IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

MERRILL & RING FORESTRY L.P.,

Claimant-Investor,

and

THE GOVERNMENT OF CANADA

Respondent-Party.

OPINION

With respect to the Effect of NAFTA Article 1116(2)

On Merrill & Ring's Claim

April 22, 2008

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I. INTRODUCTION

1. I am the Myres S. McDougal Professor of International Law at Yale Law School, where I have been on the faculty since 1965. I have published twenty books in my field, five of which focus specifically on international arbitration and adjudication; a sixth, which I edited, focuses on jurisdiction in international law. In addition to my teaching and scholarship, I have served as Editor in Chief of the *American Journal of International Law* and Vice-President of the American Society of International Law. I have also been elected to the *Institut de Droit International*. I serve as President of the Arbitral Tribunal of the Bank for International Settlements, have served as an arbitrator in numerous international commercial and public international arbitrations, as counsel in other arbitrations, as well as in cases before the International Court of Justice ("ICJ"), and as an expert witness on diverse matters of international law. A *curriculum vitae* setting forth a complete list of my professional activities and publications is appended to this opinion. In particular, I have served as arbitrator in two NAFTA arbitrations and have served or am serving in five ICSID arbitrations and in one non-supervised investment arbitration.

2. Respondent, the Government of Canada ("Canada"), asked that I study the pleadings in Merrill & Ring, an arbitration under NAFTA Chapter 11, and express an opinion on whether Article 1116(2) of the North American Free Trade Agreement

("NAFTA")[1] time-bars the allegations of Claimant Merrill and Ring Forestry L.P. ("Merrill & Ring").

II. SUMMARY OF CONCLUSIONS

3. For the reasons set forth below, I conclude that:

A. As a general matter:

(i) "measure" is a defined term in NAFTA Article 201 and this definition controls for Chapter 11.

(ii) A claim may be brought under NAFTA Chapter 11 when a "measure," taken by a State-Party, breaches one of the obligations of that State-party, with respect to an investor or investment of another party.

(iii) But a claim may not be brought if more than three years have elapsed from the date on which a qualifying investor acquired or should have first acquired knowledge of the alleged breach and the loss or damage it incurs.

(iv) Where the measure alleged to have caused the breach is a long-standing and routinely applied regulatory regime and the investor had or should have had knowledge both of the regime and the economic costs of its routine application from prior applications, that investor may not evade the three year limitation and challenge the lawfulness under NAFTA of the regulatory regime by claiming that the "measure" is actualized or

[1] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993).

materialized in each recurring, routine and proper *application* of that regulatory regime.

B. With specific reference to the instant case,

(i) in accordance with NAFTA Articles 201 and 1101, the regulatory regime expressed in Notice 102 is the subject of the complaint at issue in this case.

(ii) Notice 102 is a "measure" within the meaning of NAFTA Article 201; specific and routine applications of the regulatory regime established under Notice 102, are not "measures".

(iii) Merrill & Ring had acquired specific knowledge of the applications of the regulatory regime and its economic costs to it through applications occurring more than three years before it submitted its claim under NAFTA.

(iv) in the circumstances, specific and routine applications of the relevant measure, viz., the regulatory regime established under Notice 102, cannot be used to prolong or circumvent the period of limitation established by Article 1116 in order to challenge the compatibility of that regulatory regime with other NAFTA obligations.

(v) consequently, the violations of NAFTA Chapter 11, which Merrill & Ring alleges, are time-barred by operation of NAFTA Article 1116(2).

III. SUMMARY OF FACTS

4. The relevant facts, upon which my opinion is based (and which do not appear to be disputed), may be briefly stated. Merrill & Ring is a limited partnership organized under the laws of the State of Washington in the United States of America. It provides various services related to the ownership, purchase, and sale of logs. Merrill & Ring owns 10,347 acres of land in the coastal areas of the province of British Columbia, where it has owned and operated timberlands for more than a century. It or its predecessors acquired most of this land from Canada before 1906. Among other activities, it harvests logs from the land for sale to third parties within Canada and for export.

5. Permits issued under authority of the *Export and Import Permits Act* are required for lawful export of logs from Canada. Logs harvested from forests in British Columbia fall into a regulatory class based on the public or private status of the land on which the timber has grown or from which the logs were harvested, and if private lands, the date of their grant to the private party. Because, in the context of this regulatory scheme, the majority of the acres of forest land owned by Merrill & Ring qualify as private land granted to Merrill & Ring before March 1906, logs from those lands fall within the exclusive regulatory authority of the federal government of Canada. The federal government works with provincial authorities of British Columbia pursuant to a memorandum of understanding executed on 30 March 1998.[2]

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[2] This followed a challenge to Canada's prior practice, an adjustment which, as I will explain, is unrelated to the present dispute. See K.F. Evans v. Canada (Minister of Foreign Affairs), [1997] 1 F.C. 405 (T.D.).

6. The policy at issue in this arbitration requires that logs exported from British Columbia be "surplus" relative to provincial needs. In practice, the owner of the timber first advertises the logs for the purpose of soliciting offers to purchase the logs in Canada. If there are no qualifying bids within two weeks of its advertisement, the Federal Timber Export Advisory Committee ("FTEAC") issues a recommendation to the Export and Import Controls Bureau of the Canadian Department of Foreign Affairs and International Trade ("DFAIT"), indicating that in its view, "...the logs are surplus to domestic needs."[3] At that stage, an owner of "surplus" logs such as Merrill & Ring may obtain an export permit on application. The Minister of Foreign Affairs has exclusive discretion to issue permits. If bids are received, FTEAC considers them and may make a recommendation to the Minister.

7. In 1986, Canada issued *Notice to Exporters Serial No. 23 ("Notice 23")*, which, in substance, first introduced the federal surplus testing requirement. On 1 April 1998, it issued *Notice to Exporters Serial No. 102 ("Notice 102")*. *Notice 102* replaced *Notice 23* and remains in force today. Merrill & Ring challenges *Notice 102* within the meaning of Article 201 of the NAFTA as allegedly inconsistent with Canada's obligations; according to Merrill & Ring, *Notice 102* is the relevant "measure."

8. From 1986, the Policy for the Export of Logs from British Columbia was as was stated in *Notice 23*, and since 1 April 1998, *Notice 102* has been the federal government's log export controls policy. *Notice 102* did not substantially modify the

[3] Statement of Defence of the Government of Canada, 30 October 2007, ¶ 39. The Minister also considers any submissions from private parties, which may ask him to reconsider his decision, and judicial review by the Federal Court of Canada is available under the Federal Courts Act of 1985. *Id.* ¶¶ 39-41.

regulatory regime to which Merrill & Ring has been subject since 1986 under the former *Notice* 23. Merrill & Ring says nothing in its Statement of Claim to indicate that its grievance relates to the introduction of a federal representative as a member of the Advisory Committee—to which it has been subject for decades. The only substantial difference between Notice No. 23 and Notice No. 102 is the introduction of a federal representative on TEAC. The gravamen of Merrill & Ring's claim is the *surplus testing procedure itself.* Since the issue under consideration here is one of jurisdiction *ratione temporis,* I will refer to the regime established under Notice 102 as the "1998 policy regime."

9. Canada observes—and, to my knowledge, Merrill & Ring does not dispute these facts—that Merrill & Ring "has dealt with FTEAC and DFAIT officials numerous times since April 1998"; that it "has been issued hundreds of exports permits for advertised log booms"; and that it has duly followed the procedures set forth in *Notice 102* since April 1998.[4] I take it as given that Merrill & Ring, as an entity doing business in that economic sector, knew from the time of their publication, of the policy and the economic costs the procedures of *Notice 102* imposed on those subject to it.

10. Merrill & Ring nonetheless initiated this arbitration nearly nine years after *Notice 102* entered into force, viz., on 27 December 2006, more than five years after the *prima facie* expiration of the Article 1116(2) limitations period. Merrill & Ring does not dispute that it first acquired knowledge of the procedures set forth in *Notice 102* in April 1998. Nor, indeed, does it dispute that it has operated under substantially the same

[4] Statement of Defence, 30 October 2007, ¶¶ 42-43.

policy since 1986, well before NAFTA entered into force. On its face, then, this action would therefore appear to be time-barred by Article 1116(2).[5]

11. Because Merrill & Ring's claims against the 1998 policy would be time-barred under Article 1116(2), Merrill & Ring argues that its claims include *both* (1) discrete measures taken within the limitations period; and (2) *continuing* measures taken before that period, that is, measures that continue to be implemented and administered through a variety of discrete events and that therefore, in its view, repeatedly set back the limitations period. In particular, with regard to the latter sort of measures, Merrill & Ring contends that Article 1116(2) "do[e]s not operate to prevent claims against wrongful governmental measures that are *still continuing*."[6] By purporting to cast the "measures" as current applications of the 1998 regulations rather than the 1998 regulations themselves, Merrill & Ring seeks to enable itself to reach the compatibility of the 1998 policy with NAFTA, even though Merrill & Ring would be exceeding the temporal limits established by Article 1116(2).

12. For example, with respect to Article 1110, Merrill & Ring submits that "[t]he application of the Federal Surplus Test forces Merrill & Ring to sell the large majority of its log production at prices that are substantially below those prevailing in international markets"[7] and that "Canada violates this provision each time that it requires Merrill & Ring to sell logs at the artificially depressed British Columbia price."[8] Similarly, Merrill & Ring's claim with respect to Article 1105 is not against

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[5] *See* Notice of Arbitration, 26 December 2006.
[6] Investor's Observations on Preliminary Objections ¶ 5 (emphasis added).
[7] Statement of Claim ¶61. See also, generally, Claimant's Memorial at ¶¶ 435-436.
[8] Id. at ¶ 62.

misapplications of FTEAC but of its application to Merrill & Ring which allegedly violates NAFTA.[9] The claim under Article 1102 is also directed at the 1998 policy rather than an action under it, which action itself violates a NAFTA obligation.

13. Thus, as these examples clearly demonstrate, the issue is not *how*, in terms of Chapter 11, the 1998 policy has been or is being applied in specific cases, but that the 1998 policy is itself a violation of Chapter 11. Insofar as this is the claim, the essential jurisdictional question is whether the 1998 policy established by Notice No. 102, of which (and of whose economic consequences) Merrill & Ring was fully aware from its inception, is the relevant "measure" under NAFTA. If it is, the claim is time-barred. This opinion does not address the possibility of a particular claim by Merrill & Ring alleging violation of a provision of Chapter 11 because of some misapplication of the 1998 policy *without*, however, challenging the validity of the 1998 policy under NAFTA. If such claims were brought within the three year period prescribed by Article 1116(2), they would be admissible, even if they failed to be sustained on their merits.

14. In the following sections of this opinion, I will briefly indicate the relevant provisions of NAFTA and, after indicating the crucial role of jurisdiction, consider, in detail, the interpretation of Chapter 11's time-bar regime. Although NAFTA's provisions in this regard function as a *lex specialis*, I will also briefly consider how the issue of continuing violations is treated in customary international law and in human rights law and then review the relevant NAFTA jurisprudence. I will conclude with some prudential considerations.

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[9] Id. at ¶ 45.

IV. RELEVANT PROVISIONS OF NAFTA

15. It will be useful to set out the relevant provisions of NAFTA. I have boldfaced key sections. Article 201 of NAFTA provides:

> 1. For purposes of this Agreement, unless otherwise specified:
> . . .
> **measure** includes any law, regulation, procedure, requirement or practice;
> . . .

Article 1101 of NAFTA provides:

> 1. This Chapter applies to **measures adopted or maintained** by a Party relating to:
>
> a. investors of another Party;
>
> b. investments of investors of another Party in the territory of the Party; and
>
> c. with respect to Articles 1106 and 1114, all investments in the territory of the Party.

Article 1116(2) of NAFTA provides:

> 2. **An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.**

Article 1117(2) of NAFTA provides:

> 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

V. THE JURISDICTIONAL QUESTION

a. The Importance of Jurisdiction

16. The issue I am addressing here, though technical, touches on fundamental policies. Governments must manage complex legal systems which serve as critical struts of their political economies. Because the network of expectations which the legal systems establish are relied upon by citizens as well as by aliens who choose to enter those systems, substantive agreements with other States which will affect those internal arrangements are carefully designed so that all relevant parties know precisely to what they apply or what is their jurisdiction. Jurisdiction is analyzed in terms of the material scope of an agreement (jurisdiction *ratione materiae*), the personal reach of an agreement (jurisdiction *ratione personae*) and the temporal scope of an agreement (jurisdiction *ratione temporis*). International tribunals must implement the jurisdictional arrangements which Parties establish with great care, lest their decisions exceed the jurisdiction assigned to them and constitute an *excès de pouvoir*. In this opinion, I consider the three year time limitation under NAFTA Article 1116(2), that is, jurisdiction *ratione temporis*.

b. The Interpretation of "Measure" in NAFTA

17. In order for Article 1116(2) to apply to Merrill and Ring's claim, the breach must involve a measure as specified in Article 1101 of NAFTA. As such, I will first interpret the term "measure" under NAFTA. It is commonplace that NAFTA, as a treaty, is to be construed in accordance with the Vienna Convention on the Law of

Treaties (VCLT).[10] The VCLT requires that a treaty "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[11]

18. Thus, I begin with the ordinary meaning of the provisions in issue. Chapter 11 applies to and thus authorizes nationals of other state Parties to NAFTA to challenge:

> *measures* adopted or maintained by a Party relating to
>
> > (a)investors of another Party;
> > (b)investments of investors of another Party in the territory of the Party; and
> > (c)with respect to Articles 1106 and 1114, all investments in the territory of the Party.[12]

To what does the term "measure," which is critical here and for every obligation in Chapter 11, refer? Article 201, which bears the rubric "Definitions of General Application" defines "measure" as "any law, regulation, procedure, requirement or practice."[13]

19. While the definition is *ejusdem generis* and, hence, not exhaustive, the 1998 regulations, which set out how, as a matter of policy, Canada will administer and implement laws and regulations long applied to the timber industry of British Columbia, fall squarely within the class of legal phenomena designated as "a measure"; a routine application of one of those phenomena would not. It would require no small

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[10] *See* Grand River Enterprises Six Nations Ltd. v. United States of America, Decision on Objections to Jurisdiction, 20 July 2006 (UNCITRAL), ¶ 34 & n.13 [hereinafter Grand River Jurisdictional Decision].
[11] Vienna Convention on the Law of Treaties art. 31, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [VCLT].
[12] NAFTA art. 1101 (emphasis added).
[13] NAFTA art. 201.

violence to the ordinary meaning of Article 201 to describe, for example, "[e]ach time since December 27, 2003 that Canada"[14] has implemented or administered *Notice 102* as a "law, regulation, procedure, requirement or practice." The implication of such a forced construction would be that while Notice 102 is undoubtedly a "measure," each routine application of that "measure" is a separate and distinct "measure." Bear in mind that we are dealing with an international instrument which was negotiated with great care and then studied with as great care by three legislatures and countless stakeholders. For such an instrument, it makes little sense to speak of discrete events implementing *Notice 102* as independent measures that have been "adopted or maintained"[15] by Canada as a State Party to NAFTA in the application of the pre-existing measure, unless the gravamen was not the original measure, but the way it was applied in a specific case![16]

20. Notice 102 is a "measure" within the meaning of NAFTA Article 201; specific and routine applications of the regulatory regime established under Notice No. 102, are not "measures." Indeed, one of the consequences of reading Article 201 as encompassing "measures" of "measures" would be, as I will explain below, to drastically reduce the scope of operation of Article 1116(2); one avoids interpretations of one provision in an instrument which would frustrate another provision in the same

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[14] Investor's Observations on Preliminary Objections, Annex A, § I.2. See also Investor's Memorial at ¶436.

[15] NAFTA art. 1101.

[16] See Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶ 87 (breach of contract does not qualify as a "measure" within the meaning of Article 201). In the *Loewen Group* decision, the tribunal held that a judicial decision *could* qualify as a measure within the meaning of Article 201. The Loewen Group International v. United States, ICSID Case No. ARB(AF)/98/3, Decision on Jurisdiction, 5 January 2001, ¶¶ 54-55. But see discussion *infra*.

instrument. The ordinary meaning of the provision and the most reasonable construction are, rather, to identify measures in accordance with the examples in Article 201.

21. Now, this is not to say that only a statutory or regulatory regime can constitute a measure for purposes of claims under Chapter 11. One must distinguish between two factual situations. The first is the case in which some government action is alleged to have precipitated the breach of NAFTA, not because of *how* the action was conducted but entirely because the action implemented a measure, let us say measure X, which is itself alleged to be in violation of NAFTA. Under these facts, it is measure X that is being challenged, even though the precipitating event is a specific action applying measure X. The time limitation for challenging measure X would be reckoned from the date that an investor acquired or should have acquired knowledge of measure X's consequences to that investor. This could be the date measure X was enacted or when it began to be implemented in a usual and routine fashion, depending upon which date an investor acquired or should have acquired knowledge of measure X's consequences. If more than three years had elapsed, the investor's attempt to challenge the compatibility of measure X with the requirements of Chapter 11 would be time-barred, even though the precipitating action was more recent.

22. In this first factual situation, it is still possible that measure X, with respect to which Chapter 11 challenges are time-barred by application of Article 1116(2), may nonetheless be *relevant* to determining what standard was breached. Thus if a claim that an application of measure X, which had been enacted some ten years earlier, had

violated the obligation of fair and equitable treatment in Article 1105(1), it would be entirely appropriate to examine how that measure *should* be applied or had been routinely applied, in order to have a standard for determining whether there was substance to the allegation of violation. (This occurred in the *Feldman* and *Mondev* cases which I will I will consider in detail below.) But putative complaints about measure X itself and allegations that it constituted a violation of Chapter 11 would be time-barred if the claimant had or should have had the requisite knowledge more than three years earlier.

23. In the second factual situation, the allegation of a breach is *not* that measure X is in violation of a Chapter 11 obligation. Rather, it is the action in question itself, purportedly taken within the scope of a pre-existing and otherwise lawful statutory or regulatory regime, which is alleged to have precipitated the breach. In the *Loewen* case,[17] for example, the allegation was not that the judicial process in the United States was itself in violation of NAFTA obligations but rather that a specific action by a court misapplied that judicial process. That specific action was the "measure" upon which the claim was based. This would not be the case if part of the state's judicial process itself constituted a violation; then that part of the judicial process, rather than applications of it, would be the measure and could well be time-barred. In sum, a subsequent application may be a measure within the meaning of NAFTA if the application itself violates an obligation under Chapter 11. But a subsequent application

[17] The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (ICSID Case No. ARB(AF)/98/3). Award of June 26, 2003, 42 *ILM* 811 (2003), 7 *ICSID Rep.* 442 (2005).

will not constitute a measure, within the meaning of NAFTA and especially with respect to Article 1116(2), if the claim with respect to that application is not to the lawfulness of the action itself but to the statutory or regulatory instrument upon which it is based.

24. In the case under discussion, the alleged offense against NAFTA is the 1998 policy regime and not a specific application of it. If Merrill & Ring challenged a particular and recent application of the 1998 policy regime without trying to challenge the conformity of the regime itself to NAFTA, it would not be time-barred and might be considered on its merits. But if the gravamen of Merrill & Ring's case is the 1998 policy regime itself, as the selections from the Statement of Claim and the Investor's Memorial quoted above indicate, it is time-barred.

25. Merrill & Ring seeks to circumvent this time-bar by a purported analytic division of its various claims into "non-continuing" and "continuing" measures. But its explanation of this supposed division in Annex A of its Observations on Canada's Preliminary Objections is problematic. For one thing, the actions which Merrill & Ring calls "measures" and which it proffers as examples of "[n]on-continuing measures since December 27, 2003"[18] in fact describe discrete occasions on which Canada *implemented or administered* a single, prior measure, namely, *Notice 102*. Merrill & Ring's objection to these actions is not based on the supposed incompatibility of each discrete application with NAFTA but with the incompatibility of the long-standing policy regime which

[18] Investor's Observations on Preliminary Objections, Annex A, § I (Nov. 9, 2007). See also Investor's Memorial at ¶ 436.

they are implementing. Thus Merrill & Ring's case is the reverse of *Loewen*. Unlike *Loewen*, where the question was not the compatibility of the U.S. judicial process with NAFTA but the compatibility of a specific application of that otherwise lawful process, the question in this case *is* the compatibility of the 1998 regulations with NAFTA obligations. That question would, in the circumstances of this case, be time-barred by Article 1116(2). By purporting to characterize the actions taken under the 1998 policy as "non-continuing," Merrill & Ring begs the question of whether the challenged *measure* that triggers Article 1116(2)'s express three-year limitations period is *Notice 102*, the real target of the case, or, by contrast, is comprised separately of each and every subsequent act Canada takes pursuant to *Notice 102*—such that, as Merrill & Ring argues, the limitations period for adjudicating the compatibility of the 1998 regulatory regime starts anew on each such occasion.

26. Aside from the departure Merrill & Ring's argument requires from NAFTA Article 201, it is illogical on its own terms. Merrill & Ring's procedural submission at Annex A, § II.3.c, for example, describes "Canada's continuing application of Notice 102" as but one of the "continuing measures."[19] It is, to say the least, difficult to see by what logic this "continuing measure" does not, in Merrill & Ring's view, *include* the various "non-continuing" measures enumerated in Annex A, § I.2, which specifies as discrete and non-continuing breaches of NAFTA "*[e]ach time*

since December 27, 2003 that Canada" has implemented or administered *Notice 102*.[20] In the facts of the case, the two terms -- continuing and non-continuing - are tautological. Stated otherwise, the "non-continuing" measures enumerated in Annex A perforce depend on the *legal* conclusion that Article 1116(2) does *not* time-bar the alleged "continuing measures."

c. The Interpretation of Chapter 11's Time-bar Regime

(i) Ordinary Meaning

27. Article 1116(2) sets forth a clear period of repose, stipulating that the three-year statute of limitations begins to run "from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."[21] Note also that Article 1116(2) is directed at the investor and not the tribunal; it is a limitation on *the right of the investor* to bring a claim under Chapter 11 and not on the competence of the tribunal, as is the case in the major human rights instruments. Thus the broader scope for interpretation of its own competence, under the general principle of *compétence de la compétence* does not apply to Article 1116(2), whose scope for interpretation is considerably narrower. (I will treat this distinction when I examine human rights practice below.)

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[20] Investor's Observations on Preliminary Objections, Annex A, § I.2 (emphasis added). See also Investor's Memorial at ¶436.

[21] In parallel for claims made on behalf of enterprises by investors of states parties to NAFTA, Article 1117(2) provides: "An investor may not make a claim on behalf of an enterprise . . . if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."

28. It takes great effort to misunderstand Article 1116(2). It establishes that the challenge of the compatibility of the measure must be made within three years of *first* acquiring (i) knowledge of the measure and (ii) that the measure carries economic cost for those subject to it. If the challenge is not made within those three years, it is time-barred. A precise knowledge of the quantum of economic cost is not required, as will be explained in a review of the case law below.

29. In examining the "ordinary meaning" of this provision, an investor does not and logically cannot "*first* acquire" knowledge of the allegedly incompatible measure that constitutes the challenged "breach" *repeatedly*.[22] In the instant case, the logical and more plausible interpretation is that the knowledge acquired is of the measure, viz., the regulatory regime established by *Notice 102,* from the moment the investor appreciates or should appreciate that it imposes economic costs upon it; a precise knowledge of the quantum of economic costs is not required.

30. It will be recalled that in an effort to secure jurisdiction in respect of the 1998 policy, Merrill & Ring proposes to read "measure" to mean "each event or incident taken pursuant to that measure." This would not only do violence to the language in Article 201, as explained above, but it would effectively eviscerate the three-year statute

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[22] The *Grand River* tribunal succinctly explained the conditions required to trigger Article 1116(2)'s express three-year limitations period:

> Claims are barred as untimely only if the investor or enterprise:
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> - First acquired certain specified knowledge;
> - Should have first acquired such knowledge; and
> - Did so within three years of the alleged breach.
>
> The requisite knowledge has two elements:
>
> - Knowledge of the alleged breach, and
> - Knowledge that the investor has incurred loss or damage.

Grand River Jurisdictional Decision ¶ 38.

of limitations set forth expressly by Article 1116(2). A basic canon of interpretation enjoins construction of an instrument in ways that give effect to all of its provisions.

31. Merrill & Ring's reading would also, as set forth below, allow foreign investors to challenge state laws, regulations, and other measures that have been in place and operative and imposing economic costs on them for many years before NAFTA's entry into force—contrary to the interpretation of Chapter 11's jurisdictional reach and purpose and contrary to an international principle that has been acknowledged by states, private parties, and scholars alike and which is taken up below.

(ii) The "Object and Purpose" of This Part of the NAFTA System

32. An examination of the overall object and purpose of NAFTA reinforces the specific textual analysis of Article 1116(2) which follows.[23] NAFTA is "forward looking," and it empowers the State Parties "to convene tribunals to assess responsibility for events occurring—in the case of NAFTA—from January 1, 1994, onward."[24] This is entirely consistent with general international law, which, by default—that is, unless the parties to a treaty otherwise specify—presumes that treaties only operate prospectively.[25] "Only claims arising *after* NAFTA's entry into force are actionable."[26]

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[23] Vienna Convention art. 31.

[24] Jack J. Coe, Jr., *The Mandate of Chapter 11 Tribunals—Jurisdiction and Related Questions, in* NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 215, 246 (Todd Weiler ed. 2004).

[25] Vienna Convention art. 28 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any

33. Hence, for example, in *Mondev*, "[b]oth parties accepted that the dispute as such arose before NAFTA's entry into force, and NAFTA is not retrospective in effect"; and the tribunal agreed.[27] This did not mean that events preceding 1994 could never be "relevant" to a Chapter 11 claim, but their relevance would be limited to an evaluation of conduct *after* 1994:

> [E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has *subsequently* committed a breach of the obligation. But it must be possible to point to *conduct of the State after that date which is itself a breach.* In the present case the only conduct that could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the [Massachusetts Supreme Judicial Court] and the Supreme Court of the United States, which between them put an end to [the claims of a wholly owned limited partnership of claimant Mondev] under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev.[28]

34. Mindful of the exclusively *prospective* application of NAFTA, it is vital to appreciate that Merrill & Ring's claims challenge a regulatory regime, which, in its essentials, has been in place in British Columbia for more than twenty years—that is, since Canada introduced the surplus regulation for federal lands in 1986, when it promulgated and implemented *Notice 23*.[29] Moreover, it is a policy regime, the

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situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."); *see also* OPPENHEIM'S INTERNATIONAL LAW 1249 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

[26] Coe, Jr., *supra*, at 246.

[27] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 57.

[28] Mondev International, *supra*, ¶ 70 (emphasis added).

[29] Regulation of lands such as those owned by Merrill & Ring by the federal government stretches back even further. It began with the War Measures Act of 1942. *Notice 102*—which, for extraneous reasons related to Canada's federal system, supplanted *Notice 23* in 1998—has, in any event, itself been

economic costs of which Merrill & Ring had acquired knowledge from prior applications before the lapse of the three year period of repose.

35. The retrospective force of Merrill & Ring's theory is almost unlimited. If a challenge to *Notice 102* is not time-barred, then neither is a challenge to *Notice 23*. Yet clearly Merrill & Ring may not challenge *Notice 23*: that would be to apply NAFTA retrospectively to evaluate a measure establishing regulatory policies that had already been in force on the date of its entry into force. Surely Merrill & Ring would not be entitled to challenge *Notice 102* if Canada had simply renumbered *Notice 23* as *Notice 102* in 1998, after NAFTA's entry into force. Yet, tellingly, one scrutinizes Merrill & Ring's Statement of Claim in vain for any indication of a *substantive* change in the treatment of its logging business as a consequence of the promulgation of *Notice 102*. And this makes perfect sense in light of the *Evans* decision. Canada did not issue *Notice 102* in 1998 to impose new, still less new and more onerous, laws or regulations on forest land owners in British Columbia such as Merrill & Ring. Rather, because of Canada's federal system, it simply added a federal representative to British Columbia's Timber Export Advisory Committee ("TEAC"), thus creating the Federal Timber Export Advisory Committee ("FTEAC").

36. Logic and pragmatic considerations also argue against the theory upon which this retrospective challenge is based. To allow it would be to enable a private party of one State Party, which has been operating in the territory of another since

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implemented and administered by Canada since April 1998, and Merrill & Ring concedes that, since that time, it has operated its business in conformity with this regulation.

before NAFTA's entry into force, to bring Chapter 11 challenges to *any* law or regulation that it dislikes, even though it had been subject to that measure for years and may even have entered the local market while it was in force. Insofar as any regulation requires an entity subject to it to act in ways it would not, if there were no regulation, that regulation has economic costs for those subject to it. To allow complaints of those costs to be lodged long after the policy regime had been installed on the basis of a subsequent routine application and after the date of NAFTA's entry into force would lead to a torrent of investor-state arbitral claims. It would also make a mockery of good faith interpretation of NAFTA Article 1116(2) "in accordance with the ordinary meaning to be given to [that term] of the treaty in [its] context and in the light of [the treaty's] object and purpose."[30] Nor should one overlook, in any consideration of the policies underpinning the obligations of timeliness, the reasonable governmental and third-party interests. It is not simply that investors should not be allowed "to sit on their hands" with respect to their claims. Governments should have the opportunity to defend claims as changes come into force and third parties should be able to rely on established legal arrangements in the investment of their own treasure. Both of these interests would be defeated if claims could be brought long out of time.

37. In short, if Merrill & Ring is correct that the 1998 policy regime established by *Notice 102* constitutes a "continuing violation" that may be challenged under Chapter 11, then it is difficult to see what laws and regulations that predated NAFTA

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[30] Vienna Convention on the Law of Treaties art. 31, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

would *not* be subject to challenge. The ordinary language, context, object and purpose, and intent of NAFTA preclude an interpretation that would effectively transform the instrument into a vehicle for arbitral tribunals retrospectively to appraise the full range of laws and regulations that had been applied to foreign investors by the states parties before NAFTA entered into force.

(iii) Continuing Violations in International Law

38. Article 1116(2) is a *lex specialis* which displaces customary international law which might otherwise apply. As the International Law Commission observed, in Article 55 of its Articles on State Responsibility, its effort to codify this area of customary international law,

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of international responsibility of a State are governed by special rules of international law.[31]

Furthermore, one may ask, as the tribunal in *BG v. Argentina*[32] did with respect to the application of the ILC's Articles on State Responsibility, as to whether they even apply to the relations between a private investor and a government operating under a BIT.[33]

39. But even if general international law were to apply, Merrill & Ring's argument in my judgment, misunderstands the concept and function of a "continuing violation" in international law. That concept is not applied mechanically or acontextually. The Commentary to the International Law Commission's Articles on

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[31] GAOR 56th session, Supplement No. 10 (A/56/10) at 356.
[32] BG Group PLC v. Argentina, Final Award, December 24, 2007.
[33] Id. at ¶408.

State Responsibility correctly emphasizes that "[w]hether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case."[34] As noted in the preceding section, NAFTA, which supplies the relevant primary obligation here, did not invest Chapter 11 tribunals with jurisdiction retrospectively to appraise measures, such as laws and regulations that predated its entry into force.

40. In different places, the Articles on State Responsibility and the accompanying commentary make clear that timeliness in claiming and a time-bar for failure to act in a timely fashion is inherent in the international law of State responsibility. Article 20 of the Articles provides that

> Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

The commentary observes that "cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility."[35] Article 45 provides, in relevant part,

41. The responsibility of a State may not be invoked if:

. . .

> (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

The commentary observes that

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[34] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 136 (2002).

[35] GAOR, 56th session, Supplement No. 10 (A/56/10) at 174.

> Subparagraph (b) deals with the case where an injured State is to be considered as having by reasons of its conduct validly acquiesced in the lapse of the claim. The articles emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particulate where the injured State does everything it can reasonably do to maintain its claim.[36]

The standard "*everything* it [the State] can reasonably do to maintain its claim" is quite high.

42. Thus, neither the *lex specialis* nor general international law – which refers one back to the "primary obligation and the circumstances" – supports Merrill & Ring's interpretation of Article 1116(2).[37]

43. In the general principles of international law, the concept of a continuing violation serves as an exception to the general principle that claims may be extinguished by the passage of time, and its application must be sensitive to this fact. Bin Cheng, in his classic study, explained the *raison d'être* for a period of repose (or, as it is also known, the doctrine of extinctive prescription). Ordinarily, in international law, the doctrine reflects

> the concurrence of two circumstances: –
> 1. Delay in the presentation of a claim;
> 2. Imputability of the delay to the negligence of the claimant.[38]

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[36] Id. at p. 309.

[37] It is also important to note that Pauwelyn, cited in the Claimant's Memorial, affirms the general principle that the *lex specialis,* followed by the international law principle of extinctive prescription should apply in assessments of continuing violations: "so-called time limits, can be activated in two instances: firstly, where time limits are explicitly inserted in the legal instrument or provision conferring jurisdiction on the tribunal ... A second category of time limits emerges in the operation of the rules of general international law related to the doctrine of extinctive prescription." Pauwelyn, J. "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", 66 *The British Yearbook of International Law* 415 (1996) at 430.

[38] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 378-79 (1953).

Delay generally "gives rise to a presumption against the existence of the alleged right," and furthermore, a "long lapse of time inevitably destroys or obscures the evidence of the facts and, consequently, delay in presenting the claim places the other party in a disadvantageous position."[39] (One might add that delayed prosecution of claims would disrupt the many good faith investments that may have been made by third parties on the assumption that the previous legal situation would not be changed.) Because, however, all of these presumptions remain *factual* in nature, absent an express treaty rule such as Article 1116(2) of NAFTA, they may be "rebuttable."[40] Similarly, the second factor, negligence, supplies a reason for extinctive prescription because where a claimant has "suffered matters to proceed to such a state that there would be *a danger of mistaking the truth*, prescription operates and resolves such facts against him."[41] But here too, as Cheng stresses, the general principle is subject to the maxim *cessante ratione legis cessat ipsa lex*; it "does not apply" where "these justifying circumstances are not present."[42]

44. In considering time limits as applied to continuing acts, the Memorial of the Investor relies, in part, on Graeme Mew's *Law of Limitations*. Paragraph 463 of the Memorial of the Investor, citing to Mew, submits that "Tribunals and commentators generally recognize that time limits, such as NAFTA Article 1116(2), have two main purposes: to enable the respondent to collect evidence in its defence and to provide

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[39] CHENG, *supra*, at 380.
[40] CHENG, *supra*, at 381.
[41] CHENG, *supra*, at 381 (internal quotation marks and citations omitted; emphasis added).
[42] CHENG, *supra*, at 382.

certainty and stability." Merrill & Ring, however, leaves out the Mew's reference to a consultation paper of the English Law Commission which considered the issue of certainty and stability:

> Apart from this, the state has an interest in promoting legal certainty. Not only potential defendants, but third parties need to have confidence that rights are not going to [sic] disturbed by a long-forgotten claim. Financial institutions giving credit to businesses, for example, have an interest in knowing that a borrower's affairs will not be damaged by the revival of years old litigation. Buyers who want to purchase land or goods held by a potential seller want to know that their title cannot be disturbed by a third party to the deal.[43]

From this quotation, it appears that the stability to which Mew refers opposes Merrill & Ring's position and supports the proposition that time limitations should be generally respected in international law. In addition, it is worth noting that Merrill & Ring's Memorial omits two additional "purposes" to which Mew refers: "Four broad categories of reasons for a limitations system can be identified: **3.1 'Peace and Repose'**, **3.2 Evidentiary Concerns, 3.3 Economic and Public Interest Considerations**, and **3.4 Judgmental Reasons**."[44] These four categories, and even only the two referenced by Merrill & Ring, confirm the applicability of the time limit regime in Article 1116(2).

(iv) Continuing Violations in Human Rights Law

45. In the approach to the question of the timeliness of claims, it is important to note a fundamental difference between the major human rights treaties and NAFTA. NAFTA, in Article 1116(2) has a time-bar which is directed at the investor - "*An investor* may not make a claim" -- and represents an absolute limitation on the rights granted to

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[43] G. Mew. *The Law of Limitations*, 2nd ed., (Markham: Butterworths, 2004) at 13, citing England and Wales Law Commission, *Consultation Paper on Limitation of Actions* (Law Com 151, 1998) at paras. 1.31-1.33.
[44] *Id.* at 12-13.

the investor as a putative claimant. Each right in Chapter 11 is granted to the qualifying investor subject to the limitation that it may not form the basis of a claim "if more than three years have elapsed from the date . . . ." This is a true time-bar of rights and it is absolute. Indeed, the only point for interpretation by a tribunal seized of a claim is whether an investor seeking to be a claimant "should have first acquired" the requisite knowledge before the investor claims it actually did acquire it; moreover this is an interpretative opportunity which always puts the claimant on the defense! By contrast, the major human rights instruments direct their provisions with respect to timeliness at the tribunal and deal with *its* competence. Article 35(1) of the European Convention on Human Rights states that

> *The Court* may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.

Article 46(1)(b) of the American Convention on Human Rights provides that

> 1. Admission by the Commission . . . shall be subject to the following requirements:
> . . .
> (b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights ws notified of the final judgment.

Unlike NAFTA, neither of the human rights instruments' provision on timeliness relates to the right of the putative claimant. Both of these provisions relate to the competence of the body in question. As such they are subject to the principle of *compétence de la compétence* and thus have been interpreted more broadly than is permissible under Article 1116(2) of NAFTA. Moreover, the interpretation to which the human rights

treaties have been subjected has been motivated by a different set of concerns from those that concern NAFTA.

46. The International Law Commission's "primary obligations and circumstances" are critical to understanding the special practice with respect to continuing violations that has been developed in international human rights law. The concept of continuing violations has been most commonly applied to the most grievous types of international human rights violations. As will be evident from the review of European and Inter-American jurisprudence below, the unique application of the doctrine of continuing violations in the context of international human rights law reflects a recognition that unlike ordinary commercial claims that sound in contract or tort, violations of certain fundamental human rights infringe *jus cogens* norms of contemporary international law. Because they threaten fundamental values of individual human life, freedom, and dignity, the general rationales for a strict period of repose in the context of international claims and, indeed, other human rights claims have less force. This is apparent not only in judgments of international human rights courts but in various legislative instruments adopted by states, which reinforce a strong *opinio juris* to the same effect: for example, the Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity[45] and the U.N. Declaration on the Protection of All Persons from Forced Disappearance.[46] The preamble to the former instrument clarifies that it is the *gravity* of the violations – the

[45] Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), Annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968).
[46] U.N. Declaration on the Protection of All Persons from Forced Disappearance, G.A. Res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992).

nature, that is, of the relevant primary obligation – that militates against the application of a limitations period for the prosecution of war crimes and crimes against humanity:

> Considering that war crimes and crimes against humanity are among the gravest crimes in international law,
>
> Convinced that the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security,
>
> Noting that the application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes,
>
> Recognizing that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application, ...[47]

Article 17 of the U.N. Declaration on the Protection of All Persons from Forced Disappearance thus provides:

> 1. Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.
> 2. When the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established.

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[47] Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity pmbl., G.A. Res. 2391 (XXIII), Annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968).

> 3. Statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and *commensurate with the extreme seriousness of the offence.* [48]

47. For *jus cogens* norms of international human rights, the rationales for a strict period of repose explained by Cheng yield to another important policy. In the paradigmatic case of a disappearance, for example, it is clear that the applicant bears no responsibility for the delay in the presentation of his or her claim; to the contrary, it is precisely because of the state's malfeasance, not the claimant's negligence, that the claim could not be presented earlier. Furthermore, if the violation continues, then common judicial presumptions—for example, that evidence has become stale or that witnesses' memories will be less reliable—may be rebuttable or, in any event, must give way because of the gravity of the violation. "In every case, where such circumstances [justifying extinctive prescription's *raison d'être*] exist, conformity with the principle is regarded as bringing about *substantive justice*, while departure therefrom works injustice."[49] This is, as legislative instruments and judicial opinions alike attest, often *not* the case for violations of *jus cogens* norms of international human rights law, and the "continuing violation" exception reflects this fact.

48. *Jus cogens* norms are, by definition, insusceptible to derogation. Efforts by states to create a *lex specialis* treaty provision limiting the time for bringing claims in such a way as to be in violation of a *jus cogens* norm would fail. But NAFTA does not contravene *jus cogens*, so a *lex specialis* such as Article 1116(2) would not be barred by the

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[48] U.N. Declaration on the Protection of All Persons from Forced Disappearance art. 17, G.A. Res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992) (emphasis added).
[49] CHENG, *supra*, at 386 (emphasis added).

considerations operative in the human rights cases considered above. Bearing in mind that the human rights jurisprudence is not entirely apposite to NAFTA, I will, nonetheless, consider that jurisprudence briefly.

49. Both the Inter-American and European human rights systems have adopted and elaborated the concept of continuing violations in order to extend their jurisdiction over certain serious violations of international human rights law that would otherwise fall outside their temporal jurisdiction. They have been able to do so because the six month limit with which they dealt related explicitly to *their* competence and not to the rights concerned; indeed, under international law, many of those rights could not be subjected to statutes of limitation. Thus, continuing violations under human rights systems can be broadly distinguished from continuing violations under other systems due to the type of claimant (in human rights systems, it is an individual victim), the instrument under which the claim is brought (*e.g.* the European Convention on Human Rights), and the adjudicatory body. Pauwelyn notes these distinctions as regards the European system and provides that these characteristics should be considered when weighing their respective jurisprudence:

> The European Commission and Court of Human Rights, on the other hand, mostly deal with claims of individuals against a State and supervise a specific 'public order of Europe'. The enforcement of the Convention does not depend on the *ad hoc* consent of the member parties ... The Special Rapporteur to the ILC, Arangio-Ruiz, came to a similar conclusion when he remarked that the European institutions are more municipal adjudicating bodies, concerned with acts of national authorities towards individuals *within* a municipal legal system, rather than an international tribunal considering the complex wrongful act of a State in

its *external* relations with another State. These considerations should be taken into account in the discussion of the case law below.[50]

In 1962, in the *De Becker* matter, the European Commission of Human Rights ("Commission") sustained its competence *ratione temporis* to consider Belgium's alleged violations of the applicant's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention").[51] The Commission held that a provision of the Belgian Penal Code, which restricted the applicant's right to continue to practice his career as a journalist based on a prior conviction for collaboration with Nazi Germany, could be examined even though it had been enacted before the Convention entered into force because it created "a continuing situation in respect of which he claims to be the victim of a violation of the right to freedom of expression";[52] or as the European Court of Human Rights ("ECHR") put it, "the Applicant had found himself in a *continuing situation* which had no doubt originated before the entry into force of the Convention in respect of Belgium (14th June 1955), but which had continued after that date, since the forfeitures in question had been imposed 'for life.'"[53] On the date of the challenge, Belgium arguably continued to breach the relevant primary obligation: not to infringe the right to freedom of expression.

50. The jurisprudence of the ECHR has since developed the concept to enable that court to appraise the compliance of states with their primary obligations under the Convention. In *Loizidou v. Turkey*, for example, the ECHR sustained its jurisdiction

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[50] Pauwelyn, *supra* note 36, at 429.
[51] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.
[52] De Becker Case, 2 Y.B. EUR. CONV. ON H.R. 214, 234 (Eur. Comm'n on H.R.).
[53] De Becker v. Belgium, Application No. 214/5, Judgment, 27 March 1962, ¶ 8 (emphasis added).

ratione temporis to consider the allegations of a Greek Cypriot woman whose property had been seized after Turkish troops invaded northern Cyprus in 1974 and after the unrecognized Turkish Cypriot government purported to expropriate her property by decree in 1985, even though Turkey had not accepted the ECHR's jurisdiction under Article 46 of the Convention until 22 January 1990. But the Court's reasoning is significant: Because Turkey had no lawful right to the property, its refusal to permit the applicant access to and enjoyment of that property constituted a continuing violation of her property rights under the Convention.[54] These cases demonstrate the contextual assessment of a "continuing violation" and the emphasis on the role of the individual victim. As Pauwelyn observes:

> From the outset, one of the decisive elements in the Commission's decision on whether a continuing situation exists has been whether the position in which the victim is placed represents a continuing situation in violation of the Convention or, on the contrary, a violation of its rights and freedoms which clearly dates from the past (i.e. an instantaneous fact). In other words, the Commission focuses on the *effects* on the *victim* of the act (*in casu* the individual), taking into account all relevant circumstances of the case, rather than on the objective qualification of the *act* as such or the subjective intentions of its *author* (*in casu* the State). In this sense all rights and freedoms protected by the Convention can be the object of a continuing violation.[55]

51. In the Inter-American human rights system, the Inter-American Commission and Court have also established that certain violations, notably disappearances, constitute continuing violations because the violation of the primary obligation extends for so long as the state refuses to account for the disappeared person.

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[54] Loizidou v. Turkey (Merits), 1996-VI Eur. Ct. H.R. 2216 (1996); *see also* CRAWFORD, *supra*, at 135 n.252 (collecting ECHR jurisprudence on point).
[55] Pauwelyn, *supra* note 36, at 421.

In *Blake v. Guatemala*,[56] which relies on the seminal *Velázquez Rodríguez* case[57], for example, even though Nicholas Blake and Griffith Davis, a journalist and photographer, had been abducted in 1985, they "remained disappeared . . . until the dates on which their remains were discovered."[58] The Inter-American Court of Human Rights ("IACHR") reasoned, following the Commission and its prior jurisprudence, that "the crime of forced disappearance is an *indivisible whole* inasmuch as it is a continuing or permanent crime, which extends *beyond* the date on which the actual death took place in the context of the disappearance," for it also includes the state's continuing unlawful conduct of concealing the victims' whereabouts and obstructing justice.[59] These latter acts, as well as Guatemala's neglect of yet another primary obligation, viz., its "disregard of the duty to organize the apparatus of the State in such a manner as to guarantee the rights recognized in the Convention,"[60] continued for years after the initial abduction and murder of Blake.

52. The standard rationales for a period of repose, which NAFTA explicitly supplies in Articles 1116(2) and 1117(2) and which relate to the rights in Chapter 11, apply with full force to the claimants' Chapter 11 claims in this arbitration. The interest in legal stability and predictability, which a period of repose serves, protects a regulatory regime such as Canada's federal surplus policy regulations, which, in its essentials, has been in place for decades. The provisions of NAFTA make clear that

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[56] Blake v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 36, at 1 (2 July 1996).
[57] Velázquez Rodríguez v. Honduras, IACtHR 29 July 1988, Ser. C. No.4 (1988).
[58] *Id.* ¶ 52(b).
[59] *Id.* ¶¶ 54-55.
[60] *Id.* ¶ 65.

none of the States Parties to NAFTA wanted it to operate retrospectively so as to dramatically upset legal and regulatory frameworks upon which past investors relied. An environment favorable to cross-border investment requires, of course, not only rules to ensure the fair and equal treatment of foreign investment, but a stable, predictable legal environment for investment. That would be impossible were the statutes and regulations established and maintained by the States Parties to NAFTA prior to its adoption perpetually subject to challenge under Chapter 11—despite Articles 1116(2) and 1117(2)—simply because they must perpetually be implemented and administered. Yet that would be the inevitable result were each discrete act implementing or administering a measure, within the meaning of Article 201, to be construed as itself a measure in order to set back the limitations clock under Articles 1116(2) and 1117(2).

(v) Related Jurisprudence

53. A number of cases have dealt with or touched upon the effect of Article 1116(2) (or its correlative Article 1117(2)). In arbitral systems, of course, prior awards are not binding on subsequent tribunals. But depending upon their cogency, prior awards may have persuasive authority. The relevant awards may be reviewed briefly.

54. In *Mondev*, discussed *supra*, the tribunal first noted that NAFTA did not apply retroactively and that any claims arising from before its entry into force could only be relevant in support of conduct occurring after 1994:

> [E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has *subsequently* committed a breach of the obligation. But it must be possible to point to *conduct of the State after that date which is itself a breach.* In the

> present case the only conduct that could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the [Massachusetts Supreme Judicial Court] and the Supreme Court of the United States, which between them put an end to [the claims of a wholly owned limited partnership of claimant Mondev] under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.[61]

The *Mondev* tribunal emphasized the "forward looking" nature of treaties as established under international law. Next, the tribunal noted the distinction between a NAFTA claim and a diplomatic protection claim:

> 74. Nor do Articles 1105 or 1110 of NAFTA effect a remedial resurrection of claims a Canadian investor might have had for breaches of customary international law occurring before NAFTA entered into force. It is true that both Articles 1105 and 1110 have analogues in customary international law. But there is still a significant difference, substantive and procedural, between a NAFTA claim and a diplomatic protection claim for conduct contrary to customary international law (a claim which Canada has never espoused).
> 75. For these reasons, the Tribunal concludes that the only arguable basis of claim under NAFTA concerns the conduct of the United States courts in dismissing LPA's claims. Moreover it is clear that Article 1105(1) provides the only basis for a challenge to that conduct under NAFTA.

This quotation affirms the exceptional position of "continuing violations" in international human rights law as different from a "continuing breach" in an arbitral dispute.

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[61] Mondev International, *supra*, ¶ 70 (emphasis added).

55. The tribunal in *Feldman v. United Mexican States*[62] considered the meaning of Article 1116(2) in both its Interim Decision on Preliminary Jurisdictional Issues and its Final Award. In the Interim Decision, the tribunal focused exclusively on the definition of "make a claim" in Article 1116(2) and found that "the time at which the notice of arbitration has been received by the Secretary-General rather than the time of delivery of the notice of intent to submit a claim to arbitration is apt to interrupt the running of the limitation period under NAFTA Article 1117(2)."[63] This determination was important given that some of the alleged measures fell between the two dates. At the same time, the tribunal provided that it would join two key questions under Article 1117(2) to its examination of the merits: (a) whether the Parties on or about June 1, 1995 reached an agreement concerning CEMSA's right to export cigarettes and to receive tax rebates on such exports, and whether deviation from this agreement was formally confirmed in February 1998, thus bringing about a suspension of the limitation period for some 32.5 months; and (b) whether the Respondent is equitably estopped from invoking any limitation period because it gave the Claimant assurances that exports would be permitted and rebates paid to CEMSA.

56. In its Award on the merits, the tribunal held that there was no suspension or estoppel of invocation of the limitation period. The tribunal concluded that suspension or "tolling" of the period of limitations is unwarranted under the *lex specialis*, for the BIT does not provide any express language on tolling or suspension of

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[62] Marvin Roy Feldman Karpa v. United Mexican States. ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, December 6, 2000; Award December 16, 2002.
[63] *Id.*, Interim Decision on Preliminary Jurisdictional Issues, ¶ 44.

the limitations period as well as under international law. Tolling and a "continuing breach" are quite different matters. For the purpose of this opinion, however, the key point is that tribunals have strictly enforced observance of the three year time bar.

57. The tribunal ruled that tolling applies only in exceptional circumstances:

> Even under general principles of international law to be applied by international tribunals, it should be noted that in several national legal systems such suspension is provided only in the final part of the limitation period (*e.g.* in the last six months) and only either in cases of acts of God or if the debtor maliciously prevented the right holder from instituting a suit ... Nothing in the file shows that the Claimant, appropriately represented by counsel, was prevented from taking into consideration all relevant factors. Therefore, the Tribunal confirms April 30, 1996 as the cut-off date of the three-year limitation period under NAFTA Article 1117(2).[64]

58. As for equitable estoppel, the tribunal found that there was none. NAFTA Articles 1116(2) and 1117(2) "introduce a clear and rigid limitation defense, which, as such, is not subject to any suspension, prolongation or other qualification." A derogation from the limitation defense could only occur under "exceptional circumstances:"

> But any other state behavior short of such formal and authorized recognition would only under exceptional circumstances be able to either bring about interruption of the running of limitation or estop the Respondent State from presenting a regular limitation defense. Such exceptional circumstances include a long, uniform, consistent and effective behavior of competent state organs which would recognize the existence, and possibly also the amount, of the claim.[65]

The *Feldman* tribunal's conclusions on tolling and equitable estoppel at the merits phase – which are clearly reasoned – appears to contradict the penultimate paragraph

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[64] *Id.*, Award, ¶ 58.
[65] *Id.* at ¶ 63.

of the same tribunal's jurisdictional award. Paragraph 62 of the Interim Decision provides, "However, this also means that if there has been a permanent course of action by Respondent which started before January 1, 1994 and went on after that date and which, therefore, 'became breaches' of NAFTA Chapter Eleven Section A on that date (January 1, 1994), that post-January 1, 1994 part of Respondent's alleged activity is subject to the Tribunal's jurisdiction."[66] Given the Article 1116(2) findings in the award and the language of the provision in question, this paragraph is illogical and inconsistent. But overall, *Feldman* provides further support for the principle that a "continuing breach" does not constitute an exception to the time bar of NAFTA Article 1116(2). Applying *Feldman* to the present dispute, Merrill & Ring's claims under *Notice 102* would not have jurisdiction.

59. A thorough discussion of Article 1116(2) is to be found in *Grand River Enterprises Six Nations v. United States of America*, where the jurisdictional question turned on constructive knowledge of regulations - the MSA and associated enforcement measures -- with significant costs for the claimants, who were knowledgeable participants in a highly regulated industry. *Grand River's* tribunal saw extinctive prescription as the general practice: "The principle of extinctive prescription (bar of claims by lapse of time) is widely recognized as a general principle of law constituting part of international law."[67] The tribunal concluded that the documentary evidence of claimants' knowledge was insufficient to establish claimants' knowledge of

[66] *Id.*, Interim Decision on Preliminary Jurisdictional Issues, ¶ 62.
[67] Grand River Jurisdiction, *supra* note 11, at ¶ 33.

the MSA and associated enforcement measures.[68] But the tribunal found that claimants *should* have known. ""Constructive knowledge" of a fact," the tribunal held, "is imputed to [sic] person if by exercise of reasonable care or diligence, the person would have known of that fact."[69] In the facts of the case, the industry in question was "heavily regulated and taxed"[70] and "claimants could not have been unaware of the extensive regulation and taxation."[71] Citing to *MTD, Maffezini and Feldman*,[72] with respect to the burden on a reasonably prudent investor to inquire and inform itself of local law, the tribunal concluded the claimants "should have known of the MSA and of the Escrow Laws and other state actions taken prior to that date to implement the MSA."[73]

60. Article 1116(2) has, as will be recalled, two, cumulative requirements: knowledge of the alleged breach and knowledge that loss or damage is incurred. The *Grand River* tribunal also found constructive knowledge of the loss requirement: "[T]o the extent that these measures necessarily resulted in loss or damage to the Claimants before March 12, 20001, appropriate diligence would have disclosed that fact."[74] The tribunal found *Mondev* persuasive and relied on its tribunal's holding that "a Claimant may know that it has suffered loss of damage even if the extent of quantification of the loss or damage is still unclear."[75] The tribunal's formulation is important:

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[68] Id. at ¶ 57.
[69] Id. at ¶ 59.
[70] Id. at ¶ 62.
[71] Id. at ¶ 63.
[72] Id. at ¶ 67.
[73] Id. at ¶ 71.
[74] Id. at ¶ 73.
[75] Id. at ¶ 78, citing *Mondev*, op. cit. at ¶ 87.

> Becoming subject to a clear and precisely quantified statutory obligation to place funds in an unreachable escrow for 25 years, at the risk of serious additional civil penalties and bans on future sales in case of non-compliance, is to incur loss or damage as those terms are ordinarily understood. A party that becomes subject to such an obligation, even if actual payment into escrow is not required until the following spring, has incurred "loss or damage" for purposes of NAFTA Articles 1116 and 1117.[76]

61. *Grand River* also considered and allowed "properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events."[77] Again it relied on *Mondev* and *Feldman*.

62. *Grand River* provides a thoughtful and searching consideration of the interpretation and application of Article 1116(2). Although it was not required to consider the issue of what constitutes a "measure," for purposes of Article 1116(2), it clearly distinguished between statutory and regulatory enactments, which constituted the relevant measure from their implementation. Indeed, in the quoted sentence in the preceding paragraph the tribunal speaks specifically of "claims challenging important statutory provisions." *Grand River* is also consistent with prior jurisprudence with respect to the requisite precision of the knowledge of loss due to the measure. An exact quantification is not required. As applied to the case under discussion, *Grand River*'s holding would view Merrill & Ring as time-barred by operation of Article 1116(2).

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[76] Id. at ¶ 82.
[77] Id. at ¶ 86.

63. In *Glamis Gold v. U.S.*, the tribunal's Procedural Order No. 2, addressed the issue of a time bar when considering whether the arbitral proceedings should be bifurcated. The tribunal provided that

> [i]t is unclear from the pleadings of Claimant whether the three federal actions to which Respondent directs its objections are asserted as NAFTA claims in and of themselves or as supporting evidence of a later NAFTA claim ... Without prejudice to that question, it is clear that Claimant relies on the January 17, 2001, Department of the Interior Record of Decision and subsequent state and federal acts as a basis for its Chapter 11 claims. The Tribunal notes that even if it were to find the three mentioned federal actions to be time barred, such a finding does not eliminate the Article 1105 claim inasmuch as other federal actions are alleged by Claimant to be a basis for its claim. The potential exclusion of certain events at the merits stage to serve as independent bases of the claim will not in the circumstances of this proceeding exclude the claim in its entirety.[78]

Unlike the facts of *Glamis*, the facts of *Merrill & Ring* do not present a regulatory application for "supporting evidence of a later NAFTA claim." As provided earlier, *Merrill & Ring* brings a claim relying solely on the application of a recurring regulatory regime under *Notice 102*.

64. In *United Parcel Service of America, Inc. ("UPS") v. Canada,*[79], the claimant, UPS—a Delaware corporation, with a Canadian subsidiary, "UPS Canada"—claimed that Canada violated Chapter 11 of NAFTA by its unlawful treatment of UPS and UPS Canada relative to Canada Post, the state-owned and -operated postal service. As here, Canada pointed out that the claims (with one exception) were based on facts that the claimant knew or should have known well before 19 April 1997, the relevant date for

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[78] Glamis Gold Ltd., v. the United States of America, Procedural Order No. 2, May 31, 2005. at ¶ 19-20.
[79] United Parcel Service of America, Inc. v. Canada, Award, 24 May 2007 [hereinafter UPS Award].

purposes of the Article 1116(2) limitations period.[80] And, as here, the claimant argued that "on-going conduct constitutes a new violation of NAFTA each day so that, for purposes of the time bar, the three year period begins anew each day."[81]

65. The *UPS* tribunal started by acknowledging that "the measures that UPS claims violate Canada's NAFTA obligations were first *implemented* by Canada well before April 1997."[82] In the next six paragraphs, the tribunal summarized, without comment, the submissions and arguments of the parties. Then, in one single, conclusory paragraph, the tribunal adopted UPS' position and rejected Canada's arguments to the contrary:

> We agree with UPS that its claims are not time-barred. We put aside for the moment the question of when it first had or should have had notice of existence of conduct alleged to breach NAFTA obligations and of the losses flowing from it. *The generally applicable ground for our decision is that, as UPS argues, continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitations period accordingly.* This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. The use of the term "first acquired" is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss. The *Feldman* tribunal's conclusion on this score buttresses our own[83]

With the exception of the reference to *Feldman*, this statement is unsupported by any other reference or careful textual analysis of Article 1116(2) or to doctrinal discussion of the practice of extinctive prescription in public international law. It is unpersuasive in many ways. First, it is clearly wrong on the specific language of Article 1116(2). The

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[80] UPS Award ¶¶ 21-22.
[81] UPS Award ¶ 24.
[82] Id. at ¶ 22. (italics supplied)
[83] UPS Award ¶ 28.

meaning of that provision could hardly be plainer: "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." In this regard, the penultimate sentence of the quoted paragraph is illogical. It is not clear why confirmation of the alleged breach or the claimant's ability to more precisely calculate its damages should have any bearing on the limitations period. Indeed, it is well-established in NAFTA jurisprudence that a claimant need *not* be able to calculate the precise extent of its damages to initiate arbitration; it suffices that the investor know that it has "incurred loss or damage."[84]

66. Second, and related to the first, the tribunal overlooked the force of a *lex specialis* which the state-parties to NAFTA created. Third, even if one were to ignore the *lex specialis* and resort to general international law, the tribunal's view of a "continuing" violation as an exception to an express period of repose is simply not, as it says, "true generally in the law." The matter, as explained above, "will depend," as the Commentary to the Articles on State Responsibility stress, both "on the primary obligation and the circumstances of the given case."[85] But above all, the most astonishing thing here is the *UPS* tribunal's obliviousness to the specific terms of NAFTA Articles 201, 1101 and 1116(2).

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[84] Grand River Jurisdictional Decision ¶ 38; *see also* Mondev International, *supra*, ¶ 81.
[85] CRAWFORD, *supra*, at 136.

67. The *UPS* tribunal subsequently dismissed Canada's reliance on "dicta" in *Mondev* as support for the existence of a time bar in the present dispute:

> The dicta that Canada points us to are neither dispositive of the contentions in *Mondev* nor on point for this decision. The dicta do not relate to a continuing course of conduct that began before and extended past three years before a claim was filed. In that instance, the state's action was completed and the information about it known—including the fact that the investor would suffer loss from it—before subsequent court action was complete. The fact that the exact magnitude of the loss was not yet finally determined would not have been enough in that tribunal's judgment, to avoid the time bar if the time bar otherwise would have applied. As it was, there was no time bar and no continuing course of conduct—nothing in short that would shed any light or have any precedential consequence for disposition of the matter before us.[86]

But, as noted above, the *UPS* tribunal did not consider important *Mondev* language on the definition of a "continuing violation." Relying on the ILC Articles on Responsibility of States for Internationally Wrongful Acts, the *Mondev* tribunal had provided that

> there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage. Whether the act which constitutes the gist of the (alleged) reach has a continuing character depends both on the facts and on the obligation said to have been breached. In that regard it is convenient to deal initially with Mondev's claim under Article 1110 for expropriation.[87]

The *UPS* tribunal devoted one additional paragraph to the treatment of Canada's jurisdictional objections, which focused solely on the calculation of losses:

> Although we find that there is no time bar to the claims, the limitation period does have a particular application to a continuing course of conduct. If a violation of NAFTA is established with respect to any particular claim, any obligation associated with losses arising with respect to that claim can be based only on losses incurred within three years of the

[86] UPS Award, *supra*, ¶ 29.
[87] Mondev, *supra*, ¶ 58.

> date when the claim was filed. A continuing course of conduct might generate losses of a different dimension at different times. It is incumbent upon claimants to establish the damages associated with asserted breaches, and for continuing conduct that must include a showing of damages not from the inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2).[88]

According to the tribunal, in the case of "continuing courses of conduct" the three year time limitation of Article 1116(2) becomes relevant only at the moment of assessment of damages. Despite the continuing nature of the breach, damages can only be claimed in compliance with the three year period established under NAFTA.

68. In *Merrill & Ring* the primary obligations at issue are not, as in the human rights context, *jus cogens* norms that apply *erga omnes*, but particular commercial obligations established by NAFTA, which establishes a *lex specialis* that applies as between Mexico, Canada, and the United States in their mutual economic relations. Furthermore, given the circumstances of this case—that is, a challenge to a regulation that has been substantively unchanged for more than two decades during which time it was routinely applied to the claimant Merrill & Ring and the class to which it belongs—it would be wholly inconsistent with the object and purpose of NAFTA to apply the "continuing violation" exception. It would enable a foreign investor who has operated in one of the States Parties for more than a century to challenge retrospectively a regime to which it has been subject consistently for decades before NAFTA's entry into force. None of the States Parties wanted or expected NAFTA to authorize this sort of

[88] UPS Award, *supra*, ¶ 30.

challenge, which would have potentially catastrophic consequences for the stability and predictability of the environment for foreign investment as between the states parties.

69. In fact, Articles 1116(2) and 1117(2) seek to avoid belated challenges to measures that have long been enforced and relied upon by requiring that a "reasonably prudent investor" make "reasonable inquiries about significant legal requirements potentially impacting on [its] activities. . . . This is particularly the case in a field that the prospective investors know from years of past personal experience to be highly regulated . . . by state authorities."[89] Merrill & Ring has known that the timber industry in British Columbia is regulated by the federal government of Canada for more than a century, has been subject to regulation for more than sixty years, and has known and been subject to the particular federal surplus rule it now challenges since 1986, that is, for decades before it brought this arbitration. I believe that *UPS* erred in its application of the "continuing violation" doctrine to Article 1116(2). It is not inapposite that it deviates from all the other decisions treating Article 1116(2). Prior decisions are certainly entitled to respectful consideration but NAFTA does not establish a system of precedent,[90] and the Tribunal seized of the Merrill & Ring case therefore may —and, in my judgment, should—revisit, with fresh eyes, an issue in *UPS* that is both scantily reasoned and substantively doubtful.

VI. PRUDENTIAL CONSIDERATIONS

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[89] Grand River Jurisdictional Decision ¶ 66.

[90] NAFTA art. 1136(1); *see also* Grand River Jurisdictional Decision ¶ 36 ("As NAFTA Article 1136(1) makes clear, NAFTA arbitral awards do not constitute binding precedent.")

70. There are good reasons for the frequent practice of judicial parsimony: deciding cases on their facts. Even if one assumes that, arguably, circumstances may arise in which it would be appropriate to apply a continuing violations exception to Articles 1116(2) or 1117(2), the instant case can hardly be controversial. It should be clear beyond doubt that no NAFTA claimant that has known about and been operating under a measure comprised of a particular legal regime that predates NAFTA by decades should be permitted to use the continuing violation exception to evade the ordinary meaning of Article 1116(2). That object and purpose of NAFTA is emphatically not to authorize Chapter 11 arbitral tribunals to engage in retrospective, plenary appraisal of each state party's extant laws and regulations as of 1994, when NAFTA entered into force.

71. Merrill & Ring seeks to use Article 1116(2) as an expedient occasion to challenge a regulatory regime to which it has been subject for many years. If the continuing violations exception to the explicit limitations period of NAFTA Article 1116(2) applies in these circumstances such that Merrill & Ring's claim is not time-barred, then it is difficult to see which laws and regulations of the States parties, if any, would be safe from retrospective challenge.

VII. CONCLUSIONS

72. For the reasons set forth below, I conclude that:

A. As a general matter:

(i) "measure" is a defined term in NAFTA Article 201 and this definition controls for Chapter 11.

(ii) A claim may be brought under NAFTA Chapter 11 when a "measure," taken by a State-Party, breaches one of the obligations of that State-party, with respect to an investor or investment of another party.

(iii) But a claim may not be brought if more than three years have elapsed from the date on which a qualifying investor acquired or should have first acquired knowledge of the alleged breach and the loss or damage it incurs.

(iv) Where the measure alleged to have caused the breach is a long-standing and routinely applied regulatory regime and the investor had or should have had knowledge both of the regime and the economic costs of its routine application from prior applications, that investor may not evade the three year limitation and challenge the lawfulness under NAFTA of the regulatory regime by claiming that the "measure" is actualized or materialized in each recurring, routine and proper *application* of that regulatory regime.

B. With specific reference to the instant case,

(i) in accordance with NAFTA Articles 201 and 1101, the regulatory regime expressed in Notice 102 is the subject of the complaint at issue in this case.

(ii) Notice 102 is a "measure" within the meaning of NAFTA Article 201; specific and routine applications of the regulatory regime established under Notice 102, are not "measures".

(iii) Merrill & Ring had acquired specific knowledge of the applications of the regulatory regime and its economic costs to it through applications occurring more than three years before it submitted its claim under NAFTA.

(iv) in the circumstances, specific and routine applications of the relevant measure, viz., the regulatory regime established under Notice 102, cannot be used to prolong or circumvent the period of limitation established by Article 1116 in order to challenge the compatibility of that regulatory regime with other NAFTA obligations.

(v) consequently, the violations of NAFTA Chapter 11, which Merrill & Ring alleges, are time-barred by operation of NAFTA Article 1116(2).

Respectfully submitted

W. Michael Reisman

New Haven, Connecticut
April 22, 2008

Subscribed and sworn to before me this 22nd day of April, 2008.

Beth A. Barnes
Notary Public, Commission Expires: My Commission Expires Oct. 31, 2011