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

Mark Luz on behalf of the Respondent
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

Arbitration Place © 2022
940-100 Queen Street 900-333 Bay Street
Ottawa, Ontario K1P 1J9 Toronto, Ontario M5H 2R2
(613) 564-2727 (416) 861-8720
INDEX

| SUBMISSIONS BY MR. FELDMAN               | 303 |
| SUBMISSIONS BY MR. VALASEK              | 335 |
| SUBMISSIONS BY MR. SNARR                | 404 |
| SUBMISSIONS BY MR. LUZ                  | 418 |
| SUBMISSIONS BY MR. NEUFELD              | 497 |
| SUBMISSIONS BY MR. VALASEK (Cont'd)     | 532 |
--- Upon resuming on Tuesday, October 19, 2021 at 9:00 a.m. EDT

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

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

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

PRESIDENT HANOTIAU:

Respondent?

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

PRESIDENT HANOTIAU: Okay.

Nothing else, so we can start with the rebuttals.

Mr. Feldman, Mr. Valasek.

MR. FELDMAN: It looks like I am going first, Mr. President, and I believe
Mr. Valasek will follow me and Mr. Snarr will follow Mr. Valasek, but if we get confused you will, I am sure, forgive us.

PRESIDENT HANOTIAU: No problem.

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

--- Whereupon Restricted Transcript Commences

SUBMISSIONS BY MR. FELDMAN:

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

Counsel yesterday complained that Resolute...

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

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

MR. FELDMAN: No, we should be
in restricted access. That's what I thought that
--

MS. D'AMOUR: Okay, sorry.

One second.

MR. LUZ: Thank you so much.

I am sorry to interrupt, Elliot. Thank you.

MR. FELDMAN: I thought I was just staying put.

MS. D'AMOUR: Okay, confirming

we are in restricted.

MR. FELDMAN: Okay.

Counsel yesterday complained

that
First slide, Ricky, please.
In 2019, for economists akin to declaring the world flat. by making the 360,000 metric tonnes still being sold in North America disappear. It could be seen as driving prices down for a couple of quarters, but thereafter, the continuing price depression was to be ascribed to other sources or the excess supply was absorbed or demand extraordinarily increased. Without ever suggesting that the secular decline of the industry must be over, if it weren't over, prices wouldn't be declining which, of course, they were,
But we heard no mention from Canada yesterday of Laurentide. I don't think I heard the word once. Laurentide did close.

The 2019 report then became significant in only one way.
Ricky, did you have another slide on this subject or are we good to continue?
Okay.
So as you can see, just to conclude

We have been asked what would become of our claim if the Tribunal were to decide that everything monetary between PWCC and the Government of Nova Scotia were to be judged permissible, not breaching measures, through the
Article 1108(7) exception.

I am going to deal only partially with this question.

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

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

Nova Scotia apparently told him not to worry about the RES standard and that it would not arise. That's what we were told yesterday. But Stern said, not good enough. I need written assurance that it will never arise
and the government made the commitment just for
him. Hence, there were government measures that
could not be construed under any definitions as
subsidies or procurement and there would not have
been a deal, Port Hawkesbury would not have
reopened without them.

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

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

Dean Cass inquired about
pension liability. NewPage Port Hawkesbury left
behind substantial pension liabilities. PWCC said it would not absorb or honour them. The law didn't require PWCC to honour them, but a new and good citizen letting go half its workforce when shutting down the newsprint machine might have done so.

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

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

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

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

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

The requirement to establish a
causal link between government measures and
damages is to establish a proximate cause. In
this case, damages from the government measures
were foreseeable and foreseen.
In 2018, Professor Hausman got almost identical results while using actual price and cost data because the time had already passed for the line corresponding to the market with the excess supply. Of course, to measure without the supply, he had to estimate.
Damages cannot be measured from before entry into the market and shortly after. They continue for as long as there is excess supply.
But now when it comes time to say that there weren't any damages from this entry into the market, now we are told that company, Port Hawkesbury, operates in a market that treats customers in a North America market and a global market because Europe counts too. It's part of the world, and part of the North American import market. But the market here is the North American market because the imports from Europe stay steady in their market share and they are a market feature. They don't change the market.

But it's not possible to add significant volumes of the commodity to a market in secular decline without triggering prices to fall.

Canada yesterday attempted to retreat from Nova Scotia's statements in 2012 that it intended to make Port Hawkesbury the low-cost producer of supercalendered paper.

I think it's the next slide.

But at the time of the transaction -- not quite but I will get to it.

But at the time of the
transaction, Nova Scotia made clear in public statements that it intended Port Hawkesbury to be the low-cost producer.

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

The CME Tribunal said:

"A state may be held responsible for injury to an alien investor where it is not the sole cause
of the injury; the state is not absolved because of the participation of other tortfeasors in the infliction of the injury. The injury was effectively caused by a combination of factors, only one of which was to be ascribed to the responsible state. International practice and the decisions of international tribunals do not support the reduction or attenuation of reparation of concurrent causes except in cases of contributory fault."[as read]

Can we see the next slide, please.

Similarly, in the Gavazzi Tribunal:

"Other possible
concurrent events that are not attributable to the state are irrelevant. Such events do not diminish the state's responsibility, nor do they reduce the amount of compensation for damages due."[as read]

Thank you.

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

Can I have the Cargill slide, please.

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

"The appropriate approach to assessing damages in
this proceeding is to
determine the present
value of net lost cash
flows.
The Tribunal does not
find these projections to
be so unusual or
difficult that employment
of the method is
inappropriate in this
proceeding. This
calculation, as accepted
and utilized by the
Tribunal in its own
analysis, calculates net
lost cash flows as equal
to the but-for quantity
of HFCS that Claimant
would have sold where
quantity is determined as
the product of the entire
market for HFCS,
multiplied by the
percentage of Claimant's
projected share of that
market, multiplied by the
price of HFCS, determined
over the period of loss
and brought to the
present value using the
appropriate interest
rate." [as read]

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

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

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

MR. FELDMAN: Please.

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

So the Tribunal was able to
compare what they sold before and after the
measure that was discriminatory on the basis of
nationality. They could see how much they didn't
sell.

Isn't that different than

doing a price erosion model?

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

PROFESSOR LÉVESQUE: Thank
you.

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

Can we see that slide, please.

There must always be estimates
because the world that doesn't always exist, the
world without supply in the market must be
estimated. But it is certain, there will be damages as long as the market is saturated with excess supply.

The reason is simple, with less supply to meet demand, prices would be higher.

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

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

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

For the period when actual costs and prices were known for the market with the excess supply, the results between the
forecasted data and the economic approach, as he called it, were very close. You can see on this slide the difference of between 81 and 97. But, nonetheless, they do represent a range because we're estimating.

When he had to project both results, looking forward while the excess supply continued to cause damage, the difference between the projected price with and without the excess supply got wider as there was much more uncertainty.

The commodity was and is in secular decline. No one has disagreed with that. No one has questioned that.

U.S. International Trade Commission found that paper mills must run 24/7 so that they cannot reduce gradually their output when demand slackens. This can be found in the ITC report which is C-054.80 at Footnote 12, because we were asked yesterday about some evidence for the 24/7 requirement for running a mill.

Supply is removed from the market in chunks when mills close, as we illustrated yesterday.
Could we see that slide of the stepladder, please. Ricky, the next slide. No, okay. Well we saw this slide yesterday, there it is.

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

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

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

So he proposed a three-year average for the baseline looking forward from the
most recent data of actual losses.

There's nothing unusual about Professor Hausman's analysis. Mr. Neufeld yesterday caricatured Professor Hausman confused and befuddled. He is a world renowned and much decorated econometrician executing an analysis here that may escape Mr. Neufeld's complete understanding. There are places in here which surely escape mine. But for him and for economists, it's routine, simple and not unusual.

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

Certainly governments would be much comforted if they could cause lasting damage
that could not be compensated because this
Tribunal decided that long-lasting damages carried
into the future can not be compensated.

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

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

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

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

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

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

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

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

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

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

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

So the adjustment is to recognize that over the long term, you're still in secular decline. No one denies that. But if you project it out from just that point, from 2017 to 2028, that's what Professor Hausman did originally.
before the shock happened to occur in that year.
And then he looks at that says, well, wait a
minute, I can't project out from 2017. That's not
going to make any sense because I have removed a
chunk from the market.

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

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

PROFESSOR LÉVESQUE: A quick
follow-up and then I promise to let you go on.

In terms of impact on the

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

So what can we conclude from

that; right --

MR. FELDMAN: Well, we had

said -- I am sorry. Go ahead and finished.

PROFESSOR LÉVESQUE: So I was

just going to say you just made the point it's

about not making as much profit as one company

expected, but there's not one mill standing.

There's still currently those same players still

operating and still making money, so isn't that

relevant or?

MR. FELDMAN: It would be

relevant if it were correct but it's not correct.

There is no production anymore in the United

States. It's gone. Verso closed --
PROFESSOR LÉVESQUE: One closed because of a fire but I am talking about these Canadian --

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

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

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

So the American production is gone. The only producers now left are in Canada. And they are continuing to compete in such a fashion that as the demand will continue to decline, because everybody agrees we are in secular decline, for all the reasons stated, because of digital formats and so forth, as that happens, others will be forced to close. Kénogami probably the next one up, for all of the improvements and corrections, but we don't know for sure.

What we know for sure is that at some point, there will not be enough demand for the supply now in the market.

Now, when Professor Hausman did this analysis, he took what we keep saying as a conservative approach. That means that the only damages we have claimed are price erosion damages. We have not claimed lost sales, we have not claimed lost customers, we have not claimed other things that, as you're suggesting, could be losses. But we have restricted the damages claimed to the price erosion.

There is price erosion,
There's price erosion, there will continue to be price erosion as long as there's excess supply in the market. And there will be excess supply in the market continuously because the demand is declining. How fast it is, what the slope is is uncertain. We are now -- that's why we couldn't extrapolate from a point and that was probably an error because the overall slope is correct but its pace and how quickly we will get to the end, the idea is to be the last one standing, you're quite right. There are others still competing, but unless they are able to get their costs down below Port Hawkesbury's, they won't survive Port Hawkesbury. Port Hawkesbury will survive them.

That's the bet that the province made. That it had the security of Port Hawkesbury's perception and commitment that it would be the low-cost producer. And as the low-cost producer, it should be the last one to survive when the demand dwindles and goes away. And this industry will go away, but for the time 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: 
6
7 But the
8 province amended the plan for Port Hawkesbury as a
9 result of the denial of the tax ruling with Port
10 Hawkesbury receiving essentially the same economic
11 deal as it originally sought with the [ ] power
12 rate. It's just that the savings took place
13 somewhere else.
14
15 and indeed, as I suggested, [ ]
4 million to buy off Verso and buy off the American case that was restricting and inhibiting its market in the United States.

That can be found in the transcript at pages 489 and 490 of the November 2020 hearing, a transcript and Exhibit C-238.5.

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

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

SUBMISSIONS BY MR. VALASEK:

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

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

MS. D'AMOUR: Mr. Valasek, I don't want to interrupt you. Should we still remain in restricted access?
MR. VALASEK: No, we will be

going into restricted access I think at least at

one moment but I will indicate that to you.

MS. D'AMOUR: Okay, so are we

able to start the public stream currently, then?

MR. VALASEK: Yes.

MS. D'AMOUR: Okay, thank you.

--- Whereupon Restricted Transcript Ends

MR. VALASEK: Good afternoon,

Professor Hanotiau and good morning, Dean Cass,

Professor Lévesque.

My presentation is organized

by reference to a number of points that I wish to

rebut in particular in relation to Article 1102

and some on Article 1108. And in the course of my

rebuttal, to some of the points that Canada made

on these issues, I will also address as best I can

the questions that were put to Claimant on some of

those issues.

Yesterday, Mr. Luz argued that

the Tribunal, in its jurisdictional decision, had

already decided against Claimant, essentially.

You'll recall that Mr. Luz said that the

Article 1102 claim is not just moot but it's dead

on arrival, essentially suggesting that it had
already been killed off by the earlier statements of this Tribunal.

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

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

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

It is, therefore, Canada's continuing argument at this stage that that fact alone is decisive in respect of Article 1102 that is undermined by the jurisdictional decision. And the Tribunal will be aware that in its summary memorial, Canada has doubled down on this position that in the like circumstances analysis, the fact
that Resolute's mills are not in Nova Scotia is
decisive. And I will get to our jurisdictional
analysis in due course.

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

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

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

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

So the Tribunal wrote as a
conclusion on the question of whether the measures
that Nova Scotia adopted here related to quote/unquote Resolute's investments in Canada, the Tribunal concluded that:

"The Tribunal agrees with the NAFTA parties that Article 1102(3) should not be read so as to impose vis-à-vis foreign investments, a requirement of uniformity of treatment by the different component units of the three federal states which are the parties to NAFTA."[as read]

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

"It agrees with the Tribunal in Merrill & Ring that Article 1102(3) only applies to the same regulatory measures under the same jurisdictional authority."[as read]
And I will explain to the Tribunal again during my presentation this morning why it is that we are not violating that principle in this case considering all the relevant circumstances for the like circumstances analysis:

"But it does not follow --" [as read]

The Tribunal wrote:

"That Canada's argument limiting the effective scope of the national treatment obligation to investments located within the particular province should be accepted." [as read]

And that is really what Canada is arguing again here when it says that the fact that we were not in the province, that Resolute's mill was not in the province is decisive is essentially itself violating this direction from the Tribunal.

And then the Tribunal went on:

"Examples can be imagined of protective measures
taken for the benefit of local investors while effectively keeping NAFTA investors or their investments out. Whether this would involve a breach of Article 1102 would depend on the circumstances, including the application of the like circumstances requirement."[as read]

So that's an example that the Tribunal gave:

"But there seems no doubt that there could be a breach of the national treatment obligation in such case. The same would be true in a Methanex-type scenario if the out of province investor had been the specific target of a provincial campaign to
cause it loss. The situation is not limited necessarily to a scenario where there has been a single specific target."[as read]

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

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

The Tribunal concludes this paragraph by saying:

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

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

Ricky, you can take that down. I would also say that I am not sure that Canada wants to be drawing too much further attention to the jurisdictional decision for another reason.

Mr. Luz claimed yesterday that there couldn't be a more straightforward application of 1108(7) than the case here and it renders the question of national treatment moot and irrelevant. One really wonders why if that is allegedly the case, Canada didn't advance a preliminary argument against the Article 1102 claim, along with its other jurisdictional inadmissibility objections. The fact is it is not straightforward in the least and Mr. Luz's
assertion that the Article 1102 claim is moot is simply wishful thinking.

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

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

And I concede that it's a technical analysis. In some cases, it's not intuitive, and I would suggest to the Tribunal that if you look at the cases under Article 1102 and generally cases concerning non-discrimination, it is not an easy analysis. It's not just -- and
this is true, of course, of discrimination claims generally. The like circumstances analysis is complicated.

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

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

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

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

I am really grateful for the question. It allows me to focus on this important point and to demonstrate that Resolute's mill at
Bowater Mersey and the treatment it received from
the government is not an appropriate comparator.

And, again, this is a technical analysis. But let
me take you through it briefly.

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

So the first point to note is
that this is an issue that was raised by the
Tribunal in advance of the 2020 hearing as well.

It was the Tribunal's Question 18:

"The Respondent has
brought forward evidence
of the treatment provided
to Bowater Mersey (owned
by Resolute) by the
Government of Nova
Scotia, in particular, in
terms of financial
assistance and other
benefits. Should the
Tribunal consider that
Bowater Mersey and not
Resolute's mills in
Québec were in like
circumstances to Port Hawkesbury Paper, that all like circumstances describes the relationship to all of Resolute's mills."[as read]

So next slide, please.

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

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

And the first factor is essentially decisive but we will go through them all. Now the first series of factors are the
market and the product. Are the foreign investor
and the domestic investor operating in the same
market? And how similar are the products or
services being offered by the foreign investor and
the domestic investor? And, again, we are
complaining about the Port Hawkesbury measures.
So Bowater Mersey is not in
the same market as Port Hawkesbury and did not
sell the same product.

Next slide, please.

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

I asked him:

"As the chair of the
committee, you were
tasked with the
overseeing, the gather
and analysis --

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

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

MS. D'AMOUR: Okay.
--- Whereupon Restricted Transcript Commences

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

MR. VALASEK: So the question was:

"And as the chair of the committee, you were tasked with overseeing the gathering and analysis of information as to the state of the newsprint and SC paper industries." [as read]

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

"ANSWER: That's correct.

"QUESTION: [redacted]"
Next slide, please.

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

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

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

So next slide, please.

Perhaps, you know, very important factor as well is the combination of policy, jurisdictional analysis, and implementation. And it's critical that when one considers whether it's important that a mill, for
example, would be in the same province or not or whether measures should be or treatment should be in like circumstances, one really has to look at the policy, the relevant jurisdiction in which -- or as to which the policy was implemented and how it was implemented. And, again, this comes from the case that have looked at discrimination claims.

And we say when you look at those together, none of the measures adopted for Port Hawkesbury were of general application in Nova Scotia. None would have applied to Bowater Mersey. They were targeted at protecting Port Hawkesbury, and as such, they simply are not -- the treatment is not in like circumstances to Bowater Mersey.

Next slide.

And the Tribunal will remember this slide where we have shown or we're illustrating that if you consider this list of measures, each of them was put in place specifically to address the demands of the winning acquirer of Port Hawkesbury, and were focussed on putting that mill into what we say be a leading competitive position, be the lowest-cost producer,
and none would have applied across Nova Scotia, none apply generally. And in that sense, again, the conclusion has to be that Bowater Mersey is not in like circumstances to Port Hawkesbury. Even if it were appropriate -- next slide, please. Sorry, Ricky, are we on Slide 68?

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

And so, again, this is not treatment in like circumstances. Okay, you can take the slides down.

Members of the Tribunal, even if it were appropriate to compare Resolute's
experience at Bowater with PWCC's experience at
Port Hawkesbury, the package that the government
offered to Resolute was very different from what
it offered to Port Hawkesbury Paper. So, here, I
am not conceding that this is the right
comparator, but even if it somehow were, if you
intuitively felt, well, we need to compare it,
there are important differences.

As noted in paragraph 19 of
the Garneau witness statement, there were
qualitative differences in what was offered to
Port Hawkesbury versus Bowater Mersey. The
Government of Nova Scotia did not offer assistance
negotiating electricity rates with Nova Scotia
Power or assistance with obtaining the Utility and
Review Board approval of such rates. The
Government of Nova Scotia did not make a statement
in support of an electricity rate, hire a
consultant, present an expert witness, introduce
evidence, answer information requests, make
representations regarding government action or
enact legislation to ensure passage of a load
retention rate.

And the assistance the
Government of Nova Scotia offered to Resolute, as
I have mentioned, was intended simply to ensure the orderly closure of Bowater Mersey, not to make it the lowest-cost producer of newsprint for an extended life.

And I do wish to highlight that Mr. Luz yesterday suggested that somehow, we were abandoning our insistence that it was relevant that Mr. Todd Williams had been hired by the government as a consultant, I think in relation to the attribution claim. But this is where, you know, it is important. That was a very significant step, an extraordinary step that the government took with respect to Port Hawkesbury.

And then there was an important quantitative difference.

The amount offered to Bowater Mersey was intended to ensure that orderly closure. And we know that it ultimately wasn't even enough to do that and we know that Resolute ultimately gave back the money that was offered to it for that purpose and exited the province.

So that takes me to another red herring, if you will, that exists in this file, which relates to the fact that Resolute was invited to bid on, or was allowed to consider the
process for the bidding on Port Hawkesbury.

And, Professor Hanotiau, you also asked whether it's appropriate for Resolute to invoke Article 1102 when Resolute was not prevented, itself, from bidding on the Port Hawkesbury mill.

Mr. Luz also alluded to this point, asserting that the government encouraged Resolute to participate in the bidding process and that this was not a situation where the government was trying to prevent the Claimant from investing and doing business in the province. And of course here, again, he is alluding to what he suggests is one of only two possibilities that exist under 1102 for a claim. But as I showed you before, that wasn't what the Tribunal, I think, was suggesting.

But Resolute's complaint here isn't about being excluded from bidding or excluded from the province. It is specifically about the anti-competitive measures the province adopted in response to the demands that were made by the only bidder that emerged from that process. And had Resolute made those demands and succeeded, it would have only succeeded in undercutting its
own business elsewhere through price erosion.

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

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

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

Mr. Luz stated yesterday that
and we are in restricted access here; right, Heather?

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

MR. VALASEK: Okay.
overseeing the CCAA proceeding, essentially the
restructuring proceeding, contacted 110 potential
parties, including Resolute. 110. Eight parties
submitted offers, and four were invited to
continue bidding. Only two, including PWCC's bid,
of the four final bids were to keep the mill open.
The other two were to scrap the mill.

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

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

So it turns out that the
opportunity that Mr. Luz and Canada refers to here
as sort of being an open invitation to bid on Port
Hawkesbury at that time wasn't much of an enticing
offer. I mean, 110 potential parties, out of 110
parties, only two, including PWCC that, as we have
seen in the record, came in with a very aggressive
agenda, about which we complain because it
essentially, we say, co-opted the government into
providing measures that were anticompetitive, only
two ultimately came to the table and one of them
was simply not a reputable party.
I will turn now to what I call the false narrative red herring.

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

So correct me if I say anything you disagree with.

MR. VALASEK: All right.

MR. VALASEK: Correct.

PROFESSOR LÉVESQUE: --
MR. VALASEK: Correct.

PROFESSOR LÉVESQUE: So you agree with that?

MR. VALASEK: I agree with it and I would say that it was a reasonable assessment.

PROFESSOR LÉVESQUE: Okay.

MR. VALASEK: It was reading, and Mr. Garneau testified to this effect, that he had experience with the government, and even after certain assistance was provided to Resolute, in that context, in the context of Bowater Mersey, in
the end, it wasn't sufficient and he --

PROFESSOR LÉVESQUE: Just to -- sorry, I didn't mean to interrupt. Just to finish this point.

So it's -- I want to make sure I understand your position.

MR. VALASEK: I guess what I'm -- I am responding to the argument that Canada makes which is that because the opportunity was not foreclosed, because Resolute, like other potential bidders, was invited to consider Port Hawkesbury, its claim under 1102 is foreclosed, that's the argument.

And I don't understand that argument because everyone who looked -- almost the entire slate of bidders that looked at that opportunity said this isn't worth considering.
And obviously if you're in this market, you understand that you could get some government support,

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

But I think the evidence from the bidders shows that most of the bidders, in thinking about what the government would likely do in a reasonable scenario, would simply not be sufficient. And so they walked away. PWCC went in and said we insist on getting this. We want to be the lowest-cost producer and pushed the government to provide assistance of such a degree.

As my colleague said yesterday, it wasn't the type of measures, it was their character.

It was such an extraordinary set of relief that of course, in hindsight, it's
like why didn't anyone else do that? Well,
because it's improper. And I don't think any of
the other bidders felt that any government would
go to that extent to violate NAFTA and provide
support that ultimately is anticompetitive in that
industry.

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

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

I think PWCC recognized that
after the closure of Bowater Mersey, the political
pressure on Nova Scotia was extreme and that they
had them in a corner. And it would be very
difficult politically for Nova Scotia to back away
from the demands that PWCC was making.

And that is not a normal
approach to government support and the government
grew too far. And we say that this evidence
supports that narrative. So it's, you know, it is
consistent with what we are saying and it doesn't
prevent us from bringing our 1102 claim. To the
contrary.

PROFESSOR LÉVESQUE: Thank you.

MR. VALASEK: So, again, this
is just, I think it's consistent with what we just
discussed, this sort of false narrative red
herring, Mr. Luz referred to us as sort of
presenting a false narrative, that our claim is
built entirely on that.

And Mr. Luz referred to
government officials carefully studying and
balancing the options and weighing the
consequences of doing nothing versus some
appropriate level of government support for
private business in the public interest and
reasonable under the circumstances.

That's at transcript 162 from
yesterday.

And what I am suggesting what
the record shows is that the one bidder that
showed any interest in maintaining the mill as a
going concern commandeered that process and set
the terms of what the government was going to have
to provide by way of support in order for the
government to be able to avoid yet another mill
closure.

That's the narrative, and
that's not false.

What you have heard from -- I
understand why they testified that way and they
may well believe it, that they were doing what was
in the public interest, but the record shows that
there was a private interest here that recognized
that there was a public interest that they could
push to the point of securing an extraordinary
deal for themselves.

Now let me turn to that -- I
will now turn to the -- I am just conscious of
time.

Professor Hanotiau, you said
that we weren't going to be limited to one hour.
I know that we are beyond it. I mean, I have, I
am about halfway through my remarks.

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

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

PRESIDENT HANOTIAU: Okay, go ahead.

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

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

Canada is simply -- I mean we saw a roller coaster on a slide yesterday. I believe this is just as much -- this is the roller coaster in this case, that Canada's position on nationality-based discrimination in Article 1102.
Canada neither accepts the framework set out in our submissions based on the UPS three-part test followed by the justification test, but it doesn't really present its own framework. It is very hard for me to pin that down and I think that is strategic.

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

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

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

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

--- Whereupon Restricted Transcript Ends

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

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

And, yesterday, I explained here that Canada had finally come around to Resolute's position on the proper framework in its summary memorial.
And, Ricky, could I ask you, I
don't know if you have this handy. If not, I will
just read from it.

But the summary -- I am sure
that all the members of the Tribunal have the
summary memorial that Canada submitted in this
case. And I had been encouraged that maybe we
would finally be in a common framework so that the
Tribunal could sort of move forward with that
framework.

And at paragraph 47, Canada
said:

"Well, the Claimant has
failed to establish the
elements of the national
treatment test." [as read]

So that's something that I can
relate to. There is the three-part UPS test.

Footnote 153 is a proper
reference to that UPS test:

"Failure to establish one
of the three elements
will be fatal to its
case. This is the legal
burden that rests
squarely with the Claimant. That burden never shifts to the party here, Canada."[as read] And so forth.

So that's a three-part test, that's fine.

And then in paragraph 49 of the memorial, summary memorial, it seemed that Canada was then referring to its burden to demonstrate that the measures that were presumptively violating Article 1102 could be justified when it said:

"The evidence is clear that the government's support for PHP had a reasonable nexus to rational government policy which made no distinctions between Canadian and foreign investors."[as read]

Now, the Tribunal will recognize that language. That's right out of Pope & Talbot. That's the first of the two tests in
Pope & Talbot, and so that's why I said that it appeared that Canada was now coming around to our framework.

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

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

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

That is why Canada doesn't want to accept the framework that is the proper framework, which is that there is a burden on Canada to show that the measures were not anticompetitive, which it can't do. And that
should be the takeaway the Tribunal has from the way that Canada has sort of muddled through the framework for Article 1102, in our view.

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

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

"As Canada has explained, the purpose of the national treatment obligation in Article 1102 is to prevent nationality-based discrimination. NAFTA tribunals, parties, scholars have consistently referred to this as a necessary
element to find a national treatment violation. The irrelevance of the Claimant's US nationality is evidenced by the government's encouragement of the Claimant to bid on Port Hawkesbury and Mr. Montgomerie's testimony that the government would have considered request for financial assistance had Resolute asked."[as read]

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

And the next part of paragraph 46 goes to this:

"The Claimant concedes
that its US nationality was not a factor in the government's actions and that other Canadian-owned SC paper producers, Irving and Catalyst, were similarly impacted while Resolute 'just happened to be the only foreign participant with an investment in Canada'. "[as read] Well, guess what? That's sufficient under the UPS three-part test. That's a sufficient nationality component to meet our burden and to shift the burden to Canada. And I will show you that Canada itself in its pleadings has essentially conceded that with respect to 1102(3) because that's exactly what the language of 1102(3) says. Canada goes on at the end of its paragraph to say: "To argue that there is a national treatment violation in a situation
where several enterprises in the same sector were accorded the same treatment and similarly impacted regardless of their nationality transforms Article 1102 into a guarantee for foreign investors that places them above domestic investors, which is not its purpose."

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

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

Okay, thank you.

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

"The treatment according by a party under paragraphs 1 and 2 --"
So paragraphs 1 and 2 are the standard national treatment provisions for an investor and paragraph 2 is for investments.

Now, paragraph 3 deals with provincial national treatment obligations:

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

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

"Treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, of the party of which it forms a part."[as read]

That language on its face tells you that there will be or there can be 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,
please.

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

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

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

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

And we concede that nationality also figures into the second part of the test where the burden shifts to Canada. But
Canada doesn't want to go there because it has a second burden to meet, which is ensuring that the measures do not violate, unduly undermine the investment liberalizing objectives of NAFTA, so there's the anticompetitive concern that Canada would have to address, which, at this point, it simply addresses by wishing it away.

Yesterday, Mr. Luz referred to the writings of Ms. Kinnear saying that that is a good demonstration of what all the, you know, of the sort of position that everyone agrees defines the standard under Article 1102(3) -- or under 1102.

And Ms. Kinnear, in her treatise, noted that:

"Claimant must meet its burden of proof that it is in like circumstances with the more favourable treated entity or class of entities and that it has been accorded less favourable treatment that flows from, arises out of, or is otherwise
connected to
nationality."[as read]

Now, that is -- that's a broad
statement.

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

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

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

It is worth noting that in its
rejoinder, Canada explained in the greatest detail
yet what it meant for nationality to "form the
basis" of discrimination considering the language of Article 1102(3), and it essentially adopted Resolute's position that I have just explained.

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

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

In its Article 1128
submission, Mexico accepts this explanation and
concludes:
"Therefore, the
interpretation that
Article 1102(3) does not
require proof of
nationality-based
discrimination is
incorrect."[as read]

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

So if that is the standard,
then Claimant clearly meets that standard.

Resolute has brought its claim because, as a
foreign investor, an investor of US nationality,
it did not receive treatment as the most
favourable treatment Nova Scotia accorded to a
Canadian investor, namely PWCC.

It doesn't matter that
Catalyst and Irving also suffered deferential treatment alongside Resolute for purposes of the prima facie standard.

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

And then we get to the burden. So I am now going to turn to a few other --

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

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

Does it matter to your case that that was not a blanket statement that Resolute would have received the same support that PWCC did? Or is that simply something that is not relevant to the argument you're making?
MR. VALASEK: Dean Cass, are you referring specifically to that Mr. Montgomerie should have made a broader statement in his testimony?

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

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

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

DEAN CASS: A second question on this.

In looking at the nationality
component here, I understand that the position is that intent to harm the investment or investor of the other nation is not required and I believe Canada has agreed to that.

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

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

--- Whereupon Restricted Transcript Commences

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

MR. VALASEK: Okay.

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

We think that the -- as I described elsewhere, I believe I described it
1 yesterday, certainly at the 2020 hearing, we say
2 that the threshold for treatment is a policy
3 adopted by the province favouring its own
4 investor, so that's where the, you know, the key
5 intent is to favour its own investor that has,
6 that can only be achieved with a foreseeable
7 impact on the foreign investor.
8 So it doesn't matter what the
9 size of that foreign investor is. The threshold
10 is simply that it is a foreign investor.
11 But I think in considering the
12 evidence in this case, because that's what's
13 relevant whether we have met that standard, [REDACTED]
DEAN CASS: Just, if I may, one more question on the legal standard here. In the Claimant's view, is 1102, Article 1102 an additional prohibition on action on NAFTA parties in addition to 1101 and 1102 or is 1102(1) and (2), or is 1102(3) a substitute with respect to the actions of certain components of the state, a substitute for what would normally apply? So, in other words, if you didn't have 1102(3) and Nova Scotia gave a package of benefits to Port Hawkesbury, PWCC, and no other province was given similar benefits -- I know you are not doing a cross-province comparison here. But in the absence of 1102(3), would that be a basis for a finding of a violation of the national treatment obligation? The fact that you have one component of the state giving out benefits that are greater than are received by anyone else anywhere in Canada?

MR. VALASEK: So the question
is still in relation to a provincial measure?

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

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

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

That's a question for the justification stage.
But I think for the prima facie case, 1102(3) simply makes it clear with respect to provincial measures that that is the case.

DEAN CASS: Okay, thank you.

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

So, Dean Cass, you had asked your Question 1 was on like circumstances. You said in the like product discussion, one of the things that the Claimant says is that the government measures were intended to have a direct impact on the price of supercalendered paper -- oh, by the way, are we now in or out of restricted access?

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

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

--- Whereupon Restricted Transcript Ends

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

MR. VALASEK: Dean Cass, you
asked in the like product discussion, one of the things that the Claimant says is that the government measures were intended to have a direct impact on the price of supercalendered paper, and I was wondering whether the Claimant was thinking that that was a necessary claim or something that it was just an observation.

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

So that was at Slide 58 of our opening presentation.

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

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

Maybe, Ricky, you can pull that up.

And these observations lead to the same conclusion. So, for example, Resolute
and PWCC's investment concern the same product and that the measures were adopted expressly in a connection with a policy meant to effect competition.

So, in the CPI case, the Tribunal wrote:

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

And if you go to the -- yeah.

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

"It cannot escape the conclusion that the producers of like products, which were directly competitive, were in like circumstances as regards
a measure designed expressly for the purpose of affecting that competition." [as read]

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

--- Whereupon Restricted Transcript Commences

MS. D'AMOUR: Thanks.

Confirming we are in restricted access.

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

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

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

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

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

PRESIDENT HANOTIAU: Yes, yes.

--- Brief pause taken.

PRESIDENT HANOTIAU:

Mr. Snarr, if Mr. Valasek cannot reconnect, maybe
you could make your submission now and then we
will come back to Mr. Valasek. We still need to
have Mr. Valasek I suppose. Yeah.

MS. D'AMOUR: He is rejoining
right now so let's see if he is able to get in.
PRESIDENT HANOTIAU: Very
good. Thank you.

We lost you.

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

So are we now in restricted
access?

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

MR. VALASEK: Just to complete
my response to you, Dean Cass,

So we can look at Slide 59,

Ricky.
So once the decision was made to restart Port Hawkesbury,

So that was an observation that we made but it's not a necessary claim because we have other grounds on which to make out the like circumstances test. So that's what I would -- that's how I would respond.

Now, Professor Hanotiau, you asked a few questions relating to the jurisdictional factor and, in short, the jurisdictional factor is one of the factors in considering treatment in like circumstances, and we accept that Merrill & Ring is an important case that found that where a Claimant was complaining about a regulatory regime that applied across all federal lands of which -- in which it was, that it could not complain about a separate regulatory regime that applied to other investors that only were subject to the provincial regime.

So we would say that the jurisdictional factor is important. If you, as an investor, are in an environment where there is legislation that applies across the jurisdiction
you actually are in and it's of general
application and it's discriminatory, then
certainly you have to be in that jurisdiction
because that's where the legislation or the
regulation applies.

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

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

And so it's appropriate from a
jurisdictional analysis not to limit the scope of potential Claimants to investors in that province. That just wouldn't make sense. And that's a contextual analysis.

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

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

MR. VALASEK: Yes.

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

Does it affect the analysis of like circumstances?

MR. VALASEK: It doesn't, no.

I have my answer here. Well, the answer is, no.
Because the nature of Resolute's complaint isn't that those benefits should be extended to it in Quebec, I think I found -- that's right, I have my notes here.

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

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

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

Rather, what Article 1102 requires is that such anticompetitive measures not be adopted in the first place.
That's the answer to that point.

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

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

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

We are invoking accepted
doctrines of international law that sanction
inconsistent conduct and statements based on the
principle of good faith. These doctrines focus on
the impropriety of the inconsistent conduct of the
party and the Tribunal's discretionary power to do
something about it rather than on whether one or
the other of the inconsistent positions is
correct.

So it's a focus at a
preliminary stage on the conduct itself, not on
which position is correct. It's essentially an
evidentiary rule that the government should be
prevented from making a case in respect of its
current position when it made a different case
earlier under, you know, granted, under limited
circumstances as set out in, for example, the
Chevron case where it's clear that the party with
the inconsistent positions had something to gain
and that the other party has something to lose in
that comparison.

And in a similar vein here,
Mr. Luz argues that the Tribunal should not accept
Claimant's argument regarding inconsistent
statements because, first, the Tribunal, he says,
has no jurisdiction under the agreement under
subsidies and countervailing measures; two, there is no express NAFTA requirement of notification of subsidies; and, three, a notification under the agreement on subsidies and countervailing measures does not prejudge the characterization of the measure.

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

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

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

MR. VALASEK: That's open to you, yes. If you look at the -- Professor Hanotiau, if you look at the Chevron and Ecuador
case, Ecuador is arguing that the Claimant did not have an investment, and the Tribunal did not get into the question of whether there was or wasn't an investment. Clearly that's the Tribunal's jurisdiction to do that.

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

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

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

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

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

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

    The record is clear. That PWCC was going to walk away unless it got everything it wanted. And, therefore, we say the Article 1102 analysis precedes even with the remaining measures and it is essentially unaffected by it because our definition of treatment is the adoption of a policy by the government to favour its own investor in a way that can only be achieved with a foreseeable negative impact on the foreign investor. And we say that even with one or two remaining measures, the policy is still a fact.
The measure reflects a policy that is established by the record. And even if only one of the measures survives for analysis under 1102, the analysis must proceed and we submit it's undisturbed and one that gets into like circumstances and the less favourable treatment is also in place.

And then a final point.

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

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

And I will conclude there.

PRESIDENT HANOTIAU: Okay.

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

SUBMISSIONS BY MR. SNARR:

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

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

MR. SNARR: Okay, very good.

One thing I wanted to address at the beginning, just a correction. Mr. Feldman had mentioned the settlement where PHP joined Irving in a cash settlement to address the US countervailing duty investigation and the amount of the settlement was $42 million. I think there was a reference to a slightly higher number, but just to correct that. And that document is at C-242 if you're interested in looking at that.

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

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

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

And then we turn to the
discussion in the UPS case and Dean Cass's
observation about the meaning of a subsidy.
And I would just highlight the statement that the article, Article 1108(7)(b), while discussing subsidies, there should be a caution about construing it too broadly, that it appears intended more narrowly to reach only self-conscious and overt decisions by government to expressly convey cash and benefits to a particular business, enterprise or activity. And that that ought to be viewed in the context, as well, of the WTO disciplines. And we highlighted the WTO subsidies and countervailing measures agreement and referred to the definitions of a financial contribution or income or price support. So with those definitions in mind, turning back to the text of Article 1108(7), subsection (a), says that procurement by a party or a state enterprise is not applied to Article 1102, and subsection (b) says subsidies or grants provided by a party or a state enterprise, including government-supported loans, guarantees and insurance. And Professor Lévesque, I understood your question yesterday to be how are the words "loans, guarantees, insurance" to be
interpreted vis-à-vis the word "subsidies", and I would submit that they are subsumed within that definition so that we are describing subsidies at the beginning and then the things that follow are included and come within that umbrella of subsidies.

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

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

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

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

"The procurement includes
procurement by such methods as purchase,
lease or rental with or without an option to buy.
Procurement does not include --"[as read]
And then subsection (a) says:
"-- non-contractual agreements where any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons."[as read]
And so on.
So if you were to look to that provision as a guide for interpreting a distinction between procurement and subsidies here, the conclusion that you might draw from that is that any transaction with a subsidy element to it, a financial contribution from the government
providing assistance to the recipient, couldn't be
considered procurement. That exception in the
language in 1001(5) says that if it looks like a
subsidy, it would not be considered procurement
here.

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

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

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

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

And even if you were to look at MESA Power and say, well, but I am still not...
sure that I want to import this other provision or
if I don't think that there is necessarily an
inconsistency that 1112(1) tells me I have to go
look at the provision in Chapter 1001(5), you
still, at the end of the day, have to make the
determination of whether something that is a
measure that has elements, perhaps, of both being
a government purchase as well as a measure that is
providing assistance, which of those should apply.

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

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

MR. SNARR: Thank you.

As we understood Professor
Lévesque's question, she has asked us to choose
whether each of the Nova Scotia measures
especially would be identified as a subsidy or
procurement or neither with respect to 1108(7),
and so I will go through the list.

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

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

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

The $38 million outreach agreement. Now, Canada has said that that is either procurement or a grant. The agreement provides that PHP may receive reimbursements. The government is not buying something, there is no price for services. The amount -- the way that the agreement works is that there's $3.8 million
available for these reimbursements over a ten-year period.

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

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

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

Originally, that purchase was
announced by Nova Scotia along with other
incentives in an August announcement and then
there were some changes to get things finalized
for signature and closing the deal in September 28
of 2012.

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

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

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

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

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

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

And particularly is the way
that it was restructured at the last minute
because PHP had been disappointed about not
going the tax ruling from federal Canada the way
that it wanted to, and so there were changes to
allow them to apply those tax losses that were for
the mill and carried over previously.
We have mentioned pension relief. We consider that neither procurement nor a subsidy. There is no provision of money with respect to the handling of the pensions.

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

On top of the stumpage fees that they pay, PHP pays as part of that agreement -- and those would be the fees for purchasing wood fibre --

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

Now, the interesting thing
about that relationship is if you take a look at C-170, a newspaper learned through an access to information request that in 2017, PHP received $4.4 million in silviculture reimbursements when they had only paid -- thank you, Ricky -- when they had only paid \[\text{redacted}\] in stumpage fees.

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

So that concludes what I have to say about the list of the different measures. And we can go out of restricted access for one final comment.

--- Whereupon Restricted Transcript Ends

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

MR. SNARR: Okay, thank you.

So the last thing that I would like to say is I wouldn't want to leave any
misimpression with the Tribunal or with our
friends representing the Government of Canada that
anything that we have not addressed this morning
is a waived or conceded argument.

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

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

PRESIDENT HANOTIAU: Thank you very much, sir.

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

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

PRESIDENT HANOTIAU: Twenty
minutes, yes.

MR. LUZ: Thank you.

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

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

SUBMISSIONS BY MR. LUZ:
MR. LUZ: Professor Hanotiau,

before I start, can I ask -- I know you said that it doesn't matter, but I would like to at least know roughly how long the Claimant took so I know we have at least that amount.

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

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

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

So I will sort of follow that and, within that package or ensemble, I will make sure I answer as many of the -- or all the
Tribunal's questions and then try and refer to what some of the Claimants were saying.

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

--- Whereupon Restricted Transcript Commences

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

MR. LUZ: Thank you.

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

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

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

This is the
It's important to remember that answers so many of the questions that the Tribunal has and refutes so much of what the Claimant has tried to portray. I would just remind the Tribunal that the Claimant never brought up the fact that it took they never mentioned that in its Notice of Arbitration, throughout the entire jurisdictional phase, or in its memorial. It wasn't until Canada brought it up that suddenly they had to say, oh, well, that kind of financial assistance was okay and that was for a different purpose but the stuff that PHP got oh, no, that's a terrible violation of NAFTA. 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 

13 Now, it doesn't mean that 

24 So let's go back to the slide,

So December 1st --

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

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

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

MR. LUZ: Yes, apologies.

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

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

I also wish -- unfortunately, I don't have a slide here for it but I am going to pull up...
And we are looking at page 1 right now. I will just ask the Tribunal to just take a little picture, a little snapshot in your minds of

Let's skip to page 5.
Yeah, and if we could highlight right up at the top, "

"
11                    Let's go back to the slides.
16                    Next slide, please.
17                    Oh, and, Professor Hanotiau, I
18                    have been told that the slides were just sent
19                    again so you should have a copy of them as well.
And Mr. Feldman brought up a point this morning saying that [redacted].

Well, I refer the Tribunal to Exhibit [redacted].

So Mr. Feldman's accusation of what I was saying this morning is not warranted.
Next slide, please.

And, again,
9                    Next slide.
10
13                    Next slide.
14                    Oh, and again, this is what I
15                    was referring to.                    
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.                    

Now, as Ms. Towers testified in her witness statements, the FULA that would eventually go to Port Hawkesbury was exactly the established practices of the province with respect to licensing Crown land. So, in other words,

Next, please.

Now, as the Tribunal knows, and then, suddenly, within the next six months, the market collapsed. Mr. Garneau said, well, no one's able to predict what the market is going to be when you have a declining demand for your product.

So even within six months, Resolute itself had Everyone knew it was going to be difficult. That's not contested. Everyone knew. But for the Government of Nova Scotia, when Resolute said,
because, as Ms. Chow testified last year, as long as the mill's operating and continuing, the province is getting benefit. So that was the idea. The same circumstances, the same thinking, the same approaches that the government took with respect to Bowater Mersey, you see the same thing happening again in Port Hawkesbury. Next, please.

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

We are going to come up later when we talk about pensions.
Okay, John, we are going to --

so the Tribunal has seen

And you saw

John, if we could pull up

Exhibit

This is something that

Mr. Montgomerie testified in paragraph 25 of his first witness statement. I am going to just paraphrase what he says.

And, again,
, and maybe you can zoom in a little bit.

, but John, if you could scroll down a little bit.

But the point is you can see John, if you could just scroll down to page 2.

Yeah. "

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

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

And I look -- I would suggest
that the Tribunal look at paragraph 25 of
Mr. Montgomerie's statement.

You can put that down, John.

I will just speak to the Tribunal directly.

So Dean Cass asked yesterday about giving PHP everything it wanted referring to the Claimant's theory because that's certainly not what Canada's view of what it is.

You can see in
But the idea that PHP got everything it wanted is just simply not true.

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

Nor is the point for the Tribunal to be deciding -- and this is something I will come up with later. It's not the point for the Tribunal to decide whether or not it was appropriate that PHP got this and Bowater Mersey got this. There are differences. Bowater Mersey
was an old mill, PHP had potential, it was in a more rural area, PHP had the possibility with new machinery, brand new, brand new supercalendered paper machine to survive, whereas the old newsprint machine had been there in Bowater Mersey for decades.

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

Was the financial assistance done in bad faith or was it manifestly arbitrary?

Well, if the answer to that is no, well, then, both 1105 and 1102 claims fail. Obviously there was a rational connection and a justifiable and a reasonable connection to everything that the government was doing. And there is a reason why the Claimant did not want to talk about Bowater Mersey throughout its NOA, the jurisdictional stage, or in its counter-memorial, is because it doesn't fit their narrative.

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

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

MR. MORALES: I want to
confirm we still are in restricted.

MR. LUZ: Yes, we are in restricted.

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

MR. LUZ: It wasn't in the Government of Nova Scotia's control as to who was bidding and who was not bidding.

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

And what did they want to operate it as? Now, you've heard from the Claimant that time and time again, the entire case
1 seems to fall on a low-cost producer versus the low-cost producer.

Well, I wanted to put up -- as was mentioned yesterday from the Claimant, that really kind of encapsulates and cuts through sort of the labels and tag lines and so on, because, as Canada's said all along, labels are not a substitution for real analysis. You have to look at it.
So if the entirety of the Claimant's case falls on -- turns on "A" versus "the" low-cost producer, speaks for itself. We can see that again in one
of the submissions to the UARB.

Next slide, John.

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

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

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

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

Well, the fact is it didn't get everything it asked for and, in fact, the most important thing that it did not get, what it thought it could do to get its electricity rates down to [redacted] hour was the electricity rate that it started with. [redacted]
1 And that was noted when after
2 the advanced tax ruling was turned down by the
3 Canada Revenue Agency, and it says here -- and
4 this is a public document from the filings at the
5 UARB, where it said:
6 "In response to IRs from
7 various parties --"[as
8 read]
9 IRs, I think, is inquiries --
10 it's an adversarial process so others can demand
11 this kind of information:
12 "-- PWCC filed
13 confidential financial
14 information updated to
15 reflect the projections
16 for profitability of the
17 mill, recognizing the
18 loss of the ATR. It
19 projects the mill to be
20 considerably less
21 profitable without the
22 ATR than it would have
23 been had the ATR been
24 granted."[as read]
25 So, again, they didn't get
everything they wanted and it was going to be a lot less profitable than what they had originally dreamed of to be the lowest-cost producer, if that was ever really meaningful, which Canada says, has always said and as

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

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

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

What PWCC came up with and,
again, this is all in our pleadings, it's complicated but it was a completely different formula, completely different, never done before in Nova Scotia.

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

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

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

That is Exhibit R -364.
Now, the legislation that had been proposed was in order to help the workers and pensioners avoid an immediate windup hit of up to 30 percent or more of their pensions. So workers at the mill, they had -- and that's R-466.

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

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

So it's kind of paradoxical to, again, complain about pensions at Port Hawkesbury when it was the government that took
over [REDACTED] of pension liability at Bowater Mersey.

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

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

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

I am going to pull up Slide 15. This, again, goes back to the testimony of Mr. Coolican. And, you know, I won't go through
it too much because I think I can just explain
exactly what Mr. Coolican was saying. I can
paraphrase it.

What he was saying is that
it's common knowledge that renewable, renewable
electricity is always more expensive than
alternatives like oil and gas, so with the
transition to renewable energy, which really
started in 2007, it was clear that regulations had
to be put in place by the government to require
certain levels of renewable energy and, ipso
facto, those regulations would necessarily create
additional costs for ratepayers.

John, you can put the slide
down.

So as I said before, that
was -- that had been envisioned since 2007.

So, again, this was not
something that had been devised to make PWCC and
Port Hawkesbury the lowest-cost producer in North
America. This was all part of a regulatory plan
that had been there for quite some time to be able
to make sure that the biomass plant was designated
as must run in order to fulfil renewable energy
targets.
Slide 16, please.

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

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

Next slide, please.

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

The government has never paid a single penny for additional costs. That was
predicted by Mr. Coolican when he was asked by the board. So we are not talking about a scenario where the government suddenly took on extra costs or started paying the mill to make up for those costs. It never happened.

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

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

The problem with the FULA is that the Claimant said almost nothing through almost all of its pleadings and so Canada felt like we were, you know, trying to hit a moving target or no target at all because they weren't saying anything about the FULA which is, I would
assume, is why the question came up yesterday.

I will tell the Tribunal,

since they can't hear Ms. Towers viva voce, read

paragraphs 31 to 37 of her first witness statement

and paragraphs 3 and 4 of her rejoinder. The

testimony is unchallenged.

But I will try and paraphrase

now. Because it's important, again.

As I said yesterday, the

former owners of Port Hawkesbury had been

operating on Crown land under a piece of

legislation from 1968. The statute gave the

mill's owner de facto control of government land,

and limited the government on what it could do on

its own land. That's in contrast to Bowater

Mersey that had private land. It could do what it

wanted on its own private land.

That Act, the Stora Act, which

I believe is Exhibit R-219, that had a 50-year

term that was coming up for renewal in 2019 for

another 50 years and that was stated in the Suther

affidavit at R-24 paragraph 18.

So when Port Hawkesbury went

into creditor protection in September 2011, there

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
8 This is all in Ms. Tower's
9 testimony and it's uncontroverted. I am
10 paraphrasing for the Tribunal.
11
12 The point of the FULA, as
13 Ms. Towers explains, was to place a cap on how
14 much Crown timber can be used for PHP's operations
15 and to encourage greater use of timber from
16 private woodlots. So, in fact, the FULA, the FULA
17 was designed in order to ensure that private wood
18 supply rather than Crown wood supply would drive
19 the timber market in the province.
20
21 So the whole point of that was
22 so that PHP would not actually use Crown land as
23 much as they used to be able to use it for mill
24 operations. So that's an advantage to the
25 province. The province now had greater control
26 over its own land to fulfill its Natural Resources
27 strategy.
28
29 So, in summary, the FULA was
not a benefit to PWCC. If anything, I am sure
PWCC would have preferred the pre-existing regime
because it was a lot more advantageous to a
private owner.

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

So whatever they pay in
stumpage is prescribed that's set out in the FULA.

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

that necessarily involves PHP incurring additional
expenses to do silviculture on Crown land that it
would not do in the ordinary course of business.
Now, the reimbursement is capped at [REDACTED] and requires detailed reports that are audited by the government before it's reimbursed and those fees are specified in the FULA and Ms. Towers describes it in her witness statement.

And, again, paragraph 3 of her witness statement, the province compensates PHP for taking care of Crown land.

Now, since there's no other evidence on the record and the explanation that Ms. Towers gave and the summary that I just gave summarizes this, I am not really sure where that leaves the Claimant. I have never been sure where that leaves the Claimant, because certainly there's nothing wrong here. It's procurement obviously when it comes to the silviculture expenses, and nothing else qualifies. But even if the Claimant could argue that it was a subsidy, I don't know where that helps them because it ends up being exempted in 1108(7)(a).

Not that we concede that it is, just to point that out, but a newspaper article that obviously had no evidentiary or documentary analysis or anything behind it is not
Evidence for the purposes of the Tribunal.

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

Can you pull up the next slide, John.

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

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

So let's look at the ensemble of measures.

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

$40 million forgivable credit
facility, (b), again.

The productivity grant,

1108(7)(b).

$1 million marketing grant,

1108(7)(b).

The outreach agreement,

1108(7)(a).

I want to just hold on one

second, John, before you get to the land purchase.

The Claimant said this morning

that Canada says it's either procurement or a

grant. That's not quite accurate.

The Claimant seems to have

suggested earlier in its submissions that the

outreach agreement is a grant. We just simply

said that the testimony of Ms. Towers shows

clearly that it is a procurement but even if the

Claimant was right, that it's a grant, well, then,

that doesn't help them because it falls instead of

subsection (a), it falls within subsection (b).

But the point is Canada's

submission, and it's substantiated by Ms. Tower's

witness statement, this is procurement by a party.

The next one, please.

$20 million land purchase,
obviously that is procurement. Something that the Claimant forgot to mention. It is uncontroverted that the land purchase was for fair market value. So I don't really understand how a fair market valued transaction could be considered a subsidy.

Again, my pen ran out of ink as Mr. Snarr was going through it but I believe if they are suggesting that it was a subsidy, they obviously didn't answer the question of how that could be when it was a fair market value transaction.

Electricity rate, it was a private transaction at a market rate, not a measure of the Government of Nova Scotia. We have said that from the very beginning. Even if it was a -- if the Tribunal is not with us on attribution, our point is, well, that doesn't help them at all anyway because it was a private transaction at a market rate which was affirmed by the WTO.

Biomass plant savings were 6- to $8 million a year. Incorrect, private deal market rate, not GNS measure. As I mentioned earlier, again, we are not really sure what it is
that the Claimant is talking about because they failed to identify an actual measure that results in 6- to $8 million of savings a year. Again, that -- what they are saying doesn't really make sense because there's no measure that actually does that.

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

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

Harvesting of $1 billion tax losses, there's so many things wrong with the way the Claimants have presented this. We explained this before. That's not a measure of the Government of Nova Scotia. It's the Income Tax Act that gives the right with respect to tax losses and

so, therefore, it falls under -- that should be (b) -- I apologize. 1108(7)(b) is the -- it's part of the, so.
Yes, so that's a mistake on Slide 14. It should be (b) because it's [REDACTED]. Apologies for that.

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

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

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

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

One of Dean Cass's questions was about how the Tribunal should evaluate -- and
this actually goes to something that Professor Hanotiau had asked as well in a different context but I think I can deal with them together.

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

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

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

There's no proportionality
rule in customary international law. I think that was basically conceded by the Claimant last year, and there's no evidence on that as well. But it seems like that's what the Claimants want the Tribunal to do anyway. That is not the standard to apply in either 1105 or 1102.

Again, I will just refer to the -- for example, Eli Lilly -- and, John, if you could pull up Slide 80 from our opening statement yesterday. Just sort of pull out the language because, again, it sort of encapsulates the idea that, you know, the standard that the Tribunal there was looking is that:

"The Tribunal need not opine on whether the promise doctrine is the only or the best means of achieving these objectives. The relevant point here is that in the Tribunal's view, the promise doctrine is rationally connected to these legitimate policy goals." [as read]
PRESIDENT HANOTIAU: Mr. Luz,

concerning 1105, I think we have enough information.

MR. LUZ: Thank you, yes.

Thank you, I will just move on.

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

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

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

We did deal with this in our, I believe, in our counter-memorial that talked about how the tax, the tax agreement with the municipality in Port Hawkesbury was actually done because of a change in the property, a reduction in the size of the mill, I believe. I could -- I could get the explanation, the citations to our memorial, it's escaping me now. But we did explain this. There was a property tax relief but
it actually was commensurate with the reduction of
the size of the operation of the mill because they
closed the newsprint machine.

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

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

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

I am just going to move on
again now to talk about but just
before I do, because it again goes to the question
that both Professor Hanotiau and Dean Cass said
about the reviewing the quantum of damages. We
know that in 1105 but, and I am going to get into
this in detail.
The quantum of subsidies is also not relevant in 1102 because the NAFTA parties decided not -- decided to, not to discipline subsidies at all, and I am going to explain very clearly how that is the case. So how much quantum, the form of it, and so on, the NAFTA parties specifically decided to exclude that from Chapter 11 so it's not within the remit of the Tribunal to think about.

Again, I will deal with that later. I just want to go through because, again, there's a lot that the Claimant has said about. And I have to emphasize, and this came up very clearly in the hearing last year.
So it really is, you know, an important thing. And the testimony of Ms. Chow and Mr. Montgomerie last year, which I am going to bring up again. If we can bring up Slide 19.

We emphasize this again.

Next slide, please.

And Mr. Montgomerie also remembered, and he's right, because again,
We have already gone through in our pleadings and, again, I don't want to keep going back to this.
And so, for the Government of Nova Scotia, and this is why I brought this up, is if every time a government refused to act simply because there might be an adverse effect on some foreign investor or maybe a domestic investor or a group of them, well then governments would never be able to do anything. They would never be able to act.

The only question for this Tribunal was, was there -- was the decision manifestly arbitrary or irrational or done in bad faith, and if the answer to that is no, then that answers the questions for both 1105 and 1102, but it was rational, reasonable, connection for what they were trying to accomplish. And it's quite surprising to be able to keep, you know, and again, I don't want to belabour the point. But, again, they put too much stock on this. And last year, Mr. Suhonen went through this and explained -- and I will just bring this up very quickly.

John, bring up Slide 22.
And, again, it just goes to show how a government is obviously something -- they have to think about these things. That they are acting in good faith. Here, they point out that

The next slide. Just identifying the things --

The next slide.

The idea was -- the idea of this was that there was a huge downward shift from coated mechanical paper to eat up the SCA+ paper that Port Hawkesbury was producing and that brought up prices everywhere and made the market float for everyone because of that, and Mr. Neufeld discussed that in great detail yesterday.

The next slide, please.

Again, this is the same thing.
And we can move on.

I won't go through all those slides. I will just mention again that one of the other things that the Claimants didn't mention is that the Claimants, in October 2012, and that Dolbeau mill cannibalized its own market, including for Laurentide. So just to mention that.

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

--- Whereupon Restricted Transcript Ends

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

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

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

MS. D'AMOUR: Sorry, someone
was unmuted. I just muted them.

MR. LUZ: Okay, thank you.

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

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

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

So while Canada does not
believe that that the Tribunal needs to
definitively define the term "subsidy" here to
decide this case, but a Vienna Convention on the
Law of Treaties analysis provides sufficient
elements to conclude that the measures all fall
within the scope of 1108(7).

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

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

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

So the examples that follow

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

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

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

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

Because the Article 1108 contains the terms "subsidies" or "grant", including government-supported loans, guarantees and insurance, without any other further conditions attached, you can't use the kind of conditions that exist in the SCM agreement here. And, again, the context of the treaty is important as well. As opposed to the SCM agreement which has its own set of disciplines and its own ideas, the purpose of 1108 is specifically not to impose disciplines on subsidies but to maintain the government's policy flexibility and to carve out from the scope of national treatment subsidy -- disciplines on subsidies.

But if you're going to look at
the SCM agreement and talk about the direct
transfer of funds and so on, that's something that
might, might inform, you know, in a particular
program that is difficult to understand or is more
complex.

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

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

But the answer is, no. There
is not any discipline on the limit and the quantum
in NAFTA Chapter 11, the form nor the intention.
Chapter 11 does not discipline subsidies. The
parties purposely excluded subsidies from the
national treatment obligation and, of course, as we know, there is no customary international law that disciplines subsidies either. And, in fact, I want to bring up the next slide, it's the last slide in my deck, although I have more to say but it's just the last slide.

The NAFTA parties -- if the Tribunal needs any more support for the idea that the NAFTA parties really did not want anything in 1108(7)(a) and (b) to be -- sorry. 1108(7)(b). If the Tribunal needs any other evidence that the NAFTA parties did not want subsidies or grants and government-supported loans to be subject to the disciplines of NAFTA Chapter 11, they can just look at Article 1907. In NAFTA Chapter 19, that shows that the NAFTA parties did not agree to discipline subsidies. The only thing that they did was that if domestic remedies were going to be used, Chapter 19 of the NAFTA created a mechanism to review the use of the domestic antiduty and countervailing duty laws for a panel review process. But here is where it says:
"The parties further agree to consult." [as read]

Sometime in the future:

"The potential to develop more effective rules and disciplines concerning the use of government subsidies; and the potential for reliance on a substitute system of rules for dealing with unfair trans-border pricing practices and government subsidization." [as read]

That tells you right there.

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

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

DEAN CASS: Might I ask, if that were a blanket exclusion of any treatment of
subsidies under any provision of NAFTA, why was
the 1108(7) exclusion not drafted broadly but only
specified certain of the headings of Chapter 11
from which subsidies would be excluded? Was there
a particular reason for that?

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

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

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

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

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

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

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

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

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

John, if you could go to paragraph 418. Actually, why don't you just go to paragraph 419. And get the last -- just keep
going. Is this the right exhibit? Yes. Go right
down to paragraph 419. Maybe it's not pulling up.

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

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

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

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

The object and purpose of the
carveout in Article 1108(7)(a) -- again, applies
to (b) as well -- is to permit the NAFTA
contracting parties to purchase goods or services
in a manner that yields maximum benefits for the
local economy. It would make no difference whether at all such goods or services, once purchased, are used solely by the government or any other entity.

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

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

But you were talking about object and purpose. I noticed when you were talking about the nature of the test under 1102, you said that all we really needed to look at was whether there was a rational basis for the Government of Nova Scotia's action, not looking at that, the sort of the second part of the Pope & Talbot test dealing with the object and purpose of NAFTA, and I didn't know whether that was an intentional exclusion of that part of the test or
simply that you didn't get to it once you were are talking about it.

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

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

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

But the point is if the object and purpose -- it cannot possibly be that the object and purpose in 102 of NAFTA means what the Claimant says it is when the NAFTA -- when the object and purpose of 1108(7) is to remove subsidies and procurement by a party from national treatment. It doesn't, it doesn't make sense.

Like, that is consistent with the object and purpose of exactly what the NAFTA parties wanted to do.

So that Pope & Talbot test is just inapposite. We would suggest that it doesn't have any basis in the text of the treaty anyway.

I was just simply putting that forward as a 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.
Okay, I am going to get to the WTO notification and some of the questions that Dean Cass asked about the, are we interpreting the agreement or applying equitable principles.

PRESIDENT HANOTIAU: I ask a question concerning the objectives.

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

What's your position on this?

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

So if the object and -- if NAFTA Chapter 11 intentionally and explicitly carved out subsidies from the national treatment discipline, that is the object and purpose of NAFTA Chapter 11, the NAFTA parties decided that was not going be the subject of an ISDS claim, so
I would suggest that that's the -- and

furthermore, it's the purpose of each provision.

What is the object and purpose of each provision?

That's how the Vienna Convention analysis is. And

the object and purpose of that provision is to

make sure the NAFTA parties are not disciplined by

Chapter 11 Tribunals when it comes to procurement

or subsidies.

I do want to get through this

quickly because Resolute's response to 1108(7) is

not that the measures were not actually subsidies.

They keep talking about how the government heaped

largesse on PHP, but they ask that the Tribunal

disregard 1108(7). And I think what we heard this

morning is, really, that is what the Claimant is

asking, is they are asking for the Tribunal to

rely on some general -- I am not even sure. What

it sounds like is ex aequo et bono is what they

are asking the Tribunal on how to disregard this

because Resolute's trying to turn this WTO

notification into something that it was never

intended to be.

The notification is allowing

for transparency and discussion as between WTO

members. They were not meant to be determinative
as to whether certain measures are subsidies or not. Article 25 of the SCM agreement makes that clear.

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

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

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

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

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

What the Claimant is asking the Tribunal to do is just to disregard based on, again, I am not really sure on what legal principle. It's certainly not estoppel because it doesn't fulfil any of the criteria of estoppel. It certainly doesn't include just good faith because good faith does not exist without -- in the ether. It must be in conjunction with an obligation.

But if the Claimant is trying to complain about and transform a nil notification into some kind of contrary statement or denial and so on, what about the Claimant saying now that Port Hawkesbury's electricity rate was against the public interest and inappropriate? When, in 2011, it was Bowater Mersey that publicly testified that keeping both of those mills was in the public interest. And saying that load retention rates were common in North America. That's the Claimant's words in 2011 and they are not to be held to that account of consistency.

And what about the fact that they hid from the Tribunal's knowledge until Canada brought it up that they accepted a
1 assistance package with a potential
2 for another That's good for
3 and the Claimant but not good for Port
4 Hawkesbury.

I would suggest that the

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

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

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

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

MR. LUZ: We dealt with this in our pleadings and a little bit last year. The point is that "nil" is not a denial of a subsidy. It's a complex procedure for a federal state to gather information from provinces and so on, and no one is saying that the reporting mechanism of the WTO is perfect by Canada or any other state.

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

So the constructive notification of the subsidies actually occurred. And, again, it's not relevant for a NAFTA Chapter 11 Tribunal. We've gone through this before. This Tribunal is applying 1108(7), and that's what it's bound to apply and if there was any kind of requirement in the NAFTA
that would enable the Tribunal to disregard 1108(7), well, that's one thing. But there isn't.

DEAN CASS: Thank you.

MR. LUZ: Thank you.

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

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

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

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

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

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

MR. LUZ: Okay, thank you.

So I will just go through 1102 as quickly as I can, cognizant of the time and
cognizant of the many disagreements that we may have but I think we can boil them down and the Tribunal will know how Canada has argued this before despite the arguments put forward by my friend Mr. Valasek this morning.

With respect to what Mr. Valasek was saying with respect to the Tribunal's decision on jurisdiction, let me put it this way. Our point was not that the Tribunal had already made a determination in like circumstances.

Our point was that the Tribunal had already made some observations on how 1102 should be seen. And our point was that the Claimants haven't been able to fit their case into those observations. The first observation is that you don't need uniform treatment amongst the provinces.

So the Claimants haven't tried to modify their case to fit that. But this is essentially what they are asking for because either -- they want uniform treatment. They want everything that PHP got or PHP to get nothing, which goes against the logic of what the Tribunal had already said.
So we are not saying that that was a determinative finding on like circumstances. Paragraph 291 of the decision said that the Tribunal was not making a decision on in like circumstances so there's no dispute there.

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

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

They couldn't do the first part because Nova Scotia was not trying to keep
Resolute out of Nova Scotia. They wanted them in Nova Scotia, or at least to bid on the mill. And I believe the Claimant already conceded yesterday explicitly, although it's been done before, but they are not alleging a Methanex-type of target, I don't think they are alleging anything.

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

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

Now, as the Tribunal said in paragraph 291 on the decision of jurisdiction, those were just on admissibility questions, there was no determination as to whether or not it was in like circumstances. That was still a test that
needed to be applied in the merits, which is why
we are here now.

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

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

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

We have always been very
clear, we know what the UPS test is. Treatment,
treatment in like circumstances, and more -- the
treatment is less favourable. You have to pass
all of those and, as the UPS majority said, is
that that is the burden for the Claimant. It
never shifts to the Respondent.

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

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

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

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

And they go on to be able to
say that other Canadian courier companies were equally affected and treated in an identical manner. That obviously shows that nationality-based discrimination was something that was important to that Tribunal as well.

You can take down the slide. Thank you, John.

I am just going to end on this.

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

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

Canada has given a long list of all of the reasons why the in like circumstances test is not achieved. I don't have
anything more to say about that because I think the Tribunal has heard enough.

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

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

Perhaps a little break would be a good time.

PRESIDENT HANOTIAU: Let's say ten minutes.

MR. LUZ: Okay, thank you.

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

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

SUBMISSIONS BY MR. NEUFELD:

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

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
8 The first question, of course,
9 was Dean Cass's question when you asked if the
10 Tribunal finds that there are measures that are
11 excluded from the application of Article 1102 by
12 being in a, through 1108(7), what should we do with
13 respect to any decision on damages and causation?
14 That was the question, at least that's what I recorded
15 yesterday. So if it wasn't, please correct me now
16 because I have prepared all my remarks based on
17 that question.
18
19 DEAN CASS: I think it's if
20 there are some that are still left in after others
21 are excluded, what do you do.
22
23 MR. NEUFELD: Right, well,
24 that sounds good to me because that's exactly what
25 I understood.
26
27 And I hope that, I hope that
28 Canada's position on this is already clear. I
29 don't need to say too much on it. Our submission
is already available to you in our
counter-memorial at paragraphs 373 to 376. I also
spent some time on this at our other hearing in
2020, time that was cut short and I didn't get
much time so I do appreciate having a little bit
of an opportunity now to sum up Canada's position.

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

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

And then the words of the
Claimant at paragraph 308 of its memorial couldn't
be clearer. The Claimant argues that but for the
measures taken together, PHP would never have
re-entered the market and Resolute would not have been damaged. That's the Claimant's words. Not Canada's words. It was the Claimant's words at 308 in its memorial.

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

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

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

Mr. Feldman this morning also pointed to, and again, pointed to Mr. Steger's price bucket. He points to it to show causation. This is something I addressed yesterday. He says -- so he says, Mr. Feldman says this about Peter Steger. He says he acknowledges that PHP's reopening caused prices to fall. Well, that's not true. I said that yesterday and it's unfortunate but I am going to have to say it again today. Mr. Steger's opinion is on quantum. It in no way addresses proximate cause of any harm to Resolute.

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

"I have been asked to quantify the price erosion using the assumption provided by Canada that the entire benefits package caused the breach and was the sole reason PHP
re-entered the SC paper market." [as read]

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

And what did Mr. Steger do? Well, he looked at all of the contemporaneous commentary, the market study, the all the -- you know, the reports from all the paper watchers and he concluded that there was a market reaction and it was based on expectations of what would happen when PHP re-entered. Those expectations were not unlike RISI's,  

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

But as we have learned,
expectations don't always bear out.  

It wasn't for no reason that

prices bounced right back up six months later.

After sales contracts had expired, the market
reset. Replacing the expectations with the real
world.

The long list of industry

commentary that Mr. Steger cites to shows what
that market expectation was and it shows that that
expectation was incorrect and that, in fact, PHP's
supply was quickly absorbed by coated mechanical
paper and by imports.

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

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

Mr. Feldman says that imports
are steady. That's what he said this morning.
Imports are steady, don't worry about them. Well,
let's have a look, let's look at the numbers here.
The Claimant hasn't filed any
numbers but you will find them in Steger 1 and it
is Schedule 10. You will find them in the Pöyry
report too.
And this graph shows you a number of important things, but focusing first on imports, that's the light -- sorry, the darker green -- no, I am getting mixed up myself now.

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

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

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

From 2009 to 2011 is that when things are pretty flat, imports are pretty flat, they have gone up a little bit. But if you look specifically at 2010, there's a jump from 277,000 to 380 -- sorry, metric tonnes. 277 metric tonnes to 380, that's over 100 -- that's a jump of over 100. That is not insignificant in a market where, 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
4 Now let's look also just to
5 the general trend on SC -- you see from the
6 beginning to the end, there is a secular decline.
7 Nobody disagrees with that. You have numbers that
8 are generally coming down, but it doesn't come
9 down every year. In 2007 -- 2006, it goes up,
10 2007, it goes up. But it also goes up in 2013
11 and, of course, that's where the facts of this
12 case lie.
13
14 So I referred to it yesterday.
15 So from 2011 to 2012, you have this precipitous
16 fall and so Port Hawkesbury's idled, it's not
17 producing paper, selling paper, and suddenly,
18 demand for SC paper plummets by, you know, 440.
19
20 And the year after, in 2013,
21 on PHP's back in the market, it jumps back up
22 again. So this massive spike in 2013.
23
24 Now, the point I was trying to
25 make yesterday is what would have happened if PHP
26 had not have come back on stream?
27
28 You know, PHP, again, it's
29 making the SCA+ paper, right, the high grade
30 paper. What would have happened if it hadn't come
back in 2013? Would you have experienced the same spike in volumes that you have there? Who would have supplied them? Or would they have just, would they have just stayed with coated mechanical? Because that's what we are saying absorbed all that spike.

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

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

So this is, in our submission, what would have happened in the but-for world.

The Claimant misunderstands our argument entirely. We have never said that price erosion was caused
by coated mechanical or caused by imports.

Mr. Feldman just either misunderstands or
misconstrues what we are saying.

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

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

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

The question, as I understood
it, was from the moment -- so this is -- first
citing the Claimant's statement, and then asking
for the authorities to back it up. And the
statement was from the moment you've established
sufficiently and reasonably that your losses are
due to state's breach, other possible concurrent
events that are not attributable to the state are
irrelevant and that such events do not diminish
the state's responsibility.

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

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

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

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

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

Tehran hostages, we could talk
about those facts, the Corfu Channel. The concept
is well understood.

Now, when international law borrowed this concept from domestic law, from tort law, really, it borrowed the concept that holds that where joint and several liability on two or more parties, when there is joint and several liability on two or more parties, it's if their negligence combines to produce the same loss. I stress that. It's the parties' negligence that is causing the harm, or to translate that into international law, the parties have committed wrongs. What is the wrong?

When Claimant's counsel speaks of concurrent cause, it speaks of causes of price erosion. And the problem with that is that the multitude of causes of price erosion are not attached to any wrong. Prices go up, they go down. That's what they do. Interest rates, raw material costs. These are all things that cause prices to go up and down. They are not wrongs. And that's why this principle of concurrent cause has no application with respect to price erosion, which is the Claimant's entire quantification analysis. Really, it's the basis of its causation argument too.
It applies in tort law. You apply it to multiple tortfeasors. If they, you know, together combined to commit an assault or it applies in insurance law when you're talking about is the damage caused by the flood or by the fire.

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

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

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

And if you look on page 11, it found that reasonable royalties are the predominant measure of damages. Put that one
down, John, and go up -- oh, yeah, actually, yeah,
it's also in the big fat bolded summary right on
top, so you can just grab it from there.
"Reasonable royalties are
the predominant measure
of damages; price erosion
is rare." [as read]
And in the last paragraph on
that page, it kind of explains why:
"Damages awards for price
erosion claims have
become almost
non-existent." [as read]
It says:
"Over the last six years,
globalized competition,
turbulent economic
conditions and the cost
and complexity of price
erosion analyses have
reduced the recovery and
most likely the pursuit
of price erosion
claims." [as read]
Well, if they are rare in
patent litigation, they are a heck of a lot rarer in ISDS. The lone example that we came across was Rompetrol.

And, in Rompetrol, the Tribunal was faced with an event study. That study measured the erosion of the company's share price, allegedly due to the actions of the government. The government was undertaking an anticorruption investigation and the Claimant argued that investigation caused its share prices to shoot down please give us the difference between -- and note they are actually looking at actuals here, not at forecast prices. They are looking at the event studies what actually happened and then makes an assessment.

So the Tribunal in that case found a breach but it found that the action breaching the BIT wasn't the criminal investigation itself. It wasn't the anti-corruption investigation. Rather, it was an arrest that the government had made and an attempted imprisonment of an individual.

And since the Claimant proposed a method of assessing and calculating damages, that didn't allow the Tribunal to divorce
the harm caused by the illegal act, the arrest and
near imprisonment from the legal act, the actual
investigation, the Tribunal said, well, we can't
award damages here.

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

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

Now there's a common theme
that runs through those decisions that the
Claimant cites, that Canada cites, that, in fact,
it's really embedded in Article 31 of the rules of
state responsibility. In fact, the Claimant's
statement itself recognizes that -- the common
theme is that, as the Claimant itself states, is
that there has to be a breach established and
losses due to that breach. I mean, that's what
this all comes down to. What is the breach and
what are the losses attributable to that breach?
What's the wrong?

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

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

In fact, this is precisely why
yesterday I called attention to the words that he
uses compared to the words that the Claimant uses.
You know, you have to pay close attention when
Dr. Hausman says things like inherent uncertainty
and nobody knows for sure and it's impossible to
predict the future. He is the expert. We get that.

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

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

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

I never said that Dr. Hausman is confused. I said that the Claimant is confused. They are confused about his reports, and more importantly, they are confused about forecasts. Forecasts don't show harm.
Just look at Steger 1's report in paragraph 44. If you use to quantify damages according to the Claimant's model, it changes the quantum that they have requested from 163 million to negative $109.3 million.

The Claimant has never ever responded to that point.

Also, Professor Lévesque, you asked a question this morning about Dr. Hausman's decision to smooth out the 2016, 2018 data. And, in our view, this is another problem of the Claimant's making because its damages theory is based on forecast. Mr. Steger also addresses these anomalies. He spoke to them directly at the
hearing and you will see it in his presentation at the hearing on pages 13 and 14.

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

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

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

Forgive me, Professor Lévesque and Dean Cass, you have seen this before, but our chairman hasn't so I would like to go into confidential mode, so we just have to cut the public feed, Heather, to share the RISI data.
--- Whereupon Confidential Transcript Commences

MS. D'AMOUR: Thanks,

confirming that the feed has been cut. The
restricted access people still remain in Zoom.

MR. NEUFELD: Thanks.

---

I mean, I won't go through
again how he does it. He takes those, he compares
it to the actuals, he reduces two different kinds
of costs, et cetera.
So it's interesting because, you know, all I want to do here is to say, you know, nobody has got a crystal ball, nobody can predict the future and RISI certainly can't predict the future.
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

If you go to Slide 165 now,
And while Resolute didn't provide us with their 2018 and 2019 financials, So if you flip to the next slide. Here is a table that you'll find in Steger 1 which shows the net profits of the mills. And the net profits before tax.

the number beside it, that was the number that I put to Dr. Hausman on the stand and he said, oh, that was a very good year for -- sorry, he didn't said "very". He said that's a good year for Resolute.
So just what kind of harm did Resolute suffer? We can go back to the public feed now, Heather.

--- Whereupon Confidential Transcript Ends

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

MR. NEUFELD: Thanks.

You can see that they didn't suffer harm. And what you need to keep in mind when looking at this evidence is that Drs. Kaplan and Hausman could have used this hard financial evidence. This is hard evidence to show causation and quantified damages.

Indeed, Dr. Hausman did look at financials during the jurisdictional phase when he concluded that, you know, through a regression study that Resolute did not yet know it had been harmed. Right. He specifically looked at financials in his regression study. And yet, he chose to disregard that evidence now for the sake of this merits case. Or maybe he didn't. Knowing 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,
but my understanding is if you were a gentlemen,
you needed to go in wearing a tuxedo. If you had
a tuxedo jacket, that wasn't enough. If you had a
tuxedo vest, that wasn't enough. A tuxedo pants
weren't enough. Surely you needed the entire
outfit.

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

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

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

MR. NEUFELD: No --

DEAN CASS: -- the situation?

MR. NEUFELD: If that is

indeed what the Claimant's arguing, and I think
they haven't exactly been the clearest on this, 
but let's assume that it's the Claimant's argument 
that the package itself causes a breach, the 
individual elements might not, and it's when you 
assemble all these things, all these things 
together.

You -- the problem you have, 
Tribunal, is that you're in a situation of guilt 
by association. I mean we, you know, it was 
interesting as well that Professor Hanotiau asked 
the question about concurrent cause. Because the, 
you know, the theory applies in the same way. If 
multiple causes result in a harm and those are all 
wrongs, you can package this together. I get it.

But how do you package 
together something that is legal with something 
that illegal to say that it harmed you? 

There isn't a causation theory 
out there that says you can be compensated, you 
can get reparation for a legal act. And I 
understand that if the illegal act is a whole big 
package of things, which all acting together is 
illegal, is a different measure, it's a measure 
that stands on its own, well, then, sure, what I 
have to say is not applicable in the same way.
But I mean I have to, I just have to refer to all of the things that my colleague Mr. Luz had to say. How on earth do you look at that package and say, and assume that it was all rolled out in a concerted way as a big, a big matzo ball that is meant, you know, that is meant to -- and causes the harm.

That's a merits question rather than a damages question.

DEAN CASS: Let me -- I hear your answer. I am not sure about the relation of the matzo ball to the tuxedo but let me ask a couple of other just quick questions.

One is, I thought I heard you say that imports increased demand and that an increase in imports would increase demand for supercalendered paper.

Did I mishear you?

MR. NEUFELD: Say that again?

DEAN CASS: I thought I heard you say that a rise in imports would increase demand.

MR. NEUFELD: Yeah, no, if I said that, then I am mistaken. I am sorry.

So, first of all, I am a
lawyer, not an economist, and when I use the word "demand", I am using the word "demand" as it appears in the RISI reports and it is showing volumes, it's showing what's being sold.

There is a little -- there's a dispute -- there's a fun little retort between Dr. Kaplan and Mr. Suhonen on this that you see. And the word "demand", when I am using it, I am not using it in an economic you are pushing the scale or its changing the demand curve. That's not what I am intending at all.

That's the first part of my answer.

The second part is I wouldn't have said rise in imports creates a -- what I am saying is that, alternatively, if coated mechanical continued to occupy the space that it did and SC paper wasn't, wasn't suddenly taking, substituting and taking that from coated mechanical, two things would have happened: One is that either coated mechanical would have continued to sell the paper that it was and SC paper wouldn't have been selling anything, or SC paper imports would have substituted for coated mechanical. SC paper imports, so that's when I
probably used the word "would have taken that demand" and I mean that in a colloquial sense of the word "demand", not in an economic sense.

DEAN CASS: I wasn't trying to go to the difference between a shift in demand curve and quantities demanded.

Okay, I will leave it at that.

Thank you.

MR. NEUFELD: Okay, thank you.

Could I add one more remark just in answer to your first question.

This is the sort of aggregate -- we, you know, it was a subject addressed during our opening statements and in the first hearing as well. I said that the Claimant is welcome to point to this aggregate of measures. It can also say that there is an aggregate of measures that caused the re-entry, so let's not think about it from the breach perspective but from the causation perspective here.

That aggregate causes re-entry of Port Hawkesbury in the view of the Claimant.

But at what point does taking one of those measures out not cause the re-entry of -- I mean, that's a question they don't answer, they don't
address, right.

So I say the whole thing falls down when you pull one of the measures out. You are not wearing a bow tie because, you know, was it the bow tie that didn't get you through? Well, I think it was. Was it the, you know, the $40 million loan or the $24 million or was it the $1.5 million grant? Which element was enough to get you to...

You know, and it's funny.

This case started with, well, it was everything. It was hot idle, it was all of these measures all packaged together. And then suddenly hot idle falls: Well, no, it wasn't hot idle. It was just the two loans and, you know.

I think the Claimant's answer to that -- I don't want to speak for them, of course -- but it's that every time a measure gets knocked out: Well, that's still enough for Port Hawkesbury; well, that's still enough for Port Hawkesbury to come back on stream. And, you know, it's a little bit too, it's a little bit too cheeky. Like, at some point, if your job, from a damages perspective, is to tie your loss back to the breach, then it's not good enough to say some
jumbled mess of measures caused this without
knowing what it did.

And I don't want to land
myself into hot water. You know, Rompetrol,
again, is great on this. They say it would be
ridiculous to say you have to take one measure and
then find the harm to that and then another
measure, find the harm to that and tabulate this
all together and that's your harm. That's totally
unrealistic. We get that. That's not what I am
proposing at all.

But the position of the
Claimant is all of this package was necessary for
Port Hawkesbury to come back on stream. If the
$40 million is not part of that package, is it
still enough? We don't know.

Is that clear? I hope that
answers your first question.

DEAN CASS: I think you were
muted, Mr. Chairman.

MR. NEUFELD: I am so happy
you didn't say I was muted because I felt I
delivered that really well.

PRESIDENT HANOTIAU: Nothing
else? No.
MR. NEUFELD: Nothing for me.

PRESIDENT HANOTIAU: No, okay,

thank you.

MR. NEUFELD: Thank you very much.

PRESIDENT HANOTIAU: So we are coming at the end of this hearing. We are going to receive the transcript of the second day tomorrow. I suppose the parties are going to discuss any corrections that has to be made to the transcript, and I don't think it's necessary today to determine the date to send us the corrections to the transcripts. You can discuss between yourselves and tell us when it's convenient for you to send us these corrections.

We will need also to receive your statement of cost and fees. And also, you should agree on the format and also the date at which you want to send us these statement of fees and costs. I don't know if you already discussed that or if you want to discuss this coming few days and revert to the Tribunal.

I give you the floor, to both of you, Mr. Feldman or Mr. Valasek first.

MR. FELDMAN: We have resolved
these matters very congenially with counsel. We will be happy to try to do it again. So no hard feelings from today or yesterday. We will sort out all the communications that are necessary to the Tribunal.

PRESIDENT HANOTIAU: Okay.

Are there any other issues to raise?

Yes, Mr. Valasek.

MR. VALASEK: I am completely in your hands, Mr. Chairman and members of the Tribunal. There was a question on which I reserved which was the question relating to MESA Power and the interpretation of the object and purpose of the treaty. I have heard Claimant's argument. I would have a two-minute response to it but I understand that it's late and so I am in your hands.

PRESIDENT HANOTIAU: I give you two minutes.

SUBMISSIONS BY MR. VALASEK (Cont'd):

MR. VALASEK: Okay.

So if I understood Canada's argument correctly, it is that because Article 1108(7) is a carveout on subsidies that applies to Article 1102, the latter provision cannot be
interpreted in light of the overall objects and purposes of NAFTA set out in Article 102 because Article 1108(7) essentially represents a clear override to those objectives. Essentially what he says is the NAFTA parties have clearly indicated that they want to allow each other to give national preferences and so forth.  

This cannot be right. This would mean that once the carveout has done its work and excluded any measures to which Article 1102 cannot properly apply, but leaves some measures to which it does properly apply, the carveout and whatever policy lies behind it would continue to have an effect in relation to the measures that it did not carve out. 

The carveout in 1108 and the principal provision in 1102 are separate provisions and do separate work. Each must be interpreted on its own and once 1108 has done whatever work it can do, 1102 must be interpreted and our argument is that that provision must be interpreted in light of Article 102, which is the overall purpose and objectives of the treaty. And that's particularly true since Article 102, I have it up on my screen, reads:
"The objectives of this agreement as elaborated more specifically through its principles and rules, including national treatment, most favoured nation treatment and transparency are to --" [as read]

And then it lists the objectives and the one, of course, that comes up in the Pope & Talbot test is (b), to promote conditions of fair competition in the free trade area.

Mr. Luz is using whatever policy might lie behind 1108 to avoid the second leg of the Pope & Talbot test in an appropriate way.

And the last point I would make on this issue is that the provision that we heard about today for the first time, which is the -- I am just going to pull it up here, because I didn't have it up on screen, but Article 1907(2) to support their position, that refers to the 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.
MR. NEUFELD: Okay, we should thank you, though, for all the work that you have done and for stepping in as you have, Mr. Chairman. We are very grateful to have the opportunity and found that the proceeding went very smoothly, so thank you.

PRESIDENT HANOTIAU: Yes, well, I'd like to thank you. You know, it's a pleasure to have so brilliant lawyers on both sides. Makes our work even more difficult, I think.

But it's a great pleasure for me to share this arbitration with my colleagues who are wonderful people.

MR. FELDMAN: Mr. President, if I may just, not to be left behind, and to express regret that we have interrupted your dinner two nights in a row and we thank all three of you very, very much.

PRESIDENT HANOTIAU: With great pleasure.

Okay, I think we can end this hearing now. Thank, of course, to Arbitration Place and the court reporters because I think they are, I don't know if there is one or two but they