The Bilcon NAFTA Tribunal: A Clash of Investor Protection and Sustainability-Based Environmental Assessments

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Introduction

This article considers the implications of a March 2015 ruling of a tribunal struck under the Chapter 11 investor protection provisions of the North American Free Trade Agreement (NAFTA).² The majority of the tribunal found that Canada violated NAFTA Articles 1102 (National Treatment) and 1105 (Minimum Standard of Treatment) when the federal and provincial governments refused to approve the Whites Point, Nova Scotia basalt quarry, processing facility, and marine terminal following an environmental assessment carried out by a Joint Review Panel (JRP).³ An overview of the environmental assessment process carried out for the project⁴ is followed by a summary of the findings of the NAFTA tribunal. The ruling and its implications are then assessed, along with a review of the investor protection provisions of the recently concluded Canada-European Union Comprehensive Economic and Trade Agreement (CETA). This is followed by an analysis of whether CETA’s investor protection process is likely to encounter similar challenges, particularly when considering the fair treatment of foreign investors in sustainability focused environmental assessment processes.⁵

1. The Whites Point EA Process

In 2002, Bilcon of Nova Scotia Corporation (the Claimant) initiated the regulatory process for the construction and operation of a basalt quarry, processing facility, and marine terminal at Whites Point, Digby County, Nova Scotia.⁶ Under the proposal, basalt aggregate would be taken

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⁵ Comprehensive Economic and Trade Agreement, Canada and EU, 30 October 2016, art 8.10(2)(c) (not in force) (CETA).
from the quarry and loaded onto ships for transport to New Jersey, USA. Bilcon’s application for regulatory approvals ultimately triggered federal and provincial environmental assessment processes.

After initially commencing separate and more streamlined levels of assessment, Canada’s Minister of the Environment (under the Canadian Environmental Assessment Act) and the Nova Scotia Minister of Environment and Labour (under the Nova Scotia Environment Act) ultimately agreed to carry out a Joint Review Panel (JRP) to meet the requirements of both levels of government. The Panel began its review on the November 5, 2004, with a mandate to predict and assess the environmental, social and economic impacts of the proposed project in order to inform federal and provincial project decisions. Specifically, the Whites Point JRP was charged with identifying, evaluating and reporting on the potential impacts in a manner fulfilling the terms set out in the Canadian Environmental Assessment Act (CEAA), and Part IV of the Nova Scotia Environment Act (NSEA), as identified in the Agreement between the federal Minister of the Environment and the provincial Minister of Environment and Labour.

As part of the Whites Point JRP assessment, the Claimant was required to submit an Environmental Impact Statement (EIS) in accordance with guidelines issued by the panel after consulting with the public. As was common for panel reviews under CEAA at the time, public ‘scoping sessions’ were held in January 2005 at Sandy Cove, Digby, Wolfville and Meteghan. The scoping sessions and written commentary were used by the panel to finalize and release its EIS Guidelines on March 31, 2005.

The guidelines established the panel’s expectations for the Claimant’s EIS and included the use of and respect for traditional and community environmental knowledge, public involvement, sustainable development, the ecosystem approach, and precaution. On March 31, 2006, the Claimant submitted its 3000-page initial EIS, which the Panel made available “to the public and to regulatory agencies for their reviews as to the documents’ completeness, accuracy and compliance with the EIS Guidelines.” This public and government review period, and the panel’s own review, involving two rounds of information requests, “identified some 100 deficiencies in the EIS.”

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9 Environment Act, S.N.S. 1994-95, c. 1, s. 1, and Environmental Assessment Regulations, N.S. Reg. 26/95
10 EIS Guidelines, at 5.
11 EIS Guidelines, at 6.
12 Whites Point JRP, at 3.
13 Whites Point JRP at 16.
14 EIS Guidelines, at 8-12.
15 Whites Point JRP, at 17.
16 Neil Craik, Meinhard Doelle and Fred Gale “Governing Information: A Three Dimensional Analysis of Environmental Assessment” 90: 1(2012 Public Administration) 19, at 24; Whites Point JRP, at 17. Each round of information requests involved input from the public and government officials, followed by a consolidated set of questions posed by the panel to the proponent.
When the Claimant filed its 1200-page response to the deficiencies a year later, the JRP decided that the information obtained from the Claimant was sufficient to proceed to public hearings. The hearings, held in Digby, Nova Scotia, June 16 to 30, 2007, provided an opportunity for “individuals, organizations and government representatives” to communicate their thoughts regarding the implications of the proposed project.

Based on the “scoping sessions, Environmental Impact Statement, information requests and responses, hearing transcripts and other items in the public record,” the JRP ultimately recommended that the project should not be permitted to proceed. In conducting its review, the Panel indicated that it was guided by the five principles it used to frame the EIS and the review itself, which it concluded the Claimant had not properly addressed. It found that the Claimant had failed to incorporate local knowledge into its EIS, or to create “a transparent process where community members felt that they could openly and freely express their opinions and concerns about the Project.” The panel report noted other deficiencies in the EIS, such as ambiguous, incomplete and inaccurate information, and a lack of consideration of the project’s impact on community sustainability. In the end, the JRP was not convinced the Claimant could or would develop and operate the quarry, processing facility, and marine terminal without the risk of significant adverse environmental effects and without significant negative impacts on local communities.

The Claimant’s EIS was noted for being simultaneously “overwhelming in volume” and inadequate in addressing many of the issues listed in the EIS Guidelines. The ambiguities and incomplete information hampered the JRP’s ability to properly assess some effects and identify and assess potential mitigation measures. The JRP concluded that the proposed project was not consistent with community core values, and should not be approved.

Following the release of the panel report, both the provincial and federal governments accepted the recommendations and decided not to approve the project. The Claimant did not to seek judicial review of the panel report or the government decisions, but rather decided to initiate a claim under NAFTA’s Chapter 11. Sections two and three below offer an overview and assessment of the key issues before the NAFTA tribunal and the outcome of the liability portion of the proceedings.

2. The NAFTA Tribunal Liability Ruling

17 Whites Point JRP, at 17.  
18 Whites Point JRP, at 17.  
19 Whites Point JRP, at 101.  
20 Whites Point JRP, at 101.  
21 Whites Point JRP, at 101.  
22 Whites Point JRP, at 102.  
23 Whites Point JRP, at 102.  
24 Whites Point JRP, at 101-102.
The Claimant in the *Bilcon* case submitted a claim to arbitration under the UNCITRAL Arbitration Rules (1976) pursuant to Article 1120 of NAFTA. The proceedings deal separately with liability and damages. The initial ‘liability’ process determines whether relevant provisions of NAFTA have been violated. This is followed with a separate process to resolve the issue of damages. The liability phase of the Bilcon proceedings was concluded in March 2015 with a finding that Canada had breached NAFTA when federal and provincial decision makers followed the recommendations of the JRP to not approve the quarry. This ruling of the NAFTA tribunal has since been challenged through a judicial review application before the Federal Court of Canada. At the same time, the NAFTA tribunal is now proceeding with its determination on damages.

In the liability phase of the NAFTA process, the Claimant took the position that Canada had breached NAFTA Articles 1105 (Minimum Standards of Treatment), 1102 (National Treatment), and 1103 (Most-Favoured-Nation Treatment). The focus of the Tribunal was on Articles 1105 and 1102. The majority concluded that Canada had breached Articles 1105 and 1102, while no finding was made on whether Canada was in breach of Article 1103.

**Article 1105: Minimum Standard of Treatment**

All three Tribunal members agreed on the standard for determining whether a host-nation’s actions have fallen below NAFTA’s minimum standard of treatment. Under NAFTA, “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.” All three members applied the *Waste Management* NAFTA tribunal’s formulation of international minimum standard of treatment when considering whether Canada had violated Article 1105. They all agreed that the standard carried a high threshold, and that the standard should be applied flexibly, “in light of the facts in each particular case.” It was in their assessment of whether Canada’s actions fell below the *Waste Management* standard that majority diverged from the dissent.

A key element of the *Waste Management* analysis on Article 1105 was that a breach of representations made by the host State, which were reasonably relied upon by the investor, could be used as evidence that the host State’s actions fell below the minimum standard. The majority noted that the *ADF Group* NAFTA tribunal seemed to suggest that only representations made by “authorized officials” qualify as representations that can be reasonable relied upon.

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28 *Bilcon* NAFTA Ruling, Dissent, at para 32.
The majority characterized “authorities of Nova Scotia” as having made “repeated encouragements” to the Investors, encouraging them “to engage in a regulatory approval process costing millions of dollars and other corporate resources.” The approval process was portrayed by the majority as having been “unwinnable from the outset.”30 The Tribunal’s dissenting member, Professor Donald McRae, disagreed. He characterized the “encouragements” made by the Canadian government as encouragements to invest in the project, which he believed should have no bearing on expectations that an investor will have Canadian law applied properly to it.31 The dissent pointed out that the government officials who encouraged investment in the project never made representations that the Bilcon project could avoid an environmental assessment, or that it would automatically be approved should it undergo such an assessment. The only legitimate expectation an investor could have would be that “if the requirements of Canadian law (federal and provincial) regarding environmental assessment were met its investment could go ahead.”32

The majority next concluded that the Claimant was “denied a fair opportunity to know the case it had to meet.” They found that the Claimant was not informed that “‘community core values’ (CCV) would be an overriding factor; that this factor would pre-empt a thorough ‘likely significant adverse effects after mitigation’ analysis of the whole range of project effects; and that this factor would contain elements that would effectively preclude any real possibility that an application could succeed.”33 The majority concluded that the Bilcon project was denied a fair chance to win government approval, whereas the dissent took the position that the Claimant simply “failed to make connections with Aboriginal peoples, with fishers, and with other community members that might have allowed it to provide what was requested of it.”34

The dissent accused the majority of relying on “what the Claimant’s experts and witnesses claimed, rather than what actually was said in the [JRP] hearing itself” in order to create an “aura of mistreatment.”35 Specifically, the dissent concluded that the record simply did not support the Claimant’s allegations of lack of respect paid to its experts and inappropriate demeanour of the chair of the panel of the JRP in the hearing.36 The dissent also dismissed the suggestion that the recommendation of the JRP for a moratorium on quarry operations until a coastal planning process had been completed was evidence of bias against the Claimant.37

The idea that ‘community core values’ represented an unprecedented deviation from the normal mode of assessment employed by environmental review panels was “the key component of the majority’s conclusion there had been a violation of Article 1105.” 38 In listing the grounds upon which it had determined Canada had violated Article 1105, the majority stated that the CCV

37 It is worth pointing out that the recommendation for a moratorium, if it had been accepted, would have applied to domestic as well as foreign investors.
approach of the JRP was the decisive and overriding consideration.”39

The majority highlighted the fact that ‘community core values’ was “not mentioned in any of the statutes, regulations, or EIS Guidelines.”40 In their determination, “since no review panel had previously used a similar concept, the panel's decision could not be consistent with investors' legitimate expectations.”41

McRae defended the JRP’s use of the ‘community core values’ terminology, arguing it was not a novel factor, but rather “a restatement encapsulating the various ‘human environment effects’ (socio-economic effects) that a project can have and hence a component the JRP was entitled to assess under Canadian law.”42 As he stated in his dissent, “the ‘core values’ of the Digby Neck and Islands communities or the ‘community core values’ revolved around the matters discussed in the human environment effects assessment made by the Panel.”43

If CCV was merely a restatement of effects on the human environment, as the dissent concludes, the Claimant should not have been surprised when they were considered in the environmental assessment performed by the JRP. In McRae’s view, the Claimant was aware of what was required to satisfy the JRP’s human environment effects analysis, and that this analysis would encompass “aboriginal resource use, community history and heritage, community character and attitudes etc.” but that the Claimant was not willing or able to satisfy the JRP that “the project could operate consistently with those core values.”44

McRae accused the majority of failing “to look at the JRP report itself and see how the concepts of ‘core values’ and ‘community core values’ arose and what were their referents.”45 According to McRae, the fact the JRP did not perform a ‘likely significant adverse effects after mitigation’ assessment was not an oversight, but a result of the JRP belief that the negative social and economic effects of the Bilcon project would be too large, and that individual mitigation measures would be inadequate to mitigate the “effects of the project on the human environment as a whole.”46 McRae did not reach a firm conclusion as to whether the JRP’s decision not to identify mitigation measures was consistent with Canadian law, but defended the JRP’s approach, arguing that “pointing out possible individual mitigation measures served no value” when the JRP’s concerns about the potential human and environmental impacts were so numerous and fundamental.47

Having defended the ‘new approach’ taken by the JRP, McRae concluded that the Panel was not arbitrary in its decision-making. As McRae saw it, the majority’s reasoning seemed to imply the JRP’s new standard of assessment was a deviation from Canadian law, which suggests that any

39 Bilcon NAFTA Ruling, Majority, at para 452.
40 Bilcon NAFTA Ruling, Majority, at para 503.
42 Bilcon NAFTA Ruling, Dissent, paras 15–23). See also, Laura Létourneau-Tremblay, Daniel F Behn “Judging the Misapplication of a State’s Own Environmental Regulations” 17 (2016 JWIT) 823, at 827.
43 Bilcon NAFTA Ruling, Dissent, at para 23.
46 Bilcon NAFTA Ruling, Dissent, at paras 29.
47 Bilcon NAFTA Ruling, Dissent, at paras 29-30.
potential deviation from Canadian law would meet the *Waste Management* standard for arbitrariness. The dissent concluded that there was no “suggestion that the Panel had deliberately or wilfully disregarded the law to be applied,” and that the “Panel thought that what it was doing was justified and within the law.”

**NAFTA Article 1102: National Treatment**

The majority’s National Treatment analysis, which requires that investors from another NAFTA party be treated “no less favorably” than domestic investors “in like circumstances”, appears to focus on whether and how the JRP panel failed to perform a “likely significant adverse effects after mitigation” analysis, and, if so, whether this amounted to a violation of Article 1102. It remains unclear throughout the majority reasons, however, whether the comparison to other projects was based on the rejection of the Bilcon project, on the use of CCV, on the failure to identify mitigation measures, on the weight given to local impacts, or on some combination of these factors.

The majority’s finding of a violation of Article 1102 is formally based on its conclusion that the *Bilcon* Investors “were treated in contravention of State law and another type of investor (national investors) were treated more favourably because they had the privilege of having Canadian domestic law applied properly.” There is no clear finding of exactly what Canadian domestic law was violated in the assessment process and no analysis of the applicable legislation in relation to the potential violations identified. Focusing the National Treatment analysis on the illegal or improper application of a domestic law by a host nation is a novel and troubling approach to finding a violation of National Treatment obligations. It is fraught with difficulty, as it requires the tribunal to make findings of fact and law in a legal environment that it is not familiar with.

The majority confirmed that the Claimant bore the legal burden of providing evidence of a breach of Article 1102. The tribunal in the NAFTA ruling involving *UPS* established that the claimant had the burden of establishing three things: that the host nation had accorded treatment to it with respect to their investment, that the claimant or the investment was in “like circumstances” with local investors or investments, and that the NAFTA party member treated the foreign investor or investment “less favourably” than those domestic investors or investments in like circumstances. The legal burden remained with the claimant throughout, and a failure to

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48 *Bilcon* NAFTA Ruling, Dissent, at para 37. Neither the majority nor the dissent ever resolve whether the Panel acted within the legislative parameters set by federal and provincial EA legislation.

49 *Bilcon* NAFTA Ruling, Dissent, at para 37.

50 *Bilcon* NAFTA Ruling, Majority, at para 689.

51 Laura Létourneau-Tremblay, Daniel F Behn “Judging the Misapplication of a State’s Own Environmental Regulations” 17 (2016 JWIT) 823, at 831.

52 Laura Létourneau-Tremblay, Daniel F Behn “Judging the Misapplication of a State’s Own Environmental Regulations” 17 (2016 JWIT) 823, at 831.

53 *Bilcon* NAFTA Ruling, Majority, at paras 717-718.

prove one of the three elements would mean the breach of Article 1102 had not been proven. The majority was satisfied that the Claimant had proven these elements.

Relying upon the authority of the Feldman/Karpa tribunal, the majority noted that a claimant establishing discriminatory treatment does not have the burden of establishing discriminatory intent. “[R]equiring [a] foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government.” Additionally, were Article 1102 breaches only provable in instances where discrimination had been explicit, and intentional, “it would greatly limit the effectiveness of the national treatment concept in protecting foreign investors.” Article 1102 does not contain a “justification clause” by which a host nation can rely upon to excuse their discriminatory acts.

The approach taken in the Pope & Talbot case suggests that a host nation may be able to excuse differential treatment of a foreign investor, but only if the host-nation can provide evidence of “reasonable and non-discriminatory domestic policy objectives” that have placed an “incidental and reasonably unavoidable burden on foreign enterprises.” Differences in treatment that do not have a “reasonable nexus to rational government policies” will therefore presumptively violate Article 1102. The Bilcon Tribunal decided that the Claimant had satisfied the three elements of the UPS test, and this meant that prima facie discriminatory treatment had been shown.

The majority began its analysis by observing that it was an unusual step to subject the Claimant’s project to a joint panel review process. An Expert Report submitted on behalf of the Claimant indicated that only 0.3% of environmental assessments (EAs) were carried out by review panels, and that the kinds of projects assessed by JRP typically involved “novel or inherently dangerous activities such as the handling of liquefied natural gas or radioactive materials.” None had involved a quarry, though many had involved mining projects of different scales and complexities. However, the limitation period for challenging the decision to refer the project to a joint panel had expired.

56 Bilcon NAFTA Ruling, Majority, at para 718.
57 Bilcon NAFTA Ruling, Majority, at para 719.
60 In other words, there is no GATT Article XX-style general exception applying to NAFTA’s investment provisions (including Art 1102).
61 Bilcon NAFTA Ruling, Majority at para 723.
62 Pope & Talbot Inc v Canada (10 April 2001), Award on the Merits of Phase 2, at para 78. online: <https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf>.
63 Bilcon NAFTA Ruling, Majority, at para 723.
64 Bilcon NAFTA Ruling, Majority, at para 688.
65 Bilcon NAFTA Ruling, Majority, at para 688.
66 Bilcon NAFTA Ruling, Majority, at para 688.
The majority then proceeded with the comparator analysis under Article 1102. The treatment of comparator EAs illustrates how unclear the majority reasoning is with respect to its finding of a violation of Article 1102. The majority considered two comparator cases where a joint process was performed: the Rabaska and Cacouna Energy LNG Terminal Projects. The majority highlighted that despite public opposition to the projects, both received the benefit of a “likely significant effects after mitigation” assessment, and neither was subject to the “community core values” factor.  

Comparator cases where a JRP was performed:

- **Rabaska** - The Tribunal found the Rabaska JRP did not take one side or the other in the local community debate, or allow local opposition to pre-empt the carrying out of a “likely significant effects after mitigation” assessment of the environmental effects of the project.
- **Cacouna Energy LNG Terminal Project** - The Cacouna Panel recommended measures that could facilitate community acceptance of the project.

The majority did not clarify how these similarities and differences informed the finding that Bilcon received less favourable treatment. Would equal treatment require the Bilcon panel to ignore local opposition to the project because the panel in Rabaska approved the project in spite of opposition? Would equal treatment require the Bilcon panel to reach the same significance finding for the same impacts? Does equal treatment mean only the same factors can be considered? Does it mean the Bilcon panel could not consider the project’s compatibility with CCV and had to identify mitigation measures even if it recommended against approval of the project?  

The Claimant submitted a number of other comparator cases that were not subjected to a JRP, alleging that domestic investors had received more favourable treatment. The majority found that in three cases, the Belleoram, Aguathuna and Tiverton projects, which each involved a marine terminal component of a project that took place in an ecologically sensitive coastal area, the domestic investors had received more favourable treatment than the Bilcon investors in sufficiently similar circumstances.

Comparator assessments used by the tribunal where a JRP was not utilized:

- The **Belleoram** Project - a quarry and terminal project that would have covered “six-times the area” as the Bilcon project, and produced 300% more aggregate annually.
- **Aguathuna Quarry and Marine Terminal** - a project in Newfoundland and Labrador, for which the Tribunal provides few details.
- **Tiverton Harbour** - a project that was to be completed near the Bilcon site, involving blasting. The project involved a marine terminal but no quarry. A screening level of assessment was carried out, not a JRP. There was no significant public opposition, and the blasting was only to be temporary.

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67 Bilcon NAFTA Ruling, Majority, at paras 707-710.
68 Bilcon NAFTA Ruling, Majority, at para 696.
The majority did not limit their comparison to JRP s, as Canada had suggested, because to do so would “unreasonably limit the examination of comparisons that are relevant in light of the objects of Chapter Eleven.” The focus of the majority’s analysis is based on its finding that the JRP failed to perform “a likely significant adverse effects after mitigation” analysis, and that the “community core values” factor had only been applied to Bilcon, thereby subjecting the Claimant to a harsher standard of treatment than what was afforded to the domestic investors. Ultimately, there is little to take from the Article 1102 analysis other than a reiteration of the majority’s findings with respect to Article 1105 that the Panel’s approach was different from other EAs in its consideration of the project’s compatibility with CCV, and in its refusal to identify mitigation measures.

Professor McRae disagreed with the majority finding that the JRP panel’s actions constituted a violation of Article 1102. In his view, the Claimant was treated in accordance with Canadian law, meaning there had been no violation of National Treatment, but he did not elaborate upon the grounds on which this opinion was based beyond the analysis he offered in the context of Article 1105. This is not surprising given that the majority, in spite of its reference to comparator EAs, does not seem to go beyond its findings under Article 1105 that the JRP should not have relied on community core values, and should have identified mitigation measures.

**NAFTA Article 1103: Most-Favoured-Nation Treatment**

The Tribunal elected to leave the matter of whether Canada was in breach of Article 1103 undecided, given it would not effect the damages for the finding of a breach of Article 1102, and because both the Claimant and Canada had focused their submissions on Articles 1105 and 1102.

### 3. Assessment of the Bilcon NAFTA Liability Ruling

The Bilcon NAFTA liability ruling illustrates a number of challenges that arise from having trade tribunals sit in judgment of complex domestic non-trade proceedings such as environmental assessments. In its judgement, the majority of the tribunal demonstrates how difficult it is for a NAFTA tribunal to adequately appreciate the legal and factual context of the actions they are being asked to judge. The problem is especially evident in the Article 1102 analysis in which the majority of the tribunal seeks to carry out a comparator analysis of other assessments. The end result is an inevitably superficial analysis that seems largely driven by the majority’s intuition that the Claimant was treated unfairly. This conclusion is based on the majority’s acceptance of the Claimant’s version of events, rather than its own assessment of what transpired. It is impossible to discuss in detail all the instances in the majority ruling that demonstrate this problem, but a few particularly problematic aspects of the ruling are highlighted in this section.

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69 Bilcon NAFTA Ruling, Majority, at para 701.
70 Bilcon NAFTA Ruling, Majority, at para 701-705, 716.
71 Bilcon NAFTA Ruling, Dissent, at para 53.
72 Bilcon NAFTA Ruling, Majority, at paras 728-729.
At the heart of the majority’s ruling under Articles 1105 and 1102 is the use of community core values. The treatment of this issue serves to illustrate the problem of having a NAFTA tribunal sit in judgment of an EA process. Perhaps most importantly, the majority fails to see CCV for what it is, and for what the dissent recognizes it to be - a conclusion about the environmental, social, economic and cultural impacts of the project on local communities. CCV was not just one significant adverse effect identified by the JRP. It represented the Panel’s assessment of the combination of all local impacts.\(^73\) The Panel simply concluded, as it was entitled to consistent with the evidence before it, that the project would have a long list of negative effects on local communities that far outweighed the only positive impact of a few new jobs. The JRP concluded that these jobs could be more than offset by losses in other sectors of the local economy, such as fishing and tourism. The Panel’s discussion of core values and its main recommendation are particularly important in understanding its use of CCV. In these sections of the report, the Panel concludes that the project would change community character and identity, social networks and community cohesion, and would therefore not be consistent with core values and community visions of the future. It is quite clear from this part of the panel report that the conclusion that the project was not consistent with CCV was shorthand for all the negative impacts the project would have on the local communities.\(^74\)

To fully understand what transpired with respect to community core values, it is important to go back to the federal and provincial EA legislation under which the Whites Point Panel was established. The federal Act, CEAA 1992 (since repealed), included a definition of environmental effect that is focused on biophysical changes and socio-economic changes that result from biophysical changes. Under CEAA 1992, socioeconomic effects that are not linked to biophysical changes caused by a proposed project are not environmental effects, though they may still have relevance for decision makers (such as in the context of whether significant adverse effects are justified in the circumstances). Under the provincial EA process, all socio-economic effects of a project are considered environmental effects. As is common for joint review panels in this situation, the terms of reference for the Whites Point Panel include the broader social and economic effects under the mandate of the JRP, essentially leaving it to the federal decision maker to sort out which effects identified by the Whites Point Panel are considered to be environmental effects for purposes of the federal decisions under CEAA.

When the majority talks about the Panel’s failure to conduct a proper analysis of the proposed project’s likely significant adverse effects including mitigation, and somehow replacing this analysis with the test of CCV, it ignores the fact that the JRP was asked to consider the full range of “effects”, not just biophysical effects and socio-economic effects that flow from biophysical effects. In other words, the Panel’s careful analysis of the socio-economic effects of the project on the surrounding communities is exactly the analysis they were supposed to carry out. Yet the majority of the tribunal is critical of this analysis. It so happens that the Whites Point Panel identifies significant “socio-economic” rather than “biophysical” effects. It seems to conclude, though is far from clear on this point, that at least some of the biophysical effects can be mitigated so that they do not cross the significance threshold. The report is clear in applying

\(^73\) The dissenting member, Professor McRae, appears to be the only tribunal member with relevant domestic environmental law expertise.

\(^74\) Whites Point JRP, Discussion of core values at pg 99, and Recommendation 1 at pg 101.
appropriate and well-established methodologies to its analysis of the socio-economic effects of the project. As pointed out by the dissent, the concept of “community core values” only appears toward the end of the report, making it clear that it is a way of summing up the Panel’s conclusions rather than a methodology for evaluating the project.

The majority wrongly characterized a legitimate conclusion about the most serious problem with the proposed project as an overriding factor that it somehow wrongly construed as a community veto over the project. There is no support for this on the record of the EA. The evidence is that the conclusion about CCV was based on the JRP’s assessment of the local impacts and benefits of the project, not based on who was in favour and who was against the project. The outcome was far from predetermined. A proponent who had made an effort to engage with the community, address community concerns, and seek ways to design its project to be more compatible with the existing social, economic, cultural and environmental context may very well have succeeded in convincing a panel that it would offer net benefits to local communities. This is what responsible proponents do.

The majority’s ruling on CCV is troubling for effective EA. It suggests that it was inappropriate for the JRP to consider the disproportionate negative impact of the project on the local community, and that most of the benefits would go elsewhere. In their judgement, this amounted to unfavourable treatment of a foreign investor. There is nothing in CEAA or NSEA to suggest that the JRP’s considerations were not appropriate, and many EAs involving Canadian proponents have taken the geographic distribution of benefits and burdens into account. This does not give local communities a veto, as there are many ways to ensure local benefits, and there is nothing to prevent a JRP or government from still approving a project in the face of negative local impacts.75

The tribunal’s treatment of the JRP’s failure to propose mitigation measures as an alternative to rejecting the project further serves to illustrate how ill equipped the tribunal was to assess the adequacy of the EA process. First, at the time there really was no precedent one way or the other about the need for a JRP that recommends the rejection of a project, to suggest terms and conditions in case its recommendation is not accepted. Two of the comparator panel reports referred to by the majority on this point, the Lower Churchill and the Prosperity Mine, actually did not recommend rejection of the project. The third, the Kemess Mine, was conducted at the same time as the Whites Point review and therefore could not have served as a precedent for the Panel. Furthermore, there is no requirement either in the applicable legislation or the terms of reference for the Panel that suggests they had an obligation to propose terms and conditions for approval as an alternative to its recommendation that the project not proceed. In short, the suggestion that the JRP failed to do its job by not offering an alternative to rejecting the project is without legal foundation.

The tribunal majority then confuses the question about proposed terms and conditions for approval with the Panel’s obligation to make findings about likely significant adverse environmental effects of the project. The tribunal majority in fact confuses three different issues: the proposed terms and conditions for approval; the Panel’s obligation to make findings about likely significant adverse environmental effects of the project; and the need for the panel to consider mitigation measures in making its significance determinations. There is little doubt that the JRP failed to complete its analysis with respect to a number of environmental effects of the project. There is a lot of discussion concerning biophysical impacts in the Panel’s report, but no clear statements on the significance of project impacts on right whales, lobster, groundwater, and endangered plant species.

This legitimate criticism of the report is largely absent from the tribunal’s assessment. Instead, it confuses terms and conditions with mitigation, and then seems to suggest that the Panel somehow failed to consider ways to mitigate the impacts it identified. It is important to note that it is not the Panel’s job to find ways to mitigate project impacts; it is the Panel’s job to determine whether proposed mitigation is likely to be effective in reducing or eliminating impacts. As pointed out by the dissent, the problem was not that the Panel failed to consider mitigation, but that it concluded that the mitigation measures proposed by the proponent would not be effective in addressing the fundamental problems it had identified with the project, in particular the project’s overwhelmingly negative impact on local communities.

The tribunal majority furthermore misunderstood the role of the JRP in filling information gaps left by proponents. It suggested that the Panel should have done its own investigation to fill information gaps, since it had the power to subpoena witnesses and call its own experts. In practice, panels generally do not have the resources or time to retain their own experts to fill information gaps; they largely rely on the proponents and intervenors to provide the information they need. More fundamentally, it is amazing to suggest a proponent can refuse to provide information required under the EIS guidelines or to propose effective mitigation measures, and then complain that the panel did not retain or call experts to fill the gaps.76

A particularly problematic aspect of the majority decision is its use of the two environmental law expert reports filed on behalf of the Claimant. While both David Estrin and T. Murray Rankin have years of experience in environmental law and in environmental assessments, their contributions to the NAFTA process were more in the nature of legal submissions on behalf of the Claimant than independent “expert reports” in any real sense. The reports advance a one-sided interpretation of EA generally and the federal EA process in particular that is shaped by experience representing project proponents rather than by an objective assessment of applicable legislation and case law. Furthermore, neither has any experience of particular expertise with respect to the Nova Scotia Environment Act and its environmental assessment process. The tribunal majority clearly was in no position to reach its own conclusion on the state of the applicable law or EA practice, and essentially just accepted the Claimant’s expert reports.77

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76 Bilcon NAFTA Ruling, Majority, at par 551.
77 Bilcon NAFTA Ruling, Majority, at par 600.
In the process, the majority accepted Mr. Estrin’s position that the Claimant’s EIS was a “stellar report” despite evidence to the contrary from the actual assessment, including the many deficiencies identified by governmental and non-governmental intervenors, witnesses at the hearing, and the Panel itself. The majority failed to take note of the fact that the EIS was prepared under the supervision of the Claimant’s representative in Nova Scotia with limited EA experience, rather than by a professional consultant, as would have been the norm at the time.\(^{78}\)

The tribunal accepted the views of a journalist and Mr. Estrin that the JRP chair was biased against the proponent, without considering the context of the Panel having spent years trying to get the proponent to do its job. The tribunal failed to do its own investigation into what had happened, and as a result never appreciated that this proponent did not do its job. Bilcon was unresponsive to information requests, misapplied concepts such as adaptive management, precaution and cumulative effects, and alienated the community and the Panel in the process. This resulted in the JRP’s assessment that it was unlikely that this project could be operated in harmony with existing sectors of the economy such as fishing and tourism.

In its comparator analysis under Article 1102, the majority failed to appreciate that significance - the key test in many EA processes - is context specific. This is why the term tends either not to be defined, or defined in very general terms. The implication of the majority’s reasoning is that the same scale of impact should result in the same finding in different EAs. This ignores the fact that significance findings are context specific, and that they are predictive with inevitable uncertainties. What is significant in a specific location in the Bay of Fundy may not be significant in the Northumberland Strait, or even another part of the Bay of Fundy. What may be significant in a community dependent on ecotourism or the lobster fishery may not be significant in a context of communities with diverse or industrial economies. What may have been found to be insignificant in a screening level assessment may be found to be significant on closer examination during the course of a panel report, or as a result of new information not available in a previous assessment.\(^{79}\) The suggestions that proponents in the comparator assessments were in ‘like circumstances’ under Article 1102 demonstrates a misunderstanding of the complexity and individual nature of project EAs.

The majority seemed to be under the impression that joint review panels are required to make separate recommendations to federal and provincial decision makers, and guided by federal and provincial EA legislation in doing that. This might be a good idea, but has not been the practice in this country. Rather, it is the responsibility of cooperating governments to come up with terms of reference for the JRP that meet the needs of both levels of government. The panel’s job is to fulfill its mandate under the terms of reference. The terms of reference for the Whites Point Panel, and in fact most terms of reference for JRPCs, do not ask the Panel to separate out the basis for federal and provincial decisions. This is left to federal and provincial decision makers to sort out after the completion of the review.

It is clear that the tribunal was not in a position to draw any meaningful conclusions from its comparison to other assessed projects. The conclusions are superficial. For example, it is

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\(^{78}\) Bilcon NAFTA Ruling, Majority, at par 552.
\(^{79}\) Bilcon NAFTA Ruling, Majority, at par 561.
meaningless to compare Tiverton Harbour to Whites Point based on the scale of the blasting without considering the other elements of the projects, the temporary nature of the Tiverton Harbour construction, the different levels of assessment, the role of the provincial EA process requirements, and the local benefits of the respective projects. Similar problems arise with the conclusions drawn from other comparator assessments, such as the Rabaska project and its treatment of local opposition.

Professor McRae was correct in viewing the majority’s decision as “a remarkable step backwards in environmental protection.” He stated the Tribunal’s ruling was “not only an intrusion into the way an environmental review process is to be conducted, but also an intrusion into the environmental public policy of the state.” The Tribunal had, in his opinion, added “a further control over environmental review panels,” making it possible that any perceived error of law, or perceived jurisdictional exceedance could now give rise to NAFTA Chapter 11 damages. The implication is that environmental review panels will be more reluctant to give “weight to socio-economic considerations or other considerations of the human environment,” as even potential violations of domestic law can give rise to Chapter 11 claims.

In short, with the possible exception of failing to make clear significance findings on individual biophysical impacts, the Whites Point Panel did what it was asked to do. Given the Panel’s conclusion about the impact on local communities, it is reasonable to assert that findings on the biophysical impacts would not have affected the outcome, except to potentially reinforce the conclusion that the project should not be approved. This leaves the question of whether provincial and federal decision-makers made appropriate decisions based on the report. In this regard, it is clear that the tribunal majority had no understanding of the provincial EA process, and seems to acknowledge this. The proponent’s legal experts are similarly limited in their expertise regarding CEAA. As a result, the majority fails to appreciate that there is no legal basis on which to challenge the provincial decision. Because of the broad definition of environmental effect that includes all socio-economic effects, and the broad discretion left to the provincial Minister to decide whether to approve a project, there is no question that the provincial Minister acted within his legal authority when he followed the recommendation of the Whites Point Panel to reject the project.

A more interesting legal question is whether the federal decision maker, in the form of the Minister of Fisheries (with approval of the Governor in Council), had the legal authority to reject the project in light of the Whites Point Panel’s conclusions and recommendations. CEAA essentially states that if a project is likely to cause significant adverse environmental effects, and those effects cannot be justified in the circumstances, the Minister may not approve the project. If significant adverse environmental effects are justified, the Minister may approve the project. The Act is silent on whether the Minister has discretion to reject a project that does not cause a significant adverse environmental effect, but is otherwise not deemed acceptable for reasons that

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80 Bilcon NAFTA Ruling, Dissent, at para 51.
81 Bilcon NAFTA Ruling, Dissent, at para 48.
82 Bilcon NAFTA Ruling, Dissent, at para 48.
83 Bilcon NAFTA Ruling, Dissent, at para 51.
84 See Environment Act, S.N.S. 1994-95, c. 1, s. 1, and Environmental Assessment Regulations, N.S. Reg. 26/95
could include the project’s adverse socio-economic impacts. What is clear is that in such a case, the Minister has the ability to approve the project.

In the Bilcon review, we don’t have a clear separation of socio-economic effects of the project that would fall under the definition of environmental effect under CEAA and those that would not. We also have the somewhat unusual situation of a panel concluding that the overall socio-economic effect of the project is significantly adverse, rather than pinpointing one individual effect as significant. Added to all this is the Minister’ discretion to reject the panel’s conclusions and recommendations (with an obligation to offer reasons), and regulatory discretion under the Fisheries Act, and we are left with a complex set of legal questions about whether the federal Minister of Fisheries had an appropriate basis on which to reject the project. The situation does raise legitimate legal questions, but the answers are far from clear. What is clear is that a NAFTA tribunal is not the place to resolve these questions.

The proponent had every opportunity to challenge the federal decision through a judicial review application before the Federal Court. This would have been a wonderful opportunity to clarify a number of issues that practicing lawyers and legal academics have been debating for 20 years. None of this literature, supportive of what the Whites Point Panel and the federal Minister did in this case, was referenced in the NAFTA ruling. The failure of the proponent to pursue any of the legal remedies available to it in Canada should, on its own, have resulted in the dismissal of this case, as it leaves too much legal uncertainty for the NAFTA tribunal to deal with. There may be cases where this is not a problem, but in the Bilcon case, the failure to explore readily available domestic remedies put the majority of the tribunal, with no relevant expertise to draw upon, in an impossible situation.

There are other concerning aspects of this ruling. The suggestion that Whites Point Panel members may have been biased is one of them, as all three have a long-standing reputation of honesty and integrity, and the chair is among the most experienced panel chairs in the country. The comparative analysis carried out by the majority of the NAFTA tribunal to show that the proponent was treated differently on the basis that it was a foreign company, is also troubling and deserves a more detailed review than is possible here.

Finally, it is problematic for the tribunal majority to suggest that representations made by elected officials and senior bureaucrats seeking to attract the investor to Nova Scotia could be interpreted as assurances that the project would be approved. Any suggestion that such statements could reasonably have been relied upon raises concerns, as it was plain from applicable federal and provincial legislation that a decision could only be made by responsible Ministers at the conclusion of the environmental assessment process, and that rejection of the project was an outcome the legislation contemplated.


86 A full analysis would draw on the full record of each comparator EA the tribunal relied upon to consider in detail the appropriateness of the comparison, and the conclusions drawn based on the comparison.
To those who engaged in the EA process in good faith and at great personal cost and sacrifice, the chill created by the ruling has been unsettling. The concern is that when officials speak out in favour of a project before an EA is conducted, they may be in violation of NAFTA if they later take the advice of an independent EA that concludes the project should not be permitted to proceed because of its negative impacts on local communities. While it is fair to suggest that it would be better if officials stayed neutral about proposed projects until they have all the information, this does not always happen in practice. This is particularly true at provincial levels, where elected officials often work hard to attract economic development. The whole point of EA processes is to encourage more informed decisions than are possible without the assessment.

In conclusion, the tribunal majority considered many issues without fully appreciating the context. Examples include its superficial comparator analysis, its exploration of the scoping hearings without appreciating the change in practice over time, and its consideration of the panel hearings without fully appreciating the pre-hearing process.

Perhaps the most fundamental problem with the ruling is that the tribunal majority failed to recognize the ongoing transition of EA practice in Canada from a focus on biophysical effects toward a more comprehensive sustainability approach, which includes the idea that projects should make a net contribution to sustainability in affected communities. This transition did not start with the Whites Point Panel, but it certainly is part of the trend. Most importantly, as I have argued elsewhere, it is a trend well within the legal parameters of the environmental assessment legislation in place at the federal and provincial levels at the time. Unfortunately, the tribunal majority chose to listen to detractors of this trend, rather than appreciate that it was taking place, that it was within the law, and that the proponent had received adequate notice of the approach. The trend toward sustainability-based assessments has since continued.

4. Will the CETA Investor Protection Process Encounter Similar Challenges?

The Bilcon ruling was released in the later stages of the Canada-EU free trade negotiations that have since concluded. In fact, changes were made to the investor protection provisions of the

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90 Comprehensive Economic and Trade Agreement, Canada and EU, 30 October 2016, art 8.10(2)(c) (not in force) (CETA).
draft agreement after the release of the Bilcon ruling, though these changes were mainly motivated by other concerns. 91 Nevertheless, the timing provides the opportunity to consider whether negotiators were sensitive to the concerns this case illustrates. A comprehensive assessment is not offered here. Rather, the purpose is narrower; to consider whether the CETA provisions respond to the shortcomings of the NAFTA investor projection provisions that have been exposed by the Bilcon case. In order to assess whether the CETA investor protection provisions address some or all of the challenges that arise from the previous analysis, the perceived flaws in the NAFTA process that arise from the assessment of the Bilcon case are first summarized.

To be clear, the goals of the relevant substantive provisions of NAFTA - to ensure a foreign investor is treated no less favourably than domestic and other foreign investors, and according to accepted minimum international standards of treatment - is not in question in this article. Furthermore, the substantive tests are assumed to be appropriate, and while they are debated elsewhere, 92 it is contended here that they did not have to lead to the undesirable outcome in the Bilcon case. 93 What is in question, rather, is the process by which the Bilcon NAFTA tribunal sought to determine whether the treatment of a foreign investor violated these provisions.

For purposes of this section, the following factors are proposed to have contributed to the majority of the Bilcon tribunal wrongfully concluding that the treatment of the Claimant was in violation of Article 1102 and 1105 of NAFTA:

- The majority members of the tribunal had no expertise in key areas of domestic law, including the federal and provincial environmental legislation and case law.
- The majority had no expertise in environmental assessment practice, particularly with respect to the processes under the Canadian Environmental Assessment Act and the Nova Scotia Environment Act.
- The majority relied on “expert reports” from legal practitioners who made submissions to advocate on behalf of the Claimant rather than offer expert testimony to assist the tribunal in its understanding in domestic law and EA practice.
- The majority relied on affidavits filed on behalf of the Claimant rather than engage directly with the record of the environmental assessment process (particularly the inadequacy of the EIS, the many deficiencies identified in information requests from intervenors, government officials and the panel itself, and the conduct of the hearings).
- The majority carried out comparator assessments between the Whites Point Panel Review and other environmental assessments without adequately considering the process differences and the evolution of environmental assessment practice over time. This resulted in a

91 The change to the investor protection provisions was announced in February, 2016. The announcement from the European Commission is available online at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468>.
93 While there are some subtle differences, the substantive obligations under CETA are substantially similar.
superficial comparison with a focus on whether the projects involved some similar activities, whether the comparator projects were approved, whether the assessments used the concept of community core values, and whether the assessments identified mitigation measures.

There are a number of changes in CETA that have particular potential to be relevant. Among them are the shift from ad hoc tribunals to a standing roster of tribunal members, the introduction of an appellate tribunal, the establishment of a Committee on Service and Investment, and substantive provisions that include separate chapters on sustainable development and the environment.

On the surface, the shift to a standing roster of tribunal members may appear to be an improvement.\textsuperscript{94} It certainly offers potential for greater expertise in areas frequently adjudicated, more consistency, and could improve the independence of tribunal members from the Parties that appointed them. However, there is no reason for optimism that the changes in CETA will result in the kind of expertise that was missing in the Bilcon tribunal. Expertise in environmental matters, sustainability, or domestic environmental law have not been identified as requirements for tribunal members. More importantly, the move away from ad hoc appointments reduces the likelihood that tribunal members will have expertise that is particularly relevant to the case to be adjudicated. Furthermore, the possibility of single member tribunals further reduces the chance of diversity of expertise, and of relevant expertise of domestic environmental law and practice, as the single tribunal member would have to be of a non-party nationality.\textsuperscript{95} In short, whatever the other benefits of the standing tribunal, it is unlikely to resolve the Bilcon problems identified above.

There are no other significant changes in the tribunal process itself.\textsuperscript{96} CETA offers some added clarity on the role of domestic law, but nothing that would seem to address the Bilcon problems.\textsuperscript{97} There is no clarity on the role of domestic law experts or provision for qualified independent experts to ensure panels have access to an unbiased assessment of the state of domestic law. There is no requirement to exhaust domestic remedies, a requirement that would ensure panels have the benefits of the rigorous factual and legal analysis of domestic courts to inform their findings. There is no enhancement of the potential for civil society interventions, which would enhance the opportunity to ensure that the panel understands the factual and legal context within which it is being asked to determine whether a foreign investor has been treated unfairly.

The addition of an Appellate Tribunal does offer some potential to reverse particularly troubling tribunal rulings. Of course, it could also overrule good tribunal rulings. Much will depend on the composition and focus of the Appellate Tribunal, and on the level of deference it will grant tribunals on findings of fact and domestic law. Fundamentally, there is little in the design of the Appellate Tribunal to suggest it will be more sensitive to the concerns explored here than

\textsuperscript{94} CETA, Article 8.27.
\textsuperscript{95} CETA, Article 8.23(5), 8.27(9).
\textsuperscript{96} CETA, Article 8.23.
\textsuperscript{97} CETA, Article 8.31(2).
tribunals. The concerns regarding the desired expertise and the process for appointing members of the Appellate Tribunal are similar, as is the lack of potential for civil society interventions.

In short, there is little in the design of the CETA investor protection process to give rise to optimism that the Bilcon problems discussed here will not be repeated under CETA. There are, nevertheless, a few provisions that offer at least some opportunities to take a different path. First, CETA provides for the establishment of a Committee on Services and Investment that offers a potential forum for raising concerns in case of or perhaps even in anticipation of a tribunal decision similar to Bilcon.\(^98\) There are also individual chapters devoted to sustainable development and the environment that provide the opportunity to further consider the issues raised here, but the aspirational nature of these chapters minimizes their potential influence.\(^99\)

Unfortunately, there is only a single reference to impact assessment in the sustainable development chapter. The unique role of impact or environmental assessment in the regulation of environmental protection and sustainable development, and its unique challenges for the investor protection process, are not explored.

If the parties wanted to address the issues raised here, they could do so either by revising the Investment chapter or by adopting binding interpretive rulings (e.g. on the recommendation of the Committee on Services and Investment through 8.31.3). Both routes would require consensus. It is also worth considering CETA Article 28.3.2, which allows states to invoke a general exception. This general exception applies to national treatment, but not to the CETA equivalent to minimum standards of treatment.

**Conclusion**

The Bilcon tribunal ruling raises a number of concerns about the ability of investor protection tribunals to properly assess whether a foreign investor has been treated fairly under a domestic environmental assessment process. Among the challenges is the lack of familiarity of tribunal members with relevant domestic law, their lack of familiarity with environmental assessment practice in the relevant jurisdictions, and the process used to make findings of fact and domestic law. In addition, when facing a challenge arising from an environmental assessment process, investor protection tribunals will have to contend with the fact that EA processes are intended to be flexible, iterative, and do not lend themselves to simplistic comparisons and analysis to determine whether a foreign investor has been treated unfairly or differently. In the end, whatever the reason, the Bilcon majority confused justifiable differences in treatment with nationality-based discrimination.

Environmental assessment processes differ from regulatory processes, which generally operate on the basis of clear standards against which the fairness of treatment of a foreign investor can be measured. This problem has become more complex and pronounced as environmental assessment processes shift from a focus on biophysical effects to a much broader consideration of the impacts, benefits, risks and uncertainties associated with a proposed activity. At the same

\(^98\) CETA, Article 8.44.
\(^99\) CETA, Chapters 22, 24.
time, there is a clear trend towards meaningful assessment of the sustainability impact of proposed activities on affected communities and future generations.

The Whites Point EA was, of course, part of an ongoing transition in how environmental assessments are conducted in Canada. Some elements, such as its use of scoping hearings, were standard practice at the time, but have since been discontinued. Other elements, such as the focus on the contribution of the project on the sustainability of local communities, were fairly new and innovative at the time, but are now more common. Other unique aspects of the Whites Point process were a direct result of the proponent’s unusually adversarial approach to engaging with local communities and the Panel itself.¹⁰⁰

Contrary to the conclusion of the majority, the Panel had in fact properly and adequately signalled its concern regarding the project’s impact on local communities in the EIS Guidelines. To the extent that its approach was truly innovative, in the sense of it being the first time a panel had taken this approach, does that automatically make its approach arbitrary? If not, is a NAFTA tribunal equipped to judge whether what a JRP does is to innovate or whether it is arbitrarily changing the process in a way that arbitrarily treats a foreign investor differently? Is a NAFTA tribunal equipped to distinguish a conclusion that a project is inconsistent with community core values because of its negative social and economic effects, from a test that sprung on everyone for the first time in the panel report? What level of expertise in environmental assessment practice is required to separate innovation from unfair treatment? How likely is a NAFTA tribunal to have the necessary expertise?

The relationship between sustainability in environmental assessment processes (including the idea that projects should offer net benefits to affected communities) and treatment of foreign investors who want to export raw materials from Canada is difficult and complex. This is particularly true in the context of aggregate extraction in Nova Scotia, where no royalties are due to local governments. In these cases, local employment is often the only clear benefit unless the proponent makes a concerted effort to work with affected communities to ensure additional lasting benefits. These types of projects will have a difficult time meeting any reasonable sustainability test, and will require proponents to be more community minded. When a foreign investor uninterested in working with local communities has a project rejected based on the lack of local benefits, has the investor been treated unfairly? Or is the investor at fault for not bothering to make the case for the project to be approved?