFTA* country in accordance with the minimum standard of treatment under customary international law, and to accord them treatment that is no less favorable than the treatment accorded to its own investors. Section B of Chapter Eleven allows an investor from one *NAFTA* country to submit a claim for arbitration against a host state alleging that the substantive provisions of Chapter Eleven have been violated: William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 Hastings Int'l & Comp. L. Rev., p. 358.

[29] At issue in this proceeding are Articles 1102 and 1105 of *NAFTA*, the relevant portions of which provide that:

Article 1102: National Treatment	Article 1102 : Traitement national
1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. [. . .]	1. Chacune des Parties accordera aux investisseurs d'une autre Partie un traitement non moins favorable que celui qu'elle accorde, dans des circonstances analogues, à ses propres investisseurs, en ce qui concerne l'établissement, l'acquisition, l'expansion, la gestion, la direction, l'exploitation et la vente ou autre aliénation d'investissements. [. . .]

Article 1105: Minimum Standard of Treatment	Article 1105 : Norme minimale de traitement
1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. [. . .]	1. Chacune des Parties accordera aux investissements effectués par les investisseurs d'une autre Partie un traitement conforme au droit international, notamment un traitement juste et équitable ainsi qu'une protection et une sécurité intégrales. [. . .]

The full text of each of these provisions is attached as Appendix I to these reasons.

[30] The purpose of Article 1105 of *NAFTA* has been described as being "to avoid what might otherwise be a gap" in investor-state protections. That is, a "government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The 'minimum standard' is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner": both quotes from *S.D. Myers, Inc. v. Government of Canada*, (UNCITRAL), Partial Award, 13 November 2000, at para. 259, cited in the *United Mexican States v. Metalclad Corporation*, 2001 BCSC 664 at para. 61, 89 B.C.L.R. (3d) 359.

[31] Also relevant to Article 1105 are the "Notes of Interpretation" issued by the *NAFTA* Free Trade Commission: See "Notes of Interpretation of Certain Chapter 11, July 31, 2001," online: Global Affairs Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng> [FTC *Note*]. With regard to the minimum standard of treatment, the FTC *Notes* provide that:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment of another Party;

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment to or beyond that which is required by the customary international law minimum standard of treatment;

3. A determination that there has been a breach of another provision of *NAFTA*, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

[32] In accordance with Article 1131(2) of *NAFTA* and Article 31 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [*Vienna Convention*], such interpretations by the *NAFTA* Free Trade Commission are binding on *NAFTA* Tribunals.

[33] Insofar as Article 1102 of *NAFTA* is concerned, national treatment obligations in investor-state agreements have traditionally sought to level the economic playing field between foreign and domestic participants. Article 1102 imposes a duty on *NAFTA* Parties "not to discriminate between foreign and domestic investors or investments on account of nationality when such investors or investments are situated in like circumstances": Sergio Puig & Meg Kinnear, "*NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration"*, (2010) ICSID Rev/F.I.L.J. 225 at 241.

VII. The Decision of the *NAFTA* Tribunal

[34] The Tribunal was composed of three members. Professor Bryan Schwartz was appointed by the Investors, and Professor Donald McRae by Canada. Judge Bruno Simma was appointed as Tribunal President by agreement of the parties.

[35] The Tribunal rendered its decision on March 17, 2015: *Bilcon of Delaware Inc. et al. v. Government of Canada* (UNCITRAL), P.C.A. Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015. As the parties had agreed to bifurcate the proceedings, the initial Tribunal Award dealt only with the issues of jurisdiction and liability. While the Tribunal unanimously concluded that it had jurisdiction to determine the Investors' claim, they disagreed as to whether Canada was liable for breaches of any of its obligations under *NAFTA*.

[36] The majority decision issued by Tribunal President Simma and Professor Schwartz found Canada liable for breaches of Articles 1102 and 1105 of *NAFTA*, whereas Professor McRae found no liability on the part of Canada. The Tribunal's hearings on the quantum of damages were set to begin in February of 2018. At this point, the Investors are seeking in excess of half a billion Canadian dollars in damages for Canada's breaches of its obligations under *NAFTA*.

A. *The Majority's Decision*

[37] While the Investors had challenged a wide range of measures and decisions made over the course of the JRP process, the majority found Canada liable under Articles 1105 and 1102 of *NAFTA* based primarily on two actions of the JRP: its reliance on the concept of "community core values" to arrive at its recommendation that the Project not be permitted to go ahead, and its approach to the issue of mitigation. The majority also had regard to the expectations that had been created in the minds of the Investors by governmental officials.

[38] The majority acknowledged at several points in its decision that it was required to apply customary international law in order to determine whether the actions of the JRP breached Article 1105 of *NAFTA*. As to what the minimum standard of treatment was that was required by customary international law, the majority stated that the "starting point" for its analysis was the

decision in *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926), 4 RIAA 60. *Neer* held that to establish a breach of the minimum standard of treatment of aliens at customary international law it must be shown that the treatment in question amounted to "bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency": pp. 61-62.

[39] The majority went on to observe that more recently, the Tribunal in *Glamis Gold Ltd. v. United States of America*, UNCITRAL Award, 8 June 2009, held that "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons" was necessary to establish a breach of the minimum standard of treatment at customary international law: para. 762. That said, the majority held that "*NAFTA* Tribunals have tended to move away from the position more recently expressed in *Glamis*, and rather move towards the view that the international minimum standard has evolved over the years towards greater protection for investors": para. 435.

[40] While noting that "no single arbitral formulation can definitively and exhaustively capture the meaning of Article 1105", the majority stated that it was adopting the standard articulated by the *NAFTA* Tribunal in *Waste Management, Inc. v. United Mexican States*, (ICSID), Case No. Arb(AF)/00/3, Award, 30 April 2004 ("*Waste Management*"), as prohibiting conduct that is, among other things, "arbitrary, grossly unfair, unjust or idiosyncratic…": paras. 442-443. The majority added, however, that "[t]he list conveys that there is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but that there is

no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour….": para. 444.

[41] The majority further observed that more than a mere breach of domestic law, procedural unfairness, an imprudent exercise of discretion or even an outright mistake is generally required to establish a breach of the international minimum standard for the purposes of Article 1105 of *NAFTA*: paras. 436-437, 594 and 738.

[42] Finally, the majority accepted that the reasonable expectations of investors are a factor to be taken into account in assessing whether a host state has breached the international minimum standard of fair treatment under Article 1105 of *NAFTA*: paras. 444 – 445, 455.

i) The Majority's Application of the *Waste Management* Standard

[43] The majority found that in this case, Nova Scotian governmental authorities had created legitimate expectations on the part of the Investors by clearly and repeatedly indicating that Bilcon was welcome to pursue its coastal quarry and marine terminal project at the Whites Point location. The majority did, however, recognize that all of these encouragements were provided in the context of Bilcon being required to present a project that would comply with federal and provincial environmental laws: para. 589.

[44] The majority further found that the Investors had relied on these encouragements to their detriment, by devoting substantial resources to the environmental assessment process and attempting to design a project that would meet all of the relevant legal requirements concerning environmental protection.

[45] According to the majority, the JRP then acted in an arbitrary manner by effectively creating a new standard of assessment, namely that of "community core values", without notice to Bilcon, and by having this standard play a predominant role in the Report's conclusion that the project should not proceed. The majority further found that the JRP had effectively found the Whites Point area to be a "no go" zone for projects of this kind, without considering any measures that could mitigate the adverse environmental impact of the Project: para. 505.

[46] According to the majority, the "community core values" approach adopted by the JRP was not a "rational government policy", and was at odds with the law and policy of the *CEAA*. The approach of the JRP was, moreover, inconsistent with the investment-liberalizing objectives of *NAFTA*, and was incompatible with Article 1105 of the Agreement: para. 724.

[47] The majority further concluded that the Investors were treated unfairly in the JRP process, as they had no way of knowing that the impact that the Project would have on "community core values" was in issue, and they were thus unable to seek clarification of and respond to the JRP's concerns in this regard: paras. 534 and 543.

[48] The majority's conclusion with respect to the legality of the JRP's actions under Canadian domestic law was also central to its finding that Canada had breached Article 1102 of *NAFTA*. It will be recalled that this provision required that the Investors and their investment be treated in accordance with the treatment afforded to similarly-situated Canadian investors and investments.

[49] Citing the decision in *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL), Arbitration Rules, Award on the Merits of Phase II, 10 April 2001, at paragraph 78, the majority

observed that differences in treatment "will presumptively violate Article 1102(2) of *NAFTA*, unless it has a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of *NAFTA*": para. 722.

[50] After considering the extensive evidence adduced by the parties with respect to the treatment accorded to "like" projects, the majority concluded that as a result of the JRP's flawed approach to the environmental assessment process, the Investors, unlike Canadian project proponents, "did not receive the expected and legally mandated application, for the purposes of federal Canada environmental assessment, of the essential evaluative standard under the *CEAA*": para. 697. The majority of the Tribunal therefore concluded that Canada had denied national treatment to the Investors in relation to the Project, in breach of Article 1102 of *NAFTA*: para. 725.

[51] The Investors' claims under Article 1103 were dismissed and are not at issue in this proceeding.

B. *The Dissenting Opinion*

[52] Professor McRae disagreed with the majority's liability finding. He found that when the Report of the JRP was viewed in its entirety, it was evident that the term "community core values" was used as a form of shorthand to describe the effects of the Project on the "human environment". The impact of the Project on the "human environment" in the Whites Point area was one of the central factors that the JRP was obliged to consider under both its terms of reference, and under federal and provincial environmental assessment legislation. As a

consequence, Professor McRae concluded the Investors were on notice that they had to address such effects, with the result that there had been no procedural unfairness in this regard.

[53] Professor McRae agreed with the majority that the *Waste Management* standard was the appropriate standard to be used in determining whether there had been a breach of Article 1105 of *NAFTA*. He was, however, of the view that although the majority purported to apply the "high threshold" articulated in *Waste Management*, it had applied the standard in a way that it would be met "simply by an allegation of a breach of Canadian law": para. 2.

[54] The majority had concluded that the JRP's actions were arbitrary, as a result of it having "effectively created, without legal authority or notice to Bilcon, a new standard of assessment", instead of applying Canadian law. That is, by deviating from Canadian law, the majority found that the JRP had acted arbitrarily. According to Professor McRae, "[t]his reasoning suggests that any departure from Canadian law is arbitrary and thus any departure from Canadian law meets the threshold of arbitrariness under the *Waste Management* standard. Breach of *NAFTA* Article 1105, then is equated with a breach of Canadian law": para. 37. He concluded that the *Waste Management* threshold was not met in the case: para. 40.

[55] Professor McRae further observed that given the JRP's concerns with respect to the Project's impact on the human environment and its concerns over the adequacy of information and data that had been provided by the Investors, the Panel was of the view that "pointing out possible individual mitigation measures served no value when its concerns were much larger". In his view, it was this "accumulation of concerns" that ultimately led the Panel to recommend the rejection of the project: para. 29.

[56] Professor McRae accepted that there may be questions under Canadian law as to whether it was proper for the JRP to take such an approach to the issue of mitigation, and whether using a term such as "community core values" to encapsulate the variety of effects on the human environment effects that the Investors had failed to adequately address accorded with the requirements of Canadian law. He further accepted that the question of whether Canadian law had been complied with in the process leading up to the refusal of permission to proceed with the Project was a relevant consideration in determining whether there had been a violation of Article 1105 of *NAFTA*. However, a breach of Canadian law was not, in and of itself, sufficient to establish such a violation: para. 31.

[57] Professor McRae was further of the view that the Tribunal could not conclude that the JRP had violated Canadian law without the benefit of a determination of that question by this Court. He noted that as the expert witnesses called by the parties in the arbitration had provided divergent views on this point, "the matter was arguable and the Tribunal did not have the benefit of a determination by a Canadian federal court on the matter": para. 34.

[58] Professor McRae was also concerned about the significant implications that the majority's decision would have for the application of environmental laws by *NAFTA* Parties. In his view, the conclusion that a potential violation of Canadian law is sufficient to meet the *Waste Management* standard for establishing a violation of Article 1105 of *NAFTA*, thereby allowing a claimant to bypass the domestic remedy provided for in Canadian law, represented "a significant intrusion into domestic jurisdiction and will create a chill on the operation of environmental review panels": para. 48.

[59] In support of this contention, Professor McRae observed that if an environmental assessment agency made an error in the past, its recommendations would either be ignored by the government to which they were made, or they would be overturned on judicial review. If, however, the views of the majority in this case were to be accepted, the proper application of Canadian law by an environmental review panel would then be in the hands of a tribunal appointed pursuant to Chapter Eleven of *NAFTA*, thereby importing a damages remedy that is not available under Canadian law: para. 48.

[60] Professor McRae noted that this result "may be disturbing to many". In his view, there was nothing unusual about an environmental review panel electing to put more weight on the human environment and community values than on a project's scientific and technical feasibility. In his view, it was open to the JRP to conclude that these community values were not outweighed by what the Panel regarded as the modest economic benefits that would accrue over the ensuing 50 years. Neither the result, nor the process by which the JRP reached its decision "could ever be said to 'offend judicial propriety'", leading Professor McRae to conclude that "the decision of the majority will be seen as a remarkable step backwards in environmental protection" and that "a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages under *NAFTA* Chapter 11": all quotes from para. 51.

[61] Finally, Professor McRae was of the view that the Investors had in fact been treated in accordance with Canadian law, and that there were no grounds for a finding that the JRP process

breached Article 1102 of *NAFTA* by denying national treatment to the Investors in relation to the Project: para. 53.

VIII. The Issue

[62] Canada submits that the Tribunal exceeded its jurisdiction by grounding *NAFTA* liability in purported breaches of Canadian law. It therefore seeks a determination from this Court of the following question:

> Does the Award deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration by wrongfully determining that the actions of the JRP violated domestic administrative law standards and making that determination the sole basis of liability under the *NAFTA*?

[63] For their part, the Investors submit that the majority's Award was not outside of the scope of their submission to arbitration (to which Canada consented), and that Canada has not established that the Award dealt with a dispute that was not contemplated by, or not falling within the terms of the submission to arbitration, or that it contained decisions on matters that were beyond the scope of the submission to arbitration.

IX. The Applicable Standard of Review

[64] Canada's application is brought pursuant to Article 34(2)(a)(iii) of the *Commercial Arbitration Code*, which is Schedule 1 of the *Commercial Arbitration Act*, R.S.C. 1985 (2nd Supp.), c. 17 (the *Code*). This provision governs applications to set aside decisions of international arbitral tribunals, including claims submitted to arbitration under Article 1116 of *NAFTA*: *Commercial Arbitration Act*, s. 5(4); the *Code*, art. 1(1); the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, s. 2(1), , *Clayton v. Canada (Attorney General)*, 2018 FCA 1 at para. 4, [2018] F.C.J. No. 11 (*Clayton* FCA).

[65] The relevant provisions of Article 34(2)(a)(iii) of the *Code* provide that an arbitral award may only be set aside by a reviewing Court if the party seeking to have the decision set aside furnishes proof that "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside…". The full text of Article 34(2)(a)(iii) of the *Code* is attached as Appendix II to this decision.

[66] There has evidently been "considerable inconsistency" in the reasoning of Canadian, American and Mexican courts with respect to the standard of review to be applied to decisions of Tribunals appointed under Chapter Eleven of *NAFTA*: Henri Alvarez, "*Judicial Review of NAFTA Chapter 11 Arbitral Awards*", in Frédéric Bachand ed., *Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute: 2011), 103 at 105.

[67] The standard of review to be applied in reviewing a *NAFTA* Chapter Eleven award under Article 34(2)(a)(iii) of the *Commercial Arbitration Code* was, however, carefully considered by the Ontario Court of Appeal in *The United Mexican States v. Cargill, Inc.*, 2011 ONCA 622, 341 D.L.R. (4th) 249 (*Cargill*). *Cargill* is the one of most recent appellate-level Canadian decisions considering this issue in the *NAFTA* context, and is relied upon by both parties as a correct statement of the applicable standard of review.

[68] Although *Cargill* dealt with the standard of review established under the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 (rather than the federal *Commercial Arbitration Act*), the language of the two provisions is identical. This is because both statutes are based on

the *UNCITRAL Model Law on International Commercial Arbitration*, as adopted by the United Nations Commission on International Trade Law on June 21, 1985.

[69] The Court started its analysis in *Cargill* by observing that domestic concepts of standard of review, both in the administrative law context and in the context of the appellate review of trial decisions, "may not be helpful to courts when conducting their review process of international arbitration awards under Article 34 of the *Model Law*": para. 30. The Court further observed that none of the grounds identified in Article 34 of the *Model Law* allows a court to review the merits of a Tribunal's decision, and that courts may only review an award based on an excess of jurisdiction: para. 31.

[70] The Ontario Court of Appeal accepted that "courts should interfere only sparingly or in extraordinary cases": *Cargill* above para. 35. Indeed, the Court had previously observed that "[n]otions of international comity and the reality of the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly": *The United Mexican States v. Karpa* (2005), 74 O.R. (3d) 180 at para. 34, [2005] O.J. No. 16.

[71] The Court further noted that if Canadian judicial review principles were applicable, it would have to apply a *Dunsmuir* analysis and determine whether the applicable standard of review was that of reasonableness or correctness, and that under *Dunsmuir*, true questions of jurisdiction are ordinarily decided on the standard of correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190. The Court observed that this was the standard that had been applied by the British Columbia Supreme Court in reviewing the decision of a *NAFTA*

Tribunal in *Metalclad* above, and by this Court in *Canada (Attorney General) v. S.D. Myers, Inc.*, 2004 FC 38, [2004] 3 F.C.R. 368 (*S.D. Myers* (Federal Court)): *Cargill* above at para. 35.

[72] The Court also had regard to Canadian administrative law principles in *Cargill* in considering what constitutes a "true question of jurisdiction". Again referring to *Dunsmuir*, the Court stated in *Cargill* that the term 'jurisdiction' "is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry". True questions of jurisdiction "arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": *Cargill* at para. 40, referring to *Dunsmuir*, above at para. 59.

[73] The Court concluded in *Cargill* that a *NAFTA* Tribunal "must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction": *Cargill* at para. 40. This led the Ontario Court of Appeal to conclude that the standard of review to be applied to an arbitral decision under *NAFTA* is that of correctness, "in the sense that the tribunal had to be correct in its determination that it had the ability to make the decision it made": para. 42, citing D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), pp. 14-3 to 14-6.

[74] That said, the Court went on in *Cargill* to caution that even though the standard of review on jurisdictional questions is that of correctness, this does not give reviewing courts a broad scope for intervention in the decisions of international arbitral tribunals: para. 44. While Canadian courts are required to take a narrow view of what constitutes a jurisdictional question in the domestic context, this approach is magnified in the international arbitration context, where "courts are warned to limit themselves in the strictest terms to intervene only rarely in decisions

made by consensual, expert, international arbitration tribunals, including on issues of jurisdiction": para. 46.

[75] Although there is some authority for the proposition that there is a "powerful presumption" that expert international arbitral Tribunals act within their authority, this does not mean that a reviewing court should presume that the Tribunal was correct in determining the scope of its jurisdiction. If Courts deferred to the decisions of arbitral Tribunal on true issues of jurisdiction, it would "effectively nullify the purpose and intent of the review authority of the court under Article 34(2)(a)(iii)": *Cargill*, para. 46.

[76] The Court further cautioned that when a reviewing court does identify a true question of jurisdiction in a *NAFTA* Tribunal decision, "they are to carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal": *Cargill*, para. 47; see also *Attorney General of Canada v. Mobil Investments Canada Inc.et al.*, 2016 ONSC 790, para. 37, 129 O.R. (3d) 506.

[77] The Court concluded in *Cargill* that the role of a reviewing Court in a case such as this is to consider whether the Tribunal decided an issue that was not part of the submission to arbitration, or misinterpreted its authority under *NAFTA*: para. 53. It suggested that another way for a reviewing court to define the proper approach is to ask itself the following three questions:

1. What was the issue that the Tribunal decided?

2. Was that issue within the submission to arbitration made under Chapter Eleven of *NAFTA*?

3. Is there anything in *NAFTA*, properly interpreted, that precluded the Tribunal from making the award it made?

[78] Cases decided since the Ontario Court of Appeal's decision in *Cargill* have confirmed this approach, both in the *NAFTA* context and otherwise: *Mobil*, above at paras. 37-39; *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939 at paras. 28-32, [2017] O.J. No. 6323; *Newfoundland and Labrador v. ExxonMobil Canada Properties*, 2017 NLTD(G) 147, at paras. 111-112, [2017] N.J. No. 313; *SMART Technologies ULC v. Electroboard Solutions Pty Ltd.*, 2017 ABQB 559 at paras. 71-77, [2017] A.J. No. 953.

[79] There is one post-*Cargill* decision that requires specific comment: that is the decision of the Supreme Court of Canada in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688. Canada cites this decision as an articulation of the type of legal error that resulted in an excess of the Tribunal's jurisdiction in this case.

[80] As was noted earlier, Canada contends that the majority erred in this case by measuring the JRP's conduct against its own determination of what domestic law required, and by founding *NAFTA* liability on a breach of domestic law, rather than measuring the JRP's conduct against rules of customary international law. In so doing, Canada says that the Tribunal exceeded its jurisdiction.

[81] In support of this contention, Canada notes that the Supreme Court observed in *Teal Cedar* that although the application of a legal test to a set of facts is a question of mixed fact and law, a legal question will arise that is open to appellate review if the underlying legal test was altered by a decision-maker: para. 44.

[82] It is, however, important to note that the arbitral decision at issue in *Teal Cedar* was subject to review under the British Columbia *Arbitration Act*, R.S.B.C. 1996, c. 55, section 31 of which provides that arbitration awards are subject to appellate review on questions of law. There is no comparable provision in the *Commercial Arbitration Act*, with the result that the Supreme Court's comments in *Teal Cedar* are of limited assistance in this case.

[83] With this understanding of the applicable standard of review, I turn next to consider whether the majority in this case committed a jurisdictional error of the sort discussed in *Cargill* that would allow this Court to intervene.

X. Did the Tribunal Commit a Jurisdictional Error in this Case?

A. *The Arguments of the Parties*

[84] Canada acknowledges that the reasons of the majority correctly identify the standard that it was bound to apply in determining whether Canada breached Article 1105 of *NAFTA*, namely that established in the *Waste Management* case. However, Canada says that the majority of the Tribunal then "lost its way", exceeding its jurisdiction by founding both its analysis and its ultimate determination of *NAFTA* liability on whether the JRP's actions complied with Canadian, rather than international law.

[85] In support of this contention, Canada points to the majority's finding that the environmental assessment carried out by the JRP involved "a fundamental departure from the methodology required by Canadian and Nova Scotia law": para. 600. The majority went on to conclude that this resulted in the Investors not being "treated in a manner consistent with Canada's own laws, including the core evaluative standard under the *CEAA* and the standards of fair notice required by Canadian public administrative law": para. 602.

[86] Canada notes that *NAFTA* Tribunals do not sit in appeal of decisions made under domestic law. Not every regulatory deficiency will rise to the level of a breach of the international law obligation to accord fair and equitable treatment to investors, and that "something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)": *ADF Group v. United States of America* (ICSID), ARB(AF)00/1, Award, 9 January 2003: para.190. The jurisprudence further teaches that this "something more" can include matters such as "sectoral or local prejudice": *Waste Management* para. 115. It can also include a party's legitimate expectations resulting from representations made by the host state: *Waste Management* paras. 98 and 99.

[87] Canada further contends that the importing of an incorrect element into the majority's Article 1105 analysis constitutes a jurisdictional error of the sort contemplated by Article 34(2)(a)(iii) of the *Code*, and by the Ontario Court of Appeal in *Cargill*.

[88] In support of this claim, Canada cites the decision of the Supreme Court of British Columbia in *Metalclad*, above. The *NAFTA* Tribunal in *Metalclad* had expressly and incorrectly stated that the minimum standard of treatment under customary international law included an obligation to be "transparent". The Tribunal's finding of *NAFTA* liability was then based on a determination that there had been a lack of transparency in the governmental action in issue: para. 70. The Court concluded that in so doing, the Tribunal decided a matter beyond the scope of the submission to arbitration, and the Tribunal's decision was accordingly set aside: para. 76.

[89] The Investors contend that Canadian law simply formed part of the factual matrix in which customary international law was applied by the majority of the Tribunal. They further

submit that the question of whether or not the Tribunal applied the correct legal test to the facts of this case is not a true question of jurisdiction for the purposes of Article 34(2)(a)(iii) of the *Code*.

[90] In what the Investors characterize as a "transparent attempt to re-argue the merits", they say that Canada is mischaracterizing the majority's decision in order to fabricate a jurisdictional issue where none exists. Contrary to Canada's contentions, the majority's finding that Canada breached its obligations under *NAFTA* does not rest on Canada's domestic law, but on the international law principles that are embedded in Articles 1102 and 1105 of *NAFTA* that determined the question submitted to arbitration.

B. *Commentary on the Majority's Decision*

[91] It is fair to say that the decision of the majority in this case has attracted a great deal of negative commentary from the dissenting arbitrator, the academy and the State Parties themselves.

[92] Professor McRae's highly critical comments with respect to the majority's decision have been discussed earlier in these reasons. Academic commentators have also suggested that the majority did indeed err by equating a breach of Canadian administrative law principles with a breach of Canada's obligations under *NAFTA*, and by applying too low a threshold in finding Canada to have breached Article 1105 of *NAFTA*: see Cory Adkins & David Grewal, *Democracy and Legitimacy in Investor-State Arbitration*, (2016) 126 Yale L.J. F. at 65-76; Michael Carfagnini, *Too Low a Threshold: Bilcon v. Canada and the International Minimum Standard of Treatment*, 53 Can. Y.B. Int'l 244-277.

[93] Adkins and Grewal further assert that the decision of the majority "is inconsistent with the principled respect for democratic sovereignty with which the majority began its analysis", and that while the majority's decision "claims to uphold the importance of democratic control over national laws … it strips this commitment of meaning in its actual application to the facts": p.73.

[94] Some scholars point to the majority's decision as an example of the disturbing trend of *NAFTA* Tribunals enlarging the scope of protection offered by fair and equal treatment, made possible by Article 1105's "broad and undefined language": Armand de Mestral & Lukas Vanhonnaeker, "The Impact of the *NAFTA* Experience on Canadian Policy Concerning Investor-State Arbitration" in de Mestral, ed., *Second Thoughts: Investor-State Arbitration Between Developed Democracies* (Centre for International Governance Innovation, 2017) 187 at 198 – 199. Atik further asserts that "[e]ach provision is its own case as a textual matter; yet taken together they present a potential opportunity for a substantial enhancement of Chapter 11's reach, beyond the parties' respective original intent, and perhaps beyond the underlying consent of the respective polities": Jeffrey Atik, "Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process" in Todd Weiler, ed. *NAFTA: Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (New York: Transnational Publishers, 2004) at 147.

[95] Other commentators have raised concerns with respect to the ability of *NAFTA* Tribunals "to properly assess whether a foreign investor has been treated fairly under a domestic environmental assessment process": Meinhard Doelle, "The Bilcon *NAFTA* Tribunal: A Clash of Investor Protection and Sustainability-Based Environmental Assessments" in Stanley D. Berger ed., *Key Developments in Environmental Law, 2017 Ed.*, (Thomson Reuters) 99 at 121. Doelle

suggests that amongst the challenges facing the Tribunal in this case was its lack of familiarity with relevant Canadian law, with the environmental assessment practice at the federal and provincial levels, and with the process used to make findings of fact and domestic law: p. 121.

[96] Doelle further echoes the concern expressed by Professor McRae, the Interveners and others as to the "chill" that will allegedly result from the majority's decision. As he explains, the concern is that "when officials speak out in favour of a project before an [environmental assessment] is conducted, they may be in violation of *NAFTA* if they later take the advice of an independent [environmental assessment] that concludes the project should not be permitted to proceed because of its negative impacts on local communities": p. 117.

[97] The three signatories to *NAFTA* have also expressed their disapproval of the majority's reasoning with respect to the requirement for fair and equitable treatment under Article 1105, and its relationship to minimum standard of treatment at customary international law. In written submissions filed by Canada, the United States and Mexico in *Mesa Power Group, LLC v. Government of Canada,* (UNCITRAL), PCA Case No. 2012-17, Award, 24 March 2016, the three signatories asserted that the majority in this case erred by failing to require the Investors to establish that the actions of Canada resulted in a breach of customary international law, and by equating a failure to comply with applicable domestic law with a failure to meet the minimum standard of treatment at international law.

[98] Even if the Tribunal erred as alleged, the question for determination is whether any such error constituted an excess of jurisdiction within the meaning of Article 34(2)(a)(iii) of the *Code*. That is, whether in finding Canada to be liable to the Investors for breaches of Articles 1102 and 1105 of *NAFTA*, the majority exceeded its jurisdiction in the sense that its Award "deals with a

dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".

[99] To answer this question, regard must be had to the three questions identified by the Ontario Court of Appeal in *Cargill*. The first of these requires me to identify the issue that the Tribunal decided.

C. *What was the Issue that the Tribunal Decided?*

[100] Canada says that the majority decided whether the actions of the JRP were consistent with the *CEAA* and domestic administrative law standards. According to Canada, the majority based its liability determination primarily on two actions of the JRP: its reliance on the concept of "community core values" as a basis for recommending against the Project, and the JRP's conclusion that it was not possible to mitigate the adverse environmental effects of the Project. The majority then used the same rationale as a basis for finding Canada to have breached Article 1102 of *NAFTA*.

[101] In contrast, the Investors say that the majority of the Tribunal decided that they had been treated in a manner that was contrary to Articles 1105 and 1102 of *NAFTA*, both in relation to the procedure that was followed and the outcome of the regulatory reviews of the Project. In coming to this conclusion, the Investors contend that the majority appropriately applied the *Waste Management* articulation of the minimum standard of treatment required under Article 1105 of *NAFTA*, and further applied the appropriate test to determine whether they had received unequal treatment without justification as contemplated by Article 1102 of *NAFTA*.

[102] The Investors further submit that the majority considered the Canadian legal framework "as a matter of fact", and that its liability decision was firmly grounded in an analysis of the content and scope of *NAFTA* as established by international law.

[103] I do not accept Canada's characterization of the issue that was decided by the Tribunal. It is evident from a fair reading of the majority's reasons as a whole that the central question that it decided was whether Canada's conduct in relation to the environmental assessment and approvals process for the Project and its treatment of the Investors breached its obligations under Articles 1102, 1103 and 1105 of *NAFTA*.

[104] This understanding of the issues decided by the majority of the Tribunal is confirmed by the structure of the majority's 220-page Award, and by the "Dispositif" portion of the Award, where the Tribunal states that it:

> ii. *By majority vote* decides that [Canada] has failed to accord to investments of these Investors treatment in accordance with international law, including fair and equitable treatment and full protection and security, in breach of Article 1105 (Minimum Standard of Treatment).
>
> iii. *By Majority vote* decides that [Canada] has failed to accord to investments of these Investors treatment no less favorable than that it has accorded, in like circumstances, to investments of its own investors, in breach of Article 1102 (National Treatment).

[105] This takes me to the second of the *Cargill* questions, which is whether the majority's Award dealt with an issue that was not within the Submission to Arbitration made by the Investors under Chapter Eleven of *NAFTA*.

D. *Did the Majority's Award Deal with an Issue that was not Within the Submission to Arbitration Made under Chapter Eleven of NAFTA?*

[106] Having determined that the central issue decided by the Tribunal was whether Canada's conduct in relation to the environmental assessment and approvals process for the Project and its treatment of the Investors breached its obligations under Articles 1102, 1103 and 1105 of *NAFTA*, I find that this issue was contained within the Investors' Submission to Arbitration. I am further satisfied that the Tribunal's discussion of domestic law was incidental to the main issues that were before it, and did not constitute an excess of jurisdiction.

[107] As the Ontario Court of Appeal explained in *Cargill*, at this stage in the analysis, the Court is required to review the Award and the submission to arbitration, in order to determine whether the Tribunal stayed within its jurisdiction: para. 39.

i) The Investors' Submission to Arbitration

[108] The submission to arbitration in a Chapter Eleven arbitration consists of three parts: the agreement of the parties, the words of the relevant Articles of Chapter Eleven of *NAFTA*, and any interpretation of those words that has been subsequently agreed to by the *NAFTA* parties: *Cargill*, above at para. 32.

[109] Section B of Chapter Eleven of *NAFTA* essentially represents a standing offer to arbitrate disputes between *NAFTA* Parties and investors, which offer is accepted by the filing of a Notice of Arbitration by an aggrieved investor. In this case, the Investors' Notice of Arbitration specifically identified the governmental measures at issue, asserting that Canada breached its obligations under *NAFTA* by applying its environmental regulatory regime in "an arbitrary, unfair and discriminatory manner".

[110] The questions that the Investors submitted to the Tribunal for arbitration were the following:

a. Did Canada treat the Investors in a manner inconsistent with its obligations under Article 1102, 1105 or 1103 of *NAFTA*?

b. If yes, what is the quantum of compensation to be paid to the Investors as a result of Canada's breaches of its obligations under Chapter Eleven of *NAFTA*?

[111] The Notice of Arbitration further describes the measures that the Investors say fit within a continuous course of internationally wrongful actions, raising the issue of whether Canada's environmental regulatory regime had been applied to the Investors in an arbitrary, unfair or discriminatory manner. The disputed measures included the failure on the part of the JRP to conduct itself in accordance with the applicable laws, rules and procedures, its misstatement and misapplication of these laws, rules and procedures, and its reliance on non-legal documents and concepts. By failing to pay due regard to the legal framework of the *CEAA*, the Investors contended that Canada's response to the recommendations of the JRP "was therefore also fundamentally arbitrary and unfair".

[112] The Investors' Notice of Arbitration thus makes clear that the issues submitted to arbitration required the Tribunal to decide whether the Investors had been treated less favourably than Canadian investors would have been in like circumstances, and whether their treatment fell below the minimum standard of treatment at customary international law. The answers to these questions inevitably required the Tribunal to examine the compliance of the JRP and the

Canadian government with Canadian domestic environmental law as part of the factual matrix underlying the dispute.

ii) Canada's Argument Regarding the Tribunal's Consideration of Domestic Law

[113] Canada contends that the majority's Award dealt with a dispute that was not contemplated by, nor falling within the terms of the Investors' submission to arbitration. It did so by wrongfully determining that the actions of the JRP violated domestic administrative law standards, and by making that determination the sole basis for liability under *NAFTA*.

[114] Canada acknowledges that the majority expressly stated that it was applying the *Waste Management* standard in determining whether the actions of the JRP and Canada breached the minimum standard of treatment required under Article 1105 of *NAFTA*. It says, however, that the majority then "starkly pivoted in its approach", abandoning the international minimum standard at customary international law, instead drawing conclusions based exclusively on alleged violations of Canadian law.

[115] In assessing the Government of Canada's actions under Canadian domestic environmental assessment law - a body of law that Canada says was wholly outside a *NAFTA* tribunal's jurisdiction and expertise to interpret and apply - Canada argues that the majority dealt with a question that was not within the terms of the submission to arbitration, thereby running afoul of the jurisdictional boundaries that the *NAFTA* Parties have agreed to.

[116] In support of its position, Canada observes that *NAFTA* tribunals "have been given the power to adjudicate only upon alleged breaches of the international obligations mutually undertaken by treaty by the NAFTA Parties", and that "[t]hey are to do so using international

law principles not domestic law …": *Council of Canadians v. Canada (Attorney General)* (2006), 277 DLR. (4th) 527 at para. 42, 149 C.R.R. (2d) 290 (ONCA). While the majority of the Tribunal purported to decide questions of international law, Canada says that it actually decided questions of Canadian law that are reserved for this Court, using its findings with respect to Canada's alleged non-compliance with the requirements of Canadian environmental law as the basis for its finding of *NAFTA* liability. According to Canada, this wrongful appropriation of jurisdiction requires that the Award be set aside.

[117] In support of this contention, Canada points, in particular, to paragraphs 600 to 604 of the majority's reasons, which it refers to as the "ground zero" of the majority's error with respect to Canada's alleged breach of Article 1105 of *NAFTA*. These paragraphs appear in the section of the majority's decision entitled "Conclusions Regarding the International Minimum Standard".

[118] In this section, the majority identified "[t]he problem in this case" as being "whether the Investors' application was assessed in a manner that complied with the laws that Canada and Nova Scotia actually chose to adopt": para. 600. The majority concluded that "there was in fact a fundamental departure from the methodology required by Canadian and Nova Scotia law" in the way that the Project was assessed. While recognizing that social impacts can be within the scope of a valid environmental assessment, and that "the value placed by members of a community on distinctive components of an ecosystem" can be a relevant consideration in an environmental assessment, the majority took issue with the "distinct, unprecedented and unexpected approach taken by the JRP to 'community core values' in this particular case": para. 601.

[119] The majority found that the Investors were "not treated in a manner consistent with Canada's own laws, including the core evaluative standard under the *CEAA* and the standards of

fair notice required by Canadian public administrative law": para. 602. It went on in the following paragraph to find that "[t]he basis of liability under Chapter Eleven is that, after all the specific encouragement the Investors and their investment had received from government to pursue the project, and after all the resources placed in preparing and presenting their environmental assessment case, the Investors and their investment were not afforded a fair *opportunity* to have the specifics of that case considered, assessed and decided in accordance with applicable laws" [emphasis in the original].

[120] The majority concluded that "the approach to the environmental assessment taken by the JRP and adopted by Canada resulted in a breach of Article 1105": para. 604.

[121] Canada submits that the majority thus effectively decided that there had been a failure to act in accordance with applicable Canadian law in this case, erroneously equating that departure with a breach of the minimum standard of treatment at customary international law. It says that the majority's approach in this case should be contrasted with the Tribunal's reasoning in *ADF Group*, above, where a *NAFTA* Tribunal correctly rejected a claim that a domestic regulator had misapplied domestic law on the basis that it had no authority to review the legal validity and standing of measures under domestic administrative law.

[122] Canada argues that the error of the majority was perpetuated in its analysis of the Investors' claim under Article 1102 of *NAFTA*. In finding Canada liable in this regard, the majority held that "[w]hat is of critical importance here is that the Whites Point project did not receive the expected and legally mandated application, for the purposes of federal Canada environmental assessment, of the essential evaluative standard under the *CEAA*": para. 697. The

majority therefore found that there was no justification for the differential and adverse treatment that was accorded to the Investors: para. 724.

[123] The majority recognized that "[e]rrors, even substantial errors, in applying national laws do not generally, let alone automatically, rise to the level of international responsibility vis-à-vis foreign investors": para. 738. However, it went on in the same paragraph to find that "[t]he trigger for international responsibility in this particular case was the very specific set of facts that were presented, tested and established through an extensive litigation process".

[124] The majority then went to find that some of the factual elements of this case "were highly unusual", and that the "unprecedented nature of the JRP's approach […] was not only at variance with the existing legal framework, but also with the actual treatment provided in comparable cases": para. 739.

iii) Canada's Argument Regarding the Relevant Articles of *NAFTA* and the Interpretative Notes

[125] In support of its argument that the majority erred by relying on breaches of Canadian environmental and administrative law to ground liability under Articles 1102 and 1105 of *NAFTA*, Canada notes that Articles 1116(1) and 1117(1) of *NAFTA* provide that a tribunal has jurisdiction only to rule on alleged breaches of substantive obligations for which investor-State dispute settlement is available under Chapter Eleven.

[126] Canada observes that the Tribunal's jurisdiction was further circumscribed by Article 1131(1) of *NAFTA*, which states that tribunals are to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law". This provision "ensures that domestic law is not applied to investment matters by specifying the applicability of

international law": Denis Lemieux & Ana Stuhec, *Review of Administrative Action under NAFTA* (Scarborough, Ont: Carswell, 1999) at p. 94.

[127] This requirement is confirmed by the FTC *Note*, which confirms that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment of another Party", and that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment to or beyond that which is required by the customary international law minimum standard of treatment".

[128] As was noted earlier, an interpretation of a provision of *NAFTA* by the Free Trade Commission is binding on tribunals established under Chapter Eleven of the Agreement. As a consequence, Canada contends that the majority of the Tribunal was required to apply customary international law in determining whether Canada violated the minimum standard of treatment required by Article 1105 of *NAFTA*, and that by failing to give effect to the FTC *Note*, the majority exceeded its jurisdiction.

[129] Canada also refers the submissions of the *NAFTA* Parties in *Mesa*, cited above, as constituting an additional binding "subsequent agreement" within the meaning of Article 31 of the *Vienna Convention on the Law of Treaties*. It will be recalled that in the *Mesa* case, Canada, the United States and Mexico agreed that the majority in this case erred by failing to require the Investors to establish that the actions of Canada resulted in a breach of customary international law, and by equating a failure to comply with applicable domestic law with a failure to meet the minimum standard of treatment at international law.

iv) Analysis

[130] I do not need to determine whether the *NAFTA* State Parties' submissions in *Mesa* created a binding subsequent agreement for the purposes of Article 31 of the *Vienna Convention*. This is because the *Mesa* submissions all post-dated the Tribunal's decision in this case, and thus could not have been binding on the majority at the time that it made its decision.

[131] Canada's argument does, however, require me to consider the role that domestic law should play in considering alleged breaches of Articles 1102 and 1105 of *NAFTA*.

[132] Canada contends that it is the role of this Court, and not a *NAFTA* Tribunal, to determine whether Canada acted in accordance with its own laws in making decisions with respect to the approval of the Project. By deciding questions of Canadian law that are reserved for this Court, Canada says that the majority of the Tribunal exceeded its jurisdiction. As will be explained below, I cannot accept this submission.

[133] I understand the parties to agree that *NAFTA* Tribunals do not sit in review of decisions made within State parties: *ADF Group*, above at para.190; *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID), Case No. Arb(AF)/99/1, Interim Decision on Jurisdictional Issues, 6 December 2000, para. 61; *Glamis Gold Ltd.*, above at para. 762. That said, Canada conceded in its written submissions that *NAFTA* tribunals may consider a *NAFTA* Party's compliance or non-compliance with its domestic law as a factor in the determination of liability under *NAFTA*: Canada's memorandum of fact and law at para. 66.

[134] Although claims under Chapter Eleven of *NAFTA* are unquestionably to be decided based on international law, questions of compliance with a State Party's domestic law can nevertheless

be a material and relevant factor in that analysis, and can form an important part of the factual matrix underlying *NAFTA* disputes: *GAMI Investments, Inc. v. The Government of the United Mexican States,* (UNCITRAL), Award, 15 November 2004, at para. 91.

[135] Indeed, while domestic laws are not generally germane in international arbitrations as matters of law, "domestic law can be central to the function of [*NAFTA*] tribunals and an assessment of a given domestic regime can be a critical aspect of an assessment of the facts underlying these cases": Meg N. Kinnear, Andrea K. Bjorklund, & John F.G. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, looseleaf, (Kluwer Law International, 2006) at 1131-20.

[136] The fact that Canada's compliance with its domestic environmental assessment legislation was a relevant and appropriate consideration for the Tribunal in this case is confirmed by the fact that Canada pleaded to it as part of the "Factual Background" in its Statement of Defence. Indeed, the structure of Canada's Statement of Defence makes it clear that domestic law, and its own compliance with that law, were viewed as relevant factual issues by Canada.

[137] While arguing that the Investors were conflating the role of the Tribunal in applying the customary international law minimum standard with the role of this Court sitting in review of decisions relating to the Project under Canadian administrative law, Canada nevertheless pleaded that it had complied with the requirements of Canadian environmental law in the Memorials that it filed with the Tribunal, putting the matter squarely before the Tribunal to decide.

[138] In addition, both Canada and the Investors adduced substantial evidence before the Tribunal from leading experts in Canadian environmental law with respect to the requirements of

domestic environmental law, and whether that law had been complied with in relation to the Project. Canada's compliance with domestic environmental law was thus clearly identified by the parties as a factual issue to be decided by the Tribunal - one that ultimately went to the merits of whether Canada breached its international law obligations to the Investors.

[139] Indeed, some disputes giving rise to international claims can likely only be assessed by considering the requirements of domestic law incidentally to the issue of international liability: William. S. Dodge, "*Local Remedies Under NAFTA Chapter 11*", in Frédéric Bachand ed., Fifteen Years of *NAFTA* Chapter 11 Arbitration (International Arbitration Institute: 2011), 37 at 39-41.

[140] For example, in considering a claim under Article 1102 of *NAFTA*, a tribunal may only be able to determine whether a foreign investor has been treated less favorably by a *NAFTA* Party than the country would treat its own nationals by considering what treatment was required by the domestic laws of the country in question. Indeed, as Kinnear and Puig have observed, "[t]he focus on the context under Article 1102 requires adjudicators to pay close attention to the applicable regulatory framework before finding any national treatment violation": Sergio Puig & Meg Kinnear, "*NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration*" (2010), 25:2 ICSID Rev/F.I.L.J. 226 at 241.

[141] Authors have identified examples of such 'preliminary' or 'incidental' questions governed by domestic law as including matters such as whether an investment is valid or a contract has been concluded, as well as zoning changes, taxation and *environmental impact assessments*: Ole Spiermann, "Applicable Law", in Peter Muchlinski, Federico Ortino &

Christoph Schreuer eds., *Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 89 at 110-113.

[142] Contrary to Canada's submissions, deciding 'preliminary' or 'incidental' questions of national law does not convert a *NAFTA* Tribunal into a domestic court of appeal. Rather, it is part of the exercise of the inherent jurisdiction of a tribunal that is "necessary in order to give effect to the investor's right to international arbitration as well as the object and purpose of most, if not all, investment treaties…": Spiermann, above at 110-113; *GAMI Investments, Inc.*, above at paras. 90-91, 94.

[143] It is also noteworthy that although Canada raised a number of objections to the jurisdiction of the Tribunal in this case, it did *not* argue that the Investors failed to have the issues of domestic law raised by their *NAFTA* claim determined by this Court through an application for judicial review of the decisions at issue. Nor did Canada assert that the *NAFTA* Tribunal could not look at Canadian domestic law issues as part of its analysis of the Investors' claim. Indeed, as was noted earlier, it adduced substantial evidence on this issue.

[144] The requirements of Canadian environmental law and Canada's compliance or non-compliance with those requirements were thus put squarely in issue by the parties before the Tribunal. They were, moreover, expressly within the submission to arbitration of the Investors' claim for damages resulting from Canada's alleged breaches of its *NAFTA* obligations. Consequently, I am satisfied that the majority did not exceed its jurisdiction since it did not address an issue that was not within the submission to arbitration made by the Investors under Chapter Eleven of *NAFTA*.

[145] There was, moreover, nothing in the words of the relevant Articles of Chapter Eleven of *NAFTA* or in the interpretation of those words in the FTC *Note* that precluded the Tribunal majority from making findings as to Canada's compliance or non-compliance with the requirements of its domestic environmental laws incidentally to its finding of liability under Articles 1102 or 1105 of *NAFTA*.

[146] While Canada takes issue with the majority's findings regarding Canada's non-compliance with the requirements of Canadian environmental law, it is not open to this Court, sitting on an application to set aside an Award under Chapter Eleven of *NAFTA*, to review the merits of the Tribunal's decision and to second-guess its findings, as any error that the Tribunal may have made in this regard was not jurisdictional in nature.

[147] This takes me to the final question to be considered, which is whether there is anything in *NAFTA*, properly interpreted, that precluded the majority of the Tribunal from making the award that it made.

E. *Is there Anything in NAFTA that Precluded the Majority of the Tribunal from Making the Award that it Made?*

[148] Canada submits that Articles 1105, 1102, 1116, 1117 and 1131 of *NAFTA*, properly interpreted, precluded the majority from making determinations of domestic law, and from making those determinations the sole basis of liability under Articles 1105 and 1102.

[149] I have already found that it was appropriate for the Tribunal to consider the requirements of Canadian environmental assessment law in arriving at its decision. The question at this stage of the analysis is whether the Tribunal exceeded its jurisdiction in the way that it used those findings in finding Canada liable to the Investors under Articles 1105 and 1102 of *NAFTA*.

[150] While the Investors challenged a wide range of measures and decisions made over the course of the JRP process, Canada asserts that the majority found liability under Articles 1105 and 1102 of *NAFTA* based primarily on two actions of the JRP: its reliance on the concept of "community core values" in its recommendations, and its approach to the issue of mitigation.

[151] According to Canada, all of the findings supporting the majority's liability finding were essentially just a restatement of these two findings, and that but for its conclusions with respect to Canada's purported breach of its domestic environmental laws, the majority would not have reached the result that it did. In finding Canada to be liable for breaches of Articles 1105 and 1102 of *NAFTA*, Canada says that the Tribunal exceeded the clear, but limited authority that Canada has consented to a *NAFTA* tribunal exercising, namely to decide disputes in accordance with the provisions of *NAFTA* and the applicable rules of international law.

[152] Before considering Canada's arguments on this point, it is important to recall the standard of review that applies in cases such as this. I am not judicially reviewing the reasonableness of the decision of the majority of the *NAFTA* panel, nor am I determining whether the Tribunal erred in fact or law in arriving at its decision. Article 34(2)(a)(iii) of the *Code* does not invalidate an arbitral award simply because, in the opinion of the Court, a tribunal erred in law, or made an erroneous finding of fact: *S.D.Myers* (Federal Court), above at para. 42, *Consolidated Contractors Group*, above at para. 23.

[153] Indeed, none of the limited and narrow grounds for setting aside an arbitral decision enumerated in Article 34(2) of the *Code* permit a court to review the merits of an arbitral tribunal's award. This is so even if the Tribunal has manifestly erred in fact or in law: *Xerox Canada Ltd. v. MPI Technologies Inc.*, [2006] O.J. No. 4895 (ONSC), paras. 144-147; Jan van

den Berg, Albert, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (T.M.C. Asser Institute), p. 273; *Lesotho Highlands Dev. Auth. v. Impregilo SpA*, [2006] 1 A.C. 221, para. 31 (U.K.H.L.). I may only intervene in the Tribunal's decision if the majority exceeded its jurisdiction, as contemplated by Article 34(2)(a)(iii) of the *Code*.

[154] This approach is consistent with the modern movement towards finality of arbitration awards: Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th Ed. (London: Sweet & Maxwell 2004). As Redfern and Hunter put it, "[t]here is a belief that, so far as international arbitrations are concerned, the parties should be prepared to accept the decision of the arbitral tribunal even if it is wrong, so long as the correct procedures are observed": p. 421. The concern is that if a court is permitted to review an arbitral decision on its merits, the speed and the finality of the arbitral process will be lost. Indeed, arbitration would then become "merely the first stage in a process that may lead, by way of successive appeals, to the highest appellate court at the place of arbitration": at p. 421. As a consequence, "[i]f the Tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award, good, bad or indifferent - is final and binding on the parties": p. 422.

[155] Moreover, as the Ontario Court of Appeal cautioned in *Cargill*, Courts should "limit themselves in the strictest terms to intervening only rarely in decisions made by consensual, expert, international arbitration tribunals": above, at para. 46. Courts must, moreover, "be circumspect" in assessing whether an alleged error properly falls within Article 34(2)(a)(iii) of the *Code* and raises a true question of jurisdiction, taking "a narrow view of the extent of any such question": *Cargill*, above at para. 47.

[156] The Ontario Court of Appeal discussed what is meant by "true questions of jurisdiction" in *Cargill*. By way of example, it stated that a *NAFTA* Tribunal will have exceeded its jurisdiction if a submission to arbitration claimed damages suffered in 2007 and 2008, and the Tribunal awarded damages for 2009 and 2010, as that would be an "award ... not falling within the terms of the submission to arbitration": *Cargill*, above at para. 49. It will be recalled that in this case, the Tribunal sustained Canada's jurisdictional objection and refused to deal with the Investors' claim that the decision to refer the Project to the JRP was discriminatory, as that decision was made more than three years prior to the issuance of the Investors' Notice of Arbitration.

[157] A *NAFTA* tribunal would similarly exceed its jurisdiction if it were to award damages in relation to an investment in Brazil, as Chapter Eleven of *NAFTA* defines an investment as being located in the territory of another Party to *NAFTA*, namely Canada, the United States or Mexico: *Cargill*, above at para. 49. Another such "true question of jurisdiction" would arise if a Tribunal purported to intervene in a case brought under Chapter Eleven of *NAFTA*, even though the dispute did not relate to an "investment": Noah Rubins, "Judicial Review of Investment Arbitration Awards" in Todd Weiler ed., *NAFTA, Investment Law and Arbitration; Past Issues, Current Practice, Future Prospects* (New York: Transnational Publishers, 2004) 359 at 364.

[158] Even if a Court does identify a jurisdictional issue, *Cargill* cautions that it must "carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal": *Cargill*, above at para. 47.

i) Did the Tribunal have Jurisdiction to Embark on the Inquiry?

[159] In this case, the Tribunal clearly had jurisdiction to embark on its inquiry: that is, to determine whether Canada's treatment of the Investors and its conduct relating to the JRP and approvals process for the Project breached its obligations under Articles 1102, 1103 and 1105 of *NAFTA*.

[160] Insofar as the Investors' Article 1105 claim was concerned, all three Tribunal members understood that the *Waste Management* decision established the appropriate test for determining whether Canada's actions conformed with the minimum standard of treatment required at customary international law for the purposes of Article 1105 of *NAFTA*: see, for example, majority at paras. 442 – 443; dissent at para. 2.

[161] All three members of the Tribunal also agreed that *Waste Management* prescribed a high threshold for establishing a breach of the international minimum standard at customary international law: majority at paras. 36, 441; dissent at para. 2. They further agreed that liability under Article 1105 of *NAFTA* requires something more than a mere breach of domestic law, and that "[t]he imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard": majority at paras. 436 – 437; dissent at para. 2.

[162] Where the members of the Tribunal disagreed was in their assessment of whether Canada's actions in this case fell below the *Waste Management* standard. This understanding of the differences between the members is reflected in Professor McRae's reasons, where he observed that "[i]n large part, [his] disagreement is with the majority's assessment of the facts": dissent at para. 2.

[163] The assessment of the facts of a case goes to the merits of the decision, and does not involve a jurisdictional question. Moreover, the application of the law to the facts of a case as a decision-maker may have found them is a challenge to the conclusion reached by the Tribunal, and not a matter of jurisdiction: *Mobil Investments Canada Inc.*, above at para. 48.

ii) *Metalclad* is Distinguishable

[164] Canada argues that in the *Metalclad* case, the British Columbia Supreme Court set aside a tribunal's decision because it had misstated the applicable law regarding Article 1105 of *NAFTA*. In particular, the Tribunal expressly and incorrectly stated that the minimum standard of treatment under Article 1105 of *NAFTA* included transparency obligations, and then made its decision based on the concept of transparency. Canada argues that the majority in this case committed a similar error, importing domestic legal standards into its Article 1105 analysis, and then equating them to the rules of customary international law as a basis for imposing liability under *NAFTA*.

[165] I would start by observing that criticism of the Court's decision in *Metalclad* has been "fierce", and that numerous commentators have suggested that it was far too intrusive into the merits of the case: Rubins, above at 379; Coe, Jack J. Jr., "*Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*" (2003) 36 Vand. J. Transnat'l L 1381 at 1411; Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, (2001) 2 J. World Investment 685 at 700; Charles H. Brower II, "*Investor-State Disputes Under NAFTA: The Empire Strikes Back*" (2001), 40 Colum. J. Transnat'l L. 43.

[166] Moreover, while the cases are somewhat analogous, the decision in *Metalclad* is in fact distinguishable from the present case.

[167] As noted earlier, the Tribunal in *Metalclad* based its finding of liability under Article 1105 of *NAFTA* on a breach of the transparency obligations allegedly contained in that provision. There are, however, no such transparency obligations in Article 1105, or anywhere else in Chapter Eleven of *NAFTA* for that matter. While there is a transparency obligation in Chapter Eighteen of *NAFTA*, the parties had not consented to arbitrate issues under Chapter Eighteen, with the result that the Tribunal had based its decision on a matter that was beyond the scope of the submission to arbitration: *Metalclad* at para. 72.

[168] It bears noting, however, that the Court went out of its way in *Metalclad* to observe that had Tribunal simply interpreted the words of Article 1105 to include an obligation of transparency, there would not necessarily have been any basis for the Court to intervene. Although the interpretation of Article 1105 may have been flawed, the arbitrator would not necessarily have decided a matter outside the scope of the submission to arbitration: para. 70.

[169] In contrast to the error identified in *Metalclad*, what is at issue in this case is whether Canada's failure to follow the requirements of its domestic environmental assessment laws rose to the "threshold of seriousness" contemplated by *Waste Management*, or constituted discriminatory treatment for the purposes of Article 1102 of *NAFTA*. In other words, the alleged error involved the Tribunal's assessment of the degree of seriousness, rather than the imputing of an obligation into Article 1105 from a different section of *NAFTA*.

iii) The Tribunal's Application of the *Waste Management* Standard

[170] As was previously noted, one of the Investors' arguments before the Tribunal was that it was treated unfairly in the JRP as a result of its novel, and allegedly inappropriate, reliance on the concept of "community core values" as a basis for recommending that the Project not be

approved, without notice to the Investors that this concept was in issue. The majority found that the conduct of the JRP in so doing was arbitrary, specifically tying that finding to the *Waste Management* standard in finding Canada to have breached Article 1105: para. 591. To be clear, the question before this Court is not whether the Tribunal correctly applied the *Waste Management* threshold in finding Canada's conduct to be arbitrary, as that question unequivocally speaks to the merits of the decision.

[171] What Canada argues is that the Tribunal failed to apply the *Waste Management* standard *at all*, relying instead exclusively on breaches of domestic law in attributing liability. I cannot accept Canada's submission in this regard. I find that the Tribunal made a factual finding of arbitrary conduct and applied customary international law in determining whether Canada violated the minimum standard of treatment for the purposes of Article 1105 of *NAFTA*.

[172] Whether the approach of the JRP was in fact "novel" or "arbitrary" is a factual determination going to the merits of the Tribunal's decision. As such, it is beyond the scope of a review in a set-aside application brought under Article 34(2)(a)(iii) of the *Code*.

[173] My conclusion in this regard is supported by the *Consolidated Contractors Group* decision referred to earlier in these reasons. There, the appellant claimed that in deciding an issue against it, the Tribunal "developed its own 'novel theory' of constructive notice and denied procedural fairness by failing to give notice of that theory and an opportunity to respond to it": para. 81. The Ontario Court of Appeal rejected this argument as a basis for setting aside an arbitral award, agreeing with the respondent in that case that "this argument is essentially a complaint about arbitral fact-finding, under the guise of a procedural fairness argument": para. 82. The same may be said here.

[174] It is also not accurate to say that the majority based its conclusions of *NAFTA* liability *exclusively* on alleged violations of Canadian law in the JRP process. After expressly noting that breaches of domestic law are not necessarily sufficient to satisfy the *Waste Management* test, the majority then stated that it was also basing its finding that Canada's conduct rose to the level contemplated by *Waste Management* on the "reasonable expectations" of the Investors, which expectations had been created by representations made to them by governmental sources. These representations had led the Investors to invest substantial time and resources in pursuing the Project: majority at para. 594.

[175] There is no suggestion that representations from state officials are a relevant consideration in the Canadian environmental assessment process. The majority found that representations made by a host State that were reasonably relied on by a claimant were, however, a relevant consideration in determining whether there has been a breach of a state party's obligations under Chapter Eleven of *NAFTA*: *Waste Management*, above at paras. 98 and 99, as quoted in the majority's Award at para. 442.

[176] In finding liability under Article 1105 of *NAFTA*, the majority found as a fact that the Investors "reasonably relied on specific encouragements, at the political and technical level, to pursue the project not only in Nova Scotia but in the specific site they chose": para. 448. The majority further found that "these encouragements contributed to the Investors' decision to not only proceed with their business plans, but to invest very substantive corporate resources - including several millions of dollars - in good faith to obtain and present an Environmental Impact Statement": para. 449.

[177] This led the majority to conclude that "it was unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, have other officials effectively determine that the area was a 'no go' zone for this kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits": para. 592.

[178] The majority then specifically tied this finding to the *Waste Management* standard, finding that Canada's conduct satisfied the *Waste Management* threshold in part on the Investors' "reasonable expectations and major consequent investment of resources and reputation in a process that is the most rigorous, public and extensive kind provided under the laws of Canada": all quotes from para. 594.

[179] For the reasons cited by Professor McRae, one might take issue with the majority's findings with respect to the nature of the representations that were made to the Investors and the expectations that could reasonably have been created by these representations. These are, however, factual questions that were put squarely before the Tribunal to decide. They do not involve jurisdictional questions that are subject to review by this Court.

[180] That said, the fact that the majority focussed at some length on the representations that were made to the Investors by state officials and the reasonableness of the Investors' reliance on these representations is further confirmation that it was aware of, and was endeavouring to apply the *Waste Management* analysis to the facts of this case: majority decision at paras. 444, 446-449.

[181] My understanding that the majority was looking to international law in this regard, and not domestic law, is further buttressed by the fact that it is well-established that legitimate expectations cannot create substantive rights in Canadian law, and can only create procedural rights: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 26, 174 D.L.R. (4th) 193; *Mount Sinai Hospital v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at paras. 32, 79 and 86, [2001] 2 S.C.R. 281; *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at para. 68, [2011] 2 S.C.R. 504.

[182] Once again, Canada's complaint really relates to the way that the majority applied the *Waste Management* standard to the facts of this case in finding it liable for a breach of Article 1105 of *NAFTA*. Canada similarly takes issue with the majority's findings of fact with respect to the differential treatment to which the Investors' Project was subjected through the environmental assessment process, as well as its finding that this treatment was discriminatory, as contemplated by Article 1102 of *NAFTA*. These too involve either questions of fact or mixed fact and law, and do not involve a jurisdictional error on the part of the majority.

[183] For these reasons, I have not been persuaded that there is anything in *NAFTA*, properly interpreted, that precluded the majority of the Tribunal from making the Award that it made.

XI. The Interveners' Arguments

[184] By Order of this Court, the Sierra Club Canada Foundation and East Coast Environmental Law Association were granted leave to intervene in this Application. The Interveners are generally supportive of Canada's position in this case. Their support is, however, based on arguments that have not been advanced by Canada, or by the Investors for that matter.

[185] The Interveners argue that the decision of the Tribunal was premature, as the Investors had failed to exhaust their domestic remedies before accessing the arbitration process under Chapter Eleven of *NAFTA*. The Interveners further argue that the majority's decision gives the Investors "an unprecedented substantive finding of liability for alleged violations of procedural fairness" without ever considering or even mentioning highly relevant environmental law provisions in *NAFTA* and its sister treaty, the *North American Agreement on Environmental Cooperation*, 32 I.L.M. 1482 (1993). The Interveners contend that this offended "fundamental notions and principles of justice" and is contrary to Canada's public policy. According to the Interveners, either one of these errors would provide a sufficient basis for setting aside the Award of the majority.

[186] The Interveners argued in the written submissions that they filed on their motion to intervene that the Award should be set aside under Article 34(2)(a)(iii) of the *Code*, which is the provision of the *Code* that is relied upon by Canada. It was presumably on this basis that leave to intervene was granted. However, the Interveners' position appeared to have evolved over time, as they argued in their memorandum of fact and law and at the hearing before me that the majority's Award should be set under Article 34(2)(b)(i) of the *Code* because of the failure of the Investors to exhaust their local remedies. They further argued that Article 34(b)(ii) of the *Code* would allow the decision to be set aside on the basis that it conflicts with Canada's public policy. These were not the grounds of review on which the Interveners were granted leave to intervene**.**

[187] While finding that the Interveners had "a genuine interest in the Application and bring unique viewpoints that would be useful to the case", the Order granting leave to intervene did not

specify the issues that the Interveners would be permitted to address. The Order, must, however, be interpreted in light of the binding jurisprudence governing interventions.

[188] The Federal Court of Appeal has been clear that Interveners are not given "an open microphone" to discuss whatever may be on their mind about a given case: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, at para. 17, 414 D.L.R. (4th) 373. An outsider seeking admission to a proceeding as an intervener has to take the issues identified by the parties as it finds them, and cannot transform them or add to them: *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2015 FCA 34 at para. 19, 470 N.R. 167.

[189] The role of an intervener is thus not to introduce new issues, but rather to provide a different perspective that will "assist the determination of a factual or legal issue related to the proceeding": *Federal Courts Rules*, SOR/98-106, Rules 3 and 109; *Tsleil-Waututh*, above at para. 54; *Ishaq v. Canada (Citizenship and Immigration)*, 2015 FCA 151, paras. 7-10, [2016] 1 F.C.R. 686. As the Court stated in *Tsleil-Waututh*, "interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way": at para. 55.

[190] While Canada raised five separate objections to the jurisdiction of the *NAFTA* Tribunal in this case, none of these jurisdictional objections related to the failure of the Investors to seek judicial review of the decision of the JRP before submitting the case to arbitration under Chapter Eleven of *NAFTA*: see majority decision at para. 230.

[191] This is not surprising because the prevailing view appears to be that Article 1121 of Chapter Eleven of *NAFTA* tacitly waives the requirement that litigants must exhaust local

remedies before accessing the Chapter Eleven *NAFTA* arbitration process: Martin Dietrich Brauch, IISD Best Practices Series: Exhaustion of Local Remedies in International Investment Law, January 2017 at page 13; *Coe*, above at p. 1421. See also *Metalclad Corporation v. the United Mexican States*, (ICSID), Arb(AF)/97/1, Award, 30 August 2000, footnote to para. 97; *Waste Management*, above at paras. 116, 133; *GAMI Investments*, above at para. 103; *Marvin Feldman v. Mexico*, (ICSID), Arb(AF)/99/1, Award 16 December 2002, at para. 73.

[192] The exception to this principle arises in cases where the governmental action in issue involves an alleged denial of justice through a judicial act. In such cases, claimants must first obtain a final decision by the highest court of the host state before accessing the *NAFTA* process: *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, (ICSID), Case No. ARB(AF)/98/3, Award 26 June 2003; *Apotex Inc. v. United States of America*, (ICSID), Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013. This is not such a case.

[193] Insofar as the Interveners' public policy argument is concerned, it is true that Canada's Notice of Application advanced a public policy argument as a ground for setting aside the decision of the majority under Article 34(2)(b)(ii) of the *Code*. However, Canada did not address its public policy argument as a ground for setting aside the Award in its written submissions, and it informed the Court at the hearing that it was no longer pursuing this argument. Canada's public policy argument was, moreover, not the public policy argument being advanced by the Interveners.

[194] Canada argued in its Notice of Application that the majority's Award conflicted with Canada's public policy "insofar as it usurps the judicial review function of Canadian courts". A public policy argument relating to the alleged failure of the majority to consider the

environmental law provisions of *NAFTA* and the *North American Agreement on Environmental Cooperation* (*NAAEC*) is thus an entirely new issue: one that was not raised by any of the parties to this Application.

[195] Further, the Interveners misconstrue Article 34(2)(b)(ii) of the *Code*, which allows this Court to set aside an award on the basis that it is "in conflict with the public policy of Canada". The Interveners assert that the Tribunal's failure to cite Article 1114 of *NAFTA* and the *NAAEC* are errors of law to which "no curial deference" is owed. They ask the Court to intervene on the basis of these "flagrant" errors of law. However, it would frustrate the purpose of the narrow grounds for setting aside an arbitral decision in the *Code* to read Article 34(2)(b)(ii) as including any factual or legal error, as this would clearly open the door to a review on the merits.

[196] It has, moreover, been held that to succeed on the ground of public policy, awards "must fundamentally offend the most basic and explicit principles of justice and fairness" or "evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal": *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.*, [1999] O.J. No. 3573 at para. 30, 104 O.T.C., aff'd [2000] O.J. No. 3408 (C.A.), 49 O.R. (3d) 414, leave to appeal ref'd, [2000] S.C.C.A. No. 581, [2001] 1 S.C.R. xi. The threshold to set aside an arbitral award on the basis of public policy is therefore extremely high: Rubins, above at 367. Rubins lists cognizable violations of public policy as including, for instance, "contracts or concessions obtained by bribery, and illegal or immoral agreements, or denial of due process in the conduct of arbitration": p. 367. The Interveners did not identify issues that rise to this level in their submissions.

[197] The Interveners' arguments thus seek to expand the issues that are before the Court and to fundamentally change the focus of this case. This is not appropriate on an intervention.

XII. Conclusion

[198] I accept that the majority's Award raises significant policy concerns. These include its effect on the ability of *NAFTA* Parties to regulate environmental matters within their jurisdiction, the ability of *NAFTA* tribunals to properly assess whether foreign investors have been treated fairly under domestic environmental assessment processes, and the potential "chill" in the environmental assessment process that could result from the majority's decision.

[199] While there may be many reasons to criticize the Award of the majority, its decision ultimately turned on its conclusion that the flaws that it found to have occurred in the JRP process meant that Canada had not satisfied its obligation to provide the Investors with fair and equitable treatment as contemplated by Article 1105 of *NAFTA*, and its finding that Canada's treatment of the Investors was discriminatory, differing from the treatment that would be accorded to similarly-situated Canadian investors, without justification for that differential treatment having been established. These findings are either factual in nature, or involve the application of the law to the facts as they were found by the majority. Most importantly, they are within the four corners of the Submission to Arbitration. They do not, however, pertain to jurisdictional issues.

[200] Canada has thus not established that the decision of the majority "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration", as contemplated by

Article 34(2)(a)(iii) of the *Code*. As a result, the Application to set aside the Award of the majority must be dismissed.

XIII. Costs

[201] As the successful parties, the Investors are entitled to their costs of this application from Canada. In accordance with the agreement of the parties, these costs are fixed in the amount of $18,000, inclusive of disbursements and HST.

[202] Costs have not been sought by, or from the Interveners, and no award will be made in this regard.

JUDGMENT IN T-1000-15

THIS COURT'S JUDGMENT is that:

1. This application is dismissed with costs to the respondents, fixed in the amount of $18,000, inclusive of disbursements and HST.

"Anne L. Mactavish"
Judge

Appendix I

Relevant Provisions of the *North American Free Trade Agreement*

Article 102: Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:

a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;

b) promote conditions of fair competition in the free trade area;

c) increase substantially investment opportunities in the territories of the Parties;

d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;

e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and

f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

Dispositions pertinentes d'*Accord de libre-échange nord-américain*

Article 102 : Objectifs

1. Les objectifs du présent accord, définis de façon plus précise dans ses principes et ses règles, notamment le traitement national, le traitement de la nation la plus favorisée et la transparence, consistent

a) à éliminer les obstacles au commerce des produits et des services entre les territoires des Parties et à faciliter le mouvement transfrontières de ces produits et services

b) à favoriser la concurrence loyale dans la zone de libre-échange;

c) à augmenter substantiellement les possibilités d'investissement sur les territoires des Parties;

d) à assurer de façon efficace et suffisante la protection et le respect des droits de propriété intellectuelle sur le territoire de chacune des Parties;

e) à établir des procédures efficaces pour la mise en oeuvre et l'application du présent accord, pour son administration conjointe et pour le règlement des différends; et

f) à créer le cadre d'une coopération trilatérale, régionale et multilatérale plus poussée afin d'accroître et d'élargir les avantages découlant du présent accord.

2. Les Parties interpréteront et appliqueront les dispositions du présent accord à la lumière des objectifs énoncés au paragraphe 1 et en conformité avec les règles applicables du droit international.

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

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

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

Article 1102 : Traitement national

1. Chacune des Parties accordera aux investisseurs d'une autre Partie un traitement non moins favorable que celui qu'elle accorde, dans des circonstances analogues, à ses propres investisseurs, en ce qui concerne l'établissement, l'acquisition, l'expansion, la gestion, la direction, l'exploitation et la vente ou autre aliénation d'investissements.

2. Chacune des Parties accordera aux investissements effectués par les investisseurs d'une autre Partie un traitement non moins favorable que celui qu'elle accorde, dans des circonstances analogues, aux investissements effectués par ses propres investisseurs, en ce qui concerne l'établissement, l'acquisition, l'expansion, la gestion, la direction, l'exploitation et la vente ou autre aliénation d'investissements.

3. Le traitement accordé par une Partie en vertu des paragraphes 1 et 2 signifie, en ce qui concerne un État ou une province, un traitement non moins favorable que le traitement le plus favorable accordé par cet État ou cette province, dans des circonstances analogues, aux investisseurs, et aux investissements effectués par les investisseurs, de la Partie sur le territoire de laquelle est situé l'État ou la province.

4. Il demeure entendu qu'aucune des Parties ne pourra :

a) exiger d'un investisseur d'une autre Partie qu'il accorde à ses ressortissants une participation minimale dans une entreprise située sur son territoire, exception faite des actions nominales dans le cas des administrateurs ou fondateurs de sociétés; ou

b) obliger un investisseur d'une autre Partie, en raison de sa nationalité, à vendre ou à aliéner d'une autre façon un investissement effectué sur le territoire de la Partie.

Article 1105: Minimum Standard of Treatment

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

2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

Article 1105 : Norme minimale de traitement

1. Chacune des Parties accordera aux investissements effectués par les investisseurs d'une autre Partie un traitement conforme au droit international, notamment un traitement juste et équitable ainsi qu'une protection et une sécurité intégrales.

2. Sans préjudice du paragraphe 1, chacune des Parties accordera aux investisseurs d'une autre Partie, et aux investissements effectués par les investisseurs d'une autre Partie, un traitement non discriminatoire quant aux mesures qu'elle adoptera ou maintiendra relativement aux pertes subies, à cause d'un conflit armé ou d'une guerre civile, par des investissements effectués sur son territoire.

3. Le paragraphe 2 ne s'applique pas aux mesures existantes relatives aux subventions ou contributions qui seraient incompatibles avec l'article 1102 si ce n'était de l'alinéa 1108(7)(b).

Article 1116 : Plainte déposée par un investisseur d'une Partie en son nom propre

1. Un investisseur d'une Partie peut soumettre à l'arbitrage, en vertu de la présente section, une plainte selon laquelle une autre Partie a manqué à une obligation découlant

a) de la section A ou du paragraphe 1503(2) (Entreprises d'État), ou

b) de l'alinéa 1502(3)a) (Monopoles et entreprises d'État), lorsque le monopole a agi d'une manière qui contrevient aux obligations de la Partie aux termes de la section A,

et que l'investisseur a subi des pertes ou des dommages en raison ou par suite de ce manquement.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

2. Un investisseur ne pourra soumettre une plainte à l'arbitrage si plus de trois ans se sont écoulés depuis la date à laquelle l'investisseur a eu ou aurait dû avoir connaissance du manquement allégué et de la perte ou du dommage subi.

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

Article 1117 : Plainte déposée par un investisseur d'une Partie au nom d'une entreprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

1. Un investisseur d'une Partie, agissant au nom d'une entreprise d'une autre Partie qui est une personne morale que l'investisseur possède ou contrôle directement ou indirectement, peut soumettre à l'arbitrage, en vertu de la présente section, une plainte selon laquelle l'autre Partie a manqué à une obligation découlant

a) de la section A ou du paragraphe 1503(2) (Entreprises d'État), ou

b) de l'alinéa 1502(3)a) (Monopoles et entreprises d'État), lorsque le monopole a agi d'une manière qui contrevient aux obligations de la Partie aux termes de la section A,

et que l'entreprise a subi des pertes ou des dommages en raison ou par suite de ce manquement.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

2. Un investisseur ne pourra déposer une plainte au nom d'une entreprise décrite au paragraphe 1 si plus de trois ans se sont écoulés depuis la date à laquelle l'entreprise a eu ou aurait dû avoir connaissance du manquement allégué et de la perte ou du dommage subi.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

3. Lorsqu'un investisseur dépose une plainte en vertu du présent article, et qu'il dépose aussi ou qu'un investisseur non majoritaire de l'entreprise dépose en vertu de l'article 1116 une plainte résultant des mêmes circonstances que celles ayant donné lieu à la plainte en vertu du présent article, et que deux ou plusieurs plaintes sont soumises à l'arbitrage en vertu de l'article 1120, les plaintes devraient être entendues ensemble par un tribunal établi conformément à l'article 1126, à moins que le tribunal ne constate que les intérêts d'une partie contestante s'en trouveraient lésés.

4. An investment may not make a claim under this Section.

4. Un investissement ne peut présenter une plainte en vertu de la présente section.

Article 1131: Governing Law

Article 1131 : Droit applicable

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

1. Un tribunal institué en vertu de la présente section tranchera les points en litige conformément au présent accord et aux règles applicables du droit international.

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

2. Une interprétation par la Commission d'une disposition du présent accord sera obligatoire pour un tribunal institué en vertu de la présente section.

Appendix II

Commercial Arbitration Code, Schedule 1 to the Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.), Article 34	*Code d'arbitrage commercial, Annexe 1, de Loi sur l'arbitrage commercial (L.R.C. (1985), ch. 17 (2e suppl.)),* Article 34
ARTICLE 34	ARTICLE 34
Application for Setting Aside as Exclusive Recourse against Arbitral Award	La demande d'annulation comme recours exclusif contre la sentence arbitrale
(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.	1 Le recours formé devant un tribunal contre une sentence arbitrale ne peut prendre la forme que d'une demande d'annulation conformément aux paragraphes 2 et 3 du présent article.
(2) An arbitral award may be set aside by the court specified in article 6 only if:	2 La sentence arbitrale ne peut être annulée par le tribunal visé à l'article 6 que si, selon le cas :
(a) the party making the application furnishes proof that:	a) la partie en faisant la demande apporte la preuve :
. . .	. . .
(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or	iii) soit que la sentence porte sur un différend non visé dans le compromis ou n'entrant pas dans les prévisions de la clause compromissoire, ou qu'elle contient des décisions qui dépassent les termes du compromis ou de la clause compromissoire, étant entendu toutefois que, si les dispositions de la sentence qui ont trait à des questions soumises à l'arbitrage peuvent être dissociées de celles qui ont trait à des questions non soumises à l'arbitrage, seule la partie de la sentence contenant des décisions sur les questions non soumises à l'arbitrage pourra être annulée;

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1000-15
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON, DANIEL CLAYTON AND BILCON OF DELAWARE, INC. AND SIERRA CLUB CANADA FOUNDATION AND EAST COAST ENVIRONMENTAL LAW ASSOCIATION (2007)
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