

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 Tuesday, October 19, 2021, at 8:05 a.m. EDT

RESTRICTED ACCESS - VOLUME 2
REVISED TRANSCRIPT

APPEARANCES:

Elliot Feldman on behalf of the Claimant
Michael Snarr
Paul Levine
Analia Gonzalez
Martin Valasek
Jean-Christophe Martel
Jenna Anne de Jong
Jacques Vachon

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Rodney Neufeld
Annie Ouellet
Stefan Kuuskne
Azeem Manghat
Dmytro Galagan
Sylvie Tabet
Karolina Grzanka
Thomas Beline

ALSO PRESENT:

Shyam Balakrishnan Tribunal Assistant
Ashwita Ambast PCA
Gaëlle Chevalier PCA

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1 Arbitration Place Virtual

2 --- Upon resuming on Tuesday, October 19, 2021 at

3 9:00 a.m. EDT

4 PRESIDENT HANOTIAU: Thank
5 you. Good morning, ladies and gentlemen.

6 Before we start, should I ask
7 you whether you have any housekeeping matters to
8 address? Claimant?

9 MR. FELDMAN: I don't think
10 so. Thank you.

11 PRESIDENT HANOTIAU:
12 Respondent?

13 MR. LUZ: Nothing other than
14 to express the appreciation to the Claimant and to
15 the Tribunal just with respect to restricted
16 access documentation. We are doing the same, I
17 will do my best to make sure that we announce when
18 we are going into restricted access and the
19 Claimants were really good about doing the same
20 yesterday, so we appreciate that.

21 PRESIDENT HANOTIAU: Okay.
22 Nothing else, so we can start with the rebuttals.

23 Mr. Feldman, Mr. Valasek.

24 MR. FELDMAN: It looks like I
25 am going first, Mr. President, and I believe

1 Mr. Valasek will follow me and Mr. Snarr will
2 follow Mr. Valasek, but if we get confused you
3 will, I am sure, forgive us.

4 PRESIDENT HANOTIAU: No
5 problem.

6 MR. FELDMAN: And we will
7 start in the restricted access that we are already
8 in.

9 --- Whereupon Restricted Transcript Commences
10 SUBMISSIONS BY MR. FELDMAN:

11 MR. FELDMAN: I am going to
12 try to be organized but I don't guarantee that
13 outcome.

14 Counsel yesterday complained
15 that Resolute [REDACTED]

[REDACTED]
[REDACTED] --

18 MR. LUZ: I am sorry to
19 interrupt. Heather, can you just confirm that we
20 are in restricted access.

21 MS. D'AMOUR: Sorry,
22 Mr. Feldman, restricted access, we are in
23 confidential currently. So do you want to be in
24 restricted access?

25 MR. FELDMAN: No, we should be

1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

10 In 2019, [REDACTED]
[REDACTED] for economists
12 akin to declaring the world flat. [REDACTED]
[REDACTED] by making the 360,000 metric
14 tonnes still being sold in North America
15 disappear.

16 It could be seen as driving
17 prices down for a couple of quarters, but
18 thereafter, the continuing price depression was to
19 be ascribed to other sources or the excess supply
20 was absorbed or demand extraordinarily increased.
21 Without ever suggesting that the secular decline
22 of the industry must be over, if it weren't over,
23 prices wouldn't be declining which, of course,
24 they were, [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED] But we heard no mention from
7 Canada yesterday of Laurentide. I don't think I
8 heard the word once. [REDACTED]

[REDACTED]

[REDACTED], Laurentide did close.

[REDACTED]

12 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

24 The 2019 report then became

25 significant in only one way. [REDACTED]

1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

5 Ricky, did you have another
6 slide on this subject or are we good to continue?
7 Okay.

8 So as you can see, just to
9 conclude [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

21 We have been asked what would
22 become of our claim if the Tribunal were to decide
23 that everything monetary between PWCC and the
24 Government of Nova Scotia were to be judged
25 permissible, not breaching measures, through the

1 Article 1108(7) exception.

2 I am going to deal only
3 partially with this question.

4 First, to be remembered always
5 is that PWCC said from the outset that it would
6 not buy into the deal unless it got everything it
7 wanted and more than once it, in fact, did walk
8 away. It did not matter how small or trivial
9 government authorities might have thought the
10 demand to be; and second, not all the measures
11 were monetary, at least two were regulatory. And
12 notwithstanding that Canada wants to monetize and
13 trivialize them. You saw yesterday in Ron Stern's
14 own handwriting -- I believe we have a slide for
15 that, Ricky. There it is.

16 You saw in his own handwriting
17 that they were make or break for him. He says "we
18 can't handle any --" it's his underlining "-- RES
19 cost increase". And he indicates that "it has to
20 be never", never to be a possibility.

21 Nova Scotia apparently told
22 him not to worry about the RES standard and that
23 it would not arise. That's what we were told
24 yesterday. But Stern said, not good enough. I
25 need written assurance that it will never arise

1 and the government made the commitment just for
2 him. Hence, there were government measures that
3 could not be construed under any definitions as
4 subsidies or procurement and there would not have
5 been a deal, Port Hawkesbury would not have
6 reopened without them.

7 We imagine the Tribunal were
8 to take the hypothetical direction and dismissed
9 almost all the measures, we think it impossible
10 to dismiss the regulatory measures, might then
11 wonder whether all the claim damages should be
12 recognized. We think they should because even the
13 smallest measure was indispensable to the re-entry
14 into the market and the foreseen and the
15 foreseeable damages that followed.

16 Nonetheless, the Tribunal
17 might choose to evaluate the various measures,
18 especially the hypothetically isolated regulatory
19 measures in some kind of proportion to the
20 damages. We would suggest that were the Tribunal
21 to travel this path, it might see the regulatory
22 measures as proportionally contributory to the
23 damages and assess the damages accordingly.

24 Dean Cass inquired about
25 pension liability. NewPage Port Hawkesbury left

1 behind substantial pension liabilities. PWCC said
2 it would not absorb or honour them. The law
3 didn't require PWCC to honour them, but a new and
4 good citizen letting go half its workforce when
5 shutting down the newsprint machine might have
6 done so. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12 The government and PHP entered
13 an agreement on pension matters as a condition of
14 the plan of arrangement for coming out of
15 bankruptcy with the needed agreement of the plan
16 administered. This can be found in Exhibit
17 C-347.59.

18 By contrast with how PWCC
19 treated pensioners, Resolute did sell 550,000
20 acres to Nova Scotia, but it didn't take the money
21 to use in the business in the mill as was said at
22 least twice yesterday. Instead, Resolute turned
23 over all the money to assure the workers losing
24 their jobs that they would collect their pensions.

25 Mr. Luz said that Resolute

1 took the money but that's not so, unless he thinks
2 honouring pensions when closing is paying for
3 business in the mill. Mr. Luz has indulged in
4 uncharitably a mischaracterization.

5 Good citizen PWCC took from
6 Nova Scotia everything it could. Apparently bad
7 citizen Resolute returned assistance that it
8 concluded could not save its mill and surrendered
9 550,000 acres to protect the pensions of Nova
10 Scotians. Mr. Luz might call this context.

11 You asked right at the end of
12 yesterday's session, the Tribunal asked that we
13 address causation and damages again but without
14 particular questions. So I will try to summarize
15 that here and we can obviously return to it at the
16 Tribunal's discretion.

17 The requirement to establish a
18 causal link between government measures and
19 damages is to establish a proximate cause. In
20 this case, damages from the government measures
21 were foreseeable and foreseen. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Damages

11 cannot be measured from before entry into the
12 market and shortly after. They continue for as
13 long as there is excess supply.

14 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1 transaction, Nova Scotia made clear in public
2 statements that it intended Port Hawkesbury to be
3 the low-cost producer. [REDACTED]

[REDACTED]

16 The state measures do not have
17 to be the only cause of damages for them to be
18 held accountable. The Tribunal in CME, as did the
19 Tribunal in Gavazzi, said otherwise -- go back,
20 please, to the CME statement.

21 The CME Tribunal said:
22 "A state may be held
23 responsible for injury to
24 an alien investor where
25 it is not the sole cause

1 of the injury; the state
2 is not absolved because
3 of the participation of
4 other tortfeasors in the
5 infliction of the injury.
6 The injury was
7 effectively caused by a
8 combination of factors,
9 only one of which was to
10 be ascribed to the
11 responsible state.
12 International practice
13 and the decisions of
14 international tribunals
15 do not support the
16 reduction or attenuation
17 of reparation of
18 concurrent causes except
19 in cases of contributory
20 fault."[as read]

21 Can we see the next slide,
22 please.

23 Similarly, in the Gavazzi
24 Tribunal:
25 "Other possible

1 concurrent events that
2 are not attributable to
3 the state are irrelevant.
4 Such events do not
5 diminish the state's
6 responsibility, nor do
7 they reduce the amount of
8 compensation for damages
9 due."[as read]

10 Thank you.

11 Canada insists that Resolute
12 mills had been profitable. Assuming Canada is
13 right, it doesn't matter. Without the competition
14 of excess supply, the mills would have been more
15 profitable and the additional profits that might
16 have been but-for the excess supply are also
17 losses, also damages. This elementary economic
18 point seems lost in the Canadian analysis.

19 Can I have the Cargill slide,
20 please.

21 The Cargill Tribunal found
22 this but-for framework to be the correct one. You
23 can see highlighted passages here:

24 "The appropriate approach
25 to assessing damages in

1 this proceeding is to
2 determine the present
3 value of net lost cash
4 flows.
5 The Tribunal does not
6 find these projections to
7 be so unusual or
8 difficult that employment
9 of the method is
10 inappropriate in this
11 proceeding. This
12 calculation, as accepted
13 and utilized by the
14 Tribunal in its own
15 analysis, calculates net
16 lost cash flows as equal
17 to the but-for quantity
18 of HFCS that Claimant
19 would have sold where
20 quantity is determined as
21 the product of the entire
22 market for HFCS,
23 multiplied by the
24 percentage of Claimant's
25 projected share of that

1 market, multiplied by the
2 price of HFCS, determined
3 over the period of loss
4 and brought to the
5 present value using the
6 appropriate interest
7 rate."[as read]

8 Now, yesterday, Mr. Neufeld
9 pleaded with the Tribunal to wipe this out, to
10 make a ruling that this methodology should never
11 be used, could never been used again. No
12 government should ever be held liable for damages
13 that have to be measured this way.

14 But we are not the first to
15 say that this is not only appropriate but it is
16 the only way to measure the damages in the
17 circumstances --

18 PROFESSOR LÉVESQUE: I am
19 sorry to interrupt. I have a question.

20 MR. FELDMAN: Please.

21 PROFESSOR LÉVESQUE: Yes, also
22 on this slide, you have, it shows that in Cargill,
23 the measurement was a quantity of HFCS that
24 Claimant would have sold.

25 So the Tribunal was able to

1 compare what they sold before and after the
2 measure that was discriminatory on the basis of
3 nationality. They could see how much they didn't
4 sell.

5 Isn't that different than
6 doing a price erosion model?

7 MR. FELDMAN: I don't think
8 fundamentally it's different. The price is a
9 consequence of the quantity you sell. The
10 projection of the price is driven by how much
11 you're selling. And the how much you're selling
12 is driven by removing from the market the excess
13 supply, which you can only estimate because you're
14 working in a but-for world in which we don't have
15 those data.

16 PROFESSOR LÉVESQUE: Thank
17 you.

18 MR. FELDMAN: Damages in our
19 case are not entirely in the future. To the
20 contrary, about 77 percent of them were in the
21 past when Dr. Hausman did his analysis.

22 Can we see that slide, please.

23 There must always be estimates
24 because the world that doesn't always exist, the
25 world without supply in the market must be

1 estimated. But it is certain, [REDACTED]
[REDACTED] there will be damages as long
3 as the market is saturated with excess supply.
4 The reason is simple, with less supply to meet
5 demand, prices would be higher.

6 Professor Hausman has provided
7 two sophisticated and detailed reports of exactly
8 how he calculated the two lines on the graphs.
9 For prices with and without Port Hawkesbury's
10 excess supply.

11 Because profits are the
12 difference between costs and prices and costs are
13 different in every mill, he used data for costs
14 and prices to derive profits for each of
15 Resolute's three mills, for all the years
16 available beginning with Port Hawkesbury's
17 re-entry into the market.

18 He deployed one method
19 initially and a second as a check. One method
20 relied on price forecasts without the excess
21 supply, the other relied on calculated price
22 elasticities.

23 For the period when actual
24 costs and prices were known for the market with
25 the excess supply, the results between the

1 Could we see that slide of the
2 stepladder, please. Ricky, the next slide. No,
3 okay. Well we saw this slide yesterday, there
4 it is.

5 Mills will close, but it's
6 impossible to know exactly when.

7 In this case, mills closed in
8 2018, suddenly reducing supply. Over time, the
9 market shock of the mill closure is smoothed out
10 as supply and demand achieve a new equilibrium.
11 But at the moment of closure, prices likely will
12 go up for a time before resuming their downward
13 fall. [REDACTED]

[REDACTED]

[REDACTED]

16 That shock in 2018 disrupted
17 the overall apparently steady decline in Professor
18 Hausman's estimates obliging him to adjust from a
19 2017 baseline projecting to 2028. Neither 2017
20 nor 2018 could serve at that moment as a baseline
21 because they exaggerated the temporary impact of
22 the mill closure. What Professor Hausman called
23 an anomaly.

24 So he proposed a three-year
25 average for the baseline looking forward from the

1 most recent data of actual losses.

2 There's nothing unusual about

3 Professor Hausman's analysis. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

8 Mr. Neufeld yesterday
9 caricatured Professor Hausman confused and
10 befuddled. He is a world renowned and much
11 decorated econometrician executing an analysis
12 here that may escape Mr. Neufeld's complete
13 understanding. There are places in here which
14 surely escape mine. But for him and for
15 economists, it's routine, simple and not unusual.

16 We urge the Tribunal to rely
17 on his written reports and not on the banter that
18 characterized Mr. Neufeld's jovial
19 cross-examination. Mr. Neufeld asked the Tribunal
20 to banish the but-for economic analysis and to
21 deny the existence of damages when caused by an
22 enduring market change. He might have asked too
23 for an adoption of the flat earth society.

24 Certainly governments would be
25 much comforted if they could cause lasting damage

1 that could not be compensated because this
2 Tribunal decided that long-lasting damages carried
3 into the future can not be compensated.

4 Ricky, can I have the slide on
5 the then and now in power.

6 PROFESSOR LÉVESQUE:
7 Mr. Feldman, another question. Maybe I am
8 challenged too but there are some things I am
9 having a hard time putting together.

10 MR. FELDMAN: And I promise
11 you I am having probably the very same problem but
12 I will try to answer as a stand-in for Professor
13 Hausman.

14 PROFESSOR LÉVESQUE: I
15 wouldn't challenge Dr. Hausman. I am just trying
16 to focus on what we have to determine. I guess I
17 am having a hard time of what, you know, is
18 counted in the analysis, the way the market is
19 being defined and what we keep out or what you say
20 gets smoothed out.

21 So when I am told there's an
22 anomaly that throws the model but we can smooth it
23 out, to me, what happened in the market is still
24 relevant, right. The closings in Europe, whether
25 it's the value of the currency, grade

1 substitution, whatever it is, there are things
2 happening in the market.

3 And what I am trying to square
4 is how can we just pretend, you know, the prices
5 didn't go up substantially in 2018 and '19, and
6 that's presumably why Resolute decided to invest
7 more in Kénogami to better compete with PHP in
8 2020.

9 So I am having a hard time
10 squaring what's happening in the market with the
11 model. I hope that was clear.

12 MR. FELDMAN: I think I
13 understand. And we are not in disagreement; that
14 is the nomenclature may be evasive, an anomaly, a
15 shock, but what we are trying to look at is the
16 long term.

17 This is a commodity that's
18 been in secular decline for already two decades
19 when we are getting to this, or at least since
20 2000 there seems to be agreement. What that means
21 is that over time, all the curves are smoothed
22 out. The supply comes out in chunks because they
23 come out when you close the mill. They don't come
24 out because a mill reduces its production. It
25 can't do that. That's what the ITC found and the

1 reference I provided for you.

2 So you're trying to integrate
3 this stepladder, as I referred to it in the graph,
4 with the overall decline which is, which, when you
5 see it over a period of time, looks steady. So
6 when you encounter suddenly the mill closure,
7 well, that's an aberration at that moment but if
8 we were able to look from, say, 2015 to 2030, it
9 wouldn't stand out so much.

10 So it's not as if you're not
11 accounting for all those other events in the
12 market. You are. Professor Hausman and
13 Dr. Kaplan both took into account these different
14 events that occurred in the market. But the
15 2017/2018 moment happened to coincide with this
16 proceeding. It didn't happen in the prior four
17 years, as we saw. There were some moments where
18 the prices went up a little bit but they went up
19 in both worlds. The but-for world tracked them as
20 going up in both with and without the supply.

21 So the adjustment is to
22 recognize that over the long term, you're still in
23 secular decline. No one denies that. But if you
24 project it out from just that point, from 2017 to
25 2028, that's what Professor Hausman did originally

1 before the shock happened to occur in that year.
2 And then he looks at that says, well, wait a
3 minute, I can't project out from 2017. That's not
4 going to make any sense because I have removed a
5 chunk from the market.

6 So he finds the same thing
7 happening in 2018. He smooths it out for the
8 three-year period. It's not an ideal choice,
9 perhaps. Maybe it's the only choice. But I think
10 we would agree that some adjustment has to be
11 made. You can't project out the next ten years
12 from a wrong point. It's what might be called an
13 inverted pyramid, taking an extrapolated point --
14 taking a point that's the wrong one and
15 extrapolating. That's when your analysis becomes
16 an inverted pyramid.

17 So you're always extrapolating
18 from something. He is extrapolating from a
19 three-year average that he concludes is the better
20 way to go than to extrapolate from a point which
21 is plainly different, aberrational in the sense
22 that the chunk of supply that's removed, the
23 moment that it occurs, is not the point from which
24 you should be extrapolating.

25 PROFESSOR LÉVESQUE: A quick

1 follow-up and then I promise to let you go on.

2 In terms of impact on the
3 individual market players, so yesterday in your
4 opening, you were saying PHP wanted to be the last
5 mill standing. But if you look at the market
6 players, Irving is still, you know, in business
7 and I think maybe the closest competitor based on
8 their grades of paper to PHP, Catalyst is still in
9 the business, Kénogami, as I mentioned, invested
10 even more to be in that market.

11 So what can we conclude from
12 that; right --

13 MR. FELDMAN: Well, we had
14 said -- I am sorry. Go ahead and finished.

15 PROFESSOR LÉVESQUE: So I was
16 just going to say you just made the point it's
17 about not making as much profit as one company
18 expected, but there's not one mill standing.
19 There's still currently those same players still
20 operating and still making money, so isn't that
21 relevant or?

22 MR. FELDMAN: It would be
23 relevant if it were correct but it's not correct.
24 There is no production anymore in the United
25 States. It's gone. Verso closed --

1 PROFESSOR LÉVESQUE: One
2 closed because of a fire but I am talking about
3 these Canadian --

4 MR. FELDMAN: No, that was
5 Sartell. Verso and Madison did not close because
6 of fires. They closed because there was no longer
7 enough demand in the market for them to include
8 supply at their cost of production.

9 So when we say the last mill
10 standing, it doesn't mean everything's gone.
11 There are others there now. But when it's over,
12 the expectation is that the lowest-cost mill will
13 be the last one to survive and everyone -- and the
14 projection now is that sometime, 2028 or perhaps a
15 bit beyond, no one will be producing this
16 commodity.

17 So what we have seen from 2012
18 is already closures. The two American
19 companies -- the one that's most startling, in my
20 mind, is that Verso brought the countervailing
21 duty case against all of the supercalendered paper
22 from Canada and settled with Port Hawkesbury and
23 with Irving. Between them, they paid Verso over
24 \$60 million and, within a year, Verso had to close
25 anyway, even with that infusion from the

1 [REDACTED]
[REDACTED] There's price
3 erosion, there will continue to be price erosion
4 as long as there's excess supply in the market.
5 And there will be excess supply in the market
6 continuously because the demand is declining.

7 How fast it is, what the slope
8 is is uncertain. We are now -- that's why we
9 couldn't extrapolate from a point and that was
10 probably an error because the overall slope is
11 correct but its pace and how quickly we will get
12 to the end, the idea is to be the last one
13 standing, you're quite right. There are others
14 still competing, but unless they are able to get
15 their costs down below Port Hawkesbury's, they
16 won't survive Port Hawkesbury. Port Hawkesbury
17 will survive them.

18 That's the bet that the
19 province made. That it had the security of Port
20 Hawkesbury's perception and commitment that it
21 would be the low-cost producer. And as the
22 low-cost producer, it should be the last one to
23 survive when the demand dwindles and goes away.
24 And this industry will go away, but for the time
25 being, it's worth investment for some and they're

1 making those investments. The Americans couldn't
2 do it. They're gone.

3 PROFESSOR LÉVESQUE: Thank
4 you.

5 MR. FELDMAN: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] But the
16 province amended the plan for Port Hawkesbury as a
17 result of the denial of the tax ruling with Port
18 Hawkesbury receiving essentially the same economic
19 deal as it originally sought with the [REDACTED] power
20 rate. It's just that the savings took place
21 somewhere else.

22 [REDACTED]

[REDACTED]

[REDACTED]

25 and indeed, as I suggested, [REDACTED]

1 [REDACTED] 4 million to buy off
2 Verso and buy off the American case that was
3 restricting and inhibiting its market in the
4 United States.

5 [REDACTED]
[REDACTED] That can be found in the
7 transcript at pages 489 and 490 of the
8 November 2020 hearing, a transcript and Exhibit
9 C-238.5.

10 And that's all I thought I
11 should say without more questions to try to
12 clarify some of the issues on damages and
13 causation.

14 And so, unless you have
15 immediate questions for me, I would surrender the
16 floor to Mr. Valasek.

17 SUBMISSIONS BY MR. VALASEK:

18 PRESIDENT HANOTIAU: Yes,
19 Mr. Valasek, you have the floor.

20 MR. VALASEK: Thank you very
21 much. Let me just move my notes into position on
22 my screen, please.

23 MS. D'AMOUR: Mr. Valasek, I
24 don't want to interrupt you. Should we still
25 remain in restricted access?

1 MR. VALASEK: No, we will be
2 going into restricted access I think at least at
3 one moment but I will indicate that to you.

4 MS. D'AMOUR: Okay, so are we
5 able to start the public stream currently, then?

6 MR. VALASEK: Yes.

7 MS. D'AMOUR: Okay, thank you.

8 --- Whereupon Restricted Transcript Ends

9 MR. VALASEK: Good afternoon,
10 Professor Hanotiau and good morning, Dean Cass,
11 Professor Lévesque.

12 My presentation is organized
13 by reference to a number of points that I wish to
14 rebut in particular in relation to Article 1102
15 and some on Article 1108. And in the course of my
16 rebuttal, to some of the points that Canada made
17 on these issues, I will also address as best I can
18 the questions that were put to Claimant on some of
19 those issues.

20 Yesterday, Mr. Luz argued that
21 the Tribunal, in its jurisdictional decision, had
22 already decided against Claimant, essentially.
23 You'll recall that Mr. Luz said that the
24 Article 1102 claim is not just moot but it's dead
25 on arrival, essentially suggesting that it had

1 already been killed off by the earlier statements
2 of this Tribunal.

3 With all due respect to my
4 friend Mr. Luz, I think this is imaginative
5 revisionism of what the Tribunal found.

6 In our view, it is actually
7 Canada that lost what it had considered to be its
8 decisive argument in this case; namely, that the
9 measures adopted by Nova Scotia could not meet the
10 test under either Article 1102 or, at that stage,
11 Article 1101 which was the threshold of measures
12 that "relate to" Resolute.

13 And they made that argument at
14 that stage because they said because Resolute's
15 mills that Resolute claims were necessarily
16 affected by the measures in Quebec and not Nova
17 Scotia, that was a decisive reason to rule against
18 Resolute and to preclude the claim.

19 It is, therefore, Canada's
20 continuing argument at this stage that that fact
21 alone is decisive in respect of Article 1102 that
22 is undermined by the jurisdictional decision. And
23 the Tribunal will be aware that in its summary
24 memorial, Canada has doubled down on this position
25 that in the like circumstances analysis, the fact

1 that Resolute's mills are not in Nova Scotia is
2 decisive. And I will get to our jurisdictional
3 analysis in due course.

4 Let me first just pull up the
5 jurisdictional decision so that we can see what in
6 fact the Tribunal decided in that respect.

7 And, Ricky, if you can pull
8 up, please, paragraph 290 of that jurisdictional
9 decision which I believe is on page 82.

10 Now, Canada has characterized
11 the Tribunal's jurisdictional decision as saying
12 that there are really only two possibilities for
13 Canada's -- for Resolute's claim to be able to
14 proceed under Article 1102 or to succeed. And,
15 similarly, that we must fail because we are
16 essentially making a claim for a uniform standard
17 across Canada, and that we must fail because our
18 position violates the principle in Merrill & Ring.

19 So let me first look at what
20 the Tribunal actually decided and, of course, for
21 Professor Hanotiau, I think this is important
22 because this predates his chairmanship of the
23 Tribunal.

24 So the Tribunal wrote as a
25 conclusion on the question of whether the measures

1 that Nova Scotia adopted here related to
2 quote/unquote Resolute's investments in Canada,
3 the Tribunal concluded that:

4 "The Tribunal agrees with
5 the NAFTA parties that
6 Article 1102(3) should
7 not be read so as to
8 impose vis-à-vis foreign
9 investments, a
10 requirement of uniformity
11 of treatment by the
12 different component units
13 of the three federal
14 states which are the
15 parties to NAFTA." [as
16 read]

17 I will explain to the Tribunal
18 that we are not proposing a uniform standard:

19 "It agrees with the
20 Tribunal in Merrill &
21 Ring that Article 1102(3)
22 only applies to the same
23 regulatory measures under
24 the same jurisdictional
25 authority." [as read]

1 taken for the benefit of
2 local investors while
3 effectively keeping NAFTA
4 investors or their
5 investments out. Whether
6 this would involve a
7 breach of Article 1102
8 would depend on the
9 circumstances, including
10 the application of the
11 like circumstances
12 requirement." [as read]

13 So that's an example that the
14 Tribunal gave:

15 "But there seems no doubt
16 that there could be a
17 breach of the national
18 treatment obligation in
19 such case. The same
20 would be true in a
21 Methanex-type scenario if
22 the out of province
23 investor had been the
24 specific target of a
25 provincial campaign to

1 cause it loss. The
2 situation is not limited
3 necessarily to a scenario
4 where there has been a
5 single specific
6 target."[as read]

7 And so that's the second
8 example that the Tribunal gave.

9 Now Mr. Luz is fond of saying
10 that these are the only two scenarios specifically
11 that were open to Claimant in addressing their
12 Article 1102 claim.

13 The Tribunal concludes this
14 paragraph by saying:

15 "While the Claimant does
16 not suggest that it was
17 specifically targeted by
18 the Nova Scotia measures,
19 it is open to it to
20 establish on the merits a
21 breach of Article 1102 on
22 some other basis."[as
23 read]

24 And that's exactly what we
25 submit we are doing and have done.

1 And I just wanted to set the
2 record straight there that this was not a closed
3 list of just two limited examples that we had to
4 come within, and I submit that we have laid out a
5 basis for a breach of the merits on some other
6 basis, and of course that's what I will go through
7 in more detail today, including a rebuttal of some
8 of the points that I just mentioned, the
9 uniformity point and the Merrill & Ring point.

10 Ricky, you can take that down.

11 I would also say that I am not
12 sure that Canada wants to be drawing too much
13 further attention to the jurisdictional decision
14 for another reason.

15 Mr. Luz claimed yesterday that
16 there couldn't be a more straightforward
17 application of 1108(7) than the case here and it
18 renders the question of national treatment moot
19 and irrelevant. One really wonders why if that is
20 allegedly the case, Canada didn't advance a
21 preliminary argument against the Article 1102
22 claim, along with its other jurisdictional
23 inadmissibility objections.

24 The fact is it is not
25 straightforward in the least and Mr. Luz's

1 assertion that the Article 1102 claim is moot is
2 simply wishful thinking.

3 As I explained during the 2020
4 hearing, the fact that Canada did not advance a
5 preliminary argument during the jurisdictional
6 phase is a suggestion not just of this fact but
7 also is consistent with its delay in asserting a
8 robust objection on the basis of subsidies and
9 procurement similar to its inconsistency in the
10 positions that it took before the WTO and now in
11 this proceeding now that there's no risk to Canada
12 in the parallel US proceedings.

13 So let me turn now to a series
14 of what I would call simply red herrings. In
15 other words, issues that have been raised and
16 argued by Canada, sometimes under the guise of
17 context but strongly suggesting that the Tribunal
18 should use them as a basis to stray from the
19 analysis that's required under Article 1102.

20 And I concede that it's a
21 technical analysis. In some cases, it's not
22 intuitive, and I would suggest to the Tribunal
23 that if you look at the cases under Article 1102
24 and generally cases concerning non-discrimination,
25 it is not an easy analysis. It's not just -- and

1 this is true, of course, of discrimination claims
2 generally. The like circumstances analysis is
3 complicated.

4 And so the Tribunal needs to
5 be cautious about what I consider red herrings.
6 Issues that have been raised as context which
7 appeal to your intuitive instinct that in light of
8 those facts, surely a claim can't be valid. But
9 if one considers the proper framework for the 1102
10 analysis, then the conclusion is otherwise.

11 And I will take you through a
12 few of these points and address the Tribunal's
13 questions hopefully at the same time.

14 So Mr. Luz -- so this is the
15 first, what I call the first red herring, the
16 Bowater Mersey issue.

17 Mr. Luz took some time going
18 through the story of the closure of the Bowater
19 Mersey mill. And, Professor Hanotiau, you asked
20 us specifically about this. Can we, can Resolute
21 invoke Article 1102 when Resolute received a
22 substantial package for Bowater Mersey.

23 I am really grateful for the
24 question. It allows me to focus on this important
25 point and to demonstrate that Resolute's mill at

1 Bowater Mersey and the treatment it received from
2 the government is not an appropriate comparator.
3 And, again, this is a technical analysis. But let
4 me take you through it briefly.

5 Ricky, if you could pull up
6 the slides from yesterday and go to Slide --
7 starting at Slide 62, please.

8 So the first point to note is
9 that this is an issue that was raised by the
10 Tribunal in advance of the 2020 hearing as well.
11 It was the Tribunal's Question 18:

12 "The Respondent has
13 brought forward evidence
14 of the treatment provided
15 to Bowater Mersey (owned
16 by Resolute) by the
17 Government of Nova
18 Scotia, in particular, in
19 terms of financial
20 assistance and other
21 benefits. Should the
22 Tribunal consider that
23 Bowater Mersey and not
24 Resolute's mills in
25 Quebec were in like

1 circumstances to Port
2 Hawkesbury Paper, that
3 all like circumstances
4 describes the
5 relationship to all of
6 Resolute's mills."[as
7 read]

8 So next slide, please.

9 Now, I haven't really heard
10 Canada contest the factors that we've listed. And
11 indeed they cannot. The cases make clear that all
12 of these factors are relevant to the like
13 circumstances analysis.

14 So, really, the question is,
15 moving away from some sort of intuitive appeal or
16 contextual factor or simply appealing to your
17 instinct that it can't be right that Canada is the
18 subject of a claim and that Nova Scotia is the
19 subject of scrutiny for its treatment of Port
20 Hawkesbury when there was this story about Bowater
21 Mersey. Well, we have to look at the factors and
22 apply them. That's what Article 1102 requires.

23 And the first factor is
24 essentially decisive but we will go through them
25 all. Now the first series of factors are the

1 market and the product. Are the foreign investor
2 and the domestic investor operating in the same
3 market? And how similar are the products or
4 services being offered by the foreign investor and
5 the domestic investor? And, again, we are
6 complaining about the Port Hawkesbury measures.

7 So Bowater Mersey is not in
8 the same market as Port Hawkesbury and did not
9 sell the same product.

10 Next slide, please.

11 This was conceded by Canada's
12 own witness that was directly involved in these,
13 these efforts.

14 I asked him:

15 "As the chair of the
16 committee, you were
17 tasked with the
18 overseeing, the gather
19 and analysis --

20 MS. D'AMOUR: Sorry to
21 interrupt. Should we be in restricted access?

22 MR. VALASEK: I don't think
23 this really is but, to be safe, let's go into
24 restricted access.

25 MS. D'AMOUR: Okay.

1 --- Whereupon Restricted Transcript Commences

2 MS. D'AMOUR: Okay, confirming
3 we are in restricted access.

4 MR. VALASEK: So the question
5 was:

6 "And as the chair of the
7 committee, you were
8 tasked with overseeing
9 the gathering and
10 analysis of information
11 as to the state of the
12 newsprint and SC paper
13 industries."[as read]

14 And the Tribunal will recall,
15 Bowater Mersey was a newsprint mill and Port
16 Hawkesbury is an SC paper mill.

17 "ANSWER: That's correct.

18 "QUESTION: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1

[REDACTED]
[REDACTED] [as read]

3 Next slide, please.

4 So that dispenses of those
5 factors and Canada's never argued that Bowater
6 Mersey and Port Hawkesbury are in the same
7 industry dealing with the same product.

8 The next factor is temporal.
9 Is there a timing issue as regards the investors
10 and investments being compared?

11 Now, Resolute had already
12 decided to close the Bowater Mersey mill when the
13 Port Hawkesbury measures were adopted. So there
14 really is an issue of timing. And I will get
15 into, in any event, a comparison of what was
16 actually offered to one compared to the other, not
17 because it's relevant to the like circumstances
18 test but because I want the Tribunal to have a
19 full picture of the context.

20 So next slide, please.

21 Perhaps, you know, very
22 important factor as well is the combination of
23 policy, jurisdictional analysis, and
24 implementation. And it's critical that when one
25 considers whether it's important that a mill, for

1 and none would have applied across Nova Scotia,
2 none apply generally. And in that sense, again,
3 the conclusion has to be that Bowater Mersey is
4 not in like circumstances to Port Hawkesbury.

5 Even if it were appropriate --
6 next slide, please. Sorry, Ricky, are we on Slide
7 68?

8 I think I will -- this is
9 simply the testimony where Mr. Montgomerie
10 confirms that the objectives that were being
11 sought to be achieved in the two different cases,
12 in the case of Bowater Mersey and in the case of
13 Port Hawkesbury, were very different. On the one
14 hand, one was a policy that was adopted to
15 essentially put the Bowater Mersey, put the
16 Bowater Mersey mill on track to have an orderly
17 transition to closure, whereas the other one was
18 looking to make Port Hawkesbury a competitive
19 success.

20 And so, again, this is not
21 treatment in like circumstances.

22 Okay, you can take the slides
23 down.

24 Members of the Tribunal, even
25 if it were appropriate to compare Resolute's

1 own business elsewhere through price erosion.

2 Surely Resolute cannot be
3 prevented from advancing a claim for loss under
4 this provision of NAFTA in respect of the measures
5 supporting PWCC through an argument that suggests
6 that it could have made similar negotiating
7 demands on the government for measures that would
8 harm its own interests.

9 It would have been, I think,
10 inconceivable to go into a process and make the
11 demands that PWCC made of Nova Scotia and insist
12 on them when all the while knowing that they
13 would, as we have demonstrated, necessarily result
14 in an impact on Resolute's other mills.

15 But, again, it's also
16 instructive to consider some of the additional
17 facts in the record regarding the bidding process,
18 because Canada, I think, has given a very enhanced
19 picture, if you will, of what actually happened.

20 Mr. Luz stated yesterday that

21 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] --

7 and we are in restricted access here; right,
8 Heather?

9 MS. D'AMOUR: Correct, we are
10 in restricted access.

11 MR. VALASEK: Okay. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

18 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] The credit monitor, the monitor that was

1 overseeing the CCAA proceeding, essentially the
2 restructuring proceeding, contacted 110 potential
3 parties, including Resolute. 110. Eight parties
4 submitted offers, and four were invited to
5 continue bidding. Only two, including PWCC's bid,
6 of the four final bids were to keep the mill open.
7 The other two were to scrap the mill.

8 And that's at Exhibit C-120,
9 paragraph 15.

10 And the other bidder who was
11 willing to bid on it as a going concern had what
12 was euphemistically referred to in the media as a
13 bit of a spotty past. That's at Exhibit C-143.

14 So it turns out that the
15 opportunity that Mr. Luz and Canada refers to here
16 as sort of being an open invitation to bid on Port
17 Hawkesbury at that time wasn't much of an enticing
18 offer. I mean, 110 potential parties, out of 110
19 parties, only two, including PWCC that, as we have
20 seen in the record, came in with a very aggressive
21 agenda, about which we complain because it
22 essentially, we say, co-opted the government into
23 providing measures that were anticompetitive, only
24 two ultimately came to the table and one of them
25 was simply not a reputable party.

1 I will turn now to what I call
2 the false narrative red herring.

3 PROFESSOR LÉVESQUE: Just
4 before you move on, I'd like to make sure I
5 understand the last point you're making.

6 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

15 So correct me if I say
16 anything you disagree with.

17 MR. VALASEK: All right.

18 PROFESSOR LÉVESQUE: [REDACTED]
[REDACTED]
[REDACTED]

21 MR. VALASEK: Correct.

22 PROFESSOR LÉVESQUE: -- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1 the end, it wasn't sufficient and he --

2 PROFESSOR LÉVESQUE: Just

3 to -- sorry, I didn't mean to interrupt. Just to

4 finish this point.

5

[REDACTED]

[REDACTED] So it's -- I want to make
12 sure I understand your position.

13

[REDACTED]

15

MR. VALASEK: I guess what

16 I'm -- I am responding to the argument that Canada
17 makes which is that because the opportunity was
18 not foreclosed, because Resolute, like other
19 potential bidders, was invited to consider Port
20 Hawkesbury, its claim under 1102 is foreclosed,
21 that's the argument.

22

And I don't understand that

23 argument because everyone who looked -- almost the
24 entire slate of bidders that looked at that
25 opportunity said this isn't worth considering.

1 And obviously if you're in this market, you
2 understand that you could get some government
3 support, [REDACTED]
[REDACTED]

5 And this claim is all about
6 the extent of the support. I mean that's the
7 nature of our complaint. So I think what we are
8 saying is that all the bidders, other than PWCC,
9 were considering what would a reasonable amount of
10 support from the government, which is what
11 governments do, and even Mr. Luz said, he claimed
12 that's what the Government of Nova Scotia did with
13 respect to PWCC.

14 But I think the evidence from
15 the bidders shows that most of the bidders, in
16 thinking about what the government would likely do
17 in a reasonable scenario, would simply not be
18 sufficient. And so they walked away. PWCC went
19 in and said we insist on getting this. We want to
20 be the lowest-cost producer and pushed the
21 government to provide assistance of such a degree.
22 As my colleague said yesterday, it wasn't the type
23 of measures, it was their character.

24 It was such an extraordinary
25 set of relief that of course, in hindsight, it's

1 like why didn't anyone else do that? Well,
2 because it's improper. And I don't think any of
3 the other bidders felt that any government would
4 go to that extent to violate NAFTA and provide
5 support that ultimately is anticompetitive in that
6 industry.

7 So, you know, I think that
8 this evidence doesn't help Canada. In fact, it
9 supports our claim that when PWCC entered into the
10 bidding process, it, you know, we heard a dog
11 analogy yesterday. The tail started wagging the
12 dog.

13 This wasn't -- earlier bidders
14 were looking at this process and saying, well,
15 what's normal and then one bidder came in and I
16 showed you evidence from my cross-examination of
17 Mr. Montgomerie yesterday as well where even
18 before the bidding process ended, what happened is
19 PWCC started negotiating with the government.
20 They sat down and they said you are going to be
21 our partner and we are going to insist.

22 I think PWCC recognized that
23 after the closure of Bowater Mersey, the political
24 pressure on Nova Scotia was extreme and that they
25 had them in a corner. And it would be very

1 am about halfway through my remarks.

2 PRESIDENT HANOTIAU: Yes, no
3 worry, no worry. I think that we should be
4 flexible today because we have asked a lot of
5 questions so you are supposed to do more than your
6 rebuttal, so don't worry.

7 MR. VALASEK: Okay, thank you,
8 please let me know if -- I mean I think I should
9 be able to finish up in about 10/15 minutes, I
10 hope, so.

11 PRESIDENT HANOTIAU: Okay, go
12 ahead.

13 MR. VALASEK: Okay. So the
14 next topic, members of the Tribunal, I'd like to
15 look at is the issue of -- I am really surprised
16 that we are still debating this at this stage. I
17 had hoped that we would get beyond it.

18 But, anyway, the proper
19 framework for the analysis under Article 1102 and
20 what nationality-based discrimination means.

21 Canada is simply -- I mean we
22 saw a roller coaster on a slide yesterday. I
23 believe this is just as much -- this is the roller
24 coaster in this case, that Canada's position on
25 nationality-based discrimination in Article 1102.

1 Canada neither accepts the
2 framework set out in our submissions based on the
3 UPS three-part test followed by the justification
4 test, but it doesn't really present its own
5 framework. It is very hard for me to pin that
6 down and I think that is strategic.

7 Canada has never delved into
8 what is actually required in the way that we have
9 to establish nationality-based discrimination and,
10 importantly, which elements are Claimant's burden
11 and which elements are Respondent's burden.

12 The fact is that Canada and
13 the non-disputing parties over time assigned a
14 range of meanings to that term "nationality-based
15 discrimination" and sort of used it as a bit of a
16 cudgel, if you will, through these proceeding. As
17 a result, the meaning Canada attributes to that
18 term has shifted over time.

19 In its counter-memorial,
20 Canada started at one extreme when it argued that
21 the term imposed the burden, the burden on
22 Claimant to show that it was accorded different
23 treatment because of its nationality. Essentially
24 a type of targeting argument.

25 In its rejoinder, Canada

1 argued that nationality must still, even
2 considering the specific language of
3 Article 1102(3), which I will get to in a minute,
4 form the basis for the least favourable treatment
5 in order for that treatment to constitute a breach
6 of Article 1102, and it occurs to me we can come
7 out of restricted access.

8 --- Whereupon Restricted Transcript Ends

9 MS. D'AMOUR: Confirming we
10 are now in public access.

11 MR. VALASEK: Okay. However,
12 in a subtle shift at that time, Canada no longer
13 argued that it was Resolute's burden to show
14 deferential treatment based on nationality, just
15 that nationality should form its basis. And then
16 I am not going to go through all the details, but
17 I showed at the 2020 hearing that Mr. Luz had gone
18 back to saying that we had to show some kind of
19 linkage, that it was because of the foreign
20 nationality that the deferential treatment
21 existed.

22 And, yesterday, I explained
23 here that Canada had finally come around to
24 Resolute's position on the proper framework in its
25 summary memorial.

1 Pope & Talbot, and so that's why I said that it
2 appeared that Canada was now coming around to our
3 framework.

4 But in his remarks yesterday,
5 Mr. Luz remained vague, saying that it didn't
6 matter who had the burden. And that he didn't
7 think that the second part of the Pope & Talbot
8 test made sense in any event.

9 And so, of course, to us, it
10 matters. To us, it matters because if you apply
11 that proper framework, there are consequences. We
12 meet the first three-part test, we succeed in
13 meeting our burden, and the burden shifts to
14 Canada.

15 And then there's two elements
16 to that burden. The first is nationality-based
17 discrimination. As we have said, Canada may well
18 discharge that burden, but there is that
19 nettlesome second part of the test and herein lies
20 the rub.

21 That is why Canada doesn't
22 want to accept the framework that is the proper
23 framework, which is that there is a burden on
24 Canada to show that the measures were not
25 anticompetitive, which it can't do. And that

1 should be the takeaway the Tribunal has from the
2 way that Canada has sort of muddled through the
3 framework for Article 1102, in our view.

4 Another important point to
5 make on the framework for Article 1102 is even how
6 nationality figures into that prima facie test,
7 because Mr. Luz and Canada's position is that,
8 somehow, we are ignoring nationality all together.
9 We are just conceding that there's absolutely no
10 nationality component.

11 One can look at paragraph 46,
12 for example, of Canada's summary memorial in which
13 Canada introduced its argument on Article 1102(3)
14 as follows:

15 "As Canada has explained,
16 the purpose of the
17 national treatment
18 obligation in
19 Article 1102 is to
20 prevent nationality-based
21 discrimination. NAFTA
22 tribunals, parties,
23 scholars have
24 consistently referred to
25 this as a necessary

1 element to find a
2 national treatment
3 violation. The
4 irrelevance of the
5 Claimant's US nationality
6 is evidenced by the
7 government's
8 encouragement of the
9 Claimant to bid on Port
10 Hawkesbury and
11 Mr. Montgomerie's
12 testimony that the
13 government would have
14 considered request for
15 financial assistance had
16 Resolute asked."[as read]

17 I would say as an aside that's
18 all fine and that could be part of its
19 justification test, by the way. But it doesn't go
20 to the first part of the test which is whether we
21 have taken into account nationality to discharge
22 our burden.

23 And the next part of
24 paragraph 46 goes to this:

25 "The Claimant concedes

1 that its US nationality
2 was not a factor in the
3 government's actions and
4 that other Canadian-owned
5 SC paper producers,
6 Irving and Catalyst, were
7 similarly impacted while
8 Resolute 'just happened
9 to be the only foreign
10 participant with an
11 investment in
12 Canada'."[as read]

13 Well, guess what? That's
14 sufficient under the UPS three-part test. That's
15 a sufficient nationality component to meet our
16 burden and to shift the burden to Canada.

17 And I will show you that
18 Canada itself in its pleadings has essentially
19 conceded that with respect to 1102(3) because
20 that's exactly what the language of 1102(3) says.

21 Canada goes on at the end of
22 its paragraph to say:

23 "To argue that there is a
24 national treatment
25 violation in a situation

1 where several enterprises
2 in the same sector were
3 accorded the same
4 treatment and similarly
5 impacted regardless of
6 their nationality
7 transforms Article 1102
8 into a guarantee for
9 foreign investors that
10 places them above
11 domestic investors, which
12 is not its purpose."[as
13 read]

14 Well, I don't think Canada has
15 read Article 1102(3) carefully. And let's bring
16 that up.

17 Ricky, could you bring up
18 Slide 32, please, from yesterday's presentation.

19 Okay, thank you.

20 So it's important to read
21 Article 1102(3) after all. This is a plain
22 language issue:

23 "The treatment according
24 by a party under
25 paragraphs 1 and 2 --"[as

1 read]

2 So paragraphs 1 and 2 are the
3 standard national treatment provisions for an
4 investor and paragraph 2 is for investments.

5 Now, paragraph 3 deals with
6 provincial national treatment obligations:

7 "The treatment accorded
8 by a party under
9 paragraphs 1 and 2 means,
10 with respect to a state
11 or province --"[as read]

12 Of course that's what we are
13 dealing with here:

14 "Treatment no less
15 favourable than the most
16 favourable treatment
17 accorded, in like
18 circumstances, by that
19 state or province to
20 investors, of the party
21 of which it forms a
22 part."[as read]

23 That language on its face
24 tells you that there will be or there can be
25 deferential treatment among Canadian investors in

1 a provincial measure because the relevant
2 comparison is between the US investor and the most
3 favourable treatment of Canadian investors.

4 That's what Article 1102(3)
5 says.

6 If Mr. Luz -- if Canada were
7 correct, Article 1102(3) would have read
8 "treatment no less favourable than the treatment
9 accorded in like circumstances by that state or
10 province to investors of the party of which it
11 forms a part", and it would have assumed that that
12 treatment has to be uniform. But it doesn't.

13 Instead, the provision says
14 "treatment no less favourable than the most
15 favourable treatment accorded in like
16 circumstances by that state or province to
17 investors of the party of which it forms a part",
18 i.e. Canadian investors in this context.

19 So the fact that other
20 Canadian SC paper mill owners are also impacted
21 does not preclude Resolute's claim under
22 Article 1102(3) and it also does not mean, as
23 Canada suggests, that nationality is irrelevant to
24 our position.

25 Ricky, can you go to Slide 34,

1 please.

2 So this is our framework,
3 which is not controversial. And in the context of
4 a provincial measure, I think it's very
5 appropriate to consider what it means.

6 It means that we have the
7 burden in the first instance to demonstrate
8 nationality-based discrimination for purposes of
9 1102(3) which does not mean anything beyond the
10 simple fact that as a foreign national -- so that
11 is the nationality element.

12 As a foreign national -- no
13 one contests that Resolute is a foreign
14 national -- it has received treatment less
15 favourable than the most favourable treatment
16 accorded to Canadian investors. And we have
17 demonstrated that.

18 It doesn't matter that
19 Catalyst and Irving are also impacted by the
20 measures. 1102(3) allows for that. It's the most
21 favourable treatment that's relevant for the
22 comparison.

23 And we concede that
24 nationality also figures into the second part of
25 the test where the burden shifts to Canada. But

1 connected to
2 nationality."[as read]
3 Now, that is -- that's a broad
4 statement.

5 "Flows from" and "arises out
6 of", I understand. That suggests a causal
7 connection between nationality and the deferential
8 treatment consistent, perhaps, with motive or
9 intent. That's certainly a way to establish the
10 prima facie argument.

11 "But otherwise connected"
12 captures the remaining neutral fact patterns. I
13 suggest that it was very carefully chosen by
14 Ms. Kinnear and Professor Bjorklund, where two
15 investors in like circumstances are treated
16 differently, one happens to be a foreign investor
17 with the nationality of another NAFTA party, and
18 there is a deferential impact on that foreign
19 investor even if the motive is not nationality.
20 That is still connected to nationality.

21 Now, finally, my final point
22 on nationality-based discrimination.

23 It is worth noting that in its
24 rejoinder, Canada explained in the greatest detail
25 yet what it meant for nationality to "form the

1 basis" of discrimination considering the language
2 of Article 1102(3), and it essentially adopted
3 Resolute's position that I have just explained.

4 It said, and this is at
5 paragraph 98 of Canada's rejoinder:

6 "In a situation where a
7 Canadian province, for
8 instance, Nova Scotia
9 would treat more
10 favourably investors from
11 another Canadian
12 province, for instance,
13 British Columbia, than
14 its own local investors,
15 a foreign investor from
16 another NAFTA party could
17 still bring a claim
18 alleging a breach of
19 Article 1102 based on the
20 fact that it did not
21 receive the treatment
22 accorded by Nova Scotia
23 to investors from British
24 Columbia. There would
25 still be a nationality

1 element to such a
2 claim."[as read]

3 In its Article 1128
4 submission, Mexico accepts this explanation and
5 concludes:

6 "Therefore, the
7 interpretation that
8 Article 1102(3) does not
9 require proof of
10 nationality-based
11 discrimination is
12 incorrect."[as read]

13 But we are not arguing for
14 anything other than that. We are arguing that
15 that is the nationality-based discrimination that
16 we have established as part of our prima facie
17 case.

18 So if that is the standard,
19 then Claimant clearly meets that standard.
20 Resolute has brought its claim because, as a
21 foreign investor, an investor of US nationality,
22 it did not receive treatment as the most
23 favourable treatment Nova Scotia accorded to a
24 Canadian investor, namely PWCC.

25 It doesn't matter that

1 Catalyst and Irving also suffered deferential
2 treatment alongside Resolute for purposes of the
3 prima facie standard.

4 What matters for purpose of
5 Article 1102(3) is that Resolute is a US national
6 mon the one hand, and that it received less
7 favourable treatment than the most favourable
8 treatment accorded to Canadian investors on the
9 other hand.

10 And then we get to the burden.

11 So I am now going to turn to a
12 few other --

13 DEAN CASS: Mr. Valasek,
14 before you turn to something else, let me just ask
15 a few very small questions.

16 First, you noted the testimony
17 of Mr. Montgomerie when he said that Resolute was
18 invited to bid and had it bid and asked for
19 assistance, Canada would have, or the province of
20 Nova Scotia, would have considered it.

21 Does it matter to your case
22 that that was not a blanket statement that
23 Resolute would have received the same support that
24 PWCC did? Or is that simply something that is not
25 relevant to the argument you're making?

1 MR. VALASEK: Dean Cass, are
2 you referring specifically to that Mr. Montgomerie
3 should have made a broader statement in his
4 testimony?

5 DEAN CASS: His testimony
6 wasn't that the same support would have been
7 available regardless of the bidder in order to get
8 the mill restarted. It was that it was something
9 that would have been considered. I believe those
10 were his words.

11 MR. VALASEK: Right, I do
12 think that's relevant and I think it is consistent
13 with my earlier explanation for the circumstances
14 under which Resolute considered the bid.

15 I mean, there was, there was
16 no indication to Resolute what level of support
17 would ultimately be given to PWCC. And as I also
18 suggested, if it had been evident to Resolute what
19 that level of support would have been, it would
20 have been -- it would have in some ways put
21 Resolute into the position of having to decide
22 whether it would inflict harm on itself.

23 DEAN CASS: A second question
24 on this.

25 In looking at the nationality

1 component here, I understand that the position is
2 that intent to harm the investment or investor of
3 the other nation is not required and I believe
4 Canada has agreed to that.

5 But does it matter in
6 assessing the 1102 case that the largest player in
7 the market, the largest competing firm was a
8 US-owned and not Canadian owned? That the other
9 Canadian firms in the market were not as large as
10 Resolute in terms of SC paper production?

11 MR. VALASEK: I think it is
12 relevant because -- and here, we would have to go
13 into restricted access.

14 --- Whereupon Restricted Transcript Commences

15 MS. D'AMOUR: Sorry, just
16 confirming we are in restricted access. Thanks.

17 MR. VALASEK: Okay.

18 So, Dean Cass, I have to make
19 a distinction whether it's relevant -- whether we
20 say it's part of the standard whether it would be
21 necessary for an 1102(3) claim for the US investor
22 to be the largest player in the market. We are
23 not saying that that's a necessary component.

24 We think that the -- as I
25 described elsewhere, I believe I described it

1

5

DEAN CASS: Just, if I may,

6

one more question on the legal standard here.

7

In the Claimant's view, is

8

1102, Article 1102 an additional prohibition on

9

action on NAFTA parties in addition to 1101 and

10

1102 or is 1102(1) and (2), or is 1102(3) a

11

substitute with respect to the actions of certain

12

components of the state, a substitute for what

13

would normally apply?

14

So, in other words, if you

15

didn't have 1102(3) and Nova Scotia gave a package

16

of benefits to Port Hawkesbury, PWCC, and no other

17

province was given similar benefits -- I know you

18

are not doing a cross-province comparison here.

19

But in the absence of 1102(3), would that be a

20

basis for a finding of a violation of the national

21

treatment obligation? The fact that you have one

22

component of the state giving out benefits that

23

are greater than are received by anyone else

24

anywhere in Canada?

25

MR. VALASEK: So the question

1 is still in relation to a provincial measure?

2 DEAN CASS: Yes, a provincial
3 measure if there were no 1102(3). Would that be
4 attributed to Canada and would that on its own be
5 a basis for a finding of a national treatment
6 violation if --

7 MR. VALASEK: Thankfully we
8 don't have -- I mean we do have a specific
9 provision in the treaty that addresses this so I
10 find it is an interesting hypothetical, what if
11 the treaty had been written differently. We would
12 be in a different -- you know, we would be arguing
13 under a different set of legal realities.

14 But I do think -- my position,
15 our position is that Article 1102(3) simply
16 clarifies for purposes of provincial measures what
17 is also the case under Article 1102(1) and (2). I
18 don't believe that even for a Canadian measure,
19 for the prima facie, for a prima facie case of
20 discrimination, even under Article 1102(1) and
21 (2), I don't think the foreign investor has to
22 demonstrate that no other Canadian investors are
23 similarly impacted.

24 That's a question for the
25 justification stage.

1 But I think for the prima
2 facie case, 1102(3) simply makes it clear with
3 respect to provincial measures that that is the
4 case.

5 DEAN CASS: Okay, thank you.

6 MR. VALASEK: So I will now
7 turn to a few of the more detailed questions,
8 Professor Hanotiau. For example, the like
9 circumstances questions.

10 So, Dean Cass, you had asked
11 your Question 1 was on like circumstances.

12 You said in the like product
13 discussion, one of the things that the Claimant
14 says is that the government measures were intended
15 to have a direct impact on the price of
16 supercalendered paper -- oh, by the way, are we
17 now in or out of restricted access?

18 MS. D'AMOUR: We are in
19 restricted access right now.

20 MR. VALASEK: Okay, I think we
21 can come out of restricted access.

22 --- Whereupon Restricted Transcript Ends

23 MS. D'AMOUR: Okay, confirming
24 that we have moved back to public access.

25 MR. VALASEK: Dean Cass, you

1 asked in the like product discussion, one of the
2 things that the Claimant says is that the
3 government measures were intended to have a direct
4 impact on the price of supercalendered paper, and
5 I was wondering whether the Claimant was thinking
6 that that was a necessary claim or something that
7 it was just an observation.

8 This is the phase that we use
9 to summarize an observation relevant to
10 considering two factors in the like circumstances
11 test: Product factor and policy factor.

12 So that was at Slide 58 of our
13 opening presentation.

14 And, as such, that was an
15 observation which feeds into our conclusion that
16 Resolute and PWCC and their respective mills
17 producing supercalendered paper are in like
18 circumstances. It's not a necessary claim.

19 We also made other
20 observations regarding the product factor and
21 policy factor as set out on Slide 58.

22 Maybe, Ricky, you can pull
23 that up.

24 And these observations lead to
25 the same conclusion. So, for example, Resolute

1 and PWCC's investment concern the same product and
2 that the measures were adopted expressly in a
3 connection with a policy meant to effect
4 competition.

5 So, in the CPI case, the
6 Tribunal wrote:

7 "Where the products at
8 issue are interchangeable
9 and indistinguishable
10 from the point of view of
11 the end users, the
12 products and therefore
13 the respective
14 investments are in like
15 circumstances." [as read]

16 And if you go to the -- yeah.

17 And then also in the CPI case, the Corn Products
18 International case, the Tribunal wrote that:

19 "It cannot escape the
20 conclusion that the
21 producers of like
22 products, which were
23 directly competitive,
24 were in like
25 circumstances as regards

1 a measure designed
2 expressly for the purpose
3 of affecting that
4 competition."[as read]

5 And now here, I'd have to go
6 back into restricted access, please, Heather.

7 --- Whereupon Restricted Transcript Commences

8 MS. D'AMOUR: Thanks.

9 Confirming we are in restricted access.

10 I think, Mr. Valasek, I think
11 you actually may have froze.

12 PRESIDENT HANOTIAU: Yes, it
13 seems that Mr. Valasek is frozen.

14 MS. D'AMOUR: He mentioned
15 earlier he was having internet issues so let's see
16 if he reconnects. We will just give him a second.

17 DEAN CASS: I thought being
18 frozen was acceptable in Canada.

19 MS. D'AMOUR: Okay, it looks
20 like he dropped off the call so I will just give
21 him a minute to reconnect.

22 PRESIDENT HANOTIAU: Yes, yes.

23 --- Brief pause taken.

24 PRESIDENT HANOTIAU:

25 Mr. Snarr, if Mr. Valasek cannot reconnect, maybe

1 you could make your submission now and then we
2 will come back to Mr. Valasek. We still need to
3 have Mr. Valasek I suppose. Yeah.

4 MS. D'AMOUR: He is rejoining
5 right now so let's see if he is able to get in.

6 PRESIDENT HANOTIAU: Very
7 good. Thank you.

8 We lost you.

9 MR. VALASEK: Maybe I was put
10 into restricted access. But, okay.

11 So are we now in restricted
12 access?

13 MS. D'AMOUR: Yes, confirming
14 we are in restricted access.

15 MR. VALASEK: Just to complete
16 my response to you, Dean Cass, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

20 So we can look at Slide 59,
21 Ricky.

22 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 you actually are in and it's of general
2 application and it's discriminatory, then
3 certainly you have to be in that jurisdiction
4 because that's where the legislation or the
5 regulation applies.

6 But where you have targeted
7 measures, and I have shown you that slide before
8 which shows that all of those measures, even
9 including kind of regulatory measures in this case
10 that were adopted only for purposes of benefitting
11 Port Hawkesbury, then the jurisdictional analysis
12 is different in the like circumstances test
13 because what you are -- what you have to consider
14 is what the crux of the complaint is.

15 The crux of the complaint
16 isn't that within Nova Scotia, the overall
17 regulation discriminates between one or another
18 thing. The complaint is that the province
19 targeted these measures towards one investor, and
20 if the policy was driven by an intention to make
21 that one investor competitive in a national market
22 or, indeed, a North American market, the intended
23 effect, and the necessary intended effect was
24 extra-provincial.

25 And so it's appropriate from a

1 jurisdictional analysis not to limit the scope of
2 potential Claimants to investors in that province.
3 That just wouldn't make sense. And that's a
4 contextual analysis.

5 You know, and so Canada says
6 Merrill & Ring bars this claim. It doesn't. Just
7 like they tried to argue at the jurisdictional
8 phase that the fact that we weren't in the
9 province meant necessarily that any measure of
10 Nova Scotia does not relate to Resolute. The
11 Tribunal rejected that. It's the same argument.
12 It's a jurisdictional argument but it doesn't do
13 the job.

14 PRESIDENT HANOTIAU: And what
15 about the fact that some measures could not have
16 been granted to Claimants like, you know, for
17 example, the forest utilization license and the
18 outreach agreements?

19 MR. VALASEK: Yes.

20 PRESIDENT HANOTIAU: Because
21 it seems it was not in Nova Scotia.

22 Does it affect the analysis of
23 like circumstances?

24 MR. VALASEK: It doesn't, no.
25 I have my answer here. Well, the answer is, no.

1 Because the nature of Resolute's complaint isn't
2 that those benefits should be extended to it in
3 Quebec, I think I found -- that's right, I have my
4 notes here.

5 That argument, in our view,
6 you asked us to address whether the measures like
7 FULA could not be granted to Claimant and you also
8 said that the fact, whether Nova Scotia Power
9 could not grant favourable electricity rates, for
10 example, in Quebec, whether that's relevant.

11 And I would say that that
12 argument that Respondent raises misapprehends the
13 nature of Resolute's complaint.

14 Resolute is complaining about
15 measures that had a necessary and foreseeable
16 adverse impact on its mills in Quebec, just like
17 the high fructose corn syrup producers complained
18 about a tax on bottlers that had a necessary
19 adverse impact on their business and we say it is
20 misguided to consider that Article 1102 would
21 require such measures to be extended to the
22 complaining investor.

23 Rather, what Article 1102
24 requires is that such anticompetitive measures not
25 be adopted in the first place.

1 That's the answer to that
2 point.

3 Now, this connects, I think,
4 to Dean Cass's question for Respondent, so we, I
5 think we will let Respondent deal with it. But I
6 recognize I think there is a question that Dean
7 Cass asked relating to the quantum of support
8 given and the measures and essentially whether
9 there is some range of measures that would be
10 acceptable or not, and so I am not going to get
11 into that until maybe after I have heard Canada's
12 response.

13 I think I have three quick
14 questions to answer and then I will hand it over
15 to our colleague, Mr. Snarr, to just address some
16 of the subsidy points.

17 So just quickly, Professor
18 Hanotiau, you also asked about the inconsistent
19 declarations. Professor, you said whether the
20 prior statements of Respondent before the WTO can
21 bind the Tribunal or whether the better view isn't
22 that the Tribunal needs to determine for itself
23 whether a specific advantage is a subsidy or
24 procurement.

25 We are invoking accepted

1 subsidies and countervailing measures; two, there
2 is no express NAFTA requirement of notification of
3 subsidies; and, three, a notification under the
4 agreement on subsidies and countervailing measures
5 does not prejudice the characterization of the
6 measure.

7 Well, Mr. Luz does not address
8 Canada's inconsistent statements and conduct. He
9 just focuses on the measures. That's not what we
10 are asking the Tribunal to do. We are not asking
11 the Tribunal to rule on what the proper position
12 was under the WTO. That's not the point.

13 The point is that it's clear
14 that they took inconsistent positions there and
15 here and that that should not be permitted.

16 PRESIDENT HANOTIAU: Okay but,
17 in other words, let's suppose that we say, well,
18 this is a subsidy. It is absolutely clear that
19 this is a subsidy. What should we do? Because
20 they said that we did not give a subsidy, we
21 should not accept the position that it is a
22 subsidy?

23 MR. VALASEK: That's open to
24 you, yes. If you look at the -- Professor
25 Hanotiau, if you look at the Chevron and Ecuador

1 case, Ecuador is arguing that the Claimant did not
2 have an investment, and the Tribunal did not get
3 into the question of whether there was or wasn't
4 an investment. Clearly that's the Tribunal's
5 jurisdiction to do that.

6 They said we will not allow
7 Ecuador to argue that there wasn't an investment
8 because its own courts had ruled that there was
9 and, therefore, they are barred from making a
10 different argument here because, in that case, it
11 was actually even a different branch of
12 government. Here we are not even dealing with two
13 different branches and the independence of the
14 judiciary. Here it's even a clearer case.

15 But that is what we are
16 saying, that that doctrine is very powerful. As
17 it should be, because good faith is important.

18 Now, my final, my final point
19 addresses Professor Lévesque's question. What
20 happens to our Article 1102 claim if only one or
21 two measures remain after a carveout analysis.

22 I think, Professor Lévesque,
23 you know our main argument, of course, is that we
24 are dealing with an ensemble and that you should
25 not go piece by piece. That's our primary

1 argument.

2 We have our argument which is
3 that, in any event, Article 1108(7) is precluded
4 because of the inconsistent statements.

5 But even if the Tribunal
6 decides to apply Article 1108 on a measure by
7 measure basis, some will necessarily survive, in
8 our submission. For example, the measures adopted
9 to ensure that the electricity package could be
10 implemented, my colleague Mr. Feldman made a
11 number of points in that respect. And the record
12 shows that each measure was essential for the
13 restart of Port Hawkesbury.

14 The record is clear. That
15 PWCC was going to walk away unless it got
16 everything it wanted. And, therefore, we say the
17 Article 1102 analysis precedes even with the
18 remaining measures and it is essentially
19 unaffected by it because our definition of
20 treatment is the adoption of a policy by the
21 government to favour its own investor in a way
22 that can only be achieved with a foreseeable
23 negative impact on the foreign investor. And we
24 say that even with one or two remaining measures,
25 the policy is still a fact.

1 The measure reflects a policy
2 that is established by the record. And even if
3 only one of the measures survives for analysis
4 under 1102, the analysis must proceed and we
5 submit it's undisturbed and one that gets into
6 like circumstances and the less favourable
7 treatment is also in place.

8 And then a final point.

9 Mr. Luz said that we haven't
10 established less favourable treatment. We have.
11 For purposes of the analysis, the treatment is the
12 favouring of the local investor in a way that is
13 improper and is in a way that is -- lavishes these
14 benefits on Port Hawkesbury and, by definition, it
15 is something that is not available to Resolute,
16 and that's the very crux of the matter. That's
17 the anticompetitive nature which is that the
18 government decided to go so far in making one
19 participant in a North American market the
20 beneficiary of its largesse.

21 And that is deferential
22 treatment. If you accept that there is treatment,
23 then you have to accept that it's deferential and
24 that the, and that Resolute hasn't been accorded
25 treatment that is as favourable as that most

1 favourable treatment.

2 And I will conclude there.

3 PRESIDENT HANOTIAU: Okay.

4 MR. VALASEK: I believe my
5 colleague Mr. Snarr has a few comments to make as
6 well.

7 SUBMISSIONS BY MR. SNARR:

8 MR. SNARR: Thank you, members
9 of the Tribunal. I expect I probably just need
10 about ten minutes of time if that works.

11 PRESIDENT HANOTIAU: Yes, then
12 we will have a break, yes.

13 MR. SNARR: Okay, very good.

14 One thing I wanted to address
15 at the beginning, just a correction.

16 Mr. Feldman had mentioned the
17 settlement where PHP joined Irving in a cash
18 settlement to address the US countervailing duty
19 investigation and the amount of the settlement was
20 \$42 million. I think there was a reference to a
21 slightly higher number, but just to correct that.
22 And that document is at C-242 if you're interested
23 in looking at that.

24 Members of the Tribunal, as
25 Mr. Valasek had just said, and as you well know,

1 our view of the measures is that they must be
2 looked at as a whole in their context together as
3 an ensemble rather than in isolation, and we
4 maintain our position that Mr. Valasek has been
5 discussing about Article 1108(7), but we wanted to
6 be responsive to Professor Lévesque's questions
7 about the definitions of procurement and subsidies
8 and how those might be applied if you were to look
9 at them on a measure by measure basis.

10 Our pre-hearing memorial at
11 paragraph 70 to 72 set out the definitions for
12 procurement and for subsidies. We mentioned
13 procurement is the action of obtaining or
14 procuring something and I think Professor Lévesque
15 found that definition, while brief, consistent
16 with what the other cases have said when looking
17 at the definition of procurement.

18 We also address the definition
19 of a subsidy as a sum of money granted by the
20 government or a public body to assist an industry
21 or business so that the price of a commodity or
22 service may remain low or competitive.

23 And then we turn to the
24 discussion in the UPS case and Dean Cass's
25 observation about the meaning of a subsidy.

1 interpreted vis-à-vis the word "subsidies", and I
2 would submit that they are subsumed within that
3 definition so that we are describing subsidies at
4 the beginning and then the things that follow are
5 included and come within that umbrella of
6 subsidies.

7 So, and but viewed in the
8 context of Dean Cass's statement that we are
9 talking about cash payments, a sum of money,
10 thinking about it in the context of the WTO
11 subsidies and countervailing measures agreement,
12 that there should be a financial contribution
13 here, because otherwise, there are a lot of
14 inventive ways that you can think of some kind of
15 assistance that might arise indirectly from any
16 type of government transaction.

17 Now, one thing that I'd like
18 to add to the definition of procurement.

19 We see in NAFTA Article
20 1001(5) that there is an explanation of
21 procurement for the Chapter 10 provisions that
22 deal with procurement.

23 And I will read subsection 5
24 and then give some thoughts about it. It says:

25 "The procurement includes

1 procurement by such
2 methods as purchase,
3 lease or rental with or
4 without an option to buy.
5 Procurement does not
6 include --"[as read]

7 And then subsection (a) says:

8 "-- non-contractual
9 agreements where any form
10 of government assistance,
11 including cooperative
12 agreements, grants,
13 loans, equity infusions,
14 guarantees, fiscal
15 incentives, and
16 government provision of
17 goods and services to
18 persons."[as read]

19 And so on.

20 So if you were to look to that
21 provision as a guide for interpreting a
22 distinction between procurement and subsidies
23 here, the conclusion that you might draw from that
24 is that any transaction with a subsidy element to
25 it, a financial contribution from the government

1 providing assistance to the recipient, couldn't be
2 considered procurement. That exception in the
3 language in 1001(5) says that if it looks like a
4 subsidy, it would not be considered procurement
5 here.

6 Now, MESA Power is one of the
7 cases that Professor Lévesque mentioned, and it
8 cautions against, I think, incorporating
9 provisions of another chapter of NAFTA into
10 Chapter 11. But I will note that the Canfor
11 versus United States case, which is available to
12 you at RL-007, used a provision of Chapter 19 of
13 NAFTA which concerns anti-dumping and
14 countervailing duties and disputes settlement of
15 determinations of those measures to exclude
16 measures that had been challenged in a NAFTA
17 Chapter 11 arbitration.

18 So this is in the days of
19 lumber for when softwood lumber producers had
20 challenged the United States's antidumping and
21 countervailing duty measures. And the Tribunal in
22 that case did look outside of Chapter 11 to
23 Chapter 19, and import a provision at 1901(3) to
24 say that antidumping and countervailing duty
25 measures when they're the subject of a NAFTA

1 Chapter 11 challenge have to be excluded from that
2 Chapter 11 challenge.

3 I will note also that Article
4 1112(1) in Chapter 11 says that in the event of
5 any inconsistency between Chapter 11 and any other
6 chapter, the other chapter will prevail to the
7 extent of the inconsistency.

8 So where there's a
9 transaction, and we have really only one example
10 in the list that I am planning go through with
11 you. But where you have an example where,
12 arguably, there's a government agreement to
13 purchase something but that also serves as a form
14 of government assistance, you, as a Tribunal,
15 looking at this question, unless you view them as
16 an ensemble, as we have suggested you should,
17 would have to decide how you would distinguish
18 whether that measure would be a procurement
19 measure under 1108(7)(a) or a subsidy measure
20 under 1108(7)(b), particularly here in the context
21 of our arguments about Canada not having the right
22 to claim 1108(7)(b) because of their statements to
23 the WTO.

24 And even if you were to look
25 at MESA Power and say, well, but I am still not

1 sure that I want to import this other provision or
2 if I don't think that there is necessarily an
3 inconsistency that 1112(1) tells me I have to go
4 look at the provision in Chapter 1001(5), you
5 still, at the end of the day, have to make the
6 determination of whether something that is a
7 measure that has elements, perhaps, of both being
8 a government purchase as well as a measure that is
9 providing assistance, which of those should apply.

10 So I now -- we may be in
11 restricted access already but if we're not, I
12 would ask that we go into restricted access so
13 that I can speak about the measures. There are a
14 few items of them that, Professor Lévesque, you
15 had asked for a little bit of explanation about
16 them and I just want to be sure that I'm not
17 discussing them in a public session.

18 MS. D'AMOUR: We are currently
19 in restricted access.

20 MR. SNARR: Thank you.

21 As we understood Professor
22 Lévesque's question, she has asked us to choose
23 whether each of the Nova Scotia measures
24 essentially would be identified as a subsidy or
25 procurement or neither with respect to 1108(7),

1 and so I will go through the list.

2 The \$24 million forgivable
3 loan, well, that is a loan, it's an interest free
4 loan, so that would seem to fit with the
5 definitions of subsidy.

6 The \$40 million forgivable
7 credit facility, the working capital loan, again,
8 interest free and that would more likely fit under
9 a subsidy.

10 With respect to the two
11 grants, the \$1.5 million productivity grant and
12 the \$1 million marketing grant, as grants and the
13 description of grants there falls under subsidies
14 as well, that's where they would be.

15 The \$38 million outreach
16 agreement. Now, Canada has said that that is
17 either procurement or a grant. The agreement
18 provides that PHP may receive reimbursements [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. The

23 government is not buying something, there is no
24 price for services. The amount -- the way that
25 the agreement works is that there's \$3.8 million

1 available for these reimbursements over a ten-year
2 period.

3 So what that agreement is
4 doing is it's providing a fiscal incentive of
5 reimbursement up to annual limits for PHP as it
6 decides to undertake the types of activities that
7 would be eligible as costs to be reimbursed within
8 the amounts of the annual limits.

9 I will note that the
10 Department of Commerce found the outreach
11 agreement to be a countervailable subsidy and
12 Canada did not challenge that finding at the WTO,
13 and you can see that in the panel report that they
14 have provided at R-238.

15 Next is the \$20 million land
16 purchase. Now, while this is a transaction of the
17 government purchasing land, it's apparent that the
18 transaction took place on [REDACTED], at
19 the time when Nova Scotia and PHP were closing the
20 deal that was going to bring PHP back online. So
21 they were doing this with the other measures that
22 they were then implementing and finalizing at the
23 time so that they could go forward and come back
24 online and go into business.

25 Originally, that purchase was

1 announced by Nova Scotia along with other
2 incentives in an August announcement and then
3 there were some changes to get things finalized
4 for signature and closing the deal in September 28
5 of 2012.

6 So taken in context with the
7 other transactions, the land purchase was intended
8 to be a form of government assistance that would
9 provide PWCC with cash to start up its operations.

10 And so per the distinction in
11 NAFTA Article 1001(5), and perhaps also Article
12 1112(1), that should be considered a subsidy
13 because 1001(5), if you were to look to that for
14 guidance, this would be financial assistance and
15 that would tip the balance for it to be a subsidy
16 rather than treated as procurement.

17 One other note on procurement.
18 You know, a foreign party to a procurement award
19 who might have a grievance about it would
20 challenge that award through a bid protest
21 normally. And Article 1017 sets out fair
22 procedures for a bid challenge when someone claims
23 that they unfairly have been denied a procurement
24 award.

25 And that's not the nature of

1 our claim in this case. And that's not, the
2 transaction here is not the type of transaction
3 that reflects a procurement measure, and as we're
4 not complaining about that anyway, that's not the
5 way that the measure should be viewed.

6 The electricity rate and the
7 accompanying biomass plant must run regulations
8 and the renewable energy regulatory protection, I
9 believe that it's undisputed by the parties that
10 those items are neither procurement nor subsidies.
11 Certainly that's our position.

12 We have discussed the
13 harvesting of the \$1 billion in tax losses. Well,
14 that's not procurement. And we would say that
15 that tax incentive could be considered as a
16 subsidy providing a financial contribution. It's
17 a financial benefit being provided by the
18 government.

19 And particularly is the way
20 that it was restructured at the last minute
21 because PHP had been disappointed about not
22 getting the tax ruling from federal Canada the way
23 that it wanted to, and so there were changes to
24 allow them to apply those tax losses that were for
25 the mill and carried over previously.

1 We have mentioned pension
2 relief. We consider that neither procurement nor
3 a subsidy. There is no provision of money with
4 respect to the handling of the pensions.

5 The forestry utilization
6 license, Professor Lévesque, you asked for a
7 little bit of clarity about what that was. So
8 it's a 20-year license for the purchase and
9 harvest of timber. That's neither procurement nor
10 a subsidy because it's a purchase of goods from
11 the government. It's not the government
12 purchasing goods from the company.

13 On top of the stumpage fees
14 that they pay, PHP pays as part of that
15 agreement -- and those would be the fees for
16 purchasing wood fibre -- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

21 And then as there are -- as
22 there's silviculture work being done, then that
23 money can be provided back to PHP as
24 reimbursements.

25 Now, the interesting thing

1 about that relationship is if you take a look at
2 C-170, a newspaper learned through an access to
3 information request that in 2017, PHP received
4 \$4.4 million in silviculture reimbursements when
5 they had only paid -- thank you, Ricky -- when
6 they had only paid [REDACTED] in stumpage fees.

7 So it's not procurement and
8 the transaction, the sale of goods is not a
9 subsidy, but it certainly is a -- what happened
10 here with, as noticed in the article and as
11 revealed through the access of information
12 request, demonstrates a very generous beneficial
13 agreement for PHP and a reduction of its fibre
14 cost which is one of the four cost considerations
15 for paper mills.

16 So that concludes what I have
17 to say about the list of the different measures.

18 And we can go out of
19 restricted access for one final comment.

20 --- Whereupon Restricted Transcript Ends

21 MS. D'AMOUR: Confirming we
22 are now in public access.

23 MR. SNARR: Okay, thank you.

24 So the last thing that I would
25 like to say is I wouldn't want to leave any

1 misimpression with the Tribunal or with our
2 friends representing the Government of Canada that
3 anything that we have not addressed this morning
4 is a waived or conceded argument.

5 We have tried, above all, in
6 our remarks to be responsive and focussed on the
7 interests of the Tribunal and have tried to be
8 resourceful that way and wouldn't want any sort of
9 misimpression to be left otherwise as we are
10 focussing on the Tribunal's questions.

11 And that's all that I have for
12 the Tribunal at this time.

13 PRESIDENT HANOTIAU: Thank you
14 very much, sir.

15 I suggest that we have a
16 15-minute break. Mr. Luz, is that fine with you?

17 MR. LUZ: Could I ask for
18 20 minutes just to be able to use the facility and
19 organize my notes.

20 PRESIDENT HANOTIAU: Twenty
21 minutes, yes.

22 MR. LUZ: Thank you.

23 --- Upon recess at 11:23 a.m.

24 --- Upon resuming at 11:42 a.m.

25 SUBMISSIONS BY MR. LUZ:

1 MR. LUZ: Professor Hanotiau,
2 before I start, can I ask -- I know you said that
3 it doesn't matter, but I would like to at least
4 know roughly how long the Claimant took so I know
5 we have at least that amount.

6 PRESIDENT HANOTIAU: No
7 problem at all. You take the time that you want.

8 MR. LUZ: Okay, thank you. I
9 just wanted to make sure. I don't think my
10 colleague Mr. Neufeld and I will take as long but
11 there's a lot to get through and I want to make
12 sure that I respond to as much of what the
13 Claimant said as I can as well as dealing with the
14 issues that the Tribunal asked us to deal with.

15 And I hope, what I plan to do
16 is follow the same pattern that I did yesterday
17 where I will take the Tribunal through the Bowater
18 Mersey situation, the bidding on Port
19 Hawkesbury -- or Port Hawkesbury in general, and
20 then move on to electricity and then the measures
21 as a whole and then deal with the legal issues,
22 1108(7) and 1102.

23 So I will sort of follow that
24 and, within that package or ensemble, I will make
25 sure I answer as many of the -- or all the

1 Tribunal's questions and then try and refer to
2 what some of the Claimants were saying.

3 So we will just go into
4 restricted access session now and, Heather, you
5 can just let me know when we're in.

6 --- Whereupon Restricted Transcript Commences

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

9 MR. LUZ: Thank you.

10 I want to start off with there
11 was a question that came from Professor Hanotiau
12 about Bowater Mersey and also relating to Dean
13 Cass's question about Port Hawkesbury getting
14 everything that it asked for and it seemed like
15 there was a discussion today as to comparing
16 Bowater Mersey and Port Hawkesbury so I want to be
17 able to, you know, give the full picture because
18 so much of what the Claimants are talking about is
19 slight of hand.

20 John, if we could pull up the
21 first set of slides.

22 The first set of slides, if
23 you go to the first slide, Slide 1 -- or 2. Thank
24 you.

25 This is the [REDACTED]

1 [REDACTED]

[REDACTED]

3 It's important to remember [REDACTED]

[REDACTED]

[REDACTED]. And I would refer to [REDACTED] which we are

6 going to pull up in just one second, because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] and that answers so many of the

12 questions that the Tribunal has and refutes so much

13 of what the Claimant has tried to portray.

14 I would just remind the

15 Tribunal that the Claimant never brought up the

16 fact that it took [REDACTED]

[REDACTED] they never

18 mentioned that in its Notice of Arbitration,

19 throughout the entire jurisdictional phase, or in

20 its memorial. It wasn't until Canada brought it

21 up that suddenly they had to say, oh, well, that

22 kind of financial assistance was okay and that was

23 for a different purpose but the stuff that PHP got

24 oh, no, that's a terrible violation of NAFTA.

25 So I want to set that stage

1 because the discussion that came up later about
2 disregarding 1108(7) based on inconsistent
3 statements and whatever other equitable principles
4 that the Claimant didn't actually name but seems
5 to be appealing to, the Claimant should be held to
6 their own standard.

7 Because [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

13 Now, it doesn't mean that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

24 So let's go back to the slide,
25 John. Slide Number 2. Thank you.

1 So December 1st --

2 PRESIDENT HANOTIAU: By the
3 way, have we received your slides?

4 MR. LUZ: I am not sure you
5 have. I apologize if -- I am just checking. I am
6 told that they were sent at 11:42.

7 PRESIDENT HANOTIAU: Okay, can
8 you resend them just to make sure.

9 MR. LUZ: Yes, apologies.

10 PRESIDENT HANOTIAU: No, no,
11 problem. Okay, yeah, thank you. Go ahead.

12 MR. LUZ: I will spend some
13 time on these slides and of course you will have a
14 copy and we will be pulling up exhibits as we go.

15 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

21 I also wish -- unfortunately,
22 I don't have a slide here for it but I am going to
23 pull up [REDACTED]

[REDACTED]
[REDACTED]

1 [REDACTED]

2 And we are looking at page 1
3 right now. I will just ask the Tribunal to just
4 take a little picture, a little snapshot in your
5 minds of [REDACTED]

[REDACTED]

11 Let's skip to page 5.

12 Yeah, and if we could
13 highlight right up at the top, [REDACTED]

15 "[REDACTED]"
[REDACTED]

[REDACTED]

21 Next slide.

22 [REDACTED]

1

[REDACTED]

12

Next slide.

13

And Mr. Feldman brought up a

14

point this morning saying that

[REDACTED]

16

Well, I refer the Tribunal to

17

Exhibit

[REDACTED]

23

So Mr. Feldman's accusation of

24

what I was saying this morning is not warranted.

25

[REDACTED]

1

[REDACTED]

9

Next slide.

10

[REDACTED]

13

Next slide.

14

Oh, and again, this is what I

15

was referring to. [REDACTED]

17

Now, of course, the major

18

difference between Bowater Mersey and PHP, Port

19

Hawkesbury, was that Bowater Mersey owned more

20

private land. [REDACTED]

[REDACTED]

1 [REDACTED]

[REDACTED] because, as Ms. Chow testified last
3 year, as long as the mill's operating and
4 continuing, the province is getting benefit.

5 So that was the idea.

6 The same circumstances, the
7 same thinking, the same approaches that the
8 government took with respect to Bowater Mersey,
9 you see the same thing happening again in Port
10 Hawkesbury.

11 Next, please.

12 Actually, sorry, if we could
13 go back to the previous slide, I will just leave
14 that one for a second.

15 We are going to come up later
16 when we talk about pensions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED]

[REDACTED], and maybe you can zoom in a

3 little bit.

4 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], but John, if you could scroll down a little

8 bit.

9 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14 But the point is you can see

15 [REDACTED]

16 John, if you could just scroll

17 down to page 2.

18 Yeah. "[REDACTED]

[REDACTED]

20 So this, again, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1

[REDACTED]

16 well, I don't want to say that the Claimants are
17 accusing of collusion or something like that, but
18 something that definitely goes against the
19 narrative that the Claimant has been bringing up
20 again.

21 And, again, this was -- it was
22 Bowater Mersey and Port Hawkesbury happening at
23 the same time and the province was approaching
24 them both the same way.

25 And I look -- I would suggest

1 [REDACTED]

[REDACTED]

3 But the idea that PHP got

4 everything it wanted is just simply not true. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9 Now, again, there could have
10 been -- there's justifiable differences and,
11 again, we are not trying to recreate the
12 negotiations and we are not trying to say -- and I
13 have to remind the Tribunal, that Bowater Mersey's
14 not part of the Claimant's in like circumstances
15 claim. They never -- they hid the fact that
16 Bowater Mersey ever got financial assistance so
17 they are not complaining about it as a NAFTA
18 breach. So the differences of what they got and
19 how they got it and so on, that's not the point.

20 Nor is the point for the
21 Tribunal to be deciding -- and this is something I
22 will come up with later. It's not the point for
23 the Tribunal to decide whether or not it was
24 appropriate that PHP got this and Bowater Mersey
25 got this. There are differences. Bowater Mersey

1 was an old mill, PHP had potential, it was in a
2 more rural area, PHP had the possibility with new
3 machinery, brand new, brand new supercalendered
4 paper machine to survive, whereas the old
5 newsprint machine had been there in Bowater Mersey
6 for decades.

7 It's not for the Tribunal to
8 replace its judgment as to what would be more
9 appropriate, more or less.

10 Was the financial assistance
11 done in bad faith or was it manifestly arbitrary?
12 Well, if the answer to that is no, well, then,
13 both 1105 and 1102 claims fail. Obviously there
14 was a rational connection and a justifiable and a
15 reasonable connection to everything that the
16 government was doing. And there is a reason why
17 the Claimant did not want to talk about Bowater
18 Mersey throughout its NOA, the jurisdictional
19 stage, or in its counter-memorial, is because it
20 doesn't fit their narrative.

21 So let's go on -- I just want
22 to make sure I covered everything. Okay.

23 Let's move on to the next
24 slide, John.

25 MR. MORALES: I want to

1 confirm we still are in restricted.

2 MR. LUZ: Yes, we are in
3 restricted.

4 MS. D'AMOUR: Yeah, confirming
5 we are in restricted.

6 MR. LUZ: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] It wasn't in the Government of Nova
10 Scotia's control as to who was bidding and who was
11 not bidding.

12 I also find a lot of
13 suppositions and assumptions from the Claimant as
14 to what actually happened during the bidding
15 process because the monitor reports, those were --
16 that's Ernst & Young that had been preparing them
17 and they don't have the kinds of details that the
18 Claimant was suggesting. Again, it doesn't fit
19 their narrative, but the fact is there were
20 bidders for the mill, some of them wanted to use
21 it for scrap, but it ended up being PWCC that
22 wanted to operate it.

23 And what did they want to
24 operate it as? Now, you've heard from the
25 Claimant that time and time again, the entire case

1

[REDACTED]

1 of the submissions to the UARB.

2 Next slide, John.

3 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7 Let's move on. Since we are
8 on the topic of electricity, let's move on to
9 that, because it also goes to the question of --

10 Actually, sorry, John, you can
11 pull up that slide and go to Slide 12.

12 Because Mr. Feldman brought up
13 the idea that if PWCC would not buy the mill if it
14 didn't get everything that it wanted and the
15 electricity rate.

16 And, Dean Cass, you also asked
17 about, you know, whether the, you know, did PWCC
18 get everything it asked for.

19 Well, the fact is it didn't
20 get everything it asked for and, in fact, the most
21 important thing that it did not get, what it
22 thought it could do to get its electricity rates
23 down to [REDACTED] hour was the electricity
24 rate that it started with. [REDACTED]

[REDACTED]

1 everything they wanted and it was going to be a
2 lot less profitable than what they had originally
3 dreamed of to be the lowest-cost producer, if that
4 was ever really meaningful, which Canada says, has
5 always said and as [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9 I just respond to something
10 with respect to electricity that I believe it was
11 Mr. Valasek, it might have been someone else that
12 brought up this morning about the consultant that
13 was hired by the Government of Nova Scotia to
14 advocate for them.

15 You will recall the testimony
16 from Mr. Williams that said I did not advocate for
17 either side. I was there as an honest broker.

18 Mr. Coolican testified last
19 year that the reason why there was no need for the
20 Government of Nova Scotia to provide a consultant,
21 Resolute never asked for one, and what they were
22 asking for, Bowater Mersey, I should say, was
23 fairly straightforward is it was a fixed
24 electricity rate.

25 What PWCC came up with and,

1 again, this is all in our pleadings, it's
2 complicated but it was a completely different
3 formula, completely different, never done before
4 in Nova Scotia.

5 So that was the impetus for
6 having Mr. Williams sit in on the negotiations and
7 try and act as a translator between really two
8 different languages. Someone coming from outside
9 the province speaking to a provincial electricity
10 provider.

11 I just want to re-emphasize
12 the -- well, we will get to the electricity part
13 as well.

14 Okay. I am just going to go
15 to the pension liability question, for which we
16 don't have any slides. But I will just clarify
17 this because the Claimant had always said that --
18 or it had said last year or in its pleadings, I am
19 not really sure what they are saying now, quite
20 frankly, but what Canada has always explained is
21 that Premier Dexter had explained that the Port
22 Hawkesbury pension liability cannot be transferred
23 to the taxpayers and the province never took on
24 any liability or topped up the pensions.

25 That is Exhibit R -364.

1 Now, the legislation that had
2 been proposed was in order to help the workers and
3 pensioners avoid an immediate windup hit of up to
4 30 percent or more of their pensions.

5 So workers at the mill, they
6 had -- and that's R-466.

7 So the workers at the mill had
8 negotiated a new contract with PWCC. There were
9 obviously substantial job cuts. And the idea was
10 that instead of having the workers suffer the
11 impact of a new contract, the government just
12 simply extended the time for the windup of the
13 plan. So, as Canada has always said, there's no
14 benefit to the mill. It was something that was
15 for the workers specifically.

16 And I want to contrast that,
17 again, and I can refer to -- it's back to Exhibit
18 R-155 that in contrast to Port Hawkesbury where
19 the province did not take on the pension
20 liabilities of the mill, that's exactly what
21 Resolute -- that's exactly what the government did
22 for Bowater Mersey's mill.

23 So it's kind of paradoxical
24 to, again, complain about pensions at Port
25 Hawkesbury when it was the government that took

1 over [REDACTED] of pension liability at Bowater
2 Mersey.

3 I am going to talk about
4 biomass. I know they didn't talk about it too
5 much today but it is something that I feel I have
6 to kind of respond because of what was said
7 yesterday.

8 And, again, this was all
9 explained by Mr. Coolican at the hearing and in
10 his witness statement. The draft regulations
11 regarding biomass were done in 2011. That is
12 before NewPage went into creditor protection
13 proceedings and before there was ever a bid and
14 before PWCC ever entered the picture.

15 So, in 2011, the government
16 had already designated the biomass plant as must
17 run because it advanced Nova Scotia's renewable
18 energy policy. So just in terms of timing, it
19 cannot possibly be that this regulation was to
20 help PWCC turn Port Hawkesbury into the lowest
21 cost mill in North America because the regulation
22 was devised in 2011.

23 I am going to pull up Slide
24 15. This, again, goes back to the testimony of
25 Mr. Coolican. And, you know, I won't go through

1 Slide 16, please.

2 So, again, when -- and this is
3 important when we get to the measures because I
4 have got the list of measures that Resolute came
5 up with, so, and we are going to go through them
6 so what I am saying to you now is important for
7 later.

8 If what Resolute is talking
9 about is the amount of money that PWCC -- that
10 Port Hawkesbury pays for steam from the biomass
11 boiler, the board reviewed it. They said it's
12 reasonable, it's not subsidized by taxpayers.
13 They pay money for steam. So it's a market rate.
14 It's part of the deal. It was part of the load
15 retention rate. It's not attributable to the
16 Government of Nova Scotia. That was the deal that
17 PWCC and NSPI decided it was an amount that they
18 would pay for steam. So that's not a measure of
19 the Government of Nova Scotia nor is it a subsidy
20 because it's a market rate.

21 Next slide, please.

22 Oh, yes, and this is another
23 really, really important point.

24 The government has never paid
25 a single penny for additional costs. That was

1 predicted by Mr. Coolican when he was asked by the
2 board. So we are not talking about a scenario
3 where the government suddenly took on extra costs
4 or started paying the mill to make up for those
5 costs. It never happened.

6 So if that's what the Claimant
7 is talking about when it comes to 6 to \$8 million
8 in savings, which I am not really sure what they
9 are talking about, but if that's what they are
10 talking about, it's made up because it never
11 happened and Mr. Coolican confirmed that.

12 Professor Lévesque, you asked
13 about the FULA, and it is my great regret that the
14 Claimants did not call Deputy Minister of Natural
15 Resources Julie Towers to testify at the hearing
16 last year because I think the Tribunal would have
17 been very entertained by an exceptional public
18 servant who would have dispelled everything that
19 the Claimant has said today.

20 The problem with the FULA is
21 that the Claimant said almost nothing through
22 almost all of its pleadings and so Canada felt
23 like we were, you know, trying to hit a moving
24 target or no target at all because they weren't
25 saying anything about the FULA which is, I would

1 assume, is why the question came up yesterday.

2 I will tell the Tribunal,
3 since they can't hear Ms. Towers viva voce, read
4 paragraphs 31 to 37 of her first witness statement
5 and paragraphs 3 and 4 of her rejoinder. The
6 testimony is unchallenged.

7 But I will try and paraphrase
8 now. Because it's important, again.

9 As I said yesterday, the
10 former owners of Port Hawkesbury had been
11 operating on Crown land under a piece of
12 legislation from 1968. The statute gave the
13 mill's owner de facto control of government land,
14 and limited the government on what it could do on
15 its own land. That's in contrast to Bowater
16 Mersey that had private land. It could do what it
17 wanted on its own private land.

18 That Act, the Stora Act, which
19 I believe is Exhibit R-219, that had a 50-year
20 term that was coming up for renewal in 2019 for
21 another 50 years and that was stated in the Suther
22 affidavit at R-24 paragraph 18.

23 So when Port Hawkesbury went
24 into creditor protection in September 2011, there
25 was an opportunity for the government to negotiate

1 a modern forest licensing arrangement with the new
2 owner that would be more advantageous to the
3 province and fulfil the province's goals and aims
4 when it came to its own land. And so that is why
5 the province required PHP to sign the FULA on
6 September 27th, 2012.

7 This is all in Ms. Tower's
8 testimony and it's uncontroverted. I am
9 paraphrasing for the Tribunal.

10 The point of the FULA, as
11 Ms. Towers explains, was to place a cap on how
12 much Crown timber can be used for PHP's operations
13 and to encourage greater use of timber from
14 private woodlots. So, in fact, the FULA, the FULA
15 was designed in order to ensure that private wood
16 supply rather than Crown wood supply would drive
17 the timber market in the province.

18 So the whole point of that was
19 so that PHP would not actually use Crown land as
20 much as they used to be able to use it for mill
21 operations. So that's an advantage to the
22 province. The province now had greater control
23 over its own land to fulfill its Natural Resources
24 strategy.

25 So, in summary, the FULA was

1 not a benefit to PWCC. If anything, I am sure
2 PWCC would have preferred the pre-existing regime
3 because it was a lot more advantageous to a
4 private owner.

5 Now, again, Resolute confuses
6 the FULA's stumpage fees aspect and the
7 silviculture payments as Ms. Towers explained and
8 as is in the FULA, PHP pays for all Crown stumpage
9 harvested at the rates prescribed in the FULA and

10 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

15 So whatever they pay in
16 stumpage is prescribed [REDACTED] that's set
17 out in the FULA.

18 Now again, separately from
19 that, it still requires PHP to conduct
20 silviculture activities on Crown land for using
21 best practices for forest management.

22 [REDACTED]
23 that necessarily involves PHP incurring additional
24 expenses to do silviculture on Crown land that it
25 would not do in the ordinary course of business.

1 evidence for the purposes of the Tribunal.

2 I have gone through that and I
3 am going to go through now the ensemble of
4 measures.

5 Can you pull up the next
6 slide, John.

7 And shockingly, I mean, this
8 is something that the Claimant has now brought up
9 on the last day to set out its position on what
10 some of these are and my pen ran out of ink just
11 as Mr. Snarr was going through them to try and
12 actually finally set out what their position was,
13 so we will see how much overlap and agreement
14 there is with the Claimant and the Respondent in
15 this matter.

16 But I just want to go through
17 them all just to explain what it is very clearly
18 and then I am going to get to the legal issues and
19 answer the rest of the questions the Tribunal had.

20 So let's look at the ensemble
21 of measures.

22 The first one, John, you can
23 just go, the \$24 million forgivable loan, that
24 falls within 1108(7)(b).

25 \$40 million forgivable credit

1 facility, (b), again.

2 The productivity grant,

3 1108(7)(b).

4 \$1 million marketing grant,

5 1108(7)(b).

6 The outreach agreement,

7 1108(7)(a).

8 I want to just hold on one
9 second, John, before you get to the land purchase.

10 The Claimant said this morning
11 that Canada says it's either procurement or a
12 grant. That's not quite accurate.

13 The Claimant seems to have
14 suggested earlier in its submissions that the
15 outreach agreement is a grant. We just simply
16 said that the testimony of Ms. Towers shows
17 clearly that it is a procurement but even if the
18 Claimant was right, that it's a grant, well, then,
19 that doesn't help them because it falls instead of
20 subsection (a), it falls within subsection (b).

21 But the point is Canada's
22 submission, and it's substantiated by Ms. Tower's
23 witness statement, this is procurement by a party.

24 The next one, please.

25 \$20 million land purchase,

1 that the Claimant is talking about because they
2 failed to identify an actual measure that results
3 in 6- to \$8 million of savings a year. Again,
4 that -- what they are saying doesn't really make
5 sense because there's no measure that actually
6 does that.

7 If what they are talking about
8 is how much the mill pays for steam, the board
9 already confirmed that it is not a subsidy, it's
10 not subsidized by other ratepayers and that was
11 the deal that two private parties negotiated.

12 Renewable energy regulatory
13 protection. As I said before, no money ever paid.

14 Harvesting of \$1 billion tax
15 losses, there's so many things wrong with the way
16 the Claimants have presented this. We explained
17 this before. That's not a measure of the
18 Government of Nova Scotia. It's the Income Tax
19 Act that gives the right with respect to tax
20 losses and [REDACTED]

[REDACTED]

[REDACTED]

23 so, therefore, it falls under -- that should be
24 (b) -- I apologize. 1108(7)(b) is the -- it's
25 part of the [REDACTED], so.

1 Yes, so that's a mistake on
2 Slide 14. It should be (b) because it's [REDACTED]
[REDACTED]. Apologies for that.

4 Pension relief. Again, no
5 assumption of pension liabilities by Nova Scotia.

6 The FULA, the silviculture is
7 procurement by a party. Stumpage is [REDACTED]
[REDACTED]. Debtor in possession finances hot idle and
9 forestry infrastructure, the Tribunal has already
10 ruled that outside the jurisdiction of the
11 Tribunal.

12 And the property tax relief,
13 well, that one would require an in-depth analysis
14 into a favourite provision of NAFTA Article 2103
15 on taxation measures and our position is it
16 doesn't matter anyway because there's no -- it's
17 not within the same jurisdiction so it's not like
18 the property tax relief could have been given to
19 Quebec -- to Resolute's mills in Quebec because
20 this was a Nova Scotia property tax.

21 Okay, now I want to touch on
22 some of the legal standards and address the
23 questions that the Tribunal brought up.

24 One of Dean Cass's questions
25 was about how the Tribunal should evaluate -- and

1 this actually goes to something that Professor
2 Hanotiau had asked as well in a different context
3 but I think I can deal with them together.

4 It's what the Tribunal should
5 do to evaluate the quantum of support that was
6 given.

7 Well, under Article 1105, all
8 this Tribunal can apply is the minimum standard of
9 treatment of aliens under customary international
10 law, and that does not permit evaluating the
11 quantum or second guessing the decision of a
12 government as to whether more or less would have
13 been a good idea or a bad idea. That's not what
14 1105 permits. That's very clear from the case
15 law, including *Eli Lilly* and other cases that we
16 have cited.

17 Customary international law
18 does not discipline subsidies. There's no
19 substantial state practice or *opinio juris* that
20 would give the Tribunal any benchmark by which to
21 evaluate the quantum. Substantial deference has
22 to be given to a state to make policy decisions
23 and can't be second guessed by a NAFTA Chapter 11
24 Tribunal.

25 There's no proportionality

1 PRESIDENT HANOTIAU: Mr. Luz,
2 concerning 1105, I think we have enough
3 information.

4 MR. LUZ: Thank you, yes.
5 Thank you, I will just move on.

6 DEAN CASS: Can I ask just one
7 quick question about the slide you had up.

8 With respect to property tax
9 relief, were you saying there was no property tax
10 relief for PWCC or that there couldn't be property
11 tax relief given to Resolute by the Government of
12 Nova Scotia. I wasn't sure which point your slide
13 was trying to make --

14 MR. LUZ: I am sorry, Dean
15 Cass, and I realize it is probably not as clear as
16 it could have been on the last part.

17 We did deal with this in our,
18 I believe, in our counter-memorial that talked
19 about how the tax, the tax agreement with the
20 municipality in Port Hawkesbury was actually done
21 because of a change in the property, a reduction
22 in the size of the mill, I believe. I could -- I
23 could get the explanation, the citations to our
24 memorial, it's escaping me now. But we did
25 explain this. There was a property tax relief but

1 it actually was commensurate with the reduction of
2 the size of the operation of the mill because they
3 closed the newsprint machine.

4 So there was a property tax
5 reduction but it wasn't a benefit. It wasn't --
6 it was just an adjustment to account for new
7 circumstances.

8 The point of the slide really
9 was to say it doesn't matter because they're not
10 in the -- they are not in the -- the Claimant's
11 mills are not in that jurisdiction so it couldn't
12 get a property tax relief for its mills when they
13 are not in that jurisdiction. I think that was
14 really our point.

15 My colleague is telling me
16 that it's -- we explain the tax, the property tax
17 issue in our counter-memorial at paragraphs 134 to
18 135.

19 I am just going to move on
20 again now to talk about [REDACTED] but just
21 before I do, because it again goes to the question
22 that both Professor Hanotiau and Dean Cass said
23 about the reviewing the quantum of damages. We
24 know that in 1105 but, and I am going to get into
25 this in detail.

1 The quantum of subsidies is
2 also not relevant in 1102 because the NAFTA
3 parties decided not -- decided to, not to discipline
4 subsidies at all, and I am going to explain very
5 clearly how that is the case. So how much
6 quantum, the form of it, and so on, the NAFTA parties
7 specifically decided to exclude that from Chapter
8 11 so it's not within the remit of the Tribunal to
9 think about.

10 Again, I will deal with that
11 later.

12 I just want to go through [REDACTED]
[REDACTED] because, again, there's a lot that
14 the Claimant has said about [REDACTED]. And I
15 have to emphasize, and this came up very clearly
16 in the hearing last year. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1 And we can move on.

2 I won't go through all those
3 slides. I will just mention again that one of the
4 other things that the Claimants didn't mention is
5 that the Claimants, in October 2012, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9 and that Dolbeau mill cannibalized its own market,
10 including for Laurentide. So just to mention
11 that.

12 Okay, I would like to get to
13 the heart of what I want to talk about today which
14 is 1108(7). And this, I think we can go into
15 public access.

16 --- Whereupon Restricted Transcript Ends

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

19 MR. LUZ: The Tribunal asked
20 the parties whether they could provide a
21 definition of subsidy and how the terms in Article
22 1108(7) should be understood.

23 I am sorry, am I just hearing
24 feedback? Sorry, Heather, is there --

25 MS. D'AMOUR: Sorry, someone

1 was unmuted. I just muted them.

2 MR. LUZ: Okay, thank you.

3 Now because the term "subsidy"
4 is not defined in Chapter 11 or elsewhere in the
5 NAFTA, the Tribunal has to turn to the general
6 rule of interpretation under customary
7 international law, which is encapsulated in
8 Article 31.1 of the Vienna Convention on the Law
9 of Treaties.

10 The absence of a definition
11 suggests that the NAFTA parties did not want a
12 narrow technical definition of subsidy, but
13 rather, a broad one consistent with a general
14 understanding of what constitutes a subsidy.

15 You will recall yesterday when
16 I cited the Mercer and MESA cases where they were
17 considering the meaning of procurement. They,
18 those cases -- in those cases, they considered the
19 ordinary meaning of procurement by a party to be
20 broad and not limited. The same reasoning applies
21 with respect to subparagraph (b) and all of its
22 terms, which are undefined.

23 So while Canada does not
24 believe that that the Tribunal needs to
25 definitively define the term "subsidy" here to

1 decide this case, but a Vienna Convention on the
2 Law of Treaties analysis provides sufficient
3 elements to conclude that the measures all fall
4 within the scope of 1108(7).

5 Now, the Oxford Dictionary
6 definition, which Resolute, I believe, referred
7 to, the definition of subsidy is that it's a sum
8 of money granted by the state or a public body to
9 help keep an industry or business keep the price
10 of a commodity or service low.

11 There are other similarly
12 broad definitions that don't contain the reference
13 to keeping the price of a commodity or service
14 low, but again, the point is it's broad.

15 You also need to consider the
16 context. The context of the term "subsidy"
17 includes the word "grant" which suggests that the
18 term "subsidy" is something different or at least
19 is broader. And the term "grant" itself defines a
20 sum of money given by the state for any of various
21 purposes. For example, to finance education or an
22 authoritative bestowal or confirmative or
23 privileged right or possession, a gift or
24 assignment of money by the act of an
25 administrative body or a person in control of the

1 fund.

2 So the examples that follow
3 subsidies or grants in subparagraph (b) also
4 inform the meaning of those terms and indicate
5 that what we are talking about is government
6 support but the form of that subsidy or grant is
7 not limited to the direct transfer of funds by the
8 government.

9 So while a grant or
10 government-supported loan is a direct transfer of
11 funds by a government, a government-supported
12 guarantee or insurance is not but it could
13 constitute a subsidy.

14 And, of course, not every
15 advantageous treatment of an enterprise of a party
16 is a subsidy. There must be some kind of
17 financial contribution.

18 And we don't argue that the
19 SCM definition applies or should be read into
20 NAFTA Article 1108(7). The definition of subsidy
21 under the SCM agreement has a very specific and
22 particular meaning: Financial contribution by a
23 government which provides a benefit, and under the
24 SCM agreement, actions can only be taken against
25 subsidies that are specific.

1 And the definition determines
2 the scope of that agreement, and the application
3 of certain disciplines that exist in that
4 agreement. So we are not suggesting that it
5 should be imported into NAFTA Chapter 11 because
6 the NAFTA parties purposely left the definition
7 undefined, unlike the SCM agreement. So it is to
8 be given its ordinary meaning, broad, just like
9 procurement by a party.

10 Because the Article 1108
11 contains the terms "subsidies" or "grant",
12 including government-supported loans, guarantees
13 and insurance, without any other further
14 conditions attached, you can't use the kind of
15 conditions that exist in the SCM agreement here.

16 And, again, the context of the
17 treaty is important as well. As opposed to the
18 SCM agreement which has its own set of disciplines
19 and its own ideas, the purpose of 1108 is
20 specifically not to impose disciplines on
21 subsidies but to maintain the government's policy
22 flexibility and to carve out from the scope of
23 national treatment subsidy -- disciplines on
24 subsidies.

25 But if you're going to look at

1 the SCM agreement and talk about the direct
2 transfer of funds and so on, that's something that
3 might, might inform, you know, in a particular
4 program that is difficult to understand or is more
5 complex.

6 But as Canada has always
7 submitted along here, that's not something the
8 Tribunal needs to do because of the specificity of
9 the language in 1108(7)(b) making sure that
10 government-supported loans and grants are covered
11 specifically without needing to go into the full
12 details of what a subsidy might be. But the fact
13 is the fact that they left it undefined suggests a
14 broad definition.

15 Now, again, and this is where
16 I -- the crux of my argument for this, because
17 Professor Hanotiau had asked about government
18 subsidies and whether there should be a limit and
19 so on, and in the context of 1105, I think the
20 Tribunal already has it.

21 But the answer is, no. There
22 is not any discipline on the limit and the quantum
23 in NAFTA Chapter 11, the form nor the intention.
24 Chapter 11 does not discipline subsidies. The
25 parties purposely excluded subsidies from the

1 national treatment obligation and, of course, as
2 we know, there is no customary international law
3 that disciplines subsidies either.

4 And, in fact, I want to bring
5 up the next slide, it's the last slide in my deck,
6 although I have more to say but it's just the last
7 slide.

8 The NAFTA parties -- if the
9 Tribunal needs any more support for the idea that
10 the NAFTA parties really did not want anything in
11 1108(7)(a) and (b) to be -- sorry. 1108(7)(b).

12 If the Tribunal needs any
13 other evidence that the NAFTA parties did not want
14 subsidies or grants and government-supported loans
15 to be subject to the disciplines of NAFTA
16 Chapter 11, they can just look at Article 1907.

17 In NAFTA Chapter 19, that
18 shows that the NAFTA parties did not agree to
19 discipline subsidies. The only thing that they
20 did was that if domestic remedies were going to be
21 used, Chapter 19 of the NAFTA created a mechanism
22 to review the use of the domestic antiduty and
23 countervailing duty laws for a panel review
24 process.

25 But here is where it says:

1 "The parties further
2 agree to consult." [as
3 read]

4 Sometime in the future:

5 "The potential to develop
6 more effective rules and
7 disciplines concerning
8 the use of government
9 subsidies; and the
10 potential for reliance on
11 a substitute system of
12 rules for dealing with
13 unfair trans-border
14 pricing practices and
15 government
16 subsidization." [as read]

17 That tells you right there.

18 The NAFTA parties did not want to discipline
19 subsidies in this agreement.

20 Article 1907(2) tell this
21 Tribunal that there was no agreement by the NAFTA
22 parties to discipline subsidies and it can't be
23 done indirectly by Chapter 11.

24 DEAN CASS: Might I ask, if
25 that were a blanket exclusion of any treatment of

1 subsidies under any provision of NAFTA, why was
2 the 1108(7) exclusion not drafted broadly but only
3 specified certain of the headings of Chapter 11
4 from which subsidies would be excluded? Was there
5 a particular reason for that?

6 MR. LUZ: Sure, and this is
7 actually something that I, we have said a long
8 time ago, is that the point of 1108, reservations
9 and exceptions, and they carved out from not just
10 national treatment but most favoured nation
11 treatment and 1107, which senior management and
12 board of directors.

13 You can't carveout -- like
14 with respect to 1105, you can't carveout from
15 customary international law, the minimum standard
16 of treatment. The minimum standard of treatment
17 is the minimum standard. So you -- so the NAFTA
18 parties could not carveout subsidies from what is
19 the minimum standard of treatment.

20 Our point is simply that there
21 is no customary international law rules on the
22 discipline of subsidies. So excluding subsidies
23 from -- excluding subsidies from national
24 treatment was a deliberate choice by the NAFTA
25 parties to make sure that they did not need to

1 provide national treatment.

2 And, Dean Cass, in fact, I am
3 grateful for your question because that leads me
4 directly into the answer I was going to give to
5 Professor Hanotiau about the object and purpose,
6 like why was this done.

7 And we can look to the MESA
8 award, because the MESA award really did say what
9 this was all about, and maybe I could just pull it
10 up really quickly.

11 What's the object and purpose
12 of the procurement exception but the reasoning
13 applies equally to subsection (a).

14 John, can you pull up RL-52.
15 That's the MESA award.

16 Because we are going to go to
17 paragraphs 418 and 419, and then eventually to
18 paragraph 437.

19 As we said yesterday, the MESA
20 Tribunal was discussing procurement not a subsidy,
21 but Canada suggests that the same approach should
22 be adopted.

23 John, if you could go to
24 paragraph 418. Actually, why don't you just go to
25 paragraph 419. And get the last -- just keep

1 going. Is this the right exhibit? Yes. Go right
2 down to paragraph 419. Maybe it's not pulling up.

3 It's okay, John, we will just
4 pull it down. I am just going to quote from the
5 MESA. I know the Tribunal can find it.

6 What the MESA Tribunal said is
7 that the NAFTA contracting parties sought to
8 protect their ability to exercise
9 nationality-based preferences in cases of
10 procurement. It's the same object and purpose
11 with respect to subparagraph (b). The NAFTA
12 parties sought to protect their ability to
13 exercise nationality-based preferences in cases of
14 subsidies or grants, including
15 government-supported loans.

16 And, again, paragraph 437 --
17 oh, yeah, that's right. Okay, thank you, John.

18 Paragraph 437, if we can pull
19 that up quickly just so that it sticks in the
20 Tribunal's mind.

21 The object and purpose of the
22 carveout in Article 1108(7)(a) -- again, applies
23 to (b) as well -- is to permit the NAFTA
24 contracting parties to purchase goods or services
25 in a manner that yields maximum benefits for the

1 local economy. It would make no difference
2 whether at all such goods or services, once
3 purchased, are used solely by the government or
4 any other entity.

5 Well, if you adopt the same
6 reasoning with respect to (b), it makes sense. It
7 allows the NAFTA parties to give subsidies in a
8 manner that yields maximum benefits for the local
9 economy and it doesn't matter what it's for. That
10 tells you right there Canada's answer with respect
11 to the definition of subsidies and how we hope
12 this Tribunal will adopt.

13 DEAN CASS: Mr. Luz, if I may,
14 I have a question and you may not want to answer now
15 or you may want to defer.

16 But you were talking about
17 object and purpose. I noticed when you were
18 talking about the nature of the test under 1102,
19 you said that all we really needed to look at was
20 whether there was a rational basis for the
21 Government of Nova Scotia's action, not looking at
22 that, the sort of the second part of the Pope &
23 Talbot test dealing with the object and purpose of
24 NAFTA, and I didn't know whether that was an
25 intentional exclusion of that part of the test or

1 simply that you didn't get to it once you were are
2 talking about it.

3 And your comments here about
4 object and purpose simply reminded me of that.

5 MR. LUZ: Thank you and I will
6 deal with it more and certainly I was not ignoring
7 it.

8 You may recall from last year
9 I answered this question on the Pope & Talbot test
10 and so on and I will deal with it shortly.

11 But the point is if the object
12 and purpose -- it cannot possibly be that the
13 object and purpose in 102 of NAFTA means what the
14 Claimant says it is when the NAFTA -- when the
15 object and purpose of 1108(7) is to remove
16 subsidies and procurement by a party from national
17 treatment. It doesn't, it doesn't make sense.
18 Like, that is consistent with the object and
19 purpose of exactly what the NAFTA parties wanted
20 to do.

21 So that Pope & Talbot test is
22 just inapposite. We would suggest that it doesn't
23 have any basis in the text of the treaty anyway.
24 I was just simply putting that forward as a
25 rebuttal point that even, even what the Claimant

1 says is the test, which we don't agree with in
2 several respects, it still passed.

3 But if that's okay with you, I
4 will get to this a little bit in more detail
5 unless you would like to ask something again now.
6 Okay.

7 Just on the WTO notification.
8 Resolute's -- actually, I should look to make sure
9 I haven't -- I took so many notes.

10 Oh, something that I heard for
11 the very first time this morning was the Claimant
12 trying to pull in the procurement definition from
13 Chapter 10. Again, we are not in Chapter 10. We
14 are in NAFTA Chapter 11.

15 That has been attempted in
16 other cases. MESA, is the first one that pops to
17 mind. So obviously the Tribunal can see how
18 much -- what they face because I don't think --
19 the fact that the Claimant has never brought this
20 up before and is just bringing this up now, that
21 whole point was rejected in MESA, Mercer, UPS so I
22 don't think there's much to that, to that
23 definition. It's not defined, it's a broad
24 definition. The MESA Tribunal already dealt with
25 that.

1 Okay, I am going to get to the
2 WTO notification and some of the questions that
3 Dean Cass asked about the, are we interpreting the
4 agreement or applying equitable principles.

5 PRESIDENT HANOTIAU: I ask a
6 question concerning the objectives.

7 When one says that in any
8 case, you know, even if you are within 1108, you
9 know, you have -- you cannot undermine the
10 objectives of NAFTA, what are the objectives of
11 NAFTA? In MESA, the Tribunal said that these
12 objectives are to be determined chapter by
13 chapter.

14 What's your position on this?

15 MR. LUZ: I am agreeing with
16 the MESA Tribunal. It is chapter by chapter. You
17 can't look at them import rights and obligations
18 from other chapters unless the -- unless NAFTA
19 Chapter 11 allows it.

20 So if the object and -- if
21 NAFTA Chapter 11 intentionally and explicitly
22 carved out subsidies from the national treatment
23 discipline, that is the object and purpose of
24 NAFTA Chapter 11, the NAFTA parties decided that
25 was not going be the subject of an ISDS claim, so

1 I would suggest that that's the -- and
2 furthermore, it's the purpose of each provision.
3 What is the object and purpose of each provision?
4 That's how the Vienna Convention analysis is. And
5 the object and purpose of that provision is to
6 make sure the NAFTA parties are not disciplined by
7 Chapter 11 Tribunals when it comes to procurement
8 or subsidies.

9 I do want to get through this
10 quickly because Resolute's response to 1108(7) is
11 not that the measures were not actually subsidies.
12 They keep talking about how the government heaped
13 largesse on PHP, but they ask that the Tribunal
14 disregard 1108(7). And I think what we heard this
15 morning is, really, that is what the Claimant is
16 asking, is they are asking for the Tribunal to
17 rely on some general -- I am not even sure. What
18 it sounds like is *ex aequo et bono* is what they
19 are asking the Tribunal on how to disregard this
20 because Resolute's trying to turn this WTO
21 notification into something that it was never
22 intended to be.

23 The notification is allowing
24 for transparency and discussion as between WTO
25 members. They were not meant to be determinative

1 as to whether certain measures are subsidies or
2 not. Article 25 of the SCM agreement makes that
3 clear.

4 And if it's not the case under
5 the WTO, all the more reason that it cannot be the
6 case under NAFTA.

7 And Professor Hanotiau, I
8 think, brought this up in the question to the
9 Claimant is that it is incumbent on this Tribunal
10 to make its own determination as to whether the
11 national treatment obligation applies to the
12 measure by considering whether or not they fall
13 within the scope of the carveout in 1108(7).

14 And the question about
15 equitable principles and so on, I -- I have to
16 take a bit of umbrage with what the Claimant had
17 been talking about.

18 The question was is it open to
19 you to disregard an explicit part of the NAFTA
20 treaty? It is not open to this Tribunal to
21 disregard 1108(7).

22 And Mr. Valasek resurrected
23 these equitable principles that came about earlier
24 on in their pleadings in what is inappropriate
25 given what the Claimant has done in this

1 [REDACTED] assistance package with a potential
2 for another [REDACTED] That's good for [REDACTED]
[REDACTED] and the Claimant but not good for Port
4 Hawkesbury.

5 I would suggest that the
6 Tribunal, if they are going to even think about
7 what the Claimant is saying on that respect,
8 which, of course, they can't and would be outside
9 the Tribunal's jurisdiction to do that, but if
10 they are going to hold Canada to that kind of
11 standard, then the Claimant should be held to its
12 own standard.

13 I'd like to get -- I am sorry,
14 go ahead, Dean Cass.

15 DEAN CASS: Before you leave
16 the point about reporting subsidies to the WTO,
17 you cited, if I understood you correctly, the
18 provision in the SCM agreement that says a report
19 of something to the WTO isn't dispositive of
20 something actually being a subsidy so Canada, in
21 this case, could have reported the GNS measures to
22 the WTO as possible subsidies without that being a
23 conclusive statement that they violate the subsidy
24 agreement in any way.

25 Doesn't that make it even

1 easier to report measures as potential subsidies
2 rather than saying that there are no subsidies?
3 Doesn't that make the point about Canada's denial
4 of subsidies even stronger?

5 MR. LUZ: We dealt with this
6 in our pleadings and a little bit last year.

7 The point is that "nil" is not
8 a denial of a subsidy. It's a complex procedure
9 for a federal state to gather information from
10 provinces and so on, and no one is saying that the
11 reporting mechanism of the WTO is perfect by
12 Canada or any other state.

13 The point is that as soon as
14 the -- as soon as the United States and the
15 European Union brought this up with Canada, Canada
16 disclosed everything, and that was evident from
17 those documents that we have looked at before. We
18 have described it exactly as they were.

19 So the constructive
20 notification of the subsidies actually occurred.

21 And, again, it's not relevant
22 for a NAFTA Chapter 11 Tribunal. We've gone
23 through this before. This Tribunal is applying
24 1108(7), and that's what it's bound to apply and
25 if there was any kind of requirement in the NAFTA

1 that would enable the Tribunal to disregard
2 1108(7), well, that's one thing. But there isn't.

3 DEAN CASS: Thank you.

4 MR. LUZ: Thank you.

5 I know we have been going for
6 quite a while and this is what happens when we
7 don't have time limits.

8 Would the Tribunal like a
9 quick break and I will deal with 1102 as
10 succinctly as I can and then leave some time for
11 my colleague Mr. Neufeld to go ahead? Or I can go
12 ahead. It's for the Tribunal. I am in your
13 hands.

14 PRESIDENT HANOTIAU: I don't
15 need a break but, Ron?

16 DEAN CASS: I am at your
17 disposal, Mr. President.

18 MR. LUZ: Okay, I think what I
19 will do is I will just quickly go through -- oh,
20 Professor Lévesque?

21 PROFESSOR LÉVESQUE: No, I am
22 fine too. Thank you.

23 MR. LUZ: Okay, thank you.

24 So I will just go through 1102
25 as quickly as I can, cognizant of the time and

1 So we are not saying that that
2 was a determinative finding on like circumstances.
3 Paragraph 291 of the decision said that the
4 Tribunal was not making a decision on in like
5 circumstances so there's no dispute there.

6 Secondly, the Tribunal already
7 said that you have to be within the same
8 regulatory space as the Merrill & Ring Tribunal
9 said. I've already said, and it was picked up by
10 the Tribunal several times, including this
11 morning, is that the Claimant hasn't even tried to
12 explain how that applies with respect to so many
13 of the measures. So it didn't adjust its case to
14 account for what the Tribunal had already told
15 them.

16 And then of course, yes, there
17 were other scenarios that the Tribunal tried to
18 elucidate. Not an exhaustive list, but the fact
19 is the Tribunal was signalling to the Claimant,
20 you better prove one of these two, otherwise, you
21 are going to have to come up with some other kind
22 of scenario to even be in the realm of an in like
23 circumstances test.

24 They couldn't do the first
25 part because Nova Scotia was not trying to keep

1 Resolute out of Nova Scotia. They wanted them in
2 Nova Scotia, or at least to bid on the mill. And
3 I believe the Claimant already conceded yesterday
4 explicitly, although it's been done before, but
5 they are not alleging a Methanex-type of target, I
6 don't think they are alleging anything.

7 In fact, what they are
8 alleging, and I heard this morning is not even
9 deferential treatment. They are complaining -- I
10 believe Mr. Valasek said this, and I wish I had
11 the transcript in front of me, but essentially
12 what he is saying is we are not complaining about
13 the deferential treatment. We are complaining
14 about the anticompetitive effects.

15 So what does that mean? This
16 is not a national treatment claim anymore?
17 Suddenly it's an anticompetition claim? Well, as
18 the UPS Tribunal says, there is no anticompetition
19 in 1105 and if's not a national treatment claim, I
20 really don't know what this claim is anymore.

21 Now, as the Tribunal said in
22 paragraph 291 on the decision of jurisdiction,
23 those were just on admissibility questions, there
24 was no determination as to whether or not it was
25 in like circumstances. That was still a test that

1 needed to be applied in the merits, which is why
2 we are here now.

3 Now, on nationality-based
4 discrimination, we have already put that up, the
5 Mercer decision, another decision that the
6 Claimant just wants to disregard.

7 The Claimant's approach would
8 mean that any time a foreign investor affected
9 just happens to get less favourable treatment than
10 one other domestic investor, there is a
11 presumption of a national treatment violation.
12 That's the test they are proposing for you.

13 But that's not the test. And,
14 again, what they're making very clear is that they
15 want national treatment to be some kind of an
16 anticompetitive discipline and/or for protection
17 of the negative impact -- any negative, any
18 possible negative impact on a foreign investor,
19 and that's not what it is.

20 We have always been very
21 clear, we know what the UPS test is. Treatment,
22 treatment in like circumstances, and more -- the
23 treatment is less favourable. You have to pass
24 all of those and, as the UPS majority said, is
25 that that is the burden for the Claimant. It

1 never shifts to the Respondent.

2 But I want to bring up that
3 decision, CL-113. John, hopefully, you're still
4 listening.

5 Because the Claimant continues
6 to disparage the idea of nationality-based
7 discrimination as not being relevant here at all,
8 but I want to point the Tribunal to paragraph 177
9 of the UPS award. It's paragraph 177, John.

10 So after having gone through
11 the like circumstances test and determining that
12 the Claimant and Canada Post were not in like
13 circumstances -- yeah, right there, that's great.
14 Paragraph 177. You can get part of the -- you can
15 get 176 as well because it provides the context
16 right above was when the Tribunal decided they
17 were not in like circumstances.

18 And that first sentence,
19 because they were not in like circumstances, but
20 the Tribunal felt it important to note that the
21 fact also illustrates that the rationale for
22 providing distribution assistance through Canada
23 Post does not comprise any nationality-based
24 discrimination.

25 And they go on to be able to

1 say that other Canadian courier companies were
2 equally affected and treated in an identical manner.
3 That obviously shows that nationality-based
4 discrimination was something that was important to
5 that Tribunal as well.

6 You can take down the slide.

7 Thank you, John.

8 I am just going to end on
9 this.

10 When the Claimant goes through
11 their long list, the one that sticks out -- and
12 just given time, I am not going to go through all
13 of them. But the one that sticks out are the
14 middle categories: The policy, justification and
15 implementation and that's where their entire case
16 falls apart.

17 I have already talked about
18 treatment. But the in like circumstances aspect,
19 those three categories, policy, jurisdiction and
20 implementation, the Claimants have created a
21 narrative that simply does not comport with the
22 reality.

23 Canada has given a long list
24 of all of the reasons why the in like
25 circumstances test is not achieved. I don't have

1 anything more to say about that because I think
2 the Tribunal has heard enough.

3 I would just take note, again,
4 that the Claimant did not respond at all to the
5 more favourable -- the less favourable treatment
6 aspect of the test, which Canada has emphasized.
7 They didn't address it as with respect to
8 electricity or any of the other measures.

9 So I think we will just leave
10 it at that and unless the Tribunal has any other
11 questions, I think I will just leave it to my
12 colleague Mr. Neufeld.

13 Perhaps a little break would
14 be a good time.

15 PRESIDENT HANOTIAU: Let's say
16 ten minutes.

17 MR. LUZ: Okay, thank you.

18 --- Upon recess at 1:20 p.m.

19 --- Upon resuming at 1:32 p.m.

20 SUBMISSIONS BY MR. NEUFELD:

21 MR. NEUFELD: I am starting
22 and if the Tribunal has no questions, then we can
23 move to public and I will signal when we should cut
24 the public feed.

25 Thank you, members of the

1 Tribunal, and thank you for your questions. I
2 will have about no more than 30 minutes for sure
3 depending on if you have follow-on questions for
4 me but I don't have much today and I really tried
5 to focus on the two questions that you posed to us
6 yesterday which were damages, damages related.

7 The first question, of course,
8 was Dean Cass's question when you asked if the
9 Tribunal finds that there are measures that are
10 excluded from the application of Article 1102 by
11 being in a, through 1108(7), what should we do with
12 respect to any decision on damages and causation?
13 That was the question, at least that's what I recorded
14 yesterday. So if it wasn't, please correct me now
15 because I have prepared all my remarks based on
16 that question.

17 DEAN CASS: I think it's if
18 there are some that are still left in after others
19 are excluded, what do you do.

20 MR. NEUFELD: Right, well,
21 that sounds good to me because that's exactly what
22 I understood.

23 And I hope that, I hope that
24 Canada's position on this is already clear. I
25 don't need to say too much on it. Our submission

1 is already available to you in our
2 counter-memorial at paragraphs 373 to 376. I also
3 spent some time on this at our other hearing in
4 2020, time that was cut short and I didn't get
5 much time so I do appreciate having a little bit
6 of an opportunity now to sum up Canada's position.

7 In sum, the case that the
8 Claimant brought was on, was on a package, on an
9 ensemble of measures and, on top of that, its
10 cause in fact theory, and I use that because I am
11 constantly distinguishing cause in fact. It's
12 the only thing they run from proximate cause
13 which they don't ever address.

14 But the cause in fact theory,
15 you will find that in Dr. Kaplan's statements in
16 his first, his first expert report at paragraph 18
17 and again at paragraph 50, where he states it's
18 clear that PHP's re-entry depended on the entire
19 benefits package. His opinion is based on the
20 entire benefits package being given, so
21 \$124.5 million is what he tabulates that to be.

22 And then the words of the
23 Claimant at paragraph 308 of its memorial couldn't
24 be clearer. The Claimant argues that but for the
25 measures taken together, PHP would never have

1 re-entered the market and Resolute would not have
2 been damaged. That's the Claimant's words. Not
3 Canada's words. It was the Claimant's words at
4 308 in its memorial.

5 So the only possibility, the
6 only possibility is that if one of those measures
7 doesn't constitute a breach, because it's
8 procurement of subsidy, doesn't constitute a
9 breach of 1102, then the case that the Claimant
10 brought fails on its own premise. There's no
11 viable theory of causation that would allow
12 reparation for a non-breach.

13 Since the Claimant hasn't
14 provided an alternative argument that would allow
15 the Tribunal to consider a smaller package, the
16 Tribunal has no choice but to award no damages for
17 lack of causation coupled with the Claimant's
18 decision not to quantify a breach caused by
19 individual elements or some other, some other
20 package, some other elements.

21 Mr. Feldman's request this
22 morning to the Tribunal that it come up with its
23 own amount for damages, we have to caution this is
24 nothing but a plea for the Tribunal to act ex
25 aequo et bono. If Claimant simply hasn't made its

1 case, then it's not for the Tribunal to make it
2 for it.

3 Mr. Feldman this morning also
4 pointed to, and again, pointed to Mr. Steger's
5 price bucket. He points to it to show causation.

6 This is something I addressed
7 yesterday. He says -- so he says, Mr. Feldman
8 says this about Peter Steger. He says he
9 acknowledges that PHP's reopening caused prices to
10 fall. Well, that's not true. I said that
11 yesterday and it's unfortunate but I am going to
12 have to say it again today. Mr. Steger's opinion
13 is on quantum. It in no way addresses proximate
14 cause of any harm to Resolute.

15 Look at Steger 1. Here is his
16 opinion where this price bucket is found. And in
17 paragraph 84 of his statement, he says:

18 "I have been asked to
19 quantify the price
20 erosion using the
21 assumption provided by
22 Canada that the entire
23 benefits package caused
24 the breach and was the
25 sole reason PHP

1 re-entered the SC paper
2 market." [as read]

3 Canada instructed Mr. Steger
4 to assume that the breach occurred. We instructed
5 him to assume that the breach caused some damage.
6 And then we asked him if that's the case, please
7 tabulate it for us. It's in that context that he
8 is measuring price erosion.

9 And what did Mr. Steger do?

10 Well, he looked at all of the contemporaneous
11 commentary, the market study, the all the -- you
12 know, the reports from all the paper watchers and
13 he concluded that there was a market reaction and
14 it was based on expectations of what would happen
15 when PHP re-entered. Those expectations were not
16 unlike RISI's, [REDACTED]

18 And note that, in this regard,
19 paper sales are locked in for a long period. They
20 usually have six month -- they typically have six
21 month contracts. Sales locked in advance of PHP's
22 re-entry would have been locked in at a price
23 based on that expectation of what might happen
24 when PHP re-entered the market.

25 But as we have learned,

1 expectations don't always bear out.

2 It wasn't for no reason that
3 prices bounced right back up six months later.
4 After sales contracts had expired, the market
5 reset. Replacing the expectations with the real
6 world.

7 The long list of industry
8 commentary that Mr. Steger cites to shows what
9 that market expectation was and it shows that that
10 expectation was incorrect and that, in fact, PHP's
11 supply was quickly absorbed by coated mechanical
12 paper and by imports.

13 I'd like to point to the stats
14 in this regard and we are going to go to Pöyry's
15 first report in this arbitration to do that.

16 So, John, if you could please
17 call up Figure 3.2.

18 Mr. Feldman says that imports
19 are steady. That's what he said this morning.
20 Imports are steady, don't worry about them. Well,
21 let's have a look, let's look at the numbers here.

22 The Claimant hasn't filed any
23 numbers but you will find them in Steger 1 and it
24 is Schedule 10. You will find them in the Pöyry
25 report too.

1 And this graph shows you a
2 number of important things, but focussing first on
3 imports, that's the light -- sorry, the darker
4 green -- no, I am getting mixed up myself now.

5 John, do you have -- yeah,
6 it's 3.2, did I want 3.3. Oh, thanks, John. He
7 is showing me where they are.

8 It is the light green and dark
9 green figures. So you see almost no dark green at
10 all. That's what had me stumped because there are
11 no imports, there are barely any imports of SNC
12 and SCB, the stuff that Resolute largely produces.

13 You do see an awful lot of
14 light green, though. You see almost 25 percent in
15 some years. It's a big chunk of the market. And
16 what you see there from -- yeah, come back to
17 that, yeah, thanks.

18 From 2009 to 2011 is that when
19 things are pretty flat, imports are pretty flat,
20 they have gone up a little bit. But if you look
21 specifically at 2010, there's a jump from 277,000
22 to 380 -- sorry, metric tonnes. 277 metric tonnes
23 to 380, that's over 100 -- that's a jump of over
24 100. That is not insignificant in a market where,
25 you know, like just compare to Kénogami's output

1 alone. Kénogami is at 133. And here we are
2 talking about a jump of 100.

3 Now let's look also just to
4 the general trend on SC -- you see from the
5 beginning to the end, there is a secular decline.
6 Nobody disagrees with that. You have numbers that
7 are generally coming down, but it doesn't come
8 down every year. In 2007 -- 2006, it goes up,
9 2007, it goes up. But it also goes up in 2013
10 and, of course, that's where the facts of this
11 case lie.

12 So I referred to it yesterday.
13 So from 2011 to 2012, you have this precipitous
14 fall and so Port Hawkesbury's idled, it's not
15 producing paper, selling paper, and suddenly,
16 demand for SC paper plummets by, you know, 440.

17 And the year after, in 2013,
18 on PHP's back in the market, it jumps back up
19 again. So this massive spike in 2013.

20 Now, the point I was trying to
21 make yesterday is what would have happened if PHP
22 had not have come back on stream?

23 You know, PHP, again, it's
24 making the SCA+ paper, right, the high grade
25 paper. What would have happened if it hadn't come

1 back in 2013? Would you have experienced the same
2 spike in volumes that you have there? Who would
3 have supplied them? Or would they have just,
4 would they have just stayed with coated
5 mechanical? Because that's what we are saying
6 absorbed all that spike.

7 The new demand that you see in
8 2013, it replaces coated mechanical paper and from
9 a causation perspective, if your job is to put
10 Resolute back in the situation it would have been,
11 then we submit that either the new demand for SC
12 paper would not have shot back up at all, you
13 wouldn't have the same spike, or imports would
14 have taken up that space. And, you know,
15 Dr. Hausman, in his testimony, acknowledged that.

16 We know all this because,
17 while PHP was able to displace coated mechanical
18 production with its high grade SCA+ paper. Other
19 producers, like Resolute, are not. They can't
20 replace it. Resolute just doesn't make good
21 enough paper.

22 So this is, in our submission,
23 what would have happened in the but-for world.
24 The Claimant misunderstands our argument entirely.
25 We have never said that price erosion was caused

1 by coated mechanical or caused by imports.

2 Mr. Feldman just either misunderstands or

3 misconstrues what we are saying.

4 Our position is that in the
5 but-for world of proximate causation, Resolute
6 would have been in the position with either the
7 demand remaining low where it was, or imports
8 causing the demand to shoot back up again, which
9 would necessarily have had an effect on the market
10 and would have affected the prices.

11 Since the Claimant's method of
12 assessing harm and quantifying its damages doesn't
13 account for these factors, it's just simply
14 unusable.

15 John, you can take that one
16 down and I will turn to the second question, the
17 one that Professor Hanotiau raised yesterday.

18 The question, as I understood
19 it, was from the moment -- so this is -- first
20 citing the Claimant's statement, and then asking
21 for the authorities to back it up. And the
22 statement was from the moment you've established
23 sufficiently and reasonably that your losses are
24 due to state's breach, other possible concurrent
25 events that are not attributable to the state are

1 irrelevant and that such events do not diminish
2 the state's responsibility.

3 So that's the Claimant's
4 statement and you have asked for authorities on
5 that, of course. The Claimants have this morning
6 cited to CME, cited to Gavazzi.

7 And, again, I would like to
8 sum up Canada's views on this matter.

9 In short, we don't dispute the
10 general principle of concurrent causation. What
11 we dispute is the Claimant's application of it
12 here.

13 You'll find our arguments in
14 our rejoinder at paragraphs 225 to 229.

15 So the principle of concurrent
16 causation holds that when there are multiple
17 parties that cause harm, one can't escape that
18 harm by pointing the finger at the other guy. You
19 know, in the CME situation, the issue is whether
20 the state could escape responsibility for the
21 destruction of the investment by pointing the
22 finger at Dr. Zelezny rather than to its own media
23 counsel.

24 Tehran hostages, we could talk
25 about those facts, the Corfu Channel. The concept

1 It applies in tort law. You
2 apply it to multiple tortfeasors. If they, you
3 know, together combined to commit an assault or it
4 applies in insurance law when you're talking about
5 is the damage caused by the flood or by the fire.

6 But in patent litigation,
7 where, really, where price erosion found its home,
8 really, where quantification by price erosion is
9 so well known, concurrent cause doesn't apply to
10 that price erosion. That wouldn't make any sense.
11 To the contrary, the authorities that Canada has
12 submitted and that you will find again in the
13 paragraphs we have referenced show this.

14 And, in particular, I will
15 take you to R-474, which is a study. The study
16 was undertaken by PwC, and they looked at 1,751
17 patent decisions in the United States between the
18 dates of '95 and 2011.

19 So it doesn't have a lot to
20 say on price erosion because price erosion really
21 doesn't sort of matter in the same way that it
22 arguably used to.

23 And if you look on page 11, it
24 found that reasonable royalties are the
25 predominant measure of damages. Put that one

1 down, John, and go up -- oh, yeah, actually, yeah,
2 it's also in the big fat bolded summary right on
3 top, so you can just grab it from there.

4 "Reasonable royalties are
5 the predominant measure
6 of damages; price erosion
7 is rare."[as read]

8 And in the last paragraph on
9 that page, it kind of explains why:

10 "Damages awards for price
11 erosion claims have
12 become almost
13 non-existent."[as read]

14 It says:

15 "Over the last six years,
16 globalized competition,
17 turbulent economic
18 conditions and the cost
19 and complexity of price
20 erosion analyses have
21 reduced the recovery and
22 most likely the pursuit
23 of price erosion
24 claims."[as read]

25 Well, if they are rare in

1 the harm caused by the illegal act, the arrest and
2 near imprisonment from the legal act, the actual
3 investigation, the Tribunal said, well, we can't
4 award damages here.

5 The Tribunal didn't say it
6 didn't matter what the cause was of the harm. It
7 didn't say, well, you know, the price came down,
8 we can see the price came down. There's harm and
9 some of the reason of the harm is the arrest and,
10 you know, maybe there's a contributing cause or a
11 concurrent cause with the criminal investigation
12 but none of that matters because there's a breach
13 and there's harm and, therefore, we are going to
14 award the damages.

15 That's precisely what it did
16 not do. To the contrary. The Tribunal had no
17 choice but to award no damages which is exactly
18 the situation that you're sitting in today.

19 Now there's a common theme
20 that runs through those decisions that the
21 Claimant cites, that Canada cites, that, in fact,
22 it's really embedded in Article 31 of the rules of
23 state responsibility. In fact, the Claimant's
24 statement itself recognizes that -- the common
25 theme is that, as the Claimant itself states, is

1 that there has to be a breach established and
2 losses due to that breach. I mean, that's what
3 this all comes down to. What is the breach and
4 what are the losses attributable to that breach?
5 What's the wrong?

6 And before I address that, I
7 need to apologize. I need to apologize to
8 Mr. Feldman, but, and to the Tribunal, but most of
9 all, to Dr. Hausman, because it seems like I left
10 the impression that I thought of him as befuddled,
11 which I would like to say I absolutely do not. I
12 clearly left the wrong impression when I was
13 speaking. I am the first to acknowledge
14 Dr. Hausman as an award winning and world renowned
15 econometrician.

16 In fact, he is the only person
17 I have ever met who has a theorem named after him.
18 He is really an incredible person and "befuddled"
19 is not the word I would use.

20 In fact, this is precisely why
21 yesterday I called attention to the words that he
22 uses compared to the words that the Claimant uses.
23 You know, you have to pay close attention when
24 Dr. Hausman says things like inherent uncertainty
25 and nobody knows for sure and it's impossible to

1 predict the future. He is the expert. We get
2 that.

3 And then contrast the
4 Claimant's words. The contrast, the contrast is
5 evident. The Claimant says economic theory
6 dictates, and Dr. Hausman shows that Resolute
7 incurred loss. Well, Dr. Hausman wouldn't say "I
8 show". "I estimate". That's really the
9 difference.

10 You should also pay attention
11 to the fact that Dr. Hausman, a world leading
12 econometrician, didn't submit a regression
13 analysis in this case. He didn't do any
14 econometrics. He did in the jurisdictional phase,
15 but he didn't do that here.

16 And you should pay particular
17 attention to the fact that he wanted to rely on an
18 economic approach but the Claimant, the Claimant
19 didn't. They wanted to rely on this forecasting
20 approach instead.

21 I never said that Dr. Hausman
22 is confused. I said that the Claimant is
23 confused. They are confused about his reports,
24 and more importantly, they are confused about
25 forecasts. Forecasts don't show harm.

1

[REDACTED]

[REDACTED] Just look at Steger
10 l's report in paragraph 44. If you use [REDACTED]
[REDACTED] to quantify damages according to the
12 Claimant's model, it changes the quantum that they
13 have requested from 163 million to negative
14 \$109.3 million.

15

[REDACTED]

17 The Claimant has never ever
18 responded to that point.

19 Also, Professor Lévesque, you
20 asked a question this morning about Dr. Hausman's
21 decision to smooth out the 2016, 2018 data. And,
22 in our view, this is another problem of the
23 Claimant's making because its damages theory is
24 based on forecast. Mr. Steger also addresses
25 these anomalies. He spoke to them directly at the

1 hearing and you will see it in his presentation at
2 the hearing on pages 13 and 14.

3 But in your exchange today,
4 Mr. Feldman kept repeating that the 2018, 2019
5 price increases, they were due to mill closures.
6 You know, it was because mills closed that prices
7 went up again. And what we know is that the only
8 mill closure of relevance is the 2016 closure,
9 well before the 2018/2019 price hike.

10 But, more importantly, and,
11 again, it shows the difference in words used by
12 Dr. Hausman and words used by the Claimant.
13 Dr. Hausman didn't point to this mill closure
14 as the reason. He said the price hike was an
15 anomaly. It was an unexpected event. If it
16 related to a 2016 mill closure, it wouldn't have
17 been unexpected at all; would it?

18 The main point here is that
19 forecasts don't show harm and the RISI forecasts
20 certainly do not show harm.

21 Forgive me, Professor Lévesque
22 and Dean Cass, you have seen this before, but our
23 chairman hasn't so I would like to go into
24 confidential mode, so we just have to cut the
25 public feed, Heather, to share the RISI data.

1 --- Whereupon Confidential Transcript Commences

2 MS. D'AMOUR: Thanks,
3 confirming that the feed has been cut. The
4 restricted access people still remain in Zoom.

5 MR. NEUFELD: Thanks.

6 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

18 I mean, I won't go through
19 again how he does it. He takes those, he compares
20 it to the actuals, he reduces two different kinds
21 of costs, et cetera. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

I mean, it's obviously not -- if we all had crystal balls like this, we could predict prices, we would be playing the stock market and wouldn't have to work a day in our lives and we would all be billionaires. It's not unusual that they can't predict prices like this.

But it precisely why it shouldn't form the basis of a causation claim or a quantum claim. It can't be used to show proximate harm. And this is why you have to look at the actual evidence, not the theories, not the forecasts.

So what evidence?

Well, we know what evidence the Claimant does not want to include. It doesn't include any proof of lost contracts, lost shipments, predatory pricing. And, at the same time, it includes Resolute's -- it -- sorry, at the same time, it does include [REDACTED]

[REDACTED]

[REDACTED]

If you go to Slide 165 now, John, Dr. Hausman recognized that [REDACTED]

1 [REDACTED]
[REDACTED]
[REDACTED] And while
4 Resolute didn't provide us with their 2018 and
5 2019 financials, [REDACTED]
[REDACTED]

7 So if you flip to the next
8 slide. Here is a table that you'll find in Steger
9 1 which shows the net profits of the mills. And
10 the net profits before tax.

11 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] the number beside it, that was the
19 number that I put to Dr. Hausman on the stand and
20 he said, oh, that was a very good year for --
21 sorry, he didn't said "very". He said that's a
22 good year for Resolute.

23 [REDACTED]
[REDACTED]
[REDACTED]

1

3

So just what kind of harm did

4

Resolute suffer?

5

We can go back to the public

6

feed now, Heather.

7

--- Whereupon Confidential Transcript Ends

8

MS. D'AMOUR: Confirming we

9

are in public.

10

MR. NEUFELD: Thanks.

11

You can see that they didn't

12

suffer harm. And what you need to keep in mind

13

when looking at this evidence is that Drs. Kaplan

14

and Hausman could have used this hard financial

15

evidence. This is hard evidence to show causation

16

and quantified damages.

17

Indeed, Dr. Hausman did look

18

at financials during the jurisdictional phase when

19

he concluded that, you know, through a regression

20

study that Resolute did not yet know it had been

21

harmed. Right. He specifically looked at

22

financials in his regression study. And yet, he

23

chose to disregard that evidence now for the sake

24

of this merits case. Or maybe he didn't. Knowing

25

what we know of Dr. Hausman, maybe he actually

1 didn't choose to disregard it. It was the
2 Claimant that instructed him to do so.

3 Tribunal members, isn't it
4 obvious the Claimant didn't want to assess its
5 damages based on actual evidence? The Claimant
6 didn't want Dr. Hausman to assess damages based on
7 decreased shipments or on diminished profits
8 because there wasn't any.

9 So that concludes all I have
10 to say on damages, and unless you have questions
11 for me.

12 DEAN CASS: I do.

13 MR. NEUFELD: You do, good.

14 DEAN CASS: Let me ask, I have
15 a few questions.

16 First, let me start off with
17 the question about what would happen if there are
18 some things that are taken out and some things
19 left in? You said if even one thing is taken out,
20 then there is no claim left.

21 I would have thought it was
22 exactly the opposite. That if there was even
23 one -- let me use an example which may or may not
24 be apt -- but everything I know about the casino in
25 Monte Carlo is from the old Casino Royale movie,

1 but my understanding is if you were a gentlemen,
2 you needed to go in wearing a tuxedo. If you had
3 a tuxedo jacket, that wasn't enough. If you had a
4 tuxedo vest, that wasn't enough. A tuxedo pants
5 weren't enough. Surely you needed the entire
6 outfit.

7 Now, if you had everything
8 except for the black tie, you still needed someone
9 to give you the black tie to get in.

10 And I take it that
11 Respondent's argument about the ensemble is that
12 each piece was necessary to get the mill to reopen
13 and so, if even one piece is problematic is there
14 by virtue of the breach of a NAFTA obligation,
15 then I think the Claimant's argument is that all
16 that follows, all the damage that follows by
17 reopening the mill would be compensable under its
18 claim.

19 So before I ask anything else,
20 let me just ask. Is that not your understanding
21 of --

22 MR. NEUFELD: No --

23 DEAN CASS: -- the situation?

24 MR. NEUFELD: If that is
25 indeed what the Claimant's arguing, and I think

1 they haven't exactly been the clearest on this,
2 but let's assume that it's the Claimant's argument
3 that the package itself causes a breach, the
4 individual elements might not, and it's when you
5 assemble all these things, all these things
6 together.

7 You -- the problem you have,
8 Tribunal, is that you're in a situation of guilt
9 by association. I mean we, you know, it was
10 interesting as well that Professor Hanotiau asked
11 the question about concurrent cause. Because the,
12 you know, the theory applies in the same way. If
13 multiple causes result in a harm and those are all
14 wrongs, you can package this together. I get it.

15 But how do you package
16 together something that is legal with something
17 that illegal to say that it harmed you?

18 There isn't a causation theory
19 out there that says you can be compensated, you
20 can get reparation for a legal act. And I
21 understand that if the illegal act is a whole big
22 package of things, which all acting together is
23 illegal, is a different measure, it's a measure
24 that stands on its own, well, then, sure, what I
25 have to say is not applicable in the same way.

1 But I mean I have to, I just
2 have to refer to all of the things that my
3 colleague Mr. Luz had to say. How on earth do you
4 look at that package and say, and assume that it
5 was all rolled out in a concerted way as a big, a
6 big matzo ball that is meant, you know, that is
7 meant to -- and causes the harm.

8 That's a merits question
9 rather than a damages question.

10 DEAN CASS: Let me -- I hear
11 your answer. I am not sure about the relation of
12 the matzo ball to the tuxedo but let me ask a
13 couple of other just quick questions.

14 One is, I thought I heard you
15 say that imports increased demand and that an
16 increase in imports would increase demand for
17 supercalendered paper.

18 Did I mishear you?

19 MR. NEUFELD: Say that again?

20 DEAN CASS: I thought I heard
21 you say that a rise in imports would increase
22 demand.

23 MR. NEUFELD: Yeah, no, if I
24 said that, then I am mistaken. I am sorry.

25 So, first of all, I am a

1 lawyer, not an economist, and when I use the word
2 "demand", I am using the word "demand" as it
3 appears in the RISI reports and it is showing
4 volumes, it's showing what's being sold.

5 There is a little -- there's a
6 dispute -- there's a fun little retort between
7 Dr. Kaplan and Mr. Suhonen on this that you see.
8 And the word "demand", when I am using it, I am
9 not using it in an economic you are pushing the
10 scale or its changing the demand curve. That's
11 not what I am intending at all.

12 That's the first part of my
13 answer.

14 The second part is I wouldn't
15 have said rise in imports creates a -- what I am
16 saying is that, alternatively, if coated
17 mechanical continued to occupy the space that it
18 did and SC paper wasn't, wasn't suddenly taking,
19 substituting and taking that from coated
20 mechanical, two things would have happened: One
21 is that either coated mechanical would have
22 continued to sell the paper that it was and SC
23 paper wouldn't have been selling anything, or SC
24 paper imports would have substituted for coated
25 mechanical. SC paper imports, so that's when I

1 probably used the word "would have taken that
2 demand" and I mean that in a colloquial sense of
3 the word "demand", not in an economic sense.

4 DEAN CASS: I wasn't trying to
5 go to the difference between a shift in demand
6 curve and quantities demanded.

7 Okay, I will leave it at that.
8 Thank you.

9 MR. NEUFELD: Okay, thank you.

10 Could I add one more remark
11 just in answer to your first question.

12 This is the sort of
13 aggregate -- we, you know, it was a subject
14 addressed during our opening statements and in the
15 first hearing as well. I said that the Claimant
16 is welcome to point to this aggregate of measures.
17 It can also say that there is an aggregate of
18 measures that caused the re-entry, so let's not
19 think about it from the breach perspective but
20 from the causation perspective here.

21 That aggregate causes re-entry
22 of Port Hawkesbury in the view of the Claimant.
23 But at what point does taking one of those
24 measures out not cause the re-entry of -- I mean,
25 that's a question they don't answer, they don't

1 address, right.

2 So I say the whole thing falls
3 down when you pull one of the measures out. You
4 are not wearing a bow tie because, you know, was
5 it the bow tie that didn't get you through? Well,
6 I think it was. Was it the, you know, the
7 \$40 million loan or the \$24 million or was it the
8 \$1.5 million grant? Which element was enough to
9 get you to...

10 You know, and it's funny.
11 This case started with, well, it was everything.
12 It was hot idle, it was all of these measures all
13 packaged together. And then suddenly hot idle
14 falls: Well, no, it wasn't hot idle. It was just
15 the two loans and, you know.

16 I think the Claimant's answer
17 to that -- I don't want to speak for them, of
18 course -- but it's that every time a measure gets
19 knocked out: Well, that's still enough for Port
20 Hawkesbury; well, that's still enough for Port
21 Hawkesbury to come back on stream. And, you know,
22 it's a little bit too, it's a little bit too
23 cheeky. Like, at some point, if your job, from a
24 damages perspective, is to tie your loss back to
25 the breach, then it's not good enough to say some

1 jumbled mess of measures caused this without
2 knowing what it did.

3 And I don't want to land
4 myself into hot water. You know, Rompetrol,
5 again, is great on this. They say it would be
6 ridiculous to say you have to take one measure and
7 then find the harm to that and then another
8 measure, find the harm to that and tabulate this
9 all together and that's your harm. That's totally
10 unrealistic. We get that. That's not what I am
11 proposing at all.

12 But the position of the
13 Claimant is all of this package was necessary for
14 Port Hawkesbury to come back on stream. If the
15 \$40 million is not part of that package, is it
16 still enough? We don't know.

17 Is that clear? I hope that
18 answers your first question.

19 DEAN CASS: I think you were
20 muted, Mr. Chairman.

21 MR. NEUFELD: I am so happy
22 you didn't say I was muted because I felt I
23 delivered that really well.

24 PRESIDENT HANOTIAU: Nothing
25 else? No.

1 MR. NEUFELD: Nothing for me.

2 PRESIDENT HANOTIAU: No, okay,
3 thank you.

4 MR. NEUFELD: Thank you very
5 much.

6 PRESIDENT HANOTIAU: So we are
7 coming at the end of this hearing. We are going
8 to receive the transcript of the second day
9 tomorrow. I suppose the parties are going to
10 discuss any corrections that has to be made to the
11 transcript, and I don't think it's necessary today
12 to determine the date to send us the corrections
13 to the transcripts. You can discuss between
14 yourselves and tell us when it's convenient for
15 you to send us these corrections.

16 We will need also to receive
17 your statement of cost and fees. And also, you
18 should agree on the format and also the date at
19 which you want to send us these statement of fees
20 and costs. I don't know if you already discussed
21 that or if you want to discuss this coming few
22 days and revert to the Tribunal.

23 I give you the floor, to both
24 of you, Mr. Feldman or Mr. Valasek first.

25 MR. FELDMAN: We have resolved

1 these matters very congenially with counsel. We
2 will be happy to try to do it again. So no hard
3 feelings from today or yesterday. We will sort
4 out all the communications that are necessary to
5 the Tribunal.

6 PRESIDENT HANOTIAU: Okay.

7 Are there any other issues to raise?

8 Yes, Mr. Valasek.

9 MR. VALASEK: I am completely
10 in your hands, Mr. Chairman and members of the
11 Tribunal. There was a question on which I
12 reserved which was the question relating to MESA
13 Power and the interpretation of the object and
14 purpose of the treaty. I have heard Claimant's
15 argument. I would have a two-minute response to
16 it but I understand that it's late and so I am in
17 your hands.

18 PRESIDENT HANOTIAU: I give
19 you two minutes.

20 SUBMISSIONS BY MR. VALASEK (Cont'd):

21 MR. VALASEK: Okay.

22 So if I understood Canada's
23 argument correctly, it is that because Article
24 1108(7) is a carveout on subsidies that applies to
25 Article 1102, the latter provision cannot be

1 interpreted in light of the overall objects and
2 purposes of NAFTA set out in Article 102 because
3 Article 1108(7) essentially represents a clear
4 override to those objectives. Essentially what he
5 says is the NAFTA parties have clearly indicated
6 that they want to allow each other to give
7 national preferences and so forth.

8 This cannot be right. This
9 would mean that once the carveout has done its
10 work and excluded any measures to which
11 Article 1102 cannot properly apply, but leaves
12 some measures to which it does properly apply, the
13 carveout and whatever policy lies behind it would
14 continue to have an effect in relation to the
15 measures that it did not carve out.

16 The carveout in 1108 and the
17 principal provision in 1102 are separate
18 provisions and do separate work. Each must be
19 interpreted on its own and once 1108 has done
20 whatever work it can do, 1102 must be interpreted
21 and our argument is that that provision must be
22 interpreted in light of Article 102, which is the
23 overall purpose and objectives of the treaty. And
24 that's particularly true since Article 102, I have
25 it up on my screen, reads:

1 "The objectives of this
2 agreement as elaborated
3 more specifically through
4 its principles and rules,
5 including national
6 treatment, most favoured
7 nation treatment and
8 transparency are
9 to --"[as read]

10 And then it lists the
11 objectives and the one, of course, that comes up
12 in the Pope & Talbot test is (b), to promote
13 conditions of fair competition in the free trade
14 area.

15 Mr. Luz is using whatever
16 policy might lie behind 1108 to avoid the second
17 leg of the Pope & Talbot test in an appropriate
18 way.

19 And the last point I would
20 make on this issue is that the provision that we
21 heard about today for the first time, which is
22 the -- I am just going to pull it up here, because
23 I didn't have it up on screen, but Article 1907(2)
24 to support their position, that refers to the
25 parties agreeing to consult on the potential to

1 develop more effective rules and disciplines
2 concerning the use of government subsidies, not
3 any rules and disciplines. That must mean or
4 suggests that NAFTA Chapter 11 can include some
5 discipline on measures that are related to that
6 subject.

7 I have many other points to
8 make to rebut some of --

9 PRESIDENT HANOTIAU: I am
10 sure, I am sure.

11 MR. VALASEK: But I would like
12 to release you from that.

13 PRESIDENT HANOTIAU: Okay.
14 Respondents?

15 MR. NEUFELD: We probably also
16 have many, many points to make but I don't need to
17 make them. You have heard it. You have heard it
18 all. You have heard us say it, our submissions.

19 PRESIDENT HANOTIAU: I think
20 we have enough arguments on the table.

21 MR. NEUFELD: I am sure you
22 do.

23 PRESIDENT HANOTIAU: And I
24 said we have fixed deliberations on 18 and 19
25 November in Montreal.

1 MR. NEUFELD: Okay, we should
2 thank you, though, for all the work that you have
3 done and for stepping in as you have,
4 Mr. Chairman. We are very grateful to have the
5 opportunity and found that the proceeding went
6 very smoothly, so thank you.

7 PRESIDENT HANOTIAU: Yes,
8 well, I'd like to thank you. You know, it's a
9 pleasure to have so brilliant lawyers on both
10 sides. Makes our work even more difficult, I
11 think.

12 But it's a great pleasure for
13 me to share this arbitration with my colleagues
14 who are wonderful people.

15 MR. FELDMAN: Mr. President,
16 if I may just, not to be left behind, and to
17 express regret that we have interrupted your
18 dinner two nights in a row and we thank all three
19 of you very, very much.

20 PRESIDENT HANOTIAU: With
21 great pleasure.

22 Okay, I think we can end this
23 hearing now. Thank, of course, to Arbitration
24 Place and the court reporters because I think they
25 are, I don't know if there is one or two but they