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

ARBITRAL HEARING ARGUMENT HEARD BEFORE PROFESSOR BERNARD HANOTIAU, DEAN RONALD CASS, PROFESSOR CÉLINE LÉVESQUE, held via Arbitration Place Virtual, on Monday, October 18, 2021, at 8:05 a.m. EDT

RESTRICTED ACCESS - VOLUME 1
REVISED TRANSCRIPT

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ALSO PRESENT:

Shyam Balakrishnan — Tribunal Assistant
Ashwita Ambast — PCA
Gaëlle Chevalier — PCA

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Arbitration Place Virtual

--- Upon commencing on Monday, October 18, 2021 at 8:05 a.m. EDT

PRESIDENT HANOTIAU: Good morning, ladies and gentlemen, good afternoon for others. We are going to spend these two days listening to your submissions. I am not going to go through the list of participants. You have received this list. I just will ask you to start with whether you have any housekeeping matters to address.

For Claimant first.

MR. FELDMAN: No, I don't think so. Thank you.

PRESIDENT HANOTIAU: And for Respondents?

MR. LUZ: We are ready to proceed. Thank you, Professor Hanotiau.

PRESIDENT HANOTIAU: Okay, so will start immediately with the opening statements of the Claimant.

One thing we have discussed among ourselves, there will be questions but unless you can answer by "yes" or "no" or one sentence, given the time constraints, we prefer

that you answer the questions tomorrow; is that correct? Is that okay for you?

MR. FELDMAN: Sure. Yeah, sure.

MR. LUZ: Wonderful for Canada as well. Thank you.

PRESIDENT HANOTIAU: Thank you.

So please go ahead.

SUBMISSIONS BY MR. FELDMAN:

MR. FELDMAN: Thank you very much and good morning especially to you, Professor Hanotiau --

MS. D'AMOUR: Sorry to interrupt, Mr. Feldman. Is this to be a public access session?

MR. FELDMAN: It will be interrupted and I will warn you periodically.

MS. D'AMOUR: Are we to be in public access currently?

MR. FELDMAN: Right now we are in public access.

MS. D'AMOUR: Can you just give me a moment, please. There is one issue with the stream so I want to double-check that we are

active on that.

MR. FELDMAN: Always happy if someone else has a problem.

MS. D'AMOUR: Thank you.

--- Brief pause taken.

MS. D'AMOUR: The Tribunal, it's up to you. Could we open the breakout rooms for a couple of minutes while we sort this out or would you prefer to stay?

PRESIDENT HANOTIAU: That should be all ready. We have very strict time constraints.

MS. D'AMOUR: I understand, I apologize.

PRESIDENT HANOTIAU: It's unacceptable we have to wait so long.

MS. D'AMOUR: There is an issue with the stream and the streamer is trying to fix it in the background. I am not certain what the issue is.

PRESIDENT HANOTIAU: You should have checked that before.

DEAN CASS: Is there a problem starting and going to public session while we are in progress?

MR. LUZ: That's why I would suggest perhaps we should go with no stream into restricted access session and proceed that way.

MS. D'AMOUR: Okay, and I will keep in touch with Ashwita in the meantime and I will let everyone know once the stream has been resolved. I apologize and thank you for your patience.

MR. FELDMAN: Good morning to everyone except for Professor Hanotiau, for whom I think it's good afternoon and especially, therefore, to Professor Lévesque and Dean Cass.

I am Elliot Feldman of Baker Hostetler appearing on behalf of Resolute Forest Products. We want to thank the Tribunal for convening so promptly after the appointment of a new presiding arbitrator and for accommodating all the suggestions of the disputing parties to the procedures to complete this arbitration.

We thank too the PCA for its cooperation and assistance in enabling a smooth transition, although perhaps not so smooth this morning, and Arbitration Place for its help with this hearing.

Long after Resolute filed its

first memorial in this dispute, we received from opposing counsel, as counsel for Resolute, a document that had not been produced previously in discovery. It is R-161 in this arbitration's record and this would then be in the closed session.

--- Whereupon Restricted Transcript Commences

[redacted]

MR. LUZ: I am sorry to interrupt, Mr. Feldman. I just wanted to make sure that we are in restricted access session because this document, among many others, have been designated as such.

MR. FELDMAN: I just indicated that this should be in closed session and I

understood from Arbitration Place that everything I am saying is in closed session.

MR. LUZ: Thank you.

MS. D'AMOUR: I confirm that we are in restricted access.

MR. FELDMAN: Are we staying in restricted access or do I need to signal when we are out of it?

MS. D'AMOUR: You will signal to me when we are out of restricted access and then I will bring in all of those individuals.

MR. LUZ: Thank you. And I apologize for interrupting.

MR. VALASEK: I need to interrupt now because I have been told, my client who is sitting in another conference room, there are two representatives, Mr. Vachon has not been excluded from the restricted access session.

So there are two client representatives that are participating in this Zoom, as I understand. Jean-Christophe Martel and Jacques Vachon.

MS. D'AMOUR: I confirm that these individuals are in the waiting room.

MR. VALASEK: Okay, I confirm

that it's been fixed. Thank you and sorry for the interruption. Thank you.

MR. FELDMAN: [redacted]

1 [redacted]

[redacted]

In our view, it was bad faith to take nearly a year to [redacted]

[redacted]

This Tribunal need not find bad faith in order to find for Resolute, but [redacted]

Most of the material designated in this arbitration as restricted access derives from [redacted]

Ironically, perhaps, very little has been designated as restricted or even confidential by the private party - principally, Resolute's [redacted]

I raise this issue because it has had and continues to have a practical consequence for these proceedings. Counsel for Canada likes to emphasize that it is able to compartmentalize restricted access information, enabling most of its presentation to be uninterrupted and public.

But counsel does not want to discuss very much the [redacted] Counsel

turned down again our most recent request to make public the [redacted]

In as much as these documents are central to Resolute's case, we generally are not able so easily to compartmentalize our presentation. When our presentation must be in closed session, it is almost always because of restrictions imposed by Canada, not by Resolute.

The next is then in public session, if you want to open, please.

--- Whereupon Restricted Transcript Ends

MR. FELDMAN: Tell me when I can proceed.

MS. D'AMOUR: Confirming that everyone's been readmitted.

MR. FELDMAN: Thank you.

The supercalendered paper industry is, and already was in 2012, in what

economists call secular decline. The shuttering of the NewPage mill in Nova Scotia in 2011 shrank the North American volume of production 25 percent and left only five significant producers on the continent, of which the largest, the three supercalendered paper mills in Quebec, was Resolute Forest Products, incorporated in Delaware in the United States. Since then, both producers in the United States have closed, most recently in 2020. A large mill in Europe supplying imports to North America has closed, as has one of Resolute's three mills. [redacted]

We are back in closed session, please.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Give me one moment. Confirming that you can proceed.

MR. FELDMAN: Thank you.

[redacted]

[redacted]

And this is now public.

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Confirming you can proceed.

MR. FELDMAN: The Government of Nova Scotia invited bids for the Port Hawkesbury mill hoping to find one that would take the mill on as a going concern.

After more than a year, only four bidders emerged: Two prepared to dismantle the mill and sell it off for scrap, a third with a reputation casting doubt on its ability to rebuild

and reopen.

There was, effectively, only one bidder, a Canadian company, Pacific West Commercial Corporation or PWCC, and it set a long list of prerequisites, fiscal and regulatory, before it would buy in.

When the Government of Nova Scotia began conveying assistance for the reopening of the Port Hawkesbury mill, Resolute began questioning the Government of Canada because Resolute feared the reports of massive subsidies could lead to a countervailing duty proceeding in the United States against all supercalendered paper from Canada, including Resolute's.

Resolute specifically warned the Government of Canada through its embassy in Washington and directly with the responsible minister in Ottawa of this possibility, but Canada opted to take no action to protect Resolute against possible trade barriers arising from Nova Scotia's treatment of Port Hawkesbury.

Meanwhile, the Government of the United States, under the auspices of the WTO, was also asking questions of Canada about the rumoured assistance of Port Hawkesbury. Canada

officially told the WTO there were no subsidies -- "nil", in WTO parlance -- and refused to share with Resolute its communications with the United States. Resolute's Access to Information requests was denied when the Government of Canada invoked national security.

In addition to massive financial support through an ensemble of measures requested by PWCC, the Government of Nova Scotia made regulatory changes to accommodate PWCC demands. PWCC said it would purchase and operate the mill only if it were assured of becoming the low-cost producer in North America. This phrase and promise became a refrain. Note in these following slides the frequency of its invocation.

Port Hawkesbury would reject -- would inject into the North American market a 25 percent increase in supply underwritten by the assurance and measures of the Government of Nova Scotia that it would be the low-cost producer on the continent.

PWCC warned the Government of Nova Scotia that being merely competitive would not be close to good enough. PWCC would not undertake to restart the mill unless it was

confident it would have significant cost advantages over all other competitors.

The object from the beginning was comparative and competitive. Port Hawkesbury had to overcome inherent cost disadvantages through government assistance that would not merely neutralize the disadvantages. Port Hawkesbury was to be better off than everyone else, enabled expressly by the Government of Nova Scotia. And as declining bandwidth increased, supply would force competitors, especially Resolute, to close mills. Port Hawkesbury expected, as the low cost producer, to be the last mill standing. The economics of paper mills requires they run 24/7. There's no way to reduce supply without ceasing to operate.

Prices did fall. Resolute closed one of its three mills, the one least cost effective. [redacted]

There's no dispute that the Port Hawkesbury mill would not have reopened but-for the fiscal and regulatory interventions of

the Government of Nova Scotia. Dr. Seth Kaplan concluded that Resolute would have fared much better in the market but-for Port Hawkesbury's reopening.

Canada's own expert, Peter Steger, concluded that Resolute [redacted] as a consequence of Port Hawkesbury's reopening. MIT professor Jerry Hausman calculated the range of Resolute's losses, limiting them to price erosion caused by Port Hawkesbury.

Canada disputes that the measures taken to resurrect the bankrupt Port Hawkesbury mill caused Resolute any harm, notwithstanding the Steger conclusion, but the law of supply and demand says otherwise.

Canada admits that Port Hawkesbury would not have reopened without government intervention but argues that everything done was lawful. What is lawful domestically, however, may not be lawful internationally.

Canada also sees other causes for Resolute's losses, but the treaty doesn't require that all damages be attributable to a single source. And, regardless, Drs. Kaplan and Hausman both took into account other factors and

concluded that nothing else had a greater impact on Resolute than the 360,000 metric tonnes additional of product introduced into the market by Port Hawkesbury.

Canada contends that the disputed government measures were exempt from the scrutiny of this Tribunal because they were subsidies or the results of government procurement.

Of course, in another international forum, Canada had denied there were subsidies and, regardless, not all the measures could be construed to be subsidies or procurement. Critical measures were regulatory. There was no deal and no reopening without regulatory relief from environmental standards, nor was a reopening possible without a regulatory order to operate a boiler full-time to produce steam, nor was there government procurement in as much as the government did not entertain any bids for anything it bought to benefit Port Hawkesbury.

These defences, moreover, that would apply to Article 1102 cannot apply to Article 1105.

Our presentation today tracks

the memorial submitted last week focusing on Nova Scotia's measures, Canada's defence of them and what the applicable treaty and customary international law, including the judgments of other arbitral tribunals, have to say about them.

It's difficult for Canada to dispute the most essential facts. The industry was in secular decline. The Port Hawkesbury mill was dead and could be revived only with massive government intervention. Re-entry into the North America supercalendered market was guaranteed to inflict harm on the few competitors remaining in business.

This next short statement is restricted.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Confirming you can proceed.

MR. FELDMAN: Thank you.

[redacted]

[redacted]

We can be public again.

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Confirming you are in public access.

MR. FELDMAN: Thank you.

The Government of Nova Scotia could not find anyone to revive and operate the mill without promising to fulfil the buyer's demanded to make the buyer the low-cost producer in North America, a promise that, as demand for the product continued to decline, the Port Hawkesbury enterprise would be the last one standing.

There are a lot of details supporting these facts. The questions before the Tribunal are whether the ensemble of measures assembled and delivered by the Government of Nova Scotia - regulatory and fiscal - and taking into account the totality of the circumstances, can be attributed to the government and whether they contravened the rights and protections of an American investor in Canada pursuant to the North American Free Trade Agreement.

Did Canada violate its promises to administer fair and equitable and non-discriminatory treatment when it bankrolled and lobbied and legislated on behalf of a chosen national champion to compete with the investments in Canada of an established private American investor?

Paul Levine will demonstrate why the measures, including especially the electricity package delivered to Port Hawkesbury should be recognized as state actions fully attributable to the Government of Nova Scotia.

Martin Valasek will make the case that Canada's measures, when taken together in the totality of circumstances, breached Canada's obligations pursuant to NAFTA Article 1102, pursuant to the terms of the treaty, customary international law and the opinions of other international Tribunals when presented with similar - although never identical - facts.

Mike Snarr will do the same for Article 1105.

I will close with a few words connecting the measures to damages, the question of causation and how Professor Hausman measured

the damages.

We welcome your questions as we go or following the presentation or following both Resolute's and Canada's presentations at the Tribunal's discretion.

Thank you.

PRESIDENT HANOTIAU: Thank you very much, sir.

Mr. Valasek is going to continue?

MR. FELDMAN: No. Mr. Levine.

PRESIDENT HANOTIAU: Mr. Levine, okay.

SUBMISSIONS BY MR. LEVINE:

MR. LEVINE: Good morning and good afternoon. My name is Paul Levine and it is a pleasure to be here before you today.

Canada is responsible for the entirety of the bailout package of the Government of Nova Scotia, what I will call "the government".

Next slide, Ricky.

The entirety of this package was necessary for PWCC to purchase the mill. As PWCC stated in its evidence to the Nova Scotia Utility and Review Board -- what I will call "the

rate board" here today -- PWCC would not have purchased the mill if the government had not amended its package to provide further compensation for changes to the electricity rate. It was all or nothing to PWCC.

Next slide.

A list of those measures shows a comprehensive set of assistance given to PWCC, necessary to make the mill the lowest-cost producer of supercalendered paper.

There was a $24 million forgivable loan; a $40 million forgivable credit facility; a $1.5 million productivity grant; a $1 million marketing grant; a $38 million outreach agreement; a purchase of land by the government for $20 million; the advantageous electricity rate; saving the mill from having to pay for the biomass plant in full; renewable energy rate protection; harvesting of $1 billion in tax losses that could include assets outside of Nova Scotia; pension relief; a forestry license to obtain the wood to make paper; debtor in possession financing; and property tax relief.

The package was all or nothing to PWCC.

Next slide, Ricky.

There is one measure for which the parties dispute attribution: The electricity package.

As detailed in our initial memorial at paragraphs 118 through 120, the electricity package provided PHP with a significant cost savings over the mill's prior electricity rate. This rate does not include extra savings PHP received through the electricity deal, such as approximately $20 million charge to Nova Scotia ratepayers when the government passed regulations to make the biomass plant run full-time for PHP's benefit, or other benefits PHP received when the government modified the bailout package given to the mill as a result of changes to the electricity rate.

Canada contends that the electricity deal received by PWCC is not attributable to the government. According to Canada, the electricity deal was negotiated between two private companies. But like the remainder of the package, Canada is responsible for the electricity rate.

Next slide.

As we have laid out in our memorials, there are multiple reasons why the electricity rate package should be attributable to the government who went to extraordinary lengths to make sure PWCC received the rate it demanded.

First, Nova Scotia took direct action to ensure passage of the rate through regulations and other government commitments. These actions were necessary for PWCC to obtain the entire rate it sought from the rate board.

Second, Nova Scotia organs also took actions to pass the rate. The rate was approved by the rate board, itself a state organ, and the government took other steps to ensure rate passage. These actions are also sufficient under ILC Article 4 to attribute the rate to Canada.

Third, even if the rate is not attributable to Canada under Article 4, it would still be attributable under ILC Articles 8 or 11. Government actors took extraordinary steps to ensure passage of the rate and coupled with these other facts, demonstrate the rate should be attributable to Canada.

Next slide.

Before it would consummate its

purchase of the mill, PWCC demanded that the mill receive an electricity rate that was "greater than the level necessary merely to operate competitively".

You can see on this slide here, Slide 16, the testimony -- the evidence of PWCC that it put before the rate board.

In the highlighted portion, it states:

> "PWCC does not consider it appropriate to make an investment in the Port Hawkesbury mill unless it has confidence that there is a solid long-term foundation for success, and it is nowhere near sufficient to simply obtain an electricity costing structure that would allow it to 'merely' operate competitively."[as read]

That's what PWCC wanted out of the electricity rate. Something that would allow

it to operate more than merely competitively.

Go to the next slide, please.

The power company, Nova Scotia Power Incorporated, called the highly advantageous rate package sought by PWCC for the mill an integrally connected set of components. You can find this at Exhibit C-164 at paragraph 8.

The rate package ultimately agreed upon addressed multiple interrelated sets of components. First, there was a fixed cost contribution by the mill of $2 per megawatt hour which, in the words of NSPI, "reflects a small contribution to fixed costs."

You can find that quote at C-211 at page 13.

There would also be incremental costs such as the cost of fuel with PHP paying the actual cost of electricity the mill would be purchasing.

There was a seven-and-a-half year term which guaranteed the mill a stable rate for a long period of time.

There was renewable energy guarantees. The government had committed to power 25 percent of the province's energy supply from

renewable sources by 2015, and by bringing PHP back online, there was a chance that the mill, which would be the province's largest energy consumer, would require the use of more renewable energies.

As you will see later, this became a sticking point in the negotiations between the parties.

There was biomass for steam generation. PHP needed steam generated from the on-site biomass plant to make the paper, but obtaining that steam required the biomass plant to run full time, when PHP only needed a fraction of the production.

And, originally, there was a tax component to this deal. NSPI and PHP would form a partnership so that PHP could pay its electricity payments to NSPI through dividends, allowing PHP to offset these payments through the billion dollars in tax losses incurred by the prior owners, NewPage Port Hawkesbury. Canada Revenue Agency denied the advanced tax ruling that PWCC sought for this structure.

The two renewable energy sources, the renewable energy regulatory

guarantees and the biomass plant, those two issues were still not resolved at the time of the rate board hearing for PWCC's load retention rate request.

Next slide, Ricky.

PWCC was adamant [redacted] that it would not pay additional amounts for renewable energy if the mill returning online triggered a need for NSPI to buy renewable energy.

And on this page, you will see an excerpt of the note taken by PWCC from its negotiations with NSPI and the government for the rate. And here it says, from Ron Stern, the president of PWCC, that they can't handle any RES cost increases, and these cost increases, it has to be never. PWCC never wanted to have to pay for those cost increases.

Next slide, Ricky.

This issue festered until the actual rate board hearing. And this is a transcript excerpt from that hearing. And as you can see here, the chair's questioning Ron Stern and the chair states:

"Okay. And I think,

Mr. Stern, my next question is for you and some of this may get answered in the material that's going to be filed, but -- and I am coming back to the risk to other ratepayers with respect to RES requirements, and I understand it's your position there's enough renewables on the system to accommodate this load. But it seems to me that risk could be eliminated completely by an action of the Province of Nova Scotia."[as read]

And a little bit later in the questioning, the chair states:

"Would you agree with me that a government that wants this transaction to happen should seriously consider taking away this

risk?"[as read]

Mr. Stern:

"I agree, sir, it would make things easier for all of us."[as read]

So right here, the board chair is trying to determine who is going to have to incur any potential costs of increased RES requirements. Is it going to have to be PHP or other ratepayers or someone else? And if it's other ratepayers, the board doesn't have the power to force that because the rate has to make the ratepayers of Nova Scotia better off in approving this load retention rate.

Let's turn to the other renewable energy issue related to the biomass plant.

Next slide, Ricky.

NSPI's vice president testified during the rate board hearing that the biomass plant would run infrequently during 2013 and 2014, and it may not even run in 2015. And here is an excerpt of the board decision on the rate argument regarding that testimony.

And it states here:

"The biomass plant would likely run infrequently in 2013 and 2014 and it may or may not run in 2015 depending on generation additions."[as read]

But the plant would still have to run for PHP because PHP was banking on receiving 24 percent of the steam generated by the plant to help make paper. For PHP to get its steam, the biomass plant would need to run full-time.

Running the biomass plant full-time would cost additional amounts that PWCC and PHP were not going to pay. The power company's president testified at the rate board hearing that the cost to run the biomass plant for PHP's benefit could easily swamp certain payments from PHP. And you can find that excerpt at C-184, paragraph 174.

One prediction was that the additional cost to run the biomass plant would cost ratepayers approximately $7 million per year. You can find that at C-184, paragraph 175.

Now this was not an issue that had ever been discussed during the extensive rate negotiations between PWCC, NSPI and the provincial government. We identified that in our reply memorial at paragraph 171.

Next slide, Ricky.

PWCC, of course, wanted a rate that ensured more than mere competitiveness, so it refused to accept any changes or tweaks to its rate application.

This is an excerpt of the hearing with questioning of Mr. Ron Stern during the rate board hearing. And he is asked whether he is going to tweak any of the rate applications and Mr. Stern says, essentially, "I am not willing to do that. We have gone as far as we can in terms of economics and commitments".

So PWCC is not willing to change the rate application.

Now, the rate board stated in its final decision at C-184, paragraph 177, that it became clear that during the course of the proceeding, that without some resolution to these two RES issues, the LRT would not likely recover all of its incremental costs.

And the test for the approval of a rate, which can be found in paragraph 8 of the first witness statement of Murray Coolican, requires that retaining PHP's electricity load at the new agreed upon rate be better for existing electricity customers than losing the customer's load. So absent resolution of the two renewable energy issues, customers would not be better off if PHP returned to the power grid.

With the rate board questioning whether it would approve the deal, the government resolved these two issues to ensure passage of the electricity deal.

Next slide, Ricky.

Slide 22 includes an excerpt of a letter that the Government of Nova Scotia provided to the rate board just days after the hearing on July 20th, 2012. And it addresses these two issues, the biomass plant issue and the incremental RES issue.

And it states on the first one for the biomass plant that:

> "The government commits to ensuring that PWCC receives the full benefit

of the proposed arrangement it reached with Nova Scotia Power Inc."[As read]

And for the incremental renewable energy issue, the government commits that:

"Neither PWCC nor other ratepayers will be required to pay these incremental costs."[as read]

Any of the additional costs brought back on by PHP's load, the government is going to ensure PWCC or the ratepayers will not have to pay.

Now if we could please go to restricted access session for a short moment here.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Yes, confirming you can proceed.

MR. LEVINE: Thank you very much.

[redacted]

[redacted]

And we can return from the restricted access session now.

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Confirming you can proceed.

MR. LEVINE: The biomass regulations were amended in January of 2013. These regulations mandated the plant run full time. You can find a copy of these regulations in the record at C-217. The result of these regulations is that the ratepayers paid $7 million more for the next three years to cover the additional cost to run the biomass plant, roughly $20 million.

Now, Canada, in its last -- in the last hearing, it stated that these costs were all emanating from a newspaper article, and I am

just going to quote a little bit from page 1358 of the transcript of that prior hearing.

This is Canada's argument:

> "Similarly, there's never been any cost being paid or assumed by the Government of Canada 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 have heard of this again and again that they try and attribute this cost savings from actions of the government, you know, saying that there was this cost saving that goes, that because of the government. 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."[as read]

But if you take a look at the slide we have on the screen right now, the cost to the ratepayers was confirmed in sworn testimony to the rate board in a later proceeding. This is at C-235.13, and this is questioning of an NSPI witness during a rate board hearing.

It says:

"You said that previous analysis had shown a cost in the range -- or a differential in the range of 6- to $8 million if Port Hawkesbury biomass plant was dispatched based on price. Is that

correct?

Yes, yes, that's correct.

And when was that analysis done?

That was done in June of 2015."[as read]

I invite the Tribunal to read the remaining portion of that rate board hearing, which can be found at C-235, to demonstrate that, indeed, NSPI showed and testified that the ratepayers had picked up this additional expense.

Now, Canada also argues that no payments were ever made by Nova Scotia under its renewable energy commitment and, therefore, attribution cannot be found. But the intervention that matters is not the fact of payment. It is the government commitment and action. A government need not make a payment for attribution to occur.

As we saw with the biomass plant, the government did not make a single payment. The Nova Scotia ratepayers picked up the tab for the biomass plant running full time. But the government's regulations require the ratepayers to make these payments. That is why

attribution is proper.

And that's the same, the same is true for the renewable energy commitment.

Canada argues that enough renewable energy was coming to the power grid in Nova Scotia to resolve these issues, but these arguments were made to the rate board during the load retention rate hearing for PWCC, and that board was unpersuaded, as you can see from the transcript portion I read earlier involving the questioning of Mr. Stern by the chair of the rate board. The board in PWCC demanded provincial action, which was provided. The government's conduct, by making commitments to PWCC, PHP, and the rate board, is what makes that rate attributable to the government.

Next slide.

The ILC articles on state responsibility support Resolute's position. On this slide, you'll see an excerpt from Article 4 which states that the conduct of any state organ shall be considered an act of state under international law, whether the organ exercised legislative, executive, judicial or any other functions, whatever position it holds in the

organization of the state, and whatever its character as an organ of the central government or of a territorial unit of the state:

> "Article 4 makes Canada responsible regardless of the action. The Tribunal in von Pezold versus Zimbabwe explained that responsibility for the actions of these state organs is unlimited provided the act is performed in an official capacity."[as read]

You can find that in the record at RL-121, paragraphs 443 through 445.

It is the government action, not the ultimate payment of funds that is the key event, and that government action makes the rate attributable to Canada.

The government actions secure the renewable energy standards and the biomass plant issues raised by the board were not the only measures that the province took related to energy for PWCC.

First, the rate board itself is a state organ.

Canada contends the rate board is an independent body with quasi-judicial functions, but even a judicial and regulatory body can be an organ of the state, according to Article 4. As the articles make clear in its commentary, no distinction is made for the purpose between legislative, executive or judicial organs. That can be found at CL-145, Article 4, commentary paragraph 6.

The rate board has all the hallmarks of a state organ. Its members are appointed by the government. The members are considered government employees. The government determines the member's remuneration. The government can reject or approve the rules of the rate board, the rate board has subpoena power and can issue orders that have the force and effect of a court, and decisions of the rate board are appealable to the Nova Scotia Court of Appeal, the highest court in Nova Scotia.

Even NSPI knows this. It said in an article that setting power rates was a matter for the province's Utility and Review Board

to decide. You can find that at R-324.2.

I'd like to move back again briefly into restricted access, please.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Confirming we are in restricted access.

MR. LEVINE: Thank you, Heather.

Ricky, can you turn to the next slide, Slide 25, please.

[redacted]

[redacted]

Can we turn to the next slide and end the restricted access session.

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Confirming we are out of restricted access.

MR. LEVINE: Thank you.

Now, the NAFTA Tribunal in Bilcon versus Canada, which can be found at CL-104, found similar conduct attributable to Canada.

There, an independent regulatory body called a Joint Review Panel, held hearings, operated like a court and had its members appointed by a Canadian federal minister. The Joint Review Panel submitted a report to the Canadian federal minister. That minister, along with other Canadian cabinet members, could approve or reject the report of the Joint Review Panel.

The Bilcon Tribunal found attribution. It stated:

> "The Joint Review Panel was de jure an organ of Canada, equipped with a clear statutory role that included making formal and public recommendations to state

authorities which the latter were obliged by the law to consider - and indeed ended up accepting."[as read]

The Bilcon Tribunal found that the Joint Review Panel's actions and the minister's final decision would also be sufficient for acknowledgement and adoption under Article 11 of the ILC articles, which provides that conduct which is not attributable to a state, under the preceding articles, shall nevertheless be considered an act of state under international law, if, and to the extent that the state acknowledges and adopts the conduct in question at its own.

And, again, the ILC articles are available at CL-145.

Bilcon is materially indistinguishable from the case here. A quasi-regulatory body approved actions in both Bilcon and here. [redacted] If attribution was proper in Bilcon, attribution is also proper here.

Next slide.

Now, as I stated earlier, the electricity measures were themselves integrally connected. PWCC needed all of them to make the rate work, but the electricity rate that was ultimately approved was itself integrally connected to the remainder of the assistance package.

One of the features of the original electricity deal enabled PWCC to take advantage of the tax losses it was inheriting from NewPage when PWCC bought the mill.

PHP and NSPI were going to form a partnership and PHP would use its tax losses to offset gains to the partnership while paying tax advantageous dividends to NSPI for electricity.

But Canada Revenue Agency did not approve this structure, almost cratering the entire deal. This forced the government to go back to the drawing board, with one of the changes made was turning the $40 million unforgivable loan into one that is now forgivable under certain conditions, linked to additional payments made by NSPI, the power company, for taxes.

The government earns more tax revenue from electricity expenditures under this new proposal and it can thus forgive more in loans. Another benefit allowed PWCC to access over $1 billion in losses to offset tax gains from assets outside of Nova Scotia. Meaning that other PWCC businesses, including those not in Nova Scotia, could take advantage of tax losses that were generated only in Nova Scotia. In fact, resolving this issue was the key to the dramatic midnight change that almost nixed the entire deal on September 21st, 2012, only to have the deal resuscitated on September 22nd, 2012.

So the electricity deal rate went up some, but the Nova Scotia rejiggered the assistance package to reach the same result.

Ms. Chow, a Canadian witness, explained that these changes were linked to the electricity deal.

She stated:

> "The government is only required to forgive as much of the loan as it receives from corresponding tax revenue

from NSPI."[as read]

You can find that statement in her witness statement at paragraphs 9 and 10.

Next slide.

Ms. Chow also confirmed the link between the electricity deal and the remainder of the bailout package in her oral testimony. As she said in referencing the changes to the package related to the electricity deal:

"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]

The electricity deal was linked to other assistance provided by the Government of Nova Scotia.

Next slide.

But it wasn't just the Nova Scotia government that linked the electricity rate to the remaining issues, so did PWCC. You saw this slide before earlier in my presentation.

And as PWCC told the rate board, it viewed the benefits that it received from the changed electricity deal provided by the Government of Nova Scotia as materially similar to the original deal package.

> "QUESTION: Would PWCC have agreed to the acquisition of NPPH and the restart of the mill, absent a favourable advanced tax ruling from Canada Revenue Agency if the provincial government had not subsequently revisited its support package with PWCC?
>
> "ANSWER: No."[as read]

But that is not all the government did for PWCC to ensure passage of the electricity rate.

The government went to extraordinary length and negotiation between PWCC and the power company. The government hired a consultant, Todd Williams. Mr. Williams was heavily involved with developing the power rate sought by PWCC. For example, he was tasked with multiple items in the power plan including the process for obtaining the regulatory approval from the rate board.

You can find some additional evidence of that in our initial memorial at paragraph 58.

The government, according to a senior government Department of Justice attorney, determined that Mr. Williams would be a valuable expert witness in helping to pass the rate package before the rate board, even though the government typically doesn't sponsor expert witnesses.

You can find evidence of that at C-147 at page 107 of 165.

A list of the tasks Mr. Williams assisted on can be found at paragraph 181 of our memorial and it includes a multitude of input on how to develop the load retention rate. As a government representative

said, Mr. Williams played a pretty important part in getting the parties to where they are.

You can find that at C-177 at page 784.

Next slide.

The Government of Nova Scotia also provided assistance at the load retention rate hearing to help obtain passage of the rate. And on this screen here, this is an excerpt of the opening statement of Nova Scotia to the rate board. I don't want to read the whole thing, but as you can see from the highlighted portions on this slide, the government made a very, very strong showing, fooled PWCC to obtain this rate that was sought.

Nova Scotia knew what was at stake and it did everything possible to ensure PWCC's rate package was approved. It provided Todd Williams, it made commitments to the board to resolve issues raised with the rate package, it reconfigured the assistance package to PWCC to compensate the company for a higher electricity rate.

We think all that is evidence of direct state action attributable to Canada

under Article 4 of the ILC articles.

But, if not, Articles 8 and/or Article 11 would both be satisfied here.

I now turn to my colleague Martin Valasek to address Canada's breaches of Article 1102.

SUBMISSIONS BY MR. VALASEK:

MR. VALASEK: Professor Hanotiau, Dean Lévesque, Dean Cass, it is a pleasure to be appearing before you. My name is Martin Valasek and I will be addressing Article 1102 and the related question of Article 1108(7).

I am sure you have read and reread the relevant provision. We are concerned in this case with Article 1102(3):

> "The treatment accorded by a party under paragraphs 1 and 2 means, with respect to a state or province, of course Nova Scotia is a province of Canada, 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]

My presentation will consist of four parts: Part 1, the proper interpretation of Article 1102; Resolute's burden for differential treatment; Canada's burden to justify the measures; and, finally, the exception of Article 1108(7).

The Tribunal requested that we specifically address in more detail, both in our prehearing brief and in our submissions today, how the Tribunal should interpret the notions of "treatment" and "in like circumstances" in connection with 1102(3), and also the notions of procurement and subsidies in connection with 1108(7).

This will be the focus of my presentation and I will address each of these separately and in some detail.

But before getting to these individual components of the argument on liability

under 1102, I will address the key difference between the parties on the interpretation of Article 1102, namely the role of nationality-based discrimination in the analysis.

The main difference between the parties in the overall approach to 1102 relates to which party has the burden to show either improper or proper motivations for the differential treatment experienced by Resolute and its Quebec mills as compared to PWCC and Port Hawkesbury Paper.

It is the Claimant's position that the proper approach to 1102 proceeds through two stages: First, the Claimant's burden of establishing prima facie differential treatment in like circumstances; and then the Respondent's burden of justifying the differential treatment.

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

In the second stage, the

Respondent's state justification must satisfy two conditions. First, 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 the slides down for now.

As we explained at length in the 2020 hearing and in our submissions, this position is based on a long line of cases that have interpreted and applied Article 1102. I refer notably to the three-part UPS test for differential treatment and the Pope & Talbot test for the justification of measures that prima facie accord differential treatment.

Contrary to the well-established meaning of Article 1102 and the consensus view on how it should be applied, Canada has argued in this case, at least until its summary memorial, that it is Resolute's burden to prove that the Government of Nova Scotia differentiated between Port Hawkesbury Paper and Resolute on the basis of nationality.

Canada's case was unconvincing

for the many reasons we addressed in our submissions and at the 2020 hearing. I will highlight just two.

First, while Canada kept insisting that it was Resolute's burden to establish "nationality-based discrimination", it never explained exactly what it meant by that concept.

Ricky, Slide 35, please.

Even the Tribunal, in its Question 14(a), had picked up on the incoherence of Canada's position, asking a question that Mr. Luz never answered.

Second, Canada kept insisting, wrongly, that the Tribunal must accept its position based on the coordinated submissions of all the NAFTA parties, including the US and Mexico on this issue. In the end, Canada conceded at the 2020 hearing that the coordinated views of the NAFTA parties do not establish a governing norm that the Tribunal must apply.

Well, it seems that Canada has finally come around to agreeing with us.

In its summary memorial, Canada finally seems to acknowledge that it is, in

fact, Respondent's burden to show that measures that presumptively violate Article 1102 are neutral from a nationality point of view. See paragraphs 46 and 47, in particular, of the summary memorial.

Canada seems to acknowledge the distinction between Resolute's burden to establish the three elements of the UPS test, and its own burden to justify the measures if Resolute satisfied the three-part test.

The framework for the Tribunal's analysis under Article 1102 is therefore clear, and it is the approach long established in the relevant cases, as Resolute has been arguing from the very beginning of this case.

First, the Tribunal should determine whether Resolute has discharged its burden of establishing differential treatment in like circumstances based on the three-part UPS test. At the 2020 hearing, we showed that Resolute has discharged that burden and we will go through it again this morning.

Second, because Resolute has satisfied the 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. This will allow me to respond to the Tribunal's request to specifically address how it should interpret the notions of "treatment" and "in like circumstances".

According to the three-part UPS test, Resolute needs to establish, one, 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.

I must emphasize again my earlier point about burden, which really cannot be overemphasized. Once the Tribunal determines that Resolute has satisfied this three-part test which excludes any consideration of nationality beyond

the fact that Resolute, as a US national, received less favourable treatment than the most favourable treatment accorded to a Canadian national, the burden shifts to Canada. And the Tribunal then must determine whether Canada has been able to justify the differential treatment under the two-part test set out in Pope & Talbot.

I will now address treatment, the first element of the UPS test.

We explained our test for treatment in the 2020 hearing in response to Question 16 from the Tribunal. Question 16 asked the parties what the exact test should be.

We propose a test inspired by the cases arising out of the measures adopted in Mexico relating to its sugar industry which affected producers of high fructose corn syrup that were competing with cane sugar.

That test is as follows:

> "A government accords 'treatment' to a foreign investor or its investment where it adopts a policy favouring its own investor or

investment whose objectives can only be achieved when it produces an effect on the foreign investor or its investment."[as read]

The Tribunal's findings in respect of the corn syrup tax on bottlers in Mexico is analogous to the situation here, as we explained in detail in paragraphs 204 to 208 of our memorial and paragraph 251 of our reply memorial.

Canada's attempts to distinguish those cases have nothing to do with the finding as to what constitutes treatment.

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

MS. D'AMOUR: My apologies for interrupting, Mr. Valasek. The public stream is back up and running. I just want to confirm that we can be in public access on the You Tube stream.

MR. VALASEK: Yes, you may.

MS. D'AMOUR: Okay, thank you very much.

MR. VALASEK: So the test is not meant to capture mere incidental effects, but rather, probable and foreseeable adverse effects. As the Tribunal found in paragraph 248 of its jurisdictional decision when it decided that the Nova Scotia measures related to Resolute and its investments outside Nova Scotia, the Nova Scotia measures:

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

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

> "Does not suggest that it was specifically targeted

by the Nova Scotia measures, it is open to it to establish on the merits a breach of Article 1102 on some other basis."[as read]

That was paragraph 290 of the jurisdictional decision.

Heather, we will be going into restricted access session now, please.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Just give me one moment. Okay, confirming we are in restricted and the public stream has stopped.

MR. VALASEK: Thank you.

Again, the test for treatment is not meant to capture mere incidental effects, but rather, probable and foreseeable harm. Here, we more than satisfy the test for treatment.

[redacted]

[redacted]

To break this down further,

[redacted]

1 [redacted]

[redacted]

This is the transcript from the cross-examination where I asked:

[redacted]

[as read]

That was in his witness statement:

"ANSWER: [redacted]

[redacted]."[as read]

This is s a continuation.

"QUESTION: [redacted]

[redacted]"[as read]

I asked Mr. Montgomerie about [redacted]:

[redacted] --"[as read]

I am skipping a little bit in the text:

[redacted]

1 [redacted]

[redacted]"[as read]

[redacted]

"[redacted]

"ANSWER: [redacted]"[as read]

And then another point in his cross:

"[redacted]

[redacted]."[as read]

And finally:

"[redacted] --"[as read]

[redacted]:

"-- [redacted]

[redacted]

"ANSWER: [redacted]"[as read]

[redacted]

For example, [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

"ANSWER: [redacted]

[redacted]

1 [redacted]

13 "ANSWER: [redacted]

[redacted]"[as read]

[redacted].

"In that capacity, on any issue of importance, you briefed the minister of the department?

"ANSWER: In the context of this file --"[as read]

And, I am sorry, but I am reading above the highlighting. It's just a feature -- I think -- anyway, I am reading at the top left hand:

"In the context of this file, I was asked by the premier to chair a

working committee once the two mills were going down. So, in effect, I was basically reporting to the deputy minister, to the premier and to the premier directly in this file.

"QUESTION: Right. [redacted]

[redacted]

[redacted] It was the premier actually asked me to lead this group."[as read]

And then we have the premier's statement when he announced the reopening of the mill and described the government's measures that would:

"Help the mill become the lowest-cost and most-competitive producer of supercalendered paper."[as read]

Again, I don't have that up but I will give you the reference. It's Exhibit C-324.

Ricky, you can take the slides down.

Here, [redacted]

[redacted] the government's decision to adopt the measures in support of PWCC and Port Hawkesbury's supercalendered paper operation accorded treatment to Resolute and its investments that produced supercalendered paper.

In the 2020 hearing and in the summary memorial, Canada has attacked our position from a number of different angles but none of the arguments hit the mark.

On the one hand, at the 2020 hearing, Mr. Luz characterized our argument as claiming [redacted]

[redacted]

In paragraph 47 of its summary memorial, Canada characterizes Claimant's motion of treatment as a "remote indirect adverse effect".

At the 2020 hearing, Mr. Luz put it this way:

> "What Resolute's concept of treatment really is is that a government's treatment of a private company in one province, Nova Scotia, helps that company reopen and, in turn, treats the global SC paper market which, in turn, caused a multitude of other actors in that global market over which the Government of Nova

Scotia has no control, customers and competitors to, in turn, treat Resolute's mill in another province, Quebec."[as read]

That's at page 242 of the transcript.

But Canada 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 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, [redacted]

[redacted] But, again, Canada is missing the point. 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]

[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 the laws of demand.

The factors that are not within the government's control are therefore irrelevant. The only relevant factor that -- the only factor relevant to the harm [redacted] 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 also tried 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."[as read]

That's at page 242 of the transcript.

But the Tribunal will appreciate that: One, Resolute has investments in Canada, just like the Claimants had investments in Mexico in the sugar cases; 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 issue 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 the 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 [redacted]

[redacted] which is an issue we will get to in a little bit.

That's the end of the restricted access session.

--- Whereupon Restricted Transcript Ends

PRESIDENT HANOTIAU: Mr. Valasek, at one point, we have to have a break. Whenever it's convenient.

MR. VALASEK: Now would be a convenient time if it's convenient for everyone.

PRESIDENT HANOTIAU: Okay, let's have a ten minute break.

MS. D'AMOUR: Excellent. I will open the breakout rooms for everyone.

--- Upon recess at 9:36 a.m.

--- Upon resuming at 9:46 a.m.

PRESIDENT HANOTIAU: You have the floor, Mr. Valasek.

MR. VALASEK: Thank you very much, Mr. President.

When we paused, we were in a natural break. I'd completed the discussion of treatment and I am now turning to like

circumstances.

Numerous tribunals and reviewing courts have recognized that determining whether a Claimant is in like circumstances and whether the treatment is in like circumstances is a highly fact-specific exercise.

For example, in Pope & Talbot, the Tribunal wrote:

> "It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, circumstances are context-dependent and so forth."[as read]

And I have given you a number of different cases making that point up on the screen.

As the Tribunal had noted in its Question 17 in the 2020 hearing, the parties, in their respective submissions, had come to discuss numerous issues in passing that bear on like circumstances. And we showed in the 2020 hearing that these issues can be organized into

relevant factors which can then be considered against the facts to guide the analysis of whether Resolute and its Quebec mills were in like circumstances with PWCC and Port Hawkesbury Paper.

First is the market factor. Are the foreign investor and domestic investor operating in the same market?

Then there is the product factor. How similar are the products or services being offered by the foreign investor and domestic investor?

Next slide, please, Ricky.

For this factor, for example, one can refer to the Corn Products case at paragraph 126 where the Tribunal wrote:

> "Where the products at issue are interchangeable and indistinguishable from the point of view of the end users, the products and therefore the respective investments are in like circumstances."[as read]

Next, there's the policy

factor. What is the government's goal in adopting and implementing the measures?

Again, in the CPI case, the Tribunal wrote at paragraph 136 that it:

> "Cannot escape the conclusion that the producers of like products which were directly competitive were in like circumstance." -[as read]

And this is the key part -

> "as regards a measure designed expressly for the purpose of affecting that competition."[as read]

Also important is the jurisdictional factor. Is it relevant that the foreign and domestic investor are located in the same jurisdiction? This is important in certain cases, notably where a complainant is complaining about a regulatory measure of general application.

In the Merrill & Ring case, the Tribunal found that an investor subject to

federal restrictions applicable to all operators on private timber lands was in like circumstances with other operators subject to the same regulations, not to operators on BC's publicly-owned timber lands that were subject to provincial regulations on the public lands.

And then, finally, this brings up the related implementation factor.

Next slide.

Are the measures a law or regulation of general application in the territory, or are they measures targeted and specific in scope or effect?

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

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

In our submission, that

exercise results in the following observations, which we say the Tribunal can take into account and on which the Tribunal can form a conclusion that Resolute and its Quebec mills were in like circumstances to PWCC and the Port Hawkesbury mill in Nova Scotia.

I'd like to go into restricted access session, please.

--- Whereupon Restricted Transcript Commences

And, Ricky, on the script, we are now -- you have already gone to Slide 56 so just stay there.

MS. D'AMOUR: Thank you. Confirming we are in restricted access.

MR. VALASEK: As the Tribunal acknowledged in the jurisdictional phase, Port Hawkesbury and several of Resolute's mills were in the same North American market of supercalendered paper. They were direct competitors. [redacted]

[redacted]

Next slide:

"[redacted]

"[as read]

[redacted]

[redacted]"[as read]

We can now end the restricted access session.

--- Whereupon Restricted Transcript Ends

Go forward, Ricky, for the slide, please, yeah.

MS. D'AMOUR: Thanks. Confirming we are in public access.

MR. VALASEK: 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 national champion in the SC market -- 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 of the quotes we looked at under treatment but that same evidence is relevant here.

And, finally, the final factor. The revival of Port Hawkesbury by the Government of Nova Scotia happened at the very time when Resolute was itself hoping for better times at its supercalendered paper mills and struggling to operate those competitively.

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

A question repeatedly raised by Canada and picked up by the Tribunal in its Question 18 in advance of the 2020 hearing relates to the treatment provided to Bowater Mersey by the Government of Nova Scotia at the time it was owned by Resolute. That question raises the issue of whether Bowater Mersey and not Resolute's mills in Quebec should be considered in like circumstances.

In the interests of time,

members of the Tribunal, I will think I will skip ahead because, first of all, this could be the subject of testimony tomorrow if the Tribunal specifically is interested in this analysis. I did go through it in the 2020 hearing, but I would like to make sure that I complete my presentation in time to give my colleagues sufficient time to deal with 1105 and causation and damages. So if you -- of course we take the view that Bowater Mersey was not in like circumstances based on several factors and I will just quickly show you the slides, but I won't belabour the point.

So, Ricky, if you could go through the next number of slides when I tell you "next slide".

So it's not in the same market.

Next slide.

Well, here, I can -- [redacted] --

MS. D'AMOUR: Sorry, I just want to note we are still in public access. Should we switch to restricted access?

MR. VALASEK: Well, I am not sure this is restricted access in particular but I guess we should -- I mean this just goes to show that it's complicated to go in and out of the evidence.

Why don't we go into restricted access.

MS. D'AMOUR: Okay.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Thanks. I confirm that we are in restricted access.

MR. VALASEK: Okay. So here, [redacted]

Next slide.

From a temporal point of view, Resolute had already decided to close the Bowater Mersey mill when the Port Hawkesbury measures were adopted.

And, finally, next slide.

None of the measures adopted for Port Hawkesbury were of general application in Nova Scotia, and none would have applied to Bowater Mersey.

Each of the measures -- next slide, please.

Each of the measures about which Resolute complains in this case is focused on Port Hawkesbury. It is a not a broad regulatory measure of general application across the whole territory of Nova Scotia. And here, you see I am going through each of the measures and noting what the scope of its application was.

Finally, the intention behind the measures supporting Port Hawkesbury Paper, making it the lowest-cost producer, was completely different from the intention behind the support that the Government of Nova Scotia offered to Bowater Mersey which was producing newsprint.

And here, I think I will just focus on this long extract but I will take you through it quickly.

In this article, I was discussing with Mr. Bowater -- Mr. Montgomerie an article about Bowater Mersey, and asked him about the article and said:

> "And you explained that it was a five- to eight-year scenario for

Bowater Mersey, long enough to plan for a more orderly transition?"[as read]

Here we are talking about what the government had offered to do with respect to Bowater as compared to Port Hawkesbury:

"So that was the real goal, was simply to achieve a more orderly closure; wasn't it?"[as read]

Mr. Montgomerie said:

"Yes and we felt Resolute agreed with that."

"Yes, and even five years was perceived as very, very challenging?"

"Absolutely, it was challenging."

"By contrast, 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?"

"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]

Sorry, I just needed to check a message from my team.

In relation to this same point -- and here I will skip over this because this was a Question 3 -- Ricky, go forward, please.

This was question 3 -- no, go back.

This was question 3 in respect of a provincial champion versus national champion. I think my answer is very clearly set out in the transcript from the 2020 hearing.

And I will go forward to -- yeah, you can take that slide down, Ricky. And

you can take it down.

So I have addressed the issue of treatment and like circumstances in detail showing that Claimant has met these first two requirements. The requirements of differential treatment under the three-part test as set out in UPS.

The third element is self-evident.

In choosing to lavish Port Hawkesbury with the benefits that PWCC demanded for its investment, the Government of Nova Scotia necessarily accorded Resolute less favourable treatment. The burden, therefore, shifts to Canada to justify Nova Scotia's differential treatment and Canada has not and cannot meet that burden.

So I go into part 3 of my presentation which is on Canada's burden to justify.

The relevant test was set out in Pope & Talbot and it has two components.

Slide 71, please, Ricky.

And, Heather, we can go into public access now.

--- Whereupon Restricted Transcript Ends.

MS. D'AMOUR: Thank you. Confirming we are in public access.

MR. VALASEK: Pope & Talbot reads that:

> "Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish on their face or de facto between foreign-owned and domestic companies, and, (2), do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."[as read]

In the Bilcon case, the Tribunal wrote at paragraph 723 after citing to Pope & Talbot as well as to the Feldman case:

> "The present Tribunal is

also of the view that once a prima facie case is made out under the three-part UPS test, the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102. It is the host state that is in a position to identify and substantiate the case in terms of its own laws, policies and circumstances that an apparently discriminatory measure is in fact compliant with the national treatment norm set out in Article 1102."[as read]

Presumably concluding that it's never too late and having been given this final opportunity, Canada has finally turned its attention to seeking to justify the Nova Scotia

measures in the first sentence of paragraph 49 of its summary memorial, which I quote:

> "The evidence is clear that the Government of Nova Scotia's support for Port Hawkesbury Paper had a reasonable nexus to rational government policies which made no distinctions between Canadian and foreign investors."[as read]

This mirrors almost verbatim the language of the first part of the Pope & Talbot test.

Whatever the Tribunal thinks of whether this first condition in Pope & Talbot has been met, the testimony at the 2020 hearing established beyond doubt that the Government of Nova Scotia cannot satisfy the second condition.

And here, Heather, we need to go back into restricted access, please.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Thank you. Confirming we are in restricted access.

MR. VALASEK: As set out earlier, [redacted]

The Nova Scotia measures, therefore, unduly undermine the investment liberalizing objectives of NAFTA. The Nova Scotia measures directly violate one of the core objectives of NAFTA identified in Article 102 which is to:

> "Promote conditions of fair competition in the free trade area."[as read]

At the 2020 hearing, Mr. Luz said that:

> "Claimant actually fails completely on each part of this test."[as read]

But under a proper approach to Article 1102, it is Respondent's burden, not Claimant's.

Canada has now apparently

decided to try to discharge its burden but makes no mention of the Pope & Talbot test in its prehearing memorial and entirely ignores the second condition.

In the second -- in the summary memorial, Canada writes, and this is from paragraph 46:

> "To argue that there is a national treatment violation in a situation where several enterprises in the same sector were accorded the same treatment and similarly impacted regardless of their nationality, transforms Article 1102 into a guarantee for foreign investors that places them above domestic investors which is not its purpose."[as read]

But, again, Canada ignores entirely the second leg of the Pope & Talbot test

which relates specifically to ensuring that measures that presumptively violate Article 1102 cannot be justified if they violate one of the core purposes or objectives of NAFTA.

The Pope & Talbot Tribunal included a footnote about the second condition. I have put it on a separate slide to make it easier to read. It's this footnote at the bottom which I have expanded.

It reads:

> "The Tribunal believes that the latter test --"[as read]

And here, this is the second condition that the Pope & Talbot Tribunal identified:

> "The Tribunal believes that the latter test 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 purposes of NAFTA, as expressed in its Article 102, may need to supplement the former test."[as read]

Claimant submits that the Pope & Talbot Tribunal were very astute and that this is exactly the kind of case for which the second condition of the justification test was included.

It may well be 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.

Heather, are we in restricted access now?

MS. D'AMOUR: Yes, we are currently in restricted access.

MR. VALASEK: Okay, good.

[redacted]

[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."

You can come out of restricted access, Heather, please.

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Thank you. Confirming we are public.

MR. VALASEK: In our submission, therefore, Canada is in clear violation of Article 1102 as a result of the Nova Scotia measures. The only issue left to be

discussed is Article 1108(7) which provides an exception for subsidies and procurement.

For the reasons I will now explain, Canada does not and cannot benefit from this carve out.

So this is part 4 of my presentation.

As the Tribunal knows from its review of the record, 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.

Before turning to our two arguments, I will respond to the Tribunal's request that we specifically address the notions of subsidies and procurement within Article 1108(7).

The terms "procurement and subsidies" are not defined in NAFTA. The dictionary defines "procurement" as the action of obtaining or procuring something. It defines

"subsidy" as a sum of money granted by the government or a public body to assist an industry or business so that the price of a commodity or a service may remain low or competitive.

The dictionary definition of subsidy, i.e. the plain meaning of the term, points to a narrow category of government support. It refers to a sum of money granted by the Government, excluding other forms of government action or policy that might be directed at supporting or favouring a particular business.

In the UPS case, Dean Cass made a similar observation about the meaning of subsidy in Article 1108(7).

I am starting at the end of paragraph 158:

> "Simply put --"[as read]
>
> Dean Cass wrote:
>
> "-- the scope of government activity that has the effect of increasing returns to a particular business is too vast for that of itself to bring all such

activity within the ambit of Article 1108(7). Article 1108(7)(b) does not appear intended to cover the entire, broad sweep of government activity that might reduce the costs or increase the benefits of a particular business - what might in more colloquial terms be referred to as a subsidy. Instead, the article appears intended more narrowly to reach only self-conscious and overt decisions by government to expressly convey cash benefits to a particular business, enterprise or activity. The list of government actions that come within the scope of the provision is not

exclusive but it is certainly suggestive."[as read]

And then continuing in paragraph 160:

"Decisions to provide direct, clear subsidies of the sort adverted to in Article 1108(7)(b) typically have substantial political costs and, thus, are commonly subjects of intense debate. The evident belief in drafting the subsidies exception to NAFTA was that the political processes for evaluating considerations relevant to such decisions would guarantee public scrutiny and, if appropriate, discipline under WTO provisions for addressing

trade-distorting subsidies."[as read]

Consistent with these observations, it seems reasonable to interpret Article 1108(7) as being aimed at excluding from NAFTA scrutiny under 1102 those specific measures that the NAFTA parties knew would be subject to WTO discipline and other trade remedies. Such exclusion would require the definition of subsidy under the WTO system to be consistent with the measures that fall within Article 1108(7), and it is.

"Subsidy" is defined in Article 1 of the WTO agreement on subsidies and countervailing measures --that's at Exhibit C-367 -- and it refers to narrow categories of overt decisions by government to expressly convey a "financial contribution" or "income or price support to particular enterprises".

Having established the meaning of subsidy and procurement for purposes of Article 1108(7), I now turn to the two independent reasons why Canada cannot successfully invoke the provision to avoid liability for a breach of Article 1102.

First, Canada is precluded from reliance on 1108(7) because of its prior statements outside this arbitration to the effect that no subsidies were involved in Nova Scotia.

Second, even if Canada could rely on 1108(7), it fails as a defence because not all of the Nova Scotia measures fall within the categories of procurement or subsidies in that provision.

And, in any event, Resolute is not complaining about any one of the measures in isolation, but rather, about the entire ensemble of measures which, taken as a whole, does not qualify as a subsidy or procurement under 1108(7).

Turning to the first reason, Canada denied the existence of subsidies in connection with Port Hawkesbury no fewer than five times and over a period of more than five years.

First, in three consecutive official notifications to the WTO pursuant to the agreement on subsidies and countervailing measures in 2013, 2015, and 2017. Those are the first three bullets on the slide.

Canada reported "nil", for Nova Scotia subsidies.

Similarly, [redacted]

And, finally, the US and the European Union both objected to Canada's failure to notify the Nova Scotia measures as subsidies, especially given what they wrote was:

> "The new owner making it clear that absent a certain level of government assistance, the plant was not economically viable and would not be reopened."[as read]

And that the:

> "Production and sales of this plant had begun to have serious negative consequences in the market for US paper producers."[as read]

Canada disagreed with the need to notify. And that's set out in Exhibit C-353,

which are minutes of that meeting.

In its summary memorial, Canada claims that Resolute has not provided sufficient evidence or any evidence that Canada denied the existence of subsidies in Nova Scotia.

But let's look at those nil declarations for closely.

In these notifications, "nil" is specifically defined. By making a declaration of nil, the government is declaring that they do not grant or maintain within their territory any subsidy within the meaning of Article 1.1 of the agreement.

And "nil" is specifically put under Nova Scotia.

In the next slide, I have included an example of how the Government of Canada informed other countries about subsidies in those notification documents including in the pulp and paper sector. Now this was available to Canada to notify other WTO members of what they now claim are subsidies in Nova Scotia. But instead, they declared "nil".

And the next slide shows just how extensive the reporting was on the

notification in respect of even a single province. This is under British Columbia where this is just the table of contents listing the many programs that British Columbia revealed were being declared as subsidies.

Canada should be held to a standard of consistency in characterizing its actions in legal proceedings.

In the UPS case, again, Dean Cass wrote that:

> "It is at a minimum reasonable to ask a NAFTA party seeking to avail itself of the subsidy exclusion from Chapter 11 to clearly designate its conduct as a subsidy somewhere other than in defence of its conduct before a Tribunal seeking to resolve a dispute under Article 1116 or 1117."[as read]

Not only did Canada not do so here, it actually took every opportunity over a

span of more than five years and during the very time that Port Hawkesbury was receiving advantageous treatment through the Nova Scotia measures to expressly deny that these measures individually or collectively were a subsidy.

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

In addition to denying that the measures were subsidies in other fora, such as in official communications with the US trade representatives and in its official notifications, Canada also conspicuously changed its attitude in these proceedings.

I am going to skip over that description because it was set out for you in detail at the 2020 hearing and you can refer to the transcript there.

Now, Canada now claims that the measures are subsidies after all and seeks a determination that the 1108 exception bars

Resolute's claims.

Canada's opportunism could not be more obvious and should not be rewarded.

We have detailed our position on the applicable legal principle in our reply memorial in paragraphs 291 through 308. We say that the principle against self-contradiction exists in international law and should be reaffirmed by this Tribunal. It has variations that manifest themselves under different maxims, including venire contra factum proprium; estoppel; allegans contraria non audiendus est; and so on.

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

For example, the Tribunal in the Chevron v. Republic of Ecuador case relied on the broad principle against self-contradiction to deny Ecuador's jurisdictional objection that Chevron had not made an investment in Ecuador. That Tribunal relied on findings of Ecuadorian courts that Chevron had done so, explaining:

"That duty of good faith

precludes clearly inconsistent statements deliberately made for one party's material advantage or to the other's material prejudice that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can have it both ways or blow hot and cold. To affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment."[as read]

That's in paragraph 7106 of the second partial award.

And in the very next paragraph -- Rick, next slide, please.

-- the Tribunal explained that it was basing its decision on the general principle of good faith under international law

instead of the estoppel principle, observing that:

> "Although estoppel is consistent with the general principle of good faith, it is a different doctrine under international law. The Tribunal was relying on a broader principle precluding a state from blowing hot and cold, i.e. the principle of good faith."[as read]

Canada argues that the Tribunal does not have jurisdiction to consider non-compliance with another treaty; in this case, the agreement on subsidies and countervailing measures.

But this is not a jurisdictional issue because we are not asking this Tribunal to make any determination under that 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 we have cited.

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

This brings me to the second reason Article 1108(7) does not excuse Canada's responsibility.

Canada's argument simply sweeps too broadly.

The language of 1108(7)(b) exempts subsidies or grants provided by a party or state enterprise, including government-supported loans, guarantees and insurance. The provisions exception is limited to individual subsidies, grants or loans, nothing more. Similarly, 1108(7)(a) exempts procurement.

These provisions do not exempt a broader government initiative that is alleged to violate 1102, even if that broader initiative might include, among its components, measures that could qualify as a subsidy or as a procurement if viewed in isolation.

In paragraphs 41 and 42 of its

summary memorial, Canada enumerates the various individual programs that Canada claims are excluded from consideration under 1102 on the basis that they are properly characterized as loan, grant or procurement.

But Canada has failed to address Resolute's argument which is that these provisions do not exempt a broader government initiative that is alleged to violate 1102.

Resolute is not complaining separately and in isolation about any individual measure, nor is Resolute complaining only about those individual measures.

Slide 81, please, Ricky.

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 1108(7), like the adoption of the load retention rate and the related regulatory measures for electricity.

As Canada's own witness,

Ms. Chow, testified at the 2020 hearing, you have to look at this as a package. You can't look at these measures in isolation.

And that's at page 481 of the transcript.

Indeed, even assuming a disaggregation of the ensemble were factually plausible and conceptually appropriate, some of the specific measures, each of which was indispensable to PWCC's plan, do not qualify for the exemption. These measures alone are sufficient to expose Canada to responsibility for a violation of 1102. These measures include the 24/7 must-run order for the biomass boiler and the protection from the application 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.

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

Thank you for your attention.

I would be pleased to address any further questions but I understand we will do so tomorrow.

SUBMISSIONS BY MR. SNARR:

MR. SNARR: Thank you. May I ask how much time we have remaining for our opening presentation?

MS. AMBAST: Hi, this is the Tribunal's secretary. There are 30 minutes remaining.

MR. SNARR: Good day, Professor Hanotiau, Professor Lévesque, and Dean Cass. My name is Michael Snarr and I will address Canada's and, more specifically, Nova Scotia's denial of the minimum standard of treatment under NAFTA Article 1105.

The Government of Nova Scotia knew there were only four other producers of SC paper in the North American market, which was a market in secular decline.

It knew that PHP's predecessor had not been competitive and could not be competitive in that market on freely competitive terms.

It knew that PHP could not be resuscitated without massive assistance sufficient

to make it the lowest-cost producer in the market.

[redacted]

Since the end of 2012, there have been closures but no new entrants to the North American SC paper market, and that's not surprising. Who would want to enter a market in secular decline where they would have to compete with PHP on unequal terms based on the assistance it receives from the Government of Nova Scotia?

What Nova Scotia did to bring the Port Hawkesbury mill back from the dead and position it to be more than merely competitive in the SC paper market was unfair and inequitable to Resolute to a degree that violates the minimum standard of treatment under Article 1105 and justifies an award of compensation for damages.

Fair and equitable treatment as a part of the minimum standard of treatment under customary international law is a subjective standard without bright-line tests.

Next slide, Ricky.

The Merrill & Ring Tribunal said the concepts of fairness, equitableness and reasonableness cannot be defined precisely. They require to be applied to facts of each case.

The Windstream tribunal, citing Mondev, said:

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

NAFTA tribunals have tried to articulate what constitutes a violation of fair and equitable treatment under customary international law.

Next slide.

A standard that emerges from the NAFTA cases is that state conduct that is unjust, arbitrary, unfair, inequitable or discriminatory, that infringes a sense of fairness, equity, good faith and reasonableness to a degree that is more than imprudent discretion or outright mistakes but not necessarily egregious,

shocking or outrageous is cognizable as a breach of fair and equitable treatment.

Next slide.

We note that Canada's primary disagreement with Resolute's articulation of the standard is its assertion that only egregious behaviour can rise to a breach.

But the Bilcon tribunal said NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states. That is outrageous.

The Chemtura tribunal, quoting Mondev, said what is unfair or inequitable need not equate with the outrageous or the egregious.

The Merrill & Ring tribunal said the standard did not require a showing of outrageous treatment.

This more wordy description of the fair and equitable treatment standard remains a subjective one for the judgment of the Tribunal, one for which there can be no bright-line threshold no matter how much adjectives may be added.

The Windstream tribunal said:

"The ultimate test of

> correctness of an interpretation is not in its description in other words but in its application on the facts."[as read]

Canada contends that the fair and equitable treatment standard under NAFTA has a limited application to certain types of measures which can be shown in state practice to have been unacceptable so it argues:

> "There is no role in customary international law prohibiting or regulating the provision of financial assistance to domestic companies."[as read]

But that argument focuses on the wrong part of the problem. It is not the type of measure that is governed by the fair and equitable treatment standard, it is the character of the measure.

The Pope & Talbot case may help demonstrate the distinction.

In that case, Canada conducted a verification of certain information provided by a US lumber company in connection with a program controlling the experts of soft wood lumber.

The Tribunal found that Canada's conduct of that verification was a violation of fair and equitable treatment because Canada made the verification process unduly cumbersome and expensive for the US investor and its investment. The Tribunal awarded damages to the Claimant under Article 1105 but not because Canada deviated from some established customary state practice for verifications in export control schemes. The reason for the award was the character of the verification as it was conducted.

The Tribunal found that regardless of the government's motivations, the verification was not conducted in an open and cooperative spirit. The investment was required to incur unnecessary costs and disruption in an environment that was "more like combat than cooperative regulation".

The character of the measure, not the type of the measure, was what mattered.

The Cargill tribunal found

Mexico's imposition of an import permit on high fructose corn syrup to be a violation of fair and equitable treatment, separate and apart from other measures that violated Article 1102.

The issue leading to an Article 1105 award was not that state practice prohibited import permits. Customary international law does not prohibit states from requiring import permits. Instead, it was the character of the measure that mattered.

The Tribunal found:

> "Most determinative, the fact that the import permit was put into effect by Mexico with the express intention of damaging Claimant's HFCS investment to the greatest extent possible which surpassed the standard of gross misconduct akin to bad faith."[as read]

The few HFCS suppliers "were forced to bear the entire burden of Mexico's

actions", which the Tribunal described as willful targeting and an intentional targeting of Claimant.

Next slide.

I am obliged now to go into restricted access session to discuss the evidence we received from Canada showing why the character of Nova Scotia's financial assistance to PHP is a violation of fair and equitable treatment.

--- Whereupon Restricted Transcript Commences

MR. SNARR: Heather, could you confirm?

MS. D'AMOUR: Confirming we are in restricted access.

MR. SNARR: Thank you.

So why does the character of the Nova Scotia financial assistance to PHP rise to a breach of fair and equitable treatment?

[redacted]

Next slide, please.

We already have explained in

[redacted]

In Cargill, Mexico was held liable under Article 1105 for its intentional targeting of economic harm to the US investments. Unhappy about US trade policy on sugar, Mexico wanted to protect its own industry so it shifted the burden on its producers to the US high fructose corn syrup producers by imposing a trade restrictive import permit. The government's knowledge and intent to do harm was found to be gross misconduct in violation of the standard exceeding the threshold for a finding of liability.

[redacted]

1 [redacted]

[redacted]

The government shifted the costs of the biomass plant to Nova Scotia ratepayers by a special regulation for PHP so the electricity package could be approved.

And in this arbitration, Nova Scotia has shifted the burden to Canada to defend its national champion, and should the Claimant prevail, to pay an award compensating Resolute for its damages.

For our purposes, [redacted]

[redacted] with a package of $124 million in assistance, plus the renegotiated power rate and the guarantees and must-run regulations so they could save PHP and, according to Canada, [redacted] economy.

Canada would have us believe [redacted]

[redacted]

[redacted]

[redacted]

A NAFTA award of damages compensating for the [redacted] harm to Resolute is a fair cost of business for the economic benefits that the Government of Nova Scotia provided to PHP and the political benefits that the government took unto itself.

Canada argues in its summary memorial that if international law allows governments to provide any amount of assistance, then there could be no limits on the amount of assistance it provides, regardless of whether that meant the recipient of the assistance stood no chance otherwise to be commercially viable and [redacted]

And if you look at the hearing transcript, you see that Canada does not really believe its own argument.

Canada repeatedly argued at the 2020 hearing that Nova Scotia carefully studied and balanced options to provide some appropriate level of government support, that of course there were limits on what the Nova Scotia government was willing and able to do, and that what the government could do was consider providing a reasonable amount of financial assistance.

And that's at the hearing transcript pages 173 to 175, and again at 1220.

Unless the Tribunal is prepared to accept that any degree of competitive assistance is always permissible under the minimum standard of treatment, regardless of [redacted], then the Tribunal must determine how to assess whether the assistance under the circumstances was reasonable and proportionate in relation to the interests of the provincial public and the interests of the NAFTA treaty.

Cases cited on pages 79 to 82 of our reply memorial applying a proportionality analysis may provide a guide for balancing those interests.

If states accepted as a matter

of practice the governments were free to pick and promote their national champions to the detriment of foreign nationals, then the WTO member states would have no reason to ask governments to report subsidies. Nova Scotia and Canada would have no reason to withhold reporting the PHP assistance to the WTO member states, not just once but three consecutive times, even as Canada dutifully reported subsidies provided by other provinces.

The United States would not have asked Canada about what it called disturbing reports of significant assistance to PHP. The European Union would not have made its own similar request. There would have been no US countervailing duty investigation of SC paper from Canada, no reason for PHP to pay most of a $42 million settlement to make that investigation go away and no reason for Canada to argue that what Nova Scotia could do was provide a reasonable amount of assistance within limits.

No government wants its companies to fail, and yet, governments cannot and do not heap largesse on them to ensure that all failing companies will be commercially viable. It isn't fair to the companies who must compete

without such assistance and it is why, as Canada admits in its summary memorial, states have adopted domestic and international frameworks to regulate subsidies, citing examples of competition law, EU state aid rules and WTO subsidies disciplines.

Canada provided no expert rebuttal statement to the testimony of Mr. Morrison who said that the size and scope of the PHP assistance package from his experience of more than a decade as a bankruptcy monitor was unique. Instead of proffering an expert to show that it is typical state practice for governments to drop hundreds of millions of dollars on commercially non-viable companies operating in markets in secular decline, Canada asked Mr. Morrison to consider each piece of the package in isolation.

Ms. Chow said we shouldn't consider the measures in isolation.

The tribunal in Cargill endorsed the statement about Article 1105 violations that the record as a whole, not isolated events, determines whether there has been a breach of international law.

Canada argues that Nova Scotia has no control over a private company but it knew the private company's intentions and [redacted]

PRESIDENT HANOTIAU: Just to confirm, there is approximately 14 minutes remaining.

MR. SNARR: Okay, thank you.

Whether Nova Scotia did or didn't do for Resolute's Bowater Mersey newsprint mill investment is irrelevant. [redacted]

It's no excuse to suggest that Resolute had moved its SC paper investments to Nova Scotia that they might have been protected.

The purpose of NAFTA is to promote freedom of investment, not to force investors to invest in or purchase inputs from a certain province in order to avoid a trade war

with that province. Fair and equitable treatment requires the government either to do better or to compensate for the foreign investment's losses.

That concludes my opening presentation on Article 1105.

SUBMISSIONS BY MR. FELDMAN (Cont'd):

MR. FELDMAN: It's Elliot Feldman again.

We have discussed now what happened in this case or, more precisely, what was done by the Government of Nova Scotia. The supercalendered paper mill on Cape Breton Island shut down and declared bankruptcy. The Government of Nova Scotia committed to finding someone to reopen and operate it, notwithstanding the aggressive efforts of an investment bank, a bankruptcy monitor and the government, no one was found who would even consider restarting the mill without massive government assistance.

The only company willing to consider investing demanded that the government assistance make the mill the most competitive in North America by being the lowest-cost producer of the highest quality supercalendered paper. The government agreed.

The company set out demands and although there was much negotiation, in the end, the government met every demand and fully satisfied the company that with the government's help, the mill would indeed be the lowest cost operator of the highest quality paper in North America.

The product, supercalendered paper, constituted a commodity industry in secular decline. Despite projected ups and downs, over time, there would be only downs.

The resurrection of the mill at Port Hawkesbury meant increasing the North American supply of supercalendered paper by approximately 25 percent, at the very moment when demand for the product was in decline. As other supply would close, Port Hawkesbury's market share could only grow.

The laws of supply and demand dictated that a 25 percent increase in supply, combined with declining demand, necessarily would drive down prices that necessarily would decrease the sales and prices of Port Hawkesbury's competitors. It meant that the higher cost producers would be forced to close and others

would hang on only by taking downtime that would translate into lost profits. Hence, damage to competitors was inevitable and conceded by Canada's own expert.

The difference between Mr. Steger's analysis and Resolute's is only that Mr. Steger imagined damages would all occur in less than a year when simple economics would make the damages last as long as additional low-cost supply was in a dwindling market.

Canada questions the legal connection between what Nova Scotia did and harm to Resolute.

This is now restricted.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: We are currently in restricted.

MR. FELDMAN: [redacted]

Next slide, Ricky, please.

Because the economics of paper mills require them to run 24/7, there's no gradual way to reduce supply. Supply reduces when mills close, which means a chunk of supply leaves the market and may temporarily create a disequilibrium where demand exceeds supply. You can see that in the staircase here. Prices may briefly go up, but with demand in secular decline, they predictably will soon resume going down.

Other temporary forces may also have temporary impacts including even the weather. Prices after Port Hawkesbury's return to the market went down steadily for five years.

Next slide, please.

[redacted] Professor Hausman found in 2018, the decline was interrupted briefly in 2018 because of temporary events identify by Professor Hausman but declined resumed thereafter.

I will explain the significance of this market interruption a little further on.

Canada's consultants, [redacted], see the

anomaly in 2018 and want to make the additional Port Hawkesbury supply in the market magically disappear. Even then Mr. Steger has recognized [redacted]

Canada now argues that the Nova Scotia measures and the consequent infusion of 360,000 metric tonnes into the market were not the proximate cause of damage to Resolute.

The questions remaining for the Tribunal are whether the offending measures, the Government of Nova Scotia measures that we believe we have demonstrated breached Canada's NAFTA obligations under Articles 1102 and 1105, caused the damages to Resolute and if they did, how to quantify those damages.

Canada argues for alternative explanations for damages for grade substitution, increased demand in imports. In a moment, I would summarize but I may not have time, why these arguments are factually incorrect and analytically divorced from simple economics, but in this moment, I want to explain at least two fundamental problems with Canada's argument.

First, but-for Port Hawkesbury's delivery of the 360,000 metric tonnes

of capacity to the market, none of three supposed causes advanced by Canada would have happened. By Canada's own argument, there would not have been grade substitution, increased demand, nor an increase in imports but-for the increased supply of high quality supercalendered paper from Port Hawkesbury.

Each of Canada's three alternative causes, to the extent they are real, were themselves caused by Port Hawkesbury's new volumes. Resolute would not have experienced any of these supposed causes but-for the market impact of Port Hawkesbury.

Second, for this arbitration, Canada has abandoned the only cognizable economic analysis of damages. No matter the intricacies of the calculations, they must begin with the same question: What would have happened in the market if Port Hawkesbury had not reopened? Or as an economist would ask the question, what would have happened in the market but-for Port Hawkesbury's re-entry?

Next slide, please.

[redacted]

[redacted]

The first of Canada's alternative explanations is grade substitution. The theory that 360,000 metric tonnes of superior SCA paper flooding the market from Port Hawkesbury led customers to buy something else, to buy coated mechanical paper in a new combined market of supercalendered and coated mechanical paper.

Note, of course, that Canada accepts the cause of the grade substitution Port Hawkesbury and the fact of damages to Resolute.

Dr. Kaplan, however, relying on the U.S. International Trade Commission's year-long study and report found that different grades of supercalendered paper, SCA and SCB, belonged to a single supercalendered paper market and that coated mechanical paper constitutes a different market. Even Pöyry's own Timo Suhonen, while advancing the theory of grade substitution in the 2020 merits hearing, conceded that mixing supercalendered and coated mechanical papers would be, in his analogy, like mixing wheat and barley

flour.

Canada's second theory that Port Hawkesbury's return was a win for everyone stimulated an increase in demand for supercalendered paper. The basic principles of economics explain that demand did not increase, rather, the supply curve shifted due to the addition of Port Hawkesbury's significant capacity which had lowered prices.

Demand does not increase for a commodity in secular decline. Canada has never disputed that this industry is in secular decline.

Finally, Canada tried the trick of blaming the farmers. Imports, not Port Hawkesbury, according to Canada, were Resolute's problem. But over time, the market share of imports has remained steady at around 25 percent, a market feature not a market changer. The change in market share had to go to Port Hawkesbury from zero to whatever it could sell of its 360,000 metric tonne capacity at prices reflecting the lowest costs.

Even were any of Canada's alternative theories for causation valid, the law does not acquit the Nova Scotia measures because

they may not have been alone in causing damage. But-for the excess supply from Port Hawkesbury, Resolute would have received consistently higher prices selling supercalendered paper. Its damages should be measured by the difference between the profits it would have received at prices with and without Port Hawkesbury's excess supply.

Mr. Steger limited his analysis to before and after. He identified prices before Port Hawkesbury added to the supply and after the supply was in the market.

And then the next two slides continue to be restricted access and I will stay in restricted access now, please.

He stepped into his own bucket. He stopped, now arguing that the supply was absorbed whether by another product, coated mechanical paper, or by demand, notwithstanding two decades already of secular decline driving demand in the opposite direction.

Mr. Steger's analysis is untethered to anything resembling economics. Port Hawkesbury's supply remained in the market. The analytical task was, first, to compare actual prices for the period known, 2012 to 2018, with

Port Hawkesbury's supply in the market to estimated prices, what prices would have or should have been had the supply not been in the market.

Second and more difficult, to project what prices could be expected with and without the continuing presence of the Port Hawkesbury supply. In this case, from 2018 to 2028.

The test is not before and after but with and without.

That was the challenge presented to the tribunal in Cargill and is the same challenge here.

Next page, please, on the Cargill tribunal. One more.

The Cargill tribunal explained that damages should be measured by determining the present value of net loss and cash flows when projecting the overall market to examine damages in a but-for world. In our case, the difference between what prices would have been without the excess supply and what they were and would be with the excess supply, but-for the excess supply, over time, prices would have been higher.

Next slide, please.

The connection between the measures and the damages is linear in a but-for world. But-for the measures, the mill would not have reopened and but-for the reopening, supply of product would not have increased. Mills were closing, no one was interested in opening. Nova Scotia's decision was to reopen flooding the market with additional supply.

Next, please.

Most of the damages claimed by Resolute have -- next again.

-- have already happened and the estimates ordered by the similar results of two different methodologies are reliable.

Professor Hausman, a world renowned econometrician and chaired economic Professor at MIT, for the period 2012 to 2017, used actual prices. The lost profits are in the subtraction of costs from prices and estimated only the prices that would have been but-for the Port Hawkesbury volumes. These estimates were derived from prices forecast by RISI before Port Hawkesbury reopened and confirmed through an economic analysis relying upon an estimated price elasticity using an average of price changes.

In Professor Hausman's words:

> "I estimated a price elasticity of minus 2.1 using the average of price changes from 2013 to 2017. Based upon the estimate of price elasticity and the new capacity from Port Hawkesbury, I estimated the effect on prices."[as read]

Next slide, please.

Canada, in its new memorial, has made light of Professor Hausman's transparency and intellectual honesty during the 2020 hearing in acknowledging the uncertainties of forecasts and predictions.

The Cargill tribunal, however, relied on the same but-for methodology because there are damages, they are susceptible to reasonable estimation and the but-for methodology is the only one that makes economic sense.

Canada has studiously avoided Professor Hausman's two serious written reports

where he carefully adjusted for uncertainty with conservative discount rates and two distinct methodologies. Canada has had nothing to say about Professor Hausman's economic approach to the analysis of damages and has no defence for the abandonment of but-for analysis by its own experts.

Next slide.

The one change in Professor Hausman's analysis came with the events of 2018. Mill closures, as we suggested, are a certain in the environment of secular decline but it is impossible to be certain when exactly they may occur. In this case, there were relevant closures in both North America and Europe in 2018. 2017 would no longer be an appropriate baseline for the next decade, nor would 2018. Neither single years represented reasonably the market over time.

Professor Hausman, therefore, adjusted in his second report by proposing to use a three-year average period, 2016 to 2018, for the baseline. It was the only change.

Over the long term -- next slide, please.

Over the long term, Professor

Hausman's economic model continues to account for the sudden impacts of mill closures that may push prices up. But, over time, prices necessarily continue to fall.

He used two different data sets as data for a check: RISI's projections and an inflation index for the known period 2013 to 2018 where Professor Hausman could use known prices with Port Hawkesbury's volumes in the market needing only to estimate what prices would have been without those volumes, the but-for world.

These two different data sets produce damages between 81.2 and $97.1 million. Very close results. With the three-year average of 2016 to 2018 as the baseline for 2019 to 2028, the range was 8.5 million to 55.9 million, a broader spread for a longer period with more uncertainty. He's subtracting expected and actual for the period through 2018 profits with Port Hawkesbury in the market from expected profits without Port Hawkesbury's volumes.

We have taken conservative approaches to the damages. Although the evidence shows consistently that Port Hawkesbury added 360,000 metric tonnes of paper to the market,

Professor Hausman used the [redacted] claimed but unexplained and undocumented by Mr. Steger. He measured the losses with actual RISI data validated by an economic model. He offered ranges with both methodologies, the data and the model, to recognize market uncertainties and he used the conservative price elasticities and discount rates.

The two analytical methods yielded closely overlapping ranges, as you can see in this slide, confirming that the losses were properly measured.

Because the losses necessarily are estimated, if Port Hawkesbury were never to have opened or were to close, such estimation would not be necessary.

Professor Hausman found ranges of losses depending on different assumptions, especially of the pace of secular decline and [redacted] dollar figure appears the most reasonable measure in the presence of ranges.

Professor Hausman proposes, again, to be conservative, to stay with the lower midpoint of the two ranges in his reports, damages

of $121.4 million.

That concludes Resolute's summary of the case.

But-for the Nova Scotia measures, the Port Hawkesbury mill would not have reopened, the market in secular decline would not have been flooded with 25 percent increase in supply and Resolute would not have been damaged.

[redacted]

And that concludes the

presentation for Claimant, Resolute Forest Products. Thank you very much.

PRESIDENT HANOTIAU: Thank you very much. So we are going to have now 20 minutes break. And I'd like my co-arbitrators to go to the breakout room for one minute.

MS. D'AMOUR: Thank you.

Before we head to the breakout rooms, should I admit the people from the restricted access session into your breakout rooms as well? I guess that's a question for counsel, probably.

MR. FELDMAN: Yes, please.

MS. D'AMOUR: Okay, thanks. I will open the breakout rooms now.

MR. FELDMAN: Thank you.

--- Upon recess at 10:56 a.m.

--- Upon resuming at 11:18 a.m.

PRESIDENT HANOTIAU: We are going to resume the hearing and now hear from Respondent.

SUBMISSIONS BY MR. LUZ:

MR. LUZ: Thank you, Chairman Hanotiau and Arbitrators Lévesque and Cass, very much for your service in these proceedings, and I

also extend my thanks to the PCA and to Arbitration Place, and as well to my colleagues, Counsel for Resolute, for their professionalism and their assistance and cooperation, particularly with the restricted access materials. That's appreciated for both sides.

Professor Hanotiau and members of the Tribunal, I have quite a bit to get through in terms of facts and law. Claimant tends to rely on a lot of mischaracterization of the facts in order to serve their narrative and I hope that over the course of the day, the course of the next two hours, I will touch on the most important points that I think are relevant background and context, but also to show that the gloss that the Claimant has put on many of the facts really is not based on an objective view or reality but on exaggeration and misrepresentation. I won't be able to cover all of it but it is covered in all of Canada's pleadings.

John, if you could bring up the first screen.

Let me give an example to the Tribunal of what Resolute's claim is, that the financial assistance of the Government of Nova

Scotia to Port Hawkesbury violates NAFTA Chapter 11. It's based on the following characterizations.

"Extraordinary, possibly unprecedented and unparalleled measures never before extended by any government, so much and so many different forms on such a scale with a guarantee to become the low-cost invulnerable giant which would defeat and crush all of its competition, especially foreign competition."

Canada submits that these and so many of the other characterizations of the Claimant are not based on actual evidence but on hyperbole that is intended to provoke a sense of outrage.

These allegations fail on many levels.

The assistance of the support for Port Hawkesbury certainly was not unprecedented in size, scope, and, particularly, purpose. The Claimant's own actions with respect to its Bowater Mersey mill in 2011 and the Claimant's expert, Mr. Morrison from Ernst & Young, and Resolute's former CEO, Richard Garneau, helped prove Canada's point during the hearing

last year.

The Claimant has no credible argument as to how the Nova Scotia measures can possibly be construed as a guarantee to be the lowest cost, that PHP would have the lowest costs in North America.

As the Tribunal heard last year during the hearing from witnesses presented by Canada, for the Government of Nova Scotia, it was never about PHP being the lowest-cost mill. It was about helping to maintain the lynch pin of the province's forest industry, to employ people, and be a good corporate citizen.

The documentary evidence and the testimony of Ms. Towers, Ms. Chow, Mr. Montgomerie and Mr. Coolican, both in writing and at the hearing last year, proved that beyond any doubt.

The Claimant has provided no evidence of anticompetitive behaviour by PHP or any other evidence that PHP somehow weaponized the so-called lowest-cost guarantee to Resolute's detriment. And even if that evidence existed, it has nothing to do with the Government of Nova Scotia, since, as this Tribunal observed in its

jurisdictional award, Nova Scotia cannot and does not control PHP's pricing and business practices.

But, most importantly, the Claimant has not established what any of this has to do with NAFTA Chapter 11, the minimum standard of treatment in customary international law in Article 1105, and the national treatment standard in 1102.

Government subsidies, loans and grants to a domestic investor are not prohibited or regulated in customary international law, and there's nothing in the behaviour of the Nova Scotia government that suggests denial of justice or arbitrariness or the lack of a rational connection to a legitimate public policy goal. That's evident that that exists, that the bona fides and reasonableness of the government's actions are from the evidence.

The Claimant was deprived of nothing to which it had any legal right. So the Government of Nova Scotia certainly did not come anywhere close to breaching the minimum standard of treatment.

The Nova Scotia measures are not even subject to the national treatment

obligation in NAFTA Chapter 11, and I can't emphasize this enough.

The NAFTA parties intentionally, explicitly and entirely carved out procurement by a party as well as subsidies and grants including government-supported loans. They carved it out from national treatment because, in the words of the Mesa tribunal, the NAFTA parties wanted to protect their ability to exercise nationality-based preferences.

There can be no more straightforward application of Article 1108(7) than the case before this Tribunal.

What the Claimant labels as an ensemble or a package of loans, grants and procurements, to allegedly make PHP a national champion -- a term that has never been uttered by the Government of Nova Scotia or even PHP -- that ensemble or package cannot be magically transformed into a measure unto itself that is carved out from the carve-out. An ensemble of loans, grants and procurement are still loans grants and procurement and under Article 1108(7), it does not matter how many they were -- or how many they are or what they were for. The carve-out

still applies. The NAFTA parties wrote the treaty that way and the Tribunal is bound to apply the treaty as written.

Because of that, it is Canada's submission that there is no need for a national treatment analysis because all of the measures that are within the jurisdiction of this Tribunal don't fall into 1102(3) but that is a claim that would fail anyway because the claim cannot show that there was more favourable treatment in like circumstances.

First of all, what PHP received from Nova Scotia has nothing to do with the Claimant's nationality, which the Claimant has already admitted, and other NAFTA tribunals have said is an essential element of Article 1102.

And, again, we pass -- Canada passes any conceivable test. Whose ever burden it is, of the treatment in like circumstances test, because as the evidence and testimony of Canada's witnesses established beyond doubt, the measures were aimed at supporting the reopening of a critical industry in a rural part of Nova Scotia --

MS. D'AMOUR: Sorry to

interrupt. Is this to be public access?

MR. LUZ: Yes.

MS. D'AMOUR: So we can stream this?

MR. LUZ: Yes, thank you.

MS. D'AMOUR: Thank you. We are going into public access.

MR. LUZ: Thank you.

The measures were aimed at supporting a reopening of a critical industry in a rural part of Nova Scotia which is an eminently reasonable government policy which the Claimant had already decided for itself that it didn't want to be a part of.

1102(3) cannot possibly be read to sanction such rational and reasonable government policies, especially since this Tribunal already decided that 1102(3) does not require uniform treatment of foreign investors in different provinces.

The Claimant's national treatment claim is built entirely on a false narrative and the Tribunal should reject it.

Again, what Nova Scotia did is typical of what governments around the world do

when they are faced with a potential closure of a major industry in an economically vulnerable region that could leave thousands jobless and inflict hundreds of millions of dollars in damage to the economy.

They carefully study and balance the options and weigh the consequences of do nothing versus some appropriate level of government support for private business if it would be in the public interest and reasonable under the circumstances.

And that's what happened here.

But there were limits to what Nova Scotia could do.

It could not force hundreds of workers at the mill to accept job cuts or lower wages.

It could not dictate the price of electricity. That was in control of a private company, Nova Scotia Power, and depended entirely on how efficiently the owner of the mill could operate to minimize its energy usage.

The government can't regulate the vagaries of the market, fluctuating demand, exchange rates, imports, exports, economic growth,

the actions of other market players, customers, competitors. That's all beyond the control of the government.

So, yes, there was uncertainty about what would happen if Port Hawkesbury were to reopen, but on balance, in light of all the circumstances, the Government of Nova Scotia decided that it was appropriate and in the words of Mr. Duff Montgomerie, one of Canada's witnesses, the former deputy minister for Natural Resources: It was appropriate for prudent and reasonable financial assistance to help improve the mill's efficiency and hopefully have it remain part of the provincial economy.

None of that is a NAFTA breach.

John, if you could just bring up the outline of how I am going to organize the presentation this morning.

Recognizing that there was a desire for a bit of critical facts, first I will focus on some of the critical facts that provides the context which was largely omitted from the Claimant's presentation this morning.

Following that, I will do an

overview of the 2011 bidding process for Port Hawkesbury that led to the selection of PWCC as the preferred bidder for Port Hawkesbury.

I will also discuss very briefly what happened concurrently to that, which was the government support for the Claimant's receipt of government aid to help Bowater Mersey stay open.

Then I will discuss the actual measures, the financial assistance to Port Hawkesbury and demonstrate why the Claimant's allegation of unprecedented largesse is exaggerated.

I will then have to address specifically the electricity, the load retention rate that PWCC got and explain why that's not attributable to Nova Scotia.

Then I will deal with the law.

I will first deal with NAFTA Article 1105. I will deal with that first because so much of the context that is important for the national treatment question really can be brought together in the context of 1105, so I will briefly discuss the law but I will really talk about all the facts that the Tribunal really needs to know

because it serves both purposes, for 1105 and for 1102.

Following that, I will turn to Article 1108(7), and then following that, national treatment where we will explain that even if any of the measures were to be subject to 1102(3), there's no need to perform a national treatment analysis.

After that, my colleague Rodney Neufeld will come and talk about why the Claimant is not entitled to any damages even if it could prove a NAFTA breach.

Now, as the Tribunal knows, I will start off with some facts for the, particularly for Professor Hanotiau because the context is very important for understanding why Nova Scotia did what it did.

On September 6th, 2011, NewPage Port Hawkesbury entered the Canada Creditors Arrangement Act. The accounting firm of Ernst & Young was appointed to monitor the restructuring process.

The purpose of a CCAA filing is to help a business restructure and to continue the operation for the benefit of its creditors,

employees and the local community. That's the point. And that is what NewPage hoped to do with Port Hawkesbury: Restructure it and sell it to a new buyer as a going concern to at least maintain some of the employment for the workers there.

With Port Hawkesbury in limbo, Nova Scotia faced a very serious situation. Because simultaneously with that, the Claimant's Bowater Mersey mill was also threatening to close down, and the demise of two of the three paper mills in the province could have devastating effects for the provincial economy.

Now, there are several documents on the record. I am not going to go through them now because they have been designated restricted access. But I would encourage the Tribunal to do, look at the documents that demonstrate the very significant impact that would have happened had Port Hawkesbury shut down. Those are Exhibits R-145, R-148, R-157, R-160, R-309 and, R-430.

And it's not just because Port Hawkesbury employed 1,000 people on Cape Breton Island, a rural part of the province with limited alternative employment opportunities, but as

deputy minister Julie Towers explained in her witness statements, Port Hawkesbury managed 1.5 million acres of licensed Crown timber, so it was a massive part of the forest industry.

Furthermore, closure of PHP could have caused downstream higher electricity prices for everyone because it was the largest consumer of electricity in the province.

So faced with such far-reaching consequences, it's unsurprising the government would consider what it could do, if anything, under the circumstances.

But the government was not willing to save Port Hawkesbury and Bowater Mersey at any cost. We heard that from Mr. Montgomerie and Ms. Chow.

They had to think about whether or not there was anything that they could do and what they should do. Really, it was up to NewPage and its financial advisor, Sanabe, and Ernst & Young to find a new buyer for the mill. And it's on the public record that September 28th, 2011, was the deadline for interested buyers to bid, 21 companies did.

And it is uncontested that the

Government of Nova Scotia encouraged Resolute to participate in the bidding process.

So this is not a situation where the government was trying to prevent the Claimant from investing and doing business in the province. It's quite the opposite. They very much would have welcomed that had Resolute decided to do so.

Let's go into restricted access for a minute and, Heather, you can just let me know when it's safe to proceed.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Thank you. Confirming we are in restricted access.

MR. LUZ: Thank you.

[redacted] -- you can go to the next slide, John -- [redacted]

[redacted]

[redacted]

Now, the Tribunal will recall that Mr. Garneau wrote in his original witness statement that [redacted], but that's not exactly true.

Let's look at [redacted]

You can go to the next slide, John.

[redacted]

Now, Mr. Neufeld will hopefully get to some of this, but just for Professor Hanotiau's benefit, the Claimant's mills in Quebec do not produce coated grades. That's a higher end type of glossy paper that's used for magazines. [redacted]

So the internal analysis [redacted]

Fair enough. [redacted]

[redacted]

Again, fair enough. [redacted] But there's no dispute that the Claimant had every opportunity to participate as everyone else.

And, again, it's not like the government was closing the opportunity to it.

In fact, Mr. Montgomerie confirmed that had Resolute asked, Nova Scotia would of course been willing to discuss with them reasonable requests for financial assistance.

But as Mr. Garneau confirmed at the hearing, they never did.

Okay, we can relieve the restricted access session now.

--- Whereupon Restricted Transcript Ends

MR. LUZ: While the -- this is

an important point because what it does is it provides context.

MS. D'AMOUR: Thank you. We are in public access.

MR. LUZ: Thank you.

While the bidding process for Port Hawkesbury was just getting started, the government had to deal with a more immediate problem: The Claimant wanted to shut down its Bowater Mersey newsprint mill.

And that's important because it shows the motivations with respect to the Government of Nova Scotia also with respect to Port Hawkesbury and it also goes to show how it was the Claimant that ended up being responsible for Port Hawkesbury getting a lower electricity rate the following year.

Now, I won't go through the cross-examination of Mr. Garneau where I took him through the agreement and so on. That is in the pleadings. I just want to summarize briefly, for Professor Hanotiau's benefit primarily, because I think Professor Lévesque and Dean Cass have heard this before last year.

In September 2011, after

initially saying that they were going to close down the mill, Mr. Garneau said that he would give time to the government to figure out what they could do, if anything, to help keep Bowater Mersey open.

After it got a lower electricity rate approved in November 2011 -- something I will discuss later -- the Claimant accepted a $50 million financial assistance package from the Government of Nova Scotia.

The actual exhibit is at R-149, I won't go to that now. The Tribunal can refer to it later. But I will just look at the primary elements to this summarized in a press release. It's Exhibit R-150.

It's a $25 million capital loan through the Nova Scotia Jobs Fund for a long-fibre refining project. $23.7 million as part of a multi-million dollar plan, the province has agreed to buy 25,000 acres to help enhance the long-term stability of the paper mill, and a $1.5 million workforce training grant.

So why did the government come to the aid of the Claimant's mill?

It wanted to help keep the

mill open despite extremely challenging market positions. This was a newsprint mill and newsprint was plummeting. It was also a much smaller mill than Port Hawkesbury with a rapidly declining product. But the government hoped that with some financial assistance, it could continue to be a viable company by lowering its costs, despite the inherent disadvantages that that mill had.

Now, in Canada's pleadings, there's a long list of contemporaneous statements from the Government of Nova Scotia that discuss what its hopes and intentions were. Two of them are on the screen but I won't go through them.

John, you can just scroll through some of those just to have them up on the screen.

To make it an efficient low-cost mill.

So why is that important?

The question for the government -- sorry, you can put the screen down, John, please. Thank you.

The question for the government was always this: Given the negative

economic consequences of the alternative and given all the other public policy issues of importance to Nova Scotia, was there a reasonable amount of financial assistance that the province could provide in light of the specific circumstances of that mill and the specific product it made so it could continue to stay open and contribute to the regional economy.

That was how Nova Scotia approached it to Bowater Mersey and that's how they did it to Port Hawkesbury and that is not a violation of Chapter 11.

So let me now move on to the actual support for the Port Hawkesbury.

John, you can bring up the slide. You can skip that one. Yeah.

So in January 2012, PWCC was selected by Ernst & Young as the best fit for Port Hawkesbury. Several things happened.

You can go to the next slide, John -- no, sorry, just put that screen down. Thank you.

Several things happened. First, PWCC decided to shut down the newsprint machine, substantially cut the workforce and

negotiate a new contract. That's important because, as the Tribunal heard last year, labour costs are one of the most important determinants as to whether or not you can be a low-cost mill.

The government did not guarantee that PHP would have low labour costs. It had no control over that.

PWCC also negotiated a very complex electricity arrangement that the new owner thought it could yield substantial energy savings. And I will discuss that momentarily but, suffice to say, it was not in the control of the government whether Port Hawkesbury paid $130 or $30 for its electricity.

But what happened was Nova Scotia negotiated some agreements with the -- with PWCC to help it reopen the mill, and we will go into restricted access session right now, please.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Thank you. Confirming we are in restricted access.

MR. LUZ: Thank you, Heather.

There are so many measures that have been mischaracterized by the Claimant and I will try and get to all of them. We have

rebutted all of them this in our pleadings, but right now, I am just going to focus on the main ones.

The land purchase agreement -- John, you can bring them up.

The land purchase agreement, the outreach, the forest utilization license agreement and the two loans and grants [redacted]

Let's start with the $20 million land purchase.

And, again, I encourage the Tribunal to look at the witness statements of Ms. Towers who the Claimant did not cross-examine last year, presumably because they couldn't rebut anything that she said.

Now, Nova Scotia had had a longstanding policy of increasing its share of Crown land for conservation and other public purposes. There was already money in a pre-existing government program to buy land from private landowners at fair market value.

So as Ms. Towers explains, when Port Hawkesbury went into creditor

protection, the government was concerned that NewPage might just sell off all its land to pay off the creditors. [redacted]

That's very difficult to understand the nature of the Claimant's argument here because it also sold land to the Government of Nova Scotia in December 2011 for $24 million so Resolute could use money for business purposes in its mill.

Furthermore, [redacted]. And, it has nothing to do with the production of SC paper.

But, most importantly, it was a fair market value transaction whereby the government bought a valuable asset for use for public purposes. It's not a subsidy. It wasn't aimed at Resolute.

Similarly, it's difficult to understand Resolute's complaint about the outreach agreement and the FULA, forest utilization agreements. Apologies for using the funny sounding FULA term.

You can go to the next slide, John.

As Deputy Towers explains in her witness statements, the outreach agreement is not complicated. PHP is reimbursed for undertaking [redacted], for up to a maximum of $3.8 million per year over ten years. [redacted]

And Ms. Towers explains that the government does this all the time with companies in Nova Scotia to manage Crown land.

Indeed, the Claimant's expert, Mr. Morrison of Ernst & Young, admitted during the hearing last year that payments by a government to a company to perform these kinds of activities was not unusual or unique.

Now, again, the outreach agreement has nothing to do with the production of SC paper or crushing foreign competition. [redacted] That's what the outreach agreement is.

[redacted] in the FULA.

As Deputy Towers describes, the FULA is a modernized forestry license agreement that replaced the old legislation that had been in place for since 1965. That old legislation made it very difficult for the government to impose sustainable forestry practices on landowners. So they wanted a new regime to make sure that any cutting of timber on provincial land, on Crown land, was going to be done in accordance with government policy, Natural Resources policy.

So the FULA, [redacted], contains provisions whereby PHP is reimbursed for whatever silviculture and other expenses it performs on Crown land on behalf of the province.

And separately from that, Port

Hawkesbury has to pay for the trees that it harvests on Crown lands at set rates that everyone else in the province has to pay.

So, again, this is not a pot of gold for PHP. The company has to do work on government land and then it's reimbursed for those expenses.

Even the Claimant's expert, Mr. Morrison, admitted at the November 2020 hearing that forestry companies typically have these type of license arrangements on cutting timber on Crown land.

In fact, [redacted]

So, in reality, these are all pretty unremarkable measures. They don't -- and as evidenced by the prior practice of Nova Scotia, the behaviour of the Claimant itself and the testimony of the Claimant's own expert, Mr. Morrison.

Now let's look at the [redacted]

1 [redacted]

[redacted] That's exactly what the Tribunal heard from Mr. Montgomerie and Ms. Chow last year, whose testimony I will refer to in a moment.

[redacted]

And the Tribunal should recall that the Claimant's Bowater Mersey mill also accepted a forgivable interest-free capital loan [redacted]

And, again, as we saw earlier, the Claimant's expert, Mr. Morrison, conceded that

that was actually something that happens with the intention of modernizing mills and efficiency improvement.

[redacted]

This is not to bankroll PHP at any cost.

As Mr. Montgomerie and Ms. Chow testified, the government felt that this was a reasonable amount given the alternative of a potential [redacted] hit to the provincial economy.

Even after PWCC's request for an advance tax ruling was denied in September, the province went as far as it was willing to go in terms of the quantum of financial assistance. And this is important because it did come up in the Claimant -- I really have to spend some time on this because the Claimant really took a lot of what Ms. Chow said out of context and used it for other purposes.

In September, when there was a

modification to it, to the loan agreement, the quantum remained the same. And it also relates to the Claimant's allegation that there was a measure of, a separate measure of harvesting of $1 billion of tax losses.

Now, Canada explained in its pleadings that Claimant is very confused on this. The Government of Nova Scotia gave nothing to PHP on this. That exists -- the right to use tax losses from other jurisdiction exists in the federal Income Tax Act and any company, including Resolute, can do that.

The modification to the loan agreement was that [redacted], if the mill still existed, for which there was no guarantee that it would be, if it happened that PHP ever used tax losses from other jurisdictions, it would have to pay, for every dollar, it would have to pay $0.32 to the Government of Nova Scotia because that was seen as the possibility of paying back the loan.

So, in other words, the so-called harvesting of $1 billion in tax losses it's not a separate measure of the Government of Nova Scotia. It's one of the terms and conditions

of the loan.

And that's what Ms. Chow was talking about in the November 2020 hearing and that the Claimant is now using for other purposes.

You will see that in the transcript and some of the transcript that we have here is similar to what the Claimant brought up this morning, because they are saying -- she testified -- when she was talking about the loan, the loan itself, she wasn't talking about the outreach agreement or electricity or RES or any of the other things that the Claimant has thrown into its ensemble.

All Ms. Chow was talking about was the loan agreement:

> "You have to view it as a package."[as read]

She was explaining that while the loan was changed to be potentially forgivable, the Government of Nova Scotia would be paid back in a different way.

So you can put the screen share down, John. Thank you.

So in addition to clarifying and rebutting the Claimant's argument about the

$1 billion harvesting tax loss, it's important for another reason what Ms. Chow was saying, is that the tax loss sharing element is an inseparable part of the loan agreement and, therefore, is not a measure that can be challenged pursuant to 1108(7)(b).

I am going to go into the legal issues now.

The bottom line for all this is that it is not for a NAFTA -- it is not for the Claimant to ask a NAFTA Chapter 11 Tribunal to replace the government's good faith policy decisions with its own judgment as to whether or not Port Hawkesbury should have been supported in this or in any amount.

These measures clearly had a rational connection to the legitimate public policy goal of, [redacted] maintaining the operation of Port Hawkesbury as a major manufacturing and forest sector industry in Nova Scotia. That's all you need to know to dismiss the claim.

Now, before I leave restricted access, I'd like to show the Tribunal two very important documents that relate directly to

electricity because they help discredit the Claimant's narrative.

As we will see in a moment, originally, PWCC came to in negotiations with Nova Scotia Power with the radical idea that it wanted to get the electricity rate all the way down to $30 a megawatt hour, which is about half of what the mill had been paying previously.

We will see in a moment [redacted]

John, you can bring that up.

[redacted]

But the point is that that was the direct result of the deal that PHP and NSPI

negotiated where NSPI takes all the risk of the fuel costs, and I will talk about that in a moment.

But this is important because at the hearing, November 2020 -- next slide, John -- Ms. Chow testified that [redacted]

Ms. Chow stated back then that:

[redacted]"[as read]

Sorry, John, the previous slide.

What she said was:

"[redacted]

[redacted]"[as read]

John, you can put that down.

So please keep that in mind, because so much of the Claimant's false narrative does not actually go into the details of [redacted]

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

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Thanks. Confirming we are in public access.

MR. LUZ: The issue of electricity has been exhaustively canvassed in our pleadings and at the hearing next year, so I am going to try to be as succinct as possible on what is actually a very straightforward argument by Canada which has already been vindicated at the World Trade Organization that the Government of Nova Scotia did not and does not have effective control over PHP and NSPI or the load retention rate that they negotiated.

I am going to go through this fairly quickly because some of it we didn't even hear from the Claimant because they have abandoned some of the arguments.

First, has to do with the Claimant's original attempt regarding Mr. Todd Williams of Navigant Consulting and address Resolute's allegation that NSPI acted on the instructions of Nova Scotia.

John, you can put that the next one. Yeah, thank you.

This really has to do with Article 8 of the ILC articles and the effective control test which the Claimant has failed to do.

Then I will take the Tribunal through the relevant conduct at issue and highlight the distinction between the conduct of two private parties, PWCC and NSPI, the adjudicative conduct of the board, and the regulatory conduct of the Department of Energy.

That conduct is distinguished in international law, and that does not mean that the rate that the mill pays for electricity is attributable to the Government of Nova Scotia.

I won't really address Article

11 of the ILC articles but it's on our presentation slide anyway.

Just some quick background for Professor Hanotiau's benefit.

In June 2011, the Claimant partnered with its competitor NewPage to pursue a lower electricity rate for Bowater Mersey and Port Hawkesbury because they were both in economic distress. The Claimant and Port Hawkesbury retained an expert witness, Dr. Alan Rosenberg, testifying that load retention rates were common in North America and made economic sense when it left other ratepayers better off than they would be when large industrial customers left the grid.

And on November 29th, 2011, this is Exhibit C-138, the Nova Scotia Utility Board accepted the Claimant's argument. They should be eligible for when they are in economic distress for load retention rate but they still have to pass the legal test that all other ratepayers cannot be subsidizing the company. That is, they would be better off with the proposal than they would be without it.

In other words, the Claimant did for itself what it now alleges is verboten for

PHP.

Now let's go back to the conduct of private parties. I won't spend too much time on this. The Tribunal knows very well the rules on customary international law as articulated in the ILC articles and in case law, Bosnia, Nicaragua case.

The point is to find private conduct attributable, it must have both general control over the private person and specific control over the specific acts that are alleged to be attributable and a breach of international law.

It's a very high threshold the Claimant cannot meet.

At first, the Claimant tried to say that a consultant retained by the government to sit in on negotiations between PWCC and NSPI established effective control. Mr. Williams' own description, as an honest broker, shows that that argument was, never had legs to begin with and the Claimant has basically abandoned it.

You can take down the screen, John.

Then it moved on to saying the

government had effective control over the NSPI which is an argument that the WTO has already rejected.

You can bring up the slide from the supercalendered paper panel. This was examined extensively, the WTO concluded that the negotiations were vigorous and based on market considerations and it rejected the argument that the GNS has entrusted or directed NSPI to provide the electricity rate to PWCC.

That's not a surprising finding because the law itself says that that must be a negotiation. It is an explicit requirement of the load retention rate that NSPI and the customer have to negotiate it amongst themselves the price, terms and conditions on a customer by customer basis.

And, again, this is not unusual. The Claimant's own -- you can go to the next slide, John.

The Claimant's own expert testified in 2011 that this was normal and this made sense, it was common in North America.

In fact, the Claimant's expert, Dr. Hausman, said the same thing here. He

noted that it was his knowledge that Alcan, one of, another company in Quebec, had made many deals with Hydro Quebec, the electricity producer in Quebec, and there was no reason why the Claimant couldn't do something like that here.

The point is, and you will see this in the next slide, is that in 2011, the Claimant itself argued that a reduced electricity rate for its mill and for Port Hawkesbury served the public interest if both mills can remain in operation. Completely opposite to what they're saying now.

Now, again, as I said, the legal test has always been that just because private parties negotiate a rate, it doesn't mean that it will be approved because it has to meet the legal test that other -- other ratepayers are not subsidizing.

Now, I mentioned earlier -- and you can go to the next slide, John -- is that at the beginning -- and this comes from a public document that was filed with the utility board -- when it started, PWCC was looking to achieve $30 a megawatt hour. And now Mr. Coolican explains this but before I do that, we should go into restricted

access just for a moment.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Confirming we are in restricted access.

MR. LUZ: Thank you.

[redacted]

The problem was the quid pro quo for that, from NSPI, was that PWCC had to assume all the fuel, the fuel price risks. And that was a big risk because if you can't manage your mill to use energy at the time of day when it's cheapest, you are paying a lot, [redacted]

But that was the bargain they struck.

Part of the other way they thought that they could achieve this kind of low rate was through a complex tax structure that was ultimately rejected in August 2011.

So, in other words, this was not something that the Government of Nova Scotia gave to PWCC. And, in fact, it's not something that they ever achieved.

We heard this earlier -- you can go to the next slide, John -- is that Resolute complained that the rate was for seven years. This was addressed specifically in the board's decision.

The board noted that because of the substantial risk to PWCC because they were taking all the risk on the fuel costs, seven years was appropriate. It noted -- the board noted that that was different when you have a locked in fuel price for three years which is how Bowater Mersey wanted it last year.

So, again, the characterization that the Claimant has that this was some generous gift, it was too long, it was too good, the evidence shows it's not true.

I am going to skip forward. John, you can skip to Slide 63.

And we can go back into public session.

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Confirming we are back in public access.

MR. LUZ: So failing the Article 8 effective control test, they try and get at the electricity rate through the actions of the UARB and the Nova Scotia Department of Energy. Again, this was covered in our pleadings, it was covered at the hearing last year and I am just going to go through it very, very quickly.

John, you can skip to the next slide.

The conduct that allegedly is unfair -- sorry, John, you can go to the next slide.

You can skip this one, please.

Yeah, perfect.

The measure really at issue is how much the mill pays for electricity. That's not the conduct of the board. What the board was to sit there in an open, public adversarial proceeding and apply a test: The rate that Nova Scotia Power and PWCC negotiated, does this leave ratepayers better off than they would be if the mill were to shut down? That was the same legal test that was applied with respect to Bowater

Mersey and it was the same legal test that was applied with respect to Port Hawkesbury.

But the Claimant has never alleged that the UARB applied the wrong legal standard or made an error in its decision. So, in other words, the board's role is not what is alleged to be the internationally wrongful act.

And, in fact, this came up during the hearing last year when Professor Lévesque specifically questioned the Claimant about that. Because it would drive a hole through the whole notion of attribution in international law whereby any time governments or organs or courts approved private transactions as a matter of competition law, bankruptcy, utility, suddenly the state would become vicariously liable for the actions of private parties; that goes too far.

And that's why the Claimant's reliance on the Bilcon case is so inapposite. We said this last year. Bilcon, it was the decision of the Joint Review Panel that was alleged to breach the NAFTA. That was the attribution question there. It's completely different here.

The Claimant makes the same mistake with respect to the regulatory conduct of

the Department of Energy and, again, it conflates the conduct of two private parties with regulatory actions by the government.

John, if you go to the next slide, 67. Yeah, thank you.

The province had always been very clear to the parties that whatever you negotiate, it has to pass the legal test.

Now the Claimant says that a letter from former Deputy Minister of Energy Murray Coolican -- you can go to the next slide, John -- said that that, that what the government did here makes the rate attributable to Nova Scotia and that's not correct.

And, again, this is detailed in Coolican's statements in the testimony last year and I will just try and be succinct.

The government knew from many years of planning renewable energy standards that Port Hawkesbury coming back online was not going to generate any new additional RES costs. They knew that. And so when the board asked the government the question, what happens if RES costs come up, the government just simply said it's not going to happen. And it never has happened.

So there has never been any costs for renewable energy standards that the government has absorbed. All the government did was tell the board, in essence, don't worry about it. It's not going to cause any additional costs.

Sorry, John, you can go back to that previous slide.

This was the second, this was the second part about the biomass. Again, we talked a lot about biomass and I won't get into the details. The government had designated before PWCC ever came into the picture that it was going to designate the biomass plant as a must run. That policy intention has not changed. That's all the government told the board.

And, again, as we went through this, there was no assumption of any cost. Port Hawkesbury pays for the steam that it uses coming from the boiler from NSPI. So there is no subsidy, this is not an additional cost, this is not largesse. It's just, it's really much ado about nothing.

I think that's all I have to say about electricity because I want to move on to some other issues.

John, you can take the screen down.

Professor Hanotiau and Dean Cass and Professor Lévesque, I said I was going to deal with 1105 first because it really encapsulates so many of the factual issues that show how Canada has not breached not only Article 1105 but also Article 1102, so I am going to bring it all together here and use this opportunity to try and refute at least a few of the most major problematic characterizations that the Claimant has used in these proceedings.

I won't go too much into the minimum standard of treatment, it's in our pleadings and I know the Tribunal is well-versed on this issue.

So, John, you can bring up the slides and I will scan through it.

It is undisputed that it's the minimum standard of treatment of aliens in customary international law that applies and it is axiomatic that the burden is on the Claimant to establish the rule of customary international law.

And when it comes to the minimum standard of treatment, it's crystallized

around standards like denial of justice and full protection and security.

But let's look at what -- John, you can go to the next slide.

Let's look at what the Eli Lilly tribunal said, endorsing what the Claimant's Tribunal said, as the kind of behaviour that a government would have to demonstrate before you would even be in the realm of the minimum standard of treatment.

Egregious, gross denial of justice, manifest arbitrariness, blatant unfairness, complete lack of due process, evident discrimination, manifest lack of reasons. That's the threshold to apply, the Claimant has already accepted in many of its pleadings that it agrees with language from Cargill which is essentially the same as this. But the Eli Lilly Tribunal, being one of the more recent tribunals endorsing that as the standard description, I think is helpful to the Tribunal.

You can take down the slide, John.

It's notable that the Claimant really did very little, I should say nothing, to

demonstrate the existence of a customary international law rule prohibiting or restricting subsidies including government loans and grants or procurement. There is no such rule.

And for all of its unsubstantiated bluster, the Claimant really can't point to anything in international law that shows that anything, any legal rule under the minimum standard of treatment protects it, including anticompetitive behaviour. Not that that's relevant here anyway because, of course, it's a private company, not the Government of Nova Scotia that is competing in the market. So the government has no control over whatever so-called anticompetitive behaviour that the Claimant says exists but has submitted no evidence of.

And that was something that was noted by the Tribunal in its jurisdictional award that the government has no effective control over PHP, its prices.

Furthermore, it's been recognized in Grand River, Methanex and Mercer that there's no general rule of custom requiring host states to treat domestic and foreign investors equally.

So in the NAFTA, non-discrimination measures are covered in Article 1102, and even that provision doesn't apply to subsidies, loans, grants and so on.

So you can't argue that it's a violation of minimum standard of treatment or Article 1102 when it's explicitly permitted, both in international law and in the NAFTA Chapter 11.

Now, one of the things that the Claimant brought up, and this was in its memorial, is that it was the customary practice amongst NAFTA parties and in market economies generally to let companies that are not commercially viable fail.

It had no evidence for that. There's no rule of customary international law that supports this.

And, similarly, the Claimant essentially conceded at the hearing last year that proportionality is not part of the minimum standard of treatment of aliens in customary international law.

So what the Claimant misunderstands is that the minimum standard of treatment is not a catchall category for investors

to complain that they disagree with decision-making process of government officials, that they would have pursued a different policy or would have preferred a different outcome.

Customary international law does not guarantee that a foreign investor will not be adversely impacted by government policy measures, regulatory or otherwise, and it does not require that the interests of the foreign investor be elevated above that of everyone else.

John, you can skip forward. Yeah, go ahead. Just go to Slide 81.

Oh, yes, this is just a slide that comes from the Claimant's own submissions saying that it's in the public interest for both mills to stay open.

Now, in this case -- you can go to the next slide, John -- it's uncontestable that there was a genuine and bona fide public policy basis for financial assistance.

We heard this from the Claimant last year and even the Claimant has admitted this.

The next part of this presentation actually goes through the testimony

of the expert witness presented by the Claimant last year, Mr. Alex Morrison. The Claimant put it forward because they had no evidence at all to support their argument that what Nova Scotia did was unprecedented and unique.

Canada pointed out all of the methodological failings of the report in its pleadings. I don't want to go through that and I don't think it's necessary for me to go through the testimony from last year, but what that demonstrated was that the Claimant withheld so many of the documents that Mr. Morrison would have needed to make an objective assessment as to whether or not the measures were unique or unprecedented.

And, in fact, when you look at the cases that Mr. Morrison did find in Canada, he actually confirmed that what the Government of Nova Scotia is quite typical of what happens when you have a major employer in an economically vulnerable region. Governments will often give financial assistance in the forms of loans and grants particularly aimed at the mills, improving the mills' efficiencies.

So there are slides in

Canada's slide presentation. John, you can bring them up. I won't go through them here. I don't think it's necessary to further belabour the point of how Mr. Morrison's testimony actually damaged the Claimant and its position and helped prove Canada's point. I think these slides from the testimony speak for themselves and the Tribunal can look through that at its leisure.

Before I leave this session, we are going to go into restricted access session.

And, John, you can put the screen down, please.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Confirming we are in restricted access.

MR. LUZ: Thank you.

The Claimant's entire case seems to rise and fall on two allegations. First, that it was a violation of NAFTA, that the GNS allegedly wanted to make PHP the "the" lowest-cost producer and not just a lowest cost producer, which presumably would be perfectly acceptable.

To the Claimant, the difference between "A" and "the" is their entire case.

Their second allegation is that the GNS knowingly proceeded to support financial -- support Port Hawkesbury [redacted] And I am going to refute both of those allegations decisively now.

First, in the Claimant's view, its case rises and falls on two letters: "A" versus "the". This is where it fails.

PWCC may have had aspirations of being the lowest cost mill in North America. Those were dashed when it didn't get a $30 per megawatt hour electricity rate when it went unrealized.

But that doesn't really matter.

What was it for the Government of Nova Scotia?

Being the lowest-cost producer, that's not what it was about for Nova Scotia. We saw earlier [redacted]

And let's go to the testimony of Ms. Chow from last year, at Slide 95, John. We will skip ahead to that.

Because, notably, none of this was in the Claimant's presentations this morning. We heard it from Mr. Montgomerie and Ms. Chow last year.

What was the goal? What was the goal for Nova Scotia? Find a good corporate citizen that would restart PHP with reasonable and prudent financial support. That was our goal, that's what Mr. Montgomerie said.

Next side, please.

Here is some key testimony from Ms. Chow.

Because she was asked about this directly by the Claimant and this is what she said:

"[redacted]"[as read]

Ms. Chow said:

"[redacted][as read]

And in response to the question:

[redacted]"[as read]

Ms. Chow said:

"[redacted]"[as read]

Ms. Chow's testimony right there discredits the Claimant's case.

Next slide, please.

[redacted]

"[redacted]"[as read]

Here is the key language:

"[redacted]

[redacted]"[as read]

Next, please.

[redacted]

It was not some part of a scheme or an intention or a collaboration to be able to go out and create a national champion, which a word, again, a term that has never been uttered in Nova Scotia or by PWCC. It is invented by the Claimant.

As Ms. Chow said, [redacted]

The next slide, John.

We saw this earlier, [redacted]

[redacted]

Let's move on to [redacted]

[redacted]

John -- we heard so much about [redacted], both in its introduction and 1105 and 1102, but, in reality, and as the Tribunal heard last year, again, the Claimant is trying to make far too much, far too much of the [redacted] and we heard this from the witnesses last year and again when the Tribunal reviews this in the context of what it was, in the testimony of the witnesses, they will understand the same, Canada submits.

Some background. I can bring up Slide 101.

Are we in restricted? Sorry, Heather, are we in restricted access session? I believe we are.

MS. D'AMOUR: Yes, confirming

we are.

MR. LUZ: Thank you, thank you.

[redacted]

So, by that time, the union had already negotiated a new employment contract with PWCC. The electricity rate was on the verge of being approved. And the -- and PWCC and

NewPage were on the verge of completing the sale, that's Slide 102. Yeah.

So the planned sponsorship agreement had been signed on July 6th, the court approved it on July 17th and a vote of the creditors was going to be on August 15th.

So as Mr. Montgomerie and Ms. Chow testified last year, [redacted] And, unsurprisingly, Resolute only cherry-picks the parts that serve its goal and ignore every other part [redacted]

So let's look at it, let's look [redacted]. This is [redacted] that the Claimant relies so much on.

You can go to [redacted]

1 [redacted]

[redacted]

We can move to the next slide.

[redacted] Because that's really what the Tribunal has to focus on.

[redacted]

As Ms. Chow said, Mr. Montgomerie said [redacted]

[redacted]

If you move, in fact -- it's kind of interesting because this is one of the things that [redacted] -- you can move to the next slide, John -- [redacted]

[redacted]

You can skip, please, John.

Okay, there's 15 minutes left until the break.

You can skip forward, please, John, there are some other slides in here that just provide the proper context.

John, thank you.

That's fine. John, you can take it down now. I will just summarize this.

So, again, really, what is the point of this [redacted] and the role in this NAFTA claim? It's not much. Obviously, [redacted].

[redacted]

[redacted]

[redacted]

But the point is -- let's put that aside for a moment. Really, what is the implication of what the Claimant is suggesting? [redacted] what's the alternative?

The deal between -- so if Nova Scotia had pulled all its support and said "we are done with this" [redacted]

So, the Claimant suggests that it should have withdrawn all support for Port Hawkesbury. Meaning, NewPage would be deprived of a going concern deal and all of its creditors of the value of the deal, the remaining workers at the mill would be thrown out of work, the province would have faced a possible [redacted] hit to the economy, the electricity grid would have lost its largest consumer.

So, in other words, what the Claimant is actually doing is using this to say

that Nova Scotia should have prioritized its theoretical interests above the other real interests that were far more likely to happen if the mill shut down.

That's all I have to say about 1105 and I think that's actually a good time. I know that we were supposed to do an hour and a half but I am wondering if that is a good time to have a break, Professor Hanotiau, because I am going to move on to 1108(7) next.

PRESIDENT HANOTIAU: Yes, I think it is a good time to have a break, ten minutes. So we will resume in ten minutes.

MR. LUZ: Okay, thank you.

MS. D'AMOUR: Counsel, I will just admit the restricted access people and push them into the breakout rooms as well.

MR. LUZ: Thank you.

--- Upon recess at 12:37 p.m.

--- Upon resuming at 12:47 p.m.

--- Whereupon Restricted Transcript Ends

PRESIDENT HANOTIAU: You still have 1 hour and 11 minutes.

MR. LUZ: One hour and 11 minutes. Thank you.

MS. D'AMOUR: We are in public access. Thank you.

MR. LUZ: Thank you.

Really, this national treatment case and Canada's point here should take five minutes because the -- before the Tribunal can even consider whether or not the measures pass the in like circumstances test in Article 1102(3), it first has to ask itself does the national treatment obligation even apply.

There couldn't be a more straightforward application of 1108(7) than the case here. And it renders the question of national treatment really moot and irrelevant which is why the Tribunal should address this question first, not only in terms of judicial economy but, more importantly, it conforms to the NAFTA parties' decision to specifically remove measures covered by 1108(7) entirely from the scope of the national treatment obligation.

Dealing with 1108(7) first is how other NAFTA tribunals have approached this.

John, you can put up Slide 1112.

I noted this before. This is

what the Mesa tribunal said about -- with respect to 1108(7)(a). Of course the reasoning applies equally to (b).

It's a carve out rule. Its function is to exclude all procurement activities from the scope of obligation, some obligations in Chapter 11.

Again, it applies to (b) as well.

In Mesa, the Tribunal assessed whether the feed-in tariff program at issue was procurement by a party. The Tribunal majority found that it was and dismissed the claim without having to address whether or not it was also a subsidy and without having to address whether there was a national treatment violation because it was moot.

Similarly in Mercer -- the next slide, please -- the Tribunal determined that the generator baseline contractual term was procurement by a party and that measure was excluded from the national treatment analysis.

Similarly -- next slide -- in UPS, the Tribunal didn't first assess whether the postal imports agreement violated 1102 and then,

if it found the violation, secondarily assessed whether it was absolved by virtue of 1108(7). In that case, the question was whether the PIA was government procurement.

The majority found that it was because it found that a procurement exception so it didn't address national treatment.

Of course, we recognize Arbitrator Cass had a different opinion on that particular question on procurement but, again, that was a different measure than the issue, than the measures at issue here so I will do my utmost to convince him to Canada's side this time around.

But and, quite honestly, in contrast to what the more opaque government program that was at issue in UPS, this -- these measures don't require an in depth analysis. And it's obvious from the face of the documents that they are government-sponsored loans, grants and procurement by a party, which are the exact words used in the text.

So let's look at the slide, just as a reminder because the focus of the Claimant entirely, entirely is on 1108(7)(b) first word. They have read none of the rest of it, and

they have potentially omitted it because the NAFTA parties -- and this provision, as we know, it must be interpreted in accordance with the Vienna Convention on the Law of Treaties. It doesn't matter that it's a reservation, as the Mesa and Mobil Murphy tribunals noted. It doesn't matter if it's an exception, reservation or otherwise, ordinary rules of interpretation.

What's the ordinary rule? Ordinary meaning of procurement by a party. Let's see what the Mesa and Mercer tribunals said.

In order the ordinary meaning of procurement by a party, as a matter of English language, is the general act of buying goods and services. It's a broad term. Its ordinary meaning is broad and not restrictive. And you can see what the Mesa tribunal also said when it comes to procurement.

So, similarly, just as procurement by a party has a broad and not restrictive meaning, because that's what its ordinary meaning is, the terms "government supported loans and grants" are broad. They have no limits as to their form or purpose.

Now, as the Mesa tribunal

said, the NAFTA -- the purpose of this provision, the NAFTA parties sought to protect their ability to exercise nationality-based preferences in cases of procurement.

Again, the same applies with respect to 1108(7)(b). When it comes to subsidies, government loans and grants, the NAFTA parties specifically wrote in a text they wanted to preserve the right to have nationality-based preferences.

And, again, here, the measures in front of this Tribunal, the ordinary meaning of procurement, loan and grant align perfectly with the obvious nature of those measures. The purchase of land by the Government of Nova Scotia to keep as Crown land is plainly procurement by a party and, therefore, subparagraph (a) applies.

The payment of fees for silviculture and forest maintenance and other services under the outreach agreement and the FULA are procurement of services, as Deputy Towers noted in her witness statements. They are also covered under subparagraph (a).

The workforce training and marketing grants are actually called grants, so it

obviously falls into subparagraph (b).

The $24 million capital loan is plainly a government-supported loan so it falls within the explicit text of the paragraph -- subparagraph.

And the $40 million credit facility, including all of its terms and repayment conditions, are, again, government-supported loans.

The Claimant doesn't even really dispute the characterization of the measures. This -- we saw this last year and we saw it again today. If we could bring up the slide. This is what the argument is.

It tries a slight of hand. This is testimony from last year, but it's the same argument that we heard from the Claimants this morning.

It tries a slight of hand by calling all of them together an ensemble or a package of measures that is magically transformed into a distinct measure that circumvents the application of 1108(7). We saw that last year.

You can take it down. Thank you.

Let's take down the slide and consider this specious reasoning.

The Claimant's reasoning is akin to calling a herd of cows an elephant. There are a couple of brown cows, there are a few white cows, there are some black cows. But put them into a herd and it's an elephant.

That's illogical. Whether the herd consists of two or 20, a herd of cows is still made up of cows.

So, in other words, the Claimant can't avoid 1108(7) by saying that the alleged guarantee to make PWCC the national champion is a measure with an identity unto itself and therefore excluded from the exclusion. That would drive a truck-sized hole right through the provision, destroy its object and purpose and render the provision essentially meaningless.

Motivations for government subsidies, loans or grants and procurement are not relevant for the purpose of 1108(7). And for 1102. Because the text says 1102 does not apply to government-supported loans, to grants, to procurement by a party. The Claimant can't rewrite the treaty text.

So what the Claimant is trying to do, again, and it knows, it has to know this because it can't -- they use the words loans, grants and so on and so forth in their own pleadings and we have dealt with the other characterizations elsewhere, but they have two arguments as to why the Tribunal should ignore 1108(7).

First, it has to do with the fact that Canada did not notify the measures to the WTO. This was addressed in our pleadings and last year.

The contention that a NAFTA Chapter 11 Tribunal can refuse to apply the explicit text of Article 1108(7) because of an alleged non-compliance with a different treaty that contains a different set of obligations over which this Tribunal has no jurisdiction and under which the Claimant has no standing is unprecedented. Nowhere in the NAFTA is there a requirement for the party to make a notification at the WTO in order for 1108(7) to apply.

In fact -- and you can bring up the slide, John -- the Claimant's argument would lead to perverse results. The SCM Agreement

itself stipulates that the notification of a measure does not prejudge its legal status or effects under the agreement or the nature of the measure itself.

So it's nonsensical to argue that the absence of a notification precludes NAFTA 1108(7) when the notification of the same measure does not prejudge its status, effects or nature under the SCM agreement.

The second attempt to get around it is by saying that Canada and Nova Scotia previously denied the measures for subsidies.

Well, again, and the Claimant brought up the same arguments as it did last year so it bears repeating again -- you can go to the next slide, John, where they were asked for direct evidence of a denial. There was no such denial.

Let's go into restricted access session for just a moment, please.

--- Whereupon Restricted Transcript Commences.

MS. D'AMOUR: Confirming we are in restricted access.

MR. LUZ: Thank you.

This is some of the evidence. We saw the same thing from last year. This is not

directed -- there's no denials in the way that the Claimant's -- it's a mischaracterization of these documents to say that Canada denied that there was subsidies.

Let's look at the next document. [redacted]

[redacted]

You can go to the next, please.

Yes, again, this is just more description of what it is. So the Tribunal can look at the document for itself.

Next slide, please.

Actually, we can exit restricted access session now.

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Thank you.

Confirming we are public.

MR. LUZ: Thank you.

Now, similarly, the other documents that are brought here show that there's no denial and that the technical -- the technicality of what the Claimant is trying to do by saying that the non-reporting of a measure of the WTO really is not relevant here because this Tribunal is not at the WTO, it's not interpreting the SCM agreement. It's interpreting Article 1108(7) and what matters for this Tribunal is that it is very clear that the provision applies.

Thank you. You can put that down.

I have to apologize in advance to Arbitrator Cass because I am going to have to address not him directly but the fact is the Claimant seems to rely on his separate opinion so much in UPS, and I apologize for you having been put in such an awkward position, so I don't mean to speak to you directly, but I do want to sort of bring something up that provides comfort to show how substantially different the UPS case was than the measures before here.

I will just say a few very

brief points on this, is that here, the important measures at issue are, without doubt, government-supported loans and grants. It's not even contested.

And in this case, unlike what was happening in UPS, the two terms are expressly in the treaty. Government-supported loans and grants are specifically written in there to remove any doubt as to the intentions of what the NAFTA parties meant as to whether or not those things were subsumed in the otherwise undefined term of subsidy.

So in UPS, the publications assistance program was not a publicly-announced government-sponsored loan or wasn't a publicly-announced grant. It was inside a baseball, if I can use that term. It's an opaque internal government program operating in circumstances that bear no resemblance to this case.

So, any, any comparison that can be brought up from the circumstances in UPS really are inapposite here, particularly when it comes to subsidies because as, Dean Cass, you have noted previously and, again, Dean Cass is welcome

to keep his mind, change his mind, do whatever. I don't mean to bring this up but it was the Claimant that brought this all up so I find it awkward but necessary.

That if a subsidy is a decision, an overt decision by government to expressly convey cash benefits on a particular business, well, that's what happened here.

That's all I have to say about 1108(7).

I want to spend the rest of my time talking about national treatment.

Unless the Tribunal wants me to sort of go through the laundry list of all of the measures that the Claimant has put forward, it might be something I can do tomorrow to knock them all off because, really, the, the only measure that doesn't fall within the scope of 1108(7)(a) and (b) is the load retention rate because it's not attributable to Nova Scotia nor is it a subsidy because it's a market-based rate.

The other ones, again, I can bring them up tomorrow with the biomass boiler and so on. So much of it just depends on mischaracterizations by the Claimant. We have

dealt with it in our pleadings. I can deal with it more tomorrow. I just want to cut to the chase.

John, you can bring up the Slide 125. For national treatment.

One of the essential elements of national treatment, and this is reflected in one of the -- in many places, as we're going to see, but I thought this was a very succinct summary of what it is by ICSID Secretary General Meg Kinnear and Professor Bjorklund.

"It seems unlikely that the NAFTA parties intended that any difference in treatment whatsoever could result in a national treatment violation. Claimant must fulfill its burden of proof and it is in like circumstances with a more favourably treated entity or class, and that it has been accorded less favourable treatment that flows from or arises out or is otherwise connected to nationality."

That has been the long-standing, concordant and consistent view and practice of the NAFTA parties, long before this case. And I would refer the Tribunal to the submissions of the United States and Mexico, the

1128 submissions -- you can go to the next slide, John. Because what -- you can go to the next slide, please. Thank you.

What the United States and Mexico and Canada all said with respect to nationality-based discrimination is long-standing. It goes back many, many years and it's been consistent. So that is something that must be taken into account. Taken into account. It's not binding but it is to be taken into account by the Tribunal pursuant to Article 31 of the Vienna Convention on the Law of Treaties.

The Tribunal -- again, this is not just something that the NAFTA parties and scholars have made up. The Loewen decision, the ADM award, Mercer and other tribunals have concluded that the central object of 1102 is to prevent nationality-based discrimination.

Next slide.

We can see that. It's detailed here right from the Mercer tribunal, saying that the Tribunal agrees and accepts with the submissions of US and Mexico that:

> "Discrimination under 1102 may be de jure or de

facto, de facto discrimination occurring when a facially-neutral measure with respect to nationality is applied in a discriminatory fashion based on nationality."[as read]

And, again, you can see what Mexico says.

So exactly the same arguments.

Now, the irrelevance of the Claimant's nationality is evidenced, obviously, by the fact that the Nova Scotia government encouraged Resolute to invest in the Port Hawkesbury mill and was willing to give it loans and grants for its mill. So obviously this wasn't some sort of animus towards the Claimant as an American investor. In fact, it had absolutely nothing to do with it because they would have welcomed that investment as they already had previously in Bowater Mersey in Nova Scotia.

Next slide.

The Claimant actually concedes this. That its US nationality was not a factor.

And very importantly, other Canadian-owned SC paper producers, Irvine in New Brunswick and Catalyst in British Columbia, were similarly impacted. But Resolute just happened to be the only foreign participant with an investment in Canada so it thought that it was qualified for protection under NAFTA.

My friend Mr. Valasek brought it up this morning to say that he disagrees, the Claimant disagrees with the idea that it simply is that any group of similarly affected investors, be they foreign or domestic, is protected under 1102 and nationality has nothing to do with it. Canada respectfully disagrees with that. And I think the NAFTA jurisprudence and the work of scholars and the views of the United States and Mexico confirm that Canada's position is the better one.

Now let's move to the in like circumstances test.

We talked a lot about burden. Obviously there's UPS that came up with the burden. Again, I don't want to focus too much on burden because the fact is that whoever has the -- if it's Canada's burden, we have gone far, far beyond what is necessary to pass that test. But

the fact is it is for the Claimant to show that the treatment was not in like circumstances and it's less favourable and they have not done that.

So the first test of national treatment is treatment.

Now, in many cases, it's not a controversial question because a government passes a regulation or is targeting someone or doing something in a way that suggests the ordinary meaning of the term "treatment". It requires specific conduct or behaviour towards a specific investor or investment, so either a measure that applies to them or conduct or behaviour towards that specific investor.

But what the Claimant has been talking about is really a remote indirect adverse effect argument that no previous NAFTA Tribunal has ever accepted. And, again, I said it last year. Again, my friend Mr. Valasek disagrees with the characterization, but, again, we think that this characterization really is not within the ordinary meaning of what treatment is.

The government treats a private company in one province, Nova Scotia, helps it reopen, which, in turn, that company

operates in a market that treats customers in a North American market and a global market, because Europe counts too, it's part of the world, and part of the North American import market.

So that company treated those customers, which, in turn, decided to buy more or less SC paper depending on a multitude of other factors like exchange rates, economic growth, paper quality, et cetera, over which the Government of Nova Scotia has no control. And that, in turn, treated Resolute's mills in Quebec.

It's too circuitous of a path to constitute treatment.

Let's consider the differences between and, again, the Claimants brought up the sugar cases from Mexico. Again, there are clear distinct differences here.

The Claimants in those cases had investments in Mexico. The measures, they were within that jurisdiction and the purpose of the measures was to particularly target US investors in that market in retaliation for the US denial of Mexican sugar producers. So whereas that is the kind of treatment that might attract this, it's not here.

Can we go into restricted access for just a minute, please.

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Confirming we are in restricted access.

MR. LUZ: Thank you. Before I proceed. Can I ask Ashwita how much time we have left?

MS. AMBAST: It's 47 minutes.

MR. LUZ: 47 minutes, okay, great. Thank you.

I just want to address the Claimant's arguments with respect to [redacted] as establishing treatment. Again, it doesn't. [redacted]

That's simply why [redacted]

[redacted] it's not a basis to be able to say treatment. It's just -- it's too obscure, too uncertain, too circuitous to be able to fulfil that first part of the test.

We can leave restricted access now.

--- Whereupon Restricted Transcript Ends

MS. D'AMOUR: Confirming we have returned to public access.

MR. LUZ: Thank you.

When it comes to in like treatment in like circumstances --

You can go to the slide, John.

-- NAFTA Tribunal's UPS, Cargill, Mercer. A Claimant must do more than show that two investors are competitors making the same product. A Claimant must prove that the treatment accorded to those investments was in like circumstances and that all of the relevant context and circumstances in which the treatment was accorded must be taken into account, including the public policy objectives for the measure.

Mercer's endorsement of Cargill's reasoning sums it up:

"Like circumstances is

not determined by reference to the rationale -- it was determined by reference to the rationale for the measure that was being challenged, it was not a determination of like circumstances in the abstract. The distinction between those affected by the measure and those who were not affected by the measure could be understood in light of the rationale for the measure and its policy objective."[as read]

Canada has spent since, not only this morning but since the beginning of this arbitration, demonstrating to the Tribunal the full context, the true story, the objective reality of why the Government of Nova Scotia sought to provide financial assistance to the Port

Hawkesbury mill. The evidence speaks for itself and the testimony of the witnesses Ms. Towers -- Canada's witnesses are there.

And we mention the idea of a rational nexus -- a reasonable nexus to a rational government policy, which was how the Pope & Talbot tribunal said, is to say even if you want to apply what the Claimant says it is, Canada passes that test with flying colours.

The other thing I should say about that UPS test -- sorry the Pope & Talbot test, is their reliance on Article 1102, the object and purpose of the NAFTA, essentially what they are arguing is that it trumps the intention of the NAFTA parties with respect when it comes to government loans and subsidies and procurement. How can it be inconsistent with the object and purpose of the NAFTA when the NAFTA parties specifically reserve the right to not apply national treatment in those areas? So relying on whatever the test the Claimant makes, Canada passes.

But let's talk about the in like circumstances specifically because, again, the Claimant just takes it for granted. But it's

not. It's completely different because of the fact that they are not in Nova Scotia.

The rationale and the policy objective of the government's financing was focused on keeping a major industry in a rural part of Nova Scotia. Not in a different province where the GNS has no jurisdiction, authority or presence. The Claimant didn't even want to run Port Hawkesbury. So treatment of the company which it did not want to run are not in like circumstances.

The government could not have extended no less favourable treatment to the Claimant's mills in Quebec as it did for PHP. Government of Nova Scotia has no Crown land in Quebec so it would make no sense for Nova Scotia to pay Resolute for services to maintain roads and forests on land owned by other people in a different province.

The Government of Nova Scotia cannot implement renewable energy regulations that apply to the Claimant's plants and mills in Quebec. NSPI doesn't operate in Quebec. It operating only in Nova Scotia, so it cannot supply electricity to the mills in Quebec of the Claimant

on the same terms as it does Port Hawkesbury.

I mean, the differences in circumstances are manifest. And, again, fully justified by the rationale and policy objectives of the government that have been explained.

The Claimant -- and I want to end on this point. The Claimant's reasoning really conflicts with what this Tribunal ruled in its jurisdictional ruling. The Tribunal said that 1102(3) should not be read so as to impose a requirement of uniformity of treatment by the different provinces in the NAFTA parties.

So that being true, there could not be an obligation under 1102(3) for the Government of Nova Scotia to have withheld from PHP to ensure uniform treatment to the Claimant's mills in Quebec, but that's what the Claimant is essentially arguing.

The Tribunal also said that it agreed with the Merrill & Ring Tribunal that 1102(3) only applies to the same regulatory measures under the same jurisdictional authority. So according to that, there could be no obligation for the government to somehow extend outside its provincial borders government funding programs

like the Nova Scotia Jobs Fund, or the funding programs, all of which will were used to provide support for PHP in Nova Scotia.

And, again, nor could there be any obligation for the Nova Scotia Utility and Review Board to extend jurisdiction into Quebec or NSPI to provide electricity to the Claimant's mills in Quebec, which would make no sense anyway because, as the Claimant has never disputed, the Claimant's mills in Quebec pay less for electricity than PHP does in Nova Scotia.

Again, the differences are manifest. They conflict with what the Tribunal already wrote in its jurisdictional award, and the only two scenarios that could possibly be covered that the Claimant -- that the Tribunal mentioned just don't exist here.

The Tribunal noted that Article 1102(3) could conceivably cover a scenario where a province was taking protective measures to keep a foreign investor out; that's not what happened here. Nova Scotia would have been -- invited Resolute to bid on the mill. And there was no Methanex-style campaign against the Claimant, far from it.

Finally the last point, treatment less favourable. When are we going to start talking about the less favourable treatment? The Claimant skipped this entirely. Again, for example for the electricity, the Claimant has never disputed that it actually pays less for electricity in Quebec than PHP does in Nova Scotia. It hasn't proven that renewable energy regulations in Quebec are less favourable than that in Nova Scotia. It hasn't proven that its license agreements in Quebec to cut down timber on Crown land is less favourable. I could go on but I don't need to.

The national treatment claim is moot because of 1108(7), but it's dead on arrival anyway.

I thank you for your patience. I am going the leave the rest of the time to my colleague Mr. Neufeld to talk about damages. And we look forward to any questions that the Tribunal might have tomorrow. Thank you.

I am just going the mute the microphone just for a moment to facilitate the transition if that's okay.

MS. D'AMOUR: Mr. Neufeld,

just before you get going, I do just want to remind you that we are in public access. Thank you.

MR. NEUFELD: Thanks. I won't be needing to go into restricted access at all. I will just be cutting the public feed at one point later on, but for the most part it will be in open session.

MS. D'AMOUR: Excellent, thank you.

SUBMISSIONS BY MR. NEUFELD:

MR. NEUFELD: Good afternoon, Chair Hanotiau, Arbitrators Cass and Lévesque.

The last time that I was presenting, at least before Arbitrators Cass and Lévesque, I was trying to condense my talking points down to 15 minutes at the direction of the President. I found myself cutting back my script and cutting back the tears, maybe it was because it was a long week, that probably had a lot to do with that, but I also had the sinking feeling that maybe it might be the last 15 minutes I would spend with Professor Crawford and unfortunately that proved to be the case.

But here we are, despite the

sad circumstances that brings us together. I am very honoured to be representing Canada and grateful for the work of the secretariat and of our new President.

I am also grateful to have more than 15 minutes to present damages because it takes a considerable amount of time just to make sense of the jumbled mess that the Claimant has provided you with.

But first, first I would like to make a request. Members of the Tribunal, in the event that you decide that there is no breach of NAFTA in this case, Canada requests that you nevertheless make a ruling with respect to damages. Too often tribunals, for reasons of judicial economy, for good reasons, have not gone on to make findings on damages and, as a result, the guidance out there is lacking. Such a course of action here would be very, very disappointing. The Claimant, after all, has adduced no evidence to show that it's been harmed and has instead invoked a theory that it might have been harmed. On top of that, it hasn't made an effort to show that the harm was caused by the alleged breach as opposed to other market events. And, third, it

hasn't quantified any damages with reasonable certainty because it relies on price erosion which is incapable of providing such certainty in these, on these facts that are before you.

This method of quantification is rather novel, at least in ISDS, and has fallen out of favour even in domestic tribunals as well.

Without guidance from tribunals like this one, we will continue to see Claimants ignore the basic legal requirements.

So what are those legal requirements?

For the Claimant to succeed, it must prove three things: One, that the measure of Canada has breached an obligation in part (a) NAFTA Chapter 11; two, that the injury was by reason of that breach, meaning there's both factual and legal, so proximate cause for the Claimant's losses; and, third, that it's chosen means of quantifying that loss is reasonable, rational and not speculative.

The Claimant has largely agreed with this test, citing to Chorzow Factory and the ILC's articles on state responsibility for causation and to the standard of reasonable

certainty for quantum.

However, at the same time, the Claimant has not presented a case on quantum that provides reasonable certainty and has not made any argument whatsoever on proximate cause, leaving the matter of causation entirely to its economists.

I will turn to that later, but first let's take a ride on the Claimant's quantum roller coaster.

As you can see from this slide, the amount the Claimant has requested has gone up and down like a roller coaster. Resolute's NAFTA claim began at $70 million, Claimant's Notice of Arbitration. It rose to $163.7 million in its memorial. Dropped to 104 in its reply. Climbed to a whopping $216 million during its opening statement. And at the hearing it finally settled at $121.4 million, in its closing argument, and its latest written submission as well.

So $70 million is how this claim started. This figure was arrived at without Dr. Hausman's assistance, which is interesting in itself, but it's interesting for a couple of

other reasons as well.

First, it's a lot lower than anything Resolute has claimed in its submissions, and this is despite the fact that at the time Resolute's claims were far, they were far broader than they currently are.

As you know, following the jurisdictional award the Claimant dropped its expropriation claim and its claim against the federal Government of Canada for alleged harm in the ITC and WTO proceedings. The Tribunal also ordered it to drop its claims related to taxation measures and to the assistance of PHP's predecessor, like the hot idle funding.

Second, it's interesting because if you look at the allegations of harm that Resolute makes in its Notice of Arbitration, they are based on totally different things than it's talking about now.

There they talked about crushing its competition, being driven from the market, Resolute losing its contracts to PHP and PHP engaging in predatory pricing. Resolute made these flamboyant statements in its NOA. And isn't it interesting that it has adduced no evidence

whatsoever on these things? Not on predatory pricing, not on loss contracts. In fact, a lot of these things disappear.

On pricing, the evidence points in fact to Resolute undercutting the market, not PHP.

But, most importantly, over eight years after PHP's re-entry, Resolute's sales have been thriving and so have its profits.

And, yet, despite dropping all of these claims and despite no longer arguing that it suffered harm due to predatory pricing or being driven out of the market, its request for damages more than doubled, to $163 million.

That figure, the 163 million, it's found in the memorial's request for relief. It's based on Dr. Hausman's forecast approach. The primary, really the only approach that Resolute offers to calculate damages.

Dr. Hausman uses an October 2011 RISI price forecast. RISI is a pulp and paper analytics firm. And it uses their forecast to determine what the price of paper would have been without PHP in the market, then it compares RISI's price predictions to Resolute's

actuals, which yields an ever-widening price gap between 2013 and 2017 that he assumes represents lost revenue. And after coming up with a couple different ways of calculating costs, which he deducts from those profits, from those revenues, he produces a range. Because the two different costs have different ways of being calculated, you ultimately get a range of 163 to $200 million.

And Dr. Hausman, using the conservative figure -- he always uses the conservative figure is what he says -- he uses that here of $163 million.

Subsequently, in Dr. Hausman's reply memorial cracks begin to appear. His ever-widening price gap and prices suddenly reversed when Resolute's SC paper prices rose, they rose dramatically in 2018. And with the addition of only one more year to his calculations, Dr. Hausman's model was suddenly spitting out negative numbers. In other words, the model showed that Resolute was better off with PHP in the market.

Instead of accepting that result or casting aside the model, the Claimant got Dr. Hausman to adjust his model and account

for what they called -- or what he called unexpected developments that produced anomalous data of rising prices.

So rather than using the 2017 baseline prices, Dr. Hausman artificially smoothed Resolute's improved actual results with results from the 2016 to 2017 period to project a lower estimate of Resolute's expected revenues into the future. In other words, for Dr. Hausman to continue to use his model, he had to disregard what actually happened in the real world, preferring instead to base his quantum on made-up numbers.

In Canada's submission, there can be no reasonable certainty when quantum is based on an ever-changing model that smooths over so-called unexpected events or that produce anomalous data.

This also helps shed light on a big disagreement that Canada and Resolute have other whether the Claimant seeks past damages or future damages.

As you will see in the prehearing and heard again today -- sorry, you will see it in the prehearing memorial that they

just filed and you heard Mr. Feldman said it again today, Resolute argues that the lion's share of the damages it seeks are past damages because they occurred before the hearing of November 2020. Including these made up numbers of 2018, he says that occurred before the hearing.

Well Canada disagrees and argues that the Claimant's case is based entirely on future loss. This is because the Claimant's damages calculation is based on a 2011 forecast of what paper prices would have been starting in 2013. Sure, 2013 is in the past. But when it comes to predictions made in 2011, it's most definitely in the future. So don't be fooled. All of the Claimant's requested damages are in fact future predictions and not based on actual harm.

And as Dr. Hausman himself recognized, predicting future damages is difficult. Whether it's because of unforeseen pricing developments or worldwide pandemic, nobody has a crystal ball.

So the range it cranks out using the new formula is 104 to $149 million. And consistent with the conservative approach,

Dr. Hausman picks the $104 figure and the Claimant in turn runs with that.

But that's when things really go off the rails. With an apparent total lack of understanding of Dr. Hausman's report, the Claimant requested in its opening argument at the hearing relief of 216 million. And as you can see from this next slide of Dr. Hausman's testimony, even he was confused by the Claimant's request.

He didn't just say "I have no idea where it came from", he says the lawyers didn't consult him, they didn't even ask him to review anything.

So what can we take from this? Well, it would appear that the Claimant and Dr. Hausman have been operating in silos. Maybe one's a barley silo and another a wheat silo? Whatever the case, there appears to be a real lack of communication between them, which may explain the wild roller coaster that the Claimant takes us on. I recognize that experts need to have a degree of independence, but it should at least be a given that the Claimant understands the opinion of its own expert.

It was also during his

testimony that Dr. Hausman admitted to never having preferred the forecasting model. So he says "my preferred approach is actually the economic model", but the Claimant does put up the forecasting approach.

Well how could the Claimant have missed this? Why is it relying on the forecasting approach throughout all its written submissions except the last one rather than the economic approach? Why doesn't the economic approach get so much as a mention in the Claimant's memorial or its reply memorial? Both of these documents specifically reference in their prayers the forecasting numbers.

The Claimant obviously missed it, because in an abrupt change during its closing argument of the hearing they requested yet another quantum. That's what brings us to $121.4 million.

And this is the explanation of how it came to 121.4. Professor Hausman provided a range of damages for each of his calculations because he used two different methodologies, right, the RISI cost estimates and the 2 percent inflation. I mentioned that earlier.

Then, in their latest written

memorial, they explain neither methodology is inherently better and they are mutually validating with closely overlapping results. Once again, it appears the Claimant misunderstands. The two different cost estimates don't overlap or validate one another at all. These costs, they produce a range, a low number and a high number.

The Claimant's memorial continues.

Resolute suggests therefore that the Tribunal accept the mid-point of each of the ranges. It's clear from this statement now that they have mixed up the two costing methodologies with the two damages methodologies, the economic and forecasting approach. And unlike Dr. Hausman who is conservative and always takes the lower number, the Claimant suggests you shouldn't go to the lower number at all but take the mid-point. Yet it passes that off as a conservative statement when it says the Tribunal award the more conservative $121.4 million.

This isn't just about a lack of communication between the Claimant and its expert. It shows that the Claimant just doesn't understand what its expert is opining on.

Now if I may, a quick word about the economic approach.

What is the economic approach?

In sum, this approach is nothing but an elasticity check by Dr. Hausman of his primary means of calculating damages, the forecasting approach. Dr. Hausman made this abundantly clear in his presentation at the hearing when he said to "check these numbers, I applied the economic approach." And in his reports as well he talks about how he is looking for consistency. Well, consistency with what?

At paragraph 25 of Dr. Hausman's report he explains that. He says -- the full statement of the approach is found in this one paragraph. And you'll see in the last line of the paragraph he makes clear that what he is checking is whether the RISI price forecasts are consistent with the price elasticities estimated by ITC staff and used in the ITC.

That's all he is doing. He doesn't offer a conclusion based on his econometric expertise on what the correct price elasticity is. Rather, he translates the percentage drop in price decline arrived at

through the forecasting model into elasticity figures, which vary. Without explanation, there is sometimes negative 2.1, as in his first report, and negative 1.5 in his next report. But he says that's all okay because they are all consistent with the US ITC numbers.

In other words, his economic approach isn't a model at all, it's just an attempt to make the forecasting estimates fit the wide-ranging ITC elasticity numbers.

And what are those numbers? Well the US ITC found the elasticity demand for SC paper was somewhere between negative 2 and negative 4. And then they said actually maybe it's closer to negative 1.

Well at page 13 of Mr. Steger's second report, he tests the sensitivity of those various price elasticities by tabulating the amounts of damages that would result.

Here you see that an elasticity of negative 1 will produce damages of over $500 million. Whereas an elasticity of negative 4 will yield a damage figure of negative 97.4 million.

What this means is that if Dr. Hausman's forecasting approach based on the RISI price forecast would have produced a quantum of $500 million, it would have been consistent with the ITC findings. Likewise, if it would have produce a quantum of zero, or a negative number, or a negative number up to $97.4 million, his model would have still been consistent with the ITC elasticity numbers.

And during his testimony Dr. Hausman noted just how uncertain the entire exercise of determining elasticities is.

After acknowledging that even slight variations in price elasticity produce swings of tens of millions of dollars, he said. "No one says anybody knows for sure what the number is. If you go back and look at the ITC, they got different numbers, and Mr. Kaplan got a different number, and the staff got a different number."

But the question is: What value is a consistency check if it can okay any amount between 500 million and negative 97 million? How on earth could one base its quantum on it? After all, nobody knows for sure.

To sum up on quantum, the

Claimant's requests for damages misunderstands and misapplies the opinions of its own expert. And whether the quantum, the quantum requested is based on Dr. Hausman's forecasting or his economic approach, it utterly fails to satisfy the requirement that it be calculated with reasonable certainty.

Okay, that explains the quantum roller coaster. Now let's turn to causation.

This rule is in Articles 1116 and 1117 of NAFTA. And like the basic rule of customary international law, which you find in Article 31 in state responsibility rules, it requires not just proof of breach but proof that the injury arose out of that breach.

The Claimant hasn't even attempted to meet the test. It didn't pay lip service to it in its opening statements of the hearing or in its memorial, other than pass a passing mention to Chorzow Factory in its reply memorial accompanied by a fleeting push for a flexible test of foreseeability, it looks to its economic experts to meet this test.

But proximate cause isn't a

matter to be left to the economists, it rests with the lawyers.

Without an analysis of proximate cause we're left with a scientific notion but not the arguments of policy and law required of the test. We are left with the notion like the one that says smoking causes cancer. With which nobody can disagree, but without an explanation as to, well, what is the harm? What caused that harm? Who is responsible for it? To what degree? Is there contributory fault? Should the harm have been mitigated? Without these explanations, it's of no value. That scientific notion for your purposes is of no value.

In this case the scientific notion is of course supply and demand. Who can disagree with it? And Resolute's causation theory comes down to this statement of Dr. Kaplan which you'll find in the -- in their prehearing memorial, Resolute's prehearing memorial at paragraph 92. He says:

> "PHP added over 20 percent to industry capacity that resulted in negative effects on

Resolute's prices and shipments. As a consequence and directly attributable to the benefits package that enabled PHP to fully re-enter the market, Resolute suffered lost profits through lower prices and lower shipments than otherwise would have enjoyed."[as read]

You heard that this morning.

This excerpt shows that while the Claimant, through Dr. Kaplan, makes an attempt to show cause and fact through its economic theory, that's where the argument stops. It never proves fact of damage and it never addresses any of the crucial matters of legal or -- of policy or legal principle required to show proximate cause.

On facts of damage, where is the proof that Resolute lost shipments? There's none. They haven't cited a single document or a witness statement. They only produced one

witness, that was Mr. Garneau, and he didn't say anything on the topic. On top of that, its counsel and its experts have repeated over and over and over that its mills have to run at full capacity, that's the only thing that works in this industry, it's the only thing that can be economical. Well if they are running full and selling their paper, how could they even have proof of lost shipments?

With respect to its failure to address matters of policy and legal principle, it's most troubling that Resolute's theory of harm doesn't isolate the price erosion caused by any alleged breach from the erosion caused by other market events, any other events. It just assumes that all the erosion is caused by these measures that are before you. In the same way that it assumes that the measures of the government caused PHP to be the lowest cost provider. It doesn't even present evidence to back up that, that theory of cause and fact. For example, it doesn't prove that PHP is the lowest-cost provider. Dr. Kaplan admits to not having done a cost study. He just assumes as fact. Even in the face of the cost study done by Pöyry, page 51 in its report, where

you see that PHP was in fact not the lowest-cost provider in 2015, Kénogami was.

So nor does the Claimant distinguish cost savings that could have resulted from the measures from cost savings undertaken by PHP, rather it expects that Canada should be responsible for that, should be responsible for everything.

So PHP goes and reduces its costs by, you know, through innovative means of reducing craft pulp or through these labour arrangements, workforce arrangements that it has, and says, "yeah, Canada responsible for all that," just assumes these things. And it simply says "our theory on supply and demand, it always holds. It always holds. Added supply to the market in secular decline will always cause prices to go down." That's the logic.

Well, you know, there's one fact, there's one fact alone that proves the Claimant's theory wrong, and we referred to it earlier, it's the so-called unforeseen events that occurred in 2018 when prices did not go down, they went up. And again in 2019, they went up.

If Dr. Kaplan's theory is that

prices necessarily go down, how does one explain in 2018 and 2019 they went up?

Dr. Hausman explains it like this:

> "It was this anomalous event. No one expected prices to go up like they did in 2018. You know, price had been going down for 20 years. They would occasionally blip up but continue down, but they went up a lot in 2018."[as read]

And then he says:

> "You know, I am willing to say when I am wrong. I am an economist."[as read]

Well it's just explained, this unexpected rise in prices is what causes Dr. Hausman's -- Dr. Hausman to adjust his quantum model, and then he artificially smooths out the prices because of this unexpected event. And, as he has made clear, he is willing to admit when he

is wrong for the sake of that quantum.

But this issue, it isn't just about quantum, it goes to the heart of the Claimant's case on causation as well. In the face of rising prices how can the Claimant continue to argue that added supply will necessarily cause prices to go down? To accept the Claimant's theory you have to close your eyes to what actually happened in 2018 and 2019. You have to disregard the real world in favour of a theory that the market will always respond in a certain way, well surely this is unacceptable.

And instinctively we know it's unacceptable. Take a different example, let's use example of cars.

PRESIDENT HANOTIAU: I just want to tell you that you have still 15 minutes.

MR. NEUFELD: Thank you.

So back to the example of cars. Let's assume we have reached peak car, we are in secular decline in the automobile industry, and let's assume that nevertheless there's a new car maker that comes onto the market, let's call that car maker Tesla, moves in across the street from a Nissan dealer. Should we assume that

Nissan will sell fewer cars? We are assuming that it has to run full, it has to operate full to keep, you know, at full capacity to keep running. Will it necessarily sell its cars for less? Isn't it entirely possible that the two dealers will, together, attract more buyers? Perhaps buyers who previously wouldn't have bought an electric car? Isn't it possible that as a result, Nissan, it might benefit as customers interested but unable to afford the top-of-the-line Tesla might like to buy a Nissan Leaf. You know, the analogy has certain parallels here. Have a look at the paper continuum.

Mr. Luz promised I would share this with you and here we are. You will find this at page 10 of Pöyry's first report in this arbitration.

We keep talking about the higher priced coated mechanical paper, sometimes called coated groundwood. And this helps us visualize where it is on the continuum as compared to -- compared to all paper, in fact, because they are all represented in these bubbles.

At the highest end, coated free sheet, then coated mechanical, that's the

glossiest, the brightest, the most expensive paper. It's also the heaviest. So not only is it the most expensive, it's the most expensive to ship.

On the bottom end is newsprint. And you know, well you know that Vogue and magazines are continuing to maintain a readership, newsprint is having a tougher time, it's going the way of the dodo bird and really experiencing the worst of the secular decline.

According to the Claimant, this disputes stops and starts in the orange and the yellow bubbles. Canada disagrees with this myopic view taken by the Claimant and advanced by Dr. Kaplan.

As Mr. Suhonen pointed out, the proper frame of analysis for this dispute is the orange box found in the middle of the screen. This is what Mr. Suhonen calls the competitive domain of SC paper. Within that domain, Resolute's business falls mainly inside the orange bubble. Its paper made at Laurentide and Dolbeau are the low grade of uncoated mechanical paper, SNC and SCB. Note that SNC, or soft paper, it's technically not even supercalendered. Dr. Kaplan

recognized that in his testimony.

This category's closest competition is from standard uncoated mechanical, the big blue bubble that you see -- yeah, the light-coloured blue bubble below it. In there you have got paper like high-bright news, ROTO news, book, e-book, improved newsprint.

So for the Claimant to argue that Dr. Kaplan -- through Dr. Kaplan that you could only assess damages based on the myopic view of SC paper and only SC paper because that's the relevant market, when SNC paper is in fact not even SC paper, well that doesn't even pass the red face test.

Now note as well that as the newspaper falls into disuse, newspaper mills have faced two options: Either they can shut down as we saw in Nova Scotia, Bowater Mersey and the Port Hawkesbury machine, the newsprint machine, or they can retool. And you have seen that happen in the market too where newsprint mills have moved up into that standard uncoated mechanical category.

Now to use the same logic as Dr. Kaplan, if new capacity is opening up down at the bottom, you know, in standard uncoated

mechanical, within the market in secular decline, wouldn't that necessarily have caused prices to come down? Yet the Claimant doesn't account for that in its causal theory, it doesn't account for it in its quantum either.

Let's look to the top part of the square. There you see standard uncoated paper, the light blue -- I have ten minutes left, thanks.

You see that the light blue bubble of standard uncoated doesn't reach the yellow bubble. The yellow bubble, that's SCA paper. And SCA paper is made at the Kénogami mill. They produce SCA and they produce a bit SCB as well, although less so now I understand.

So that up -- so that pressure that you get from newsprint mills going into standard coating, you are not going to have -- the pressure from there is going to be less, at least, on the SCA production than it would be on the SCB and the SNC, where Resolute's main production lies.

And at the high end of the yellow bubble, that's where Port Hawkesbury sits, there you have got high end SCA+ paper, ++, +++

paper. The only other producers in the category are Irving, which is in New Brunswick, and the European mills, UPN, Norske Skog.

This is SCA+ paper is directly substitutable with coated mechanical 5 and 4. And, again, not only is it cheaper to buy it also weighs less. So it's cheaper to ship. It's also cheaper to print on because it gives more space to print.

And so while it's true that PHP and Resolute primarily overlap -- sorry, they partially overlap, not primarily at all -- they partially overlap with respect to SCA paper, the bulk of Resolute's production is actually in SCB and SNC, whereas the bulk of PHP's production is in SCA and SCA+. And the parties don't really disagree on this point.

The Claimant's answer, though, is that it doesn't matter. It doesn't matter for price erosion claim because SCA and SCB paper prices fall together, they are correlated. But so are newsprint prices with other paper prices. So is the entire paper continuum. Since the more expensive paper will typically set the trend, and it's the larger volume product -- in our case, the

coated mechanical product is much more volume and is more expensive so it will really set the trend on prices for SC paper.

Just look at the graph of printing paper prices. They go up and down in tandem. They are all correlated. Even newspaper, they are all correlated. But, as we know, correlation is not causation.

One cannot assume that because PHP added supply of high quality paper it damaged Resolute's low quality production. And that's one of many problems that the Claimant's price erosion claim contains, it requires you to assume these effects, assume the effects of SCA+ and ++ paper on the lower grade SNC and SCB prices.

Turning back to our car analogy. The high end electric car by Tesla, it's kind of like the SCA+ paper. And the customers that used to buy the high end Jaguars or Mercedes are like the customers that used to buy heavy coated mechanical paper. Once introduced to an electric car that has the same power, the same acceleration, the same bells and whistles, maybe they will just shift from that big gas guzzler they used to love to an electric car.

And that shift to Tesla, just like the shift of Time magazine to SCA+ paper, maybe it will also cause common car buyers of Fords and Buicks to prefer the Nissan Leaf over their former gas guzzling cars.

What I am saying is that it's the advent of really high quality SCA+ paper that has, like the Tesla, changed the way customers think about SC paper. And PHP was part of that shift. Its opening coincided with a major uptick in supercalendered paper purchased. As well as a major downtick of coated mechanical paper.

You'll find the numbers in Pöyry's countermemorial report at paragraph 51. It provides that when PHP was idled demand, you know, shot way up, 440,000 metric tons of SC paper fell drastically. Meanwhile demand for coated mechanical paper decreased by just a mere 83,000. Suggesting there was some substitution between SC and coated mechanical paper.

And then in 2012, SCA demand dropped 282 metric tons, but almost fully recovered in 2013 to an estimated 260 or 270 metric tons.

What the numbers show is that

PHP's 2013 supply was absorbed by decreases in sales of coated mechanical paper. And not only does that have some significance when we are looking at price erosion, it goes straight to the issue of proximate cause.

Tribunal members, you are well aware of Chorzow Factory test and the standard that requires that in reparation where all the consequences of an illegal act re-establishes the situation that in all probability would have existed if the act not been committed.

Well had PHP not re-entered what would have happened? It's pretty clear that SCA paper sales would not have recovered in the same way at the expense of coated mechanical paper, they wouldn't have come back up. And the price of SC paper wouldn't have jumped back up $43 as well. As Mr. Feldman showed us in that price bucket of Mr. Steger's, where he points to -- that he points to in, you know, showing that prices came down originally when PHP came back and then they shot right back up again.

I want to pause on this point for a very, very important reason. I want to be crystal clear here. Mr. Steger's opinion is on

quantum. It in no way addresses proximate cause of any harm to Resolute. The Claimant at paragraph 102 of its prehearing memorial, and again today a couple of times, seriously misunderstand that. The Claimant argues Peter Steger acknowledged that PHP's opening caused prices to fall. Well that's not true at all.

Canada instructed Mr. Steger to assume that a breach occurred and to assume that the breach caused the prices to fall. And it's in that context that he looked to the contemporaneous evidence, to all the commentary, to measure price erosion. Mr. Steger doesn't opine on causation, that is a matter to be left to the lawyers.

The other thing that's especially important to note with respect to the factual causation is imports. I don't have time to go into it, but I will note that imports in 2010 shot up by over 100,000 metric tons, and Dr. Hausman recognizes this. And when we put that to him -- go to the next slide there, John. He said:

"I don't think we can be sure -- I don't think we

need to be sure of it, imports go up and down and I can't guarantee it wouldn't have happened that imports would have occupied the space that PHP is currently occupying."[as read]

If PHP hadn't come back, Dr. Hausman is saying that he is not sure that imports wouldn't have grown.

Well historical evidence shows, we know that they have grown, a lot, from one year to the next.

So in 2013, 2014, 2015 what would have happened without PHP in the market? You know of course it's anybody's guess, but going back to the Chorzow standard, in all probability if SCA demand would not have recovered in 2013 with PHP's re-entry, if that was problem -- if that was Situation Number 1, it wouldn't have -- then Situation Number 2 is that it may have bounced back but it would have been taken by European imports.

Ultimately any model that

focuses on the North American paper market to the exclusion of European imports of coated mechanical or standard uncoated mechanical at the bottom, they miss the mark. The myopic view that the Claimant provides excludes relevant considerations that goes straight to the matter of causation. And, on top that, would undoubtedly have had an effect on prices too.

Now these are just some of the problems with the Claimant's case and I'd urge you as you review the submissions to pay close attention to the language that the Claimant uses compared to Dr. Hausman's language.

You get incidents of this all over the place. At paragraph 104 in the latest submission you see that -- and you heard it from Mr. Feldman this morning: "Economic theory dictates that the impact of PHP supply will necessarily have." Well what theory dictates? Compare that to Dr. Hausman's testimony where he says that future harm estimation always has a higher degree of uncertainty than past estimation.

Compare also the Claimant's argument where it says over 20 percent industry capacity increase resulted in negative effects.

Well Dr. Hausman doesn't say that. He says a capacity increase of approximately 25 percent typically leads to a significant price increase barring special circumstances.

And, finally, contrast the Claimant's arguments that Dr. Hausman showed that Resolute incurred 91 to 137 million with Dr. Hausman's carefully -- careful stipulation made throughout his reports that he's providing estimates. These differences in languages are telling, and so is the difference in language 180-degree turn that the Claimant took between jurisdiction and now.

Here are the words of the Claimant during the jurisdictional phase:

> "Markets are not like statutes or regulations. They are not certain. Forecasts about markets are always speculative."[as read]

And it also said that:

> "No thoughtful or responsible observer was certain what the effect

of PHP's reopening might be particularly because of movement and slippage in grades of paper."[as read]

Well how does that apply to RISI or Dr. Hausman's forecast? [redacted] Of course it does. How the tables have turned.

PRESIDENT HANOTIAU: Just to tell you that your time is up, so. But, please.

MR. NEUFELD: Well, thank you. I don't -- you have some price forecasts to look at and some, in the documents which I did at the first hearing so Arbitrators Cass and Lévesque are familiar with them and can probably walk you through them if you so wanted.

And I can just conclude, then, to say that not only has the Claimant failed to prove causation, it's failed to quantify any damage with reasonable certainty, it's failed to show fact of damage, particularly given Resolute's incredibly profitable years as of late.

And then without guidance from

Tribunals like this one, we will continue to see claims like this, we will continue to see problems in damages claims. So that's why we would urge you for a decision. It's time to oblige Claimants to understand and apply the rule of reparation properly so as to respect the concept of causation.

Thank you very much, Chairman Hanotiau and Members of the Tribunal, we conclude our argument today and look forward to the questions that you might have.

PRESIDENT HANOTIAU: Thank you very much.

If my co-arbitrators agree, we could start asking a few questions so that the parties may prepare for tomorrow.

Also, sir, if you want tomorrow to continue on damages you are, of course you are free to do it.

MR. NEUFELD: Thank you.

PRESIDENT HANOTIAU: Mr. Cass?

QUESTIONS BY THE TRIBUNAL:

DEAN CASS: Let me start with the questions for Claimant and then I will move on to questions for the Respondent.

In the white product discussion, one of the things that the Claimant says is that the GNS measures were intended to have a direct impact on the price of supercalendered paper. And I was wondering whether the Claimant was thinking that that was a necessary claim or something that it was just an observation?

I also wanted to know whether any of the impugned measures that Claimant has pointed us to from the Government of Nova Scotia are within 1108(7). And if they're not within 1108(7), how would removing some measures that it finds to be within 1108(7) be treated? If the Tribunal finds that there are measures that are excluded, what should we do with respect to any decision on damages and causation?

I also wanted to ask the Claimant that there is a dispute about the relief of pension liability. Respondent says that there is no relief from pension liability and it cites a news report from January 2012. Claimant says that there was relief from pension liability, citing both news reports and some emails and the planned sanction order from September and April of 2012,

and I wonder if they could pin down more precisely what the story is on that.

For Respondent, were the only options that the Government of Nova Scotia had to give PWCC all that it asked for or to do nothing? And if not, what should the Tribunal do with the valuation of the quantum support that was given?

Another question I have for Respondent concern the question respecting a denial of subsidies under the WTO treaties. Does a -- if we take account of that, if we say that the meaning of subsidies is similar in both context, and that the report of "nil" for subsidies on separate occasions and failures to respond to the arguments in that forum respecting complaints about subsidies being given, if we find that is at odds with the representations being made here, are we making use of equitable principles or are we enforcing the WTO treaties?

I have other questions but I'd rather wait until tomorrow and formulate them with somewhat more precision.

PRESIDENT HANOTIAU: So, Céline.

PROFESSOR LÉVESQUE: Oui

merci. I will try to articulate general questions and hopefully tomorrow we can probe them, they apply to both Claimant and Respondent but I will start with Claimants.

We had signalled an interest in looking at the definitions of -- some definition of terms used that Article 1108(7) including procurement and subsidies. And in the submissions I don't think we went much further, so I would like to probe that tomorrow. So on Claimant's side on procurement, a few words were added, I am looking at I think page 6 of your memo where you give -- hopefully I am right -- where you give a dictionary definition but then you don't return to it. So what I would like to do tomorrow is to look at the different measures and whether Claimant thinks they do fall under procurement or subsidies. And I understand the primary argument is that it's an ensemble and we shouldn't be doing this. But I want to look just as an hypothesis, if the Tribunal were to look at 1108(7) and decide it has to be applied, as Mr. Luz would say, cow by cow, as opposed to the herd, would they qualify? So I would like to do that tomorrow. So the little bit of definition

Claimant gave seemed consistent with the majority of opinions in the ADF, UPS, MESA and Mercer, but I'd like the Claimant's position on the land purchase, the outreach agreement, et cetera.

On the FULA, the arguments on both sides on stumpage fees I think have been a bit unclear, so if you could clarify clearly the facts on the stumpage fees.

And finally on subsidies, we went a little further on the definition but still Respondent is avoiding defining subsidies, so I'd like both parties to address that further tomorrow.

And on the Respondent's side, since Mr. Luz likes animal analogies, I was thinking of my own. By avoiding to define subsidies and focusing on government supported loans, I will just stick to that, is it like you are saying I walk in a park every day, so I see signs. So if the sign says "no dogs allowed including Pit Bulls and Rottweilers." So are you saying a pit bull is a dog so we don't need to tie it back to the term "dog", we can dispense with that because the government-supported loan stands on its own?

So I'd like to know that because, to me, if you say subsidies or grants, including X and Y, you still need to define what's a subsidy. That would be my inclination. But clearly you see it differently so I'd like to hear you, how can we dispense with defining subsidies?

I think that's it for 1108(7). I will have questions also on 1102 and again going back to the ensemble argument, and I will be very short, just to make two links.

So let's say the Tribunal, again just for the purpose of discussion, was going to apply 1108 measure by measure and decide some fall within 1108 and are excluded. And as a matter of attribution, let's say the Tribunal also decides that the rate is not attributable. I want to know from the Claimant's side what does that do to your case? So if at the end there's only let's say the outreach and the FULA, for example, that were not excluded by 1108, what does that do to your 1102 arguments?

If -- to rephrase, if we don't buy the ensemble argument, what are the consequences? Of course that's, I mean, for the purpose of discussion. So that would be it for

me.

PRESIDENT HANOTIAU: Okay, yes, as far as I am concerned I have also questions for Claimant and questions for Respondent.

For Claimant first. Well of course this is an argument which is advanced by Respondent so I will put it in terms of the question: Can Claimant invoke a violation of the obligation of non-discrimination with respect to the Nova Scotia assistance measures when it received itself a substantial package of advantages to keep the Bowater mill running and improve its competitive position? And also, to the extent that it was, it received -- well it was approached with the proposal to invest in the Port Hawkesbury mill?

Another question with respect to like circumstances. Well you, Claimant, you enumerated a number of factors to be taken into consideration and Factor 4 was the jurisdictional factor. I'd like you to restate your position on this factor.

And also with respect to like circumstances, I'd like you to address the

position of Respondent that are some measures like the forest utilization license agreement and the outreach agreement that could not be granted to Claimant, and that NSPI could not grant favourable electricity rates in Quebec. I am sorry, but it's a bit late for me.

And then another question concerning the prior statements of Respondent before the WTO, the argument of Claimant is that Canada cannot invoke the subsidy exceptions of Article 1108 because of their submission before the WTO. And the question is, but don't you think that an Arbitral Tribunal is not bound by these, these submissions, that it has to determine for itself whether a specific advantage is a subsidy or is procurement?

Another question for Claimant concerns damages. You said in your submissions, and I have taken notes, that from the moment you have established sufficiently and reasonably that your losses are due to the state's breach, other possible concurrent events that are not attributable to the state are irrelevant and that such events do not diminish the state's responsibility nor do they reduce the amount of

compensation which is due. Could you please give some references in case law or in other authorities concerning this principle?

And then I have one question for Respondent concerning Article 1108(7). Well the NAFTA parties have carved out procurement and subsidies from Article 1102, but is there not a point where the accumulation of these measures undermine the NAFTA policy objectives? In other words, each measure separately can be acceptable but from the moment you have an accumulation of these measures don't you think that they can undermine the NAFTA policy objectives?

And in this respect, and that's another question, what are the NAFTA policy objectives which have to be taken into consideration? And I refer in that respect to the MESA decision where the Tribunal said that the NAFTA policy objective have to be examined chapter by chapter and not global.

These are mainly my questions.

I suppose that now we can adjourn the session and we will resume tomorrow at 3 p.m. CET. I think that I should warn the parties that probably it's going to take more than

four hours tomorrow given the number of questions and maybe additional questions that we will raise.

By the way, I would like also Claimant if possible to address, you know, the arguments which have been developed at the end of this session by Respondent concerning damages.

So, in other words, tomorrow we will start at 3, but I do not think that we will finish before 7 or later.

Anything else from the parties?

MR. FELDMAN: Mr. President, may I ask, should we consider answering these questions within the framework of the one hour assigned to each party for rebuttal or separately?

PRESIDENT HANOTIAU: As you like. I think you are not bound by the one hour.

MR. FELDMAN: Okay.

PRESIDENT HANOTIAU: As we said, we have asked a number of questions and we expect that you will need more than one hour with your presentation and the answer to the questions to address those.

MR. FELDMAN: Okay, thank you.

PRESIDENT HANOTIAU: Anything

else from the parties?

MR. NEUFELD: Nothing from Canada.

PRESIDENT HANOTIAU: Anything else from -- yes?

MR. VALASEK: No, thank you very much.

PRESIDENT HANOTIAU: Anything else on the side of my arbitrators? No.

Okay, I wish you a good afternoon, and as far as I am concerned, I think that I am very glad that we are reaching the end of this session and I look forward to meeting you tomorrow at 3 p.m.

--- Whereupon matter adjourned at 2:19 p.m., to be resumed Tuesday, October 19, 2021, at 9:00 a.m. EDT.