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 Saturday, November 14, 2020, at 8:05 a.m. EST

RESTRICTED ACCESS - VOLUME 6

REVISED TRANSCRIPT

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Arbitration Place Virtual

--- Upon resuming on Saturday, November 14, 2020, at 8:05 EST

JUDGE CRAWFORD: Good afternoon, or good morning in the case of two of us. It is good afternoon in the case of two of us and good morning in the case of everyone else. I have got to get my days and nights in better order than they have been recently.

Today we are to hear the final statements of counsel, both parties, with responses by the other party.

Can I ask you to allow about 10 seconds if you are showing an overhead. The system being used is slightly slow to react, so just pause a bit, and the secretary to the Tribunal may indicate that you are ready to go.

This case has been full of changes, and we have yet another change of venue and change of atmosphere, but it is obviously a separate and distinct part of the case and very important from that point of view.

The claimant is going first, I understand. Mr. Feldman.

MR. FELDMAN: Thank you.

Excuse me, Judge Crawford, I have lost my screen. Could you excuse me just a moment?

JUDGE CRAWFORD: Yes.

MR. FELDMAN: I apologize for that. Judge Crawford, we are having some challenges today in Washington. All the roads were closed. We couldn't access the building. We are parked in different places, and we are running a little bit late. But I think we are all here and ready to start, so when you drop the flag, I will be happy to begin.

JUDGE CRAWFORD: Consider it dropped.

MR. FELDMAN: Thank you.

CLOSING ARGUMENT BY MR. FELDMAN:

MR. FELDMAN: Good morning and good afternoon to Judge Crawford and the PCA team in The Hague and the Arbitration Place team in Toronto.

We have now heard from four fact witnesses, five expert witnesses over the course of four days. We, at least, have learned a great deal that we hope will be reflected in the remarks to follow. We will extend our thanks

again at the end of the day, but having brought everyone to work on the weekend, there should be no harm in expressing our appreciation twice.

Because of the frequency with which we will revert to restricted access materials, we think it prudent simply to make our closing statement restricted, and I will pause for a moment so that Heather can enact that.

MS. AMBAST: Sorry, this is the tribunal secretary intervening. We weren't told whether we should be starting to stream or not, so if counsel could let either the PCA or the Arbitration Place know or just flag it to us when we are meant to start streaming, we can implement that. Thank you.

MR. FELDMAN: Our intent is to make the entire presentation restricted access so that we don't have to go back and forth, so from now.

MS. D'AMOUR: Excellent. I confirm we are in a restricted access session.

--- Whereupon Restricted Transcript Commences

MR. FELDMAN: Thank you very much.

Alex Morrison, of Ernst &

Young, after examining in detail the records of 174 cases of Canadian companies entering into CCAA proceedings since 2009 and relying on an additional two decades of personal experience as a bankruptcy monitor, concluded that he had seen nothing quite like the case of Port Hawkesbury for three reasons.

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First, the range in comprehensiveness of assistance from the Government of Nova Scotia to resurrect a defunct company was peerless; no Canadian government, federal or provincial, had ever done and given as much as Nova Scotia did to and for Port Hawkesbury. Second, the total value of the assistance was, to scale, extraordinary. And, third, he found not a single other instance where the avowed government purpose was not to make the revived enterprise merely competitive but, instead, to make it the most competitive by making it the low-cost producer in its industry.

Nova Scotia's resuscitation of Port Hawkesbury was unique. The circumstances of Port Hawkesbury's resuscitation were also unusual. Port Hawkesbury was revived to out-compete five

other already established companies in North America, all of whom produce the same commodity in secular decline. The industry was already shedding capacity through closures. NewPage Port Hawkesbury was not the first to fail, and it surely was not going to be the last, but it would be the only one that would die and be resurrected by a government and the only one with a government as a joint venture partner promising it would be the low-cost producer among the survivors, destined to be the last standing when, eventually, secular decline would dictate the demise of the others. Port Hawkesbury was the only supercalendered paper producer native to Nova Scotia, but its market was North America and beyond, not Nova Scotia.

As you may note on the slide that I am putting up now -- next one, please -- Pöyry agrees about the market. Most of the competitors were Canadian operating in Canada, but Port Hawkesbury contributed to the demise of Verso in the United States and to Resolute's mill at Laurentide. What Nova Scotia did was, Mr. Morrison concluded, extraordinary, in some respects unique and unprecedented.

MS. D'AMOUR: Sorry, Mr. Feldman, can we just interrupt quickly? I understand Judge Crawford is having some issues with his screen.

Judge Crawford, can we take a couple of minutes to sort that out, and I can put everyone in their breakout rooms in the meantime?

JUDGE CRAWFORD: The problem is not the screen, the main screen. The problem is the ancillary screen with the documents and so on. The slides.

MS. D'AMOUR: Okay. Can we open the breakout rooms, and I can work with you to fix that?

JUDGE CRAWFORD: Yes. Yes.

MR. FELDMAN: I was having the same problem, Judge Crawford.

MS. D'AMOUR: Sorry about that. So I am going to open the breakout rooms and push everyone back in there, and then I will give you a heads-up just before we close them.

--- Upon recess at 8:14 a.m. EST

--- Upon resuming at 8:19 a.m. EST

JUDGE CRAWFORD: Mr. Feldman.

MR. FELDMAN: I think

everything is restored. At some point, Judge Crawford, you and I are going to have to have a technology lesson together.

I think I am roughly at this place, if I may resume?

What Nova Scotia did was, Mr. Morrison concluded, extraordinary, in some respects unique and unprecedented.

In showering Port Hawkesbury with funds and favours, Nova Scotia favoured one company over all others within the same industry. More than favoured, it actually invested in the company. With the industry in secular decline and the resuscitated company among the largest producers, an already oversupplied market received an additional 20 to 25 percent capacity.

Next slide, please.

Two things had to happen. As illustrated on the slide, some competing capacity would have to close and prices would have to fall. Resolute, known as the most prominent competing company, would necessarily be damaged through closures and lost profits by the revival and return to the market of Port Hawkesbury. This much, making one company among six a

government-sponsored national champion was certainty that others would be severely and, in some instances, fatally harmed would be enough to establish a breach of NAFTA Article 1105. Resolute was not accorded fair and equitable treatment. The treatment it received did not reach the minimum standard as prescribed in customary international law. But, in this case, there was more. Claimant in this case is an American company, entitled to the treaty protections of both Articles 1105 and 1102. It is entitled to fair and equitable treatment and non-discrimination. The damage it suffered because of Nova Scotia's conduct is compensable because it was real, measurable and not inadvertent. The laws of supply and demand guaranteed the damage. Add substantial capacity to an oversupplied market for a commodity in secular decline and competitors will have to close, prices will fall and competitors will lose money. But here, the damage was not only foreseeable. Canada has indulged in hyperbole and exaggeration, arguing that Resolute claims the Port Hawkesbury revival was nothing more than a deliberate scheme to crush Resolute and put it out

of business. That's not Resolute's claim, nor is it a standard Resolute must satisfy.

Nova Scotia did not have to set out to do Resolute harm to make its conduct actionable, but Nova Scotia was well aware what it was doing would harm Resolute, and it proceeded anyway. And not only the laws of supply and demand made the damage foreseeable. [redacted]

Next slide, please.

[redacted]

In this proceeding, the [redacted] surfaced months after production of it would have been responsive to a discovery

request. Canada designated it in its entirety for restricted access.

Next slide, please.

Keeping it secret from the public has been a continuing theme of this arbitration and this very hearing. [redacted] and, as you can see on the slide, [redacted] is still being kept a secret.

But we all know now [redacted] The damage to Resolute did not have to result from deliberate conduct to have been

knowing and willful. Nova Scotia did not have to know or be willful to have damaged Resolute, breaching Articles 1102 and 1105. It only had to treat Port Hawkesbury better than all its competitors to an extreme that assured others would be harmed.

But, in this case, Nova Scotia knew what it was doing and did it. It knew it would harm Resolute, and it proceeded willingly.

Canada apparently did not want Resolute to know about [redacted] and it knew it would have to deal with them in this proceeding. In our opening statement, Mr. Valasek reasonably called [redacted] So Canada [redacted] Mr. Suhonen, then, in his -- in this hearing, [redacted] Sitting in Pöyry's home base in Finland, Mr. Suhonen [redacted]

Next slide, please.

[redacted]

[redacted]

Next slide, please.

The Government of Nova Scotia, as Ms. Chow explained, assembled a package of assistance for Pacific West Commercial Corporation to enable PWCC to relaunch Port Hawkesbury as the most competitive producer in the business. The ensemble of measures, which Nova Scotia and Canada studiously avoided or denied calling subsidies

until this proceeding -- next slide, please -- [redacted] But, Nova Scotia, through Port Hawkesbury, would restore jobs quickly and help a mill town in Nova Scotia. Nova Scotia officials knew there was at least a very high risk of harm to other Canadians but chose to invest in the immediate gratification of the local citizenry and its politicians and bureaucrats at the long-term expense of its own treasury.

The [redacted] Pöyry analyses commissioned for this arbitration faced a formidable task. They had to eschew the laws of supply and demand and create arguments for how a market in secular decline could absorb a 25 percent increment in supply while doing no one any harm.

The Pöyry mandate, like the mandate for Peter Steger, was expressly to refute the PhD economists Resolute had hired to determine the connection between Nova Scotia's conduct and damages, liability, and to measure the consequent damages.

Pöyry came up with a [redacted] theory of absorption that, despite all the studies and analyses of the market and competition in supercalendered paper, the market and competition was not about supercalendered paper at all but, instead, about coated mechanical paper. This argument led to debates in this hearing about the difference between product substitution and markets; but, in the end, it's about whether an oversupplied market for a commodity in secular decline can absorb a huge increment in supply without causing anyone any harm.

Could Canada, through Pöyry, make the elephant disappear?

In 2010, NewPage Port Hawkesbury was making high-quality supercalendered paper and was losing tens of millions of dollars annually. It went bankrupt. With the same physical plant and the same superior piece of machinery making the same commodity, PWCC returned within two years with a 25 percent increment in supply to the market and, according to Steger, had no more than a six-month impact.

Pöyry reckoned it was absorbed immediately and had no impact at all. For both,

within six months, the new supply was absorbed.

[redacted] according to Canada's experts, [redacted]

According to Pöyry, there was a phenomenal surge in demand, new customers. Mr. Steger repeated this theory. His primary source, we learned in the hearing, was the commissioned Pöyry report, which was written for the purpose of denying that the reopening of Port Hawkesbury caused any competitor any harm.

Next slide, please.

Mr. Steger also relied in confirming Pöyry on the testimony of a witness before the U.S. International Trade Commission whom Port Hawkesbury hired expressly to say no harm was done by Port Hawkesbury's market re-entry. The mission for both Pöyry and Steger was to discredit Professor Hausman and Dr. Kaplan, to deny injury to anyone outside Nova Scotia, and to discredit [redacted]

According to Mr. Steger, there was a six-month impact with falling prices, but then the market, expanded in definition to include

coated mechanical paper -- next slide, please -- a product not even made in Canada that the International Trade Commission expressly had decided was not part of the same market, also confirmed econometrically by Professor Hausman as he testified in this hearing, absorbed the new supply. Both Pöyry and Steger terminated their inquiries in 2013. There could be no damage after 2013 because they could not see any damage, and they could not see any damage because they deliberately didn't look. Mr. Steger quoted industry analysts in 2013 saying there was no damage after 2013. He also complained that real data, not economic models, should be used for analysis and forecasting. He looked at real data in 2013 and found damage. He did not look beyond 2013 and then found no further damage.

Pöyry's Timo Suhonen called "hilarious" the analysis of a prize-winning chaired econometrician in one of the three leading economics departments in the world when Professor Hausman concluded that the miracle of absorption through the transformation of the market could be little more than a fantasy. According to Pöyry in Finland, [redacted]

[redacted] There were all kinds of alternative forces at work, exchange rates, imports, foreign supplies. They waved away the long-term and inescapable basic law of supply and demand by growing the demand. They endorsed the conclusion of secular decline, but industries in secular decline do not grow demand.

Let's suppose, despite the improbability and inconsistencies, that they are right about what happened in 2013. Let's suppose the new volume of supercalendered paper drew all its customers from buyers of coated mechanical paper. Pöyry argues that there was an opportunity in 2013. Not only were coated mechanical customers ready to buy SCA paper, mills closed in Europe, currency fluctuated in favour of North American suppliers, imports from Europe increased, although part of the argument is somehow that European mills closed, shrinking supply and the import statistics do not support the conclusion.

Next slide, please.

As Pöyry itself says, had Port Hawkesbury not suddenly come on the scene to take advantage of the new opportunity, someone else would have. There were potential orders to fill.

And that's the point. Had Port Hawkesbury not been in the market, someone else would have filled orders for 360,000 metric tons. Pöyry argues that it could not have been Resolute because the new demand was for a quality of SCA paper that Resolute did not make; therefore, Resolute could not have been injured because it couldn't have been the beneficiary of the new demand.

The evidence defining markets defines the competition. SCA and SCB prices rise and fall together. SC paper, everyone agrees, is in secular decline. Its prices are falling. Its prices will continue to fall. The more supply is present in the market, the more those prices will fall.

Slide 13, please.

As you can see on this slide, as long as Port Hawkesbury's 360,000 metric tons are being sold, Resolute is fetching a lower price. The difference between Port Hawkesbury in or out of the market, Dr. Kaplan's with and without analysis of the but-for world, is the only difference that matters as long as the product is supercalendered paper with its many grades, and all agree that it is in secular decline.

In that but-for world, Port Hawkesbury's 360,000 metric tons makes a calculable and continuing difference. Professor Hausman, using econometrics and deriving price elasticities, measured it. Pöyry and Mr. Steger questioned the elasticities Professor Hausman calculated but never explained why Professor Hausman's conservative calculations were incorrect. Without Port Hawkesbury's additional supply, prices for supercalendered paper, whether higher or lower generally at any particular time, always would have been higher without the Port Hawkesbury volume. The difference between what they were with Port Hawkesbury and what they would have been without Port Hawkesbury is the measure of Resolute's damages.

Port Hawkesbury's volume became a permanent feature of the market because its status as the low-cost producer guaranteed it would not be the loser when demand fell enough to force a mill closure. Everyone agrees that the higher-cost producer will close. [redacted]

Next slide, please.

As Dr. Kaplan explained -- his

testimony is on this slide -- the higher-cost producers would always suffer from reduced prices because their prices always would have been higher with less supply in the market to meet the declining demand. Being the lowest-cost producer enabled Port Hawkesbury to re-enter the market and then conferred a permanent advantage. Nova Scotia made Port Hawkesbury the lowest-cost producer. Nova Scotia conferred the security and the permanent advantage. And the advantage for Port Hawkesbury necessarily meant a disadvantage for Resolute. As long as there are at least two competitors, there will be a low-cost producer and a high-cost producer. With secular decline, the low-cost producer will always win.

Next slide, please.

The bargain PWCC struck with Nova Scotia, demonstrated in detail during this hearing, was to be made the low-cost producer. It was that bargain, along with what Nova Scotia had to and did do to live up to its side of the bargain that Mr. Morrison found so extraordinary.

PWCC would not have bought in -- would not have bought in and resuscitated the mill under any other circumstances, and no one

else would either. More than 100 companies were approached to buy the defunct mill; and, in the end, there was only PWCC as a credible bidder and two junk dealers. That bargain and what Nova Scotia had to do to meet its side of the bargain crossed the line between permissible and impermissible conduct according to the international standards of NAFTA Articles 1102 and 1105.

Canada argues that the Nova Scotia government only did its job and served its public. As we said at the outset, Resolute is agnostic on the public interest within Nova Scotia. Canada entered a treaty encouraging foreign investment and international trade. It took on international obligations pursuant to that treaty and got in trouble with the United States and made material misrepresentations to the WTO, and it has been challenged here, all because no one seems to have paid any attention to those international obligations.

Pöyry's theory in 2018 [redacted] and making the elephant disappear through absorption was complemented by Peter Steger's new theory

acknowledging possible damages but limiting them to an impact lasting no more than six months. He [redacted] and excluded consideration of what the commercial world might have been like without Port Hawkesbury. The but-for world is the only framework in which economists can assess the impact of a market change, looking at what happened with the change and what the world would have been like without it. There is no other reputable methodology. [redacted] and Canada found two experts to come up with alternative theories.

We did not want to engage in a battle of experts, but we are now asking the Tribunal to prefer the testimonies of our experts to the testimonies of theirs by recognizing the candour and intellectual honesty of Professor Hausman and Dr. Kaplan and the difference between a scientific method of analysis and a collection

of distracting anecdotes.

Next slide, please.

Mr. Steger claims he did a but-for analysis, but it was nothing more than a before and after. As Dr. Kaplan explained, there are always events of one kind or another that affect a market temporarily. A mill burns down, the currency fluctuates, the economy goes into recession, there's a global pandemic. It may be said that economics is the science of taking into account and explaining such anecdotes. Everyone who addressed the issue during this hearing agreed that forecasts are hard and the future is unpredictable. Professor Hausman probably proclaimed this truth more than anyone. Mr. Steger and the Pöyry revisionists, however, believe only actual data are subject to examination. Forecasting, in their world, is impossible. The purpose of social science, however, is prediction, which requires the careful development and application of theory. All the events Pöyry and Steger identify to dismiss forecasting cannot replace the fundamental principles of economics. And, in a case such as this one, there is only one reliable and reputable

methodology that answers the only question that matters: What does the world of prices for supercalendered paper look like with Port Hawkesbury and without it? But for Port Hawkesbury, what would prices have been? The measurement may be imprecise, but it is more certain than any alternative.

In this case, Mr. Steger concedes that were the Tribunal to find liability, damages could be calculated, although he restricts damages to a six-month past. The problem then goes away because, somehow, the increment in supply, Steger claims, went away, absorbed in his new market that combines supercalendered paper and lightweight mechanical papers. But, of course, the new volumes did not go away. Through the protections of being the lowest-cost producer, Port Hawkesbury's 360,000 metric tons is a permanent feature of the supercalendered paper market. Professor Hausman measured the but-for world described and analyzed by Dr. Kaplan, a world with and without Port Hawkesbury. [redacted] proved extremely discomforting for Canada in this case, so Canada hired Pöyry in 2018 to [redacted]

[redacted] And the only way [redacted] was to indulge in anecdotes and renounce basic economics.

Professor Hausman offered two distinct methods to measure damages. His forecast method relied upon projections of RISI price forecasts.

Next slide, please.

His economics approach, with results displayed on the slide, required econometric modelling and the calculation of elasticities. For both methods, he was conservative, permitting himself the use of Mr. Steger's erroneous, unfounded, undocumented and thoroughly contradicted capacity estimate of [redacted] for Port Hawkesbury. His tortured explanation under cross-examination was purely post hoc. The correct capacity is much closer to 360,000. And while Mr. Steger thinks the number that matters is production, not capacity, paper mills must run 24/7, and it is their capacity that shapes the market.

Next slide, please.

Neither Pöyry nor Steger has rebutted Professor Hausman's elasticity

calculations, although they confess difficulty understanding them.

Resolute suggests that the Tribunal measure the damages according to Professor Hausman's economic approach deploying his calculated elasticities, take the midpoint of his range, thereby giving altogether too much credit to Mr. Steger's arbitrary estimate, and find damages of $121.4 million in lost profits from the reduced prices caused by Port Hawkesbury.

We further suggest that the Tribunal recognize the damages in two parts, the first derived from the past and real data, 2012 to 2018, and the second based on a forecast from 2018 to 2028. The past damages come to $89.2 million. The future damages come to $32.2 million.

I'd like to summarize where we seem to be after five days of testimony and argument.

There's no reasonable or plausible dispute about the following.

Next slide, please.

Nova Scotia delivered a rich and varied ensemble of measures to the Pacific West Commercial Corporation, enabling it to

resurrect the Port Hawkesbury mill. No matter what ingenuity or creativity or innovation PWCC may have brought to the task, it still could not have resurrected the mill without extraordinary assistance from the Nova Scotia government. Perhaps even more important, PWCC would not have invested or resurrected the mill without the government's contributions, and there were no other takers. Canada credits PWCC with [redacted] which may be true, but beside the point. The point is Port Hawkesbury would not be in business without Nova Scotia's extraordinary support.

The supercalendered paper industry was in secular decline when Port Hawkesbury's 20 to 25 percent supply increment supplemented the market. No one seems to disagree with that.

None of the parties involved in the resurrection, PWCC, the premier, his cabinet, his civil servants, the public utility and its review board, the CCAA monitoring the overseeing court, gave any thought to international obligations or international law. Those who testified on this subject all concurred

that international obligations were not among their considerations.

There remain some questions about these indisputable facts. Were the Nova Scotia measures cognizable acts of state?

Next slide, please.

Resolute says the regulatory measures, the waiver of renewable energy standards and the order to run a boiler 24/7 are unmistakable acts of state that cannot be construed as exempted subsidies. Mr. Coolican confirmed in his testimony displayed on the slide that there would have been no electricity deal without the state's intervening regulatory measures. In the ensemble of measures, only one seems contested as to whether it was an act of state, the electricity deal itself. The regulatory changes were integral to the electricity contract. Resolute says the contract was an act of state additionally because the Nova Scotia Utilities and Review Board is an organ of the state that oversaw and had to approve the contract. The premier personally engaged for approval of it. The government hired a consultant to work with the public utility and the rate board

to facilitate negotiations over the deal. [redacted] The NSUARB would not approve the deal knowing that the operation of Port Hawkesbury's biomass plant likely would cost ratepayers approximately $7 million per year, so the government mandated that the biomass plant must be run to make the review board approve the deal notwithstanding that objection. And the deal was structured ultimately for Port Hawkesbury to pay the government as well as the public utility.

Despite all that government engagement, were the Tribunal to decide that the contract cannot be attributed to the state, there remains the long list of investments that undeniably must be. Taken --

PROFESSOR LÉVESQUE:

Mr. Feldman, I have a question on attribution under Article 4 of the ILC articles, so before you move on, if I could ask my question.

MR. FELDMAN: Please do, but with a caveat that Mr. Valasek is also prepared to speak further on attribution should there be questions on that subject. So let me try --

PROFESSOR LÉVESQUE: No, I am happy to wait. I was not sure if that was your main submission on attribution or if it would come more detailed later. If you tell me it's coming later, I am happy to wait.

MR. FELDMAN: It's not the only one.

PROFESSOR LÉVESQUE: Okay, so I will wait, then.

MR. FELDMAN: Okay, good, then. Thank you.

Well, let me just go back a little bit.

Despite all that government engagement, were the Tribunal to decide that the contract cannot be attributed to the state, there remains the long list of investments that undeniably must be. Taken as the package Nova Scotia officials agree is the appropriate way to see these measures, Nova Scotia was directly responsible for returning Port Hawkesbury to the market.

Canada implausibly argues that Port Hawkesbury's return to the market did not cause damage to Resolute because they were not

competitors. Port Hawkesbury, Canada has reasoned post hoc, competed with coated mechanical papers, not lower-grade supercalendered paper. The United States International Trade Commission thoroughly investigated exactly this question, whether supercalendered and coated mechanical papers were like products, and concluded to the contrary.

Next slide, please.

The evidence in this arbitration also establishes -- Mr. Suhonen confirmed in the captioned testimony on the slide comparing coated mechanical and supercalendered paper on the one hand to wheat flour and barley flour on the other -- that the relevant industry is supercalendered paper, the relevant market is North America. And, for Mr. Steger's information and possibly of interest to the Tribunal, the US countervailing duty order on supercalendered paper from Canada, occasioned entirely by Nova Scotia's subsidies, was not overturned. The American petitioner accepted over $42 million in cash from Port Hawkesbury and Irving and declared no further interest in the order. The settlement agreement can be found at C-242.

[redacted]

[redacted] Port Hawkesbury wanted to be, and Nova Scotia enabled Port Hawkesbury expressly to be, the lowest-cost producer of supercalendered paper, not the lowest-cost producer of supercalendered and coated mechanical paper.

Canada challenges Resolute's comparisons of Port Hawkesbury to Resolute's Quebec supercalendered mills, arguing that the mill in like circumstances was Bowater Mersey. Mr. Garneau demonstrated definitively that Bowater Mersey and Port Hawkesbury could not be usefully compared -- different industries, different competitors, different scales and conditions. And Canada argues that Resolute could have been treated as well as PWCC had it only bid for Port Hawkesbury. But only one company could have been the winner in the provincial sweepstakes for the one lowest-cost operator, and Resolute was being asked to cannibalize its operations in Quebec for business in Nova Scotia, just after Resolute's unhappy experiences negotiating unsuccessfully

with Nova Scotia for the survival of the Bowater Mersey mill.

Mr. Snarr will now discuss how this narrative relates more directly to the breach of Article 1105, and he will be followed again by Martin Valasek, who will address again the breach of Article 1102 and expand on the attribution issue, which we hope will answer Dean Lévesque's question. I will have a brief conclusion following Mr. Valasek.

Mr. Snarr.

CLOSING ARGUMENT BY MR. SNARR:

MR. SNARR: Thank you.

As addressed in our opening statement, the legal standard the Tribunal should apply to determine whether Resolute's investments were denied the minimum standard of treatment, including fair and equitable treatment under Article 1105(1), is the following.

Ricky, would you put up the first slide, please?

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.

NAFTA tribunals have found that this determination must be made by the Tribunal in view of the facts of the particular case. Canada has claimed that Resolute must prove more than the content of the standard above. In its opening statement, Canada argued that "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 extensive subsidies."

Canada pointed to Cargill as an example, saying "there always needs to be a rule of customary international law identified that was breached. And that has to be based on custom."

You may remember that the measures at issue in Cargill were trade barriers. Mexico had adopted antidumping duties, excise

taxes and import permitting requirements which were applied to US producers of high-fructose corn syrup in restrictive ways that would advantage the domestic sugar producers.

The breach of Article 1105 in Cargill was not that customary international law prohibited trade restrictions per se. The breach of Article 1105 was, instead, the conduct of Mexico in adopting those measures, specifically the import permit restrictions which deliberately targeted HFCS producers for harm.

Similarly, in Pope & Talbot, the claimant did not establish that customary international law prohibited verifications of quota reports under the Softwood Lumber Agreement, but customary international law established that the manner in which the verification was conducted was so burdensome and abusive as to be a violation of fair and equitable treatment.

The standard that Resolute has proposed should be applied to Article 1105(1) is the product of analysis of arbitral awards and the writings of international scholars which have analyzed customary international law to determine state practice with respect to the minimum

standard of treatment. It is a standard which reflects the evolution of the minimum standard of treatment in customary international law which Merrill & Ring, Chemtura, Bilcon and Windstream, among other cases, acknowledged has evolved to provide greater protection to investors while still requiring a threshold standard of seriousness for unfair and inequitable government conduct.

Next slide, please.

In addition to the evidence presented in our memorials and highlighted in my opening statement as well as Dr. Feldman's closing statement, the evidence produced at the hearing this week has reinforced the unfair and inequitable nature of Nova Scotia's conduct toward Resolute.

First, Nova Scotia provided a large package of assistance that, as an ensemble, provided benefits to Port Hawkesbury on non-commercial terms. You heard Mr. Morrison testify at pages 554 of the transcript that he reviewed 174 cases that were in CCAA proceedings, 117 of which had no government assistance at all. Of those cases, only 8 were even comparable, and

Mr. Morrison found this case unique among them.

Let's look now at page 560 of the hearing transcript where we can see what Mr. Morrison said.

Line 2:

"The fundamental difference in the NewPage Port Hawkesbury case was the stated goal of the province of Nova Scotia that it was going to assist NewPage Port Hawkesbury to become not just competitive and sustainable but to help the mill become the most -- the lowest-cost and most competitive producer of supercalendered paper. We haven't seen that in other cases. That is a unique situation. And, typically, we see, as I mentioned, companies get

some form of government assistance, when they do get it, to allow it to survive and sustain but not to receive a competitive advantage."[as read]

So Dean Cass asked, if you take out the hot idle and the temporary or transitional elements, do you still reach the same conclusion? Mr. Morrison responded affirmatively at pages 604 to 605, if we could go there, Ricky. Line 16:

"I think we would probably reach the same conclusion. You know, the objective of creating a low-cost producer, again, is very unique. It's not something that we have seen in other CCAA cases.
And then the rest of the package, it's hard to break it up into

components. You have to kind of look at the totality of the package. It was certainly significant in terms of the package of support that was provided on the exit of the restructuring, and we combine it up with the interim financing and the electricity arrangement. It would still be significant if it excluded the interim financing as well."[as read]

Ms. Chow confirms the basic terms of major elements of the ensemble. The $64 million of loans were [redacted] --

PROFESSOR LÉVESQUE: Sorry to interrupt. Before we leave the question of Mr. Morrison's testimony, I have some questions.

So it strikes me there's a lot

of emphasis put on a line crossing at different places in the pleadings, including in relation to that evidence. But the line crossing has to be the international law standard; right? It's the customary international law standard for the treatment of aliens and not what might be usual or unusual in Canada. And one step further, of course it's a question of definition what you put in your evaluation and what you exclude, as we have seen.

And just to give you a, I guess a quick example, if you were looking at the Tribunal members, okay, we are three former deans, so none of us are unique; but I am the only female former dean, so all of a sudden I am unique, but it doesn't really matter in the sense that it's a question of definition.

So there's two issues, to me, first, what you include and exclude in the evaluation, and we've seen some very, I will say -- I am trying to find the right word, some cases, like in the steel industry, were excluded on the basis that were very minor to me in saying, well, this was a general government program versus this was just for one company, when, in fact, in

the case of PHP, there were also general government programs used to provide assistance.

So you can get to a place where the distinctions you make just get you to where you want to go. So I'd like you to address that and then also address whether even if we all agreed this was unique in Canada, let's say we agree on that, it still doesn't mean that it's a breach of 1105. So if you could address these two.

MR. SNARR: Okay, so let me start, first, with the crossing of the line.

I think what we have been trying to say in our presentations under 1105 is that there can be a number of different factors that come together cumulatively to reach a level of unfairness that is -- that we would contend would be egregious even though we don't think that that necessarily is the standard that we need to meet in order to have a breach under 1105.

And there's a combination of different things that come together that take you to that level. One is the circumstances of the package itself that are at least rare, if not unique, because of the dedication of the

government to take a company that was in bankruptcy and to resuscitate it and then take it to the other extreme of the market to put it in the position of being the most competitive. And in addition to that, it's the range and the extent of the assistance that's provided.

Now, if you were to look at different elements and say, well, governments sometimes provide loans, so why is that unfair and inequitable? And if that's the only thing that you looked at in separation from the other pieces, you might find that it's not.

In a similar sort of way, if you were to look at the way that the Government of Canada conducted the verification of Pope & Talbot, there were a number of things that they did in a series there that were found to be extreme and abusive to the extent of being unfair. Some of those things might just, in isolation, rise to the level of mistakes, but it's the combination of them that puts you in a place where we think that the line has been crossed. And the line is the line that has been established through customary international law and reflected in the decisions of the arbitration tribunals as to what

is the content of the standard, how much unfairness, arbitrariness or government misconduct do you have to have in order for it to be actionable versus something that doesn't rise to that level.

The other point that you asked me to address was the inclusion and exclusion of different elements in the evaluation.

So, so we asked Mr. Morrison to do as complete of a search as we could within the period that he looked at. And, again, I think what he found was that there were a combination of different factors that made the Port Hawkesbury situation unique. It's not just that you had some government programs that everybody was eligible for, and my recollection of the Port Hawkesbury programs is that most of those programs were, were Nova Scotia programs. Specifically, they were reviewing Port Hawkesbury specifically to see what it was that it needed. So while there was a -- the FULA agreement that other organizations could participate in in Nova Scotia, but on top of that, you had the different loans, the working capital, and the $40 million loan, and then those loans were tailored specifically for Port Hawkesbury

when they weren't able to get the Canada tax ruling that they wanted.

So there were a combination of things there that were really tailored specifically to Port Hawkesbury's needs. And you see many times in the record that, if there's not one thing or another that they get, then the deal itself isn't going to go through.

PROFESSOR LÉVESQUE: Thank you for that.

Maybe a follow-up back to crossing the line because it's quite pervasive in your argument. So I am looking at paragraph 396 of your reply memorial, so really on the last page:

> "So the key questions to the Tribunal are: How much assistance, how much government intervention, how much government favouring of one company over another is too much? There's a line -- "[as read]

Da, da, da:

" -- about guaranteeing they will be more competitive and necessarily prevail. The facts of this case show that Nova Scotia knowingly crossed that line."[as read]

And I'd like to explore that again a little bit.

So Bowater Mersey was going to get -- well, based on the agreements signed, 50 million with the possibility, if I remember correctly, of another 40 million. So that, I assume, is deemed by Resolute to be not a breach of 1105 to provide assistance to a company with variable components to the tune potentially of 90 million. Then if it's, as you claim, 124 million worth of assistance, that crosses the line.

And, to me, that's not a way a Tribunal can decide between what's fair and unfair. Right? Just based on quantum. Right? 100 million is okay, but 124 is not okay. So I am sure you will say, well, there was more, more to it than the quantum was all together and

electricity deal, but if you could address that, that line, and in terms of standard, not money value, I assume that's not good enough, in terms of standard, what makes this case cross the line.

MR. SNARR: Thank you. A couple of thoughts on that.

One, I do think the role of the Tribunal, particularly when it comes to questions of unfair and inequitable treatment, has to take in the totality of the circumstances. In fact, I think Pope & Talbot uses that phrase in their 1105 analysis.

And I think that Cargill did a similar sort of thing. Certainly they were moved by the fact that the trade restrictions, the problems with the import permitting were focused particularly on the high-fructose corn syrup producers. But they went through a series of considerations and looked at it in the context of the broader picture between, in the sugar dispute, between Mexico and the United States. And as I recall, even the last phrase of their analysis, in some respects, looks like a proportionality analysis because they say, well, you were allowed to -- they seem to recognize that governments can

restrict trade, but the way in which they did it in the targeting of these companies was not the right way to do it and therefore exceeded the bounds of fairness and equity.

There are, I think, important distinctions between Bowater and Port Hawkesbury. One, I think there's agreement with the Nova Scotia officials, from the testimony that we heard and from Mr. Garneau, that Bowater never was anticipated to run more than [redacted] But, for Port Hawkesbury, [redacted]

So the intentions are different between Bowater and Port Hawkesbury. Bowater was a newsprint mill and Port Hawkesbury being a supercalendered paper mill. And [redacted] And then with [redacted] and that being critical to the economics of that market, not only to have it survive but to be more competitive when the environment is a secular

decline and demand is trailing off as we become more and more digital.

It seems to me also that, in addition to the amounts that are different, there's an important recognition that Mr. Garneau said that he knew that Nova Scotia was trying to put on a public face to show that they were trying to help their constituents. And he wanted to try to help them in that respect to save face, and so that was part of the reason why these negotiations went on for the time that they did. When he recognized that there really wasn't going to be a future there for that mill, there were no more -- the costs of it were just going to be too high.

PROFESSOR LÉVESQUE: One last question and I promise to let you continue.

You referred the sweetener cases and proportionality, so I'd like to poke that a little bit with you.

So, in the sweetener cases, of course there was a clear dividing line between what the Mexicans were producing and what the Americans were producing, so you didn't have that mix of HFCS being produced both by Mexican and Americans. It was really the Americans were

producing HFCS, and the sugar-based one were Mexican producers. And, in that case, the government intention was very clear, and it was discriminatory based on nationality, and that was the whole point of the countermeasure, not defence, but I guess we will call it the defence, but it's a measure precluding wrongfulness.

So that was the whole point.

So the closest I guess you could talk to a disproportionate impact was actually discussed in the CPI case where the Tribunal, if I remember correctly, I have the reference somewhere, said, well, if it had been equal Mexican and American producers, we could not have found this discriminatory effect.

And not many other tribunals have broached that topic. In Pope & Talbot, you will remember that was brushed off. The Tribunal didn't want to get into a disproportionality analysis. So we can talk about that again for 1102. But, for proportionality, you said in the opening that it was not customary international law yet, and you can correct me if I am wrong, but you were encouraging us to use it as an analytical device. I have looked again at the sources you

cited, and even as a matter of general principle of law, I would push back a bit that this Tribunal should apply a proportionality analysis. So if you could confirm, one, that you agree it's not customary international law, the standard of protection of aliens, and, two, that it would be -- well, I will let you answer this first.

MR. SNARR: Okay, thank you.

So I think there is some evidence, maybe an emerging body of evidence, of proportionality playing a role in customary international law. There's probably not enough yet to preclude us having this discussion.

But it seems to me that where you have a scenario that a government is saying we are pursuing an activity in the interests of the public or the interests of the government, you still have a question of what are the means by which you're pursuing that interest. By virtue of pursuing an interest that, as the government, you claim is a proper one, are all means available at your disposal?

Now, S.D. Myers talks about proportionality, and I recognize that S.D. Myers is a case that really is decided on 1102 grounds,

but they find a breach of 1105 kind of co-existent with each other. And, in that context, they do say the way in which you are restricting the travel of the PCBs, you could have done it a number of different ways, but the way that you chose was not a way that was appropriate. So there's something about the means that was unfair or inappropriate with respect to the ends being pursued.

One other point on the reference to the countermeasures for, in the Cargill case, the Cargill Tribunal, as I recall, found that the actions of Mexico were not countermeasures because they were not countermeasures to the investor; they were actions taken with respect to the US government. And yet there is a phrase there -- you might consider it dicta, but there is a passage where they talk through the policy and then think about, and there's a statement about the means by which they decided to react were not means appropriate to them even if they had intended proper ends.

PROFESSOR LÉVESQUE: I guess I didn't see where the Tribunal ruled because you will know in the three cases, they reached

different decision, only one accepted the countermeasure defence, the other two did not.

On -- so just back to general principles of law and proportionality because you argued that in your opening, to me, the Tribunal's task is to interpret the text of NAFTA and applicable rules of international law, and that should be -- I am sorry, I am a boring positivist in that sense. I think we should look at the words of the treaty and apply them within the guidelines provided by customary international law.

So let's say, for expropriation, you have police power doctrine, and that's where you will find that balance and the limits. And you could say for national treatment, in like circumstances provides that, the room for analysis whether there's a reason for the measure that's not discriminatory. And for MST, it's the high threshold and the content that provide that balance. And to go outside and say we are going to look at the WTO's necessity analysis or the European Court of Human Rights' margin of appreciation jurisprudence and use proportionality, to me, is really outside the

bound of our mandate because you don't have that hook in the treaty or customary international law. Again, we are talking about the treatment of aliens. We are not talking about self-defence or anything else.

So I'd like your, I guess, comments on that. What justifies us to go beyond the text of the treaty and applicable customary international law to import that analysis?

MR. SNARR: Well, we have the benefit of these decisions that try to set out for us with descriptive words the nature of the content of the standard and when you have conduct that is so offensive as to be actionable under Article 1105. And notwithstanding the fact that we have a lot of different words with a lot of different adjectives, sometimes of varying degrees of severity depending on which Tribunal you look at and how far back you go, you still have a task of trying to decide, at the core, whether this conduct is objectionable and whether it's unfair, and that is a subjective determination.

So what tools do you use to come to a conclusion about that subjective determination? Is your determination that, well,

as long as the government says it's pursuing something that's noble and in its interest, I don't care how they get there? So if they're regulating nuclear power and they say, we are not going to have nuclear power anymore, and they send a bulldozer and they bulldoze a nuclear power plant, I am not concerned because they have a right to regulate nuclear power and that end justifies the means.

So it may be that, as you still have to make these subjective determinations, you have to look to at least principles of general law to come up with an analytical framework to get you to the conclusion where you say that the conduct is significantly objectionable to be actionable.

PROFESSOR LÉVESQUE: Just one more thing on this: So there's different steps in the proportionality analysis, and you submitted literature on this, the least restrictive aspect of this, that's one, personally, I find that's really taken from elsewhere. Like, what you describe, I think, when you decide if something is unfair and inequitable, you will naturally look at the objective and the means; but, beyond that,

that analysis, especially looking at what's least restrictive, I don't think is -- there's a source for that, you know, that there is a foundation, again, in what we are looking at, not some other, you know, interpretation of other treaties that have developed, you know, standards. I will stop there.

MR. SNARR: Well, the least restrictive element, I mean, when you hear it that way, it may sound like you're telling the government it has to run to the utmost extreme. And that's been one of Canada's objections to our arguments, is they've suggested that we are saying that Nova Scotia needs to put Resolute's interests first, above all else, and to not put any of its own interests first. And I don't think that that's what we are trying to say, and I am not sure that that's the right way to look at that. Rather, to just consider when, when you recognize that there is a foreign investor that has a right, and when you're trying to balance these rights, and you are aware -- and the Government of Nova Scotia was clearly aware. They were aware of Resolute. They knew who they were, and [redacted]

[redacted] So when you're aware, is there anything that you have to do to consider any other means to accomplish your goal if you have other options available to you? It seems to me that might be another way to frame that element of the test.

PROFESSOR LÉVESQUE: Thank you.

MR. SNARR: Okay. And before I go on, just one very brief follow-up. In all of this discussion of the lowest-cost producer, of course, the one thing I forgot to mention to distinguish Bowater and Port Hawkesbury was that Nova Scotia was focussing on making Port Hawkesbury the lowest-cost producer, and that was not the same kind of focus for Bowater, and so I did want to add that to complete my response to you on that question.

Okay. So we were talking about the elements of the ensemble, and Ms. Chow confirmed the basic elements -- the basic terms of the major elements. You had loans [redacted] You had a $40 million loan that was converted to a forgivable loan. And when asked about the province's profit sharing component with

respect to the $24 million capital loan being considered as a provincial investment, Ms. Chow explained at page 481 -- Ricky, if you could bring up page 481 of the transcript. And I believe we saw this in Mr. Feldman's presentation. Her response at line 5:

> "Well, I don't know if I would call it investment. It's just one of the other changes that -- as a package. So I don't feel comfortable looking at one amendment because there was so many, that some looked like it might be in favour of the company, some looked like it might be in favour of the province. You can't take them in isolation. I think you really have to view it as a package."[as read]

And that's what Resolute has argued throughout these proceedings, that the

ensemble of measures benefitting Port Hawkesbury should be considered together.

Mr. Coolican confirmed that Nova Scotia passed regulations requiring Port Hawkesbury's biomass plant to run full time to produce steam from 2013 to 2016, which you can find at page 525 of the transcript.

But I'd like to ask Ricky to bring up Exhibit C-051, please.

This is an article referring to the regulations that diverted approximately $7 million in energy costs away from Port Hawkesbury to other Nova Scotia ratepayers, on top of the $124 million provincial bailout package, as well as [redacted] in additional savings from the lower electricity load retention tariff in comparison to the prior rate.

I would refer you to paragraphs 118 to 120 of our memorial to see the calculations of the difference in the electricity rates.

The ensemble of benefits was provided to a commercially unviable mill, which Dr. Kaplan confirmed in his testimony. Slide 3 of his presentation showed that Port Hawkesbury had

been losing $4 million per month, on average, prior to its closure. Each of the loans and other benefits in the package were well understood by Nova Scotia not to be sufficient by themselves to save the mill.

Mr. Coolican acknowledged in page 505 of his testimony that the board hearing on Port Hawkesbury's rate was an important hearing for the province for the electricity system and the way that it operated.

Now, Ricky, if you could pull up C-158.1, please.

[redacted]

So, Ricky, if you could turn forward a couple pages to page 4.

And under [redacted], you'll see here [redacted]

[redacted]

[redacted]."[as read]

The Port Hawkesbury mill was one of a handful of producers in a market that was in secular decline, meaning that demand was falling. Canada's expert from Pöyry, Mr. Suhonen, confirmed that nobody denies that the market was in secular decline. That's at pages 942 and 943 of the transcript.

Although Mr. Suhonen talked about a combined market for coated paper and supercalendered paper, [redacted]

And the focus of the company and government alike was to make Port Hawkesbury the lowest-cost and most competitive producer of supercalendered paper, at C-183. Even Mr. Suhonen had to acknowledge that the prices for coated paper and supercalendered paper were as different as wheat and barley flour and could not be combined in one market, which you will see at page 948.

Ricky, if you could now put up

R-161.6, please.

[redacted]

Now, let's move ahead two pages to page 8.

[redacted]

Now let's move ahead two pages to page 10.

[redacted]

Now let's go to Exhibit C-334 at page 1, please. And if you could blow up the text there on the lower half, Ricky, starting with [redacted]

[redacted]

[redacted]

Thanks, Ricky.

So Mr. Steger admitted in his testimony the economic fact that, in any given market, a supply increase is expected to lead to a price decrease, holding other economic factors constant. That's at page 1002 of the transcript.

But, Ricky, let's go to pages 614 and 615 of the transcript now.

You heard Dr. Hausman explain at line 22:

> "Now, Resolute is affected by PHP's capacity and lower prices even though Resolute produced a significant amount of SCB. I will show you an econometric test later, but it's well known that SCA and SCB

prices track each other very closely. The gap is usually very small. And, actually, in one of Mr. Steger's reports, he has a graph that shows that. I don't think there's any argument about that."[as read]

Now if we can go to page 29 of Pöyry's first expert report.

Although Canada has tried to present coated mechanical paper and SCA as closer competitors than SCA and SCB, you saw this week how Figure 5-1, at page 29 of Pöyry's expert report, [redacted]

You heard Dr. Kaplan explain in his testimony at page 855 -- and, Ricky, if we could go to page 855 of the transcript.

MR. MARTEL: I am sorry to intervene. Dean Lévesque, is she still in the call? I am not seeing her on the screen. Apologies for --

MS. D'AMOUR: She has dropped from the call, but we discussed this before, she is following along on the transcript while she works to reconnect. So we are working with her right now.

MR. MARTEL: Okay, sorry.

MS. D'AMOUR: No problem, thanks.

MR. SNARR: Thanks, JC.

So Dr. Kaplan explained in his testimony that Resolute and Port Hawkesbury are indeed competing with each other:

> "They're competing with each other -- line 11 -- in the sense that the introduction of quantities of the Port Hawkesbury product affects the price of all SCA and SCB products. And so, as an economist sense, if you are looking at a market, you could say, would it increase the supply of that

product, affect the price of the other products in that market? And the answer -- at a high rate, you know, intensely. And the answer is, yes, they do."[as read]

So you have seen numerous slides and documents about [redacted]

We saw those at C-158, C-338, [redacted] and the premier's press release at C-183.

And you heard Dr. Kaplan explain [redacted]

So, Ricky, if you'd pull up transcript pages 858 and 859, and then it will -- I will read it, and it will carry over to 860.

Dr. Kaplan said, line 22:

"It matters over the development of the

market. Over the longer run. In that with an industry in secular decline, demand is decreasing as consumers substitute the paper toward digital advertising. And, as demand decreases, the equilibrium price is going to fall, and it's going to start being below the marginal cost of the high-cost producer. And that guy leaves the market. [redacted] Being the low-cost producer means that you're definitionally the last man standing. As demand falls and price declines,

since you have the lowest marginal cost, you are in a position to remain in the market. But if you can remain below marginal cost -- equilibrium marginal cost as the price falls, then the new quantity will lower the price."[as read]

MS. D'AMOUR: Mr. Snarr, sorry to interrupt. I am just speaking to Professor Lévesque, and the transcript has also stopped for her now. If we can just pause for a moment, I am going to give her a call and work to reconnect.

MR. SNARR: That will be fine.

MS. D'AMOUR: Thanks.

JUDGE CRAWFORD: I think this might be a good moment to have a five-minute break.

MR. SNARR: That would be fine. Thank you, Judge Crawford.

JUDGE CRAWFORD: So we will do that. We will start again at 25 to 4.

MR. SNARR: Okay.

--- Upon recess at 9:33 a.m. EST.
--- Upon resuming at 9:47 a.m. EST

MS. D'AMOUR: Just confirming everyone is back in the main room and we are still in a restricted access session.

JUDGE CRAWFORD: All right. Thank you for that break. We are all a bit refreshed, and let's get back to the cross-examination. You have got a fair bit of time left. Sorry, I can't hear you.

MR. SNARR: Thank you, Judge Crawford. I have just a little bit more, and then we will be turning to Mr. Valasek.

So where we left off was in the testimony of Dr. Kaplan. And on line 13, it's page 859 to the right of my screen, as I see it, I will resume there with his testimony:

> "But if you can remain below marginal cost -- equilibrium marginal cost as the price falls, then the new quantity will lower the price. As an aside, this goes to the point of why both parties

wanted them to be the low-cost producer. For the purchaser, of course you're more profitable if there's an equilibrium price and your costs are lower. But for the seller, for the government, you don't want to have to come back again as prices fall and ask for more money. You have arranged a situation where you are the last man standing in the market; and, therefore, not only the increase in quantity and the price decline consequently causes damages, but over time, the exit is of other players and not of you if you're the low-cost producer."[as read]

Thus the purpose of being the lowest-cost producer in a small secular market in decline is to outlast your competitors. Nova Scotia set the wheels in motion for Port Hawkesbury to do so, which could only happen to Resolute's detriment.

You heard testimony from Ms. Chow about how the Government of Nova Scotia had a [redacted]

She also mentioned the recovery of taxes from the company as an additional government financial interest. All of which was consistent with the view of Canada when it characterized [redacted]

[redacted] which is found at C-212.3.

The facts of this case show that Nova Scotia provided a large ensemble of measures to a bankrupted and commercially unviable SC paper mill in a market of few producers in secular decline. It did so with the intention of making that mill ultra-competitive, the lowest-cost producer in the market, artificially reordering the hierarchy in the marketplace and positioning the mill to be the last one standing at the end of the secular decline. Nova Scotia had full knowledge that the reintroduction of 360,000 metric tons of capacity would harm not just any producer but specifically Resolute by lowering the prices for an already highly cost-competitive market.

Nova Scotia attached its own financial interests to the success of the Port Hawkesbury mill, which was success that necessarily would come at Resolute's expense as the march into the digital age continues.

Nova Scotia's measures conferred advantages on its domestic producer,

Port Hawkesbury, by artificially lowering its costs to make it the lowest-cost producer, which occurred with willful disregard to the detriment of Resolute. These measures were more than garden-variety assistance to a business or support for local workers. Nova Scotia knew Resolute well. They knew the SC paper market and that Resolute was the leading producer.

So, Dean Lévesque, again, when you asked where is the line, the bright line here is the fact that Nova Scotia knew full well that they were harming Resolute. [redacted] set events in motion to do it without any evidence of constraint, mitigation, or respect for the foreign investment with whom Port Hawkesbury would compete unfairly. They crossed the line of deliberate conduct expressly known to be harmful to a foreign investment for the advantage of the provincial government and the mill it had chosen.

Let's go to the last slide, please, Ricky.

We submit that these facts constitute state conduct which is unjust,

arbitrary, unfair, inequitable or discriminatory. The government's measures to artificially vaunt Port Hawkesbury as a national champion of the SC paper market over Resolute, knowingly and consciously to Resolute's detriment, infringes a sense of fairness, equity and reasonableness to a degree that is more than imprudent discretion or outright mistakes; and thus the Tribunal should find those measures to be a breach of fair and equitable treatment and the minimum standard of treatment under NAFTA Article 1105(1).

I will now yield to Mr. Valasek for his presentation of Article 1102.

JUDGE CRAWFORD: Thank you very much.

Mr. Valasek.

PROFESSOR LÉVESQUE: Could I have one more question before we go on?

JUDGE CRAWFORD: Of course, yes.

PROFESSOR LÉVESQUE: Thanks.

So in the opening statement, Mr. Feldman told us that the entire dispute was about "a" versus "the" and the but-for scenario, and you've also highlighted this. So I'd like to

explore that a bit more, so, because this was a big part of your argument, I paid attention to "a" and "the" and compare when it was used. And even the company itself, depending on the forum, I think, although I haven't done a full analysis, if [redacted] low-cost producer maybe as often or more often than "the" low-cost producer. It was trying to, I guess, convince people it could make it after the failure of the previous business, it used "a" low-cost producer.

So that's the private company saying this is what I want to do. And then you have the government also using both, sometimes [redacted]

So what I want to ask is how much should really turn on this? And the press release, in particular, which is emphasized a lot. If you're a government, you already lost an important mill, you've been blamed for not doing enough, especially when it was announced that the deal with PWCC had fallen through, is it not just politically expedient to say, "We are helping

them, and they are going to be the best, and we are going to make it", kind of thing. Is that not a political thing to do?

And as we learned also from Mr. Garneau, sometimes you say things in public that you don't believe, for whatever reason. In this case, he said it was to save face. The premier may have said these things for politically expedient reasons, but if you look at the bureaucratic side, and Mr. Montgomerie and Coolican testified to this, maybe it was not so somber. So if you could address that?

MR. SNARR: Sure.

In the way that you presented some cheering statements of a government official saying, we are going to help them and we are going to make them the best, that by itself, I think, and in the way that you expressed it, you can understand a government doing that and that that's just, you know, encouraging your industry and your community to go forward.

I think that the evidence here in this case takes us beyond that. It takes us even beyond the words on the page.

In order for Nova Scotia to

have this mill work, they had to have Mr. Stern involved because he was the only one bidding who was a serious bidder. And there was one other company that was bidding to make it a going concern, but there were questions about that company, and it didn't appear to be attractive.

The other two finalists were going to make this mill scrap.

So [redacted] There's testimony to the UARB about, talking about how Mr. Stern wants this company not just to be assisted and brought back into

operation but wants it to be ultra-competitive, to be more than merely competitive. All of these different elements around making this company, which, again, before it had shut down, [redacted] and even with what we heard from some of the, of Canada's experts about [redacted]. So in order to bring it back and have it be competitive in a tight market with these conditions, it couldn't just be merely competitive, not for Mr. Stern and therefore not for Nova Scotia because without Mr. Stern, they weren't going to get the deal done.

PROFESSOR LÉVESQUE: Thank you.

JUDGE CRAWFORD: Any further questions?

Thank you very much. We will go back to where we were. Mr. Valasek.

CLOSING ARGUMENT BY MR. VALASEK:

MR. VALASEK: Thank you. Thank you, Judge Crawford. Before I start, I know that we had a number of questions and some interruptions due to technical issues, and it is

important for me to know how much time I have because I will compress or expand as necessary. Hopefully not expand, but I want to make sure that I don't overstay my welcome. Could we check, perhaps, whether it's with the Tribunal secretary or whoever is keeping track of how much time has been allocated or imputed to us, for what we have done so far this morning?

MS. AMBAST: This is the Tribunal secretary. If you can give me a second, I can come back to you with the time.

MR. VALASEK: Okay, thank you.

MS. AMBAST: Discounting the Tribunal questions and the various technical interruptions, I have the closing going on for 56 minutes, so we have a little over an hour left.

MR. VALASEK: Okay, thank you very much.

JUDGE CRAWFORD: One hour left.

MR. VALASEK: Yes.

JUDGE CRAWFORD: And then your reply presentation.

MR. VALASEK: Pardon me, Judge Crawford?

JUDGE CRAWFORD: And then, I think, 15 minutes for the redirect.

MR. VALASEK: Right, well, we are in the closing argument, so I think we will then have Canada's closing argument, and then I think we have set aside some time for rebuttal argument.

JUDGE CRAWFORD: Yes.

MR. VALASEK: Okay. Thank you.

Let me just make sure I have the right slides up as well. Ricky, could you call up my presentation on Article 1102, the national treatment presentation?

Well, good afternoon and good morning, I will now present Claimant's argument that the evidence in this case, including the testimony the Tribunal heard during this merits hearing, supports the conclusion that there has been a breach of Article 1102 and that Canada cannot take advantage of the subsidy exception in Article 1108(7). And, as Mr. Feldman mentioned, I will also address attribution at the end of my presentation.

Next slide, please, Ricky,

Slide 3.

My presentation is divided into four parts. First, I revisit and confirm the proper interpretation of Article 1102. Then I show that we have established differential treatment in like circumstances, which we say is claimant's burden. I then explain why it is not possible for Canada to discharge its burden of justification. And, finally, I submit that the exception in 1108(7) is not available to Canada to excuse its breach.

I explained in our opening statement that the proper interpretation of Article 1102(3) follows from the ordinary meaning of its terms in their context in the light of NAFTA's object and purpose, applying Article 31(1) of the Vienna Convention.

Ricky, next slide.

I think it's worthwhile just rereading Article 1102(3) before we continue our discussion. After 1102(1) and(2), which set out the national treatment standard for investors and investments in the context of national measures, 1102 (3) states:

"The treatment accorded

by a party under paragraphs 1 and 2 means, with respect to a state or province, treatment no 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]

Next slide.

After delving into the Tribunal's Questions 14 and 15 in the opening statement, I summarized claimant's position on the interpretation of 1102 as follows: I said that the proper approach, in our view, proceeded through two stages. First, the claimant has the burden of establishing prima facie differential treatment in like circumstances. And the second stage, assuming the claimant meets its burden, is for the respondent state to attempt to justify that differential treatment.

We said that, in the first stage, the claimant need not demonstrate what Canada refers to as "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 in the second stage, assuming the Tribunal gets to a second stage, it is the respondent state's burden to justify two conditions -- or on the basis of two conditions. It must establish that nationality did not figure into the equation when the measures were adopted; and, importantly, that the measures do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.

Ricky, you can take down the slides.

In our submission, Canada has failed to present a convincing alternative to this interpretation and has even conceded a number of points.

First, Canada has not addressed the inherent incoherence of its

position. 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]

I would say -- I would note, first, that, in fact, the Tribunal's question relates to a breach of Article 1102 that already implies that it might expand to cover the second stage of the inquiry, namely, the justification stage, but we know that Canada, in fact, uses these concepts in the first phase. In fact, it doesn't acknowledge that there might be a second phase, so it's even more difficult in some respects to comprehend how, how they square these two concepts.

Mr. Luz did not address the Tribunal's question in Canada's opening statement and never delved into what is actually required, in Canada's view, to establish "nationality-based discrimination" and, importantly, which elements are claimant's burden and which elements are respondent's burden.

The fact is that Canada and the non-disputing parties have, over time, assigned a range of meanings to nationality-based discrimination. As a result, the meaning Canada attributes to that concept has shifted over time.

In its counter-memorial, Canada started at one extreme when it argued that the term imposed the burden on Resolute to show that it was accorded different treatment "because" of its nationality. For example, in paragraph 252 of its counter-memorial, Canada wrote:

> "In order to demonstrate a violation of Article 1102, the claimant must establish that it was accorded less favourable treatment than PWCC (a Canadian company)

because it is an investor of another NAFTA party (i.e., the United States)."[as read]

After we pointed out in our reply that this did not accord with the jurisprudence and indeed did not accord with the plain and ordinary meaning of Article 1102(3), Canada, in its rejoinder, argued in paragraph 97 that:

"Nationality must still -- i.e., even considering the specific language of Article 1102(3) -- form the basis for the least favourable treatment in order for that treatment to constitute a breach of Article 1102."[as read]

However, in a subtle but important shift, Canada no longer argued that it was Resolute's burden to show differential treatment based on nationality, just that nationality should form its basis.

But in his opening statement, confusingly, Mr. Luz reverted to the formulation Canada used in its counter-memorial, and I am quoting here from page 236 of the transcript, lines 16 to 21. Mr. Luz says:

> "I am not suggesting that an investor must establish targeting and discriminatory intent, but it must show, it must show, the claimant must show evidence that it was treated less favourably than a Canadian investor because of its foreign nationality."[as read]

It is worth noting that, in the rejoinder, Canada tried to explain what it meant for nationality to "form the basis" of discrimination considering the language of Article 1102(3). This just adds to the confusion since, with this explanation, Canada seems to have come around to Resolute's position. And this is in, I am quoting from Canada's rejoinder, paragraph 98.

In a situation where a Canadian province -- and here, I am citing Canada's rejoinder:

"In a situation where a Canadian province (for instance, Nova Scotia) would treat more favourably investors from another Canadian province (for instance, British Columbia) than its own local investors, a foreign investor from another NAFTA party could still bring a claim alleging a breach of Article 1102 based on the fact that it did not receive the treatment accorded by Nova Scotia to investors from British Columbia. There would still be a nationality element to such a claim."[as read]

That's Canada speaking.

In its Article 1128 submission, Mexico accepts this explanation and concludes that this interpretation of Article 1102(3) -- that the interpretation of Article 1102(3), that it does not require proof of nationality-based discrimination is incorrect.

So it agrees with Canada, which now seems to agree with us, but then Mexico says that our position is incorrect.

Again, very confusing.

But if this is what Canada and the non-disputing parties now mean by nationality-based discrimination, then claimant clearly meets their standard. Resolute has brought its claim because, as a foreign investor, i.e., an investor of US nationality, as a matter of fact, it did not receive treatment as favourable as the most favourable treatment Nova Scotia accorded to a Canadian investor, namely, PWCC.

Second -- and I am in the broad category of the interpretation of Article 1102.

In the opening statement for

Canada, Mr. Luz conceded that reliance on the coordinated views of the three NAFTA parties does not establish a governing norm. And, again, we recall that, really, Canada does not have a principled text-based argument on its interpretation. So it simply goes to, as we saw in the opening, its many submissions in argument before various tribunals and the many submissions in argument by the other NAFTA parties to other tribunals. But in his opening statement, he conceded that that cannot establish a governing norm. He said:

> "Third-party submissions are not binding."[as read]

And that's at page 235, line 3.

At best, under the Vienna Convention, 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.

Here, as I mentioned during the opening, there are 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 Article 1102 generally, but none of the submissions to which they refer grappled with the specific challenges of the language of 1102(3), and that specific language is a barrier to their position.

And, Number 2, while the NAFTA parties may have agreed that "nationality-based discrimination", and I have that in quotes, is a requirement, they never agreed on the content of that requirement, as I just explained by reference to the shifting position in the pleadings and indeed at the hearing.

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-based discrimination" within Canada's own submissions, let alone the three NAFTA parties. Therefore, there is no governing norm on which Canada can rely based on the coordinated submissions, and, really, very little weight in the context of Article 31(3) should be given to that position.

The Tribunal should therefore follow the established approach for applying Article 1102. First, the Tribunal should determine whether Resolute has discharged its burden of establishing different treatment in like circumstances based on the --

PROFESSOR LÉVESQUE: Sorry, Mr. Valasek, before you move on from nationality-based discrimination, I have a question.

In the opening, I think it was in the opening statement, you made a statement to the effect that it was enough for the provincial government, for example, to favour a national, a national. And as opposed to -- I think you were saying, as opposed to wanting to disadvantage the foreigner, that it was enough to want to advantage

or favour a national. Did I get that right?

MR. VALASEK: That was in connection with our discussion of treatment. Yes.

PROFESSOR LÉVESQUE: Okay.

MR. VALASEK: In respect of the test for treatment, the question the Tribunal asked was whether -- what's the role of intention in respect of treatment, is it important that the government somehow intend to affect the foreign national? And we say that the test is actually -- there is, there is -- intentionality does play into it, but it's sufficient that the government intends to favour its own investor or its own investment or, in the case of a province, an investor from its own state, so a Canadian investor or its investment, and for there to be a probable and foreseeable harm to the foreign investor. And so that's the test we set out for treatment, and I stand by that.

PROFESSOR LÉVESQUE: Okay, so we will talk more about treatment, because I was thinking just purely as a legal standard, so if you take a step away, using that standard, it would mean that, again, not in this market but more generally, that there could be a foreign

investor in Ontario that is damaged without the provincial government even knowing it; right? So I am saying not this case but another case, if the standard was just to favour its own provincial, let's say the only one in the province who produces this industry, that would be wrong; right?

MR. VALASEK: Well, I think it, you know, we are dealing with the specific facts of this case, and I think they say sometimes, you know, the expression that facts make the law or --

PROFESSOR LÉVESQUE: Yeah.

MR. VALASEK: -- good facts, good law; bad facts, bad law.

PROFESSOR LÉVESQUE: Yeah, yeah.

MR. VALASEK: But these are very specific facts and we know -- I remember, Dean Lévesque, you asked me a question at the jurisdictional hearing relating to the -- I think the idea of relating to at that stage, and you said, well, what if, for example in Quebec, the government wants to establish a favourable provisions for the gaming industry --

PROFESSOR LÉVESQUE: Yes.

MR. VALASEK: -- for example. I think it was right on point. I mean, it related to the related-to inquiry. But, obviously, although the tests are not exactly the same, a similar kind of question is raised by your question today, which is what if a government passes measures to favour its own industry and maybe it doesn't really do an inquiry, it doesn't think about it, but there is a potential link? And as I answered your question at the jurisdictional hearing, of course, it all depends on the market.

Here, we have a very specific set of circumstances. I am not sure how often it might be repeated, and I think I would caution you against worrying about a standard that would open the floodgates to many NAFTA claims because this is quite a unique set of circumstances, as we know. It's a very limited market with very few players in a secular industry in a commodity where the impact of introducing supply from a low-cost supplier at a very significant amount has essentially a cognizable impact through the economic theory of supply and demand on the price,

which necessarily affects other producers of the commodity.

So it is, it is difficult to simply say, well, if that's the test, we are going to, you know, we are going to immediately expose governments to claims from everyone in the economy. And that is a straw -- that is sort of a scare-tactic argument, I think, if Canada were to raise it because you always have to apply that test to the circumstances. We say it applies here given the evidence before you, but I think that most cases where a player in the economy would seek to rely on it would have a high evidentiary burden to make out what we have been able to make out here.

PROFESSOR LÉVESQUE: Thank you. I was not concerned about floodgates so much as we have to formulate the standard that respects the object and purpose of the provision, right. So I just wanted to make sure that what you -- I understood what you argued and what that meant, you know.

MR. VALASEK: Right. The other thing that I would say is that that standard is only part of 1102. That just gets you in --

what we say is that that's part of the first phase of 1102, and it gets you through the door. We then say the government actually has, in general terms, has various ways of defending itself, including by justifying its measure, and there is two components to it. So, again, I think it's important, as you're doing, to focus on the different elements, but we are confident that our framework is coherent.

PROFESSOR LÉVESQUE: Thank you.

DEAN CASS: Mr. Valasek, before you get to what Canada might show, I want to make sure I understand the test you've laid out and your answer to Professor Lévesque.

MR. VALASEK: Yes.

DEAN CASS: As I heard you, I thought you said that there had to be favouritism toward a domestic investor or investment and knowledge that there would be an impact or harm to another party's investor or investment. And then I thought, in your answer to Professor Lévesque, you limited yourself to the first and not the second part of that test.

Did I misunderstand your test?

MR. VALASEK: Yes. In respect, and I don't have the question up here, but I think the Tribunal set out a three-part test for treatment, and it asked, do you need to have -- do you need to intend to harm the foreign investor -- does the state need to intend to harm the foreign investor, does it need to have knowledge that it will harm the foreign investor, or, three, is it sufficient that there just be some level of harm to the investor?

So to answer your question, we say that the standard should be 3, that there just needs to be some level of harm, some level of probable and foreseeable harm to the foreign investor connected to the state's decision or policy to favour its own investor. But where some confusion might arise, Dean Cass, is that, in this case, we say we meet that standard and, in fact, exceed it because we have brought evidence that meets the higher standard. So we have brought evidence that goes way beyond simply arguing about whether there's probable harm, but we now have evidence that the state knew at the time that it was considering these measures that it was likely that harm would be caused.

DEAN CASS: So if the Tribunal adopts a standard that requires knowledge, your argument is that is met even though that is not your preferred standard?

MR. VALASEK: Correct.

DEAN CASS: Thank you.

MR. VALASEK: So I had been moving to the second part of my presentation, encouraging the Tribunal to approach Article 1102 in what we consider or what we say is the established approach. So that means, first, the Tribunal should determine whether Resolute has discharged its burden of establishing different treatment in like circumstances based on the three-part UPS test. We say that we have. And, second, because Resolute has satisfied the three-part UPS test, the burden shifts to Canada, and the Tribunal should determine whether Canada has been able to justify the differential treatment. We say that, in the particular circumstances of this case where the government measures were adopted to subvert rather than promote competition, the discrimination suffered by Resolute is unjustifiable.

I will address each of these

steps in the analysis in more detail.

Ricky, can you please bring up Slide 6?

According to the three-part UPS test, Resolute needs to establish, first, that it was accorded treatment by the Government of Nova Scotia when the government decided to resuscitate the Port Hawkesbury mill; two, that the treatment was accorded in "like circumstances"; and, three, that Resolute was accorded treatment that was less favourable than the treatment accorded to Port Hawkesbury.

Turning first to treatment, which picks up on the questions and the discussion we just had.

We explained our test for treatment in the opening statement in response to Question 16. We submit that 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. We explain that the threshold requires just probable and foreseeable harm.

In this case, however, Resolute has been able to show more through [redacted] The Tribunal heard testimony this week [redacted]

On cross-examination, Mr. Montgomerie [redacted]

And I am citing to the transcript at page 378, line 16, to page 380, line

3.

My question was:

[redacted]

[as read]

And I was quoting to him his witness statement.

"ANSWER: [redacted]

1 [redacted]

[redacted]

Ricky, could you please bring up R-161.13. Ricky, just go to the front -- sorry, R-161.1 for one second. Yeah, I just want to clarify just so I am not misleading anyone.

My questions were in respect of the -- at that point in my questioning, I was referring to [redacted]

I will get back to some specific questions on [redacted] But certainly in respect of [redacted] I took

him to this page.

Ricky, back to .13. 161.13.

[redacted]

And I asked Mr. Montgomerie about this page specifically, and our exchange is at page 430, line 10, to page 431, line 3. And I asked him:

[redacted]

[redacted] And this is at page 423, line 25, to 424, line 13.

And I asked Ricky, I asked him in my cross-examination of Montgomerie, [redacted] And we are not on this page:

[redacted]

pricing levels'. That's pretty clear on its face; isn't it?

[redacted][as read]

And at another point in his cross-examination, page 427 of the transcript, line 3 to 11.

[redacted]

[redacted][as read]

And, finally, at page 429 of the transcript, pages 1 to 15:

[redacted] [as read]

There are also relevant documents in the record showing [redacted]

And, Dean Lévesque, this goes to your earlier question, [redacted]

[redacted]

And, Ricky, please bring up C-324. And the Tribunal will remember me bringing this [redacted] to Mr. Montgomerie's attention.

Go to the next page, please, Ricky. And just leave it there, full page.

And so this is [redacted] And I asked Mr. Montgomerie about it, and the Tribunal will see at the bottom, it will be reminded that [redacted] [as read] [redacted]

[redacted]

[as read]

[redacted] and I said, [redacted] [as

[redacted] I am not going to -- I will just, for your information, otherwise, I am going to run short on time, but it's Exhibit C-334. It's quite important. [redacted] I am not going to read the whole thing. But it's page 372, line 25, to 373, line 23.

And then we have, of course, the premier's statement when he announced the reopening of the mill, and that's C-183.

So here, [redacted]

[redacted]

In his opening statement, Mr. Luz attacked our position from a number of different angles, but none of his arguments hit the mark. On the one hand, he characterized our argument as claiming that "Resolute was intentionally targeted", and that's 219, line 16.

He then argued that [redacted] But we are not claiming [redacted], considered in the light of the testimony the Tribunal heard this week, shows that [redacted]

[redacted]

On the other hand, Mr. Luz attacked our position on treatment as follows, and this is page 242, lines 1 to 9:

> "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 multiple 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."[as read]

That's Mr. Luz.

But he ignores the evidence that is before the Tribunal regarding the dynamics of the North American market for supercalendered paper and the necessary impact of adding -- the necessary impact that would be produced by adding a producer with significant capacity as the lowest-cost supplier. As Dr. Kaplan testified, the additional supply has a necessary price effect. This is not an indirect adverse effect but rather harm that was probable, foreseeable, [redacted]

[redacted]

That's page 243, lines 19 to 21.

But Mr. Luz misses the point, with respect. We are focussed on the one and only issue that was within the government's control; namely, the decision whether to rescue Port Hawkesbury by making it the lowest-cost producer.

[redacted] The fundamental point of Dr. Kaplan's testimony is that no matter what the economic conditions going forward after the re-entry of Port Hawkesbury, there would necessarily be a price effect over the long term given the laws of supply and demand. That's Dr. Kaplan's "with and without" concept as opposed to "before and after".

The factors that are not within the government's control are therefore irrelevant. The only relevant factor relevant to the harm expected to be caused to Resolute is whether Port Hawkesbury is brought back to life, thereby bringing its significant capacity to a market that everyone agreed was in secular decline.

In a different line of attack, Mr. Luz once again seeks to distinguish the sugar cases in Mexico, arguing that "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." And that's at page 242 at lines 19 to 23.

But the Tribunal will appreciate that, first, Resolute has investments in Canada, just like the claimants had investments in Mexico in the sugar cases. And, two, the question of treatment for the tax on bottlers did not turn on questions of nationality or intent but rather the effect of the measures on the claimants.

The issues of protectionist intent was relevant to the ultimate question of breach, just as we would say that the issue of Nova Scotia's intent to favour its own mill over all other competition in the supercalendered paper market is also relevant to the overall question of breach. But that brings in the question of whether Canada can justify the differential treatment. And we say Nova Scotia's protectionist focus on its own mill and its knowledge about the devastating effects on the competition outside Nova Scotia supports the conclusion that the differential treatment is unjustifiable, which is

an issue we get to a little later.

I am now going to turn to like circumstances, and I am going to -- I realize I really do need to accelerate, so bear with me.

PROFESSOR LÉVESQUE: I am going to prevent you from accelerating just yet.

MR. VALASEK: Okay, yes.

PROFESSOR LÉVESQUE: Before we move on.

So a lot, I think, rides on this question of knowledge and the level of certainty of the knowledge. You used expressions like "foreseeable", "probable and foreseeable". I have a question about that.

So if you go back to the, I will say fall of 2012, as we heard during the jurisdictional phase, Resolute did not know what the impact was going to be of the re-entry. There was a lot of uncertainty as to whether the business would make it, would be successful, what impact it would have, when. So we heard a lot of this, and that's how we get to this point, if you like.

So how is it that Resolute, with all its sectoral expertise, like you said, in

a tight market, could not know if this was going to work, PHP fully aware of the package, while the government should be able to know exactly that this was going to work out? So I have a hard time reconciling how the government knew for sure while Resolute did not.

MR. VALASEK: Well, I think that -- and here, I am really just directing you to the expert evidence that you heard in that phase and this phase. I mean, this is really -- these are economic questions. I am not -- obviously, I am not relying on my own expertise to tell you this, but I think the evidence shows that the economists look at this, and they -- first of all, the time scale is important. So in the jurisdictional phase, the question was, was there actual harm, can we say that there was actual harm and actual loss in that very short time frame right after Port Hawkesbury was starting up? And it was, it was the uncertainty of whether the, whether Port Hawkesbury would actually succeed in actually, you know, getting its restart done fast enough and what the actual pickup was in the short term of its product in the market. I don't have all that evidence in front of me, but I remember

it was all about that.

The evidence here is different. The evidence here is a broader approach over a long time scale, understanding that Port Hawkesbury -- there may have been some uncertainty about whether, you know, in the short term, it would have gotten all its ducks lined up to have an immediate impact, but once it did -- and the only reason it did was because of the government's support. The economic evidence that you have before you from Dr. Kaplan is that the laws of supply and demand are as clear as the laws of gravity on this. You know, over the longer term, if you introduce that type of capacity into this kind of market where, as he mentioned, the various factors that have been raised in the discussion back and forth are already incorporated into the demand curve, you will have a price effect. And, so, that's my answer, I mean, I think that the -- there is a difference in terms of the time scale and in terms of the factors that are considered in those two time scales.

PROFESSOR LÉVESQUE: All right. Thank you.

MR. VALASEK: Yeah.

So for like circumstances, I am going to breeze through this fairly quickly. Ricky, can you bring up Slide 7?

I just want to remind the Tribunal, in the opening statement, we said that, for like circumstances, really there's a number of factors that the Tribunal needs to consider. We then apply those factors to Port Hawkesbury and the Quebec mills, the Quebec supercalendered mills that Resolute has.

And, Ricky, go to the next slide.

And the Tribunal could review this. This was Slide 90 of our opening statement.

And then in Slide 9, Ricky -- we then did a similar application to why Bowater Mersey was not in like circumstances.

And so I am just reminding the Tribunal that's there in the record, our analysis at Slide 90 and Slide 94, and then my opening statement that accompanied it.

So, Ricky, you can take the slides down.

I would tell the Tribunal that we submit that the evidence that the Tribunal

heard this week confirms these conclusions. So with respect to whether there were direct competitors, we say that [redacted] That's at R-161 on page .13. We are not going to bring it up.

[redacted]

By contrast, this is very important, Port Hawkesbury and Bowater Mersey were in separate industries. They could not be in like circumstances. And I asked Mr. Montgomerie:

"As the chair of the committee, you were tasked with overseeing the gathering and analysis of information as to the state of the newsprint and SC paper industries?

"ANSWER: That's correct.

"That's in paragraph 8 of your witness statement.

[redacted]

[as read]

That's at page 376, lines 12 to 23.

And then the other factors that we mention, that the Nova Scotia measures were intended to have and had a direct impact on

price of SC paper which affected all producers of this commodity, including the mills owned by Resolute producing this product.

And, Ricky, please bring up Slide 10 of my presentation.

And this is just an important one that I would like to bring up. And this, the Tribunal will be familiar with this. [redacted]

And, so, 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, what we have called a national champion, which I think is accurate, in the market for SC 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.

I am not going to go through all the quotes we looked at under "treatment", but the same evidence that applies there applies here in terms of the objective of the policy and how that plays into like circumstances.

The cases do say, and you can refer to my opening statement, there are cases that say, you know, that the government's objective is relevant to the like circumstances analysis. And, by contrast, this was not the intention behind the support that the Government of Nova Scotia offered to Bowater Mersey, and this was quite clear. You'll remember I took Mr. Montgomerie to the discussion in an article where he and Mr. Black had reported to the reporter that really it was just a five- to eight-year time horizon, and I asked him:

> "So the goal with Bowater Mersey was simply to achieve a more orderly closure; wasn't it?

"Yes. And we felt Resolute agreed with that.

"QUESTION: Yeah, and even --

My question was:

"Even the five years was perceived, according to your witness statement, as very, very challenging given the status of the newsprint market.

"ANSWER: Absolutely, it was challenging.

"QUESTION: Yeah. And so, by contrast -- "[as read]

I questioned Mr. Montgomerie:

" -- the government policy with respect to Port Hawkesbury was to put the mill on a path for long-term success; wasn't it?"[as read]

And he said again:

"My role was to assess the possibilities of success in Port Hawkesbury and make recommendations accordingly, and we felt there was a possibility of success."[as read]

So, again, very different objectives with respect to these two firms.

In his opening statement, Mr. Luz argued that Resolute cannot complain about Pacific West and Port Hawkesbury and cannot consider itself to be in like circumstances because "there was an open competition to obtain special advantages, and competition criteria were not tied to nationality of the investment". And that's at page 246, lines 2 to 4.

And in support, he cited an excerpt from the authors Newcombe and Paradell, but this argument is unavailing because there was no "open competition to obtain special advantages". At no point did the Government of Nova Scotia say to prospective bidders in an open and fair process that it would provide special

advantages to the purchaser of Port Hawkesbury Paper. To the contrary, as the cross-examination of Dr. Montgomerie demonstrated, the government engaged with Pacific West on an individual one-on-one basis and was enticed by Pacific West to offer to it, and to Pacific West only, an ensemble of measures [redacted] And we saw that in the earlier exchange that I brought you to.

I now turn to the third part of my presentation, that Canada cannot justify the discrimination. And, again, I am going to go through this quite quickly.

Ricky, bring up Slide 11, please, where I refer to the Pope & Talbot two-part test.

And I will say that the Tribunal heard testimony this week that establishes beyond doubt that the government cannot satisfy the second condition in particular, whatever the Tribunal thinks of the first condition. The first condition being that the policy does not distinguish on its face or de

facto between foreign-owned and domestic companies, and the second condition being that the policy does not otherwise unduly undermine the investment liberalizing objectives of NAFTA.

As set out above in my earlier argument, Mr. Montgomerie confirmed that the government adopted measures that [redacted] The Nova Scotia measures, therefore, unduly undermine the investment liberalizing objectives of NAFTA. The measures directly violate one of the core objectives of NAFTA, which is to promote conditions of fair competition, fair competition, in the free trade area.

Mr. Luz raised a number of comments on this point. First, he said that "claimant actually fails completely on each part of this test". But under a proper approach to Article 1102, it is respondent's burden, not claimant's.

And, second, the only substantive argument Canada mustered in respect of this point is based on Article 1108(7). Mr. Luz argued on Monday:

"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 -- "[as read]

And he is referring to the justification test:

" -- when the test itself excludes all the measures at issue in this case?"[as read]

And that's at page 240, line 22 to line -- sorry, to page 241, line 2.

But Mr. Luz is jumping the gun.

Article 1108(7), with all due respect, is a separate analysis. If Canada wins on Article 1108(7), which I will get to in a moment, then that is one thing. But if it doesn't, then it cannot invoke Article 1108(7) to

argue that the differential treatment is justified under Article 1102.

I would also highlight the footnote in Pope & Talbot which is at the bottom of the slide that you see there. And in Pope & Talbot, the Tribunal quite wisely said:

> "The Tribunal believes that the latter test -- and that means that second test, the second condition -- will rarely apply and does not think it useful now to speculate on the kind of fact situations that would bring it into play. Nonetheless, it is important to recognize that the fundamental purpose of NAFTA, as expressed in its Article 1102, may need to supplement the former test."[as read]

And we talked about the quite

unique circumstances of this case, and I thought it was very interesting that the Tribunal there recognized that.

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 supercalendered paper market, all of whose other players were outside the province but in the same market, and [redacted]

Furthermore, [redacted]

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".

This brings me to the final part of my presentation, Article 1108(7).

As the Tribunal knows, we have two arguments against the application of Article 1108(7): first, Canada's inconsistent statements, which we say should preclude respondent from being able to rely on the provision; and, second, the fact that the provision, even if it applies, does not insulate Canada from scrutiny given the nature of the measures in question.

On the first point, we have provided evidence of denial, notably, the declarations of "Nil" before the WTO. And I bring up Slide 12 only because I somehow managed to correct that last reference that was missing in the slides when I presented to you in the opening. So it is Section 12 of the 2017 report as well. But you will remember that we brought forward this evidence of Canada's affirmative report of "nil" subsidies over a five-year period in respect of the Port Hawkesbury measures.

Canada argues that the Tribunal does not have jurisdiction -- so, on this point relating to the nil declarations, Canada argues that the Tribunal does not have

jurisdiction to consider non-compliance with another treaty, but this is not a jurisdictional issue, because we are not asking this Tribunal to make any determination under the other treaty. We are simply raising Canada's formal and unequivocal statements in other fora in an attempt to prevent them from relying on inconsistent statements here contrary to principles of good faith, as recognized in the jurisprudence that we cited.

We think Dean Cass's observation in the UPS case bears repeating:

> "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]

Canada has not done so. Quite the opposite, in fact.

And regarding our second

argument, Canada's opening statement confirmed that its argument sweeps -- I am sorry, regarding our second argument -- yes, Canada's opening statement confirmed that its argument sweeps too broadly.

Relying on what he referred to as "the ordinary meaning of paragraphs (a) and (b) of Article 1108(7)", Mr. Luz proceeded to enumerate the various individual programs that the provision excluded on the basis that it was a loan, a grant or a procurement program. But Mr. Luz failed to address Resolute's argument, which is that these provisions do not exempt a broader government initiative that is alleged to violate Article 1102 even if that broader initiative might include among its components measures that could qualify as a subsidy or as procurement if viewed in isolation.

Resolute is not complaining separately and in isolation about any individual measure that Canada claims is a subsidy or a 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, 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. Of course, Canada simply argues at this stage that those aren't covered in your jurisdiction because of attribution. But, again, that's a separate argument.

If they do come within your jurisdiction, then their argument here under 1108(7) simply doesn't meet our claim.

As Canada's own witness, Ms. Chow, testified, it is not appropriate to look at the measures on their own. They must be considered as a package. And Ms. Chow testified, "You can't take them in isolation. I think you really have to view it as a package", and that's page 481 at lines 11 to 13.

Indeed, even assuming a disaggregation of the ensemble were factually plausible and conceptually appropriate, some of the specific measures, each of which was

indispensable [redacted], do not qualify for the Article 1108(7) exemption. Those measures alone are sufficient to expose Canada to responsibility for a violation of Article 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 subsidy, grant or procurement to be, these measures do not qualify, and Canada has not taken a contrary position.

Now, that brings me to the conclusion of 1102. I do have a brief presentation on attribution which I would like to just present very quickly so that we get it in within the primary presentation, but it could also be the subject of further elaboration in rebuttal, of course.

I realize that we've eaten up about the hour, but I do think there were some, there were some questions as well, so I am in your hands, Judge Crawford. May I just very quickly present the framework for attribution, maybe in -- in however much time you give me, and then leave further questions and debate about it for

rebuttal, perhaps?

JUDGE CRAWFORD: I think that there's very little time left, and the attribution questions have already been signalled as to their importance. I don't think we should deal with them in three minutes, so I would leave that for rebuttal.

MR. VALASEK: That's fine. I just don't want to be faced then with the objection from Canada to say, well, you're not actually rebutting our position; you are now presenting your argument. So that's why, I mean, I am -- we are in the Tribunal's hands, of course, I just want to raise that concern.

JUDGE CRAWFORD: Well, Canada can make whatever submissions it likes. We have had to hear complex cross-examination on a range of issues; and you have obviously given priorities of some over others, but you haven't abandoned anything.

MR. VALASEK: Thank you. So if I understand the Tribunal correctly, we can present our argument on attribution in the rebuttal phase?

JUDGE CRAWFORD: Yes, from my

point of view, I see no great difficulty with that. Canada can point out, if you make any new arguments on attribution, that it didn't have an opportunity to respond. But if it's just summarizing where we are now, I think that can be done in the rebuttal phase.

That concludes your argument. And you have now further argument?

MR. FELDMAN: We just have about a minute, Judge Crawford, if you permit us.

JUDGE CRAWFORD: A minute.

MR. FELDMAN: Thank you.

FURTHER CLOSING ARGUMENT BY MR. FELDMAN:

MR. FELDMAN: We began with the letter "a", and we are very pleased that this reference caught the Tribunal's attention. Unlike all similar bankruptcies studied by Mr. Morrison, Port Hawkesbury was not to be rehabilitated as a low-cost producer but instead as the low-cost producer. This difference is not merely semantics.

What matters most is what the parties did more than how they might have used the definite and indefinite articles. Such an assurance to be the low-cost producer in a

competitive industry where the promise was not to make Port Hawkesbury merely competitive but to make it the most competitive, [redacted] mobilized the state's organs and apparatus -- the cabinet, the premier, the utilities and review board -- in a collective and concerted effort.

"The" made the enterprise unique, and it had express meaning. [redacted]

Once achieved, resuscitation to the return to the market on these exceptional terms, the harm to Resolute was as certain as the laws of economics where an increase in supply and a decline in demand means lower prices.

There's no need to exaggerate or engage in hyperbole. It was not Nova Scotia's purpose to crush or annihilate competition. According to Jeannie Chow and Duff Montgomerie,

the more prosaic purpose was to be as certain as possible, effectively to guarantee commercial success for a new joint venture, a hybrid state-owned enterprise in which the government was an investor with a direct financial interest.

Nova Scotia willfully disregarded the harm it knew that would come to Resolute in order to put its own national champion, its own investment at the top of the North American supercalendered paper market.

And that concludes our closing statement. Thank you very much.

JUDGE CRAWFORD: Thank you. We will now have a break of a half an hour for those who need to absorb some substance, and we will then start with the respondent's reply. Thank you.

--- Upon recess at 11:09 a.m. EST.

--- Upon resuming at 11:51 a.m. EST

JUDGE CRAWFORD: Ready to start? Have we got an audience?

MS. D'AMOUR: Judge Crawford, we are back in the main room now. And we aren't streaming, and we are in a restricted access session, so please just let me know if that should

change at all, please.

JUDGE CRAWFORD: Right, thank you.

MR. LUZ: May I proceed, Judge Crawford?

JUDGE CRAWFORD: Yes, please.

MR. LUZ: Thank you. Good morning, Judge Crawford.

JUDGE CRAWFORD: You have two hours for your statement. Collectively, Canada has two hours. And I am going to insist rather strongly on the deadline.

CLOSING ARGUMENT BY MR. LUZ:

MR. LUZ: That's understood, Judge Crawford. We will adhere to that, and we will do our best to make sure that we get everything that we have to say in that two-hour period, although I have even more to say after this morning's presentation from my friends on the claimant's side, but I will try and get through everything.

And I do want to say before I begin how appreciative I am and my colleagues, most of whom are actually attending virtually, are to the Tribunal, to the PCA, to the assistant to

the president, to Arbitration Place, and I also appreciate the hard work that my friends, the counsel for Resolute, have put into this. I think none of us would have realized how well a virtual hearing could go, with some minor hiccups here and there, but I think my colleagues, counsel for Resolute, will agree with me that the one thing that has not changed is the process for preparing for closing arguments the night before they have to occur. There's a lot less paper involved than what we have had in the past, but the lack of sleep and trying to formulate everything that you want to do within that certain period of time is the same. So I pay tribute to them and express my appreciation again.

In Canada's opening statement on Monday, I said that Nova Scotia's support for Port Hawkesbury was typical of what governments around the world do when faced with the potential closure of a major industrial player in an economically vulnerable region that could have left thousands jobless and inflict hundreds of millions of dollars' worth of damage to the economy.

Nova Scotia carefully studied

and balanced the options and weighed the consequences of doing nothing versus some appropriate level of government support for private business if doing so would be in the public interest and reasonable under the circumstances.

And as I said in Canada's opening statement, the question guiding the Government of Nova Scotia's decision-making 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 it made so it could stay open as a profitable going concern.

As the Tribunal heard this week, Canada's witnesses, Duff Montgomerie, Jeannie Chow and Murray Coolican, as well as Julie Towers who the claimant chose not to examine, provided the Tribunal with the evidence that supports exactly this. Those witnesses illustrated how the Government of Nova Scotia had hoped that a good corporate citizen, in the words of Duff Montgomerie, could be found to run the

Port Hawkesbury supercalendered paper mill; and when the court-appointed monitor and financial advisor, Sanabe, found one, Nova Scotia engaged with PWCC to provide reasonable and prudent support to a company that had new and innovative ideas on how to run the mill to make a grade of paper that even Resolute itself recognized could be profitable if certain costs were managed.

Now, unfortunately for the claimant, as the Tribunal heard this week, Resolute's witness, Mr. Richard Garneau, and their expert, Dr. Hausman, actually helped bolster the arguments that Canada has been making all along.

Of course, they both confirmed how difficult it is to accurately predict the future of the paper market and all the other multitude of factors that affect a mill's profitability, which stands in contrast to the standard of visionary perfection that Resolute argues the Government of Nova Scotia should be held to.

Dr. Hausman also confirmed that it takes a lot more than government subsidies to make a successful business. He is absolutely right. And that's something I intend to discuss a

little bit later on this morning to discredit the claimant's narrative of the guarantee of the lowest-cost producer capable of crushing its competition.

And in walking Mr. Garneau through the various elements of the financial assistance package provided to Resolute's Bowater Mersey mill, some of which was identical, virtually, to that provided to Port Hawkesbury, helped to illustrate what Duff Montgomerie was saying about the Government of Nova Scotia's approach to dealing with the crisis that faced the forest industry in the province in 2011 in the spirit of partnership and realistic expectations.

Now, Canada respectfully submits that the evidence presented to the Tribunal over the course of this week proves this is exactly what happened in the case of Port Hawkesbury and that nothing in the actions of that government can be construed as a violation of NAFTA Chapter 11.

Now, in Canada's opening statement, I also suggested that the flaws in the claimant's legal and factual case were so fundamental that it had to adopt a strategy of

misrepresenting the nature and amount of government assistance to Port Hawkesbury, ascribing malevolent intentions to the government and misstating the legal standards that this Tribunal must apply under Articles 1102, 1105 and 1108(7). Canada respectfully submits that the claimant's argument presented this morning again is a continuation of that same strategy.

But the testimony of this week's witnesses only serves to confirm what Canada has argued from the very beginning: Resolute's is a flawed legal claim that is not supported by factual evidence.

The claimant's -- the argument from the claimant revolves around the mantra that PHP must be the lowest-cost producer enabled to destroy its competition and force the closure of its mills. But this is a red herring. The Tribunal heard it this week. Being the lowest-cost producer may have been the aspiration of the company, but there was never a guarantee or a promise from the Government of Nova Scotia that that would happen. Indeed, as we have also seen this week and as I will describe further on later on this morning, not even PWCC could guarantee for

itself that that would happen.

Mr. Garneau and Ms. Chow both said this week that a mill may have aspirations of achieving their cost reduction goals and targets, but that's not in the hands of the government. That depends entirely on the private company operating the mill and its own abilities and market forces that are beyond their control.

Now, we will discuss that later.

But the president of the Tribunal, Judge Crawford, had asked the disputing parties to focus on the key substantive arguments and particularly the arguments that relate to the economic material and the legal arguments relating to the application of the treaty as well as questions of attribution.

On the questions of attribution, as was discussed earlier, I believe those are going to be left until the rebuttal, and then I will address them in surrebuttal.

But with respect to the economic material that we have heard so much about this week, I can tell the Tribunal now, succinctly, that given the legal standards that

this Tribunal is bound to apply in 1108 -- in 1105 and 1102, the economic material that you heard this week -- SC paper prices, grade substitutions, imports, exports, prices, elasticity econometrics -- is largely, if not completely, irrelevant to the application of the treaty.

I am going to describe this morning in the first part of my presentation -- Chris, if you -- yeah, thank you, you can put the slide up.

The first part of my presentation, I will discuss Article 1105, and I will try and address some of the arguments that came out of the discussion that my friend, counsel for Resolute, talked about in the context of 1105. And I will try and address some of the legal issues and, of course, open myself up to questions from the Tribunal.

But in this case, I have already stated how the claimant has done nothing to be able to establish a principle of customary international law that the minimum standard of treatment of aliens has been breached in this case.

That, alone, is enough for the

Tribunal to dismiss the claim. But in this case, it is uncontestable that there was a genuine and bona fide public policy basis for the financial assistance, and the Tribunal heard that from Canada's witnesses this week. They heard about the difficult decision-making process that the province had to undertake and all the various considerations that had to be balanced before deciding to choose whether to do nothing or to provide a reasonable amount of public money to help keep a private business operational because it was in the public interest to do so.

Now, the economic issues that we spent so much time talking about this week are not relevant in the 1105 analysis. This is not an anti-trust or countervailing duties case under domestic statute. It's the threshold of the minimum standard of treatment of aliens in customary international law. That is the threshold that must be applied. And there is no evidence on the facts in this case that suggests anything came close to that threshold.

I'd like to suggest that what Resolute seems to be confused about is -- what they are complaining about is much of which is

acts of a private company, and I think the Tribunal saw this, and I will talk a little bit more about this in Part 1 of my explanation, that the same flaw that the Tribunal saw in the claimant's expropriation argument in the jurisdictional award infects this 1105 claim here.

As I stated in my opening statement: PHP is not a state organ. It doesn't exercise government authority, and it's not controlled by the government in its business or pricing practices. So whatever conduct PHP is doing in the market really has nothing to do with the state.

And as the Tribunal heard over and over again this week, the government does not control the cost of operating the Port Hawkesbury mill. It doesn't control the market factors that enable the mill to survive in the market, let alone let it be the or a lowest-cost producer.

Now, what does this economic evidence have to do with the national treatment argument? Again, not much, if anything.

In the second part of my presentation, national treatment is a moot point and need not be addressed by the Tribunal because

of Article 1108(7). But I will get into the question of national treatment in the third part of my presentation and address some of the issues that my friends brought up this morning.

I will conclude -- I will after the legal arguments -- I won't take the Tribunal through the key facts that we heard this week, the selection of PWCC as the preferred bidder for Port Hawkesbury, so that the Tribunal understands the process and how this came about, so that it can understand that the nefarious and problematic intentions and predictions that the claimant has ascribed to the Government of Nova Scotia are just simply not the case.

And then I will describe Nova Scotia's financial assistance to Port Hawkesbury so that the Tribunal can understand from the testimony how it fits into our legal theory. And then I will conclude that there has been no breach.

I will afford some time to my colleague Mr. Neufeld to come in to describe to the Tribunal why, even if there was a breach of NAFTA Chapter 11, the claimant is not entitled to any damages. And I will try and leave him at

least 30 minutes -- 20 to 30 minutes to do that, but, again, I am happy to answer whatever questions the Tribunal has and take whatever time the Tribunal wants.

Article 1105. I have already described in Canada's opening statement what the proper standard is, and I would like to address some of the issues that came up with this morning. But, first of all, I'd like to address the fact that the claimants have put forward a report of Mr. Morrison from Ernst & Young, and Resolute noted in its opening statement that Canada had not proffered a competing expert, preferring lawyers to challenge the Ernst & Young accountants.

Well, ironically, it is Resolute that is relying on its accountants to add a veneer of legitimacy to an otherwise flawed legal case under 1105. And, in fact, Canada did not need to proffer its own expert because, as became evident this week, instead of assisting the claimant's case, Mr. Morrison actually helped prove the merits of Canada's case.

Chris, will you put up on the screen -- let's remind the Tribunal why the claimant commissioned Ernst & Young in the first

place to rehabilitate its sweeping and unsubstantiated statement in its memorial that the customary practice amongst NAFTA parties and in market-oriented economies generally is for companies that are not commercially viable to be allowed to fail.

Now, as Canada wrote in its rejoinder memorial after -- I am sorry. This was in Resolute's memorial. Canada criticized this for having no probative value. And the claimant came forward in the reply with the report of Ernst & Young.

And in Canada's rejoinder, we criticized the report, saying that it can be disregarded based on methodological failings alone, its temporal scope, intentionally omitting cases where government assistance was provided to mills that were not in CCAA proceedings, like the claimant's own Bowater Mersey mill. Those were all flaws that are set out in Canada's rejoinder. I won't go through them again, but those are enough to render the Ernst & Young report valueless.

But the weaknesses of the argument as support for its 1105 argument became

more evident over the cross-examination this week because, according to the report, there were two factors that made the PHP case unique: the stated goal of the Government of Nova Scotia to make the mill the lowest-cost and most-competitive producer of SC paper in North America, and the comprehensiveness of government assistance.

Now, in making this assertion, Ernst & Young relies on a press release and the claimant's own written pleadings. So that's all Mr. Morrison relied on to say that this was the aspiration and this was the goal.

But as Jeannie Chow explained, [redacted]

This is just one of the quotes that Ms. Chow has, and you will see many of them throughout this presentation because it completely discredits the narrative of the claimant. And had Mr. Morrison actually been able to do an independent analysis of the situation, I am sure he would have found this comment and intention of the government to be quite interesting and

relevant in his analysis.

Ernst & Young also did not have any materials. They were not provided with any materials upon which he could form an objective opinion. For example, Ernst & Young erroneously includes measures that were included out -- that were outside of the Tribunal's jurisdiction, such as the hot idle funding and funding for the forestry infrastructure fund.

Now, of course, in response to a question from Dean Cass, Mr. Morrison said, well, even if you take these things out, it still is -- Chris, you can just hold on for a second. You can leave that slide there.

But the fact is, Mr. Morrison was not even provided with a piece of information that would have been relevant and was important for him to understand, nor was he even aware of what the context of the forestry infrastructure fund funding was. And I am sure if he had actually been provided with those documents, he may have found it not worthy of inclusion in his list of measures.

You can go to the next slide. That was just to say that Ernst & Young did not

do -- did not attempt to do a quantification of the financial assistance. So it's difficult to know whether or not a package of measures is unique or different if you don't really know how much the package is worth.

Its analysis includes transactions done at fair market value, such as the land purchase agreement, which Ernst & Young did not review.

You can go to the next slide, Chris. Thank you.

The next slide, you can go ahead.

Electricity. Again, Mr. Morrison was not provided any information about the context of the electricity rate and was not aware that the WTO had already agreed and accepted that the electricity rate was based on market negotiations and market considerations.

We can go to the next slide, Chris.

Another thing that Ernst & Young was not informed of was that many of the issues -- many of the, the financial assistance that came from general programs was not specific

to PHP. And as my colleague put to Mr. Morrison, all three paper mills in Nova Scotia, including the claimant's own Bowater Mersey mill, was receiving financial support through the Nova Scotia Jobs Fund at the same period, something that he admitted he was unaware of.

Now, again, had he been made aware of this by the claimant, he would have realized the similarity as to what he discusses at paragraph 84 of Mr. Morrison's report. Monetary assistance to assist in the modernization of the mills and improve efficiency from pre-existing government programs, that's exactly what happened here with respect to the three paper mills in Nova Scotia.

Next slide, Chris. Thank you.

Again, he was not aware that the outreach agreement was actually to be able to procure services to -- that the government would have needed to purchase elsewhere and acknowledged that having this kind of arrangement is not unusual in the forestry business, something that Canada has been saying all along.

And another fact that -- next slide, Chris.

Another fact that Ernst & Young did not address, that the financial assistance was dealt with, for example, for Resolute's Bowater Mersey mill.

You can go to the next slide.

There were a lot of factors that Mr. Morrison did not take into account.

You can go to the next slide.

These discuss all of the various aspects, the land acquisition coming from pre-existing programs.

Chris, you can go to the next slide. Thank you.

Again, the FULA license arrangements on cutting timber on Crown land. That was actually something that we noticed [redacted] so that, again, shows that this is not unusual.

Can you go to the next slide, please.

Again, there was no assessment

on whether or not this was going to have some kind of an economic impact on the province of Nova Scotia; and, as you can see in the next slide, this is actually something that Mr. Morrison -- you can go to the next slide, Chris.

You can actually see that Mr. Morrison, in his observations, observed exactly this kind of thing in his comparison of similar cases. He said that his observations is when -- governments will sometimes step in -- when you have large industrial companies that offer significant regional employment, governments have provided both monetary and non-monetary assistance to a purchaser to complete a transaction and continue the business as a going concern.

That is exactly, exactly what happened with Port Hawkesbury.

And had Mr. Morrison been provided with any information upon which he could do an objective analysis, I submit that he probably would have come to the conclusion that many of the examples that he cites in Appendix H of his report are quite similar to what happened in Port Hawkesbury.

Thank you, Chris. You can

take the slides down.

I think that just goes to show the Tribunal that the claimant's reliance on the Ernst & Young report for all of its methodical shortcomings really fails to help its case and, in fact, helps bolster what Canada has been saying all along.

Now, I would like to get to the legal issues of 1105, and I would be pleased to open myself up to questions from the Tribunal. I am going to try and get through some of the issues that my friend from Resolute got through this morning, and I would like to address some of them; and if that pre-emptively answers some of the questions from the Tribunal, I guess I have done well, but if there are remaining questions, please interrupt me.

The question of proportionality obviously played a large role in the claimant's arguments. I think it's well established that even the claimant itself has acknowledged that it is not a rule of customary international law in the minimum standard of treatment of aliens. The claimant had -- continued to bring up the sugar cases, and as we

had -- Canada had already explained, that's a very different set of circumstances because the question of proportionality came up in the context of countermeasures, which is a separate customary international law principle encapsulated in Article 22 of the ILC articles on state responsibility. That is, countermeasures are considered to be a defence to an otherwise internationally wrongful act.

That's just not a principle in MST in custom.

The other difference with the sugar cases, and, again, this is something that we have said, Canada's said several times before, is that in that -- in those cases, Mexico is specifically trying to induce the United States to comply with separate trade obligations, and it used the measures against US investors in order to be able to induce the United States, and that was what the tribunals found to be targeting and discriminatory. And this was, you know, something that's not only relevant for 1105 but for 1102. It's just simply not relevant here.

The claimant has already admitted that nationality had nothing to do with

the Nova Scotia measures, and Canada would submit that there is absolutely no evidence whatsoever of targeting or anything else that could form the basis of an 1105 claim.

What it seems that the claimant is arguing for is a standard whereby which any time there is any kind of a negative financial impact on a foreign investor, the government can't act. It seems like that is their argument, and it's also that a, you know, it must have the least restrictive aspect and other elements that they were arguing for. But this is not the minimum standard of treatment. The minimum standard is as low as the bar goes; there are no exceptions. So unlike national treatment, which is a treaty standard, and the NAFTA parties have agreed that there are exceptions to that national treatment standard, i.e., in the case of procurement, subsidies, grants, government loans, and so on. The minimum standard of treatment doesn't have an exception. It's as low as the bar gets. And Canada would submit that none of the type of behaviour that has been described in Waste Management, Cargill, Glamis and other cases has been present here.

The Tribunal heard for itself that the Government of Nova Scotia made a rational, reasonable, good faith decision to be able to provide financial assistance to keep a mill going, and nothing in that calls upon the NAFTA Chapter 11 Tribunal to judge that to be a violation of customary international law.

There are other aspects to the claimant's argument that I think will probably be addressed as I go through my factual arguments. For example, it was something that -- well, again, there is so many arguments that the claimant tries to bring up that really have nothing to do with the government. The costs issue, being the lowest-cost producer, that's not something that has ever been guaranteed or promised. And to the extent that the claimant is trying to argue that PHP's pricing or business practices somehow injured it, well, that's not even state action and it's not attributable, so, but right now, I am just talking about what did the government do. And there's just nothing in that element that comes close to a breach of 1105.

I'd like to open myself up to questions from the Tribunal, if you have any, on

the minimum standard of treatment. If not, I will move on to Article 1108(7). Okay, thank you.

JUDGE CRAWFORD: Can I just ask --

MR. LUZ: Yes, please do, Judge Crawford.

JUDGE CRAWFORD: Can you hear me?

MR. LUZ: Yes, I can. Yes.

JUDGE CRAWFORD: Assuming the interpretation of 1105 which is relatively consistent with what you've said it is based on the authorities, does that mean that the government which has a fragile -- presides over a state with a fragile economy is pre-empted from offering support to individual companies on the grounds of their individual weaknesses?

MR. LUZ: I think the answer, again, I think the answer to the question would be how is the -- like, what is the government actually doing and the circumstances that it's faced within its economy. That doesn't mean that there are -- that states can do whatever they want whenever they want; but in circumstances where there's a public purpose and a public goal, and in

the absence of any other kind of factors that would suggest that the government has, you know, in bad faith or manifestly arbitrary -- acted in a manifestly arbitrary way with respect to a foreign investor, then I don't think that we are in the realm of the minimum standard of treatment of aliens in customary international law.

JUDGE CRAWFORD: Thank you.

MR. LUZ: Thank you.

Article 1108(7) and talking about national treatment. Now, I did discuss quite a bit in Canada's opening statement and we have discussed in our pleadings as to why there's no legal basis upon which the Tribunal can disregard the application of the plain and ordinary treaty text.

Resolute just doesn't want the provision to apply because it knows that it negates the entirety of its 1102 argument.

That is something that Canada has maintained, that 1108(7) applies here to the vast majority of measures. I agree with Resolute when we talk about the electricity rate. Canada maintains it's not attributable to the government, but even if it was, it's not a subsidy because it

was a market-based rate. It's between two private parties. It was negotiated on market terms, so it wouldn't qualify on the exception for 1108(7), so it's sort of a moot point.

But, again, one thing I do want to come back to because, again, the claimant left this at the very end. The Tribunal asked in its Question 8 for direct evidence -- and, Chris, you can put the next slide up.

The claimant has been consistently arguing that Canada has denied and taken inconsistent positions in the past. And the Tribunal asked -- yeah, no, that's fine, Chris, you can just leave that there.

The claimant has brought this up, saying that this is direct evidence of Canada's denial of subsidies in relation to Port Hawkesbury. And, again, this came up in the opening, and I encourage the Tribunal to go and look again at these, at these submissions because there is no denial whatsoever in any of these that would support the claimant's argument.

We can just go to the first one for example -- you can go to the next slide, Chris, where it's [redacted]

[redacted]

You can go to the next slide, Chris.

[redacted]

So... You can move on, Chris, thank you. Next slide.

The claimant also says that there was denials of subsidies in the meetings of the WTO SCM committee. Again, you won't find any of that in any of these documents. I invite the Tribunal to read them.

You can go to the next slide, Chris.

This is -- again, Canada's already argued as to why the Tribunal just simply cannot disregard the plain meaning of the NAFTA

text. There is no obligation anywhere in the NAFTA to report the, report under the SCM agreement. But just one last point, and Canada made this argument in its pleadings, that the outcome of the claimant's argument would be absurd because if you do report a subsidy under the SCM agreement, Article 25(7) recognizes that it doesn't prejudge either its legal status under the WTO agreements, the effects under the agreement or the nature of the measure itself. So then how can failure to report have the opposite effect in a come completely separate treaty?

You can go to the next slide, Chris.

The claimant also -- yes, please.

DEAN CASS: Might I just ask in respect of that argument, the provision you are talking about deals with the effect of reporting a subsidy. The question here is whether entering something that's saying there are no subsidies is inconsistent with later saying there was a subsidy, even if each tribunal, whether it's in the WTO, or in a countervailing duty proceeding in the United States, or in an arbitration, each

tribunal has its own way of deciding whether there was or wasn't a subsidy. Isn't there an ability to say that claiming there wasn't one or failing to report one or saying "nil" when asked if you were subsidizing, that might be in tension with a later claim that there are subsidies being given?

MR. LUZ: Thank you for the question, Dean Cass. I don't think any such inference can be read from a simple reporting of the word "nil", especially given the fact that, as soon as the measures became known, Canada engaged with the United States and the European Union, discussing those issues. So I don't think that there's any inference to be read from three letters in a completely different treaty. Again, it's NAFTA Chapter 11, it's 1108(7), that is the applicable treaty text and what should apply here, and I don't think there's a legal basis to disregard it for the sake of, for three letters in a separate agreement.

It would be a very different circumstance -- sorry. Go ahead.

PROFESSOR LÉVESQUE: Yes, just on this point, on the "nil", so claimant provided a definition of what it meant when you put "nil",

so it's still a bit unsatisfactory, like, I still don't understand enough. So are you saying the "nil" didn't mean nil or, like, can you explain a bit more -- so I am not saying, like, we have made a decision on the meaning, but if you could just explain what that meant, if you can.

MR. LUZ: Okay, um-hmm. The honest answer is I don't know, I can't speculate, and it's not relevant for the context of this. We have addressed this somewhat in our pleadings, but it's not something that I or anyone else can speculate on. And I, you know, I don't think there's much more to say about it because it's not something that can excuse the inapplicability of 1108(7) here.

PROFESSOR LÉVESQUE: All right. I understand what you are saying.

Just one last thing. In terms of process, then the Canada government gathers what the provinces have to say, so a certain province will send someone in the federal government their list, so if Nova Scotia put down "nil", then that's what it is, could you at least say that in terms of process?

MR. LUZ: I -- if I was able

to explain the Byzantine process of gathering information as such, I would be able to, but I don't think I would be able to do it in a way that is, you know, is satisfactory. But, generally, I think what you have said is, yes, it's, you know, it's a collaborative process, but the details of that, again, I don't know, I can't speculate and, again, I don't think it's something that the Tribunal has to grapple with.

PROFESSOR LÉVESQUE: All right. Thank you.

DEAN CASS: Mr. Luz.

MR. LUZ: Please.

DEAN CASS: While we are interrupting you, I want to ask one other question.

MR. LUZ: Sure.

DEAN CASS: When you are giving your definition of what constitutes a subsidy for purpose of 1108(7), is it your submission that anything that is given to a business that lowers the cost of the business constitutes a subsidy?

MR. LUZ: Dean Cass, I don't think I can make that kind of position or

statement here because in the case here, the measures at issue are so obviously within the plain text of 1108(7). 1108(7) refers to grants. They were grants given here. 1108(7)(b) refers to government-sponsored loans. There were two government-sponsored loans. So the -- in the particular circumstances of this case, the measures fall so plainly into the ordinary meaning. I appreciate the question, and that might be relevant in other cases where there, you know, it may not be so obvious as to what a subsidy may or may not be, I just, I don't think I can take a position generally speaking as to the, you know, the broadest meaning of what that means.

I think --

DEAN CASS: Just to make sure I understand it, is your argument that the measures here all fall within terms under 1108(7), other than subsidy?

MR. LUZ: Well, it's -- well, the plain -- the meaning of -- the text says including government-supported loans. And there are two government-supported loans, and so it falls directly within that. The grants are grants, so they fall within the specific aspect of

it, of subparagraph (b). The broad -- subsidies within the broadest meaning, if that's what you're requesting for, I don't know if that's something that, that we need to broach here because there may be other circumstances where it's not quite as obvious as to what a subsidy may or may not be, and it's not something that I think I can give a broad answer to given the limited circumstances of this case.

DEAN CASS: Thank you.

MR. LUZ: Thank you.

The final point that -- I don't think that the claimants brought this up again, but they did bring it up in their opening. They said that Canada had been inconsistent in its positions previously on this question. You can see very obvious evidence from Canada's Statement of Defence that we raised Article 1108(7) in our Statement of Defence right away, so there was no inconsistency.

I just would like to address very quickly the argument that the claimant has tried to bring up to say that they're creating sort of a single non-exempted measure out of a collection of exempted measures. But this just

really short-circuits the treaty and is an attempt to evade the entire object and purpose of 1108(7).

The NAFTA parties have clearly, in their treaty, argued that national treatment is not an obligation that needs to be applied to foreign investors when it comes to procurement and when it comes to subsidies and grants, including government-sponsored loans. That was the choice of the NAFTA parties. That provision has to prevail.

Now, I would like to move on to Article 1102.

DEAN CASS: Before you leave.

MR. LUZ: Oh, yes, please, Dean Cass.

DEAN CASS: Before you leave 1108(7), on procurement, in the United States, procurement has an understood meaning in terms of what governments do. They issue requests for procurement. They have a process they go through in selecting someone to supply a particular good or service. They have a whole series of rules as to how they do procurements.

Is your position that Canada doesn't have similar processes for procurement

which would define the scope of the exception under 1108(7), or is your position that anything that is bought in exchange for a payment, any good or service, would constitute a procurement for purposes of 1108(7)?

MR. LUZ: Thank you, Dean Cass.

Again, in this particular case, the procurement exception applies in a very straightforward fashion. The Government of Nova Scotia purchased land to keep as Crown land, so it was a purchase of land and keeping it for state -- for government purposes. So in that case, it really is procurement by a party.

Similarly with the outreach agreement, they are purchasing services to do silviculture on Crown land, that is a procurement by a party.

Whether there are circumstances where something could be broader than that, again, and I am not doing this to be evasive or trying to not answer your question, because I think, obviously, in other cases, the question of procurement might be broader --

PROFESSOR LÉVESQUE: So stop a

second.

DEAN CASS: We might want to pause a moment.

MR. LUZ: Oh, yes, Judge Crawford, sure.

PROFESSOR LÉVESQUE: Thank you.

DEAN CASS: Sorry to interrupt midway through. But hold that thought.

--- Brief pause taken.

--- Upon recess at 12:38 p.m. EST.

--- Upon resuming at 12:44 p.m. EST

JUDGE CRAWFORD: Can you hear me now?

MR. LUZ: Yes, Judge Crawford, I can hear you.

JUDGE CRAWFORD: Let's go.

MR. LUZ: Can I proceed? Thank you.

I left off, Dean Cass, in the midst of a question, that, I apologize, it was procurement we were talking about; is that right?

DEAN CASS: Yes, we were discussing procurement.

MR. LUZ: That's right.

Yes, so, in -- so, for example, as I was saying, in the case of the land purchase agreement, the outreach agreement, those are procurement in its ordinary -- procurement by a party in its ordinary meaning. Those are the kinds of things that the NAFTA parties had decided to leave out of the national treatment obligation. There are government procurement rules and so on in Canada like there are in the United States and elsewhere, but the ordinary meaning of 1108(7) in this case applies, in Canada's submission, quite cleanly.

DEAN CASS: So it would apply to any purchase of goods or services whether or not it went through standard sorts of procurement steps? So it's not, not listing things on some sort of routine going through a particular ministry?

MR. LUZ: Yes, yes, I think so. In the context of 1108(7), it's a broad meaning. It's procurement by a party. It's not covered by other chapters in the NAFTA which deal with procurement or WTO rules on procurement and so on. In the case of 1108(7), the exception is broad. It's procurement by a party, and anything

that falls into that, the ordinary rules of interpretation qualifies. And we think, in this case, it's straightforward.

DEAN CASS: Last question on this.

MR. LUZ: Sure.

DEAN CASS: Is there any particular ruling that you have, a NAFTA ruling, that you have to cite for that proposition, or is that just your reading of the text?

MR. LUZ: Well, the Mesa case, for example, dealt with a far more complicated question than what this Tribunal has before it. It deals with the question of whether or not a FIT program in Ontario, electricity purchase program, was a question of procurement. And, in that case, the tribunal found that it was, applied the 1108(7) exception and didn't go on to the 1102 question.

There are other cases dealing with procurement, such as ADF, but the Mesa, I think the Mesa case is more complicated. It had to -- that was something that went to the, you know, to the questions and the facts in that case. But here, it's fairly straightforward, we think.

DEAN CASS: Thank you.

MR. LUZ: Thank you.

And just before I leave 1108(7), I do want to go back to Dean Lévesque. You had asked the question about the process within Canada for reporting subsidies and so on. I do, I do recall now that we have, it's a footnote in our rejoinder, Footnote 155, and, in that footnote, I believe it's also referring to Exhibit R-433, which helps, I think, provide a little bit of the background to what you were thinking about.

If there's no other questions on that, I will move on to national treatment.

I don't intend to spend a lot of time talking about this. I think the legal grounds have been well trodden. And I do want to respond to some of the things that Mr. Valasek said this morning, but I will go through some of them and then again open myself up to questions for the Tribunal before I move on to the facts of the case and the testimony that the Tribunal heard this week which I think are of particular interest and value to the Tribunal.

Chris, you can just bring up

the next slide on the ILC commentary.

Again, I don't want to belabour the question on the value and the weight that the Tribunal should put on the concordant subsequent state practice -- no, you will have to go back a few slides, Chris. Go back just a little bit more. There we go. Thank you. And so we will pick up from here. Oh, you had it right. Yeah, thank you.

The claimants have tried to bring up the fact that, you know, if statements are made in the course of a legal dispute, that lessens the probative value of these statements, and even the ILC recognizes that subsequent practice under the Vienna Convention, paragraph 3(b), can, can be seen in statements in the course of a legal dispute.

I just wanted to make that point.

Chris, you can take down the screen and then we will move on -- I will just move on to some of the legal argument.

The question of nationality-based discrimination, this has been something that the NAFTA parties have consistently

said, that there has to be some element of nationality for Article 1102. And, now, the claimants have said, again, that there is no such test in Article 1102(3). Canada has already explained that that is a paragraph that is just simply a clarification of what happens when the treatment is of a state or a province. It doesn't set out a separate legal test. And, really, it would be unreasonable to interpret 1102(3) as imposing a different or higher standard when the measure at issue is a provincial or a state measure.

And as Canada's also explained, an investor doesn't need to show discriminatory intent to establish a breach of 1102. And by that, we mean that it is not necessary to provide evidence of the government's intention to harm the foreign investor. But the test under Article 1102 still requires an objective analysis of the evidence as to whether or not there were nationality-based discrimination reasons.

Now, here, we have a situation which doesn't happen very often, and I can't recall in any other previous NAFTA case where the

claimant has admitted explicitly that nationality has not been relevant, is not relevant. And it can't allege otherwise because of the bidding process, as we have already explained, and also because the impact of the Port Hawkesbury reopening was similarly impactful on two other Canadian producers of supercalendered paper. And, as Resolute had stated previously, they just happened to be the only foreign investor with a presence in Canada, and so they were eligible for a NAFTA claim.

Now, in addition, the evidence put forward by Canada shows that there were legitimate non-discriminatory reasons for the Nova Scotia measures. The claimant only contends that, in its view, the government measures were unreasonable and had a negative effect on competition in the market. The claimant suggests that the foreign investor's burden is limited to establishing simply that the state's conduct harmed the foreign investor and it is sufficient simply that the measure affects the foreign national at some level of significance. But that can't be the test.

It's not sufficient to show

that the government knew that the measure could have a negative impact on certain foreign investors or there was only an impact on foreign investors. That would paralyze the ability of governments to act any time anything they did had some kind of an impact on foreign investors.

So the impact on a foreign investor, even if there are disproportionate effects on a foreign investor, that can't be decisive. It does not establish discrimination and is insufficient, even for a presumption of discrimination.

The Tribunal must find evidence of other -- of discriminatory reasons or purpose. Otherwise, 1102 would simply become a standard of protection against any measure that negatively affects an investor, requiring the government to then justify its actions.

Now, the claimant may want that kind of an outcome, but the result is what my friend Mr. Valasek said this morning, while it would result that an enumerable number of measures would be found to be discriminatory simply because it had a negative impact on a foreign investor.

Now, again, for the three-part

test set out in UPS for an investor to make out a national treatment claim, Canada's already set out the definition of treatment in its pleadings and that nothing that the claimant has said establishes that there has been treatment in like circumstances.

In this case, Resolute seems to argue the case as if it were before a competition or an antidumping tribunal, but the question is not whether the marked companies are in the same market or whether the products are in competition. That might be a relevant consideration in some circumstances, but not in others, including this case. It's not purely an economics test.

Rather, again, the test is based on the terms of 1102. It refers to treatment in like circumstances.

Now, fundamentally, the question here is one that is quite obvious. The Government of Nova Scotia was helping a mill in Nova Scotia. Resolute's mills are in Quebec. They are not in like circumstances. This is not something that the Tribunal needs to get to because of 1108(7). And if the Tribunal has

questions, I'd be happy to answer them. But, otherwise, I can move on to the factual arguments that we have on the testimony from this week.

PROFESSOR LÉVESQUE: I do have a couple of questions on the test.

One of them is on burden, burden shift and who has the burden.

So respondent has put forward the argument, based on UPS, that the burden never shifts. Claimant says otherwise. Is there a difference to make, as other tribunals have made, including Mercer, that we are just talking about different things, the burden to prove a breach under certain provision and just the evidential burden. So if Canada, which is in possession of the best information to explain why the government acted in a certain way, then they should make that case. So can you -- do you agree with that, that there's a certain burden? It may not be the burden under the provision per se, I am not sure I am explaining this well, but it's an evidential burden?

MR. LUZ: I understand that, and I think, you know, obviously, for the government, when they're arguing that there has

been a, in the words of, like for example, Pope & Talbot, when -- that's something that was brought up, if there is, you know, a reasonable nexus to rational government policies, well, obviously, that is for the government to come forward and say there are reason -- there was a reasonable nexus to rational government policies. If the government doesn't want to put forward that kind of explanation, well, that's its choice. But the burden of proving that there has to be some kind of a nationality basis on which the discrimination is occurring, that has to be the burden on the claimant because then otherwise, again, any measure which impacts a foreign investor in more than a tangential way, negatively, will then presumptively violate the, violate the provision.

PROFESSOR LÉVESQUE: Okay. Thank you.

I have another question, also something that was discussed this morning with claimant. It's the two-part test in Pope & Talbot from paragraph 78, the second part.

MR. LUZ: I have it in front of me.

PROFESSOR LÉVESQUE: All

right, I do too, so we are on the same page.

What struck me in this second segment a long time ago is that the Tribunal didn't get into what it meant, and we read the footnote explaining, I guess, that this will rarely apply and they don't think they need to get into it. And I have looked at all the cases, and only two -- I could have missed some, but only two, I think, mention this again, I think it was Bilcon and Feldman, but without really analysis.

So can you, from Canada's point of view, can you say what that means, in which case it would be relevant, and as claimant argued, if you can't prove A, I think it was an A -- no. One, sorry, if you can't prove 1, you could just prove 2; could you address that?

MR. LUZ: Yes. If it's okay, I will address the last part of your question first and then go on.

Clearly, the answer is, no, that last part of the test, you can't simply just try and prove that because then it undermines the entire purpose of 1102.

And I made this point during my opening when I brought this slide up and I

said -- in addition to the Footnote 74 saying that it's never been elaborated on and so on.

But the idea that would unduly undermine the investment liberalizing objectives of NAFTA can't possibly apply to the exceptions in 1108(7) because, obviously, it's not undermining of the liberalizing objectives of the NAFTA when the NAFTA parties agreed that you don't need to provide national treatment for those categories. So, in this case, the test is automatically -- even if this test existed, it would automatically fail because it doesn't undermine the NAFTA because the NAFTA parties agreed there should be no national treatment for the categories in 1108(7).

So I, you know, I cannot think of any other kinds of circumstances where that second part of the test would be relevant. I think that's probably why no other NAFTA tribunal has really gone there. I think it's probably too broad and too amorphous. In addition to the general rules of interpretation that one does not take a preamble of a treaty and read it in as if it is an obligation, which is what the claimant has, seems to be suggesting.

Did I answer --

PROFESSOR LÉVESQUE: Yes. Thank you.

MR. LUZ: -- your question fully?

If there are no other questions, I think I will move on to our presentation on some of the facts that I hope the Tribunal will find illuminating because they really get to the heart of what the witnesses testified to this week.

Chris, if you can pull up the slides because I will go through -- we put together as much of the testimony as we could in a succinct way that we thought that would be helpful to bring the Tribunal the story that shows really the testimony of the witnesses being consistent with what Canada has said all along.

You can move to the next slide, Chris.

Now, the Tribunal -- as the Tribunal knows, and this is really -- the purposes of this is to try and clarify many of the factual liberties, I will say diplomatically, that the claimant has brought up in this case. And,

really, the story is much more straightforward and one that is consistent with what Canada has said.

Now, when NewPage went into CCAA proceedings, obviously, it, as we know from what happens in these proceedings, the goal is to try and sell the business as a going concern. We saw that from Canada's opening statement, and we heard that again from Mr. Morrison.

In this case, Sanabe had identified a potential option to be able to bring this mill back to potential profitability. Now, you heard the claimant say many, many times that this was a bankrupt mill, nobody wanted it except scrap dealers, so on and so forth. But the financial advisors for this actually identified that there is a strategy to market premium SCA++ grades as a lower-cost alternative to coated grades, which we have heard a lot about. It's the higher level of SC paper. This initiative could generate an incremental 7 million to $15 million in annual EBITDA. Focus on consistently serving selected export markets could drive additional mix improvement.

Now, that was something that Sanabe had done and was marketing to other

potential buyers.

Next slide, Chris.

Now, that was the information memorandum that you might remember from my cross-examination of Mr. Garneau. He wasn't sure if he had seen it. It seemed like, from two days before the deadline for submitting a bid, they had not yet executed a non-confidentiality agreement and therefore never saw that information memorandum. But it doesn't really matter if he did or didn't. The fact of the matter is there was a financial analysis being done that there was potential, there was potential.

And as you can see, Sanabe had said, minds have been concentrated. They have a new EBITDA recovery plan that could swing the mill from a significant loss position to material profitability.

Now, if you go to the next slide, what's interesting is that -- oh, yeah, and this was just to show that Mr. Garneau wasn't sure if he had signed the non-confidentiality agreement, but it didn't seem like that two days before the bidding deadline was due.

You can go to the next slide,

Chris.

Because -- and this is just to show, to rebut, again, the constant statements of the claimant that no one wanted this mill, no one was interested, it was for scrap, and so on and so forth. If you look at paragraph 17, which I put to Mr. -- you can go back, Chris, just to leave it there on the screen for a second.

There were 21 submissions filed, some of which were going concerns and some of which intended to liquidate the company's assets. The claimant just continues to say that no one wanted this, but there were bids and there was interest in the mill.

Next slide.

But this is what I wanted to point out. Sanabe had identified that you could actually make this mill profitable by marketing -- sorry, Chris, yeah, thank you -- by marketing SCA+ paper. [redacted]

[redacted]

Now, of course, the second bullet point, which everyone knows, a one-machine scenario requires aggressive cost reduction to be profitable. And it goes through labour, energy, fixed costs, but resulting with an annual profit.

Now, we're not saying Resolute should have got it, could have bought it, wanted to buy it. It didn't make a bid for it, and it had the reasons. Whatever reasons it had, were the reasons it had. But the point is that this was identified by Resolute itself as a potential for profitability at the mill if you focussed on those kinds of grades.

You can go to the next slide, please.

Resolute decided that it wasn't going to do this. It thought there's probably not going to be that many interested

buyers except scrap dealers. They didn't want to drive up the price of the auction, and they were willing to just take the risk that maybe they could buy it on the cheap later, perhaps ask the government to contribute to give them money to keep it in a hot idle or perhaps financial assistance, but that's what they were thinking.

Next slide, please.

Now, I asked Mr. Garneau about this, and, [redacted]

Now, shortly, I am going to take the Tribunal to some documents that will show [redacted]

[redacted] So while Resolute may have thought there would not have been anyone else to bid on the mill and that it should just wait to see if there was an opportunity to buy it later, there was another buyer that saw an opportunity, and that was PWCC.

And it was the kind of company that the Government of Nova Scotia had -- was hoping that it would be a good corporate citizen to achieve the goal of maintaining the lynchpin of the province's forest industry.

You can go to the next slide, please, Chris.

And this was [redacted] that Resolute put to Mr. Duff Montgomerie, [redacted] It's exactly what

Mr. Montgomerie had been saying.

There's a lot more in here, and I would encourage the Tribunal to take a look at [redacted] later.

You can see here [redacted]

But there's something else in here that I found very interesting when it was put to Mr. Montgomerie. [redacted] And I think we are going to come to that later, and I will ask the Tribunal to keep that in mind because, as you are going to see, [redacted]

Next slide, please.

So, again, we can see that [redacted]

You can go ahead, Chris. Can

you hear me?

JUDGE CRAWFORD: Yes.

MR. LUZ: Have I been muted?

Oh, okay, sorry.

That was Duff Montgomerie's testimony.

Now, again, we have heard this many times from the claimant, that they constantly go to the lowest cost, lowest cost, lowest cost. But as the Tribunal has heard consistently, the Government of Nova Scotia does not control PHP's pricing and business decisions. [redacted]

So let's go to the next slide because we have heard this again. It's another quote from Ms. Chow.

[redacted]

The next slide, please.

You can go -- this is a slide of Ms. Chow describing how the government is being able to be repaid back through the financial assistance by keeping people employed, payroll, taxes and so on.

You can go to the next slide.

Before I get to this, I was just reminded of a question that, Dean Lévesque, you had asked about before about some of the various descriptions of PWCC where they just would say it's a low-cost producer and so on. And, again, we agree that not much, if any, kind of weight should be given on public statements and press releases and so on, that you have to look at, really, what is happening behind that.

But we do note that there are various exhibits, and I will just note them for the record and the Tribunal can go and look at them later, where the goal of PWCC is to be just a low-cost producer simply because the claimant seems to think that that's a great distinction. Tribunal can look at [redacted], C-166 on page 25 of 26 where it's an application by PWCC to the review board for its load retention rate.

"The opportunity for the mills to continue to operate as a low-cost mill in North America with the jobs and economic benefits to the community it can provide."[as read]

There are other various documents where that kind of language is said in the record.

But, again, let's go back to those -- there's [redacted] Mr. Garneau pointed out that energy is a particularly important driver, labour is a particularly important driver, and fibre is an important driver. And as he said, if you control those three, plus some of the chemical that you put on, you are on solid ground to compete when the market declines and pricing goes down. [redacted]

Next slide, please. Chris.

Yeah, so, again, [redacted]
You can go ahead, Chris.
Thank you.
So this is actually something
that came up this morning in -- I am going to look
at the [redacted]

[redacted]

Next slide.

Now, and this is something that came from Jeannie Chow, is that what they were seeing, and this was consistent with what we have already seen in evidence, [redacted]

Go ahead, Chris, you can move the slide.

Yeah, and so this was another thing that Ms. Chow, [redacted]

You can go to the next slide.

[redacted]

You can go on, Chris.

[redacted]

So as the Tribunal will recall, there were almost 1,000 people employed by PWCC at the mill, either directly or indirectly, and what they ended up doing was [redacted]

[redacted]

[redacted]

Next slide, please.

This was what I found so interesting about Mr. Garneau's testimony. When he talked about the fibre costs and how expensive it is in Nova Scotia, if you can fix your fibre problem, well, then you can bring down your costs.

[redacted]

Go ahead.

It -- oh, you can skip -- well, this just had noted [redacted] but this is what we found quite interesting -- you can go to the next slide, Chris, thank you -- [redacted]

[redacted] This is exactly the kind of thing that Professor Hausman was talking about, government subsidies alone do not make a business successful. You need innovation. You need productivity. You need abilities. And that was what a private owner brought to the table.

Next slide, please.

Electricity, we have heard a lot about this, and I will leave the attribution question until the surrebuttal to give my friends at Resolute the chance to put forward their argument. So let's just talk about -- and we have talked about this a lot.

[redacted] Figure out what's the best way to achieve the electricity rate that you want. There is no guarantee by the government that you are going to get it or that you can achieve it, but go ahead, talk to NSPI. It's a private company. Whatever they agree to and if you can

pass the legal test, then that's what you get.

You can go to the next slide, Chris.

[redacted]

Next slide, please.

And I should say, if the Tribunal has any questions about some of these factual details, please interrupt me. Don't hesitate.

Again, the idea, this is just referring to the legal test that you have to achieve, is that you have to be able to come up with a rate that leaves all ratepayers better off than they would be otherwise if the mill closes. And as we know and as we have seen, the board test is, if other ratepayers are subsidizing the mill, you don't pass the test. So that's part of the reason why we say the electricity rate's not a subsidy.

Next slide, please.

Oh, this is actually to do with the other of the -- [redacted] And it was a question that Dean Cass had brought up in the context of coming over. But freight, and this is something that Resolute had consistently said, its freight costs are too expensive because it's on an island in Cape Breton, and it's too expensive for freight.

We can go to the next slide.

[redacted]

Next slide, please.

[redacted]

You can go ahead, Chris, thanks.

So, again, we have heard this over and over again from Ms. Chow because it seems to be the only thread that the claimant's case is hanging on, [redacted] And, as Ms. Chow said, [redacted]

[redacted]

Next slide, please.

JUDGE CRAWFORD: Counsel, your time has more or less expired.

MR. LUZ: Judge Crawford, according to my clock --

JUDGE CRAWFORD: Sorry. I have maybe got the time wrong.

What is the time?

MR. LUZ: Sorry.

JUDGE CRAWFORD: Is ten minutes enough? Counsel, is ten minutes enough?

MR. LUZ: I am sure I could accelerate, but, Judge Crawford, I think, and, please, the tribunal secretary can correct me if I am wrong, but I believe I have spoken for an hour, not including the Tribunal questions. That's the time that I have. I am happy to take a break at some point.

MS. AMBAST: Sorry, this is

the tribunal secretary. I have you having spoken for an hour and three minutes. So you should have an hour left, according to the schedule.

MR. LUZ: Thank you, Ms. Ambast.

Judge Crawford, if a break is something that the Tribunal would like now, I am happy to take it. Otherwise, I think I only have about 15 minutes left. Maybe a little bit longer than that, depending on how quickly we go. And I am in the Tribunal's hands.

JUDGE CRAWFORD: Why don't you go quickly.

MR. LUZ: Okay, I will.

I think we can just go through the next slide, Chris. This is -- sorry, if we could -- sorry, I meant to go back to that one. Because it really is something that was important that the claimant has completely ignored throughout this process, and it's of absolutely vital importance in the context of the legal analysis that the Tribunal has to apply in 1105 and 1102. And Jeannie Chow just said right there that this is:

"We are looking at

significant closures. The economic impact overall is something that was important for us to consider. I mean, it would have been significant to our GDP if this company never reopened, and we had to consider that."[as read]

Next slide.

We can go to the next slide as well.

Yes. So this was something that Jeannie Chow had been brought to by counsel, and, again, I had already read into the record the Department of Finance documents that talked about the potential [redacted] that the closure of the mills would have on the provincial economy, but here's a perfect succinct summary of what was motivating and thinking in the government's mind. I will just read from that third paragraph:

[redacted]

[redacted]

Next slide, please.

Again, this just goes to what the Tribunal has heard many, many times, that [redacted]

Next slide.

And the idea, again, that the claimant keeps talking about, that the final deal was done as a final concession to PWCC, but, in

fact, it was something that -- the idea was that the province was going to gain more out of it over the long run.

Next slide, please.

I don't want to say much about Bowater Mersey. Canada brought that up again, and we've never said that Bowater Mersey was in like circumstances to Port Hawkesbury. The point of that was to show something that the claimant never revealed until Canada brought it up, was that it was also accepting financial assistance from the government. Different mill, different circumstances, different product, but the idea was, and I think we heard that and it's in the agreement itself, that the idea was how can we help the mill in this -- given its particular market and its particular product, what can we do to help. And we saw that, and I don't think we need to go through much of it again today.

Chris, you can go to the next slide. Again, Bowater Mersey, so we don't have to go to it.

Next slide. No, just skip through the Bowater Mersey aspects, I think, unless the Tribunal has any questions. Go ahead.

Next slide. Next slide. And, again, that -- sorry, you can just hold on one second.

Again, this just goes to the lowest cost, the lowest cost. It's not a guarantee. And I think we have gone through that, and the Tribunal heard that again and again. I don't think we have to spend much more time on that.

Chris, you can move to the next slide.

Again, the [redacted] I mean, there's only so much more I can say on this.

Next, please.

[redacted]. Yes. This is something that obviously the claimant had spent a fair amount of time on, and, again, I don't think it's something that I need to spend too much time on as well because it really is a non-issue.

[redacted]

[redacted] And the claimant is just simply holding the Government of Nova Scotia to a standard that it doesn't even hold itself to.

We heard from Mr. Garneau that it's very difficult to predict markets and that six months after they had signed an agreement with the Government of Nova Scotia to try and keep the mill open, well, suddenly, the currency markets collapsed, and they had to shut down the Bowater Mersey mill six months later.

So I don't think it's fair or appropriate to hold the Government of Nova Scotia to a standard of perfect foreseeability of everything but, rather, [redacted]. And we know in

hindsight that what -- and again, this is, I have to admit, somewhat infuriating because they keep talking about [redacted]

So there were so many other aspects. I already went through them in my opening. I don't plan to go through them again here because I think it's already been amply illustrated in the testimony that there's not much weight to be given to this in the context of 1102 or 1105.

My remainder of this issue dealt with, I believe, electricity. And I think given the -- well, what I can say, I think, just as a few rebuttal aspects, and I will save the attribution arguments until the end, but the slides also cover some of those things, but, again, I think I am just going to reiterate the electricity costs issue, that I would just call the attention of the Tribunal to the board's decision approving the electricity rate for Port Hawkesbury. And that's C-184.

And this is important context.

PWCC and NSPI had negotiated a complex partnership to run the mill. It relied on a tax strategy by which they thought they would be able to achieve a very low cost for electricity, [redacted] but it was using a tax strategy to reduce its costs.

That didn't work. That never happened. The ATR, the advanced tax ruling that that goal relied on was denied.

And so what ended up happening was they went back to the load retention rate that they had negotiated with NSPI, a private company, that it would have a variable rate whereby it was designed that the actual fuel costs risk would be borne entirely by the mill. That's, again, very different than the fixed rate that Bowater Mersey wanted. And so all the risk was on PWCC. There's no guarantee.

PROFESSOR LÉVESQUE: We just lost you, still.

MR. LUZ: Can you hear me from here? Oh, you can, okay. I can't hear you. I apologize. The phone speaker disconnected, but I was actually right at the very end of my presentation. I was just going to sum up.

That the situation of a store that advertises that it guarantees to beat any price by its competitor and promises that whatever the lowest price your competitors have, we will beat it, that's not what happened here. The situation is not what claimant says. There is no violation of 1105, no violation of 1102.

And while Canada's position is what my colleague Mr. Neufeld is about to say is unnecessary and irrelevant because there should be no damages awarded to the claimant, nevertheless, I would like to offer him the opportunity, unless the Tribunal has any questions, which at this moment, I can't hear, I'd be happy to answer them later on this morning. And I apologize for the technological malfunction in the middle of it, but, fortunately, we have multiple computers in multiple rooms that came in.

JUDGE CRAWFORD: It wasn't in the middle.

MR. LUZ: I am sorry. So, Judge Crawford, if we could ask for the indulgence of the Tribunal for a couple of minutes while we fix this problem?

JUDGE CRAWFORD: Three

minutes.

MR. LUZ: Yes, we will do it as quick as we can. Thank you.

--- Upon recess at 1:38 p.m. EST.

--- Upon resuming at 1:43 p.m. EST

MS. D'AMOUR: All right. The breakout rooms are closed. Everyone is back in the main room, and we are still in our restricted access session.

JUDGE CRAWFORD: Thank you.

Mr. Neufeld, not for the first time, I have to ask you to be as quick as you can. And we have got, effectively, your speech, a short break, to the extent some break is required, and then closing events. We have to be out of the whole -- school has to be out of the Peace Palace by 10 o'clock.

I can't hear you. Can you put your speaker on, please? Still can't hear you.

MR. NEUFELD: Sorry. Of course, I will be very brief, then.

Can you give me an idea of how very brief I should be? Whether that's...

JUDGE CRAWFORD: That's Rodney Neufeld, I would have thought.

MR. NEUFELD: It is.

So would you like it to be sort of ten minutes?

JUDGE CRAWFORD: Ten or fifteen.

MR. NEUFELD: Fifteen, okay, okay. I will do my best. Should I proceed?

JUDGE CRAWFORD: Yes, please.

MR. NEUFELD: Thank you.

CLOSING ARGUMENT BY MR. NEUFELD:

MR. NEUFELD: Members of the Tribunal, we started this week shocked and confused. We were shocked that the topic of causation appeared nowhere in the claimant's oral arguments, and we were confused about the many numbers that the claimant has put out on damages. Now that we are at the end of the week, we are no further enlightened about the claimant's cause, its calculation on causation, and we remain just as confused as ever about the quantum it has asked for.

After once again totally failing to address the matter, causation, the only thing we can safely conclude is that the claimant's case on causation rests totally on --

and these are Mr. Feldman's words from this morning -- totally on the PhD economists Resolute has hired to determine the connection between Nova Scotia's conduct and damages, liability and to measure the consequent damages too.

But causation shouldn't be left to the economists. It needs to be left to the lawyers.

The legal test that we apply is not complicated. It comes from Articles 1116 and 1117 of NAFTA. We started the week this way with the three things -- Chris, can you put the screen up -- that the measure of Canada has to breach Part A of NAFTA Chapter 11; that the injury needs to be by reason of that breach; and that its chosen means of quantifying its loss reasonable, rational, and not speculative.

PROFESSOR LÉVESQUE: Heather, I am sorry to do this and we apologize, but maybe we should be sent back to the breakout room very briefly.

MS. D'AMOUR: Sure, no problem. I will open the breakout rooms.

PROFESSOR LÉVESQUE: Thank you.

--- Upon recess at 1:48 p.m. EST
--- Upon resuming at 1:49 p.m. EST
MS. D'AMOUR: All right. The breakout rooms are closed, and we are still in a restricted access session.
JUDGE CRAWFORD: Sorry, Mr. Neufeld, I interrupted your question. You have to put the speaker on.
MR. NEUFELD: There, is that better?
JUDGE CRAWFORD: Yes, much better.
MR. NEUFELD: Now I am leaning into my laptop like everybody else is, it's good.
All right. So all I did was provide the introduction of the comments that I hope will last no more than 15 minutes.
But because it's 2020, I am going to turn that outline on its head. We spoke at the beginning of the week about the measure and the breach first, and then going to quantum, I was going to say a word about quantum first before turning back to the matter of causation.
Because, I mean, the stress here, the important aspect here is the matter of

causation. Too many tribunal's have not respected the clear delineation between the breach and the requirement to prove that damages arose out of that breach. The principle of causation is obviously widely acknowledged and applied; but, unfortunately, it is often incorrectly argued, and, in part, owing to the lack of guidance from tribunals since it's common for tribunals to say nothing at all on damage once they have found no breach.

I had laid out the position of the claimant on quantum, which goes up and down like a yo-yo throughout all the pleadings and even the oral arguments, but I am not even going to walk you through that today because I don't think you need to hear this numbers soup that arrives out of the mishmash of different approaches put forward without being substantiated whatsoever.

What shocked me the most was arriving today for closing arguments and still not, not only not having it cleaned up but having been pointed to a new number still. Dr. Hausman said very clearly when the question was put to him that he is conservative in his approach and he always picks the lower number. Well, that's

precisely not what the claimant is doing here today. The claimant, in its prayer for relief, has relied on a number based on the forecasting methodology of 103 to 148. And today, it has changed its stance completely, abandoning its request in its prayer for relief and opting for a figure that is even higher than the conservative figure that its own expert puts forward.

The only conclusion is that the claimant doesn't know or understand the quantum it requests. As argued this morning, the fact remains that its written request for relief upon which you must found your decision cites to a number arrived at through Dr. Hausman's forecasting model, not the model that they rely on today. The claimant hasn't asked to amend its prayer for relief, and awarding it a sum based on Dr. Hausman's testimony that he now prefers an economic approach would be to act ex aequo et bono.

Okay, let's turn to the heart of the matter. And here too, I can be quite brief. Matter of causation.

This case is emblematic of a common and unfortunate problem in investor-state

dispute settlements, the claimant's misguided conception that it need not prove causation. This rule, articulated in Article 1116, 17 and a basic rule of customary international laws as reflected in Article 31, the rules of state responsibility, requires not just proof of a breach but proof that the injury arose out of that breach. The claimant, in its case, didn't even pay lip service to this rule during its opening statements or in its memorial that it filed. Other than a passing mention to Chorzów Factory in its reply memorial, the matter has been left entirely to its economic experts.

The argument that Canada has made regarding the claimant's failure to isolate the harm caused by the breach from the harm caused by other market events have gone totally unaddressed. Likewise, so have Canada's arguments that damages are too remote, too indirect, too speculative to be awarded.

A case like the one before you lends itself to being dismissed on the basis that breach has occurred. In our view, this is the only conclusion that you can draw. But what often occurs in arbitration is that then there is lack

of guidance on damages. Whether or not this Tribunal determines what a wrongful -- that a wrongful act has occurred, it would be helpful to send a signal that the flaws in the claimant's damages model were such that it could not form the basis upon which damages can be awarded. By choosing a damages model that requires imprecise estimates of price erosion in the face of alternative more reliable models, that they could have measured damages with sufficient accuracy, the claimant's case fails to satisfy the requirement to prove that its damages arose out of the alleged breach.

Frankly, it's a little bit frustrating that we are where we are. I mean that both in terms of the international practice and the specific case that's been brought here. For Canada, this is its fourth submission in this case with detailed arguments on the claimant's failure to prove causation, and the claimant addresses none of them.

For the Tribunal, we can appreciate that it is more frustrating still, hence the pleas to the parties to focus on the main arguments tieing the economic matter --

economic material to the treaty. Yet again, in the claimant's closing argument, it does a woefully inadequate job with respect to proving causation, leaving it to the economists.

What's shocking about this is that the Tribunal, in its jurisdictional award at paragraph 247, sent all the signals it needed to send. That award was prescient in a way that we could hardly have imagined.

At paragraph 247, it deals with the issue of relating to, but the Tribunal asks for the questions relating to, first of all, has it been shown that the benefits afforded to Port Hawkesbury might have allowed it to produce paper at a lower cost than its competitors?

Second, it asks how the price has been reduced as a consequence.

Third, it asks, in this five-company market, what might have, might there have been significant losses as a consequence?

And then fourth, you asked, in the same five-company market, is it proximate to a company that's in Quebec?

Well, if you asked those questions not from a jurisdictional perspective as

is it possible but from a merits perspective as has it been shown that, you have your template here to prove your case on damages, and it's been completely ignored by the Tribunal.

I was planning on taking each of these in turn, and I guess I will give a quick, quicker summary of all four of the topics instead of dwelling on each one.

The first question, has it been shown that the benefits afforded to Port Hawkesbury might have allowed it to produce at a lower cost than its competitors?

One thing that seems to have become clear this week is that the claimant's identification of the breach, it's no longer driving somebody out of business, as we said in the opening, now it's just about a low-cost producer, or the low-cost producer, as Mr. Feldman likes to say.

Mr. Kaplan, in his testimony, called it the last man standing.

Over to the next page there, Chris, and we will see it.

And, of course, Mr. Feldman spent some time accusing Canada of

recharacterizing its claim to be one that requires the Government of Nova Scotia to have acted intentionally, but he still misses the point here when it comes to the question of damages. The problem that the claimant has has still not been rectified. It cites to the breach as being the establishment of the low-cost provider, but that's total divorced from the event giving rise to the breach, which is this simple re-entry of the mill.

I addressed that in my opening. I don't need to address that further now.

I also mentioned the benefits package in the opening.

Flip two slides down, Chris, to the blue package. One more.

We spoke about how the benefits package was $124.5 million and they needed that entire package to justify their claim. You will recall Mr. Steger also sharing his view that this $38 million outreach agreement doesn't constitute assistance and how the $20 million land purchase agreement, likewise, is not assistance since it was an exchange of an asset, the land, for payment, fair market value.

Mr. Steger then did an accounting and found that only [redacted] was received. That's where we left things at the opening.

But the sum of the assistance, if you are going to consider it, should also consider what the company paid for the mill as well, at $33 million. What's left at the end is a far cry from a $124.5 million package.

Further, if Resolute were to be awarded damages based on the simple re-entry of the mill and this package rather than on the breach caused by the lowest-cost producer, it would be unfairly rewarding the claimant for PHP's existing cost advantages unrelated to the measures. For example, it already had the biggest machine, made the best paper, irrespective of the government's measures. It would also be unfair to award the claimant for PHP's private initiatives to lower its costs; for example, [redacted]

Chris, you can stop the screen share here.

Dean Lévesque, you will recall the questions that you put to Dr. Kaplan and the non-answer that he provided when you asked about the electricity and the variable rate. And the Tribunal might also recall Mr. Feldman's remarks this morning when he argued that PHP must produce close to 360 metric tons because that's what every mill requires to, you know, has to run full or close to full. This marks a key misunderstanding of the claimant. The claimant misunderstands the [redacted] This is why we speak not of a 360-metric-ton package.

Finally, there's been an elephant in the room this entire discussion when it comes to costs. Mr. Suhonen was the only expert presented in this case who could talk about costs of the mills. His company models costs all the time. That's what they do. [redacted] Yet Resolute counsel never asked him the question, they never asked him [redacted]

[redacted] And if you look to page 51 of his first report, Pöyry 1, [redacted] [redacted] Surely, that's all the Tribunal needs to understand and dismiss the case based on a premise of benefits package to transform PHP into the lowest-cost mill.

The second question that the Tribunal asked at jurisdiction was, and now turning into a merits question, has it been shown that the prices were reduced as a consequence?

Much of the economic material this week relates to this very issue, the rise and fall of prices. But I take it that we probably don't have the patience to deal with that right now. My plan was to sum up the myopic view that Dr. Kaplan puts forward of a market. If we pull that lens back and we see the fuller picture and the timeline, the geography and the market players, we understand full well why you can't apply his model to the situation at hand. The market isn't confined to an arcane, archaic definition of boundaries applied by the ITC on account of its need to apply a "like products" analysis. That's not what we are doing here.

This Tribunal, your job is to talk not about like products but about damages in this case, and, in the but-for world, wouldn't supply have been taken by other players if PHP wasn't there to occupy it? You heard squarely this week that that was the case, whether it would be imports or coated mechanical paper.

I am going to skip this entire part of my argument which would have gone into the difficulties with the claimant's case in terms of the forecasting model and what Dr. Hausman said about forecasting, about the Dr. Kaplan's model as well and how equally they are -- they are all future -- they are all based on predictions, they are all future-oriented. Dr. Hausman claims that this is, that he is measuring past damage, but it is based on a prediction, no matter which model is used, based on a prediction that starts in 2011 -- or starts, in the case of the economic model, in 2013.

This morning, you know, Mr. Feldman said that the Sartell fire -- or, sorry, the Sartell mill shut down because of -- I mean, this is where the problems start. The whole premise that the claimant has built its case on,

that capacity shutdowns would have to occur, that's just not proven to be true. The Sartell mill went down because of a fire, before PHP even came back on board. The facts are important here. And as the Pöyry 1 report shows, there was not any capacity shut down until 2016 when UPM Madison closed.

I am just pausing because I am skipping through. My suspicion is that you don't want to hear about price elasticity. Well, perhaps not you, Dean Cass, but the rest. Others don't want to hear about price elasticities. And if you do, I would urge you to Peter Steger's reports where he has a table comparing the different price elasticities and what they do to the different quantum amounts, including putting them in the negative. I mean, the swings, the variables -- a slight change in the price elasticity causes a massive change in the overall quantum. This, of course, he spoke about and Mr. Suhonen summarized in his answer to a question to you about this is what we call a garbage in, garbage out model.

If the price elasticity was computed by Dr. Hausman, it had to be done in the

first report. There is no computation in the second report. And that first report relies on a 2.1 number, a negative 2.1. Whereas the second report relies on a 1.5, which he applies equally to [redacted] metric tons or 360, despite his view that he only adopted it in response to this idea that he would only value a [redacted]

The third question to ask is has it been shown that Resolute has incurred significant losses as a consequence of price decline?

And here, we started the week saying they had a lot of options with their model. They could have modelled -- they could have -- their damages model could have looked at volumes. And it could have looked at finances. But Dr. Hausman didn't. And the question I asked at the beginning of the week was why didn't he? Maybe he did and he just didn't like the results. Well, we do now have an answer to that at least. In terms of model -- in terms of volumes, we heard about that Kénogami and Dolbeau had been running full. There's been no loss of volume whatsoever.

[redacted]s

[redacted] That same year, Resolute earned [redacted]

Whether it's about volumes or finances, the point here is that Dr. Hausman didn't want to go to that model. He didn't want to use that. Either he was -- either he saw the result and chose not to or he -- but what's so surprising is that these are things that he does consider at jurisdiction and then he doesn't consider at the merits.

The very question on models was put to him, and his testimony is clear. I asked him:

> "In any event, this whole discussion is about volumes. Your damage model doesn't consider volumes at all; does it?"[as read]

And he said:

> "No, it's based on prices. The volumes come

into it because, in the but-for world, the supply curve would have been to the left-hand side, so there would have been higher prices. But in terms of estimating damages, no, both the forecasting approach and the economic approach calculate what happens to prices."[as read]

And I said:

"Because you don't consider Resolute's loss quantities via loss shipments or market share at all; right, do you?

And he says:

"No I didn't. I looked at that, but I didn't use it."[as read]

Which really caught me by surprise.

And then I said:

"So it was a conscious decision not to use the volumes?"[as read]

He said:

"Yes. It's a very complicated story about what was going on, and I wasn't able to separate things out sufficiently in my mind."[as read]

We submit that it wasn't complicated at all to see that Resolute's volumes hadn't suffered with PHP's re-entry. What was more complicated is to figure out how much of the SCA paper supply left by PHP when it was in hot idle was picked up by coated mechanical mills, like Resolute's Catawba mill, which has a swing machine and can produce supercalendered paper. On this point, Mr. Feldman this morning took great pains to say that there's no coated mechanical producers in Canada. But they certainly exist in the United States, the market that we are talking about, and all we are saying is that Dr. Kaplan's model fails because it turns a blind eye to them.

I said on the first day of the

hearing that the Tribunal should ask itself why the claimant chose price erosion over other means of quantifying damage, suggested that maybe that it considered these methods and just didn't like what they showed. I think we know the answer to that question now.

The fourth and final question that the Tribunal set out in its jurisdictional instructions, I will call them, is has there been a significant loss in Quebec as a proximate loss?

Now, this question's already been answered given what I said about finances; but, in addition to record profits, Resolute also saw the $60 million return in tariffs, with interest. And on this point too, Dr. Hausman's testimony is telling. He says, sure, they got their money back, but they would have made more if they had that money. It's exactly the same response as he made on the pretty profitable return of [redacted] He simply said, well, it would have been higher. So I think we know what their claim boils down to. The claim is very simple. It boils down to, "we should have made more money".

Where does all this leave us?

I will take two minutes to tell you, and then we can wrap it up.

When it comes to quantum, admittedly, it's a mess. The claimant has provided you with nine different numbers now and none of them substantiated. The latest doesn't even come from the mouth of its expert and is most certainly not found in its prayer for relief. In the end, you have absolutely no basis to justify a decision awarding quantum.

But as my short submission today has also made clear, the claimant's case really fails on the basis of causation. Most claimants at least make a mention of Chorzów Factory. And you might be aware, Tribunal members, of some of the controversies around that decision these days in its application to investor-state dispute settlement. Some commentators have gone so far as to say that it shouldn't apply in investor-state dispute settlement since it concerns damages incurred by a state, not a private actor.

Well, in Canada's view, this isn't the time to halt a reliance on the basic rule of reparation enunciated in Chorzów Factory.

Rather, it's time to begin to hold claimant's feet to the fire on the claims that they advance. It's time to oblige claimants to understand and apply the rule of reparation properly so as to respect the concept of causation. Full reparation does not mean pulling a number from the sky just because it's difficult to make a prediction, absolutely not. As another great professor-turned-judge once said:

> "Every act carried out by a subject that is contrary to the rule creates as its consequence the obligation to re-establish, in some form, the legal order troubled by such act."[as read]

Those words were, of course, the words of Professor Anzilotti, and they are very instructive since no legal order was troubled here. But even if it had been, what were the consequences? Resolute's SC paper mills had their most profitable years with PHP back in the market.

And if the economic material has shown us anything, it's that there was plenty of room in the market for both companies and plenty of room for both companies to be successful. There's been no sign of one of Resolute's mills being driven out, and the only conclusion about paper prices is they go up and they go down, just as the claimant's quantum request has.

Even if you find no breach, we would ask you to note in your final award that the flaws in the claimant's damages model were such that it could not have been a basis for damages to be awarded. The problem with price erosion in a fact situation like this is that it fails the basic test of isolating the alleged harm caused by the event from the harm caused by other market factors.

The claimant's chosen model simply does not measure with sufficient accuracy and therefore fails to satisfy the requirement to prove that its damages arose out of the breach.

With this, Judge Crawford, members of the Tribunal, Canada concludes its closing argument. And as this will likely be the last time I take the camera, please allow me to

thank the Tribunal and particularly, James, for your patience and your authority and your guidance.

JUDGE CRAWFORD: Thank you very much on behalf of the Tribunal as a whole. If any patience has been shown, it's as much due to them as to me.

I now have to raise a few administrative matters to the parties so we can wrap up the decision once we come to the decision itself.

The first question is post-hearing briefs. The rules make no provision for post-hearing briefs, but it is contemplated as a possibility. The Tribunal, though it might like to hear the whole case all over again, doesn't really want to hear it -- sorry. Doesn't want to hear it in the measure, and it's more a case of uncertainty as to particular points, which will depend on the deliberations of the Tribunal.

In short, there's some doubt as to whether post-hearing briefs are going to be helpful or not. If the Tribunal had to decide, it would say no, but it's open to guidance by the parties as to what they feel, if anything, would

be, could be served by this mechanism. And, if so, on what topics and with what deadlines. Consistent with what I have said, the Tribunal's view is that there are such difference in topics which require clarification, but it's doubtful that will be obtained from post-hearing briefs due in three weeks. So our recommendation is to dispense with post-hearing briefs, but I will leave that question open to the parties to respond in writing at the same time as they deal with some other matters as mentioned.

First are the exhibits and the text of the written submissions. You weren't asked to provide speaking texts, which is done in international court. Some of you, I think, had to have speaking text, but you may not have sent them. If you have PowerPoint or similar displays of speaking texts which reflect what you have said, you are welcome to make them available to the secretary for inclusion in the proceedings. If not, please tell us not.

DEAN CASS: Mr. Chairman, did we have a break coming up and then rebuttals still?

JUDGE CRAWFORD: Yes, I am

just clearing my mind as to the various questions as the questions have arisen. I think I will leave it there.

And we will say our final farewell at the end of the respondent's rejoinder, which we now have for 15 minutes.

MR. NEUFELD: Okay.

JUDGE CRAWFORD: So over to you.

MR. NEUFELD: Should we -- so you are saying we have 15 minutes for a rejoinder now; is that what I understood?

JUDGE CRAWFORD: I think we should have a five-minute break.

MR. NEUFELD: A five-minute break.

DEAN CASS: If we could have a slightly longer break, I think some of us want to try to grab a bite.

JUDGE CRAWFORD: Eat during the lunch break, okay, so a 20-minute break.

DEAN CASS: Thank you.

MR. NEUFELD: Very good. Thank you.

JUDGE CRAWFORD: So we will

resume at twenty to nine The Hague time. Which is what time?

DEAN CASS: Twenty to three here.

JUDGE CRAWFORD: Twenty to three. Thank you very much.

--- Upon recess at 2:20 p.m. EST.

--- Upon resuming at 2:43 p.m. EST

JUDGE CRAWFORD: It's been pointed out that I cut the final speaker for respondent, Mr. Neufeld, off from the time I had, myself, already awarded him. So he was 18 minutes short of a full serve. I think the respondent can have that 18 minutes as part of their reply on occasion or if you prefer Mr. Neufeld to return now and complete it he can do that?

MR. LUZ: Judge Crawford, I think Mr. Neufeld has abandoned his post, and I don't think it's something that I think he would take the offer anyway, if he were here. So I am happy to proceed with Mr. Feldman's rebuttal.

JUDGE CRAWFORD: Right. Thank you. Mr. Feldman.

REBUTTAL CLOSING ARGUMENT BY MR. FELDMAN:

MR. FELDMAN: Thank you, Judge

Crawford. There was a pending question that never got asked by Dean Lévesque, my fault. So before we proceed perhaps you would like to hear us on attribution based on the question that Dean Lévesque may want to ask. Alternatively, we can leave an attribution discussion to the end. Or, if the Tribunal would prefer, it could be addressed in "a", not "the", post-hearing brief.

So I am asking how you would like to proceed with respect to the attribution question that Dean Lévesque didn't get to ask.

JUDGE CRAWFORD: I will ask the respondent to reply to that, please.

MR. LUZ: Judge Crawford, Canada does not think that there is any need for post-hearing briefs. The questions have been fully briefed in the claimant's -- in both pleadings of both parties. It was addressed in the opening statement. The Tribunal specifically asked the both parties yesterday to deal with the question of attribution today. So we'd had two opportunities already. So of course if the claimant would like to discuss attribution right now we will respond, but we don't see any need for post-hearing briefs on any matter.

MR. FELDMAN: We are not asking for a post-hearing brief, we are just asking whether that would be preferable for the Tribunal for this subject and this subject only. So it's -- so there are three options: One is that we can do it in writing; one is we can hear Dean Lévesque's question now; one is that we can put it at the end of the rebuttal now.

JUDGE CRAWFORD: I think my preference is to deal with it now so, since the question is asked and hasn't been answered, I think it should be answered. If Dean Lévesque is available she can ask it otherwise someone can ask it on her behalf.

PROFESSOR LÉVESQUE: No, I can quickly ask my question. So it's, it falls under your arguments for Article 4 ILC articles on state responsibility. So one question the Tribunal must answer is whether the approval of the LRR by the NSUARB makes it a measure adopted or maintained by the Government of Nova Scotia relating to Resolute or its investment under Article 1101 of NAFTA, and you've presented arguments on approval and I would like to ask a question about that.

So governments and state

organs approve thousands of private transactions on a regular basis, whether it's a matter of competition law, bankruptcy law, utility law. So is your argument that all such transactions, then, can be attributed to the state as a matter of international law. And to give a very quick example: Let's say the government of Canada approves a merger between two, say, big tech companies and then they go on to doing anticompetitive behaviour and a US competitor then complains to the US government which in turn says "Canada, you approved this merger, you're responsible for the anticompetitive behaviour." So that seems to go too far to me, but I would like you to clarify what "approval" means for you.

MR. FELDMAN: Thank you. So Mr. Valasek had prepared to address the attribution question. I don't see him on the screen now. There he is. So I would yield to him to answer.

But my brief response, Dean Lévesque, is that in this particular case the government interceded in the process and approved two regulations to enable the NSUARB to approve which it otherwise was not going to approve, so

there was a particular government intervention beyond the authority of the review board.

But I will leave the rest to Mr. Valasek whom I now see has appeared.

PROFESSOR LÉVESQUE: Thank you.

REBUTTAL CLOSING ARGUMENT BY MR. VALASEK:

MR. VALASEK: Yes. Ricky, can you pull up the slides. I will just take advantage, and I know that we are tight for time, but I think it would be useful since the slides were shared with the Tribunal to just put them up, put them in context, I am not going to spend a lot of time on it, but I think part of the answer is reflected in the slides that we had done.

And so let me just make sure I have the screen up. Ricky, could you go to the slide, I think it's maybe Slide 5 or 6, where we just list the arguments, the three arguments, and I will tell you if it's before or after, because there's some preliminary. Keep going. We will get through the preliminary remarks, we don't need to do. Yeah. Right here.

So, Dean Lévesque, we, this table here or this slide summarizes claimant's

approach to attribution and it really lays out the three arguments that we made. The first argument is that attribution should not be considered on a disaggregated basis, and that's a theme that we've made in a number of different respects, including in respect of causation and the like. That's the first argument.

The second argument is that to the extent that the Tribunal does look at the measures on a disaggregated basis, in which case of course the electricity deal is looked at more closely, then our argument is that both Article 4 and Article 11 are available as a basis for attribution.

And then the third argument is that there's a complementary argument under Article 8 which relates to another way of looking at the state's involvement. And I think this connects with my colleague's response; which is, that in these particular circumstances, we are not -- the analogy to your various approvals, which I understand is the basis for your question and raises your concerns, is really not the context that we're in: Which is, a government that was involved in those negotiations from the

very beginning and went through them all the way to the end and, in fact, participated in an important way.

And maybe we can go forward, fast forward, Ricky, to the slide in relation to -- keep going. Because we are on the -- in order to respond to your argument, really, I think we are going to the second argument. So maybe just back up one slide, Ricky, in terms of the second argument.

So we say that with respect to Article 4, the electricity benefits result from direct action taken by state organs, not private parties, and therefore the benefits constitute an act of state. The Nova Scotia state organs in their official capacity set the goal to achieve, supervise negotiations, approve the transaction, gave force to the rate, and enacted modifications to applicable regulations to realize the benefits. And that's what Mr. Feldman was referring to, but you can see that it's part of a continuum of involvement. And it was the conduct of provincial state organs that made the electricity benefits a reality, and therefore those benefits should be recognized as an act of state.

And on the next slide, Ricky. We have used one way of demonstrating it which is to present over the horizontal bar up top the different state organs involved: The premier and the cabinet; the Department of Natural Resources and Department of Energy; [redacted] then the review board; and then cabinet. Each I think irrefutably a state organ.

And then we looked at the actual conduct that was involved in each case. So [redacted] And this is important in relation to your question because I don't think in most of the cases that you're raising in your hypothetical you would have governments already thinking about how and why they want this private transaction, so to speak, to happen. So already we have distinguishing features here.

And then we have departments that initiated and oversaw negotiations between Nova Scotia Power and PWCC. [redacted]

[redacted] And so the electricity deal wasn't a stand-alone and, in fact, the government was linking other elements of the ensemble to the rate being approved in a certain way so that the entire ensemble could be granted. So that's another element of unmistakable state conduct.

Now we come to the review board, which you asked about, and you can see why we have some difficulty in simply taking it out in isolation and saying "Well, in this case, this case is about Article 4 as applied to the review board and is it really appropriate to say that that approval on its own meets Article 4?" We would say in these circumstances in the context and in -- in the context in which we find ourselves, the answer is: Yes, it is appropriate given the way in which other state organs were involved in parallel to the review board. And then finally cabinet, as Mr. Feldman indicated, modified the renewable energy requirements applicable to Port Hawkesbury.

So that's on Article 4. And I will pause there to see if you'd like to push me on that.

PROFESSOR LÉVESQUE: No, not really. I was -- my question was specific to the board because, again, I am thinking what -- I know you want us to focus on this particular case, but when you apply -- you elaborate the standard it has to apply beyond the particulars in the sense that if you say that any government regulatory board approving a private transaction, that opens the government to liability for any misconduct of those private parties, to me, that seems to go too far.

But I understand your argument and you say, well, it's not just the NSUARB, there was other government intervention so you shouldn't single it out. So I understand it. So I think I -- you answered my question.

MR. VALASEK: I would also go a step further to say that I would not concede that just an approval by the review board could not be attributed to the state. In other words, in your hypothetical, I think what I would take issue with is that you say that if our position is

that any government approval will attract liability to the state for any wrongdoing that those private parties do, but I would beg to differ a little bit. Obviously you have to establish a breach of international law. There has to be --

PROFESSOR LÉVESQUE: Yes, of course.

MR. VALASEK: The attribution of course does not resolve liability or responsibility, it's an element of it, it's a necessary element but it's not sufficient. And we are in a, again, the unique circumstances of this case are such that we say given the way that Pacific West took advantage of an opportunity in Nova Scotia to its own benefit but brought the government in through a partnership with Nova Scotia Power, we say here there is conduct which breaches NAFTA, so there is conduct under 1105, under 1102, which is a violation. And if we were going to really talk about your hypotheticals we'd have to say "well, in what circumstances would those hypotheticals likely lead to a breach of international law?" And probably there wouldn't be that many, which would counterbalance your

concern about the standard.

And just to complete on -- just so that we complete our attribution presentation, I would just go to the next slide. And of course you have these so you don't have to really be concerned about noting anything down.

But we say that there's -- no, go back.

So here there's a very subtle difference in this slide, and the only difference is really in the article at the bottom. We say that all of this, this series of actions by the different state organs, to the extent that the Tribunal feels that there is actually a more important role, and of course these can be subtle questions, a more important role for the private parties where there is some question whether there isn't sufficient conduct or there's a temporal issue under Article 4, then Article 11 is an alternative basis or a complementary basis which is that the electricity rate or the electricity deal was acknowledged and adopted by Nova Scotia under Article 11. And here we would refer to the Bilcon case, where the Tribunal accepted that in the circumstances of that case where the Joint

Review Panel, the environmental review panel, was looking at the circumstances of the quarry project, also in Nova Scotia, was looking at the quarry project and made a recommendation to the minister, and the minister then accepted that recommendation and ultimately was found that there was a violation of NAFTA given the standard that was applied by the review board. The Tribunal there assessed and analyzed those circumstances under both Article 4 and Article 11 and found that both could be applicable. So we, in a similar way, we think in this case a similar analysis applies.

And, finally, one more slide. We think that Article 8 could also be considered in these circumstances. Now Article 8, if you go to the next slide, please. Article 8 relates to conduct directed or controlled by a state, but it's a somewhat misleading title because when you read the provision it says:

> "The conduct of a person or group of persons shall be considered an act of state under international law if the person or

group of persons is in fact acting on the instructions of, or under the direction or control of that state."[as read]

And so Article 8 really goes beyond just direction or control, it also refers to the second set of circumstances, which is instructions.

And on the next slide there's some commentary on that, where you can see that Article 8 deals with two circumstances relating to specific factual relationships. The first involves private persons acting on the instructions of the state in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the state's direction or control.

And so if we go back, please, Ricky, to this slide. What we are relying on is that first branch here of instructions. And it's certainly not our main argument, our main argument is under Article 4 and Article 11, but I think these can be seen as complementary because the extent of the government's involvement here

suggests that they were involved from the beginning all the way through the end. And as I list here on the left, the premier and the cabinet set a specific result to achieve, namely:

Reducing Port Hawkesbury's electricity costs [redacted]

Nova Scotia Power was reluctant to enter into negotiations but government officials made sure they would take place regardless;

Nova Scotia officials supervised the negotiations; the government took the exceptional step of retaining the services of an intermediary, Mr. Todd Williams;

[redacted]

that's where I was relating to the fact that [redacted]

[redacted] and;

There is a specific factual relationship between the province of Nova Scotia and Nova Scotia Power, which was a former state-owned enterprise that retained certain

privileged by statute, such as expropriation powers, tax exemptions, and monopoly.

So that explains the Article 8 argument. We don't have time to get into it any further unless there's further questions, but I think I would leave it there. That gives you an overview of the different grounds for attribution.

MR. FELDMAN: And unless there are other questions, we won't go any further into attribution, but we would be happy to take any other questions now and complete this particular discussion. No? So, Judge Crawford, shall I proceed?

JUDGE CRAWFORD: Yes, please.

FURTHER REBUTTAL CLOSING ARGUMENT BY MR. FELDMAN:

MR. FELDMAN: Thank you.

So in the interest of time, I am going to treat this mostly as bullet points and not really elaborate. So, please, if there's more you would like said please interrupt me.

But I am going to touch upon a variety of issues that were raised in Canada's closing statement and hence a rebuttal.

A lot has been said about the low-cost operation or being the lowest-cost

operator, and today we kept hearing the word "guarantee", that there was no guarantee and there was no guarantee that they would be the low-cost operator and so forth. It really doesn't matter.

There was a slide that Mr. Luz put up today in which we saw that [redacted] without the 124-and-a-half-million-dollars worth of benefits, however they were assembled and however they were determined by the two, by the government on the one hand and the company on the other, without

that, the company would not have been in business. The mill would not have reopened. So when we heard a sentence today that said success had nothing to do with the government: Success had everything to do with the government because but for the government's intervention and the government support that was demanded by PWCC successfully this mill would not have reopened.

When it reopened, it knew, the government knew, that there was likely harm to the competitors. The importance of it being the low-cost operator is that it was, in effect, insulated from that harm because, as we have seen from the testimonies of Professor Hausman and Dr. Kaplan, the low-cost operator is protected in an environment of secular decline for the product because it's the high-cost operator who will be the first to close and it's a stepped system, it's not a curve. And in the stepped system whole mills have to close at once because there's no efficient way for a mill to operate unless it's operating 24/7. So it's either in business, if it's taking much down time it just has to go out of business. And then you take a lot of supply out of the system all at once. So when that

happens, the supply suddenly can fall. If the demand is steady prices could go up a little bit. But you are continuously going down.

The stepped process means that there will be moments in which the price may go up because the price is varying with supply and demand. And the long-term projection is that the supply will disappear because the demand is disappearing.

It was Nova Scotia's calculation that [redacted] It expected to be the last company standing.

To get there, the support was not ordinary it was extraordinary. There has been a lot of effort to describe each piece of the puzzle, to describe each measure as coming from an established program or being ordinary kind of support: It's the package that made it extraordinary, that's what Alex Morrison's

analysis told us. That out of 174 examples that he looked at, he found nothing quite like this, in addition to his additional 20 years of experience. Nothing quite like this. Not because you have a quantum, not because you add up the dollars. This could have been a $50 deal if the $50 was enough to make the company the low-cost operator and put it back in business. So the quantum really isn't important, we are not measuring whether it was 24 million for one thing and 50 million for another, irrelevant. The relevance is that the entire package was understood by both the company and the government as necessary to make it the low-cost operator and to put it back in business.

Unless the government had done this, they wouldn't have been back in business. When they went back into business with 360,000 metric tons, making it the largest single machine in the business with only five other companies still surviving, they added a quantity of volume that necessarily meant that supply in an oversupplied market would exceed the demand. And when it did that, the only consequence possible is that the prices drop.

The damage to Resolute was

inevitable as one of the high-cost operators in facing a price drop. And the causation, therefore, is really not complicated. The cause of the damage is the re-entry into the market and the additional 360,000 metric tons, and they stay in the market as long as Port Hawkesbury's the low-cost operator.

So as the low-cost operator, keeping that money in the market -- keeping that volume in the market, there'll be ups and downs because there will be other exogenous events and there is a stepped process. But over time, in secular decline which everybody agrees this is a commodity in secular decline, over time, necessarily, money will be lost. And the money that will be lost is what Professor Hausman measured econometrically -- and the econometrics meant that he isolated this cause from other causes -- isolating this cause, analyzing it econometrically, he determined the difference between what the price would have been without Port Hawkesbury and what the price was with Port Hawkesbury and that difference is the measure of the lost profit.

He then gave us ranges in that

economic approach, and he gave us a mid-point in the range. The range was based on an acceptance of Mr. Steger's unfounded [redacted] But accepting it as the bottom and looking otherwise at the top, the 360,000 metric tons -- what would have been appropriate for the mill to be running full 24/7, as paper mills need to do -- then $121.4 million was the midpoint in that range and that, therefore, is the logical measure of the damages. Which we have also separated for those damages that are measurable from the period that already happened, past damages, easier to determine, and the damages that are projected forward from 2018 to 2028, [redacted] There is no point in disaggregating these various measures and, indeed, Jeannie Chow told us not to do so.

We had an interesting concession this afternoon in saying that Bowater Mersey is not in like circumstances with Port Hawkesbury. We have said that all along and therefore there is nothing more to be said about the Bowater Mersey story, except that what --

except Mr. Garneau's testimony that what was offered or proposed was not remotely what was offered or proposed for Port Hawkesbury and whatever assistance was received was given back because it was not feasible to keep the mill running.

We've heard a lot about the WTO and "nil". If the Government of Canada can't define "nil" and can't tell us what it means, can't define a subsidy and can't answer the question about what the process is to report it, it can hardly invoke Article 1108(7) as refuge about subsidies, and it can't then say "We'll rely on a WTO report in the -- in a countervailing duty case about entrustment and direction on the one hand but reject reporting to the Subsidies and Countervailing Measures Committee on the other." It either accepts the WTO or it doesn't.

We have heard about [redacted] But one interesting point, seems to me, that Mr. Garneau invoked was to point out that Bowater Mersey sold off 550,000 acres. We are hearing a lot about Delaware these days, that's

about the size of Delaware. Sold off 550,000 acres to put the money into the pension relief of its employees. Pacific West Commercial Corporation shed the pension liabilities of the closing of the NewPage mill. That had to come with approval. So not only did we hear also this afternoon that [redacted] all of them lost their pension relief. In contrast -- since they are such a good citizen. In contrast to Resolute making sure that its employees got its pensions by turning over the money from the land sale.

We understood this afternoon [redacted] and that's very understandable. They presented two experts in these proceedings, both of whom were hired for the express purpose of [redacted] And they were answering two experts brought in by Resolute who were not addressing per se [redacted] So the experts that were brought in were there because [redacted]

[redacted]

Now the government wants to say, well, no one was injured and nothing happened. Mr. Steger says, well, maybe six months, and then he stops looking in 2013 so there's nothing more to discover. [redacted] The elephant disappeared.

Nobody in the process in Nova Scotia or Canada considered at all the international obligations that flowed from signing the treaty and accepting the terms of Chapter 11 of NAFTA. They, therefore, have taken refuge in doing the right thing in serving the public interest in the context of Nova Scotia. We have no quarrel with them trying to do the right thing for Nova Scotia. Our quarrel is in their ignoring their obligations to a foreign investor in the same economic space and in the same business sector, which is what defines the like circumstances, and therefore puts the Quebec mills and Port Hawkesbury in the same like circumstance.

And in that circumstance, they completely neglected their obligations and responsibility for the foreign investor and the foreign investment.

But for the measures, the mill would not have revived. But for the revival, Resolute would not have been damaged. It's not a complicated story.

And the measure of the damage is in the but-for world, what would the prices have been had Resolute -- had Port Hawkesbury not been in the market? What were the prices when they were in the market? The differences are the damages, however that may be ultimately measured.

And unless my colleagues tell me I missed something, and I went as quickly as I could. Mr. Valasek may want to elaborate on one or two of these points but otherwise I shall stop and hope that I have been appropriately parsimonious.

FURTHER REBUTTAL CLOSING ARGUMENT BY MR. VALASEK:

MR. VALASEK: Just, I realize I left out two quick points on attribution that I think is important to raise, and then just one or two rebuttal points on 1102.

Picking up again on

attribution. Two points that Canada has made that I think it's important for the Tribunal to get our perspective on, and one of them goes directly, Dean Lévesque, to your question about the review board and whether attribution can flow from their approval.

Canada argues that that can't be right and their argument essentially is that that can't be the conduct we are complaining of, we are actually complaining about the terms of the private deal and, in any event, the review board was just following Canadian law and so there was nothing unlawful, they say, that we allege about the review board's decision and, in fact, it followed their statutory duty.

But as the Tribunal will be aware, the characterization of conduct under domestic law really is irrelevant to the characterization of the conduct under international law. And if it wasn't so, any expropriation authorized by legislature which may be perfectly lawful under domestic law could never violate international law. But Canada says, yeah but let's compare to Bilcon where the Joint Review Panel was actually found to have breached

international law but in that case the Tribunal took into account the argument that what they did breached national law. Yeah, but that's just the particular facts of that case. In that case, claimant's used that argument to argue that the review board had breached international law, they used the argument that in that case a violation of national law actually supported their argument that international law was breached. That was quite controversial, as the Tribunal will be aware. In fact, Canada sought to set aside that case on the basis that the Tribunal was wrong in all sorts of ways.

So we would say be cautious about the references to domestic law. It's irrelevant. We are complaining about the conduct of the review board even if they were simply following their statutory duty, because of all the circumstances that Mr. Feldman just mentioned. And the fact that everyone was doing everything according to domestic law doesn't mean that there can't be a violation of international law based on the particular circumstances of this case, the ensemble; the fact that the government assisted PWCC to become the lowest-cost producer. So

that's one point.

The other point, much more briefly, is with respect to Article 8. Canada says that is an impossible argument to make because we haven't shown effective control of Nova Scotia Power. But as I alerted you to, there are two different branches of Article 8. One of them is direction and control, and the other one is instructions. Now instructions depends on factual circumstances but it does not depend on control.

So I leave attribution.

And I think Mr. Feldman made the points under 1108(7), with maybe one exception. And I would say, I would say that in response to the Tribunal's questions, Mr. Luz argued in favour of a broad exception, resisting the notion that the meaning of subsidy or procurement should be limited to certain specific types of measures or more technical definitions of those terms. But, as was expressed in the UPS case, including by Dean Cass, the 1108(7) exception should not be interpreted broadly. This is consistent with the object and purpose of Chapter 11, which is investment protection. And it's also consistent with basic canons of

construction, which suggest that exceptions should be construed narrowly.

And a final point on 1102. I, really, this obviously is -- I think the Tribunal will appreciate -- I spent some time on this provision and it would be fascinating to spend a lot more time discussing it, but I think I would simply say: Canada's position seems to be that we don't come forward with any nationality component, and that's just not true. We clearly meet the prima facie component for nationality because we say there was de facto differential treatment between Resolute, a foreign investor, and PWCC, a Canadian investor, and between Resolute's paper investments and the mill at Port Hawkesbury, and that's all we say we need to meet in terms of the basic nationality component for differential treatment.

That, then, swings us into the justification phase. Obviously I am skipping over the other components we discussed earlier like treatment and like circumstances, I think we have discussed those enough.

But I wanted to make one last point on justification, and that is the discussion

that Dean Lévesque had with my colleague for Canada on the Pope & Talbot justification test and in particular that second element of the test. And I think I heard my friend on the other side say, well, we should probably just ignore or eliminate that second hurdle. And we actually disagree entirely, and we think that this is the very -- perhaps rare -- type of case that Pope & Talbot was suggesting is precisely the type of case in which that becomes relevant.

And I'd like you to imagine another hypothetical. This time I will bring a hypothetical to you, which wouldn't even depend on a provincial or state measure.

Imagine the federal government passing legislation in the context of a similar type of market perhaps, where they would focus on one participant in the market, a domestic producer or a domestic investor that would get all sorts of benefits compared to all other producers, including foreign investors. And let's say, putting aside how that might be challenged under domestic law. But if Canada's position is correct, what they're saying is, well, we have to assume that every time even a national government

passes legislation that might harm a foreign investor, it clearly will always apply in the same way to all domestic investors. But that's, that can't be true. There has to be the possibility that the federal government might pass legislation that would benefit just one domestic investor. And if there wasn't this second hurdle of justification, that would be an easy way for the federal government to harm a foreign investor and surely that cannot be the way that Article 1102 was meant to be interpreted.

And so with that I will close my submissions, and I will add my voice to the many thanks that have already been expressed to the members of the Tribunal and to colleagues who have made this hearing possible.

MR. FELDMAN: And to conclude, therefore, Judge Crawford, and Dean Cass and Dean Lévesque, we thank all of you. Judge Crawford, we all wish we were with you in the Peace Palace, your surroundings certainly are more attractive than ours, and we regret that we are not all meeting together. But thank you all for giving up a chunk of your weekend and for indulging us this whole week and throughout the process of these

proceedings. And we thank your staff and the folks at Arbitration Place. And we thank the Government of Canada's team for its courtesy.

So, with that, I think our side has completed its role in these proceedings and thank you.

JUDGE CRAWFORD: Thank you Mr. Feldman, Dr. Feldman.

And there are a few matters to be dealt with. First of all, the -- I think we have dealt with the 18 minutes gap, I think that's now no longer complained of by Canada. We haven't, however, had the respondent's rebuttal in relation to the second round. So let's have that first.

REBUTTAL CLOSING ARGUMENT BY MR. LUZ:

MR. LUZ: Thank you, Judge Crawford.

I do not intend to take the full allocation of time that we have. I think most of what the claimant has already -- has said in its surrebuttal has been dealt with and is really just a repetition of the same kinds of misrepresentations on facts, which there is a couple of them that I would like to correct, but

most of it is the same things that we have heard before and I don't want to belabour the discussion further than what you have already had.

I will just quickly deal with the attribution issue because it was only brought up here. I am going to have to do this fairly impromptu but fortunately most of the -- in fact all of everything that the claimant has said has already been addressed in Canada's written pleadings.

I am just going to get back to the basic framework of public international law when it comes to attribution of actions of private parties. And this is, you know, this is something that is very clear within Article 2, Article 4, Article 8 and Article 11. It always comes back to the conduct. What is the conduct that is attributable to the state organ with respect to Article 8 -- sorry, Article 4 of the ILC articles, and the conduct of private parties which falls within Article 8 of the ILC articles?

And the claimant continues to mix up what this is. And we have dealt with this in our pleadings in some of the investor-state cases where the Tribunals have specifically noted

that when you are talking about the conduct of private parties, you look at the conduct of those private parties and that is what is attributable to them.

This all comes back down to two cases and all of it is, all of this can be resolved by the paramilitary activities in Nicaragua case and the Bosnian genocide case. In those cases, the International Court of Justice really separated out the conduct that was at issue, the conduct of the Contras in the case of the paramilitary, the Nicaragua case, and the conduct of the United States. The Court specifically said the conduct of the United States is attributable to the United States. The conduct of the Contras can only be attributed to the United States if there was effective control. And that's the test that you apply under Article 8.

Now, Canada laid out the framework here that needs to be applied. There's three types of conduct, and I said this in my opening statement and it was just a repetition of what we have been saying all along in our written pleadings.

There is, the conduct, the

adjudicative conduct of the UARB, that, acting as a court, has to apply a legal test to whatever rate is presented to it, if it's by Bowater Mersey or if it's by NewPage or if it was PWCC. They negotiated a rate that they wanted to live with and pay and do pay. That's the private conduct that allows Port Hawkesbury to supposedly be the lowest-cost mill in the world or North America, it constantly changes with the claimant. That is what enables it to pay for its electricity bills and that was a rate that was negotiated between two private parties.

Now, they took that rate, came to the board and had to pass a legal test. Does this proposed rate leave all other ratepayers better off with it than without it? That is the adjudicative conduct. That is what the board does. And this is exactly what, Dean Lévesque, what you were talking about, the kind of conduct where you have a court that's approving private transactions and so on. This is exactly the world that we are talking about and this is exactly what Canada has been saying all along.

That's not the conduct that pays for the mill's electricity. The board only

decided to pass a test, decide if the rate as proposed fulfilled the legal requirements. That action would be attributable to the state, but that's not what is at issue here. Again, I said this in my opening statement with respect to the Bilcon case. In the Bilcon case it was the Joint Review Panel's decision to reject the quarry project, that was the impugned or alleged internationally wrongful act.

That is separate from the regulatory conduct of the Government of Nova Scotia, the Department of Energy specifically. And, again, the claimant keeps coming back to passing regulations, it's just not true. The board -- the Department of Energy said there will be no RES costs, renewable energy standard costs, there will be none because we don't think they will ever come back online. It's true, they have never paid for it.

If the government paid for RES costs, if that came out of the government's pocket, that conduct would be attributable to the Government of Nova Scotia. It's never happened, so it's moot.

Similarly, there has never

been any costs being paid assumed by the government of when it comes to biomass. It's just a fallacy.

And, again, it's quite frustrating because the claimant keeps going back to this newspaper article, Exhibit C-51. We've heard this again that they try and attribute this cost savings from the actions of the government, you know, saying that there's this cost saving that goes, that's because of the government. It's -- the board was very clear. PWCC, the mill, PHP, pays for the steam it gets from the biomass plant, it pays for it. The board ruled it is not subsidized by other ratepayers. It's not a subsidy. They pay for it. That conduct is attributable to the private parties.

The regulatory conduct of the Department of Energy and the adjudicative conduct of the board are separate.

And that is a framework that is just basic and fundamental and it goes back to the Nicaragua case and the Bosnia case.

Very quickly. Claimant also brought up Article 11 of the ILC articles which encapsulates the adoption and approval. And,

again, we have dealt with this in our pleading so I don't want to talk about it too much.

But I, again, just emphasize that all you need to do is go back to the hostages in Teheran case. That's the case where you have a prototypical circumstance of Article 11 where a state adopts an action of a private actor as its own. In that case the revolutionaries had taken over the American embassy, that was private conduct. But then the government said, yes, we like this, we continue it on, we endorse it, we adopt it, we go on. Then Article 11 was implicated.

I don't think it needs to be said that the Government of Nova Scotia does not pay for the mill's electricity. That's a mill, it does it, it pays for its own electricity. There's not much more to say about this.

Unfortunately the claimant continues to come back to the wrong intellectual framework.

And I should say one last thing because this is another point that when they are saying that this is a defence of -- like using Canadian law as an excuse for non-compliance of

international law: That misses the point entirely. This is not an issue of using Canadian law as a defence for a breach of international law. We are talking about attribution, so let's stick to that question of attribution. The question that the claimant brought up is really irrelevant.

I will finally say, unless there's any questions on that, I just have one final point, factual matter that I think I have to correct the record on because the claimant brought it up sort of the first time that we heard it during the hearing in quite some time with respect to pensions, and I think it's egregious enough that it needs to be corrected.

You know, this was something, again it's been dealt with in Canada's pleading so I am a little surprised that we have heard about it at this late hour and I don't want to belabour it. But the, but the claimant is suggesting that the government over -- took over the pension liabilities and that's just false. It is not true. And I refer the Tribunal to Exhibits R-464 and R-465, which shows clearly that the Government of Nova Scotia did not take over the pension

liabilities of the Port Hawkesbury mill when it did. And I would like to contrast that with what the government did for Bowater Mersey when it decided to shut down the mill. It did exactly what the claimant is saying. It took over pension liabilities from the Bowater Mersey mill instead of leaving those pension holders out in the dark.

So, you know, again, Bowater Mersey is just one of these examples of a bit of double-speak, I would suggest, on the part of claimant because they would say that all of these things were given to Port Hawkesbury and they really were trying to do everything to harm us and harm us and harm us and yet on the other side at the exact same time here they were engaging in a partnership. And I think, you know, it really is relevant to hear what Mr. Montgomerie and Mr. Garneau were talking about. I think they were both fairly forthright with their respective goals, they both were honest in the idea that there was a difficulty here with this mill because of the market that it had and it was something that they tried to work on together.

Now Mr. Garneau had his own perceptions of how it was going to be and why it

was being done, the government had its views. But clearly what they were doing is they were working together to try and solve an issue that was in the best interests of the mill, the company, its stakeholders, and the community. And that's exactly what happened with Port Hawkesbury.

And that's not -- and there's a reason why the claimant never decided to reveal any of this and tell its expert Mr. Morrison about any of this or to reveal any of it until Canada brought it up, it's because it doesn't serve their legal strategy, it does not serve their purpose.

And I am just going to conclude because everything that the claimant's counsel ended with in that rebuttal is not just a repetition of what they have said, it is not a breach of the minimum standard of treatment under customary international law. The claimant can complain all it wants, but there is a standard, a threshold that exists in customary international law, and when you look at what the Government of Nova Scotia did, how it approached the measure, and every element of the decision-making process, the broader context that was happening in the province's forest industry as a whole,

specifically when it came to Resolute itself, and with respect to PWCC, the company that eventually bought the mill and continues to operate it; none of that breaches 1105 or 1102 in the NAFTA. This is a claim that should not have been brought.

And I would just like to end with the imploring the Tribunal to look at the evidence and look at the law and assess for itself what Canada has been saying and what the claimants have been saying, and I would respectfully submit that the claim -- that the arguments of Canada is more convincing and the Tribunal should dismiss the claim entirely.

I don't have anything else to say. If the Tribunal has any other questions I would be happy to take them, but otherwise I would again like to express the thanks on behalf of the entire group of my colleagues here in Canada. And again, I said it at the beginning of the presentation, to send my warm wishes to counsel on the other side as well, and especially to the Tribunal, and good health. We all wish that this was not the circumstances we were meeting in. I am glad that everyone is well now and I hope that continues to be the case for a long time to come.

JUDGE CRAWFORD: Thank you very much.

I have raised the question of post-hearing briefs and given the indication the Tribunal's preference in that regard, but we will include those in the letters we send out to you, probably tomorrow.

Do either of my colleagues have any last questions?

DEAN CASS: I just think that all of us should be joining together to wish you a happy birthday today.

JUDGE CRAWFORD: Thank you very much. It's not exactly what one wants to be doing on one's birthday but these things happen.

MR. VALASEK: Happy birthday.

JUDGE CRAWFORD: Thank you very much. And thank you very much for you company, it's been a tiring week.

The Tribunal will consult and meet as soon as can be conveniently arranged. And it's possible we may have some further questions for the parties, in which case they will be sent along. And that you will hear from the PCA as to progress of our deliberations and the date in

which the award will be released.

I wish to thank my collaborators on the Tribunal, Céline Lévesque and Ron Cass, for your enormous help and support. These issues are not easy, they are not issues on which everyone takes the same line necessarily, but they are issues which are better resolved in a collaborative exercise as seen by the attritioners' opposing emails. But I have been very pleased, indeed, with the way in which we have managed to get along.

So our thanks to the parties, for their very able argument and also for the very congenial manner in which they have run their respective cases.

And, finally, our thanks to the PCA staff and to the non-PCA staff who have been working, including Professor Freya Baetens, who have been an enormous help.

And you will hear from us in due course. Thank you.

--- Whereupon matter adjourned at 3:43 p.m. EST.