PCA Case No. 2016-13

UNDER THE RULES OF ARBITRATION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW AND CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN:

RESOLUTE FOREST PRODUCTS INC.,
Claimant/Investor

- and -

GOVERNMENT OF CANADA
Respondent/Party

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE JUDGE JAMES CRAWFORD, DEAN RONALD CASS, PROFESSOR CÉLINE LÉVESQUE,
held via Arbitration Place Virtual
on Monday, November 9, 2020, at 8:22 a.m. EST

RESTRICTED ACCESS - VOLUME 1

REVISED TRANSCRIPT

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Scott Falls, PCA
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Arbitration Place Virtual

--- Upon commencing on Monday, November 9, 2020, at 8:22 a.m. EST

JUDGE CRAWFORD: Good afternoon, everyone. I am on Hague time. We all will take that time as whatever is meant, whether it's good morning, good early morning or good afternoon.

We meet today and in the days to come to have the oral argument in the arbitration between Resolute Forest Products and the Government of Canada, PCA Case 2016-13.

I am pleased to welcome to the meeting my co-arbitrators, Céline Lévesque and Ronald Cass, and the members of the PCA staff who have been very helpful in putting this together. And I also welcome the parties, the claimants and the respondents, and you will introduce individuals on your team as necessary.

Are there any electronic problems at present? Is everyone online? Claimant first?

MR. VALASEK: Judge Crawford, I had difficulty this morning -- it's Martin Valasek -- for some unknown reason. We resolved

it by switching workstations with my colleague, Jean-Christophe. He's resolving issues at the other workstation, but I believe he is able to participate currently, so we are ready to go.

JUDGE CRAWFORD: Thank you. And Respondent?

MR. LUZ: Sorry. We have a separate Polycom here, but now I can control the mute from the computer screen.

Judge Crawford, I was saying that I believe we are all online. I have two colleagues in the room with me, my co-counsel, Rodney Neufeld, and our senior paralegal, Darian Bakelaar. Both of them are in the room with me, but everyone else is working from different stations.

JUDGE CRAWFORD: We start the proceeding today with the opening statements of the parties, and we have given some guidance as to how we want those opening statements to be taken.

And the other thing that will require management during the week is the adjustment of the audio system to allow for submissions which should be kept confidential, restricted access information and things of that

sort. It would be helpful if counsel, when they are coming up to a period in which such deletion will be necessary, if they can warn us of that, that will save time when the occasion arises.

If any of the parties has any problems with the way things are proceeding, you should raise them before the Tribunal, and we will deal with them as they arise.

I think in terms of housekeeping, we have an hour for dinner, which is, by The Hague standards, adequate. I am not sure about how it is with you locally. But I think we should have a coffee break -- coffee in inverted commas, whatever use you want to make of it -- during the opening statement. I will leave it to counsel to decide when would be the appropriate moment for that. That will be only five minutes, just to give people an opportunity to pick up some papers or get a breath of air or go to the loo or whatever.

And we won't make any adjustment to the lunch break time or dinner break time, I suppose, more accurately, unless it appears to be necessary after some experience.

Today we are having the

opening statements of the claimant and the respondent.

The claimant's opening statement is to be made by Martin?

MR. FELDMAN: No, Judge Crawford, I will begin, and I will be followed by Mike Snarr and then Martin.

JUDGE CRAWFORD: Right. Well, should we start?

MR. FELDMAN: We do have a housekeeping question, Judge Crawford. We received the oaths, I guess, a couple of days ago, and we have a question with respect to the expert witnesses.

JUDGE CRAWFORD: Yes.

MR. FELDMAN: The information as to the oaths would seem to bar them from having notes for their initial presentation. We have allowed them each up to 15 minutes to summarize their positions and their expertise. We had assumed that they would be able to use notes for that purpose but then, during cross-examination, would not. The oath is ambiguous in this regard, and so we would like to confirm that they can indeed use some notes in making their initial

presentation but then would uphold the rest of the oath with respect to having no notes and so forth.

JUDGE CRAWFORD: What's the respondent's position on that?

MR. LUZ: Canada shares the position with the claimant. That's fine.

JUDGE CRAWFORD: As long as it's agreed, then we will amend the declaration so as to allow for notes for the opening part of the witness -- the expert witness' testimony. But I would stress that, from the Tribunal's point of view, we want to hear what the witness, him or herself, has to say. So we don't want these notes to be substitute text which is simply read out.

Subject to that, Mr. Feldman, the Tribunal accepts your suggestion.

MR. FELDMAN: Thank you, Judge Crawford. Shall I now begin?

JUDGE CRAWFORD: Yes.

OPENING SUBMISSIONS BY MR. FELDMAN:

MR. FELDMAN: Thank you.

Judge Crawford and Deans Cass and Lévesque, on behalf of Resolute Forest Products, we want to thank you, the Tribunal, for your flexibility in enabling us to convene this

hearing and your adaptability and cooperation as the hearing takes a form none of us anticipated when we began this arbitration.

We thank the PCA and Arbitration Place for mastering the requisite technology. We thank the Tribunal for the questions it presented to us in advance of the hearing. We found them insightful and provocative. We will try to answer all of them at least partially during this opening statement.

We will also note where we are referencing, whether orally or in slides, restricted access information. We are respecting these designations, although they involve entirely government actions and expenditures we think ought to be in the public domain.

It's taken us three years to reach this hearing on the merits of Resolute's claims against the Government of Canada. We have reserved together at least six days; yet when we reach the final reckoning, we think the Tribunal may find that the entire dispute is about the letter "A" when used as an indefinite article and the letters "T", "H", and "E" when combined into a definite article.

We expect as well to find two words in combination, "but for", to define the outcome. But for the Nova Scotia measures, Port Hawkesbury would not have become the low-cost producer of supercalendered paper and would not have reopened. But for the reopening, Resolute would not have been damaged.

The Government of Nova Scotia, in resurrecting a bankrupt and effectively shuttered paper mill, intended not merely to restore the mill to competition -- please go to the next slide -- Nova Scotia set out to guarantee the mill's long-term future by making it the low-cost producer in North America. The mill was not to be merely competitive among peers. It was not to be a low-cost producer or competitor. It was to be the low-cost producer.

The quotations displayed on the slide are but three in a collection of oft-repeated commitments. If two roads diverged in Nova Scotia's contemplation, one to be competitive among peers and the other to be unlike any other, better situated to compete than any competitors in North America, to be the last standing as the industry spiralled in secular

decline -- next slide, please -- as you can see on the graph, secular decline since the great recession in 2008, then the road chosen made all the difference. It distinguished Port Hawkesbury from all its competitors and distinguished this case from all others. And but for the Government of Nova Scotia's engagement as a co-investor, there would be no Port Hawkesbury.

The Tribunal has inquired, particularly in its 3rd and 24th questions, about the magnitude of Nova Scotia's market intervention, whether our reference to a national champion implies something about the magnitude of assistance precluding competition and whether there is a line that has been crossed. The Tribunal has asked whether we are drawing a line between permissible government engagement and violations of international law.

We are drawing a line. The Government of Nova Scotia crossed it, and Alex Morrison, of Ernst & Young, has described and analyzed the magnitude of assistance that crosses the line by contrasting Port Hawkesbury with other cases where companies had gone bankrupt and governments have intervened to help them.

Next slide, please.

You can see the list of assistance on this slide. Reference will be made often to it during the week and on the next slide, one prominent example of substantial government assistance that still does not rise to the unique level of the case here.

The essential difference between what Nova Scotia did and what may be permissible is the difference between "a" and "the", between assistance enabling competition and assistance knowingly and deliberately making everyone else less competitive.

Nova Scotia's crossed another line implicit in the Tribunal's 14th question. Nova Scotia did not have to cross that line, knowledge of harm it would cause before it acted, to make its conduct actionable under Article 1102. Its conduct was actionable under the Tribunal's third option, (c), in Question 14. Nova Scotia's action caused harm, which is enough to make its conduct actionable.

But there does seem also to be a line between knowingly causing harm and causing harm unwittingly. Nova Scotia crossed that line

too.

The Tribunal has asked in its 24th question whether deference is owed to the Nova Scotia government when it asserts it is acting in the public interest, which is effectively the argument of all Canada's fact witnesses. It's Canada's excuse for whatever harm was done.

All governments can take refuge for their actions almost always by claiming deference for service to the public interest. International law serves, among other things, to overcome parochialism. Nova Scotia was owed no deference for its intervention in the North American market once it knew competitors necessarily would be harmed by its actions.

Governments do and are permitted to intervene to help companies compete domestically and internationally. But democratic governments typically do not, as Mr. Morrison has testified, favour one company over another in the same business. They do not typically co-invest or create state-owned enterprises where private enterprises already are operating.

Here, the Government of Nova

Scotia contends that it helped the only company in the business sector within its jurisdiction and so was not favouring one company over another. But the Government of Nova Scotia also knew that the company it was helping was not the only one in the business within Canada and that the company it was helping was competing directly with other companies in Canada and in North America.

Notwithstanding the substitutability of European product, the parties and the experts all agree that the relevant market in this case is North America. In further answer to the Tribunal's third question, Nova Scotia chose not only a provincial champion as the only producer of supercalendered paper in Nova Scotia but a national champion for all of Canada in the North American market, the market that Nova Scotia identified when fulfilling Port Hawkesbury's shopping list. And when advised that its market intervention necessarily would impact Resolute, Nova Scotia knew that it was treating Resolute, competing in the same market, a market in secular decline with only five remaining companies, made treatment more than a mere possibility.

Professor Jerry Hausman and

Dr. Seth Kaplan later in this hearing will answer the Tribunal's first question as to the definition of the relevant market, the relationship of European imports, and the role and impact of the national champion on its competitors.

Martin Valasek, later this morning, or afternoon for Judge Crawford, will elaborate on the legal standard for treatment and address the Tribunal's 16th question. Long before Resolute brought its claims on behalf of its investments in Canada, the United States was complaining to Canada through the WTO about the likely consequences of Nova Scotia's actions for competing US companies.

The next slide is confidential because Canada did not want its answers to the United States Trade Representative to be known, but could we have the next slide, please.

[redacted]

Next slide.

Canada denied, therefore, that there were subsidies in Nova Scotia. Mr. Valasek will answer the Tribunal's 7th, 8th and 9th

questions.

MR. LUZ: Excuse me. Excuse me. I don't think the public feed has been cut. Mr. Feldman, the agreement was that counsel of all parties would --

MR. FELDMAN: Yes, I announced it --

MR. LUZ: Well, you have to wait until -- the public feed is on.

MR. FELDMAN: Okay.

MR. LUZ: One has to wait until we go into restricted access or confidential session. That was pursuant to the procedural order. And even introducing the document -- if you could take the screen down, please, for a moment because this is something that is of great concern that the president of the Tribunal asked both parties to be very careful about confidential and restricted access information. And we would just like to request the opportunity to make sure that the public feed does go into restricted access or confidential session.

MR. FELDMAN: So I did announce that this slide was confidential. I am not controlling the slides, so, I did not and

can't really see whether it's coming down in the public feed. But I understood from our prehearing conference that, if we announce that a slide was confidential or restricted access, that the public feed would be cut off immediately.

JUDGE CRAWFORD: Can I ask the Tribunal secretary whether the public feed was cut off?

MS. AMBAST: I am afraid it wasn't cut off, but it might be that we require a little more time, maybe a brief pause after notice is provided that there is a slide that shouldn't be on the public feed. It was cut off eventually but maybe not at the precise point at which it should have been.

So perhaps we could have a pause, and then one could confirm -- either me or Arbitration Place could confirm that the feed has been cut off and then counsel could proceed.

JUDGE CRAWFORD: Okay. In future, if you are about to introduce confidential material orally or in writing, please give formal notice of that so the secretary can ensure that the rules are followed.

Mr. Feldman.

MR. FELDMAN: Thank you.

I am not quite sure where I stopped, but Canada denied, therefore, that there were subsidies in Nova Scotia. Mr. Valasek will answer the Tribunal's 7th, 8th and 9th questions when elaborating on Canada's reporting to the WTO its answers to direct questions from the United States and its response to investigations conducted by the United States Department of Commerce and the United States International Trade Commission. He will address Canada's obligations of consistency under international law by reporting on Canada's tendency to call the same things by different names in different fora, including this one.

Using the applicable and available US law, the U.S. Department of Commerce investigated and brought sanctions on behalf of companies operating in the United States against the measures undertaken by the Government of Nova Scotia to make Port Hawkesbury the low-cost producer in North America. And later, Resolute brought its claims, now before this Tribunal, under the applicable and available law of NAFTA's Chapter 11 on behalf of the lone American company

invested and operating in this industry in Canada.

Nova Scotia and Canada knew the US investigation was coming because of the questions from the US Trade Representative and should have known this case eventually would come before a tribunal after receiving [redacted]

The slide going up is restricted access.

JUDGE CRAWFORD: Ashwita, can you confirm when that's been implemented?

MR. FELDMAN: I am waiting for confirmation.

MS. D'AMOUR: Please wait one second. I just need to remove the restricted people. I'll confirm once they've all been removed.

MR. FELDMAN: Okay.

MR. LUZ: The slide needs to be removed.

I apologize for the interruption, Judge Crawford.

JUDGE CRAWFORD: No, it's

better an apology at the time than a regret afterwards. The slide has been removed from my screen. And I haven't read it, I might say.

MR. FELDMAN: I don't think it's supposed to be removed from your screen.

MR. LUZ: But it is the public feed, and so that's why, in the procedural order, it was specifically contemplated that the parties would organize their presentations in such a way that they would go into restricted access or confidential sessions during their presentations with advance notice and then wait for the Tribunal secretary of the PCA and our case manager from Arbitration Place to confirm that we are in restricted access session. And this is meant to protect both parties, both the claimant and the respondent. So I apologize for interrupting, but we have organized our presentation in that way, and hopefully the claimant will do the same.

JUDGE CRAWFORD: We are waiting for that confirmation.

MR. LUZ: We also notice that there are representatives from the claimant who are not entitled to be visible for a restricted access session, so those that don't have

restricted access confidentiality rights should not be in the room as well.

MS. D'AMOUR: I am just in the midst of removing those restricted people, Mr. Luz. Just give me one more second.

--- Whereupon Restricted Transcript Commences

MS. AMBAST: I can confirm that the feed has been cut and that we are in a restricted access session.

MR. FELDMAN: But I point out that it's only at the moment in reference to this particular slide.

JUDGE CRAWFORD: Right.

MR. FELDMAN: And, otherwise, I am resuming what I believe is public.

JUDGE CRAWFORD: Do you have an answer to the question that was asked by the United States in private session?

MR. FELDMAN: Yes. The slide is, but apart from this particular slide, we are otherwise addressing public matters, I believe.

JUDGE CRAWFORD: So the answer to the question is, no?

MR. FELDMAN: Could you ask me the question again?

JUDGE CRAWFORD: The question was whether the answer to the question of Mr. Luz was to be taken in private session or not. And I understand your answer to be no.

MR. FELDMAN: That's correct, yes. Thank you.

JUDGE CRAWFORD: So we are back in public session?

MR. FELDMAN: We are back in public session. This slide should not be accessible to those who are restricted. Should I -- should I resume?

MS. AMBAST: Sorry. This is the Tribunal secretary. I think we could resume, and then once you are done with the slide, if you could pause briefly, we could revert to the public session.

MR. FELDMAN: Okay. In which case, I think you should revert to the public session. The slide has now been visible, I think, and apparent to the Tribunal.

JUDGE CRAWFORD: Yes.

MR. FELDMAN: So that being the case, you could take the slide down, and we can resume in public session.

--- Whereupon Restricted Transcript Ends.

JUDGE CRAWFORD: Right.

MR. LUZ: Judge Crawford, just as we are going on, I would just like to confirm with counsel that there are no other slides that are confidential or restricted access in the presentation and to confirm that no one on the claimant's side who has not been designated with restricted access rights have not received the presentation, and if there are any more remaining slides in that respect, that the claimant will make sure that the slideshow is not being shown on the public feed but rather taken down, and then we go into restricted access, as was contemplated by the procedural order. Thank you.

JUDGE CRAWFORD: Counsel?

MR. FELDMAN: There will be additional slides. I will signal them. They will be in the context of a restricted access period. No one has -- no one who was not entitled to see these matters has seen them. We have been completely respectful of Canada's designations.

JUDGE CRAWFORD: Thank you.

Canada, if you have any problems with the way that Mr. Feldman proceeds,

let us know.

MR. LUZ: Thank you, Judge Crawford. It is also just to ensure that, even if the slide that is on the screen itself doesn't contain confidential or restricted access information, that what the claimant's oral argument is saying also respects that because there -- you know, there are a few moments where the arguments may actually be referring to confidential or restricted access information, and those types of allegations or comments should only be made in the applicable session for restricted access or confidential.

Judge Crawford, I should also -- I apologize for interrupting, but we have noticed again, one of the claimant's experts from Ernst & Young does not have restricted access designation and has been present and observing the session in RA. And I am not sure if he has received the slideshow, but he does not have restricted access designation and should not be receiving it.

MR. FELDMAN: May I say again, Judge Crawford, I have been subject to administrative protective orders for 30 years. We

understand how they work. We did not distribute any restricted access information to anyone who was not entitled to see it.

JUDGE CRAWFORD: Thank you.

MR. LUZ: I understand Mr. Morrison is in the room with the restricted access designations.

MR. FELDMAN: Well, he is not in my room. And the list of people eligible to see these materials, I believe, was provided. I don't control the feed.

MS. D'AMOUR: Mr. Luz, Mr. Morrison has been removed, and he has been put into the waiting room.

MR. LUZ: Thank you.

JUDGE CRAWFORD: So we have addressed that problem at least presently. Mr. Valasek --

MR. FELDMAN: Feldman.

JUDGE CRAWFORD: Feldman. Sorry.

MR. FELDMAN: Mr. Valasek will follow me.

But for the ensemble of measures and their collective magnitude assembled

and deployed by the Government of Nova Scotia, the shuttered NewPage paper mill at Port Hawkesbury would not have come back to life. No one was willing to buy it for anything but scrap unless the Government of Nova Scotia would provide everything perceived as necessary to guarantee commercial success. And commercial success had a definition: to outcompete everyone on the cost of production. But for all the support, all the elements together, the Port Hawkesbury mill would not exist. And but for the magnitude and creative variety of support, it would not continue to exist. But for Port Hawkesbury's presence in the market, Resolute would not have been damaged by Port Hawkesbury's unfair competition.

Canada would like to take apart the ensemble of measures that brought Port Hawkesbury -- brought back Port Hawkesbury from bankruptcy to pre-eminence. The Pacific West Commercial Corporation, or PWCC, was unambiguous and consistent. It would not buy in without receiving everything it said it needed. Examples are on the slide. In partial answer to the Tribunal's 26th question, each measure taken separately would not have made Port Hawkesbury the

low-cost producer in North America, nor might any combination of measures short of the complete ensemble. Dr. Seth Kaplan, later in this hearing, will elaborate on the relationship among the measures. And Professor Hausman, answering the Tribunal's 27th question, will explain the impact of the measures taken together on damages.

PWCC insisted that the complete ensemble of measures was necessary. It demanded all or nothing. It told Nova Scotia that it had to receive everything it wanted, no exceptions. And when an exception presented itself in the final hours of negotiations, the federal government turned down a special tax arrangement PWCC had said it had to have, PWCC walked away from the negotiating table and returned only when the parties came up with a replacement measure that PWCC would value as equal or better.

In partial answer to the Tribunal's fourth question, there is no evidence on our record that the Government of Nova Scotia ever questioned what was necessary for PWCC to succeed, nor even the magnitude. The record reveals instead the government's preoccupation

with how to make PWCC's dream come true. And it struggled from time to time with whether it could deliver. The relationship was of a private company with a barely satiable appetite at the trough and a government with a potentially unlimited supply of sustenance to keep the trough filled.

To disaggregate the measures and to argue that no single one of them or even a subset combination of them reached Articles 1102 or 1105 of NAFTA is to evade the point. PWCC determined that what it would take to be North America's lowest-cost producer, it assembled those measures into an ensemble and communicated to the government what it said it must have.

The Government of Nova Scotia, absolutely determined to resurrect Port Hawkesbury, set out to give PWCC everything it wanted. Canada contends that some of the measures cannot be attributed to any government and that without those measures, Resolute's argument fails because all the measures must survive disqualifying tests such as contained in Article 1108(7)(b), but each measure contributed to the outcome. Port Hawkesbury did reopen as North

America's low-cost producer without any one of the measures producing the outcome on its own.

Whether any particular measure is attributable to the state, such as the electricity contract, or within the purview of this Tribunal, such as the hot idle, makes no material difference. Port Hawkesbury would not have emerged as North America's low-cost producer without all of them. They all played their part. No single one or subset combination would have been enough to satisfy PWCC. And without satisfying PWCC, the mill would not have reopened.

But for the ensemble, there would be no Port Hawkesbury. And but for Port Hawkesbury, I repeat, Resolute would not have been damaged by unfair competition.

The Tribunal has asked in its fifth question whether it matters that Resolute pays for less expensive hydropower in Quebec than Port Hawkesbury must pay even in an unprecedented Nova Scotia discount. It makes no difference at all.

Next slide, please.

Port Hawkesbury's reckoning of the price it could pay for electricity was always

and only part of a larger calculation of costs within Nova Scotia and as compared to the ensemble of costs confronting other North American producers. PWCC calculated the overall costs, including electricity, to make it the low-cost North American producer, declaring, as you can see on the slide that:

> "It is nowhere near sufficient to simply obtain an electricity costing structure that would allow it to 'merely' operate competitively."[as read]

It did not disaggregate for selective comparisons, nor should the Tribunal.

In considering disaggregation, we have not asked the Tribunal to decide whether the hot idle caused damage to Resolute. But had the Government of Nova Scotia not spent over $15 million keeping the mill running for nine months after PWCC had been selected as the winning bidder, PWCC would not have bought it. The Tribunal has interpreted the hot idle as a benefit to NewPage, not necessarily PWCC, and therefore

not a direct cause of damage to Resolute. But NewPage could not have made the sale to PWCC under other circumstances. As Mr. Morrison has explained, government payments to keep the mill running are exceptional, an important part of what makes the story unique.

Canada's intent on proving that the preferential electricity deal is not attributable to the Government of Nova Scotia because it took the form of a "commercial transaction between two private parties" and because international trade dispute panels of NAFTA and the WTO, examining subsidies, found no entrustment and direction by the Nova Scotia government of a financial contribution.

Entrustment and direction in the trade law are inapplicable terms here, with their own definitions and standard for international trade subsidies. Here, the question is not whether the Government of Nova Scotia directed private parties to make a financial contribution to Port Hawkesbury. Instead, here, the electricity deal, a contract, not a subsidy, required and received direct state action and [redacted] The

government's regulatory interventions then effectively mandated the adverse impact on the public that NSUARB on its own was trying to avoid.

Responding to the Tribunal's 12th and 13th questions, the Nova Scotia government was engaged directly in the negotiations of the contract from the beginning and impressed upon the parties the importance of an agreement that would satisfy PWCC.

Next slide, please.

This slide lists the Nova Scotia government's interventions in support of an electricity agreement. The government adopted regulations connected directly to the electricity deal, an intervention sufficient to make the deal the product of organs of the state according to Article 4 of the ILC. A favourable outcome was essential to the government's own financial goals tied to the resurrection of the mill. Approval was required not only of the NSUARB, which Canada, the Tribunal points out in the 12th question, does not dispute is a state organ, but -- and here, we are entering restricted access discussion, so I will pause for the --

MS. D'AMOUR: Please pause

while I remove all of the restricted people.

MR. FELDMAN: Thank you.

--- Whereupon Restricted Transcript Commences

JUDGE CRAWFORD: Go ahead.

MR. FELDMAN: Thank you.

And I will also indicate when we are past this period.

MS. D'AMOUR: Okay. Just one second so I can put everyone in the other room.

All right. The feed has been cut, and everyone is in the waiting room.

MR. FELDMAN: Thank you.

The Nova Scotia Utility and Review Board, the Tribunal points out in the 12th question, is a state organ. [redacted] The

actions of the NSUARB, [redacted] all qualify as state conduct under ILC Article 4.

Next slide, please.

And Article 4 tells us:

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercised legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."[as read]

Go back one slide, please.

[redacted] hired a special consultant to help negotiate it,

intervened directly with the NSUARB to lobby for it, [redacted] and, finally, assumed obligations through special regulations to run a biomass boiler 24/7 and to waive the province's renewable energy standard, all to relieve the NSUARB of its misgivings and inducing it to approve the rate.

That is the end of this restricted access reference. So I will pause a moment for you to let people back in.

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Thank you. Everyone's readmitted, and the stream is live again.

MR. FELDMAN: Thank you.

Canada argues that the NSUARB was merely fulfilling its statutory role. But even if this description were accurate, domestic law cannot pre-empt the state organ's international law obligations.

Next slide, please.

ILC Article 3 is written to overcome just such an argument:

"The characterization of

an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."[as read]

And were the Tribunal still to doubt attribution under ILC Article 4, it seems inescapable that the direct actions of state organs in promulgating the load retention rate constitute acknowledgement and adoption for the purpose of ILC Article 11 -- next slide, please -- analogous to the analysis of the Joint Review Panel in Bilcon that we discussed in our memorial.

Next slide, please.

Even if this Tribunal were to find these state actions were not enough for attribution, it remains that PWCC would not have bought Port Hawkesbury without the approval of the entire electricity deal. The slide reveals PWCC chairman Ron Stern rejecting any deal without the renewable energy standard waiver which Canada

concedes would not have been approved but for acts unquestionably attributable to the state, such as the 24/7 must-run order for the biomass boiler and the waiver of the renewable energy standard.

The Government of Nova Scotia did everything possible to assure that the electricity deal and all the other measures were executed and implemented.

Next slide, please.

All parties knew the electricity deal was a sine qua non of the rest, and all the Canadian parties were committed to making the electricity deal and all the rest happen.

The electricity deal for Port Hawkesbury is notably in contrast to what Canada purports was offered by Nova Scotia to Bowater Mersey. As M. Richard Garneau has testified, the survival of Bowater Mersey also depended in significant part on the cost of electricity. That cost was at the top of his list in answering the government's questions about what it would take to keep Bowater Mersey operating.

As M. Garneau has testified, Nova Scotia's offer plainly would not deliver the

price M. Garneau needed, nor was the government prepared to intervene with NSPI or the rate board, which it did for PWCC. The treatment accorded Bowater Mersey was far less favourable than the treatment accorded to PWCC.

Should Canada not cross-examine M. Garneau on the contrast between his experience dealing with the Government of Nova Scotia over Bowater Mersey and the government's treatment of PWCC, we hope the Tribunal will.

Disaggregated, none of the measures in the ensemble would have been enough to complete a deal with PWCC and resurrect Port Hawkesbury. Together, the measures fulfil the government's pledge, matching the company's demand to reinvent Port Hawkesbury as the low-cost producer in North America.

Canada argues that Nova Scotia merely provided subsidies and that governments are entitled to subsidize. Canada argues that governments are entitled to subsidize selectively, favouring sectors or companies. Canada wants to make the extraordinary story here ordinary and argues that nothing was done for PWCC that was not done or might have been done or could have been

done for Abitibi Bowater, whether to extend the life of Bowater Mersey or to induce Abitibi to bid on Port Hawkesbury. Canada wants to minimize the value and significance of the waiver of the renewable energy standard, a state action tied into the electricity deal. But PWCC was unambiguous in requiring it.

Recall Mr. Stern saying:

"Cannot leave door open by regulator. It has to be never."[as read]

The waiver is a measure that cannot be construed as a subsidy. PWCC said it would walk away without it.

Again, M. Garneau has testified that there is no useful comparison between Bowater Mersey and Port Hawkesbury.

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Although both were forestry operations, they were in different industries. Bowater Mersey produced newsprint. Port Hawkesbury produced supercalendered paper. Both industries were in secular decline, but they competed in different markets and with different competitors. Abitibi Bowater had a partner in

Bowater Mersey, The Washington Post, which also concluded that there was no viable future for the newsprint mill with the aid and intervention suggested by Nova Scotia.

M. Garneau has testified that his negotiations with Nova Scotia were almost entirely with Paul Black. Canada has not offered Paul Black as a witness. Instead, Canada has produced several civil servants who met with M. Garneau very little, if at all. Inevitably, their historic recollections are less than a perfect match. But most important are their respective understandings. M. Garneau understood that Nova Scotia wanted Abitibi to extend the life of Bowater Mersey for five years. Nova Scotia never suggested it would enable Bowater Mersey to last more than five years. M. Garneau saw no commercial point in a terminal five-year plan. He identified three areas of critical need: the cost of electricity, the cost of fibre, and the cost of labour. None could be satisfied enough to make the continued newsprint production in Nova Scotia viable.

M. Garneau has reported on his conversations directly with the premier of Nova

Scotia and with the premier's surrogates. He concluded that Abitibi's needs would not be met. The suggested offer on electricity was not the deal later executed for PWCC, not even close.

M. Garneau concluded that Nova Scotia could not and would not do what was needed to save Bowater Mersey and that without extreme and improbable government involvement, nothing could be done to revive Port Hawkesbury.

Canada attempts to ridicule M. Garneau, that he lacked the vision to bid on Port Hawkesbury, that he could have had the same deal, maybe better than the deal obtained by PWCC. But M. Garneau already had engaged Nova Scotia over electricity for Bowater Mersey and knew the government would not intervene to meet the mill's financial needs.

He was handed money, which he accepted briefly to help the premier save face, but he knew it was not enough and he gave it back. It was a diplomatic act by the CEO of a publicly traded company. But substantial experience with the premier and the premier's office convinced M. Garneau that Nova Scotia was not going to save Bowater Mersey, and intervals of months passed

with no new ideas or proposals from the provincial government. He had more than ample reason to conclude Abitibi Bowater's dealings in Nova Scotia were over.

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Mr. Morrison, one of the leading bankruptcy monitors in Canada, compared the Port Hawkesbury bankruptcy, at our request, to a universe of such cases. He found it extraordinary, unlike any other he had seen in the last three decades in his own experience.

In his expert testimony, he sets out what made the deal extraordinary, beginning sequentially with the commitment to keep the mill running so that it could be sold as a going concern and continuing through an ensemble of measures that, taken together, reveal a government making one company, one mill, more competitive than any other.

He addresses the Tribunal's third question about the magnitude of the assistance.

Mr. Morrison explains in critical detail the difference between the definite and the indefinite article. It's not

extraordinary for a government to keep a sector or even a particular business alive and to enable it to compete. What he finds extraordinary is a government choosing one company among competitors, promising it will succeed while knowing that, because of its success, others likely will fail. He finds extraordinary a government pouring resources into a bankrupt and shuttered operation to resuscitate it.

Striking Canadian comparisons come to mind easily and are noted by Mr. Morrison, particularly the automobile and steel industries, but they are readily distinguishable. More than one company was being saved in each instance. No one company or factor was being saved. They were going concerns already. They represented major sectors of the entire economy.

Canada may argue that Port Hawkesbury was to Nova Scotia what General Motors was to all of Canada, an important source of jobs, a whole sector of the local economy; but Mr. Morrison's methodology, examining bankruptcy cases across all of Canada, which is the relevant economy, and the expert testimony of Dr. Kaplan identifying the economic impact of adding new

capacity in a declining industry, highlight at least four major problems with Canada's argument.

First, the Nova Scotia economy cannot be isolated from the North American economy, nor even from the Canadian economy. Nor in its planning and decisions to act on Port Hawkesbury's behalf did Nova Scotia think of itself as detached from a broader economy. Its experts expressly recognize the market and economy beyond Nova Scotia, which necessarily meant that the governments and issues for Port Hawkesbury also meant treatment of Port Hawkesbury's North American competitors, including Resolute.

The United States and Canada, in saving General Motors, were not jeopardizing other North American automobile manufacturers. Nova Scotia conferred benefits of PWCC beyond its own borders, allowing it to amalgamate other assets into the Port Hawkesbury mill, giving it access to a pool of a billion dollars in tax losses that it would share with the Nova Scotia government.

Second, even as the closure of Port Hawkesbury may have threatened Nova Scotia's forestry sector, particularly after the failure to

rescue Bowater Mersey, Port Hawkesbury's approximately 300 jobs, although considerable, did not threaten the demise of the whole economy.

Third, automobiles were not in secular decline, nor did rescue in the industry jeopardize competitors with overcapacity. Were North American production to fail and Ford was not being bailed out, foreign competition would have flourished.

Fourth, as Mr. Morrison's report establishes, the full panoply of measures assisting Port Hawkesbury exceeded to scale all other bankruptcy bailouts. Combined with knowledge aforethought of the consequences, it was willful, and notwithstanding Canada's ridicule of the proposition, an industrial enterprise in Quebec was robbed to pay workers in Nova Scotia.

Answering, in part, the Tribunal's 14th question, claimant need not prove intent to harm nor even knowledge that harm will follow; but when there is such knowledge, a government's conduct is presumed to be actionable. The Port Hawkesbury rescue operation was a beggar-thy-neighbour policy, and Nova Scotia knew it.

As the Tribunal observes in its 18th question, Canada has wanted to compare Nova Scotia's policy toward Port Hawkesbury to its policy toward Bowater Mersey, but these policies are related more by chronology than by commonality.

After careful study of the global and continental newsprint markets, including the high cost of transportation from remote locations for a relatively low-valued product, Abitibi Bowater concluded that there was no future for the production of newsprint in Nova Scotia. The president and CEO of the company personally advised the premier of Nova Scotia that the Bowater Mersey mill would close.

Premier Dexter implored M. Garneau to reconsider. He asked for a full explanation of why Bowater Mersey would close and asked for time and opportunity to see what he could do to persuade the company to change its mind.

M. Garneau has testified that talks ensued, but he concluded that there was no point in postponing the inevitable and that the province would not or could not do what would have

been necessary to make the newsprint operation commercially viable in Nova Scotia.

What the provincial government eventually offered and gave to Port Hawkesbury was significantly different from what it had suggested to Abitibi Bowater.

The Dexter government promised Nova Scotia it would not repeat what happened with Bowater Mersey but instead would necessarily save Port Hawkesbury. And while making this political promise to the Nova Scotia population, Nova Scotia invited PWCC to set out what it would need to be the low-cost producer and then provided everything PWCC requested.

PWCC's practical shopping list sounded suspiciously like the negotiations over Bowater Mersey, electricity, fibre and labour. These are all, of course, the essential elements of any enterprise, energy, input, and labour, but here with one crucial difference: There were limits on what Nova Scotia would do for Bowater Mersey, believing, perhaps, that the company would accept a five-year prolongation of operations or that Resolute was bluffing or that it was merely negotiating. There were no apparent limits on

what the province would do for Port Hawkesbury. Almost cliché, desperate conditions made for desperate solutions, an electricity deal that would keep the largest consumer on the grid but at discounts never imagined for anyone else before.

Fibre guarantees with offsetting land transactions. Ms. Towers, for example, has testified that the land transactions offered to Bowater Mersey may have been in the province's interest to protect forests, but they were also intended to boost Abitibi Bowater's cash. In her words:

> "The GNS bought 25,000 acres of land for $23.75 million from Bowater. This was part of a larger financing deal to help Resolute keep its Bowater Mersey mill operating."[as read]

No less could be said for similar land, cash and loan transactions for Port Hawkesbury, but, in Port Hawkesbury's case, all essential elements in a much more global transaction.

The issue is not whether the price paid for land was fair, nor even whether it supported provincial goals. The issue is that the land was bought purposively to enhance Port Hawkesbury's cash position and to keep fibre supply available, one of an ensemble of measures recognized mutually by the PWCC buyers and the province to make Port Hawkesbury the continent's low-cost producer. With the province's commitment to supply fibre from forests the province would now own, the province was addressing one of the essential guarantees sought by PWCC.

Canada has put forward a collection of civil servants testifying that they acted conscientiously in the public interest. No one has suggested to the contrary. No reputations are being impugned. The dispute here is not whether what Nova Scotia did was good for Nova Scotia. Resolute is agnostic on that issue.

The dispute is whether Nova Scotia, while purporting to act in its own interest, went too far in disregard for its NAFTA obligations towards competing foreign investors and their investments, relating both to the minimum standard of treatment and national

treatment. Resolute is a foreign investor qualified for the protections promised in NAFTA. The measures taken for Port Hawkesbury damaged Resolute's investment in Canada, and Nova Scotia knew they would, even before the measures were taken.

The enhanced terms for Port Hawkesbury, when contrasted with the offers to Bowater Mersey, accomplished their objectives. They did make Port Hawkesbury North America's low-cost producer of supercalendered paper. There could be only one company that would be the low-cost producer. In an industry in secular decline, Nova Scotia guaranteed that Port Hawkesbury would be a winner, which guaranteed that Resolute would be a loser. Mr. Morrison has testified that he and his colleagues at Ernst & Young have never seen anything quite like it before or since.

Canada's second argument arising from the Bowater Mersey experience, as the Tribunal suggests in Question 17, is that, if Resolute had only bid against PWCC for Port Hawkesbury, it would have been in like circumstances and might have received all the

benefits PWCC received. But Resolute was not in like circumstances. Canada would have had Resolute compete against itself, adding upwards of 25 percent capacity to the declining market in which Resolute already was competing. PWCC was not in the supercalendered paper market before buying Port Hawkesbury. It would not be jeopardizing its own revenue and jobs.

Canada has questioned Resolute officials for remarking in a private communication that it would be better to hope no one would bid than for Resolute to bid. But what else should Resolute have done? Should it have sought to resurrect all that capacity in Nova Scotia, certain that it would lead to its own closures in Quebec? The Bowater Mersey experience was instructive for Resolute.

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Resolute was getting out of Nova Scotia, selling off 550,000 acres in addition to the paper mill and a power plant, a deal that turned out, according to the premier, to be very profitable for Nova Scotia, a $14 million gain for the province.

M. Garneau has testified that,

from his direct experience with the premier, he did not believe Nova Scotia could or would deliver what would be required for Bowater Mersey, a continuous stream of funds and favours. And even had he believed otherwise, it could not have made any sense for Resolute to compete against itself to sacrifice operations in Quebec for jobs in Nova Scotia.

The Nova Scotia government knew well what it was doing for Nova Scotia. It also knew what it was doing to the competition and, even more specifically, to Resolute.

This is -- now we are going into restricted access, please.

MS. D'AMOUR: Give us just a moment to remove everyone.

MR. FELDMAN: Thank you.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: All right. The feed has been cut, and everyone else is in the waiting room who is restricted.

MR. FELDMAN: Thank you very much. And the next slide coming up is restricted access.

We wrote in our reply memorial

of December 6, 2019, quote, and you see it here on the slide:

"GNS knew, before restarting the mill at Port Hawkesbury, that it would [redacted]

Unquote.

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[redacted]

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[redacted]

[redacted]. [redacted] The U.S. International Trade Commission, however, thoroughly and coincidentally studied the arguments about product shifting and concluded that supercalendered and mechanical papers -- and coated mechanical papers operated in distinct markets, and the laws of supply and demand applied to the prices for supercalendered paper.

[redacted]

[redacted]

End of restricted access.

Thank you.

--- Whereupon Restricted Transcript Ends

MR. FELDMAN: You will admit people back in?

MS. D'AMOUR: Yes, the stream is live and everyone has been readmitted.

MR. FELDMAN: Thank you very much. Thank you. Next slide.

Pöyry had not addressed the corollary exposed by Dr. Kaplan, remove a whole mill or more all at once and prices may climb, assuming demand remains constant when supply steps down. But that price rise will be temporary as long as the secular decline continues, which is

the case here.

Resolute's prices were forced down. Resolute necessarily lost profits. Whatever else might be said about market events, Port Hawkesbury's addition of 20 or 25 percent supply in the market was and necessarily continues to be the principal cause of damage.

Lowering supercalendered paper prices has not been the only price Resolute has had to pay because of Port Hawkesbury. The Tribunal has asked in Question 6 about Resolute's $11 million investment in its Kénogami mill announced in January of this year.

Resolute customers, able to buy SCA+ quality paper at prices reflecting Port Hawkesbury's low-cost advantage, and with the reduced prices caused by the additional PHP volumes, have urged Resolute to raise the quality of its product. Without government help or intervention, Resolute is investing $11 million to upgrade the quality of its product, the only way it has found it can continue to compete with Port Hawkesbury's low-cost advantage, selling SCA++ at reduced prices.

In its report for this

arbitration, Pöyry tried to sidestep these basic economic principles by offering an alternative explanation, that the additional supply occasioned product shifting, that coated mechanical paper customers turned to the highest-quality supercalendered paper when it became more available at lower prices, enabling supercalandered paper prices then to rise with the new demand for it.

But, as Professor Hausman has demonstrated, the temporary price rise in 2018 is explained far better by the reliable laws of supply and demand, the excess supply of supercalendered paper over time driving down supercalendered paper prices. The liability thus is as certain as the most basic laws of supply and demand. What is left is the measure, not the whether, the existence of damages.

Dr. Kaplan proves that Port Hawkesbury's re-entry into the North America market drove down prices and consequently deprived Resolute of profits.

Professor Hausman has calculated a range of damages with conservative assumptions utilizing, in part, Mr. Steger's

unexplained and undocumented assertion about Port Hawkesbury's capacity. But at the documented 360,000 metric tons, Professor Hausman calculates damages to Resolute at approximately $150 million in lost profits.

The Tribunal has asked in its second question whom it should believe, which experts should prevail in a battle of experts? The question appears to have two parts, one referring to the experts and commentators upon whom the experts in this arbitration have depended, the other referring to the experts on the two sides of this arbitration.

Professor Hausman, later in this hearing, will comment on the expert sources upon whom he has relied, particularly RISI and price forecasts. But for the experts testifying in this arbitration, we are confident that the Tribunal recognizes all experts are not equal. They don't cancel each other out. The Tribunal must exercise judgment. And, in judging the relative authority of economists, the Tribunal should consider which are faithful to the laws and principles of economics, which rely on well-resourced data, which are logical and

persuasive. The economics here concern the laws of supply and demand. When supply is increased substantially while demand is constant or falling, pricing will fall.

Canada has offered experts who seem to contest this economic principle.

Resolute has offered an additional expert on bankruptcies and bailouts. Canada has not proffered a competing expert, preferring lawyers to challenge the Ernst & Young accountants. The Tribunal will have to judge whether it finds Mr. Morrison's analysis sufficient to satisfy the Article 1105 criterion for extraordinary conduct and find that Nova Scotia did cross a line that denied Resolute fair and equitable treatment.

We do not have on the record of this arbitration just how profitable Port Hawkesbury has been since returning to the market in 2012, but we do have at least one indication. The U.S. Department of Commerce investigation of imports from Canada of supercalendered paper led to a countervailing duty order applicable to all imports, notwithstanding that the cause of the investigation was unmistakably Port Hawkesbury.

Port Hawkesbury and J.D. Irving bought their way out of the countervailing duty order with Port Hawkesbury contributing over $32 million. By operation of law, the order terminated for Resolute as well, but Resolute didn't contribute to the buyout.

Irving, of course, could draw its $10 million contribution from many different enterprises, but Port Hawkesbury had only one source. The mill was profitable enough to pay out over $32 million to terminate the countervailing duty order. The American recipient of the cash, the petitioner, Verso, survived barely another year.

The Tribunal must decide whether Nova Scotia's extraordinary generosity to PWCC breached norms and obligations of international law as set out in Articles 1105 and 1102 of the North American Free Trade Agreement and whether the subsidy exceptions in Article 1108(7)(b) excuse Nova Scotia's conduct. Assuming the Tribunal finds a breach, it must then determine whether Resolute was damaged by Port Hawkesbury's re-entry into the market and, if damaged, the extent of damages for which Canada

should be held liable.

My partner, Michael Snarr, will make the case for breaches of Article 1105, first showing that the standards for minimum and fair and equitable treatment are continuously evolving, and then showing that Canada breached those standards. He relies on the conclusion of the Ernst & Young analysis that, when Nova Scotia chose between a path that might make Port Hawkesbury competitive on the one hand or much more than merely competitive on the other, it chose a path not taken by a Canadian government before, to favour, in many ways, one company over all other companies in the same economic space to assure that chosen company would outlast all others to become a co-investor in a hybrid state-owned enterprise.

This treatment of one over all others, as described by Mr. Morrison, crossed a line, separating permissible subsidization and assistance on one side of the line and breaches of customary international law on the other.

Mr. Snarr will now address, then, the Tribunal's Questions 19, 20, 21, 22, 24 and 25, regarding Article 1105 and its

relationship to Article 1102.

Mr. Valasek will follow Mr. Snarr, addressing Canada's breaches of Article 1102 through its discriminatory treatment of a foreign investor and its investment, thereby addressing Tribunal Questions 14, 15, 16 and 17. He will address the Tribunal's related questions, 3, 5, 18 and 23.

Mr. Valasek will explain why Canada cannot take refuge in the exceptions of Article 1108(7), answering the Tribunal's Questions 7 through 11, pointing to the direct record evidence requested by the Tribunal in Question 8, that Canada has "denied that there was subsidies when challenged in other fora". And he will emphasize again that not all the actionable measures in dispute here could be called subsidies under any circumstances.

Nova Scotia is the agent of damage to Resolute. But for the ensemble of measures it took to resurrect Port Hawkesbury, Port Hawkesbury would not have re-entered a market in secular decline with a 20 to 25 percent increment in capacity that inevitably drove down the price of supercalendered paper. Then, but for

that re-entry, Resolute would not have been damaged by the downward spiralling prices.

But for the commitment well fulfilled by the measures challenged here to make Port Hawkesbury the low-cost producer, PWCC would not have purchased the idled mill. The difference between "a" and "the" is the central factual issue in this case. A fact dictating the legal consequences, in a but-for world Canada is liable.

Mr. Snarr.

JUDGE CRAWFORD: I wonder whether this would be an appropriate moment for a quick coffee break given we have been going for some time.

MR. SNARR: That would be fine with me, Judge Crawford. I also wanted to raise one thing before beginning.

Claimant's counsel submitted a letter last Thursday requesting to submit four additional authorities that were responsive to questions raised by the Tribunal.

JUDGE CRAWFORD: Yes.

MR. SNARR: Question Number 25, asking about additional evidence of proportionality in customary international law,

and Question 23 regarding the weight of the 1128 submissions, and Mr. Valasek and I would plan to reference these authorities in our presentations, assuming that would be permissible.

JUDGE CRAWFORD: Yes, that's an appropriate way to respond to those particular queries.

MR. SNARR: Thank you.

JUDGE CRAWFORD: So we will have a five-minute break. The time is 3:30 here, which is in -- where you are, I am not quite sure.

MR. SNARR: 9:30, Judge Crawford.

JUDGE CRAWFORD: 9:30. So we will resume again at twenty to ten.

--- Upon recess at 9:33 a.m. EST.

--- Upon resuming at 9:44 a.m. EST

JUDGE CRAWFORD: Mr. Snarr, you were going to respond.

MR. SNARR: I think Mr. Valasek had a comment, was starting to speak.

MR. VALASEK: Well, I would just put on the record that, when we had run through the presentations, which were essentially in the form that we've presented them today, the

time for Mr. Feldman was much closer to about 50 minutes. So I do think that there is -- and that corresponds to the stop time that I took in relation to the actual substance of the presentation.

It doesn't need to be resolved now to the extent that we are able to fit everything into the two-and-a-half hours, but I expect that we might come up against a little bit of a time issue if we count the full hour.

JUDGE CRAWFORD: We will review the situation at the end of the day.

MR. VALASEK: Thank you.

MR. SNARR: Okay. Shall we begin?

JUDGE CRAWFORD: Yes.

OPENING SUBMISSIONS BY MR. SNARR:

MR. SNARR: Judge Crawford, Dean Lévesque and Dean Cass, I'm Michael Snarr, counsel for the claimant, and will discuss NAFTA's Article 1105, "Minimum Standard of Treatment".

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Canada and Resolute agree that Article 1105(1) assures the minimum standard of treatment afforded under customary international

law to NAFTA foreign investors. Article 1105(1) explicitly identifies fair and equitable treatment as being included in the minimum standard.

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There seems to be no dispute among NAFTA Chapter 11 tribunals that fair and equitable treatment exists as a rule of customary international law. Early NAFTA Chapter 11 awards offered some descriptors to help define fair and equitable treatment as understood within the minimum standard of treatment under customary international law.

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The Waste Management II Tribunal wrote:

> "The minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is

discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety."[as read]

That description has become an oft-repeated formulation among NAFTA and non-NAFTA tribunals alike. A few tribunals, such as Glamis, employed similar language but with the addition of more severe modifying terms, such as "outrageous, shocking and egregious".

But Bilcon, Chemtura and Merrill & Ring have noted the minimum standard under customary international law evolving in the direction of increased investor protection and describing the fair and equitable treatment standard without the strenuous modifiers.

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The Bilcon Tribunal explained:

"NAFTA tribunals have, however, 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 toward greater protection for investors.

"NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection."[as read]

The Chemtura Tribunal, quoting Mondev, said:

"One cannot overlook the evolution of customary international law, nor the impact of BITs on

this evolution... 'To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious'."[as read]

The Merrill & Ring Tribunal, which Canada does not endorse despite winning that case, reviewed international conventions, international custom, general principles of law and judicial decisions and the teachings of the most highly qualified publicists to determine international law with respect to the minimum standard of treatment.

It cited the Max Planck Encyclopedia of Public International Law for the proposition that the development of the minimum treatment standard has been through customary international law, judicial and arbitration decisions, and treaties. It examined state practice as reflected in the work of the International Law Commission on state responsibility, the commentary on the articles on state responsibility approved by the United Nations General Assembly and many international

arbitral awards.

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From this analysis, the Merrill & Ring Tribunal concluded that:

"A requirement that aliens be treated fairly and equitably in relation to business, trade, and investment has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as opinio juris... The standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.

"This standard...is evidenced by the tendency of states to support the

claims of their citizens in the ambit of diplomatic protection with an open mind, and without requiring a showing of 'outrageous' treatment before doing so."[as read]

And then again with a nod to the Waste Management II decision:

"Conduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of the minimum standard of treatment, even in the absence of bad faith or malicious intention on the part of the state."[as read]

Thus, egregious conduct, bad faith, or malicious intentions, each would be

sufficient, but none of them is necessary, to find a breach of fair and equitable treatment under contemporary customary international law.

These conclusions were cited favourably in the Bilcon award but with that tribunal's additional observation that the evolution in the minimum treatment standards still had a threshold bar for determining unfair and inequitable treatment that was actionable under international law.

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> "Any kind of unfairness...the imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard. At the same time, the international minimum standard exists and has evolved in the direction of increased investor protection

precisely because sovereign states -- the same ones constrained by the standard -- have chosen to accept it. States have concluded that the standard protects their own nationals in other countries and encourages the inflow of visitors and investment."[as read]

The Bilcon Tribunal referred to Waste Management, noting 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...there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour."[as read]

The Bilcon Tribunal noted that tribunals must be sensitive to the facts of each case in their application of the standard, which is a view that has been echoed by several other tribunals.

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> "The concepts of fairness, equitableness and reasonableness cannot be defined precisely: they require to be applied to the facts of each case.
>
> "A determination of unfair or inequitable treatment is best done, not in the abstract, but in the context of the facts of this particular case, taking into account the indirect evidence of the content of the customary international law minimum standard of treatment as evidenced in

the decisions of other NAFTA tribunals. "A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of particular case."[as read]

So in answer to the Tribunal's Question Number 19 regarding the standard for a violation of Article 1105, egregious behaviour, as Canada argues, would be sufficient but not necessary to find a breach. Resolute suggests that a distillation of state practice and opinio juris, as they have been interpreted by NAFTA arbitral tribunals, produces the following standard:

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State conduct which is unjust, arbitrary, unfair, inequitable or discriminatory, that infringes a sense of fairness, equity and reasonableness to a degree that is more than imprudent discretion or outright mistakes but less than egregious, shocking, or outrageous, is

cognizable as a breach of fair and equitable treatment.

And, again, this determination is made by the Tribunal in view of the facts of the particular case.

The Tribunal has asked in Question Number 22 what evidentiary grounding there needs to be in customary international law to assess the unfairness and inequity of the acts complained of in this proceeding.

NAFTA tribunals agree that fair and equitable treatment has become a part of customary international law. They have interpreted customary international law to provide guidance as to the severity of unfair and inequitable treatment that would be sufficient to constitute a breach.

Although customary international law may be proven in the first instance by evidence of prevailing state practices, the Windstream Tribunal observed that decisions taken by NAFTA tribunals and legal scholarship reflect customary international law with respect to the interpretation and application of the minimum standard of treatment under Article

1105(1).

Even the Neer standard which the NAFTA parties frequently presented as a customary international law norm arose as a decision of a tribunal, U.S.-Mexico Claims Commission.

Tribunals interpreting the fair and equitable treatment standard under customary international law have identified certain types or categories of violations, but they also have recognized that the standard has evolved over time and that it is not a closed set of circumstances that may be actionable. These decisions have said that the standard remains to some extent a flexible one which must be adapted to the circumstances of each case and that, ultimately, a tribunal must view the standard in the context of the facts presented.

The Tribunal has asked in Questions 20 and 21 about the relationship between Articles 1102 and 1105 and whether Article 1105 includes a non-discrimination norm.

The breadth of state actions that would constitute a violation of Article 1105 is much wider than that of Article 1102, which is

focused only on a particular type of discrimination, the denial of national treatment. But there is a higher threshold to the degree or severity of state action that would be cognizable under Article 1105 than under Article 1102.

When a NAFTA party accords a foreign investor, or its investment, treatment less favourable than the most favourable treatment that it accords to its own investor or investment in like circumstances and that action causes foreseeable harm, the action is a cognizable breach under Article 1102.

Under Article 1105, a higher degree of seriousness must be recognized in order for the state action to be a cognizable breach, but the range of actions that may constitute this is not limited to nationality-based discrimination.

The analysis of a breach under 1105 arguably is a more subjective determination than a determination of whether less favourable treatment was provided in breach of Article 1102.

Discrimination is referenced in the definition commonly given for denial of the minimum standard of treatment. NAFTA tribunals

have said harmful state conduct that is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, et cetera, constitutes a breach.

National treatment discrimination is one type of discrimination, but there may be others. One can imagine that discrimination on the basis of gender, race, ethnicity, religion, or other classes would be considered unfair or inequitable treatment. We are not aware of fair and equitable treatment cases that were decided on the basis of such discrimination, but the language of the tribunals describing the range of possible breaches seems to hold open that possibility.

We also would suggest that, where a provincial government discriminates against foreign investors that are in like circumstances to the domestic investor in that province that receives the most favourable treatment, that infringes a sense of fairness, equity and reasonableness to a sufficient degree, that discrimination could be cognizable as a denial of fair and equitable treatment in breach

of the minimum standard.

In Question 23, the Tribunal has asked about the weight that should be accorded to views of non-disputing NAFTA parties about the interpretation of Article 1105 and Article 1102.

A governing norm may be viewed as an interpretation of the scope of a provision of the NAFTA agreement. The NAFTA parties have two ways to establish their interpretation of the rights affecting foreign investors and their investments. They may renegotiate or amend the international agreements as they have done through the adoption of the U.S.-Mexico-Canada Agreement, or they may issue an interpretation of NAFTA in the form of a Free Trade Commission statement as they did in 2001.

The views expressed by the non-disputing parties in Article 1128 submissions should be given less weight than an amendment or a Free Trade Commission statement. The Tribunal may rely on the views of the non-disputing NAFTA parties in their 1128 submissions to the extent that they find them persuasive but not necessarily as authoritative, binding expressions of the intent of the NAFTA parties with respect to

interpretations of the agreement.

The fact that provision was made in Article 1131 for the expression of an agreed interpretation but the NAFTA Parties did not exercise that provision should be an indication that the views of the non-disputing parties do not have the full imprimatur of the Parties, meaning the fully considered views of the governments and all of their stakeholders and not merely the views of their counsel with respect to particular litigation.

The Tribunal has asked in Question 25 about further evidence of the doctrine of proportionality in customary international law with respect to the minimum standard of treatment and suggested there may be distinctions with the Mexican sugar cases where, in at least one of them, proportionality was considered within the context of countermeasures.

In addition to the authorities cited in Resolute's memorials, some scholars have written about proportionality as an emerging principle of customary international law.

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Professor Benedict Kingsbury,

of NYU, and Stephan Schill co-wrote a paper in 2009 entitled "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law". The paper identifies examples of proportionality analysis as a means of analyzing global administrative law cases to balance legitimate state policy interests with the interest of protecting foreign investors under investment treaties.

Kingsbury and Schill argue that reasonableness and proportionality together constitute one of five clusters of normative principles that recur as elements of fair and equitable treatment.

They go on to suggest several examples of a state practice of proportionality, including a decision by the Supreme Court of Canada in Regina v. Oakes where the Court applied a three-part proportionality test to consider whether the Narcotics Act conformed with Canada's Charter of Rights and Freedoms;

A German constitutional court decision called Apothekenurteil, balancing the interests of a system that limited pharmacy

licenses with pharmacists' rights to freedom of profession;

European Court of Justice cases, balancing fundamental EU freedoms with the interest of member states;

WTO cases, balancing member states' public health and safety interests with free trade interests;

And European Court of Human Rights cases.

Professors Alec Stone Sweet and Giacinto della Cananea similarly co-wrote a 2014 paper entitled "Proportionality, General Principles of Law, and Investor-State Arbitration", in which they consider proportionality as a general principle of law used by national and international courts around the world to assess derogations from constitutional or treaty obligations from measures that are necessary to achieve important public or state interests.

They argue that constitutional courts and international tribunals have used a proportionality analysis to examine whether the relationship between the means chosen and the end

pursued is rational and appropriate, whether the measures were taken by necessity, and whether the benefits of the act outweighed the costs incurred by infringement of the protected right. They contend that proportionality analysis diffused to become a global standard because it works, providing important benefits to both judges and the legal system as a whole.

That there is not a large number of awards in writing that expressly identify proportionality as a customary international law principle should not be taken to mean that proportionality is not pertinent for the Tribunal's minimum standard of treatment analysis. It may be that the principle of proportionality is not yet a customary international law norm but rather a general principle of law that informs a determination of whether fair and equitable treatment has been provided.

Canada has cited a treatise by Professor Dumberry for the idea that measures that are sufficiently egregious and shocking could never serve a legitimate government purpose, so there is no place for consideration of proportionality.

But even when the ends being pursued by the government may constitute a legitimate purpose, the means to pursue those ends may unfairly and disproportionately impose burdens on foreign investors in contravention of the purpose of investment treaties.

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Cases that have applied a proportionality analysis have applied three different steps. First, the measures adopted must be carefully designed and rationally connected to achieve a legitimate government objective.

Second, the measures should impair no more than necessary the right or freedom in question.

Third, the burden imposed on the rights of the foreign investor and the interests of fair competition in the free trade area should not be excessive in relation to the weight of the legitimate government objective involved.

And I would refer the Tribunal to pages 77 to 82 of our reply memorial.

Few NAFTA Chapter 11 cases involve government actions that cannot be argued

as measures taken in pursuit of a government purpose.

Canada and its witnesses have argued that the Government of Nova Scotia is owed significant deference for its decision to provide PHP with a substantial assistance package in furtherance of government assistance policies to protect the local economy. But Nova Scotia was not required to resurrect and magnify the competitiveness of the idle PHP mill as the sole means of addressing perceived local economic needs. It also considered itself a co-investor in the future success of the PHP mill through profit sharing provisions of the $24 million power working capital loan and other tax-related provisions.

The measures shifted Nova Scotia's economic burdens from the cost-prohibitive PHP mill to Resolute as one of few producers in the SC paper market. The Tribunal should consider, as part of its Article 1105 analysis, whether the burden imposed on Resolute was fair and proportional to the objectives being pursued, taking into account Nova Scotia's competing interests.

The Tribunal also should consider -- excuse me -- the Tribunal should consider proportionality as an analytical tool in the fair and equitable treatment analysis to weigh and balance competing interests. Resolute does not contest that a government may provide some assistance to a company or a whole industry when it determines that such assistance is in the public interest. But the government is obligated to identify the public in whose interest it is acting and recognize international obligations when they apply.

Here, the government knew that its actions would affect a public beyond the borders of the public the Nova Scotia government set out to serve. Its assistance to a commercially non-viable mill was disproportionate with a legitimate objective because Nova Scotia knew it would have adverse effects on Resolute, a foreign investor, and the government directly placed the interests of PHP and its own interests ahead of Resolute's interests to Resolute's detriment.

The Tribunal has asked in Question 24 about claimant's reference to the line

that Nova Scotia crossed when providing too much assistance to Port Hawkesbury and what role the Tribunal should ascribe to the concept of deference to government decision-making in answering this question.

We will explain in our discussion of the application of the Article 1105 standard to the facts, why Nova Scotia crossed a line when, with an ensemble of measures, it went significantly beyond more typical government support, resulting in unfair treatment to Resolute's SC paper investments.

Nova Scotia's measures went from making Port Hawkesbury competitive, typical when governments help bankrupt companies, to, in effect, guaranteeing it would be the most competitive, expressly advantaged over Resolute.

The Pope & Talbot Tribunal found an 1105 breach caused by the cumulation of several events related to Canada's verification of information provided by the foreign investment of the Softwood Lumber Agreement. Similarly, Resolute contends here that it is the cumulation of several factors and measures rather than any one particular measure that demonstrates the

government's unfair and inequitable treatment.

It took an ensemble of measures to make Port Hawkesbury the supercalendered paper market's lowest-cost producer. The ensemble of measures combined to achieve the goal of making Port Hawkesbury more than merely competitive, collectively it crossed the line.

Nova Scotia knew that its measures would harm Resolute's SC paper investments. Resolute was the largest producer in the market, and Nova Scotia intended to make Port Hawkesbury super competitive in relation to Resolute and the other producers. Nova Scotia also considered some of these measures as its own investments in PHP. Therefore, it has its own pecuniary interest in making PHP successful at Resolute's expense.

Were the Tribunal to agree that the evidence supports these conclusions that Nova Scotia went beyond normal government conduct to achieve an unusual goal, knowing that it would harm a competing foreign investor, the Tribunal should not defer to the Nova Scotia measures as supporting a legitimate government interest. The

measures were undertaken deliberately for purposes that were expected to harm a foreign investor's investment for the sake of the government's own interests and the interests of a competing private company.

Were the Tribunal to conclude otherwise, finding that the government was led by legitimate public interest, that still should not be the end of the inquiry.

The Tribunal should then consider whether the means of accomplishing legitimate public interests were unfair or inequitable. A proportionality analysis may be the appropriate tool for such a determination to balance legitimate public interests with NAFTA's protections for foreign investments.

In considering the degree of deference due to the government's policy choices, Canada has referenced Mesa Power to argue for a high measure of deference, but deference has its limits, and the height of that deference should not be overstated. As examined by the US -- as explained by the U.S. Federal Court reviewing that award, the Tribunal's deference merely amounted to an acknowledgement that a government is entitled

to make policy choices that are not perfectly rational.

Canada also has argued that deference is owed to states when they make policy decisions within their territory, and Mesa Power explained that deference is owed to the state when it comes to assessing how to regulate and manage its affairs. That may be so when the management, regulation and policy decisions apply strictly within the government's territory, but this case is different because what is being managed is the ability of a previously moribund paper company to sell paper outside of the government's territory, competing directly against the foreign investor selling the same product.

The number of SC paper purchasers within the provincial territory of Nova Scotia never could have sustained or justified Port Hawkesbury's production. Because these measures were deliberately contemplated to advantage Port Hawkesbury extraterritorially and were adopted with the expectation that they would disadvantage Resolute outside of Nova Scotia, the rationale for deference here is not justified.

Tribunals require evidence of

a logical connection between the state's measure and a legitimate governmental objective, and Canada has not produced evidence that justifies this connection.

I turn now to the application of the minimum standard of treatment to the facts.

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What makes this case unfair and inequitable is a unique combination of facts:

A very large package of assistance providing benefits on non-commercial terms;

Provided by Nova Scotia to a mill shown to be commercially unviable without such assistance;

Intended for a market of few North American producers, with overcapacity and in secular decline;

With the express knowledge that such assistance necessarily would be for competition detrimental to Resolute;

Next slide.

With the express intention that the company be made not just competitive but ultra-competitive relative to the other producers

in the market as the lowest-cost producer;

With the intention that competition be detrimental to the non-Nova Scotia producers for the exclusive benefit of Nova Scotia;

And the government itself becoming an investor in Port Hawkesbury, requiring detrimental competition to Resolute to maximize its own investment.

I will highlight some of the evidence that has been presented in support of each of these facts, but in doing so, I will need to refer repeatedly to documents that Canada has designated as restricted access information and ask that we now go into a closed session for the majority of my remaining time.

MS. D'AMOUR: Sure. Just give me one second to remove all the restricted access.

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MS. D'AMOUR: All right. The feed has been cut, and everyone is in the waiting room. If you can just let me know once you are out of restricted access, Mr. Snarr.

MR. SNARR: I will do that. Thank you.

MS. D'AMOUR: Thank you.

MR. SNARR: Next slide, please.

You will see on this slide, again, the items comprising the large assistance providing Port Hawkesbury benefits on non-commercial terms. Each of these elements was addressed in our memorials, but I will highlight some very advantageous features of some parts of the package.

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[redacted]

[redacted]

Nova Scotia passed regulations requiring Port Hawkesbury's biomass plant to run

full-time to produce steam from mid-2013 to 2016. This regulation diverted approximately $7 million in energy costs annually from Port Hawkesbury to other Nova Scotia ratepayers. The government also exempted Port Hawkesbury from having to source a minimum proportion of its power from renewable energy sources.

The magnitude and breadth of this assistance package was remarkable. It prompted inquiries from the United States and Europe and a countervailing duty investigation in the United States which Canada, Nova Scotia, and Port Hawkesbury all defended until Port Hawkesbury settled the case by paying the US petitioner an estimated $32 million.

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Resolute's expert witness, Alex Morrison, of Ernst & Young, and a very experienced court-appointed monitor in Canadian Companies' Creditors Arrangement Act cases testified that the Port Hawkesbury assistance package was unique for the comprehensiveness of assistance, combined with the stated goal of making Port Hawkesbury the lowest-cost producer of SC paper.

All this assistance was provided to resurrect a mill that was in CCAA proceedings because it had been commercially unviable. Despite having a very good SC paper machine, the mill had to go into CCAA proceedings because electricity costs and transportation costs were so high.

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Dr. Kaplan testified that the inability of the mill to operate profitably was previously demonstrated. Port Hawkesbury closed because NewPage could no longer afford to keep it operating with spiralling and uncontrollable losses. Even Nova Scotia recognized that the mill was a high-cost producer and that it had to help solve the mill's inherent cost disadvantages for it to restart.

Among the four final bids for Port Hawkesbury, two of the bids came from liquidators who were going to scrap the mill. The other bidder to purchase the mill and operate it as a going concern had a poor reputation.

Business analysts observed that "nobody can just go in and shovel away money at a losing asset. You have got to make some good

concessions to put this thing on a profitable footing to have a hope of survival going forward."

There was a secular decline in demand for SC paper in 2012 driven by the shift in advertising from print to digital media and the declining circulation of magazines. Three US firms were known to produce SC paper in the United States, while four others, including Port Hawkesbury, were producing in Canada.

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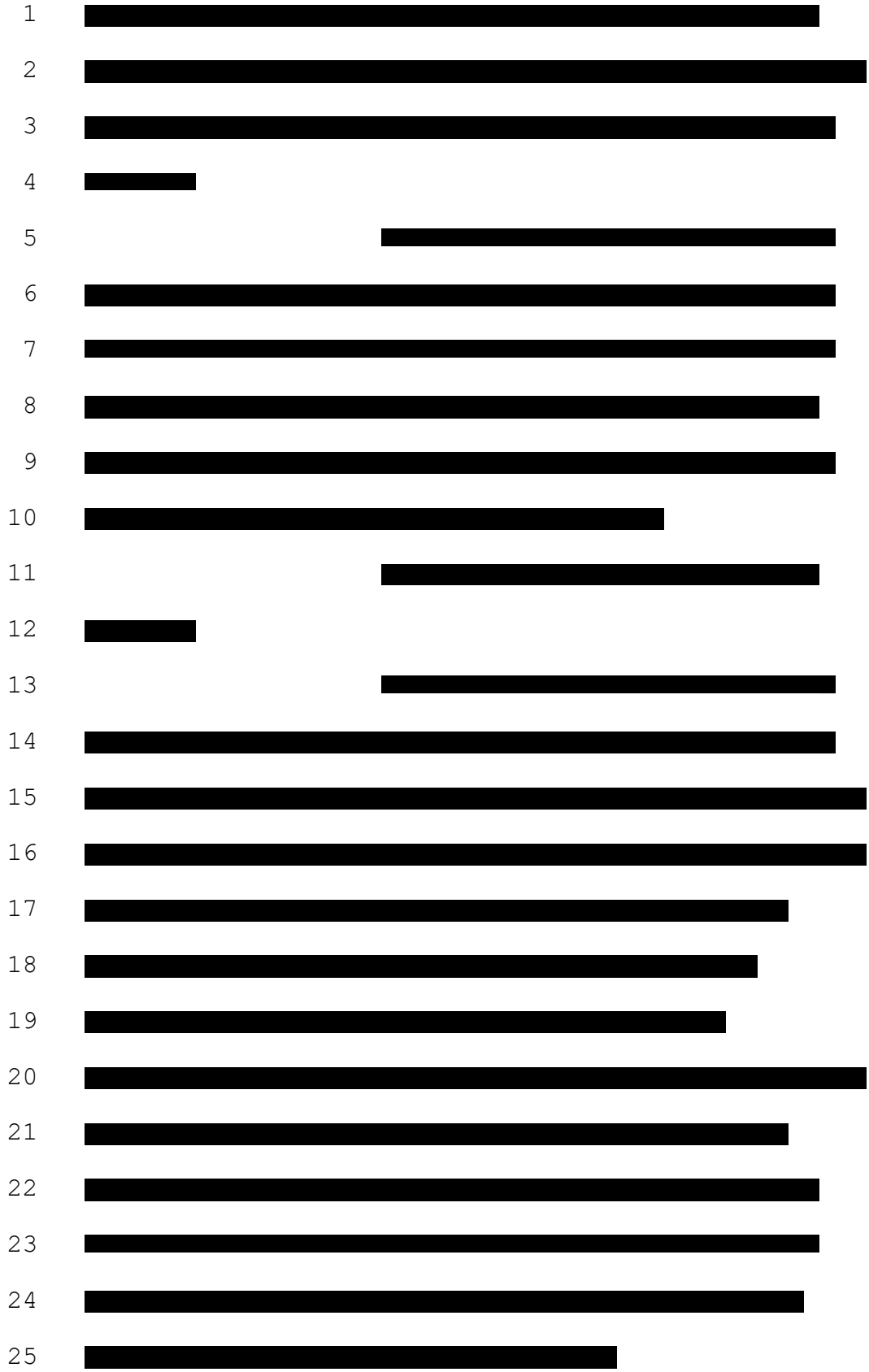
[redacted]



[redacted]

Resolute was a well-known producer in the market and unavoidable in Nova Scotia's plans to find a way for Port Hawkesbury to re-enter the market and compete.

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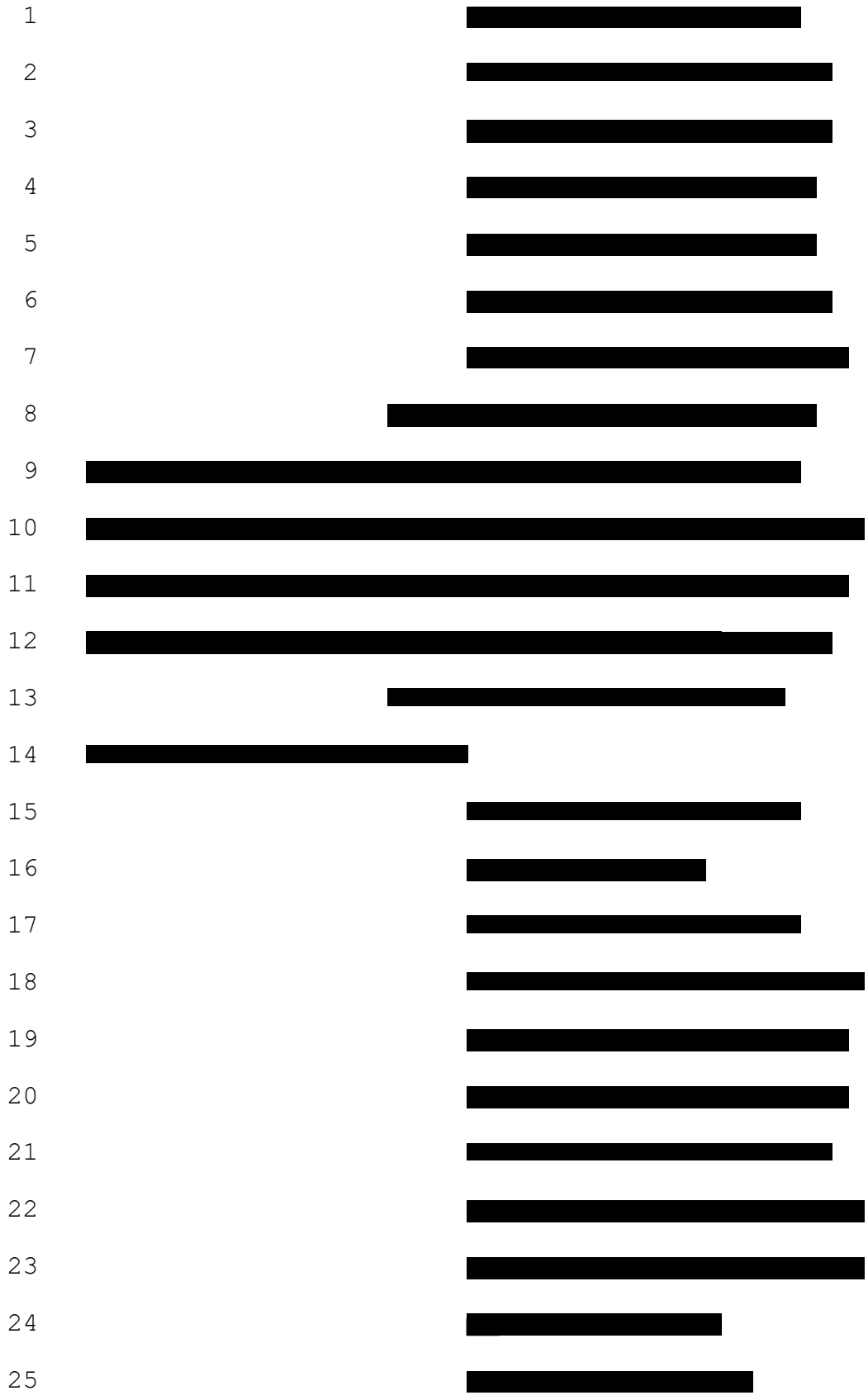
[redacted]



In August 2012, as Nova Scotia was about to close the deal with PWCC, the Nova Scotia premier's office issued a press release announcing the assistance package, that the assistance would make Port Hawkesbury the lowest and most cost-competitive producer of supercalendered paper and the most efficient paper producer in the world.

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The U.S. International Trade Commission found that Port Hawkesbury added significant volume to a declining market, that the additional volume necessarily drove down prices and that the lower prices injured Port Hawkesbury's competitors.

Dr. Kaplan's analysis reached the same conclusions. The North American SC paper market is in secular decline, involving commodity-like products that are highly substitutable and sold primarily on the basis of price. SC paper mills must operate at or near full capacity to maximize efficiency.

These conditions of competition distinctive to the SC paper industry made Resolute's SC paper operations particularly

vulnerable to economic harms by the large-scale market re-entry of the Port Hawkesbury mill. PHP added over 20 percent to industry capacity in 2013 and resulted in negative effects on Resolute's prices and shipments.

[redacted]

[redacted]

Next slide, please.

Nova Scotia has financial interests in the success of Port Hawkesbury, some of which mean that Nova Scotia is a co-investor with PWCC in Port Hawkesbury's success. [redacted]

[redacted] Nova Scotia therefore placed itself in a position as an investor that was directly adverse to Resolute. [redacted]

That concludes the restricted access portion of my presentation. We can return to the public viewing room.

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Thank you. The

feed is live, and everyone has been readmitted.

MR. LUZ: Can the slide be removed, please?

MR. SNARR: Let's remove that slide, please.

Referring back to the Tribunal's Question 24 regarding where the line is drawn, the treatment that Nova Scotia forwarded to Resolute's SC paper investments, one might ask, is it unfair and inequitable that Nova Scotia provided assistance to a Nova Scotia mill? Not necessarily. Governments can help companies in their territory, particularly as to matters they regulate within their territory.

Such assistance may not, however, change the markets fundamentally by adding a new participant with substantial production capacity in a market already with overcapacity, few surviving producers and secular decline.

Is it unfair and inequitable that costs of production should be different for some companies? Of course not. Different companies in different locations will have different competitive advantages. Costs cannot

all be the same, nor should governments make them so. Resolute does not contend that costs of production should be the same for all companies. Rather, that it is not the function of a provincial government to reorder the hierarchy of producers according to their production costs, particularly for markets outside of that province.

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Is it unfair and inequitable that companies seek lower electricity rates? No, companies can petition the government for relief or to change terms of government services.

There was a concerted interest and effort by the government to ensure a very low rate for Port Hawkesbury which was essential for the PWCC deal to get done.

Is it unfair and inequitable that there is competitive effect from government measures? No. Most business government interactions will have some effect on the business and may or may not affect other businesses in the market. But the knowledge that the government, through its assistance and its own investments, would harm the foreign investor's investment with the conditions of the SC paper market in North

America, all for the benefit of an operation that was not commercially viable, pushes the walls of fair and equitable treatment beyond their limites.

That concludes my presentation on Article 1105. I will now turn to Mr. Valasek to discuss Article 1102.

OPENING SUBMISSIONS BY MR. VALASEK:

MR. VALASEK: Thank you very much. Judge Crawford, Dean Lévesque, Dean Cass, it is a pleasure to be appearing before you again this morning, or this afternoon. I will be addressing Article 1102 and the related question of Article 1108(7).

Next slide, please.

My presentation is divided into three parts: The proper interpretation of 1102 where I will respond to Questions 14, 15, and 23; the three elements for which claimant has the burden of proof to establish actionable differential treatment, where I will respond to Questions 3, 5, 16, 17, and 18; and the subsidy exception under 1108(7), where I will respond to Questions 7 through 11.

The Tribunal's Questions 14 and 15 frame the discussion about the proper

interpretation of 1102. Question 14 addresses the standard of conduct that is actionable under the provision. The Tribunal asks:

> "One basic issue is whether to be actionable under NAFTA Article 1102, the conduct complained of (a) must be intended to harm a foreign national or the investment of a foreign national, (b), must be taken with knowledge that it will have that harm or very likely will have that harm, or (c) simply is an action that does have that harm."[as read]

The Tribunal then includes Subquestions (a) through (c) for further clarification.

Question 14 correctly identifies the two aspects of the provision's interpretation, about which Canada is plainly wrong.

The first aspect is whether the foreign investor must establish that the state has acted with intent to harm or with knowledge of likely harm or, rather, whether the foreign investor needs only to establish that the state's measures have resulted in harm, which is the Tribunal's option C.

It is claimant's position that the proper answer is C. The foreign investor's burden is limited to establishing simply that the state's conduct harmed the foreign investor.

This brings us to the second aspect addressed in subquestion 14 (c) where the Tribunal asks:

> "If the proper answer to question 14 is (c), does the harm have to be, (i), exclusive to the foreign national, (ii), primarily to the foreign national, or, (iii), simply affecting the foreign national at some level of significance?"[as read]

It is claimant's position that

the correct answer is (iii), simply affecting the foreign national at some level of significance.

In the plain language of 1102(3) in order to be actionable, the conduct need only result in treatment that is:

> "Less favourable than the most favourable 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."[as read]

The standard set out in 1102(3) is plainly an objective standard based on a difference of treatment between the foreign investor and the domestic investor who, among all domestic investors, has received the most favourable treatment by the province or state.

This means that while the foreign investor is being harmed by the measures, there could be harm to other domestic investors, namely those not accorded the most favourable treatment. This rules out Option (i) in Question

14 (c), which would require that the harm be exclusive to the foreign national.

The language of 1102(3) also allows that the harm might even be primarily to other domestic investors and not to the foreign investor, which rules out Option (ii).

It is necessarily the case, based on the plain language of 1102(3), that the foreign investor discharges its burden regarding actionable conduct under 1102(3) as long as the conduct harms the foreign national. A certain minimum level of harm is likely to be required for an actionable claim under 1102 given the requirements that the foreign investor be accorded treatment, which I will address momentarily.

We are now going into a restricted access session.

MS. D'AMOUR: Thank you, just give me one second to confirm.

All right, the feed has been cut and everyone else is in the waiting room.

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MR. VALASEK: So I just completed my previous point by saying that our position is that a certain minimum level of harm

is likely to be required for an actionable claim under Article 1102 and under the Tribunal's 14 (c).

While this is our position on the proper interpretation of 1102(3) as regards claimant's threshold burden, we submit that the evidence in this case shows that the Government of Nova Scotia acted with knowledge that making the mill at Port Hawkesbury the lowest-cost producer would very likely cause harm to Resolute, and that it in fact did cause harm and that, in fact, did cause harm to Resolute.

In other words, claimant meets not just its threshold burden that Nova Scotia's measures in fact caused it harm, option (c) in the Tribunal's framework, but also that Nova Scotia adopted those measures with the knowledge that its measures would very likely cause that harm.

That's the end of the session.

MS. D'AMOUR: Thank you, the stream is live and everyone else has been readmitted.

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MR. VALASEK: This means that claimant also satisfies option (b) in the

Tribunal's framework. For purposes of claimant's basic burden under 1102(3), however, it is not necessary for the Tribunal to parse the details of what prediction the government was acting on and how clear the relevant officials were on the probability of the predicted changes in price and resulting harm to competitors.

This brings me to Canada's argument that it is Resolute's burden to establish nationality-based discrimination in order to meet the requirements for actionable conduct under 1102(3). While it is self-evident that 1102, as a general matter, is a provision that guarantees national treatment and therefore protects the foreign national against harm that befalls it because it is treated differently from a domestic investor, Canada ignores the specific language of 1102(3) which protects the foreign national against treatment which is:

> "Less favourable than the most favourable treatment accorded in like circumstances by the state or province to domestic investors."[as

read]

While this language might not be important for certain fact patterns, notably where a province or state treats all domestic investors the same, in this case it is determinative.

Question 14(a), which I will now read, is directly on point.

> "The respondent argues that discriminatory intent is not required to establish a breach of Article 1102, but discriminatory reasons are required in order to support a conclusion that Article 1102 has been violated. Is there a meaningful distinction here? Is the distinction one that has purchase in the law?"[as read]

For the reasons we just gave, it is our position that Canada's argument is contradicted by the plain language of 1102(3). We

say that a government's intent or knowledge is irrelevant to the Tribunal's determination of whether claimant has met its burden of establishing prima facie differential treatment. The government's intent or knowledge, however, does become relevant at the second stage of the Tribunal's analysis when the Tribunal must determine whether the state has advanced a reasonable justification for the discrimination.

This brings me to Question 15, which addresses the second stage of the analysis under 1102.

In accordance with the analytical approach the Tribunal has correctly summarized in its question, after a claimant has made a prima facie demonstration of differential treatment, it is the government's burden to justify it. As the Tribunal notes in its introduction to the subquestions in Question 15:

> "Past NAFTA Chapter 11 tribunals have adopted approaches that consider whether there were reasons for the measures that were not

discriminatory."[as read]

The Tribunal refers to Pope & Talbot, SD Myers, Feldman and GAMI, and continues.

"If such reasons could not be found, then Tribunals could conclude that nationality played a role in the differential treatment (i.e. that nationality-based discrimination was present)."[as read]

Throughout these proceedings, however, respondent has taken the position that the burden never shifts to Canada to justify the measures, which the Tribunal questions in part (b) of Question 15. It is our position that Canada is wrong.

We also appreciate the Question 15(a), asking us what test we are contending for when it comes to Canada's burden of justifying the measures.

As was set out in our written submissions, we agree with the test first formulated in Pope & Talbot and subsequently

endorsed in numerous NAFTA cases.

In Pope & Talbot, the Tribunal noted that the first step in the analysis is for the claimant investor to establish differential treatment. It then turned to the second step, which it described as follows:

> "Differences in treatment will presumptively violate 1102(2), unless they have 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."[as read]

This test has two components, both of which must be met.

In our case, neither of the conditions of the Pope & Talbot test is met.

First, the Nova Scotia measures were unreasonable and had a devastating de facto effect on Resolute, a foreign investor in the supercalendered paper sector.

Second, the Nova Scotia measures unduly undermine the investment liberalizing objectives of NAFTA. The Nova Scotia measures directly violate one of the core objectives of NAFTA, which is to promote conditions of fair competition in the free trade area.

We are entering into at restricted access session, please.

MS. D'AMOUR: Thank you, the feed has been cut and everyone else has been removed from the room.

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MR. VALASEK: Here, the government's knowledge of how its measures would very likely impact Resolute are relevant and devastating to any attempt to justify them.

In its counter-memorial Canada wrote:

> "Nova Scotia's financial assistance to Port

> Hawkesbury helped achieve a number of legitimate public policy objectives that do not hide a protectionist agenda. If PWCC received financial support from the Government of Nova Scotia, it is simply because it decided to purchase the Port Hawkesbury mill."[as read]

There is no doubt that the officials in Nova Scotia believed they were achieving important public policy objectives. But they also knew that they were doing so in an extraordinary way. They were heaping largesse on Port Hawkesbury knowing they were creating a national champion in the supercalandered paper market, all of whose other players were outside the province but in the same market and knowing that the long-term success of their policy objectives would most likely come at the potentially fatal expense of the competition.

Furthermore, they knew that Resolute, the only foreign-owned competitor in Canada, would likely suffer most.

Even if Canada convinces the Tribunal that this policy decision was neutral from a nationality perspective, there is no way, in our submission, that this policy can pass the second part of the justification test as "not otherwise unduly undermining the investment liberalizing objectives of NAFTA".

Article 102(1) of NAFTA sets out expressly that one of the key objectives of the treaty, including as elaborated more specifically through Article 1102 and the national treatment guarantee, is to "promote conditions of fair competition in the free trade area."

It is inconceivable, we say, that Canada should be allowed to justify the conduct of the Government of Nova Scotia when its officials knew they were subverting, not promoting, conditions of fair competition.

End of the session.

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MS. D'AMOUR: Thank you, I confirm that the stream is now live and everyone

else has been readmitted to the room.

MR. VALASEK: Thank you.

Having answered Questions 14 and 15, we can summarize our position on the fundamental questions of interpretation. The proper approach to 1102 proceeds through two stages: First, the claimant's burden of establishing prima facie differential treatment in like circumstances; second, the respondent state's burden of justifying the differential treatment.

In the first stage, the claimant need not demonstrate nationality-based discrimination beyond the simple fact that, as a foreign national, it has received treatment less favourable than the most favourable treatment accorded to a domestic investor in like circumstances.

And, finally, in the second stage, the respondent state's justification must satisfy two conditions, that nationality did not figure into the equation when the measures were adopted and that the measures do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.

This interpretation of 1102

has been regularly endorsed by arbitral tribunals tasked with applying it. It is also entirely consistent with the primary rule of treaty interpretation in Article 31(1) of the Vienna Convention:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[as read]

Confronted with this interpretation, Canada fails to muster any serious argument based on Article 31(1).

The sole argument Canada articulates is that the objectives of NAFTA do not impose obligations on parties, its substantive provisions do. But this paints too stark a dichotomy given the role of a treaty's object and purpose in the interpretation of a treaty's substantive provisions.

Abandoning Article 31(1) in

favour of article 31(3) Canada relies almost entirely on the positions it and the United States and Mexico have advanced to no avail before other arbitral tribunals considering 1102 of NAFTA or similar provisions in other treaties.

Footnotes 523, 524 and 525 of Canada's counter-memorial are really quite remarkable. They are nothing but a compendium of references to arbitration briefs that the three countries have filed in their own or one another's cases. Up on screen are Canada's references to its own briefs which, it should be said, failed to convince any of those tribunals.

Then there follows a similar reference to the arbitration briefs of the United States in Footnote 524. And, finally, a reference to the briefs of Mexico in Footnote 525. In Footnote 526, Canada confirms its reliance on Article 31(3)(b) hoping this Tribunal will apply it to all of these coordinated but unsuccessful arguments.

Canada asks this Tribunal, contrary to settled and consistent interpretation, to place the burden on claimant investors to establish a negative, to show that the respondent

state does not have a valid justification for the differential treatment.

Canada put it this way after citing to its briefs in other cases and the briefs of the non-disputing parties:

> "Consequently, in order to demonstrate a violation of Article 1102, the claimant must establish that it was accorded less favourable treatment than PWCC, because it is an investor of another NAFTA party."[as read]

In Question 14(a), the Tribunal observed that:

> "The respondent argues that discriminatory intent is not required to establish a breach of Article 1102 but discriminatory reasons are required in order to support a conclusion that

> Article 1102 has been violated. Is there a meaningful distinction here?"[as read]

As the Tribunal rightly implied, in our view, there is an incoherence in Canada's position and the Tribunal should reject it.

But is the Tribunal nevertheless bound by a norm expressed only in memorials? Must it accept any position the three NAFTA parties have advanced in their briefs just because they say so, whether it makes sense or not?

This brings us to the Tribunal's Question 23. The Tribunal asks:

> "In relation to both Article 1105 and issues respecting the construction of Article 1102, what weight should be accorded to views of non-disputing NAFTA parties? To the extent that those views

are pressed and presented in litigation but have not been adopted by the Free Trade Commission as a formal expression of the parties' intents, can they establish a governing norm?"[as read]

We say no, for the reasons already advanced by Mr. Snarr and for the following additional reasons. Canada argues in its counter-memorial that:

"The consistent and concordant views of the NAFTA parties constitutes subsequent practice under Article 31(3)(b) of the Vienna Convention. As a threshold matter, several tribunals have questioned whether submissions made in the course of an arbitration are evidence of subsequent practice within the meaning of

Article 31(3)(b)."[as read]

These authorities set out on the slide were included in the supplemental bundle submitted to the Tribunal last week which the Tribunal accepted to consider a few moments earlier.

For example -- next slide, please.

For example, the tribunal in Telefónica v. Argentina wrote:

"The Tribunal is not convinced that positions on interpretation of a treaty provision expressed by a contracting state in its defensive brief filed in an international direct arbitration initiated against it by an investor of the other contracting state amount to practice of that state."[as read]

And the Suez case is to the

same effect.

Second, even if such made-for-arbitration views are considered evidence of subsequent practice, they do not establish a governing norm that the Tribunal must follow. Rather, the Vienna Convention states that such subsequent practice is to be taken into account together with the context. It is an additional factor to be considered, and the Tribunal must determine what weight should be given to the allegedly concordant views. This was noted by the tribunal in Mobil Investments, a decision relied upon by the United States in its 1128 submission.

In relation to the proper construction of 1102, and 1102(3), in particular, we see two reasons why the Tribunal should give very little weight to the coordinated views of the NAFTA parties.

Number 1, the NAFTA parties point to their so-called agreement on the requirement for nationality-based discrimination under 1102 but none of the submissions to which they refer makes specific reference to 1102(3) whose specific language is a particular barrier to their position.

Number 2, while the NAFTA parties may have agreed that nationality-based discrimination is a requirement, they never agreed on the content of that requirement. As Mexico itself acknowledged in its submission in our case, in order for putatively "common positions" of the parties to the treaty to be capable of constituting a subsequent agreement or practice as to the scope and meaning of the treaty, it is essential that the points of consensus "can be discerned", that's at paragraph 14 of its second Article 1128 submission.

Here there is no consistent meaning of nationality -- sorry, of nationality-based discrimination within Canada's own submissions, let alone among the three NAFTA parties.

Therefore, there is no governing norm on which Canada can rely based on the coordinated submissions of the non-disputing parties. The Tribunal is on more solid ground relying on the interpretation of 1102 that follows from a faithful application of Article 31(1).

This brings me to the second part of my presentation, showing that claimant has

discharged its burden of showing differential treatment.

For the reasons explained earlier, we say that on a proper construction of 1102, the first stage of the analysis requires us to establish differential treatment in like circumstances.

In accordance with the three-part test developed in UPS, we must establish that Resolute or its investment has been accorded treatment by Nova Scotia with respect to its investment; second, Resolute or its investment is in like circumstances with PWCC or its investment, Port Hawkesbury, because PWCC is the Canadian investor and Port Hawkesbury is its investment, which have received Nova Scotia's most favourable treatment, and; finally, Nova Scotia, we must establish, treated Resolute or its investment less favourably than it treated PWCC or its investment, Port Hawkesbury.

I turn, then, to the issue of treatment. Question 16 addresses this issue, asking what the exact test should be. We propose a test inspired by the cases arising out of the measures adopted in Mexico relating to its sugar

industry which affected producers of high fructose corn syrup.

> "A government accords treatment to a foreign investor or its investment where it adopts a policy favouring its own investor or investment whose objectives can only be achieved when it produces an effect on the foreign investor or its investment."[as read]

The tribunal's finding in respect of the corn syrup tax on bottlers in Mexico is analogous to the situation here, as we explained in detail in paragraphs 204 to 208 of our memorial, and paragraph 251 of our reply memorial. Canada's attempts to distinguish those cases have nothing to do with the finding as to what constitutes treatment.

The test is not meant to capture mere incidental effects, but rather probable and foreseeable adverse effects. As this

Tribunal itself found in paragraph 248 of its jurisdictional decision, when it decided that Nova Scotia measures "related to" Resolute and its investments outside Nova Scotia, the Nova Scotia measures:

> "Were intended to put the purchaser of the mill at Port Hawkesbury in a favourable position and in a small and saturated market, it was to be expected that competitors would be affected."[as read]

The Tribunal rejected Canada's argument that it was impossible for Nova Scotia to accord any treatment to Resolute or its investments because those investments are in Quebec, not Nova Scotia. The Tribunal reasoned that even though Resolute:

> "Does not suggest that it was specifically targeted by the Nova Scotia measures, it is open to it to establish on the

merits of breach of Article 1102 on some other basis."[as read]

That was at paragraph 290 of the jurisdictional decision.

Question 16 also asks:

"How much does the matter turn on the intent of the government with respect to the foreign national?"[as read]

We say it does not turn on intent with respect to the foreign national. Intent with respect to the favoured domestic investor is sufficient. As long as the government has adopted a policy intended to benefit a domestic investor where it is probable and foreseeable that the foreign national will be affected, then the test of treatment is met. And in the context of a provincial or state measure under 1102(3), it is irrelevant that the measure produces an adverse effect not just on the foreign investor but also on other domestic investors.

This is consistent with our answer to Question 14(c) where we say that the

proper interpretation points to Option (iii) and does not require harm to be exclusive to or primarily to the foreign national.

Here we more than satisfy the test for treatment. Nova Scotia adopted measures intended to benefit the Canadian investor, PWCC, with an investment in Nova Scotia, the Port Hawkesbury mill. It was probable and foreseeable that those measures would harm Resolute. That was the case we made in our memorial.

Please start a restricted access session.

JUDGE CRAWFORD: Given the time of the afternoon, I think this would be a moment for a five-minute break.

MR. VALASEK: That's fine.

JUDGE CRAWFORD: So now it's five minutes to six Cambridge -- minutes to five in Cambridge, I am sorry. So we will resume in Cambridge shortly after five o'clock.

MS. D'AMOUR: Thanks. I will open everyone's breakout rooms. And I have also removed all of the people who shouldn't be in a restricted access session for when we return, and I can confirm that the feed's cut.

--- Upon recess at 10:55 a.m. EST
--- Upon resuming at 11:10 a.m. EST
--- Whereupon Restricted Transcript Commences
MR. VALASEK: I am just going to back up one paragraph so that we remember where we were.
JUDGE CRAWFORD: Before you do, I just wanted to raise a couple of issues. Are there any issues?
MR. VALASEK: No, I can hear you.
JUDGE CRAWFORD: You have got about 20 minutes left of your time, I think. Is that accurate?
MR. VALASEK: If I -- I have been tracking, I have been tracking how much time I have taken without the interruptions and restricted access procedures and so forth, and I have been at it for 26 minutes, according to my clock here. And I had thought that I had about 50 minutes. So I am just over halfway through. So I was more like thinking 25 minutes, and then Mr. Feldman has about 30 seconds or one minute by way of a wrap up.
JUDGE CRAWFORD: So it's like

35 minutes to complete?

MR. VALASEK: No, I think 30 minutes. 30 minutes, yeah.

JUDGE CRAWFORD: Well we seem to be making reasonable progress, so the Tribunal will give you the 30 minutes provided you don't enlarge it.

MR. VALASEK: Thank you.

JUDGE CRAWFORD: Then the respondent can start after the lunch break. The lunch break will be shorter to take account of interruptions during the day. So the lunch break will be 40 minutes and then, as I say, we will have the respondent.

Any other questions anyone has? Okay.

MR. VALASEK: Thank you.

So I will back up one paragraph.

I was saying that here we more than satisfy the test for treatment. Nova Scotia adopted measures intended to benefit a Canadian investor, PWCC, with an investment in Nova Scotia, the Port Hawkesbury mill. It was probable and foreseeable that those measures would harm

Resolute, that was the case we made in our memorial.

[redacted]

[redacted]

That's the end of the restricted access session.

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Thank you, I can confirm everyone's been readmitted and we are now back to streaming.

MR. VALASEK: Thank you.

I turn now to the second element of differential treatment, like circumstances, and Question 17. The Tribunal writes:

> "With respect to like circumstances, there are numerous issues that the parties discuss in passing that bear on this. For instance, the respondent argues that the claimant cannot have been in like circumstances because it declined to bid on Port Hawkesbury. What exactly are the proper elements

of like circumstances here?"[as read]

Numerous tribunals and reviewing courts have recognized that determining whether a claimant is in like circumstances to a particular domestic investor is a highly fact-specific exercise.

For example, in Pope & Talbot the tribunal wrote:

"It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, circumstances are context-dependent and have no unalterable meaning across the spectrum of fact situations and the concept of like can have a range of meanings from similar all the way to identical."[as read]

The slide includes quotes from

other decisions to the same effect.

As the Tribunal noted in its question, the parties have discussed numerous issues in passing that bear on the like circumstances analysis. It is instructive to organize these into relevant factors which can then be considered against the facts to identify, in the Tribunal's words, the proper elements of like circumstances here.

First, is the market factor. Are the foreign investors and domestic investor operating in the same market? Then there's the product factor. How similar are the products or services being offered by the foreign investor and domestic investor?

Next, there is the policy factor. What is the government's goal in adopting and implementing the measures?

Also important is the jurisdictional factor. Is it relevant that the foreign and domestic investor are located in the same jurisdiction?

That brings up the related implementation factor. Are the measures a law or regulation of general application in the

territory, or are the measures targeted and specific in scope or effect?

Finally, there is a temporal factor. Is there a timing issue as regards the investors and investments being compared?

Ricky, one more slide.

We say that one -- okay, hold off.

We say that no one factor is decisive in the like circumstances analysis. The Tribunal must ultimately consider all of the circumstances against these factors to determine whether the comparators are in like circumstances.

In our submission, that exercise results in the following observations which we say give the Tribunal a proper basis to conclude that Resolute and its Quebec mills were in like circumstances to PWCC and the Port Hawkesbury mill in Nova Scotia.

And, Ricky, we are already -- no, hold back. You were one slide ahead of me. Okay, thank you.

So we are now on Slide 87.

As the Tribunal acknowledged in the jurisdictional phase, Port Hawkesbury and

several of Resolute's Quebec mills were in the same North American market of supercalendered paper, they were direct competitors. This combines the market and product factor.

The Nova Scotia measures were intended to have and had a direct impact on price of supercalendered paper which affected all producers of this commodity, including the mills owned by Resolute producing this product. This combines the product and policy factors.

It does not matter that the relevant Quebec mills were not in Nova Scotia, since Nova Scotia's main policy goal was to ensure Port Hawkesbury's long-term success by making it a national champion in the market for supercalandered paper, a goal it achieved through a combination of targeted and specific regulatory and spending measures whose main objective was to make Port Hawkesbury the lowest-cost producer of the relevant products and this is a combination of the policy, jurisdictional, and implementation factors.

Finally, the revival of Port Hawkesbury by the Government of Nova Scotia happened at the very time when Resolute was itself

hoping for better times at its supercalandered paper mills.

That Resolute was a potential bidder for Port Hawkesbury just reinforces the like circumstances analysis. It was a player in this market and in this product but, because it was, it had no interest in being part of a scheme that would cannibalize its own sales through price erosion.

With this framework I address the specific questions the Tribunal has asked that bear on the like circumstances analysis.

In Question 18 the Tribunal notes that:

> "The respondent has brought forward evidence of the treatment provided to Bowater Mersey (owned by Resolute) by Government of Nova Scotia. In particular, in terms of financial assistance and other benefits, should the Tribunal consider that

Bowater Mersey and not Resolute's mills in Quebec were in like circumstances to Port Hawkesbury paper in Nova Scotia? That all like circumstances describes is the relationship to all of Resolute's mills?"[as read]

Bowater Mersey was not in like circumstances based on several factors. First, it was not in the same market or product, it produced newsprint whereas the revised Port Hawkesbury produces supercalendered paper.

Moreover, Resolute had already decided to close the Bowater Mersey mill when the Port Hawkesbury paper measures were adopted. The question about a Resolute mill in Nova Scotia also highlights why political jurisdiction is not a key factor in the like circumstances analysis in our case.

None of the measures adopted for Port Hawkesbury, even those of a regulatory nature, would have applied to another facility in

Nova Scotia. Each of the measures about which Resolute complains in this case is focussed on Port Hawkesbury. It is not a broad regulatory measure of general application across the whole territory of Nova Scotia.

In relation to the same point, I turn to Question 3 in which the Tribunal suggests that the term "provincial champion" seems more apposite for Port Hawkesbury than national champion, since:

> "Most of the measures at issue in this case are provincial jurisdiction. In other words -- "[as read]

The Tribunal writes.

> " -- the regimes supercalendered paper producers are subjected to is defined in large part by provincial laws, regulations, and programs. As such, producers are dependent and benefit from whatever

conditions apply in the province where they operate for matters such as the price of electricity, cost of fibre, support programs, taxation, et cetera."[as read]

But Resolute is not complaining about a regime of provincial laws, regulations, and programs that apply to a pool of supercalendered paper producers in Nova Scotia. That is not what this case is about.

As is evident from a review of the individual measures that make up the coordinated ensemble which appear on the slide, this case is about a series of targeted measures aimed only at making a single supercalendered paper producer the low-cost producer in the North America market.

Port Hawkesbury was a "provincial champion" only in the sense of its domicile in Nova Scotia, but a national champion by design and effect of the Nova Scotia measures.

As Mr. Feldman stated earlier,

Nova Scotia chose not only a provincial champion as the only producer of supercalendered paper in Nova Scotia but a national champion for all Canada in the North American market, the market that Nova Scotia identified when fulfilling Port Hawkesbury's shopping list.

One would not expect a province to pick a provincial champion in the sense of making one of several producers in a province the champion in that province. Why would it? It would be creating benefits for one employer and one region but causing harm to another in another region. It would be a zero sum game. It is only when there is a single provincial producer in play and that single producer can be made the lowest-cost producer that the province sees only upside by giving sufficient support to create a national or even world champion. In such circumstances which obtained here, the province exports the predictable losses caused by its policies outside its borders thereby guaranteeing an economic and political win within its borders but at the expense of those apparently outside.

Question 5 raises the question

of the electricity rates paid by Resolute in Quebec. The Tribunal asks how the Quebec rates impact its legal analysis. As Mr. Feldman stated, Port Hawkesbury's reckoning of the price it could by for electricity was always and only part of a larger calculation of costs within Nova Scotia and as compared to the ensemble of costs confronting other North American producers. PWCC calculated the overall costs, including electricity, to make it the low-cost North American producer. It did not disaggregate for selective comparisons, nor should the Tribunal.

And as for the aggregate or overall cost structures as between Resolute's mills and Port Hawkesbury Paper, Resolute's cost structure is what it is. It is not on trial here.

What is on trial is: One, the difference between Port Hawkesbury Paper's cost structure with and without the Nova Scotia measures, and; two, Nova Scotia's motivation for putting that preferential cost structure in place, namely to make Port Hawkesbury Paper the low-cost producer, with a cost structure lower than any other producer including Resolute.

I turn now to the third part

of my presentation on Canada's 1108(7) defence. Resolute takes the position that Canada cannot benefit from this provision and thus cannot escape its responsibility for its breach of 1102 and thus can escape -- sorry. Resolute takes the position that Canada cannot benefit from this provision and thus cannot escape its responsibility for its breach of 1102. Sorry about that.

I will now address Questions 7 through 11 which conveniently frame the relevant issues.

Question 7 focusses on the distinction between an exception and derogation. The issue has not come up frequently and NAFTA tribunals seem just about evenly divided, 3 to 2 according to our research, about whether to treat 1108(7) as a derogation or as an exception. We submit that there are several reasons to treat the provision as an exception and to turn to it only after considering whether there has been a breach of 1102.

First, Canada has not been consistent in its approach to the issue. While Canada in its Statement of Defence did advance arguments suggesting that what it called the

"exception" in Article 1108(7) should be considered before the merits of 1102, it simultaneously advanced an inadmissibility argument that was based on the interpretation of Article 1102, not 1108(7). Moreover, in its request for bifurcation, Canada argued in favour of considering its admissibility argument in a preliminary phase to avoid any need to enter into the merits of the 1102 claim.

Second, the parties have presented extensive argument on 1102, which is a central provision in this claim. Much time and significant resources have been spent on the debate. In our submission, the parties expect and deserve a determination on the merits of 1102, whatever the decision on 1108(7).

And, finally, such a decision would benefit the international law community. Although 1102, per se, is now relevant only to grandfathered cases under NAFTA, a virtually identical provision exists in the USMCA in Article 14.4, and similarly worded provisions of course exist in many treaties.

The Tribunal also asks whether deciding on Canada's defence under Article 1108(7)

one way or another makes a difference as to the way the Tribunal analyzes this provision. We cannot discern any impact on the analysis.

We should go now into a confidential session.

MS. D'AMOUR: Just give me one second. Is anyone else having issues with the real-time lagging at all?

The feed has been cut and everyone is in the waiting room.

--- Whereupon Restricted Transcript Commences

MR. VALASEK: In Question 8, the Tribunal asks:

> "Irrespective of the relevance given by this Tribunal to WTO obligations, does the claimant have direct evidence other than the alleged lack of notifications of subsidies under the SCM agreement that Canada denied the existence of any and all subsidies in

relation to the assistance provided by the government to Port Hawkesbury?"[as read]

The slide now up on the screen summarizes the direct evidence of Canada's denial of subsidies in relation to Port Hawkesbury.

In November 2012, in response to questions from the US trade representative, [redacted] In the meeting of the WTO committee on subsidies and countervailing measures held on April 22nd, 2013, Canada disagreed with other members of the WTO regarding the need to notify the Port Hawkesbury measures as recorded in the minutes published in August 2013. And then, in three consecutive official notifications to the WTO in 2013, 2015 and 2017, Canada reported "Nil." for Nova Scotia subsidies in its 2013 notification to the WTO.

That's the end of the confidential session.

And I note, Members of the Tribunal, there was a missing reference on that slide, that we will get to you, in the last item.

That's my oversight.

MS. D'AMOUR: Thank you. Everyone's been readmitted and the stream has restarted.

--- Whereupon Restricted Transcript Ends

MR. VALASEK: Canada made it clear what it meant by "Nil." This designation is defined in the notification documents themselves. "Nil" means that Governments of each Province and Territory informs that they do not grant or maintain within their territory any subsidy. Our evidence is therefore not just a lack of notifications of subsidies under the SCM agreement. Canada necessarily implied by affirmatively using the "nil" designation that Nova Scotia's support for PHP was not a subsidy. This is clear from the face of the WTO notifications where provincial subsidies of all kinds were notified in the very same document, and entirely unambiguous given the context of the earlier exchanges with the trade representatives and in meetings of the SCM committee.

Up on the slide is an example of a notification of a federal subsidy in the 2013 WTO notification. And, now, a list of subsidies

notified for the province of British Columbia in the same WTO notification. And I think this is just the index, there is then details on each one.

Question 9 then gets to the crux of the matter.

> "Given that Canada earlier denied that the Nova Scotia measures were subsidies, should its 1108(7) defence be rejected? Should governments -- "[as read]

The Tribunal asks.

> " -- be held to some standard of consistency in characterizing their actions in legal proceedings?"[as read]

Yes, we say they should. And Canada's argument should be rejected.

In the UPS case, Dean Cass wrote, that:

> "It is at a minimum reasonable to ask a NAFTA party seeking to avail

itself of the subsidy exclusion from Chapter 11 to clearly designate its conduct as a subsidy somewhere other than in defence of its conduct before a tribunal."[as read]

And that was in Dean Cass' separate statement at paragraph 163.

Not only did Canada not do so here, as we just saw in answer to the Tribunal's previous questions, Canada actually took every opportunity over a span of more than five years and during the very time that Port Hawkesbury was receiving advantageous treatment through the Nova Scotia measures, to expressly deny that these measures, individually or collectively, were a subsidy.

Canada's declarations of "nil" subsidies for Nova Scotia were made to other WTO members, some of whom, notably the United States and the European Union, questioned Canada directly and specifically about the Port Hawkesbury bailout measures. In responses to those questions, Canada

denied that the measures were subsidies.

In addition to denying that the measures were subsidies in other fora, such as in official communications with the trade representative and in official notifications to the WTO, Canada also conspicuously changed its attitude in these proceedings. While 1108(7) was mooted from the outset and should have been an obvious argument to advance during the admissibility and jurisdictional phase of these proceedings, Canada did not actually advance its subsidies defence in these proceedings until March 2019, after Port Hawkesbury Paper paid more than $32 million to settle the U.S. Department of Commerce proceeding. By this point, neither Canada nor Port Hawkesbury would suffer any adverse consequence arising from Canada's failure to comply with its WTO reporting obligations.

Now, Canada claims the measures are subsidies after all and seeks a determination that the 1108(7) exception bars Resolute's claims.

Canada's opportunism could not be more obvious and should not be rewarded. We have detailed our position on the applicable legal

principle in our reply memorial in paragraphs 291 through 308.

We say that the principle against self-contradiction exists in international law and should be reaffirmed by this Tribunal. It has variations that manifest themselves under different maxims, venire contra factum proprium, estoppel, allegans contraria non audiendus est, and so on.

And while the estoppel doctrine is a variation of the principle that requires reliance, there are broader versions of the principle that do not; these are squarely grounded in the related principle of good faith.

In the Chevron v. Ecuador arbitration, for example, the tribunal explained that it was basing its decision on the general principle of good faith under international law instead of an estoppel principle, observing that "although estoppel is consistent with the general principle of good faith it is a different doctrine under international law." The tribunal was relying on a "broader principle precluding a state from blowing hot and cold, i.e. the principle of good faith".

Underlying the use of these doctrines, whatever their name, is the requirement that a state ought to be consistent in its attitude to a given factual or legal situation.

At their core, these are evidentiary principles meant to require a state to have at least a basic level of consistency in the representations it makes in different fora.

Even if the Tribunal does not hold Canada to a consistent position, however, Canada should still not benefit from the exclusion in 1108(7).

This brings me to the questions -- to Questions 10 and 11. In Question 10, the tribunal asks:

> "Whether the sweep of the respondent's argument under the subsidy exception would eliminate matters from the scope of NAFTA parties' national treatment obligations that were not intended to be or understood to be removed by the language

pointed to by the respondent?"[as read]

And in Question 11, the Tribunal signals the same concern in relation to the respondent's argument based on grants or loans or payments that constitute procurement. The concern is well-founded.

With respect to both subsidies and procurement, respondent's argument sweeps too broadly. The language of 1108(7)(b) exempts:

"Subsidies or grants provided by a party or state enterprise including government supported loans, guarantees and insurance."[as read]

The provision's exemption is limited to individual subsidies, grants, or loans, nothing more. Similarly 1108(7)(a) exempts "procurement". These provisions do not exempt a broader government initiative that is alleged to violate 1102 even if that broader initiative might include, among its components, measures that could qualify as a subsidy or a procurement if viewed in

isolation.

Resolute is not complaining separately and in isolation about any individual measure that Canada claims is a subsidy or procurement program. Nor is Resolute complaining only about those individual measures. Instead, Resolute is complaining about Nova Scotia's decision to make Port Hawkesbury the lowest-cost producer through the adoption of a program that, by express design of the state as a willing partner of the buyer of Port Hawkesbury Paper, involved an indivisible ensemble of coordinated measures, some of which Canada does not even claim qualify under Article 1108(7), like the adoption of the load retention rate and related regulatory measures. Indeed, even assuming a disaggregation of the ensemble were factually plausible and conceptually appropriate, some of the specific measures, each of which was indispensable to PWCC's plan, do not qualify for the exemption. These measures alone are sufficient to expose Canada to responsibility for a violation of 1102. These measures include the 24/7 "must-run" order for the biomass boiler and the waiver of the renewable energy standard. No matter how broad

Canada would like the definition of a subsidy to be or grant or procurement to be, these measures do not qualify and Canada has not taken a contrary position.

For these reasons, we submit that Resolute makes out a valid and compensable claim for breach of Article 1102.

Thank you for your attention this morning or afternoon. I look forward to the week ahead and to answering any further questions the Tribunal may develop in advance of the closing argument.

FURTHER OPENING SUBMISSIONS BY MR. FELDMAN:

MR. FELDMAN: Mr. Valasek has completed Resolute's opening statement.

Nova Scotia breached NAFTA Articles 1102 and 1105 when it more than favoured a competing company over the already-established Resolute at an extraordinary level, knowing the ensemble of measures it was undertaking would incur monetary damages and likely drive at least one Resolute mill out of business. Resolute asks the Tribunal to recognize Nova Scotia's unfair and unjust conduct and award Resolute damages in the amount of the losses Professor Hausman has

calculated up to approximately $216 million or in his alternative methodology between $103 and $148 million.

We thank the Tribunal for its attention. This concludes Resolute's affirmative presentation.

JUDGE CRAWFORD: The panel is grateful for the claimant's organized presentation of its material, despite certain technical difficulties, and we look forward to hearing what the respondent has to say in response after the lunch break which has been reduced in length to 40 minutes. And the time now is, if I can see the clock, twenty to six, Hague time. So 40 minutes is 20 past six. So we will start again at 20 past six. I hope you have an enjoyable short lunch.

--- Upon luncheon recess at 11:40 a.m. EST

--- Upon resuming at 12:27 p.m. EST

JUDGE CRAWFORD: All right. We are ready to start in the afternoon. It's respondent's opening statement. And I suppose, Mr. Luz, you are starting?

MR. LUZ: Yes, Judge Crawford. I will start off. But before we do, I was hoping we might be able to go into restricted access

session for just a moment so we can discuss an administrative issue.

JUDGE CRAWFORD: Yes, of course.

MR. LUZ: Thank you.

MS. D'AMOUR: Just give me one moment. All right. The feed has been cut, and everyone's been put back in the waiting room.

--- Whereupon Restricted Transcript Commences.

MR. LUZ: Thank you. Judge Crawford, it's come to our attention that one of the members of the claimant's team has -- who is not supposed to have access to the transcript because it has confidential -- restricted access information has been following along on the transcript. Mr. Vachon, who, as the Tribunal knows, is not allowed to have access to restricted access information, has apparently been following along on the transcript. And we don't know how Mr. Vachon would have received the link to the live feed, but it obviously does raise a concern that came up, and so I don't really know what to do about this other than to ask the claimant to confirm what happened and why Mr. Vachon has access to the live feed when he wasn't supposed

to.

JUDGE CRAWFORD: Is that something the claimant can do now, or do you want to wait until tomorrow morning?

MR. LUZ: If Mr. Valasek can answer the question now and alleviate the issues, then we can...

MR. VALASEK: Let me just clarify because I am actually -- the way we have organized ourselves is that the team from Norton Rose Fulbright is in our offices in Montreal, those of us who are in Montreal, and Mr. Vachon is in a separate conference room here. So if you want to -- if you would like us to look into this for a few seconds, and we will come back to you in a moment, we could do that or -- and presumably we should so that whatever misunderstanding may have happened doesn't continue. So I am happy to do that now.

JUDGE CRAWFORD: But he's not accessing the transcript now? Is he accessing the transcript now?

MR. VALASEK: I can't answer that question, so -- I'm not the one who set up his particular workstation, so -- but I can --

it's around the corner. I can go check.

JUDGE CRAWFORD: I think it's something that you should sort out overnight to give you the opportunity to find out what happened and why without taking the Tribunal's time.

MR. VALASEK: Okay. And what I will do is I'll just tell my colleague here to go to see Mr. Vachon to make sure that it's off. Okay. Very good.

JUDGE CRAWFORD: Yes, I will call on you first thing tomorrow morning to respond to the question.

MR. VALASEK: Yes, very good.

MR. LUZ: Thank you, Martin.

We can leave the restricted access session and go to the live feed for opening statement. Thanks.

MS. D'AMOUR: All right. The stream is live, and everyone's been readmitted.

OPENING SUBMISSIONS BY MR. LUZ:

MR. LUZ: Thank you. Judge Crawford, Dean Cass, Professor Lévesque, it's an honour to appear again before this Tribunal representing the Government of Canada although under remarkably different circumstances than the

last time we were together. On behalf of my colleagues, all of us from the Government of Canada team, I would like to express our appreciation to the Tribunal, to Ms. Ambast, and her colleagues at the Permanent Court of Arbitration, the assistant to the president and to Arbitration Place for accommodating this online hearing. And I would also like to thank counsel for the claimant for their cooperation and professionalism throughout the arbitration.

Now, before I start with Canada's opening statement, I would like to describe how we plan to proceed for the next two and a half hours.

Now, as the Tribunal knows, much of the documentary evidence in this case has been designated as confidential or restricted access, so with this in mind, we have organized our presentation in such a way as to minimize interruptions to the public feed as much as possible.

And, furthermore, given the unique circumstances of speaking to the Tribunal in an online environment, I will do my best to speak directly to the Tribunal without keeping

documents or PowerPoint slides on the screen for extended periods of time so that it won't distract.

Of course, if the Tribunal would like to me to keep up a slide or pull up a particular document to discuss, don't hesitate. Of course, I am happy to do that.

Now, in this opening statement, I will focus on the key legal issues and the critical facts that will assist the Tribunal in coming to the conclusion that Canada submits that it should reach: There has been no breach of NAFTA chapter 11.

We will also try to answer all of the questions that the Tribunal posed to the disputing parties in its October 16th letter.

If there's a specific question that the Tribunal feels I haven't fully addressed, let me know, and I will be happy to reply.

I will be presenting Canada's case on the merits, and I will be speaking for approximately an hour and 45 minutes, and thereafter my colleague Rodney Neufeld will speak for approximately 45 minutes on the question of damages should a violation of NAFTA chapter 11 can

be found.

Now, Resolute's claim that the financial assistance by the Government of Nova Scotia to the Port Hawkesbury paper mill violates chapter 11 is based on the following characterizations: Extraordinary, possibly unprecedented and unparalleled measures, never before extended by any government, so much in so many different forms, on such a scale with a guarantee to become the low-cost, invulnerable giant which would defeat and crush all of its competition. We can see that from the claimant's own words.

Chris, you can go through the rest of this, please.

Now, Canada submits that these and the other arguments presented by the claimant are not based on actual evidence, but on hyperbole and mischaracterizations intended to provoke a sense of outrage.

The claimant's allegations fail on many levels. It has provided no evidence whatsoever of anticompetitive behaviour by PHP let alone establish or even allege that PHP was a state organ, was exercising governmental

authority, or was controlled by the government in its pricing or business practices. There is no logical argument as to how the Nova Scotia measures can be construed as a guarantee of profitability or a guarantee that Port Hawkesbury would have the lowest costs in North America, another fact which the claimant has not even proven.

It's also failed to back up its allegation that Nova Scotia's assistance to Port Hawkesbury is unprecedented in size and scope. But most importantly for this Tribunal, the claimant has failed to establish what any of this has to do with the minimum standard of treatment of aliens in customary international law and the national treatment standard in article 1102.

Government subsidies, loans, and grants to a domestic investor are not prohibited by customary international law. Such measures are not even subject to the national treatment obligation in the NAFTA.

So to give its claim a chance of success, Resolute resorts to a three-pronged strategy. First, misrepresent the nature and the

amount of government assistance provided to Port Hawkesbury; second, ascribe malevolent intentions to government, including Resolute was specifically targeted by Nova Scotia; and, three, misstate the legal standards to ensure that its skewed version of the facts fits its view of what international law should be rather than what it actually is.

In reality, Nova Scotia's support for Port Hawkesbury is typical of what many governments around the world do when faced with the potential closure of a major industrial player in an economically vulnerable region that could leave thousands jobless and inflict hundreds of millions of dollars in damage to the economy. They study carefully and balance the options and weigh the consequences of the "do nothing" option versus some appropriate level of government support for a private business if doing so would be in the public interest and reasonable under the circumstances. That's exactly what happened in the case of Port Hawkesbury.

The lynchpin of the province's forest industry, a major employer and Nova Scotia's largest consumer of electricity was in creditor protection and looking for a new owner

who might be able to bring innovations to reduce electricity, labour, and other costs and to implement a fresh new strategy for high-grade SC paper projects, competing for new customers in different market categories in ways that the old owner was not able to do.

Of course, there were limits on what the Nova Scotia government was willing and able to do. It could not force hundreds of unionized and salaried workers at the mill to accept job cuts and lower wages. It could not dictate the price of electricity. That was in the hands of Nova Scotia's private utility company and depended on how efficiently the mill could control its own energy usage.

It could not control the vagaries of the market, fluctuating demand, exchange rates, imports, exports, economic growth, the actions of other market players like customers and competitors. These are all factors that are out of the control of the government. And there was a myriad of other public policy considerations playing into the calculus facing Nova Scotia at the time, including advancing the province's sustainable forest strategy, renewable energy

goals and Crown land acquisition targets.

So faced with these limitations and the bigger picture, what the government could do was consider providing a reasonable amount of financial assistance from government programs that are intended to encourage economic restructuring in key industries. Yes, there was uncertainty about the future of the SC paper market and the impact of Port Hawkesbury's return, and there was no guarantee that the business was going to survive let alone achieve its profit and cost-saving goals, making the investment of government money risky.

But, on balance, the Government of Nova Scotia decided that it was reasonable and prudent to provide Port Hawkesbury with some financial assistance to improve the mill's efficiency and hopefully remain a major part of the province's economy. Nothing in that decision even comes close to the line of violating customary international law's minimum standard of treatment, and nothing in that decision can be construed as a violation of article 1102, national treatment, a provision that's not even applicable to the measures at issue in this case.

My presentation this morning will be organized as follows: Recognizing that the Tribunal already has an in-depth knowledge of the facts, the first part of my presentation will focus on the critical details which establish the context of Nova Scotia's decision-making and the financial assistance measures at issue.

This will include a short overview of the 2011 bidding process for Port Hawkesbury that led to the selection of Pacific West Commercial Corporation as the preferred bidder by the Court-appointed monitor.

I'll also briefly discuss what happened concurrently to the Port Hawkesbury bidding, namely, the claimant's receipt of government aid to help its Bowater Mersey mill lower its costs, stay open, and competitive.

I will then move on to discuss what the government did in terms of financial assistance to Port Hawkesbury and demonstrate that the claimant's allegation of unprecedented largess is exaggerated.

I will then address the specific issue of the load retention electricity rate that PWCC negotiated with Nova Scotia Power

and explain why this act cannot be attributed to the Government of Nova Scotia under international law. But even if it were, Resolute's claim on the merits would still fail.

Now, the merits analysis will be covered in the second part of my presentation. I will first deal with NAFTA article 1105, the minimum standard of treatment of aliens under customary international law.

I will set out the proper test which Canada and the other NAFTA parties agree should be applied, and it should be apparent that the Nova Scotia measures plainly do not violate customary international law.

On national treatment, Canada's position is that the claim is moot. By virtue of article 1108(7), virtually ever measure in this entire case -- government loans, grants, and procurement -- are not subject to national treatment.

So while I will conclude my presentation with an argument as to why there could be no violation of article 1102 even if 1108(7) did not apply, Canada's position is that consideration of the national treatment provision

is simply unnecessary.

And after I'm finished, my colleague Rodney Neufeld will take the screen for about 45 minutes to explain why, even if -- if the Tribunal were to find a violation of NAFTA chapter 11, Resolute is not entitled to any of the damages that it seeks.

Let's recall the situation that Nova Scotia found itself in late August 2011. NewPage had announced that it was indefinitely idling the Port Hawkesbury mill. A few days later, Resolute's then president, Mr. Richard Garneau, delivered the news to the government that it would be closing its Bowater Mersey newsprint mill by the end of the year. Now, I will describe the government bailout of Bowater Mersey in a moment, so let's just focus on Port Hawkesbury.

On September 6th, NewPage Port Hawkesbury sought creditor protection under the Canada Creditors Arrangement Act, the CCAA.

Now, the goal of a CCAA filing is to help a business restructure and to continue in operation for the benefit of its creditors, employees, and the local community. And that's exactly what NewPage hoped to do with Port

Hawkesbury: Restructure and sell it to a new buyer as a going concern and maintain employment for at least some of the hundreds of people that worked there. You can see that goal reflected in NewPage's court filing on September 6th, 2011. It's paragraph 8 on the screen.

Now, with Port Hawkesbury in limbo and facing an imminent closure of Bowater Mersey, the government found itself in a very serious situation. The demise of two of the three paper mills in the province could inflict hundreds of millions of dollars in damage to the economy, throw more than 1,000 people out of work, and cause higher electricity prices for everyone. Now, there are several exhibits on the record in this arbitration which establish the magnitude of potential damage to the economy should both of these mills close down.

Now, both -- these documents have been designated as confidential, so there's no need to break the public feed. I will just refer the Tribunal to certain exhibit numbers, and they can refer to them at their leisure later. They are Exhibits R-145, R-148, R-157, R-160, R-309, and R-430.

Hopefully those have been recorded clearly in the transcript, and the tribunal will be able to refer to them later.

Now, it's not just that Port Hawkesbury's operations directly employed 1,000 people on Cape Breton Island, a rural part of the province with limited alternative employment opportunities. But as Deputy Minister of Natural Resources in Nova Scotia, Julie Towers, explains in her witness statements, the forest industry in the province is highly integrated and dependent on Port Hawkesbury, which, at the time, managed more than around 1.5 million acres of licensed Crown timber at the time it went to creditor protection.

So that's why, as the tribunal will recall from the jurisdictional phase, the province acted in September 2011 to set up the forester infrastructure fund to help stabilize the industry while the sale of Port Hawkesbury ran its course.

So faced with such far-reaching implications, it's unsurprising that the government started to consider what, if anything, it could do. But the government was not willing to save Port Hawkesbury and Bowater Mersey

at any cost. The Tribunal has read that in written testimony and will hear it again from Duff Montgomerie, Nova Scotia's then Deputy Minister of Natural Resources and current Deputy Minister of Labour and Advanced Education.

It was up to NewPage, Port Hawkesbury's owner, and its financial advisor and the Court-appointed monitor to find a buyer for the mill.

Now, we know for a fact that the Nova Scotia government encouraged Resolute to submit a bid for Port Hawkesbury. That's agreed to by Deputy Montgomerie and Garneau in the witness statements. Resolute decided not to but it's not in dispute that the claimant had the same opportunity to participate in the bidding process as everyone else regardless of nationality, and obviously only those companies that were selected by the Monitor as qualified bidders had the option of discussing potential financial assistance with the government.

Now, PWCC was ultimately selected over Paper Excellence by the Monitor in January 2012 as the best going concern bid for Port Hawkesbury. And it was at that point

difficult negotiations began between PWCC and NewPage, the labour union at the mill, NSPI, and with the Government of Nova Scotia.

Now, before I discuss the outcome of those talks, let's backtrack slightly to discuss what was happening concurrently to the Port Hawkesbury bidding process in the autumn of 2011, Bowater Mersey.

Now, what happened with the claimant's Bowater Mersey mill is critical context for the Tribunal to understand two issues: First, the government's motivations and intentions for financing Port Hawkesbury and, two, that it was, in large part, thanks to the claimant itself that Port Hawkesbury was eligible for a lower electricity rate in the first place, a measure that the claimant is now challenging in this arbitration.

So let's talk about Bowater Mersey briefly.

In 2011, the claimant's Bowater Mersey mill directly employed around 450 people, so less than half the number at Port Hawkesbury. But it was still an important part of the province's forestry industry and a major

consumer of electricity.

Bowater Mersey only made one product, newsprint. And as everyone knows, newspapers are becoming an endangered species, and market decline for newsprint was in steep decline. That plus a strong Canadian dollar and high electricity and labour costs put Resolute's mill in a precarious financial situation.

Now, in August and September of 2011, Resolute agreed to give the government time to figure out what, if anything, it could do to help keep Bowater Mersey open. Now, for its part, Bowater Mersey struck a new deal with its workers and also had a lower electricity rate for the mill approved by the Nova Scotia Utility Board on November 29th, 2011. That's a decision that I will come back to discuss a little later.

And on December 1st, 2011, Resolute accepted a $50 million financial assistance package from the Government of Nova Scotia aimed at reducing the mill's costs so it could stay open.

Now, the claimant's agreement with the government is Exhibit R-149, but we don't

need to break the public feed to look at it now because the main elements of the deal are summarized in a press release from the Premier's office, Exhibit R-150.

Resolute received a $25 million capital loan through the Nova Scotia Jobs Fund for a long-fibre refining project, which will reduce electricity consumption at the mill.

$23.75 million to purchase land, 25,000 acres of land to help enhance the long-term sustainability of the paper mill and a $1.5 million workforce training grant.

Now, what was the government's goal in providing this kind of financial assistance to Resolute? Well, the Tribunal will hear Deputy Montgomerie's perspective tomorrow, but let's see what government officials said at the time.

Now, for a full list of references, the Tribunal can refer to paragraph 169 of Canada's rejoinder memorial, but here are two representative statements from the Nova Scotia government's goal for financing Bowater Mersey at the time.

Nova Scotia's Premier said

that the money was going to be invested right back into the plant to make it a more efficient, low-cost mill and, therefore, be able to survive in that exact environment.

And the vice president of investment at Nova Scotia's Department of Economic Rural Development and Tourism said:

> "The whole exercise was designed to reduce the operating costs of the mill to a cost-competitive level."[as read]

He went on to say:

> "The company indicated that, you know, if we had $25 million to invest, we can invest in energy-saving projects that would result in a significant reduction in our costs per tonne for energy."[as read]

Now, in other words, while everyone knew that it would be difficult given the

rapidly declining newsprint market, the government wanted to help Resolute lower Bowater Mersey's costs so it could become more competitive and stay open.

But the government doesn't control market forces. That became clear when foreign currency fluctuations caused a massive drop in demand for Bowater Mersey's newsprint exports. So Resolute decided in June 2012 to shut down the mill for good.

What's the important takeaway from the Bowater Mersey bailout is that it demonstrates how the Nova Scotia government took a principled approach to finding solutions to the crisis in the province's forest industry, starting first with Bowater Mersey.

The question for the government was always this: Given the negative economic consequences of the alternative, was there a reasonable amount of financial assistance the province could provide in light of the specific circumstances of that mill and the specific product that it made so it could stay open as a profitable going concern. And the Government of Nova Scotia took the same principled

approach with respect to Port Hawkesbury, which I will talk about now.

Now, as I mentioned earlier, once the Monitor selected PWCC as the preferred bidder in January 2012, it started to negotiate with various parties to complete the transaction to purchase the mill. It was clear to everyone that, for the mill to survive, the newsprint line had to close. And, instead, it had to focus on high-end SCA+ paper that its new and efficient supercalendered paper machine could produce.

Now, by April 2012, PWCC had negotiated a new contract with Port Hawkesbury's union, but the closure of the newsprint line and introduction of new efficiencies meant that the workforce was cut by more than half.

PWCC also negotiated a complex energy -- electricity arrangement with the province's private utility, NSPI, and submitted its application for a load retention rate to the UARB in April 2012, which I will come to later, because electricity, of course, is a subject that requires a separate discussion.

But before I go there, let's review the primary financial assistance agreements

that were negotiated between PHP and the Government of Nova Scotia. And the Tribunal will see that they are far from being as astounding as Resolute claims.

Now, because the agreements I'm about to discuss have been designated as restricted access, I would ask the Tribunal secretary and our assistant from Arbitration Place to cut the public feed so we can go into RA session for a little while. Thank you.

MS. D'AMOUR: Just give me one second. All right. The feed's been cut, and everyone's been removed from the room.

MR. LUZ: Thank you.

--- Whereupon Restricted Transcript Commences.

MR. LUZ: Now, obviously, given the limited time, I won't attempt to cover all the measures that the claimant says enables PHP to crush its competition. Canada's responded to all of the allegations in the pleading, so this morning I am just going to focus on the principal agreements between Nova Scotia and PWCC. It's the land purchase agreement, the outreach agreement, the forest utilization licence agreement, or the FULA, [redacted]

[redacted]

Let's start off with Nova Scotia's $20 million land purchase from Port Hawkesbury. As Deputy Minister of Natural Resources in Nova Scotia, Julie Towers, explains in her witness statements, Nova Scotia had a longstanding policy of increasing its share of Crown land for conservation and other public purposes, including reconciliation with the Mi'kmaq First Nation. She also explains that the Department of Natural Resources already had substantial amount of money set aside to pay fair market value to landowners when the opportunities arose.

[redacted]

[redacted] Why? As Julie Towers explained in her witness statements, the government wanted to secure valuable forested lands for its natural resources strategy and Crown land targets and [redacted]

[redacted]

Now, it's difficult to understand the nature of the claimant's complaint here, especially since it also sold Bowater Mersey's land to the government just a few months prior to this for almost $24 million. As well, the land acquisition would have occurred regardless of whether PWCC bought the mill, and it has nothing to do with the production of SC paper.

But the most important reason why this claim has this measure has no place at all in an assessment of Resolute's claim is that it was a fair market value transaction, whereby the government bought a valuable asset to use for public purposes. It was not a subsidy.

It's also difficult to understand Resolute's complaint regarding the outreach and the FULA, which are Exhibits R-206 and 191 respectively. The claimant portrays the outreach agreement as a $38 million lump sum gift which bolsters Port Hawkesbury's alleged unlimited

market dominance.

Deputy Towers' witness statements discredits those arguments completely.

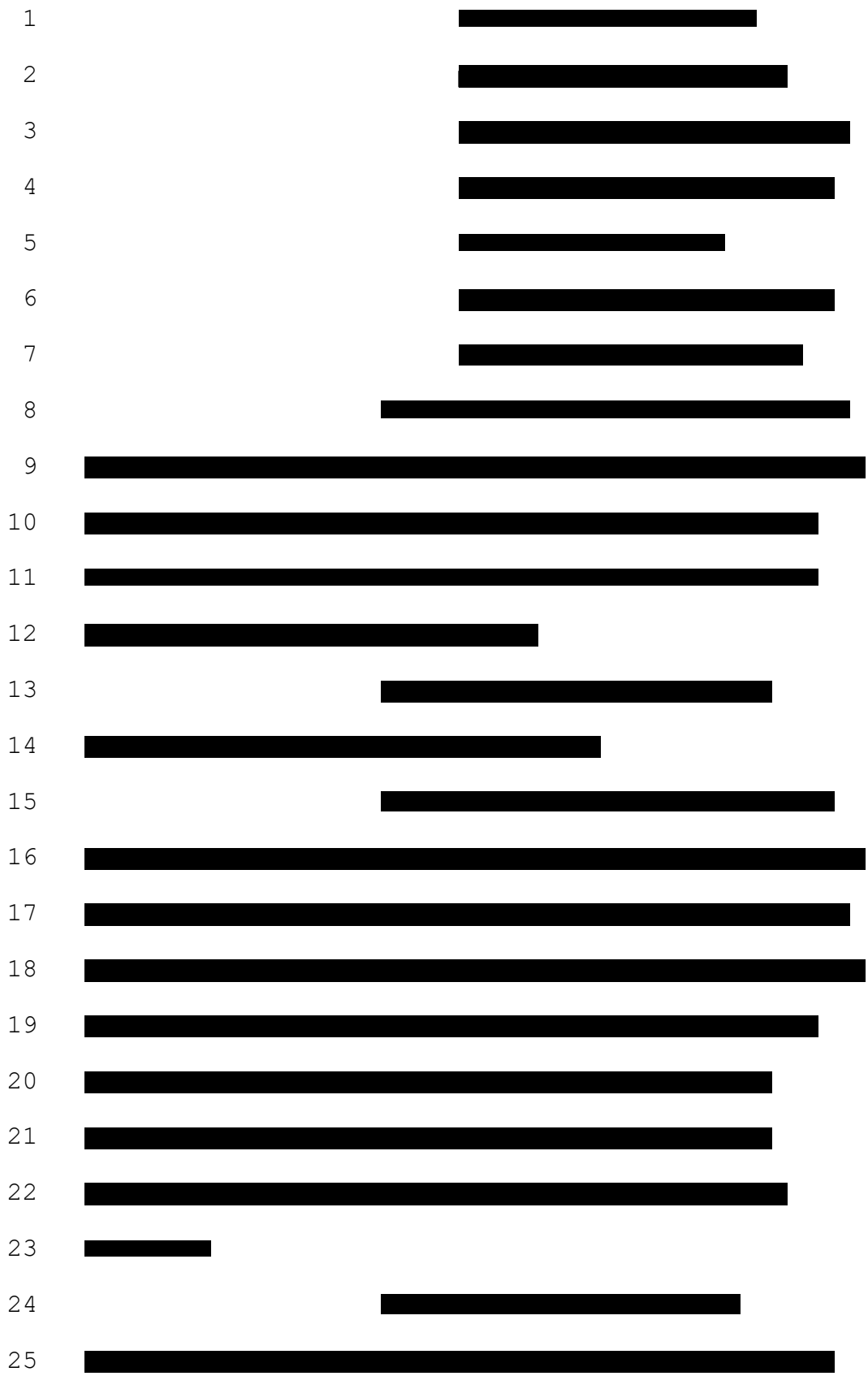
[redacted]

Similarly, the forest utilization licence agreement is not helpful to Resolute's claim. As Deputy Towers explains in her witness statements, the FULA is a modernized forest licence agreement that replaced legislation that had been in place since 1965. Whereas the old legislation made it difficult for the government to compel the mill's owner to implement modern forest management practices, the FULA was a

new regime imposed on PHP to make sure that it would act in a manner consistent with the province's natural resources strategy.

Chris, you can put that slide back up again because it's the FULA, provisions from the FULA. It contains provisions whereby PHP is reimbursed for certain silviculture [redacted] that it incurs on behalf of the province on Crown land. And separately from that, Port Hawkesbury pays for the trees that it harvests from Crown land at set stumpage rates. Again, there's no pot of gold in the FULA being used by PHP to knock Resolute out of the SC paper market.

[redacted]



[redacted].

[redacted] There was a [redacted] And also there was a [redacted] This was not bankroll PHP at any cost, as Resolute would suggest. Rather, as the Tribunal has read and will hear from Duff Montgomerie and Jeannie Chow, the Government of Nova Scotia felt that this was an appropriate and reasonable investment under the circumstances given the alternative potential [redacted] hit to the province's GDP.

[redacted]

[redacted] And I don't propose to go through the financial intricacies now. Jeannie Chow, from the Department of Business of Nova Scotia, will be happy to explain if the tribunal's interested, but the bottom line is that the amount of the loans and the grants remain the same.

It is not for a NAFTA chapter 11 Tribunal to replace its judgment as to whether Port Hawkesbury should have been supported in this or any amount. But even a cursory review of the measures reveals nothing that supports the claimant's allegation that the Government of Nova Scotia was trying to create a national champion at any cost with the intention of crushing all foreign competition. And that conclusion does not change even if the Tribunal includes whatever

energy cost savings that PHP has been able to create through its own innovations at the mill.

I will now discuss the attribution of PHP's electricity rate before I get into the merits on 1105.

But before we leave the restricted access session, I would like to draw the Tribunal's attention to one particular document that helps to explain why Resolute's argument about the guarantee of the lowest costs in North America is so fundamentally flawed.

As I will explain shortly in the public session, and as the Tribunal will hear later on this week from the former Deputy of Energy in Nova Scotia, Murray Coolican, [redacted]

[redacted]

We can leave the restricted access session and go back to the public feed.

MS. D'AMOUR: Okay. Thank

you. The stream is live, and everyone's been readmitted.

--- Whereupon Restricted Transcript Ends.

MR. LUZ: Thank you. Now, as the Tribunal knows from Canada's written submissions, we argue that the price of electricity that PHP pays to NSPI is not attributable to the Government of Nova Scotia under the rules of public international law. Now, I want to emphasize that, even if the Tribunal does not accept Canada's argument on attribution, Resolute's case on the merits still fails under 1102 and 1105.

Nevertheless, Canada maintains that there is an important legal distinction to be made between the financial assistance agreements between Nova Scotia and PWCC, which we just reviewed, and the electricity rate that applies at the mill.

This part of my presentation will be structured as follows: First, I will dispense with the claimant's argument regarding Mr. Todd Williams of Navigant Consulting. I note that that did not make any kind of an appearance in the claimant's opening statement, which only

confirms that it is not -- it only confirms that his role in the negotiations between PWCC and NSPI plainly does not meet the international law test set out in article 8 of the ILC, articles on state responsibility. The claimant would have had to have proved effective control by the state over the conduct of private persons. It clearly did not with the role of Navigant Consulting, and it clearly did not under any of the other categories.

And that's where I'm going to go next. And this is in response to the Tribunal's questions 12 and 13.

I will take the Tribunal through the relevant conduct at issue, specifically the conduct of PWCC and NSPI, two private companies, the adjudicative conduct of the UARB, and the regulatory conduct of the Government of Nova Scotia's Department of Energy. And that's where I will conclude as to explaining why the Tribunal should find that the electricity rate negotiated between NSPI and PWC is not attributable under international law.

Let's first quickly dispense with the role of Mr. Williams, which, again, did not feature in the claimant's opening statement

this morning, but featured heavily in its memorial in this proceeding.

As Mr. Coolican describes in his witness statements, Mr. Williams was retained as an independent consultant whose experience in different jurisdictions could help PWCC, who had never operated in Nova Scotia before, and NSPI, who operates exclusively in Nova Scotia, better understand each other's perspectives on electricity. Mr. William's own account of his role of -- Mr. William's own description of his role as an honest broker who did not advocate for any specific party or position, but only offered suggestions and proposals to help resolve differences and keep the discussions moving forward, clearly that does not mean effective control as understood in international law, which is probably why the claimant has dropped that argument.

But the Tribunal's questions 12 and 13 go to the heart of the electricity issue. That is, what -- exactly what conduct is alleged to be wrongful, and to whom exactly is that conduct to be attributed?

It is Canada's position that

there is a distinction to be made and it must be made between the conduct of (a) a private company, PWCC, negotiating an electricity rate with a private utility and operating its mill in an efficient -- efficiently as possible to reduce costs; (b) the adjudicative conduct of the UARB as a state organ determining a legal test, whether ratepayers would be better off either with or without the proposed rate; and (c) the regulatory conduct of the Nova Scotia Department of Energy with respect to its pre-existing environmental policies.

At the heart of the claimant's claim, it's the first. It's the price of electricity at the mill. That's the allegedly internationally wrongful act, and so that's the conduct that really is at issue. And I will talk about that now.

It's important for the Tribunal to remember that Port Hawkesbury had already been declared eligible for a load retention tariff in November 2011, before PWCC had been selected as the preferred bidder. And that was because it was the claimant's Bowater Mersey mill, jointly with NewPage, successfully argued

before the board that load retention rates were common in North America, and they make economic sense when other ratepayers are better off than losing a large industrial customer in economic distress.

This is dealt with extensively in Canada's pleadings showing exactly what Bowater Mersey, jointly with the Port Hawkesbury mill, argued to convince the board to say they should be eligible for a reduced electricity rate. And the UARB, on November 29th, 2011, agreed with them. They said -- they agreed that both mills would be eligible for a load retention tariff.

Now, I won't go through this -- I won't go through the decision itself in great detail, but what it represents in -- is the adjudicative conduct of the UARB. The board agreed with the claimant and NewPage that other customers benefit from the large customers staying on the system. They agreed that the establishment of a load retention tariff based on economic distress is common in other jurisdictions and that further rates are in the public interest. The role of the UARB was simply to decide whether the proposed rate was subsidized by other ratepayers

or not. A board would not agree to approve a rate unless it was -- left ratepayers, all other ratepayers, in a better position than they would be otherwise.

Of course, since Port Hawkesbury was not operating at the time of that decision, it was for any potential new owner to negotiate the price, terms, and conditions of the proposed rate. That was the explicit requirement of the load retention tariff, as you can see here:

> "The price, terms, and conditions offered under this rate shall be determined on a customer-by-customer basis."[as read]

And then it has to be submitted to the board for approval to the application of the legal test.

Now, PWCC thought that it could do better than the fixed rate that NewPage and Bowater Mersey had secured for their mills. In its negotiations with NSPI, PWCC proposed an innovative approach to electricity pricing. It wanted a variable rate mechanism, whereby the mill

would assume the fuel price risks and adjust its paper-making operations to use electricity at times of day when they were at the lowest, which, hopefully, would result in electricity savings.

You can see that ambition from a publicly available document. That's an early PWCC discussion document. It's on the board's website. And you can see here that their goal was to have improved efficiencies to bring the rate all the way down to $30 a megawatt hour. That was their original plan and their hope. It didn't happen.

It took months of hard bargaining between the parties to come up with a formula and a partnership that relied largely on creative tax and corporate structures to yield a low price for electricity, and I won't go through that now. But as the Tribunal knows, after the tax ruling in September -- that PWCC had been hoping for was denied in September 2012, it chose to proceed anyway with a variable electricity rate mechanism. The bottom line is that that rate was negotiated in their economic self-interest. And the WTO itself, in the supercalendered paper panel, agreed with Canada exactly on this point.

The panel at the WTO said:

> "The Load Retention Rate had indeed resulted from negotiations based on market considerations. It seems entirely consistent with market principles for an electricity provider to seek to both manage its load and accommodate the needs of its largest customer and for a company that consumes a large amount of electricity to make concessions and accept the flexibilities that would result in a lower rate being payable."[as read]

So whether Port Hawkesbury pays $50, $100, $150 per megawatt hour, all of that is exclusively in the hands of the private company that manages the mill, and that conduct

cannot be attributed under the rules of public international law unless they were under the effective control of the state. And they were not. That rate can have no part of this NAFTA claim.

And the reason is because it's separate and distinct from the conduct of the UARB. The claimant, as we heard this morning, argues that the UARB expressly approved the electricity rate, which makes it attributable to Canada. That's too simplistic and is not the right test in international law.

As I've said, the conduct of the UARB was purely adjudicative. Through an adversarial process, it received the evidence and the argument, both for and against the proposed rate, and then applies a legal test that the proponent has the burden of proving.

Let's go back to the November 29, 2011, decision that gave Bowater Mersey and Port Hawkesbury a discount -- a lower electricity rate.

The next slide, Chris, please. Thank you.

The board applied a legal

test. Does it leave all ratepayers better off than they would be otherwise if the mills were to close down? And the board said explicitly:

> "The board will not and, indeed, cannot approve a rate in circumstances where the other customers are worse off (because they are subsidizing NewPage Bowater) than they would be if these customers left the system."[as read]

This was the same legal test that the board applied with respect to PWCC's proposed rate ten months later. It found, on a balance of probabilities, the proposed LRT pricing will recover all the incremental costs without subsidization from other ratepayers. And here's the crux: The board's adjudicative role in determining that the rate was not subsidized by other ratepayers is not the wrongful act at issue here. The claimant has never argued that the UARB applied the wrong legal standard or made an error in its decision. That's why -- Chris, you can

take the slide down. That's why the claimant's reliance on the Bilcon case is so misplaced.

In Bilcon, the decision of the Joint Review Panel to reject the claimant's environmental application was the conduct alleged to breach the NAFTA. The claimant in Bilcon, as the Tribunal knows, alleged that the panel applied a principle that was not part of applicable Canadian law and wrongfully recommended that the claimant's proposed project be rejected. The Bilcon Tribunal concluded that such conduct was attributable to Canada under ILC Article 4 and then proceeded to determine whether or not that conduct breached NAFTA chapter 11.

The case before this Tribunal is totally different. The UARB is not alleged to have applied the wrong legal test or wrongly concluded that the load retention rate was not subsidized by other taxpayers. Conduct of the UARB is not at issue.

And the claimant makes the same mistake with respect to the regulatory conduct of the Department of Energy by conflating it with the conduct of the private parties. Now, you'll see on the screen that the Government of

Nova Scotia had always said and always maintained that whatever PWCC and NSPI negotiated, it had to make -- it had to pass the legal test that customers would be better off by having the mill remain on the system than they would be if the mill did not resume operations. The government didn't ask the board to change the legal test.

Now, the claimant didn't spend much time in its opening discussing this, but it did spend a lot of time talking about it in its pleadings, and so I think it's appropriate to refer to the July 20th, 2012, letter from former Deputy Minister of energy Murray Coolican. That's Exhibit C-179. They spent a long time in their pleadings, not much this morning, saying that that was a regulatory conduct that made the rate attributable to Nova Scotia.

It's not. As the Tribunal has read and will hear from Mr. Coolican, the government had a longstanding regulatory policy to transition the province away from excessive reliance on fossil fuels. On RES costs, which the Tribunal -- which the claimant did refer to this morning as saying something that PWCC didn't want to absorb, the government just simply explained

that it was confident that there was enough RES supply coming online that the mill would not end up triggering any incremental RES costs over the term.

Now, Mr. Coolican explains in his witness statements why they were so confident of that. It turned out to be correct. There has never been any RES costs since the mill reopened in 2012, so the government has never absorbed any costs from the mill, so the whole issue of RES costs is a moot point and irrelevant.

Similarly on biomass, Mr. Coolican explains that the board -- that the government had previously intended to have regulatory amendments to shift the -- to make sure that there was more environmentally friendly and renewable energy available online, and that policy intention hasn't changed.

So, again, there is no conduct here that gave any kind of benefit to the mill even though the claimant continues to allege that is the case without any evidence, because since PWCC and NSPI agreed that the mill would pay for all the costs for the steam that was used at the mill, and since the board found that what the mill

pays for steam arising out of the biomass plant was reasonable and not subsidized by ratepayers, it is entirely confusing as to why biomass and RES are even relevant. Again, this is regulatory conduct, and it's separate and distinct from the conduct of the private parties that negotiated the electricity rate.

Resolute had only one path to attribute that electricity rate to Port Hawkesbury, and that was through the effective control test set out in the ILC articles, article 8, and it failed in that effort. The electricity rate has no part in this claim.

I will now move on to Canada's arguments with respect to the minimum standard of treatment in international law, which, as the Tribunal knows, is based on customary international law, not what the claimant would like customary international law to be.

Now, the Tribunal asked at its question 19: What is the standard of violation of NAFTA 1105? Egregious conduct or something less than that?

But when it comes to the minimum standard of treatment of aliens, customary

international law has crystallized around standards like denial of justice, full protection and security, as well as the rule against expropriation without compensation. The applicable standards ensure that investors are protected from what is considered egregious conduct.

Now, to clarify, Canada's position is not that customary international law declares egregious as the proper standard in the abstract. Rather, words like "egregious," "grossly unfair," "manifestly arbitrary" describe the nature, the nature of the types of conduct that have crystalized into custom for the protection of foreigners, like denial of justice.

So, for example, the Cargill Tribunal's description of how the minimum standard of treatment of aliens in customary international law could be implicated also relies on these kinds of descriptions. But at the same time, it always recognizes that there needs to be a rule of customary international law identified that was breached. And that has to be based on custom. The Tribunal asked on Question 22: What evidence do you need to have for customary international

law? Well, it's axiomatic that that the burden of claimant to establish a rule of customary international law is theirs, and it must be based on substantial state practice in opinio juris.

The burden is the claimant's, but Resolute has not submitted any evidence of substantial state practice to demonstrate the existence of a customary international law rule prohibiting or even governing subsidies, including government loans, grants, procurement. It's not the Tribunal's role to create international law rules to govern scope and extent of subsidies.

Nor did the claimant present any credible evidence for the assertion that it had in paragraph 274 of its memorial that the customary practice amongst the NAFTA parties and in market-oriented economies generally is for companies that are not commercially viable to be allowed to fail. Not only have they not shown any evidence of that, they haven't shown any evidence that there is a rule to that effect, and that any state has agreed to that, that they are legally bound by such rule.

And despite all the rhetoric of anticompetitive behaviour and crushing foreign

competition from the claimant, nor has the claimant -- nor can the claimant rely on a customary international rule governing anticompetitive conduct because, as the UPS Tribunal said, there is no such rule.

Of course, Resolute has not submitted any evidence of anticompetitive conduct by PHP, nor has it even alleged that the Government of Nova Scotia had any effective control over PHP in its pricing or business practices.

Furthermore, and in reference to the Tribunal's Question 21, the Grand River, Methanex, and Mercer Tribunals observed that there is no general rule of custom requiring host states to treat domestic and foreign investors equally.

In the NAFTA, nondiscrimination obligations as between domestic and foreign investors are set out in articles 1102 and 1103, the national treatment and most favoured nation treatment respectively. It's not customary international law that we are talking about.

Nor has the claimant shown any evidence that the minimum standard of treatment includes a proportionality test, which the

Tribunal asked for evidence of in its question 25.

And the evidence that the Tribunal -- that the claimant submitted this morning is not evidence of state practice and opinio juris. I note that it relies on a few Tribunal decisions that are applying autonomous, fair, and equitable treatment standards, for example, from the energy charter treaty. That is not applying customary international law and is, therefore, not relevant for this Tribunal's analysis.

Similarly, they rely, again, on the ADM case against Mexico, misunderstanding the role of proportionality in countermeasures versus the minimum standard of treatment. It also relies on FD Meyers v. Canada, which did not apply a proportionality test in the context of 1105. And the various other sources simply do not constitute evidence to say that there is a proportionality test in the minimum standard of treatment.

Tribunals in Mondev, Cargill, Glamis, Mobile Murphy, Eli Lilly, and others have emphasized that it is not the function of a NAFTA chapter 11 Tribunal to legislate a new standard

which is not reflected in the existing rules of custom. What the claimant misunderstands is that customary international law is not a catchall category for investors to complain that they disagree with the decision-making of government officials, that they would have preferred a different policy option or a different outcome. Customary international law does not guarantee a foreign investor will not be negatively impacted by government public policy measures, regulatory or otherwise, nor does customary international law require that a state elevate a foreign investor's interests above all other considerations. That's not even part of the fair and equitable treatment test if you were to apply from other autonomous SAP standards. So it can't be in customary international law.

The Tribunal also asked about deference. NAFTA Tribunals have always consistently emphasized that custom does not contemplate the second-guessing of public policy decision-making and recognize that a great deal of deference must be given to states when making economic decisions in their territory.

The standard of article 1105

does not invite the Tribunal to review the policy choice to provide financial assistance to Port Hawkesbury.

But the reality is that the Tribunal has before it everything that it could ever need to conclude that the Nova Scotia government had a legitimate public policy goals and was plainly not an arbitrary measure that was discriminating against or targeting the claimants.

Of course, Resolute's complaint about Port Hawkesbury doesn't sit easily with the fact that it took $50 million in financial assistance from the Nova Scotia government as well, a fact that the claimant chose not to reveal until Canada brought it up in our reply memorial.

And it is curious now to see that the claimant argues that it was not in the public interest for Port Hawkesbury to pay less for electricity when it made the exact opposite argument when it was applying with NewPage for a reduced electricity rate in 2011.

The claimant itself said, jointly with NewPage for Port Hawkesbury, the mill that we are talking about here, the public

interest is far better served if these mills can remain in operation.

Now, it's apparent that the claimant invented the term "national champion," one that is totally inapposite given the reality of what Nova Scotia was hoping to achieve in providing financial assistance to Port Hawkesbury.

And in questions 1 through 6, the Tribunal asks several questions about the factual matrix of this dispute and how it would influence the legal analysis.

But given the applicable legal standard in article 1105 and given the fact that national treatment is not even applicable in this case because of 1108(7), which I will get to in a moment, Canada's position is that the Tribunal need not delve into the intricacies of the SC paper market, the relative cost structures of Port Hawkesbury versus Resolute, and the predictions of competing experts and commentators other than to observe that the claimant's arguments are not well founded.

Now, before I conclude on 1105, I'd like to go into restricted access session for just a moment.

MS. D'AMOUR: I confirm the feed has been cut, and everyone's been removed.

MR. LUZ: Thank you, Heather.

--- Whereupon Restricted Transcript Commences.

MR. LUZ: [redacted]

As the Tribunal's going to hear from Canada's witnesses this week and as it has already read in their witness statements, [redacted]

[redacted]

The Tribunal will hear later on this week from Mr. Suhonen of AFRY talks about foreign suppliers who export to North America, that is, European exports.

[redacted]

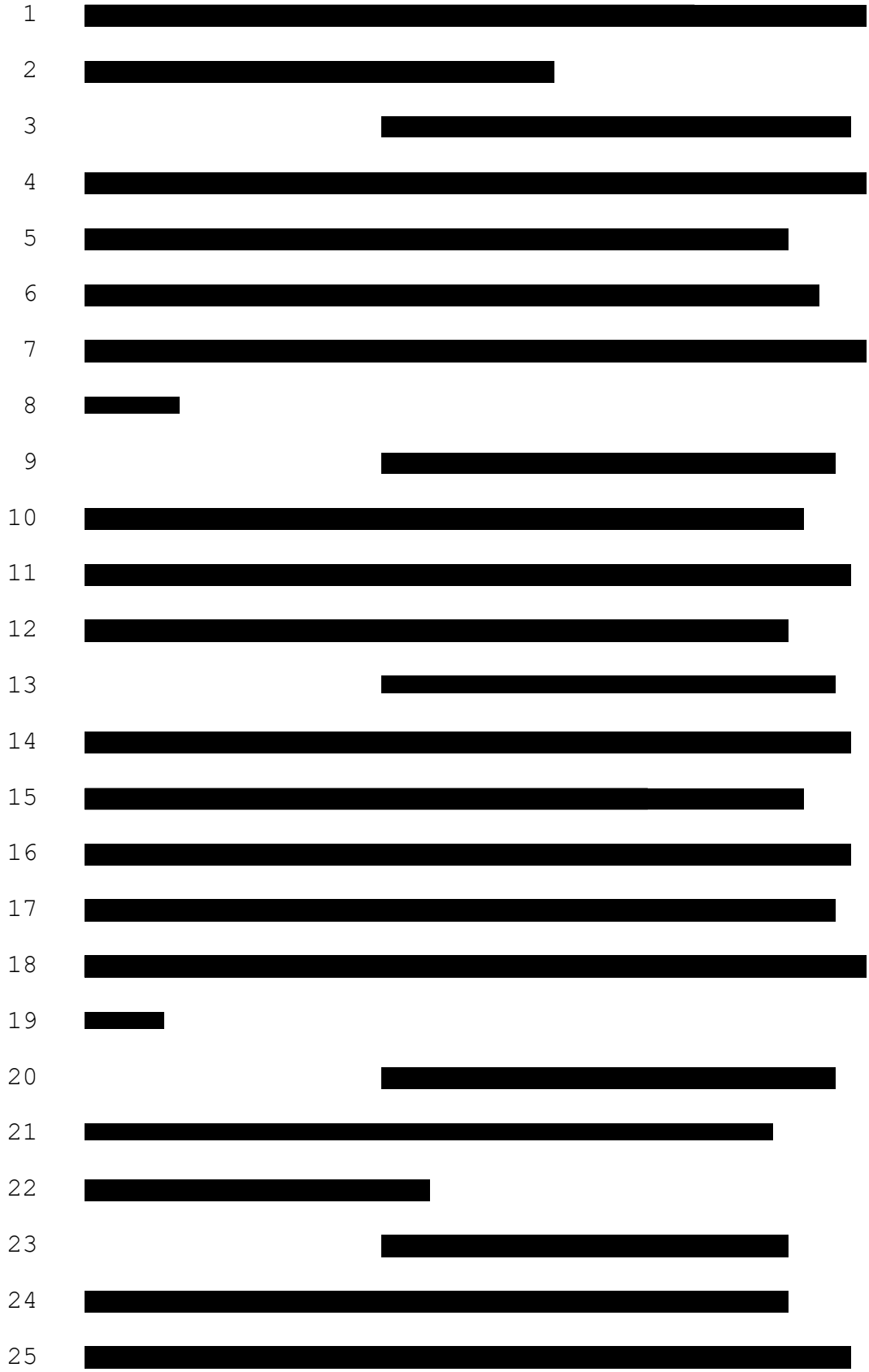
[redacted]

Let's fast-forward to July 2012. The union at Port Hawkesbury had already agreed to accept a reduced workforce and new contract with PWCC, which substantially reduced the mill's labour costs. PWCC and NewPage were on the verge of completing their sale. On July 6th, they entered into the planned sponsorship agreement, and it was approved by the Court on July 17th, and the creditors were about to vote on the plan on the 15th of August.

PWCC and NSPI had already finished their arguments at the board, and they were just waiting for the board to deliberate and issue a decision as to whether or not the rate

they had negotiated met the legal test, and they were waiting for a tax ruling from Revenue Canada.

But there had been an unexpected dip in prices of SC paper in the first part of 2012. [redacted]



[redacted], because what they are essentially saying is that Nova Scotia should have just pulled the plug on its plans to finance Port Hawkesbury. What would have happened? The deal with NewPage would have collapsed, depriving NewPage, an American company, also with NAFTA rights, creditors of their value of the sale. The 300 or so remaining workers at the mill who had negotiated a new contract with PWCC would have been out of work, and as evidenced by the documents that I have referred to earlier, the

province would have faced potentially a [redacted] hit to its GDP within five years. The forest industry would have hit -- would have had a double blow. Recall, Bowater Mersey had decided to close down the month before. [redacted]

That concludes my discussion on article 1105, and I will now move on to the question of article 1108(7) and its applicability to national treatment, and we can leave the restricted access session.

--- Whereupon Restricted Transcript Ends.

MS. D'AMOUR: Thank you. Confirming the stream is live and everyone's been readmitted.

MR. LUZ: Thank you. Judge

Crawford, Dean Cass, Professor Lévesque, before the Tribunal can even consider whether there's been a violation of article 1102, it first has to consider whether or not the national treatment obligation even applies in this case. It does not.

The NAFTA parties could not have been more clear in the text of the NAFTA, article 1108(7)(a) and (b).

Chris, if you can put up the screen, we will put the language on just for reminder.

It states that:

> "The national treatment obligation does not apply to procurement by a party and does not apply to subsidies or grants provided by a party or a state enterprise, including government-supported loans, guarantees, and insurance."[as read]

Now, the Tribunal asked in its

question 7 should be treated as an exception or derogation and whether this makes a difference.

Well, Canada submits that, as the ADF and Mesa Tribunals did, the Tribunal should assess the application of article 7708(7) first before you even get to article 1102.

This is appropriate not only as a matter of judicial economy, but it confirms the NAFTA parties' decision to specifically remove the measures covered by article 1108(7) entirely from the scope of the national treatment obligation. Again, both ADF and Mesa did that, and this Tribunal should do the same. There's no disagreement between the claimants and Canada on how this provision should be interpreted in accordance with the ordinary rules of interpretation under customary international law set out under the Vienna Convention on the law of treaties. As the Mesa and Mobil Murphy Tribunals noted, it doesn't matter if it's an exception, reservation, or otherwise. It's the ordinary terms of interpretation.

In this case, article 1108(7) is remarkably straightforward because the ordinary meaning of the terms "procurement,"

"government-supported loan," and "grant" aligns perfectly with the obvious nature of the various measures. The two loans provided by the Nova Scotia government to PWCC in August 2012 are government-supported loans. Therefore, subparagraph (b) applies. The money for workforce training and marketing are grants. Therefore, subsection (b) applies. The purchase of land by Nova Scotia to acquire and keep its Crown land plainly is procurement; therefore, subparagraph (a) applies.

As Deputy Towers confirms in her witness statement, the sums paid under the outreach agreement and the FULA for silviculture activities are procurement of services; and, therefore, 1108(7)(a) applies. There are no qualifications to the text of 1108(7). It falls under the ordinary meaning. The inapplicability of 1102 is decisive.

Now, the Tribunal asked in questions 10 and 11 if Canada's argument sweeps too broadly, but in a case like this. When the ordinary meaning of the terms "government-supported loans," "grants," and "procurement" so clearly apply, the Tribunal

doesn't need to delve into the exact confines of the term "subsidy" and whether anything of monetary value, regulatory measures, and so on. It just need not consider it.

Indeed, the claimant doesn't actually dispute the characterization of the vast majorities of the measures. Instead, as we heard this morning, what it's asking the Tribunal to do is just disregard the provision entirely. And it does that for two -- on two bases, both of which are completely baseless.

The first argument that they bring forward is that Canada did not notify the measures of the WTO pursuant to the SCM agreement. Resolute's contention that a NAFTA chapter 11 can refuse to apply the explicit text of 1108(7) because of an alleged noncompliance with a different treaty that contains a different set of obligations over which this Tribunal has no jurisdiction and under which the claimant has no standing is unprecedented. There is nothing in the NAFTA, nowhere in the NAFTA, that there is a requirement for a party to make a notification in order for 1108(7) to apply. The Tribunal is bound to apply the text as written. The WTO

notification issue is irrelevant.

Resolute's other attempt to get around article 1108(7) is to allege that Nova Scotia and Canada previously denied that the measures were subsidies and just simply not true.

The question to the -- the answer to the Tribunal's question number 8 is, no, they don't have direct evidence of a denial that these were subsidies because no such denial exists.

I would just refer the Tribunal -- we don't have to put it up on the screen, but I would refer the Tribunal to the claimant's Slide 102, where it suggests that this is the denial -- the direct evidence of Canada's denial. Once the Tribunal reads them, they will see that there is no such denial.

The first bullet point referring to Canada's response to USCR's questions can explain the full details of what the measures were. There's no requirement to explicitly state or accept that they were subsidies. There was a simple explanation of what was happening.

The other bullet points are minutes of the meetings. And, again, there is

just no denial in any of this. So it really is stretching the meaning of what, of what a denial is. And, quite frankly, it is irrelevant because, again, 1108(7) applies explicitly.

The claimant also goes on in the U.S. Department of Commerce proceedings to say that there was a denial there. Again, it is just not the case. Canada and Nova Scotia did not dispute that a number of the elements that led to a finding of countervailable subsidies under US domestic law. The arguments were really limited only to the quantification of the benefit. And I should remind the Tribunal that Canada was successful at the WTO in its challenge to many of the findings of that -- those proceedings in the United States.

So, accordingly, the answer to the Tribunal's question if governments should be held to some kind of standard of consistency is really in the abstract, because there has been no inconsistency.

And, in any event, what is said in other proceedings under different treaties, different domestic laws, different texts, different parties, different circumstances

does not release the NAFTA Tribunal from its responsibility to apply the text as written.

Now, Canada has said more about this issue in its pleadings. We have also addressed the question of good faith and estoppel. They are not relevant in this case. And as we said in our pleadings, they don't even -- Resolute doesn't even meet the test for estoppel even if it was a relevant application here.

To sum up, 1108(7)(a) and (b) apply to all the Nova Scotia measures that fall under the jurisdiction of this Tribunal. There's no need to consider 1102 on the merits.

But, for the sake of completeness, I will do that. I will address what the claimant has said with respect to 1102.

MS. D'AMOUR: Sorry to interrupt, Mr. Luz, we don't have audio from you.

MR. LUZ: Can you hear me?

JUDGE CRAWFORD: Mr. Luz, I am afraid we are not getting any sound from you.

MS. D'AMOUR: I am not sure he can hear us. Darian, are you in the room or...

It says connecting to audio, so it looks like he may have lost audio. Just

give me one second.

JUDGE CRAWFORD: Ms. D'Amour, can you tell us what is being done to fix this?

MS. D'AMOUR: It looks like they are trying to reconnect to the audio. I am just messaging them on the side. There we go.

MR. LUZ: Can you hear us now?

MS. D'AMOUR: Yes. It sounds like you are back. Thanks.

MR. LUZ: Apologies for that, but given that it's an online hearing, it's to be expected that there are going to be technical glitches that do it. But the timing was good. I think my audio cut out just as I was starting national treatment; is that correct?

JUDGE CRAWFORD: That's right. You were on a paragraph about national treatment, which we didn't hear any of.

MR. LUZ: Okay. I will just start again and continue on.

And just for the Tribunal to know, I probably have about 20 minutes left before my colleague Mr. Neufeld will take the stand, and if the Tribunal would like a quick five-minute break after that, of course, we can, but we are in

your hands, as you wish.

Now, I just explained that the question of 1102, national treatment, is moot, but let's talk about 1102 anyway. Now, the only measure that would fall within the scope of 1108(7) is the load retention rate, which is a market-based rate charged by PHP to NSPI, which does not operate in Quebec and is not attributable to Canada under international law. But let's talk about 1102. First, as Canada explained in its memorials, it's been the longstanding and consistent view of the NAFTA parties, including in this case, that 1102 is intended to protect against nationality-based discrimination.

Chris, if you can put up the next slide. Thank you.

Again, this does not seem to be much of a difference between the claimant and the respondent with respect to how these submissions are to be interpreted.

The claimant, of course, wants to make as much of an issue as possible on the difference between an FTC note of interpretation and the subsequent practice and subsequent agreement of the NAFTA parties. Well, clearly, an

FTC note of interpretation is binding and is mandatory on a NAFTA chapter 11 Tribunal. Third-party submissions are not binding, but they are subsequent practice and subsequent agreement that shall be taken into account by the Tribunal. Other NAFTA Tribunals have done that. This Tribunal has heard that argument before and done so in its jurisdictional phase.

But it's not just the claimants -- it's not just the NAFTA parties have consistently said that 1102 is intended to cover nationality-based discrimination. The Tribunals Loewen, ADM, Mercer, and others cited in Canada's pleadings concluded that the central object of 1102 is to prevent nationality-based discrimination. As the ADM Tribunal noted, article 1102 is not intended to prohibit all differential treatment, but to ensure that the NAFTA parties do not treat investors and investments and investors that are in like circumstances differently based on their nationality.

Now, Resolute's argument that a different legal test applies because of 1102 (3) is really inconsistent with the findings of Pope &

Talbot and others we have cited in Canada's pleadings. Correctly understand that subparagraph 3 merely clarifies the meaning of article 1102(1) and (2) when the treatment at issue is being accorded by a state or province. It doesn't establish a different legal test.

So, accordingly, even if the Tribunal -- if the treatment at issue is accorded by a state or a province, nationality must be the basis for the less favourable treatment, and then it's appropriate to consider the like circumstances test and, as the Tribunal noted in its question 15, whether there is a rational nexus to legitimate public policy, which could justify the differential nationality-based treatment.

I'm not suggesting that an investor must establish targeting and discriminatory intent, but it must show evidence that it was treated less favourably than a Canadian investor because of its foreign nationality. Resolute has already admitted that nationality was not relevant in this case.

We can see here from the jurisdictional phase, statement by Resolute:

"We are not saying

necessarily that Nova Scotia had in mind to support Port Hawkesbury because it wanted to impact Resolute as a foreign investor only. This was a market intervention. They wanted Port Hawkesbury to be the champion as against any other producer, be it Canadian or foreign. We just happened to be the only foreign participant with an investment in Canada, so we qualified for protection under NAFTA."[as read]

Resolute could not allege otherwise. The bidding process for Port Hawkesbury was open to Resolute. It was given the same opportunity as anyone else to bid and negotiate financial assistance. Indeed, as Deputy Minister Montgomerie said, the Government of Nova

Scotia would have been pleased to discuss possible financial assistance had Resolute submitted a bid and was selected by the Monitor.

I think the generous financial assistance package that Nova Scotia gave to Bowater Mersey demonstrates what the claimant has already admitted explicitly. Nationality was irrelevant when it came to the financing of Port Hawkesbury.

The Tribunal's analysis could just simply end right there, but for the sake of completeness, we will briefly address each element of the 1102 test and demonstrate that Resolute has not established a breach.

But before I do that, I would like to address the Tribunal's question with respect to the burden and note that the UPS Tribunal noted in its award that the claimants -- it is the claimant that has the burden to establish each of the three elements of the national treatment test, and failure on one is failure to the entire claim.

Now, Canada did provide enough evidence to establish the legitimate nondiscriminatory public policy reasons for the

adoption of the measures, quite frankly, because the claimant's mischaracterizations required correction. It doesn't mean that the burden of proof switches to Canada, but Canada's unrebutted evidence of that legitimate nondiscriminatory policy reasons plus the claimant's explicit admission that nationality-based discrimination was irrelevant should be sufficient to persuade the Tribunal of its case and dismiss it on 1102 outright.

I would like to refer to -- I am not sure if our -- if Chris is able to pull up a slide from the claimant's presentation this morning. But it quite succinctly describes -- before I go into the three-part of the national treatment test, Chris, are you able to pull up Slide 57 from the claimant's? Yeah. Thank you. Perfect.

The claimant says that this is something that they agree with in terms of the test. Differences in treatment will presumptively violate 1102(2) -- okay. I assume they are talking about 3 as well -- unless they have a reasonable nexus to rational government policies that, one, do not distinguish on their face or de

facto between foreign-owned and domestic companies and, two, do not otherwise unduly undermine the investment liberalizing objectives of the NAFTA.

The claimant spent a good deal of time talking about these two things, but if you look at it, the claimant actually fails completely on each part of this test.

First, a reasonable nexus to rational government policies, Canada submits that it has provided more than enough evidence in this case to establish that that part is done.

The next part, do not distinguish between foreign-owned and domestic companies, we just saw from the quote that the claimant itself admitting that nationality had absolutely nothing to do with this measure.

And the second and the last part is not otherwise unduly undermine the investment liberalizing objectives of the NAFTA, to which the claimant refers to the preamble of the NAFTA.

What is curious about this is that article 1108(7) says explicitly that national treatment does not apply to subsidies, government loans, grants, and procurement. So how is this

test supposed to be violated when the test itself excludes all the measures at issue in this case?

You can put that slide down. Thank you, Chris.

The flaws in the argument from the claimant doesn't stop there. First, with treatment, is there treatment? No. There was not treatment in the way that 1102 is supposed to be interpreted, and that's covered in our pleadings.

The Tribunal noted it was not ruling on the question of treatment in its jurisdiction. And as the Methanex tribunal said, the finding that a measure is relating to an investor does not establish that there has been a breach of 1102. In this case, Resolute has not shown that the Government of Nova Scotia undertook any actual treatment of Resolute or its mills in Quebec. The Government of Nova Scotia never had the opportunity to accord treatment to Resolute because Resolute did not have and was not seeking to make any kind of SC paper investment in the province. The same is true for NSPI, which does not provide electricity in Quebec, and the same is true with respect to Richmond County, the Nova Scotia municipality in which Port Hawkesbury is

located. What Resolute's concept of treatment really is, is that a government's treatment of a private company in one province, Nova Scotia, helps that company reopen and, in turn, "treats" the global SC paper market, which, in turn, caused a multitude of other actors in that global market over which the Government of Nova Scotia has no control, customers and competitors, to, in turn, treat Resolute's mill in another province, Quebec.

No other NAFTA Tribunal has every found such a circuitous path to constitute treatment as that term is understood in 1102. Resolute's allegation is really just an indirect adverse effect argument. It's not what 1102 was meant to apply to.

Even the claimant's reference -- continued reference to the sugar cases in Mexico shows how far they have to stretch this argument. The claimants in those cases had investments in Mexico, which imposed the measures in question, and those Tribunals found that nationality-based discrimination and protectionist intent were at issue. That's not relevant here.

Before I move on, we just need to quickly move into restricted access session.

It won't be too long.

JUDGE CRAWFORD: All right.

MS. D'AMOUR: Just one moment. All right. The feed's opinion cut, and the participants have been removed.

--- Whereupon Restricted Transcript Commences.

MR. LUZ: [redacted]

[redacted] The notion of treatment put forward by the claimant in this case is simply too remote.

That's all I have to say on that [redacted]. We can leave the restricted access session now.

--- Whereupon Restricted Transcript Ends.

MS. D'AMOUR: Thank you. The feed is resumed, and everyone has returned.

MR. LUZ: Thank you.

Now, Resolute has also failed to show that treatment was accorded in like circumstances. Now, the claimant has made the argument based on the idea that the measures were intended to make Port Hawkesbury the national champion. Now, I have already noted that the term "national champion" was one that was invented by the claimant, but it also misunderstands the legal test.

The focus of the test in article 1102 are the circumstances in which the treatment was accorded. In other words, Resolute must do more than prove that two investors or the investments are in like circumstances. They must prove that the treatment accorded in those investments was in like circumstances.

Now, Resolute relies on the self-serving argument that, if a measure aims to

discriminate in favour of a competitor in a given economic or business sector, there are like circumstances. But, again, that is only self-serving, but it only looks at one factor and not all the important ones.

But as the Pope and Talbot Tribunal recognized, being in a common economic sector may be pertinent, but it's not determinative of whether they are in like circumstances. Context depended. And all of the circumstances need to be taken into account.

And I have spent this morning explaining to the Tribunal, and as we have done in our pleadings, the full context in which the Government of Nova Scotia decided to provide financial assistance to Port Hawkesbury, and the Tribunal will hear more from the claimant's witnesses this week. The fact is Resolute's mills in Quebec were not in like circumstances with Port Hawkesbury.

Now, the Tribunal's question asked if the claimant can make an in-like circumstances claim with respect to a mill that it chose not to bid on? Well, Canada cited an excerpt from Newcombe & Paradell at paragraph 114

of Canada's rejoinder, and it speaks to this. There was an open competition to obtain special advantages, and competition criteria was not tied to nationality of the investment. An argument could be made that the investment or investor chosen by the state for special treatment was not in like circumstances to other investors. Why Resolute's complaint that it was never offered assistance for Port Hawkesbury is irrelevant. Of course, the fact that Resolute's investments are in Quebec, not in Nova Scotia, needs to be a decisive factor in the analysis.

Now, Tribunals like Merrill & Ring have confirmed that the treatment accorded under different legal and regulatory regimes can't be compared. And in its jurisdictional award, this Tribunal noted, noted its agreement with the Merrill & Ring Tribunal on that point, and it also agreed that 1102 does not impose a requirement of uniformity across states and provinces.

Now, the Tribunal did recognize the possibility that 1102(3) could conceivably cover a scenario of a state or province taking protective measures to keep other NAFTA investors out or a Methanex-type scenario

where an out-of-province investor has been the specific target of a provincial campaign to cause it loss. Again, the facts of this case clearly do not fall into either of those categories.

First, Resolute was the one that kept itself out of Nova Scotia by declining to bid on Port Hawkesbury, and there was no Methanex-style campaign against the claimant, far from it. Nova Scotia encouraged Resolute to put in a bid on Port Hawkesbury, and it also provided financial assistance to Resolute's only mill in Nova Scotia. Clearly there was no campaign against Resolute to cause it loss.

And, again, finally, in like circumstances requires an analysis of any public policy considerations that justify the differential treatment by showing there's a reasonable relationship to rational policies not motivated by preference of domestic over foreign-owned investments. This is something that the Tribunal -- that the claimant has already admitted, that it's not motivated by preference for domestic over foreign-owned investments, and all of the other rational policies have already been established.

The measures at issue pursued legitimate social and economic policy goals. There was no protectionist agenda. It was nondiscriminatory. PWCC received support from Nova Scotia because it decided to purchase the mill. Resolute made a different decision. GNS, Government of Nova Scotia, cannot be blamed for that.

And, finally, I will just quickly deal with the last part of the test, treatment less favourable, which I will deal with summarily. Certainly when it comes to electricity, even if it were attributable to the Government of Nova Scotia, Resolute has not even established that it has received less favourable treatment. How could it? Because it doesn't even deny that its mills in Quebec pay less for electricity.

So, in conclusion, while everything that I have said with respect to 1102 is something that Canada does not think the Tribunal needs to address, the fact that the claimants decided to spend much of its pleadings and much of its morning presentation focused on that does not mean that the Tribunal necessarily

needs to get into any of the debates because 1108(7) applies so clearly in this case.

With that, I would like to sum up and conclude that there has been no breach of NAFTA chapter 11. The legal standards don't support the claim. Factual -- the facts before this Tribunal do not support the claim. We ask that the Tribunal issue a decision confirming that there has been no breach of chapter 11.

Thank you. And I put my hands -- I put myself in the hands of the Tribunal if a break would like to happen before we move on to the question of damages. I'm sorry, Judge Crawford. You were on mute.

JUDGE CRAWFORD: How long will the presentation on damages be approximately?

MR. LUZ: Less than 45 minutes, I'm told.

JUDGE CRAWFORD: That takes you rather beyond the time meant for the presentation. It doesn't. I have got my timing wrong. Well, in that case, we will have a five-minute break.

MR. LUZ: I'm sorry. We will double-check the time that we took. I was under

the impression that we still had 45 minutes, but we'll confirm and make sure --

JUDGE CRAWFORD: I am told that you do have 45 minutes, so we will take five minutes to have a break now.

MR. LUZ: Thank you, Judge Crawford. Thank you.

--- Upon recess at 2:16 p.m. EST

--- Upon resuming at 2:25 EST

JUDGE CRAWFORD: The Tribunal would be grateful if Canada could make an effort to conclude this submission by three o'clock, because one of the members of the Tribunal has another engagement predicated upon closing at the time that was advertised, and it would be embarrassing if it goes on longer than that. Subject to that, let's hear on this next subject.

MR. NEUFELD: Good. Okay. Am I audible? Can you hear me? Great. Super.

Okay. I will do my best. Thank you, Judge Crawford.

OPENING SUBMISSIONS BY MR. NEUFELD:

MR. NEUFELD: Members of the Tribunal, it's, once again, an honour to be before you today. As you know, I will be addressing

damages. I did manage during the -- while Mr. Luz was speaking to trim my script down a little bit, so I will do my best to be within 30 minutes.

So this hearing will highlight many reasons for the claimant's failure to prove its case on damages, but one failure rises above all others: failure to show causation. It will not be lost on the Tribunal that this requirement did not get so much as a mention by counsel this morning, not a single word on causation, on what the test is or how the claimant has met it.

In its pleadings, the claimant appears to rely on ILC article 31. However, the NAFTA lays out its own rules on causation. They provide in article 1116 and 1117 that Resolute must prove that it has incurred loss or damage by reason of or arising out of a breach of part A. So to succeed in any of its claims, the claimant must prove three things.

First, it move prove that a measure of Canada breached an obligation in part A of NAFTA chapter 11; second, that the injury was by reason of that breach, meaning there is both factual and legal or proximate cause of the Claimant's loss; and, third, that its chosen means

of quantifying that loss is reasonable, rational, and not speculative.

This three-part test, which Canada has articulated in both of its written submissions and which the claimant did not dispute, will frame my opening argument. I will discuss the first two questions together before turning near the end of my remarks to the third question. As you'll see, the claimant's fails on every single prong.

Applying the three-part test to the claimant's argument, let's turn first to the measure and the alleged breach of NAFTA from which damages arise.

So my colleague Mr. Luz just explained why there's been no breach of NAFTA, the impact, the package of benefits that Resolute cites, and he has given you an overview of each of the measures. As you heard, the electricity rate is not a measure attributable to Canada. Other measures like the loans and training, marketing funds are precluded from constituting breaches of national treatment. My point here isn't to repeat all of the arguments just made by my colleague, but to emphasize that, from a damages perspective,

the measure and the breach it allegedly causes matter.

If you're considering whether a particular loss has arisen out of a national treatment breach, it matters what the actual measure is that caused that breach. It would be wrong, for example, to conclude that a loss arises out of a subsidy or a procurement. Yet the claimant doesn't tie its alleged losses to any one measure, but, rather, to a collection of measures, what it calls the Nova Scotia measures or the benefits package.

Now, there are a number of problems with its position. One problem is that it's an all-or-nothing approach. According to Dr. Kaplan, at paragraph 18 and 15 of his first report, PHP's re-entry depended on the entire benefits package which he tabulates at his second report, paragraph 56, to be $124.5 million. As the Tribunal is aware, Canada has a different position that, even if we're talking about a collection of measures, there's still a need to analyze each one of those measures and what it does. This issue relates directly to Tribunal question 26, which reads:

"For the purpose of assessing damages, what evidence is necessary to show the connection of state actions and harm? What evidence must be specific to each state action complained of? Must the evidence be or may all the acts complained of be treated in the aggregate?"[as read]

The short answer to this question: While it may be possible to complain of acts in the aggregate and even to expect that damages arise out of a package of measures, doing so doesn't obviate the need to demonstrate how each state action contributed to the wrongful act and to the damages that arose out of that wrongful act. If the wrongful act is an entire benefits package of government support that picks a national champion to destroy its competition, the claimant needs to prove through evidence that each element, like the outreach agreement, contributed

to this end. The outreach agreement has as its purpose forest management, road maintenance, environmental research, not competition with other mills. Resolute adduces no evidence that PHP used that funding to drive Resolute from the market. It doesn't even try because there is none.

Acts may be aggregated, but such aggregation cannot serve as a curtain that hides the actual objective and purpose of each act or replaces its actual objective with one of the claimant's choosing.

If a fund is for environmental research, it's not open for the claimant to say that it is, in fact, for crushing the competition without adducing some evidence to support that claim.

As Mr. Feldman admitted just this morning, Resolute is agnostic about the stated goals of the measures and whether they were taken in the public interest or what legitimate goal they pursued. His statements show how badly Resolute is missing the point of having to show causation.

A key problem with the claimant's approach is that it assumes that each

act contributes to the overall wrongful act and the damages that arise.

But this is something that must be proven. Evidence is required. This is particularly so if the measure would not, in and of itself, give rise to harm.

Otherwise, the result would be to award damages as a result of guilt by association.

On its own, a measure like a loan or a training fund wouldn't give rise to damage, and this, of course, isn't what the claimant is arguing. However, the difficulty with the claimant's argument is that an individual measure that's consistent with NAFTA is being said to cause damage through its association with the total collection of other measures.

If a $1.5 million training fund or a $40 million loan isn't sufficient to give rise to damage, we are left to wonder how much assistance would. Again, the claimant provides only one answer to this question. The entire benefits package is what gives rise to the damage, and anything less than the entire benefits package would not.

Although Dr. Kaplan values the benefits package at $124 million, the claimant has failed to adduce evidence showing that the $38 million outreach agreement contributed to harm arising from the breach. This alone is fatal to the claimant's case.

But it's not just the outreach agreement. The claimant also adduced no evidence that the $20 million land purchase was used by PHP to drive Resolute out of business either.

What this leaves is a couple loans, a training fund, and a marketing fund to be paid out in tranches over five years, amounting to $66.5 million.

Now, Mr. Steger looked at what has actually been paid out in assistance pursuant to that package, and in his expert view, PHP received even less than that. As Mr. Steger will point out in his testimony this week, PHP has received approximately half of the amount that Dr. Kaplan requires for his damages theory to work.

The claimant's case, therefore, fails on its own premise that the entire benefits package of $124.5 million caused

PHP's re-entry. It has not adduced the evidence necessary to prove its case and has provided in alternative that would allow the Tribunal to consider damages arising out of a smaller benefits package or out of an individual measure.

Now, much of the claimant's problem with evidence relates to a discrepancy of its own making, between the wrongful Act, on one hand, and the act that gives rise to the damage, on the other. On the firsthand, it's identified assistance used to crush or destroy the competition as a wrongful act. But, on the other, it identifies the event giving rise to the damages as a simple restart of Port Hawkesbury mill.

So let's consider this in a little bit more detail.

Here's how the claimant characterizes the acts leading to an article 1105 breach. Canada established a national champion in competition with the investor to undertake measures to destroy the investor's investment. Now, keep these allegations of competition in mind. I will be coming back to them in discussing proximate cause later. But for now, let's just stick with that discrepancy.

The discrepancy between the acts that caused the damage, the re-entry of the Port Hawkesbury mill, and the acts that give rise to the breach, which the claimant describes at paragraph 106 of the NOA in the following terms:

> "Nova Scotia has rearranged the SC paper market by presenting Resolute with a direct competitor that is bankrolled by Nova Scotia's public purse. It's unfair and discriminatory that Nova Scotia has used its public funds to rearrange the SC paper market so severely as to put Resolute's Laurentide mill out of business and to threaten its other SC paper mills with a similar fate."[as read]

You will also recall the description of the wrongful act that the claimant

provided during the jurisdictional phase. That's when Canada sought clarity on what the offensive conduct in the context of whether -- what was the offensive conduct in the context of whether Resolute was receiving treatment or whether the measures related to Resolute. And the claimant will surely recall the argument that Canada made that PHP wasn't given a bag of money to drive Resolute out of the market. Well, Resolute's response is highly, highly instructive. Here's what it said:

> "Canada now asserts that the $124.5 million investment was not a bag of money provided to PWCC to drive its competitors out of the market. Resolute doesn't complain about a bag of money but about a collection of creative measures all designed to do exactly what Canada now denies."[as read]

The claimant could not have

been more explicit. The collection of measures breached NAFTA because they were designed to drive Resolute out of the market. Of course, this is something upon which the claimant produces little or no evidence, but the other problem, the other -- the total breakdown in the claimant's argument is in its identification of the damage in relation to that breach.

The damage that Resolute points to is its reduced profits arising out of PHP's re-entry into the market. In other words, after alleging A breach based on the creation of a national champion that would crush its competition, rearrange the SC paper market, drive Laurentide out of business, subject Resolute's other mills to a similar fate, what does it claim for? Its reduced profits for purported lower prices. The disconnect couldn't be more stark. The claimant bases the breach on government support that will assuredly drive Resolute's mills out of business, but then it assesses damages on reduced profits over 16 years of ongoing operations.

But it is clear that the claimant has abandoned entirely the requirement to

show that the damages arise out of the breach when it chooses damages caused by the simple restart of the mill rather than on a government-bankrolled competitor that crushes its competition. After all, the assisted re-entry business of into a market does not, on its own, constitute a breach of NAFTA. No NAFTA provision prohibits it. It constitutes a legitimate policy goal.

Resolute itself admits in its reply memorial at paragraph 198 when it states:

> "The Nova Scotia policy aim crossed a line between encouraging competition and defeating competition, especially foreign competition. Anything done in the service of crushing foreign competition is inherently disproportionate."[as read]

But the claimant doesn't contemplate damage caused by the crushing of competition, only damage caused by the mill's

re-entry into competition.

As the claimant's expert Dr. Hausman states in his first damages report at paragraph 16:

> "I have been asked to calculate the monetary damages to Resolute assuming that the Nova Scotia government's provisions lead to PHP's reopening."[as read]

That's it. Gone is the outcry in the damages assessment of a national champion that destroys the competition and shutters mills. The only scenario Dr. Hausman has been asked to contemplate is Port Hawkesbury's restart. Gone also are the damages contemplated in the claimant's Notice of Arbitration when it argued that Resolute experienced the closure of Resolute's Laurentide mill, the loss of hundreds of jobs for its employees, the loss of market share to its other SC paper mills.

Despite the accusations, which Mr. Feldman repeated again just this morning, that Nova Scotia robbed workers in Quebec to pay

workers in Cape Breton, the claimant has made no attempt to quantify losses based on a closure of a mill. One wonders how Mr. Feldman's argument has any relevance at all in the context of a price erosion claim. Resolute has abandoned any claim for such damages along with its abandonment of damages on lost market share or predatory pricing.

Dr. Hausman states that, by not assessing damages for lost market share, he has taken a conservative approach, but don't be fooled. The reality is that, by choosing price erosion, the claimant chose this but-for scenario over all others because the others would not have produced the results that it wanted. Resolute's mills in Kénogami and Dolbeau, they are still producing and selling paper. Not only have they not been driven out of business eight years after PHP's re-entry, but they posted their most profitable years in the past decade, more profitable than when PHP was in hot idle and not producing paper.

Now, a quick word about proximate cause before turning to quantum: Another reason that the claimant chose price erosion rather than the valuation of its lost

market share is because Resolute and PHP's paper are, for the most part, not substitutable. I said earlier that you should keep in mind the claims of direct competition. Well, the term "competition" will undoubtedly come up often throughout this week. It's understandable given the claimant's description of the breach. But what the evidence shows -- and this is something that Timo Suhonen of AFRY will speak to -- is that while Resolute and PHP may be competitors in a paper industry, most of the paper they produce is not substitutable.

The paper continuum found at page 10 of Pöyry's first report helps to visualize the differences. As Mr. Suhonen will point out, the proper frame of analysis for this dispute is the orange box found in the middle of the screen. This is anything but a gerrymandered category of paper, as Dr. Kaplan argues, but a recognition of what Mr. Suhonen calls the competitive domain of SC paper within the entire paper continuum.

In that domain, Resolute's business falls principally within the orange bubble. Its Laurentide and Dolbeau mills make this lower grade of uncoated mechanical paper

called SNC or SCB, approximately 300,000 metric tons in 2013. Its Kénogami mill, which has the capacity to make 133,000 metric tons produces SCA and SCB paper, but not SCA+. Besides competing with paper from that yellow bubble that you see in the middle, it competes with standard uncoated mechanical paper from the large blue bubble below, including hybrid news, bulky book, and improved newsprint.

The Port Hawkesbury mill focuses on high end SC paper located in the upper part of the yellow bubble, and it makes almost no SCB paper at all. Of its production, we understand that it focuses on higher quality SC paper and even higher quality SCA+++ and now +++ paper. These grades are directly substitutable with coated mechanical, sometimes called coated groundwood, Number 5 and Number 4 above the continuum.

So while it is true that PHP and Resolute partially overlap with respect to SC paper, SCA in particular, the bulk of Resolute's production has been in SCB and SNC, whereas the bulk of PHP's production is in SCA and SCA+.

In addition to these -- Chris,

you can take that down now.

In addition to the Kénogami mill, which is the only mill that produces SCA paper, produces a quality of paper that Resolute's officials recognize as inferior or fourth quartile. This is why Resolute is upgrading its Kénogami mill, as Mr. Feldman mentioned this morning. Its upgrade is part of a $38 million project with $11.6 million of government assistance that will upgrade its paper to SCA+ so that it can access these more favourable markets. You will find this information in Resolute's press release at R-427.

But what was extremely telling about Mr. Feldman's comments this morning is that the upgrade he described as the only way Resolute has found it can continue to compete with Port Hawkesbury's low-cost advantage selling SCA++ paper at reduced prices. First of all, to be clear, Resolute produces no evidence at all of reduced prices by PHP. But, second, more significantly for the question of causation, Resolute's upgrade is being taken in 2020. Pause on that for a second.

Resolute requests damages from

2013 because of grossly unfair measures intended to drive them out of business. Yet it isn't until 2020 that Resolute bothers to upgrade its mill so that it can, in its words, it can undertake the only way to compete with Port Hawkesbury's product.

In any event, it's only once Resolute will be able to access the more favourable SCA+ market that Resolute will be counted among PHP's true competition, which presently comes from Irving paper, European imports, like UPM and Norske Skog, and coated mechanical paper producers.

Dr. Kaplan's answer to this is that it doesn't matter. It doesn't matter for a price erosion claim because SCA and SCB paper prices are highly correlated. His response serves to highlight why the claimant chose a damages model based on price erosion rather than a lost contract or market share. It knows that it wouldn't like the result that such a model would produce. So it's banked on a price erosion claim, on a price erosion claim that its experts view that whatever effects PHP on the price of SCA+ and SCA++ paper were necessarily passed on to

Resolute's lower-quality paper due to correlation that exists between SCA and SCB. But correlation is not causation. And, at best, this would constitute an indirect effect too remote to be compensated.

For some of my argument on factual causation, Resolute chooses a damages model that fails because the damages it seeks are too remote and indirect and don't arise out of the breach being alleged. If the measure that breaches NAFTA is one of creating a national champion that defeats all competition, as Resolute has so clearly and repeatedly argued, then it would be incorrect to compensate it for the simple re-entry of the PHP mill, which doesn't constitute a breach of NAFTA at all. The fact is it's been eight years since PHP's re-entry, and the Resolute mills have not been defeated. They continue to produce and sell SC paper to this day, even under the incredibly trying conditions of the COVID pandemic.

Up until now I have talked mostly about factual causation, but the point I just made about indirect effect points to additional problems with the claimant's damages

case, the lack of proximity or foreseeability, all embedded in its model.

The most basic requirement of any damages assessment is that it must isolate the harm caused by the wrongful act from the harm caused by other events. The claimant disagrees.

It argues that even if events contributed to price erosion, Canada would still be responsible for the -- responsible and would be responsible on the basis of contributory causation. The claimant is mistaken. Its contention that Canada is responsible for any and all drops in SC paper prices, whatever their cause, is, in fact, the antithesis of proving causation. And Resolute's misplaced reliance on contributory causation is simply a tactic to avoid proving causation and proving proximate cause. With every intervening event that contributed to a drop in SC paper prices, Resolute's damages become more and more remote. In a but-for scenario price erosion could equally have occurred due to an increase in imports from a saturated European market or through the substitution of non-SC paper, including coated mechanical from above and standard uncoated mechanical from below. But

beyond supply, prices also go up and down just because of economic growth, factor or input costs or even just exchange rates, arguably the most important.

This is something that Pöyry pointed out in its first expert report with which Dr. Hausman specifically agreed. Pöyry wrote as follows:

> "The impact of the Port Hawkesbury PM2 exit and re-entry on the SC paper market prices appears negligible because paper prices are not dependent only on supply volume but also on economic growth, factor costs, and exchange rates."[as read]

And Dr. Hausman responds as follows:

> "I agree with this statement, but it doesn't answer the fundamental question. Given economic growth, factor costs, and

exchange rates, what would SCP prices have been if PHP had not reopened?"[as read]

And he says Pöyry doesn't answer the question.

Of course, this isn't Pöyry or Canada's question to answer. It falls squarely to the claimant. And as the Rompetrol Tribunal held, if its model is incapable of differentiating between a price drop caused by the breach, distinguishing that from a price drop caused by market effects, not related to the breach, it fails to satisfy the causal nexus.

Okay. Let's turn to the last part -- and I'm sure I don't even have ten minutes on this, so I think we are good on time -- the question of quantum.

Assuming the claimant can overcome the many problems it has with causation, which, of course, it can't, it has an additional burden. Its quantification of the damages must be reasonable, rational, and non-speculative. It hasn't met this burden either.

Now, I have to say, after this

morning's presentation by the claimant, Canada is more confused than ever about the amount that Resolute is claiming. The claimant seems now to be relying on Dr. Hausman's preferred quantum of 103 million in the alternative only, and it cites instead to a $216 million sum, which it had not previously relied on. Presumably this is something that the claimant would clarify throughout the course of the week. But allow me here now to address its method of calculating quantum.

Its theory of quantum is as follows. But for the added supply of SC paper due to PHP's re-entry, Resolute's SC paper prices would have been higher. To attempt to prove that SC prices would be higher, the claimant relies on a 2011 forecast by RISI of what SC prices would have been. Although the forecast is no proof at all, this is the only document that it has as evidence.

Dr. Hausman, one of the world's preeminent econometricians then calculates the quantum through a surprisingly basic process. First, he takes the forecasted percentage prices of SCA paper. Then he applies them to Resolute's

SCA, SCB, and SNC grades of paper to show what the prices would have been or what it preferred to have been. Then he subtracts from the result the amount that Resolute actually earned on the market.

Despite hiring a leading econometrics expert, who presumably performs regression analyses in his sleep, Resolute proposes a quantum analysis that doesn't depend -- isn't dependent on his expertise at all, but one that lives or dies on a 2011 price forecast by RISI. The claimant's approach, quantum is 100 percent about future lost profits. Dr. Hausman may classify his quantum as the past profits of 2013 to 2018 and future profits out to 2028, but by relying on an October 2011 forecast, every single in penny damages that Resolute requests is based on a prediction of what will happen in the future. Quantum based on future lost profits, as the Tribunal is well aware, is among the most speculative ways to calculate damages and is commonly rejected by Tribunals. One of the reasons that tribunals are so reluctant to award future lost profits is because a minor change to one assumption can cause a major change

to the quantum requested.

Sometimes assumptions are proven incorrect by events that have occurred between the time the pleadings took place and the hearing took place, like a pandemic for example. But even absent such blatant market shocks, any number of everyday events will drastically alter the expectation of profits.

In this regard, I would urge the Tribunal members to pay particular attention this week to how the claimant's quantum assessment produces wild swings of tens of millions of dollars in one direction or the other as soon as Dr. Hausman changes an assumption or otherwise tweaks his model. Just this morning, we heard 216 as the new, as the new number. No longer 103, as his last pleadings suggested.

This segues into the second question that the Tribunal has posed with respect to damages, question 27. What degree can conclusions regarding the quantum of damage be predicted on (a) economic models or (b) anecdotal evidence? And what degree of confidence must attach? The calculation's based on future harm.

For better or for worse,

economic models have now become a common means to calculate quantum. Unfortunately, many claimants, like the one here, also uses the model to try to prove causation. Resolute may claim that that's not what it's is doing and it may argue that Dr. Kaplan proves causation with his theoretical economic model while Dr. Hausman shows quantum through a forecasting model. However, Dr. Kaplan has no evidence to show that prices would have been higher in the but-for world other than that RISI forecast.

Without evidence, a theory and a forecast prove nothing. And Resolute fails to satisfy the basic requirement, just as Rompetrol did, to employ a method that measures price erosion with sufficient accuracy and reliability.

In the face of the claimant's forecasting model, Canada's experts have looked to the industry commentators, one expert in particular, Mr. Steger. The strength of such anecdotal evidence lies in the fact that it is contemporaneous and objective. The industry reports that Mr. Steger relies on at paragraph 80 of his first report were not prepared for the purposes of litigation. Rather they span the

first 16 months of PHP's re-entry, commenting on how SC paper became a beacon of market strength after PHP's re-entry, and the market has quite easily absorbed the capacity from the restart of the Port Hawkesbury mill.

These commentaries by industry experts prove that the claimant's case on quantum is not rational. The quantum model put forward by the claimant is entirely speculative and based on faulty assumptions. Timo Suhonen of AFRY will speak to the faulty assumptions and the lack of transparency in the RISI model later this week. Up to now, Dr. Hausman has provided no response to these arguments.

Yet another reason to scrutinize the model is on the extent to which it predicts future damages as opposed to tabulating actual or present damages. In the case of future damages, like a discounted cash flow analysis, assumptions must be scrutinized very closely for the same reasons just described. But scrutiny should turn to distrust when the claimant chooses a model based entirely on future lost profits to quantify allege damages that have occurred in the past.

This is the choice that the claimant has made. It wasn't forced to select price erosion, and it didn't have to proceed on the basis of future lost profits. It could have looked to the 2011 and 2012 time period when PHP had exited the market to consider what happens to prices then. But then again maybe it did, and it just didn't like what it saw. As Dr. Kaplan explains, without PHP in the market, raw material cost declined, and so did prices.

So instead Dr. Hausman relies on the predictions of the soothsayers and the prognosticators, the same ones that that Resolute criticized Canada for relying on in the jurisdictional phase.

It's undoubtedly not lost on the Tribunal that this is a very strange position for Resolute and Canada to be in, given what both parties had to say about RISI during the jurisdiction phase.

This is what the claimant had to say about RISI in its rejoinder memorial on jurisdiction at paragraphs 57 and 58:

"Markets are not like statutes or regulations,

he said. Forecasts are always speculative, whereas implementation of a regulation or statute is certain."[as read]

And it also said that no thoughtful or responsible observer was certain what the effect might be, PHP re-entry, because of movement and slippage in grades of paper, Resolute's planned withdrawal of PM10, reopening of Dolbeau, and Port Hawkesbury's historic failures to be competitive.

During the jurisdictional phase, during the hearing itself, you will recall how Mr. Feldman had great fun teasing Canada about its speculative position and how surprised he was that Canada's speculation was derived from the speculators and that Canada looked to the gurus and the soothsayers. He also said that Canada insists that, even when the gurus have admitted error, Resolute should have listened to them and believed them.

Well, how the tables have turned. Now, it's Resolute's turn to rely on the soothsayers and the gurus. And Dr. Hausman does

not rely on RISI's contemporaneous statements like Canada had at the jurisdictional phase. Rather, he relies on RISI's five-year forecast for graphic paper. That forecast was published in October 2011, and he relies on it to show what prices of paper would have been starting in January 2013 all the way out to December 2016. It shouldn't come as any surprise that RISI does not accurately predict the future. Nobody can.

You delve a little further, though, and it will take two minutes. I will have to go into confidential session. Are we good, Heather? It's confidential, not restricted.

MS. D'AMOUR: Just one moment. Yeah. You are good to proceed. Thank you.

--- Whereupon Restricted Transcript Commences.

MR. NEUFELD: As you will hear from Mr. Steger, what we can expect not just from the [redacted]

So what you see here [redacted]

[redacted]

Dr. Hausman says, of course, that this [redacted] In fact, as Mr. Steger shows, [redacted]

As you can see, [redacted]

this is all the evidence you need to reject Resolute 's quantum request, which relies on a [redacted]

Okay. We can go back to

public session now, and I will just wind up.

--- Whereupon Restricted Transcript Ends.

MR. NEUFELD: All of this brings to mind another axiom about models. The further into the future a model pushes, the more likely it is to be unreliable. Resolute is critical of Canada's experts for not wanting to operate in the but-for world. However, operating in the but-for world doesn't entitle the claimant to pretend that the prices -- that the price increases forecasted by an October 2011 RISI forecast would have been borne out when we know that these are speculative forecasts based on incorrect assumptions.

It also doesn't allow the claimant to pretend that other market factors didn't cause its prices to fall in the real world or that it would keep its contracts going forward even in the face of a pandemic.

In conclusion, the claimant fails on all three requirements of the three-part test to prove damages. It doesn't make a request for damages that arises out of a breach, but rather out of a state action that doesn't breach NAFTA. Then it fails to choose a damages model

that isolates the alleged harm from all other market events, preferring instead a model that is too remote and direct and speculative. And, third, its quantification of damages is not rational, reasonable, or accurate.

Thank you very much for your attention. I think -- oh, I might be a minute over. I apologize for that. Unless you have questions, all I will do is wish you a good evening, Judge Crawford, and a good afternoon to the rest of the Tribunal members. Thank you very much.

JUDGE CRAWFORD: Thank you very much for that illuminating brief account.

We will start tomorrow at two o'clock.

MR. NEUFELD: Fine. Thank you.

JUDGE CRAWFORD: Two o'clock Hague time, eight o'clock Canadian time, so a slightly different change of routine. And we will see you all then. Thank you, again, for you attention today.

MR. NEUFELD: Very good. See you tomorrow.

--- Whereupon matter adjourned at 3:03 p.m. EST to be resumed, Tuesday, November 10, 2020, at 8:00 a.m. EST.