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

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In the Matter of Arbitration :
Between: :
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MERRILL & RING FORESTRY L.P., :
:
Investor, :
:
and :
:
GOVERNMENT OF CANADA, :
:
Respondent. :
- - - - - - - - - - - - - - - - - - x Volume 6

HEARING ON JURISDICTION AND THE MERITS

Saturday, May 23, 2009

The World Bank
1818 H Street, N.W.
MC Building
Conference Room 13-121
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to notice, at 8:30 a.m. before:

PROF. FRANCISCO ORREGO VICUÑA, President

MR. J. WILLIAM ROWLEY, QC, Arbitrator

PROF. KENNETH W. DAM, Arbitrator

Also Present:

MS. ELOÏSE OBADIA, Senior Counsel,
Secretary to the Tribunal

Court Reporter:

MR. DAVID A. KASDAN
Registered Diplomate Reporter (RDR)
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C O N T E N T S

P R O C E E D I N G S

PRESIDENT ORREGO VICUÑA: Good morning.

What did you say, Mr. Appleton?

MR. APPLETON: I asked if we might have 30 seconds before we begin.

PRESIDENT ORREGO VICUÑA: We will turn it over to Mr. Appleton.

Mr. Appleton, please.

CLOSING ARGUMENT BY COUNSEL FOR INVESTOR

MR. APPLETON: Thank you very much, Mr. President, Members of the Tribunal.

As we said at the opening of this case, this case is about seeing the forest and not getting lost in the trees. And now, after we've had a few days of listening to experts, we have taken a walk through the trees, and as we step back from the trees, we see a forest through the eyes of Merrill & Ring, and what we see is simple and clear.

The real view of the forest we see is perhaps best framed by what we heard from two of the key witnesses, Paul Stutesman and Judy Korecky.

The Tribunal will recall what Mr. Stutesman

08:05:07 said the administration and application of the Regime looks like from Merrill & Ring's point of view. And I quote: "It becomes day-to-day business for us, but it's not really day-to-day business in the way we do business in the U.S. It's like the bully shows up at the end of the streets, and you go by with your lunch bag and he takes your cookies every day, and if you give him any trouble, he takes your sandwich, too. The problem is you can't go back home because your mother says you have to go to school."

And you will recall what Ms. Korecky said about how the Regime really works. Professor Dam asked her, "But you really make that determination not on the basis of any rules or regulations, but just how you decide to handle it?

The witness's answer, Ms. Korecky: "It's the way we do business in Government."

That, Mr. President, Members of the Tribunal, is what this case is about.

Could I just go off the record for one moment.

08:06:18 (Pause.)

MR. APPLETON: Thank you. I'm back on.

How the Government administers the export of logs from British Columbia and how it treats Merrill & Ring is wrong and contrary to the principles of international law that Canada, through the NAFTA, has promised to protect. And when we clear away the debris, we also clearly see that the export of logs from British Columbia is governed by one national Regulatory Regime under the sole jurisdiction of the Federal Government of Canada. The same Regulatory Regime applies everywhere in the country, and it derives from one Federal statute called the Export and Import Permits Act, and the Export and Import Permits Act controls the export of all commodities on specified lists from Canada and regulates the granting of Export Permits. The Act is administered and implemented by civil servants of the Federal Government whose administrative authority and discretion delegated to them under Section 3(e) of the Act is for a particular purpose. That purpose is quoting the Act, "to ensure that

08:07:36 there is an adequate supply and distribution of the article in Canada for defense and other needs."

Now, the Federal Regulatory Regime applies to every commodity on the Export Control List, which includes logs, and is applied in the same way everywhere in Canada except in the Province of British Columbia, Canada.

And the reason why it's applied differently in British Columbia is because administrators of the Regime adopted an administrative policy that requires anyone who wants to export logs from British Columbia to satisfy a test before they are issued an Export Permit. The Federal Government doesn't require anyone who wants to export logs from any other Province in Canada to go through that test. In any other Province, someone who wants to export logs simply applies for an Export Permit, and the Export Permit is automatically issued to them.

The administrative policy, which purports to sanction this Regulatory Regime, this regulatory scheme that's applied differently to logs from British Columbia, is contained in a policy called

Notice 102, which describes itself as a notice to exporters under the Federal Export and Import Permits Act.

While the Federal Government has exclusive jurisdiction in Canada over the control of exports and the granting of Export Permits, it has no jurisdiction over forests or tree farming. That jurisdiction belongs to the Province of British Columbia, which has exclusive jurisdiction over all land in the Province of British Columbia, whether it is public land or private land.

And that Provincial jurisdiction extends to everything that grows on the land, which, in British Columbia, as the Tribunal well knows by now, is covered almost entirely by trees. It is the Province of British Columbia that governs trees and forests in the Province of British Columbia, and it does so through its Ministry of Forests, which derives its regulatory authority from the British Columbia Forest Act. And under the British Columbia Forest Act, the Province mandates that all timber harvested from land in the Province of British

Columbia must be used or processed in that Province.

The British Columbia Forest Act, however, provides for some exclusions to this mandate. It allows for administrative exemptions to be granted from the requirement to use or process timber within the Province, and I will quote, and here is the quote, "that timber is surplus to the requirements of timber processing facilities in British Columbia."

Now, the British Columbia Forest Act also states expressly that it applies to all land in the Province, whether public or private, and in the case of private land, regardless of when it became private.

So, the British Columbia Forest Act applies to all timber on the land in the Province of British Columbia, including through the adoption of British Columbia regulations in the case of Federal Lands and the Federal Export Import Permits Act. That Act applies to all log exports from British Columbia. The administrative policy developed by the British Columbia Ministry of Forests for the administration

of exemptions to the Provincial use requirements of the Forest Act is contained in the Ministry of Forests handout. This is termed the "Procedures for the Export of Timber."

And although it is directly contrary to provisions of the British Columbia Forest Act itself, the administration of the exemption policy purports to put the small amounts of private land in British Columbia that were bought from the Government before March 12, 1906, in a separate category of lands for the unexplained purpose of being called federally regulated.

Regardless of the administrative legality or constitutionality of the distinction which this Tribunal does not need to determine, the practical result of the categorization of some private land as federally regulated, which happens to be the category that most of Merrill & Ring's lands fall into, is that it has become an accepted convention of both industry and Government jargon to refer to it as Federal Lands in distinction to Provincial Lands.

This distinction, however, is completely arbitrary. It is one of form and not of substance, and it has no other practical or pragmatic consequence except for the administrative policies that are applied to the export of logs from the Province of British Columbia.

For administrative purposes, the Provincial exemption policy refers to a companion Federal policy contained in Notice 102, which, in turn, purports to adopt an administrative policy of the British Columbia Ministry of Forests that govern the use of trees grown in the Province.

And Notice 102 purports to have timber from British Columbia to be surplus to the needs of the Province before a Federal permit will be given for the export of the timber. It also purports to require that the determination of whether the timber is surplus is to be determined by the same Procedures as used in British Columbia.

The Federal policy, thereby, adopts the Provincial procedure of the TEAC Committee, and it turns the FTEAC Committee by adding a Federal

representative to it which, as we all know by now, is currently Ms. Korecky. And the Federal policy also incorporates the corollary that unless the logs have been given an administrative exemption under the administrative policy of British Columbia, it is FTEAC that determines if the logs to be exported from British Columbia are surplus to the needs of British Columbia before the logs can be granted an Export Permit.

Since the small amount of land that Merrill & Ring owns in British Columbia is deemed by these companion policies to be federally regulated, and Merrill & Ring does not have a Provincial exemption because the Provincial exemption policy does not grant exemptions to land on the South Coast of British Columbia, where most of Merrill & Ring's land is located, every time Merrill & Ring applies for a new permit to export its logs, it is subject to satisfying FTEAC that the logs it wants to export are surplus to the needs of British Columbia.

If Merrill & Ring satisfies FTEAC that the logs it wants to export are surplus to the needs of

British Columbia, then FTEAC will give Merrill & Ring an Export Permit. But if it does not satisfy FTEAC that the logs it wants to export are surplus to the needs of British Columbia, then Merrill & Ring will not be granted an Export Permit. So, Merrill & Ring then has to go through the so-called "Surplus Testing Procedure" and satisfy the Surplus Test again and again each time it applies for a log Export Permit.

Now, the problem is that the resulting administration of this Regulatory Regime is fiction operated by bureaucrats in a void of accountability, sanctioned only by an abdication of Government responsibility through practices, requirements, procedures, and discretionary decisions that are arbitrary and artificial and that substitute power and politics for a free and open market.

The problem is exacerbated by an absence of any rational connection between the avowed purpose of the Regime and the actual administration of it. The purpose of the Surplus Test and the surplus testing procedure itself is to determine whether or

not there is a shortage of logs in British Columbia. But, in fact, there is no shortage of logs in British Columbia. To the contrary, it is well-known in the industry and to the Government that there has actually been a huge surplus for over a decade. Even more astounding is that the application of the Surplus Testing Procedure does not actually test for shortage or surplus.

From the extensive evidence you've heard, which Canada did not even attempt to controvert, the Log Expert Control Regime is simply a pretense. It rests on pillars of sand that collapse under the weight of reality.

The Tribunal will recall, for example, that TEAC is also the administrative Committee which grants the British Columbia exemptions which are premised on there being a surplus of timber in British Columbia, and that Mr. Cook, who is the Secretary of TEAC, confirmed that TEAC has adjudicated several blanket exemptions based on that particular premise.

So, TEAC grants exemptions premised on a

surplus of supply. At the very same time it makes log export determinations premised on the shortage of supply in British Columbia.

The Tribunal will recall that Canada did not provide any documentary evidence evidencing a shortage of logs in Canada; and, in fact, it certified that there are no such documents. And although the procedure is called a Surplus Testing Procedure, FTEAC conducts no actual tests to determine if there is an surplus or a shortage. Instead, the test it applies is whether the subjective view of the FTEAC committee members, the price of it--it was whether in that view the price of an offer is within the range of the prevailing Domestic Market Price. Rather than being based on any verifiable objective data, that determination is based on anecdotes and whimsy.

Most importantly, the Tribunal will recall that when asked to explain the connection between price and surplus, Ms. Korecky testified they are two different considerations. Most disservingly, FTEAC does not even consider where there is

actually--I'm sorry, whether there is actually a surplus or a shortage. For example, you heard that companies in British Columbia are granted an annual allowable cut referred to as the AAC, which sets the volume of timber they can harvest. There is currently 60 million cubic meters of uncut timber on the Coast of British Columbia. And despite the known reality of companies buying logs from the Bi-Weekly Lists of logs advertised for export, when they have thousands of cubic meters available from their own lands, because buying logs from the Bi-Weekly Lists is cheaper their harvesting their own. And Ms. Korecky confirmed that the AAC is not a factor in FTEAC's determination of surplus.

In addition to FTEAC not considering the standing exemptions it grants to the North and Mid-Coasts, which are premised on surplus of supply, FTEAC does not consider the number of no bid sales in which auctions of timber, which are regularly held by the Timber Sales Division of the British Columbia Government, receive no bid because they're not necessary. There is no shortage.

Neither does FTEAC look to the economic factors generally or the state of the Provincial economy in particular. It does not take into consideration any assessments of shortage or surplus that might exist in industry or governmental reports, like the closure of some 60 sawmills in the past decade. Instead, Ms. Korecky confirmed that FTEAC simply accepts at face value that any offer that comes in is legitimate.

And there can be no excuse for the administrators of the Regime ignoring these real, overwhelming, and objective economic and industry indicators of nothing but a surplus of logs in British Columbia. The Memorandum of Agreement, the MOU that purports to govern the Federal and Provincial relationship in the area of log exports, requires that B.C. Ministry of Forests and the Department of Foreign Affairs and International Trade, DFAIT, to cooperate in the exchange of information. Failure to do so is simply irresponsible.

And throughout the hearing, the Tribunal

has observed Canada's witnesses disclaim responsibility for the policies and decisions of the Log Expert Control Regime because no one in Government will admit to being the decision maker. Mr. Cook said repeatedly that FTEAC and TEAC adjudicate offers and that they made the decisions about whether offers met domestic market value. Yet, he hastened that, and I quote, "The Committee does not make decisions." In the face of his own admission that he is not aware of whether the Minister ever disagreed with a TEAC recommendation in the normal course of business, and he is, to say at least, disingenuous with about the 300,000 offers FTEAC adjudicates every year, the single instance in which the Minister disagreed with a TEAC decision was based on Mr. Cook's recommendation.

So, there can be no doubt that TEAC's recommendations are in substance and effect the final decisions here.

Ms. Korecky told a similar story, and what emerged from her testimony is that, for all practical purpose, she considered herself to be the

judge in charge of making final decisions. In effect, after participating in the deliberations and the decisions of FTEAC, she makes a recommendation to herself. She then reports to herself and decides any appeals of her own decisions.

In the result not only is there no accountable decision maker, but there is no meaningful review process and no way to know the factors that will be taken into account.

The Tribunal may also recall that Ms. Korecky testified that the criteria and factors of review are not publicly available, and that she finishes her private review of her own decisions, and after she does so, she makes a final determination without reasons or explanation of the process followed or of the factors considered.

So, of the principal players, both Mr. Cook and Ms. Korecky have the authority and discretion to act unilaterally and to do unilaterally without any rules or written documents about the process itself or complaints about her decisions.

Ms. Korecky, as it turns out, is both

investigator as well as adjudicator of complaints about her own decisions. She testified that despite her acknowledged lack of expertise, she conducts her own investigatory inquiry process into complaints. In doing so, she usually seeks additional information from the advertising company, but only, "in certain instances" from the offering company.

It also seems incongruous that she justifies her lack of knowledge by describing herself as not being a subject matter expert while considering herself to be a perfectly--to be perfectly competent to conduct the high-level reviews without any subject matter assistance.

What the evidence also made patently clear is that the Regime is really administered by a small coterie of industry insiders who are all competitors of Merrill & Ring and who stand to benefit from their own decisions. And Mr. Cook also acknowledged that offerors may well have a common interest with committee members and that they are all friends.

By assessing the price of offers in relation to the prevailing Market Price, TEAC and

FTEAC effectively set the Domestic Market Price. Mr. Cook confirmed they all know the offers in advance before convening to set their view of the Market Price, and Ms. Korecky explains that they considered Market Price as a range and a 5 percent guideline of acceptable variation that determined the range.

So, if FTEAC's view of the Market Price range was a hundred dollars to $110, the 5 percent variation would result in offers anywhere from $95 to $115 being considered as Market Price offers. Margin fluctuations at that magnitude make private sector decision making and planning almost impossible.

And the process reveals several serious problems: First, there are no written conflict-of-interest guidelines. FTEAC meeting minutes show that at best, a committee member may withdraw from a discussion if an offer from his own company is being adjudicated, but he is nevertheless fully aware of all the other offers and, as well, the adjudication of his own company's offer, as soon

as he returns to the Committee table. And while all that information is kept secret from the rest of the industry, the thing, the acquiescence, the conflict of interest considerations is nothing but a transparently silly charade.

Second, the FTEAC committee members have an interest in keeping domestic prices as low as possible so that their own companies can buy logs at low prices from exporters. This sometimes happens in less than obvious ways. For example, there are three veneer mills in British Columbia, and representatives of two of those mills sit on FTEAC and TEAC. And although the third veneer mill, CIPA, does the blocking, the two other veneer mill owners have a financial interest in their adjudication of CIPA's offers, since they're all competing buyers in the same market and stand to benefit from setting the Market Price as low as possible for their own mills.

In the meantime, they have inside information about the amounts that their competitors are offering and whether those offers will be deemed

consistent with the Market Price by FTEAC. Committee members are given a summary sheet containing information about the offeror, seller, boom, number and description, and price, and they adjudicate on the claims of their competitors with a clear interest in the results of the recommendation. In other words, their approval of a lower price as indicative of fair Domestic Market Price effectively pushes the Domestic Market Price down and sets a new floor. The process amounts to price suppression by design.

And despite Ms. Korecky's assertion that, for the most part, companies will go and see the logs, and Mr. Cook's admission that the purpose of the remoteness provision was to bring the logs to a nonremote location for inspection, FTEAC Committee Members do not bother to physically inspect the logs the value of which they presume to adjudicate.

Yesterday, Professor Howse provided us with a three-part definition of transparency that encompasses publicity, the rule of law, and administrative fairness. This is a very useful

guide to assessing the striking lack of transparency in the Log Expert Control Regime. The Tribunal will recall that Ms. Korecky was asked if she had ever recommended that FTEAC deliberations be open, transparent, and public. She appeared to be puzzled by the content accepts and asked Mr. Nash to define the terms "open" and "transparent." She also confirmed that the practices under Notice 102 changed from time to time and that her decisions change in tandem with these changing practices.

Despite her reference to other factors that she will take into account, Ms. Korecky confirmed that the criteria for review of FTEAC recommendations are not publicly available. In fact, there is a complete dearth of notice and publicity in the Log Expert Control Regime as a whole. For example, there is no notice of FTEAC/TEAC meetings or agendas. There is no notice of changes in Committee composition. There is no circulation of Committee recommendations. There is no notice of Committee Procedures or criteria. There is no notice of prices and no notice of the

5 percent guideline.

There are particularly two telling omissions of the principle of transparency, the Remoteness Rule and the 90-day penalty box requirements. The Tribunal has heard much about the Remoteness Rule under Notice 102, the effect of which requires log suppliers to tow their logs to a nonremote location so that offerors can inspect the logs, but the meaning of remote is not publicly defined anywhere. The rule is unclear and inconsistent between TEAC and FTEAC resulting in inconsistent application. Mr. Cook who had only what he called a "rough and approximate understanding of the meaning of 'remote,'" had never seen a document defining the rule until he prepared his Affidavit for this proceeding.

Mr. Nash referred Mr. Cook to the E-mail in which Mr. Walders, defines remote in the terms that Mr. Cook essentially cut and pasted into his own Affidavit. Nonetheless, Mr. Cook cribbed--sorry, nonetheless, Mr. Cook's cribbed definition differed from Ms. Korecky's explanation of the term as being

privately defined by the industry.

The 90-day penalty box rule is intended to preclude offers from anyone who has exported logs directly or indirectly in the last 90 days. There are no Procedures with respect to the rule. There is no process for alerting Merrill & Ring when a company is in the penalty box, and there is no common understanding of when the penalty period commences.

Perhaps the most curious aspect of Ms. Korecky's view is that privacy and confidentiality concerns preclude the disclosure of any information about deliberations, decisions, penalties, or discipline to the industry at large.

In most regulatory regimes, including those for professionals and brokers, that kind of regulatory information is made public. The penalty box is also indicative of a larger problem in the Regime. There is no enforcement or policing of the Regime. It relies on log exporters to alert Government officials to abuses but denies them information to make that possible.

Above all, the evidence you heard makes clear that blockmail exists, it is real, and a systemic problem caused by the Log Export Control Regime. Merrill & Ring's witnesses were eloquent and honest in their descriptions of the threats and intimidation that are endemic to the Regime and caused serious and expensive consequences.

You heard how blockmailers used their ability to block Merrill & Ring logs from export and hold them hostage and extract a ransom to let them out. The ability to make an offer on a boom is used as leverage to obtain concessions on other logs, like price discounts or logs cut to order, and such concessions include price discounts or logs cut to order.

Mr. Stutesman, Mr. Kurucz, and Mr. Ringma all described how blockmail can occur at two times during the surplus advertising process. It can be used preemptively as leverage to prevent a block or after the offer has been placed as leverage to remove a block.

In the first, blockers threaten to make

offers on logs unless they receive something in return. In the second case, blockers threaten not to withdraw their offers unless they receive something in return. Blockmail is especially difficult for a small industry player like Merrill & Ring. It does not have the value of provincially--it does not have the volume of provincially regulated logs so other companies can use to placate these blockmailers, and as a exclusive log producer, it cannot turn to its own sawmill operations to process logs.

Another consequence of blockmail is what Mr. Ringma referred to as the iceberg, if you recall his exhibit. FTEAC only sees the tip of the iceberg. It is hypocrisy in the extreme to suggest that Merrill & Ring obtain surplus approval from most of its logs or that offers are only made for a small percentage of the logs that Merrill & Ring wants to export. Some offers are withdrawn before FTEAC can adjudicate them. Others are preempted through extortive negotiations, and Merrill & Ring has to reduce its harvest and to refrain from

listing logs when they're likely to be blocked.

The administrators of the Regime are well aware of the process of blockmailing. In the TimberWest case, for example, Mr. McCutcheon, the former Chair of FTEAC and TEAC, described blockmailing as an industry game to get logs. Mr. Cook acknowledged in his testimony that, and I quote, "Another thing that tends to happen is an offer may be withdrawn prior to the time of review." Say that the administration of the Regime receives notice of all offers that had been withdrawn. He also acknowledged that FTEAC Committee Members know about blockmail because, "as they are log traders and active in the log market, they would be a party to discussions with friends and cohorts. That, I'm sure, they're aware of it." And that's in reference to blockmail.

This is clarified by Mr. Ringma's testimony when he described how Interfor sends 200 blocking letters but ultimately withdrew 199 of them so FTEAC and TEAC only saw one or two letters. But the administration knew that all the offers had been

placed and had been subjectively withdrawn. So the administrators of the Regime knew.

Perhaps most troubling is that in the face of blocking in a system that they know is broken, both Mr. Cook and Ms. Korecky turn a blind eye to it. Ms. Korecky says that she simply accepts at face value that an offer is a legitimate offer. And Mr. Cook says, "I can't say that it's not happening, but it's not my general concern."

The resulting harm that blockmail--sorry--the Regime caused to Merrill & Ring--so the resulting from blockmail that is caused to Merrill & Ring is also very real. These logs are a perishable commodity, and markets change suddenly. The delays caused by the Log Expert Control Regime cause harm in many ways. Much time has passed, and many things have changed. Even if the logs are granted an Export Permit, Merrill & Ring must often rescale and resort the logs to meet the requirements of changing international markets or market changes that may render the logs unsalable.

For example, Merrill & Ring has logs it

advertised in November, what you could have sold for export at a very good International Market Price. But by the time the Surplus Testing Procedure's run its course, the international marketplace has plunged. Buyers have dried up and the logs still remain in the water. And the delay begins immediately as soon as the blocking offer is made, regardless of the amount of the offer.

For example, if the prevailing Market Price is a hundred dollars and a blocking offer is made at $50, which is clearly below the market rate, it has the same effect of causing a delay as if the offer was made for $98. And it makes it painfully easy for anyone wanting to cause Merrill & Ring a delay, which is immediately a delay of over 60 and maybe as long as 120 days.

The damage Merrill & Ring has sustained is also easy to summarize. The Tribunal will recall the slide that Mr. Low prepared to show the simple formula that shows Merrill & Ring's damages. They equal the Lost Export Premium multiplied by the volume of affected logs plus the costs of complying

with the Regime.

You heard from Mr. Low that Merrill & Ring has incurred and will continue to incur damage over two periods of time: The past, and that he divided into actual historical loss and retrospective loss, and the future.

The formula applied by Mr. Low shows damages of $16,700,495 for each of Articles 1102 and 1105. $16,652,699 for Article 1106, and $18,555,550 for Article 1110. The damages for Article 1110 are higher because as you recall, they include a compounded interest rate at 6 percent.

As you saw, Merrill & Ring's claim for Lost Export Premium is made up of two parts: The first relates to the logs to which Merrill & Ring is unable to access the export market, and the entire Export Premium is lost in that case. The second relates to logs that Merrill & Ring is able to export, but that the Regime has caused a reduced export price and, therefore, a portion of the Export Premium is lost.

Mr. Low determined that the total Lost

Export Premium to be equal to the sum of the loss of each affected raft. The Lost Export Premium on each raft is the difference between the benchmark price and the target market for which each sort of each species has been done and the actual price realized by Merrill & Ring.

Where necessary, the Lost Export Premium was adjusted for transportation costs between the target market and where the sale actually occurred. The additional costs Merrill & Ring incurred and will incur to comply with the Regime were determined as a cost per cubic meter. This was multiplied by the number of cubic meters of affected volume.

The Tribunal will also recall that the President asked Mr. Bowie if there was a way to estimate the difference between an average domestic price and the average export price, and Mr. Bowie said that assembling the necessary information would not be easy and that it would, "require a significant analysis."

The Investor, however, has been able to develop a very simple analysis to answer the

President's request: All that is required is the 2007 TimberWest Annual Report, which was attached to Mr. Low's Report, and which Mr. Bowie confirmed yesterday that he had reviewed.

You will also recall that the auditors of TimberWest are KPMG, of which Mr. Bowie is a partner. The Annual Report of TimberWest provides a number that represents an Export Premium TimberWest obtains for its own logs. The relevant section of that Report reads, and I'm going to quote, "The export of most private land logs out of British Columbia is restricted by the Federal Government Surplus Test Notice 102. This test requires that Private Forest Landowners offer their logs for sale first in British Columbia at domestic prices which are typically lower than export prices and only if there is no buyer in British Columbia can a private forest landowner then sell logs outside of the country. This restriction applies only to British Columbia landowners. Private Forest Landowners and all other Provinces and in the U.S. are free to sell their logs to any customers they choose.

In 2007, TimberWest sold 1.2 million cubic meters of logs into markets in Asia and the U.S. West Coast at an average sales realization premium of $18 per cubic meter over what would be realized in the domestic markets.

The premium earned by selling private land logs into the export market represents 25 percent of the 2007 distributable cash and has represented more than half the distributable cash generated by the company in the past. The ability to export private land logs has also played a key role in keeping employees working. Selling logs at higher international prices allows owners of private land to harvest stands that would otherwise be uneconomic. Forcing private forest landowners to sell logs to domestic sawmills at prices lower than international prices transfers the value from the tree grower to the processors, impairs the value of private timberlands in coastal British Columbia, and reduces pricing of Crown logs sold on the coast of British Columbia.

Now, the TimberWest Annual Reports for 2004

through 2007 are also in the record, and the average export sales price premium reported by TimberWest for those years is $26 per cubic meter. Simply multiplying the annual average sales price premium reported by TimberWest by Deloitte volume on which damages were claimed results in total Lost Export Premium of approximately $2.8 million. And I point out that this figure is virtually identical to the loss claimed by Merrill & Ring in relation to its own inability to access the export market in the Past Loss Period. And this simple test confirms in a practical and useful way the findings of the Investor's independent expert on damages in relation to the loss caused by Merrill & Ring's inability to access the Export Premium and supports Mr. Low's Export Premium methodology. And in response to the President's inquiry, it shows another simple and reasonable way of quantifying damages that leads to the same results put forward by Mr. Low.

You will also recall that the remaining 32 percent of Merrill & Ring's actual Past Losses, that amounts of $1.4 million, relates to rafts that

were exported but were negatively affected by the Regime. These negative effects include delay resulting in missed market opportunities, discounts to compensate buyers for damaged logs, suboptimal log manufacture, and Merrill & Ring's inability to enter into long-term contracts, and these all resulted in reduced Export Premium. Combined with the simple TimberWest test, it reflects the overall sensible reasonableness of Merrill & Ring's claim for Lost Export Premium of approximately $12 million. And as the auditors of TimberWest, KPMG's association with its Annual Report also confirms the credibility of the average sales price premium published in TimberWest's Annual Reports.

Now, the rationale for the Export Premium in the U.S. market was also explained by independent timber appraiser Douglas Ruffle. And in response to a question from Professor Dam, Mr. Ruffle said the following, and I do have a transcript here, it's day four. "U.S. sawmilling is at a competitive"--

(Pause.)

MR. APPLETON: Try this again.

"U.S. sawmilling is at a competitive advantage to the Canadian one, particularly on the Coast of B.C. They have lower labor costs. They don't have the 15 percent lumber tariff. They're closer to their end markets. They have lower transportation costs, and I think that most importantly they have retooled their sawmills. They went through a significant timber supply shortage in the early 1990s, when the Spotted Owl environmental restrictions on the Federal harvest came in, and it was a substantial reduction in timber supply primarily from old growth forests, and many mills were shut down in the U.S. Pacific Northwest. Since that time, second-growth forests have come on stream, and the industry rapidly developed down there to build super mills, very efficient sawmills, particularly along Puget Sound. They had water access and they had water access also to Canadian logs.

So, if you imagine the B.C. Coast, the logs can keep coming down, and if it wasn't for the 49th parallel, they would just keep going, and those

mills have a competitive advantage compared to our mills,"--so he means the mills of Canada--"on the Coast of British Columbia. I can't recall any mill being retooled or rebuilt to the extent they have done in the U.S. In fact, the B.C. Coast is a basket case in terms of milling technology."

The same logic is contained in the Dumont and Wright review of British Columbia's log export policies. This was provided as Respondent's authority at Tab 38. This was attached to the Supplemental Affidavit of Mr. Reishus referenced by Mr. Jendro and discussed by Mr. Low in his testimony. It is apparent from these observations that U.S. mills are able to pay higher costs for logs.

Turning to the actual impact of blockmailing, the Log Export Control Regime forces private landowners to sell logs to domestic sawmills at prices lower than international prices. This simply expropriates value from private landowners and gives it to log processors. It is not, as Mr. Bustard imagined, a theoretical negotiation

between willing sellers and willing buyers where the buyers were motivated by harmony in the universe but rather than by obtaining the lowest possible prices. In the real world, which Mr. Bustard pretended not to know, the Regime creates and sanctions a situation in which buyers have a distinct advantage, which is the ability to limit Merrill & Ring to the Domestic Marketplace. As Mr. Kurucz said, the buyers hold this like a hammer over the head of Merrill & Ring.

Merrill & Ring receives Surplus Letters for 96 percent of its advertised rafts. Only 72 percent of these rafts receive Export Permits and are actually exported. This is information from Mr. Bowie's Report. While it might appear rational that Merrill & Ring will export all the volume for which it receives a Surplus Letter, blockmailing occurs throughout the surplus testing process.

And this was vividly explained by Mr. Stutesman, Mr. Kurucz, and Mr. Ringma. Even if no offer appears to be received or an offer has been withdrawn and a Surplus Letter is issued, the buyers

have been playing the system. A portion of the volume deemed surplus has been sacrificed or committed to be sacrificed to the domestic market to pay the ransom and to liberate the remaining volume. An offer letter or even the threat of an offer letter will result in the loss of any opportunity for Merrill & Ring to realize an Export Premium since an offer letter at domestic market value results in a nonsurplus determination.

And the Export Premium analysis also relies on Merrill & Ring's sort codes providing a sufficient and consistent indicator of quality so that the benchmark export price can be used for all affected rafts of the same sort code in the same time period. The Merrill & Ring sort codes specify qualities, including diameter, length, service characteristics, knots, straightness, and taper.

And the Tribunal heard from Mr. Schaaf and Mr. Stutesman that the Merrill & Ring sort codes embody consistent quality characteristics and that customers are willing to commit to a price in the Log Sale Agreement based on those sort codes with

verifying inspection on delivery. These quality characteristics are more specific than the British Columbia log grades and sorts, which Mr.--which appears to be the basis for Mr. Jendro and Mr. Reishus's analysis. It was demonstrated by Mr. Jendro's reliance solely on diameter as the only quality for analysis.

Now, as Mr. Low explains that benchmark prices were based on arm's length sales agreements absent any opportunistic events, this concept that was used by Mr. Low--sorry, the concept that was used by Mr. Low was that Merrill & Ring would be able to sell into the benchmark Log Sale Agreements. Mr. Jendro and Mr. Reishus clearly did not understand this. The selected Log Sale Agreement was not intended to represent the average of the possible Log Sale Agreement policies or of the Log Sale Agreement prices. The volume would also not displace Merrill & Ring's Washington logs, but would be substituted for brokered logs; that is, logs purchased from a third party that Merrill & Ring Group sold under the Log Sale Agreements. No

additional sales to the customer would have ever been required. Although Mr. Schaaf indicated as evidence that customers frequently desired more Merrill & Ring Group logs due to its reputation for service and delivery, none of this was understood by Mr. Jendro or Mr. Reishus.

Consistent with this concept that there could never be a Negative Premium because there is nothing in the Regime and its application that could result in benefit to Merrill & Ring. The only time so-called "negative Premiums could conceivably result is where Merrill & Ring might react to market opportunities. For example, where a customer has unusual need for logs and might be prepared to pay more to obtain them or where the target marketed selected for sort is temporarily not the best market. Neither of those situations would result in an offset to the Lost Export Premium on other rafts because they would occur absent the Regime.

Regarding conversion from Scribner board feet to cubic meters, Mr. explained that a recalculation of the Lost Export Premiums for rafts

that had dual scale data indicated that the Lost Export Premium in fact increased by approximately 3 percent.

Mr. Low also demonstrated that the long-term conversion factors used in the raft analysis were reasonable for the purpose of the raft analysis and that the evidence of Mr. Low was uncontroverted.

The raft analysis also used quarterly exchange rates that convert the current Market Price to Canadian dollars. Mr. Low explained to the Tribunal that revised calculations of Target Market Prices to reflect Monthly Exchange Rates resulted in a 0.16 percent overstatement of the total Target Market Price. 0.16 of 1 percent. This calculation determines that the use of Quarterly Exchange Rates was appropriate, and again this was not controverted.

In his evidence, Mr. Low also discussed the basis for his estimated 60-day delay due to the Regime. The Tribunal will recall that in Exhibit 3 there was a slide in which Mr. Low explained his

estimate to the Tribunal. This, too, was uncontested.

For the calculation of compliance costs, Mr. Low's determination of the total volume of logs impacted by the Regime include all the volume that was advertised on the Federal list. This volume must obviously be included in the analysis as the costs of compliance had to be incurred for the logs to be advertised. The cost of dual scaling also remains a cost due to the Regime. As you heard from Mr. Low, there is an exemption available under the B.C. Forest Act relative to metric scaling where volume reporting for property tax purposes could be done on a Scribner converted basis, and this too was uncontroverted. Merrill & Ring also incurs additional timber management costs as a result of the Regime. Mr. Schaaf testified that the Progressive Timber Sales per cubic meter rate would be decreased by $1 across the board in the absence of the Regime. And Mr. Low explained that the premium rate on export sales was provided as an incentive to achieve export sales. It did not

represent the costs incurred to comply with the Regime.

Likewise, Mr. Schaaf and Mr. Low explained that the fees paid to Merrill & Ring Forestry Products L.P. would be reduced by $1 U.S. per cubic meter for all volume affected by the Regime. In addition, administrative costs would be reduced by .075 of a full-time employee in the absence of a regime. These incremental costs relate to inventory, transportation, management, and administration related to the Regime.

The Tribunal also heard from Mr. Ruffle that his Harvest Plan was based on an independent review of Merrill & Ring's Harvest Plan. He made adjustments for growth and operability based on his expertise and experience, and considered the reasonableness of the retrospective harvest. Mr. Ruffle concluded that there were no concerns about Merrill & Ring properties regarding timing and volume of harvests, environmental restrictions, and aboriginal issues.

Mr. Ruffle also surveyed the properties by

helicopter to validate the Harvest Plan, and he confirmed that the projected harvest volumes by aerial and ground inspection as well as by discussions with management. Accordingly, Mr. Ruffle included 76,590 cubic meters from the Unwin Lake property based on his knowledge of properties owned by Merrill & Ring and the actual distance for economic feasible helicopter logging. Mr. Jendro has already indicated he did not visit the property and was unaware of the extent of Merrill & Ring Group's property ownership.

Okay. When we clear away the clutter, there are four simple legal elements to our claim: One, Canada's violation of the international law standard of treatment; namely, fair and equitable treatment and full protection and security.

Two, Canada's expropriation of large amounts of the Claimant's property in logs in British Columbia through governmental coercion and acts of interference. Canada is required to pay compensation for this taking at fair market value.

Three, Canada's failure to provide national

treatment to the Claimant's property in trees and logs in British Columbia.

And, four, Canada's imposition of unlawful performance requirements.

I would like to say something briefly on each of these breaches. Turn first to fair and equitable treatment and full protection and security.

Canada has breached its obligations to provide fair and equitable treatment as obligations to provide full protection and security. By doing this, Canada has breached NAFTA Article 1105. By referring to the international law standard of treatment, the NAFTA Parties conferred on investors the benefit of over 200 years of international laws and jurisprudence. In so doing, they reflect an almost universal practice and the now more than 2,578 investment protection treaties worldwide.

I edit the series for West, so I know the actual number.

NAFTA Article 1105 enshrines protection for fair and equitable treatment within the core meaning

of international law standards. The meaning of fair and equitable treatment is defined in case law. The words "fair and equitable treatment" are essentially an expression of the principle of good faith and the pacta sunt servanda principle as reflected in Article 18 of the Vienna Convention. They imply a range of obligations on Canada's part in this case. These include, but are not limited to, fair treatment of Merrill & Ring, nonarbitrary treatment of Merrill & Ring, nondiscriminatory treatment of Merrill & Ring, treatment of Merrill & Ring in accordance with principles of due process, natural justice, and procedural fairness; treatment in line with Merrill & Ring's legitimate expectations. And treatment that provides Merrill & Ring with a stable and predictable business environment.

The principles of due process, natural justice, and procedural fairness entitle Merrill & Ring to be regulated by decision makers who are unbiased.

What does this mean in legal terms? It means decision makers who are impartial and that

they have not predetermined the result of the decision-making processes and that have no interest, direct or indirect, pecuniary or otherwise, in the outcome of a decision.

In accordance with due process, natural justice and procedural fairness, Merrill & Ring is also entitled to be heard in any process that may affect its status, rights, or interests. Canada says that Merrill & Ring can apply to be heard by FTEAC in any matter where written submissions are insufficient. But save in the course of this NAFTA arbitration, Canada has never told log producers that they can make submissions to FTEAC, nor told them that FTEAC will consider such submissions.

Merrill & Ring is not allowed access to FTEAC's decision-making criteria or the information on which it bases its decisions. It therefore cannot possibly know when written submissions are insufficient or incorrect. Canada says Merrill & Ring is always entitled to complain to the Minister if it does not like an FTEAC decision, but the practical reality is that a businessperson with logs

in the water cannot appeal decisions made on such a frequent basis. In reality, Merrill & Ring has no realistic right to be heard. Merrill & Ring is entitled to be treated in a nonarbitrary manner. In short, this means Merrill & Ring must be treated reasonably and in accordance with the principle of rationality. We know from the Metalclad Decision that a decision maker cannot decide based on irrelevant considerations.

As we've heard, FTEAC makes decisions based on factors that have nothing to do with a shortage of wood in British Columbia. This is completely arbitrary. We know from the Lauder Case that decision makers must decide on facts and reason rather than on mere preference.

And as we heard, FTEAC makes decisions that show preference for domestic log processors over log producers. This, too, is arbitrary.

And we know from Pope & Talbot the decision maker cannot rely--sorry, the decision maker cannot deny reasonable requests for pertinent information. As we've heard, FTEAC has refused to provide Merrill

& Ring with information on how their surplus applications are considered. This, too, is arbitrary. And we have heard that TEAC and FTEAC make decisions that affect Merrill & Ring in secret, and Merrill & Ring has no way of knowing what criteria they're taking into account.

Merrill & Ring also knows nothing about what happens to other producers' applications to export. All that they are told is the results of the application they make. There is no way of knowing about the results of other applications unless you are a member TEAC and FTEAC.

Of course.

Canada has suggested that TEAC and FTEAC is not really a decision maker, and they only make recommendations to the Provincial and Federal Governments, respectively. But the issue here is what in substance is going on. Who is really making the decision? When we consider substance rather than mere form and labels, as Canada urges, it is plain that TEAC and FTEAC are decision makers. Merrill & Ring is also entitled to be treated

fairly.

As we've heard, TEAC and FTEAC often puts Merrill & Ring in the position where it has to accept a price for its logs that are as much as 5 percent lower than the already suppressed Domestic Market Price. This shows blatant bias in favor of domestic British Columbia log processors over log producers, and it is simply not fair.

FTEAC and TEAC is also packed with representatives of log processors, but none of the members come from private landowners.

FTEAC and TEAC have no formal systems for dealing with conflict of interests. As we've heard from Mr. Ringma, the CIPA matter is a powerful illustration of the implications of this. This is simply not fair.

And as we've heard, blockmail is the inevitable result of the FTEAC process, the main element of the game that John McCutcheon, the former Chair of FTEAC and TEAC, testified about under oath in the TimberWest case.

The blockmail system favors log processors

and disadvantages log producers. Canada knows about the blockmail system and turns a blind eye to it and refuses to take simple measures to bring it to an end. Merrill & Ring remain subject to such shakedowns on a regular basis, and this is obviously not fair.

In the meantime, Canada stands by and lets this happen in a flagrant breach of the long established international law principles of fair and equitable treatment and full protection and security. In its authorities Canada has filed a recent article by Professor Christoph Schreuer that summarizes many of these decisions. You can find that at the Respondent's authority Tab 124, I'm just pointing that out in the record so you can come back to it later if you wish.

In this article, Professor Schreuer observes that the Vienna Convention principles of treaty interpretation apply to the obligation of fair and equitable treatment just as they do to any other Treaty provision, so the words must be given their ordinary meaning and read in their context and

in light of the Treaty's object and purpose. The preamble to the NAFTA describes the object and purpose of fair and equitable treatment which includes ensuring a predictable commercial framework for business planning and investment, enhancing the competitiveness of their firms in the global markets, and reducing distortions to trade.

In addition, NAFTA Article 102 sets out specific objectives to the interpretation of NAFTA, and these include, B, promoting conditions of fair competition, and, C, increasing substantially investment opportunities in the NAFTA zone. Clearly the drafters of NAFTA made apparent the desire to ensure that the NAFTA promoted these objectives and work towards the progressive removal of obstructions to trade and investment.

Professor Schreuer has also summarized the case law on the fair and equitable treatment standard as including four principles. I thought these might assist the Tribunal. These principles are the following:

One, transparency and protection of the

Investor's legitimate expectations;

Two, freedom from coercion and harassment;

Three, procedural propriety and due process;

And, four, good faith.

Let's turn to legitimate expectations. But each of these principles is relevant to the claim.

Let me begin with a consideration of the Tecmed Case. This is a very clear recognition of the relationship between good faith and the protection of legitimate expectations. It's set out in the Investor's authority at Tab 55, and I'm going to make reference right now to 154. I'm just going to read a portion of that finding of the Tribunal. "The foreign Investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign Investor so that it may know beforehand any and all rules and regulations that will govern its investments as well as the goals of the relevant policies and administrative practices or directives to be able to plan its investment and to comply with

such regulations. Any and all state actions conforming to such criteria should relate not only to the guidelines, directives, or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations."

And it continues on, "The Investor also expects the State to use the legal instruments that govern the actions of the Investor or the investment in conformity with the function usually assigned to such instruments and not to deprive the Investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign Investor or its investments affects the Investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State confirm to the fair and equitable treatment principle.

I would like to then turn to the Occidental Case. That Tribunal stated--and this will our Investor's book of authority Tab 40, I'm going to quote from Paragraph 183, and they say, "Although

fair and equitable treatment is not defined in the Treaty, the Preamble clearly records the agreement of the parties that such treatment is desirable in order to maintain a stable framework for investment and maximum utilization of economic resources. The stability of the legal and business framework is thus an essential element of fair and equitable treatment."

Professor Schreuer then considers cases involving coordination coercion and harassment or an absence of good faith, and one example of that is the coercion and harassment that we found in the Pope & Talbot Case. You will find that in the Investor's authorities at Tab 42. The Pope & Talbot Tribunal did not find it necessary to make an explicit determination of the motivations for the Government's action in the case. And in order to conclude that the threats and harassment of the Government of Canada were a violation of the principle of fair and equitable treatment. Professor Schreuer turns--he notes actually--Professor Schreuer notes that bad faith is

not a necessary component of fair and equitable treatment. However, where bad faith exists, then there certainly is going to be a violation of fair and equitable treatment.

Paragraph 138 of the Waste Management Award, and that is set out in the Respondent's book of authorities at Tab 157. In Waste Management, the Tribunal confirmed that evidence of a bad-faith effort to destroy or frustrate investment would undoubtedly violate the fair and equitable treatment standard. In this case, Canada's conduct gave Merrill & Ring specific expectations. Representations to Merrill & Ring and other investors generated the following reasonable expectations: That Canada would fairly apply its laws and regulations, that Merrill & Ring would be able to operate under a system that put it on a level playing field with log processors and enabled fair negotiations between log processors and log producers rather than blockmail. That Merrill & Ring would be able to operate in an environment where it was advised of relevant regulations and

09:19:38 Procedures, including those as to the remoteness of its lands. And that Merrill & Ring would be able to operate in a stable business environment.

ARBITRATOR ROWLEY: Could I just interrupt you for one second here, and can you tell us where it got those expectations from.

MR. APPLETON: I would have liked to just finish this one particular section. However--

ARBITRATOR ROWLEY: Whenever it's convenient. I do want to know where it gets these expectations from.

MR. APPLETON: Canada believes in the rule of law and that there are principles of natural justice that would apply to an investment made in Canada, and that if one is to go through a process that involves a regulatory process--and this is true, by the way, throughout those countries that adopted the Common Law and I believe actually a very common theme in countries that didn't adopt the Common Law--that you can expect basic due process, and you can expect basic fairness and basic natural justice, and that means that the person determining

09:20:53 your case doesn't have an interest.

And you can assume that the person looking at your materials are not going to have an interest in an unfair matter in terms of suppress your price.

And by the way, the expectation in the NAFTA makes clear that Canada as a country is committed to the provision of a competitive market, the reduction of these types of barriers. And that alone should be good enough for a foreign Investor who has an investment in Canada after NAFTA is in force.

ARBITRATOR ROWLEY: Does the doctrine of legitimate expectations not suggest that the expectations must arise as a result of representations to the Investor made at the time of the investment by the host nation?

MR. APPLETON: No, I believe that especially in the case of ongoing investments, such as the one you have here, which is more than 120 years in operation, that legitimate expectations could be modified by what one expects.

So, for example, if you were to have that

09:22:10 type of a change, I think that it would be appropriate.

But in any event, a legitimate expectation of British Columbia as it was when Mr. Merrill and Mr. Ring first sailed up and started buying land in 1884 or 1882 was that at that time it would have been the British form of law, which was adopted in its entirety, it was received into the law of British Columbia and of Canada, which would have required due process, it would have received at that time.

I'm just going to return back to the point I'm making, and then, Mr. Rowley, of course, if you have other questions, I would be happy to take them. Because I'm going to give some examples of some specific expectations because Canada failed to fulfill some specific expectations.

Consider once again the following exchange between Arbitrator Dam and Ms. Korecky.

"PROFESSOR DAM: But you really make that determination not on the basis of any rules or regulations but just on how you decide to handle it.

09:23:20 "MS. KORECKY: It's the way we do business in Government."

Canada has suggested that for Merrill & Ring to have a legitimate expectation that Canada would have to fairly--sorry, to have an expectation that Canada would fairly apply its laws and regulations, that we would have to point to a specific representation by Canada, the very question, Mr. Rowley, that you had just asked.

But we know that Canada is a country of laws.

Canada has also failed to fulfill the Investor's general expectations that are held by every Investor in a foreign country, and this test for Article 1105 is consistency with its Treaty obligation. The question is: Did Canada afford Merrill & Ring due process and natural justice? Did Canada treat Merrill & Ring in a way that was not arbitrary? Did Canada protect the stability of the business environment?

Canada suggests that this is not an adequate test. It submits that any breach must be

of a higher egregious standard. Now, the S.D. Myers and Pope & Talbot tribunals both rejected Canada's agreements that the meaning of NAFTA rested on an egregious behavior standard. Canada now states that the standard is just a high one. Of course, as Professor Howse testified yesterday, the standard under the ILC Articles on State responsibility shows us it's just a simple breach. It's consistency. That's the test.

The obligation to provide full protection and security also in recent years has been interpreted to provide protection for a stable business environment. This extends the principle beyond its traditional realm of an obligation of the host Government to use due diligence to protect physical property.

For example, in the Azurix case, this is in the Respondent's book of authorities at Tab 8, the Tribunal stated at Paragraph 48 that, "Full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security. The

stability afforded by a secured environment is as important from an investor's point of view."

It then continues: "When the terms protection and security are qualified by full and no other adjective or explanation, they extend in their ordinary meaning the content of the standard beyond physical security."

Such an interpretation implies an obligation on Canada to execute and apply its laws in a fair manner. As we've heard, blockmail is the inevitable result of the FTEAC process. The main element of the game that John McCutcheon, the former Secretary of TEAC and FTEAC, testified about in the TimberWest case, the blockmail system favors log processors and disadvantages log producers. At Tab 124 in the Respondent's book of authorities, Professor Schreuer states, and I quote, "The necessary measures must be capable of protecting the investment against adverse action by private persons as well as by state organs. In addition to physical protection, this requires the provision of legal remedies against adverse action affecting the

investment and the creation of mechanisms for the effective vindication of the investors' rights."

Canada knows about the blockmail system but refuses to take simple measures to bring it to an end. Now, a bully is a bully whether he wants your lunch money or your logs, and that Merrill & Ring is regularly subject to bullying and threats is obviously not fair. In the meantime, Canada stands by and lets this happen in a flagrant breach of the principles of fair and equitable treatment and full protection and security.

Now, the Canadian Statement on Implementation of the NAFTA states that NAFTA provides, "important protections to investors and creates a more stable and predictable Legal Framework for investment." You can find that, by the way, as the Investor's authority at Tab 160, and that quote is from Page 72.

Those Tribunals that have considered the international law standard of treatment have concluded that it obliges Canada to provide a stable, legal, and business environment. And I will

refer you in particular to a couple of cases to assist you, as you consider this, to give you a nice, clean record here. I refer you to Paragraph 274 of the CMS Gas Decision. You will find that in the Respondent's book of authorities at Tab 28. Also Paragraph 408 of the Azurix Decision, which I've already referred to, and that's the Respondent's book of authorities at Tab 8; and Paragraph 124 of the LG&E Decision, which is set out at Tab 71 of Canada's book of authorities.

All three tribunals also said that a State breaches its obligation to provide a stable business environment when it fails to fulfill the Investor's legitimate expectations, and I refer the Tribunal to the LG&E Decision at Paragraph 127, CMS Gas at Paragraphs 276 to 279, and Azurix at 372.

All three decisions and all three tribunals found that Argentina breached the Bilateral Investment Treaty, both the CMS Gas and LG&E Tribunals reached this decision on facts almost the same as the facts before this Tribunal. All of these aims and purposes add up to the requirement

09:29:40 that the NAFTA must protect legitimate expectations of a foreign Investor. In other words, at a minimum, these treaties protect a foreign Investor's most basic expectations. The international law standard of treatment espoused by bilateral investment treaties demand certainty and stability for foreign investments.

It's not suggested these treaties should protect an Investor or a foreign Investor, actually, is who they protect against mere disappointment or misfortune, but the NAFTA must be able to provide a sense of legal security. If the international investment treaties cannot protect the most fundamental expectations of foreign investors that the State will not break its own promises, then the protections in the Treaty are simply worthless. And we have identified the ongoing steps taken by Canada that fundamentally interfered with their legitimate expectations. And what are these factors? Well, they must include at least the following.

Canada has made exceptions to its laws for Merrill & Ring's competitors, such as Pluto

09:30:58 Darkwoods, but it refuses to grant such exceptions to Merrill & Ring. Canada has administered the Regime in such a way that it creates an unlevel playing field between log producers and log processors in such a way that it gives unfair advantages and special exemptions to Merrill & Ring's competitors, and in such a way that export decisions are made by committees comprising representatives of log processors with an interest in suppressing log prices, but not Private Forest Landowners; in such a way that it prevents Merrill & Ring from establishing long-term contracts with international clients; in such a way that it has blocked Merrill & Ring's logs from export in favor of domestic purchasers whose agents can then seek to export the logs themselves, in such a way that the processing--in such a way such as processing export applications have in some years stopped in August, the month in which logs are most vulnerable to teredo infestation and sun damage, in such way that the log processors frequently break the rules of the system with impunity; in such a way that log

09:32:17 processors have been unable to be unfairly--try this again--in such a way that log processors have been able to unfairly target Merrill & Ring; and in such a way that if log processors believe the rules have been broken, they have access only to a long, slow, ineffective, and highly uncertain review process.

Canada has also represented to the Investor that certain of its lands are remote, such that the Investor has made business decisions in reliance on that representation. Since arbitration has commenced, it now appears that Canada has changed its mind. Investors must be able to rely upon the statements of government officials at full face value. The NAFTA permits them to be able to assume and rely on the good faith of Government officials. We believe that the NAFTA requires Government parties to act in good faith. The essence of good faith is pact sunt servanda, and this requires that Governments follow their obligations. And, of course, that officials be held to account for their statements.

This is also reflected in Article 18 of the

09:33:39 Vienna Convention on the Law of Treaties, and it is at its heart part of the principle of good faith which underpins all of Article 1105.

(Brief recess.)

PRESIDENT ORREGO VICUÑA: Right, Mr. Appleton. We are ready to continue.

MR. APPLETON: Very good.

Just before I proceed back to where we were, I understand that I may have slightly misspoken this morning, perhaps the shock of starting our session so very early. In reference to the offers that I had made reference to with respect to FTEAC and its adjudication, I believe I said 300,000. My intention was to say 300, and so I would just like to make sure that we are clear as to what I was referring to. That was the number of cases that were adjudicated per year. It's not 300,000. It's 300.

ARBITRATOR ROWLEY: Just before you go on, at some stage can you give us a reference to the Bowie Report where we find the reference to the fact that Merrill & Ring received Surplus Letters, at

least offers, I think you said offers, on 96 percent of its advertised rafts.

MR. APPLETON: I believe I gave the reference on the transcript. I believe I said it was at Page 62, if it's my recollection.

ARBITRATOR ROWLEY: Thank you.

MR. APPLETON: Well, we'll come back. If I missed it, I'll be happy to come back. Mr. Rowley, did the transcript not--are you just trying to find this, or have you seen the transcript and I missed it?

ARBITRATOR ROWLEY: Let's not waste time. You've got my question.

MR. APPLETON: Okay.

I would like to pick up now on the issue of expropriation. NAFTA Article 1110, which deals with the obligation to pay compensation in the case of expropriation, and it provides as follows: "That no party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such

investment except," and then it sets out four different things:

A, for a public purpose;

B, on a nondiscriminatory basis;

C, in accordance with due process of law and Article 1105;

And, D, on payment of compensation, and it goes on to explain how the compensation is to be calculated.

Now, five NAFTA Tribunals have considered the meaning of NAFTA's expropriation obligation. They have together provided a clear view of how they should be interpreted and applied.

Now, the first significant Award was made by the Pope & Talbot Tribunal, which began by determining that the object of an expropriation under NAFTA Article 1110 is the investment of an investor of a NAFTA party. This term is defined under NAFTA Article 1139 and includes any tangible or intangible property interests included therein. It's not limited to any particular form of property, and it is intimately tied to the nature of the

business in question.

Finally, the Pope & Talbot Tribunal provided an articulation of the current test of what kind of interference constitutes a taking under modern international law, and the Tribunal stated--and again this is at Investor's authorities Tab 42, and I'm going to quote from Paragraph 311: "While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner." Thus, the Harvard Draft defines the standard as requiring interference that would justify the inferences that an owner will not be able to use, enjoy, or dispose of the property.

There are statements in addressing the question of whether regulation may be considered expropriation, speaks of action that is "confiscatory or that prevents unreasonably"--sorry--"that prevents, unreasonably interferes with, or unduly delays effective

enjoyment of an alien's property."

Indeed, at the hearing, the Investor's counsel conceded correctly under international law that expropriation requires a substantial deprivation. That's the full extent of the quote from Pope & Talbot.

The CME Tribunal similarly held, shorter quote I'll quote from them, and this is Paragraph 604 of their decision, "The expropriation claim is sustained, despite the fact that the media counsel did not expropriate CME by express measures of expropriation. De facto expropriation or indirect expropriations--that is, measures that do not involve an overtaking but that effectively neutralize the property of the property of a foreign owner--are subject to expropriation claims. This is undisputed under international law."

The CME Tribunal also include cited with approval the Metalclad, another NAFTA case, that an expropriation under Article 1110, and I quote, "included not only open, deliberate, and acknowledged takings of property, such as outright

09:53:45 seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with use of property which has the effect of depriving the owner in whole or in significant part of the use or reasonably to be expected economic benefit of property even if not necessary to the obvious benefit of the host State." NAFTA Article 1110 says investments shall not be expropriated without the payment of expropriation. That's in Clause D, 1(d).

In this case, Merrill & Ring plants its trees. It grows its trees for more than 60 years on its private lands. It's on at least its second crop and in some places third crop of trees that it's planted itself over the period of 125 years or so. It seeks to export its premium logs for premium value. Instead, due to the Log Expert Control Regime, Merrill & Ring is required to sell those premium logs into the domestic British Columbia market at a distant.

Furthermore, the coercive elements of the Regime direct Merrill & Ring to harvest its trees if

09:55:13 it wants to export them. Merrill & Ring must engage in destructive acts to its property to meet the requirements of the Regime, and these are not needs or the desires of its clients or the needs and desires of Merrill & Ring. It needs to sort and cut these logs in ways that it does not wish, and then it must expose these logs to destructive natural forces while it awaits a decision from the Government.

Finally, Merrill & Ring is told that the price it must receive for its own logs. All of this coercive interference with Merrill & Ring's property is a substantial interference. And we've heard that by the year 2005, the Merrill & Ring board had determined that due to the cumulative effects of the Regime, Merrill & Ring would no longer have a viable ongoing business in Canada. Merrill & Ring--sorry, Canada has offered no evidence to in any way contradict this judgment, either to suggest that Merrill & Ring's analysis that it will no longer have a viable business is incorrect, nor that Merrill & Ring is wrong so it should be the

09:56:35 situation entirely to the export Regime.

Canada has offered no alternative explanation whatsoever. It has not suggested that Merrill & Ring's fate is due to market factors or to business decisions or risks extrinsic to the Export Control Regime. In these circumstances, Canada's actions and their effects on Merrill & Ring meet, if not exceed, the requirements of the substantial deprivation test in Pope & Talbot.

I would like to turn now to national treatment. I'm going to ask that Article 1102 go up on the screen.

As we can see from the title of Article 1102, it's entitled "National Treatment." Now, national treatment is not specifically defined in the NAFTA. We had a discussion about some of that with Professor Howse yesterday, but it has an undisputed well established meaning in international law and has had so for well over 50 years. That meaning is universal and constant across all over predecessor and related trade agreements to the NAFTA. That meaning has been consistently

09:57:53 interpreted and applied by International Trade Tribunals including NAFTA Tribunals. That meaning is internally coherent and harmoniously consistent with the context of the NAFTA. The Articles of the NAFTA that are integral to and related to NAFTA Article 1102, the internal self-guiding principles of NAFTA that are self-defining, and Canada's own express confirmation the national treatment means, and always was intended to mean, equality of competitive opportunities. And there is no reason in language or law or logic to conclude that it could possibly mean anything else. The phrase "national treatment" has its origins in international economic law.

GATT and WTO tribunals have consistently interpreted the phrase "national treatment" as imposing an obligation to provide treatment that is no less favorable and as requiring States to provide equality of competitive opportunities. The Tribunal will find extensive discussion of this jurisprudence in Merrill & Ring's Memorial at Paragraphs 255 to 296 and at Paragraphs 128 to 214 of the Investor's

09:59:08 Reply Memorial.
Based on the success of the GATT, principles enshrined in that agreement were applied to additional forms of trans-boundary economic activity, such as things other than trade and goods. The concept of equality of competitive opportunities expanded as well. So, for example, national treatment obligations were applied to these activities, and those obligations were consistently interpreted as requiring states to provide equality of competitive opportunities. And the NAFTA Parties clearly intended like circumstances to mean the same as like service and service providers in the GATTs. NAFTA Article 1102 is not an island in this ocean of international economic law. And Article 31(1) of the Vienna Convention directs to us consider the meaning of Article 1102 in light of its context. Every aspect of that context indicates that the NAFTA embraced the concept of equality of competitive opportunities in NAFTA Article 1102.
And the context of that Article also includes the reservations to NAFTA Article 1102,

10:00:21 which apply the specific economic sectors.
All of this analysis of like circumstances needs to occur in the context of a particular economic sector.
Now, the NAFTA Parties could have precluded the obligation of treatment no less favorable by reservation of the sector to Article 1102 to meet social objectives, and Canada, I point out, did not take any reservations for log exports under NAFTA Article 1102, even though such a reservation was entirely available to it.
Indeed, as Ms. Tabet pointed out yesterday, Canada did recognize that its Log Expert Control Regime was prima facie inconsistent with its obligation to provide national treatment this time with respect to goods. And to the extent that we are dealing solely with trade in goods, Canada made a reservation to the NAFTA, but this exemption does not apply in the case of any failure to provide national treatment in services under Chapter Twelve of the NAFTA or to investments under NAFTA Chapter Eleven. Canada could have made such reservations,

10:01:36 but it did not do so.
Now, of course, the context is just one of the interpretive guides that we find in the Vienna Convention. There are other interpretive aids that we can look at that compel the conclusion that Article 1102 requires Canada to provide equality of competitive opportunities.
I think we really don't need to really go there. I think the record is pretty clear. I think what we need to look at is to apply the test, and applying the test is not a mechanical exercise. As a WTO Appellate Body has recognized, there is a need to apply some judgment here.
First, we need to clarify conceptual issue. The concept of equality of competitive opportunities is different from the notion of a general obligation of nondiscrimination against foreigners. The nondiscrimination principle is reflected, for instance, in NAFTA Article 1105. We also saw part of that reflected in the text of expropriation in 1110. National treatment requires a diversity of nationality between an American or a Mexican being

10:02:53 treated differently from a Canadian, but it does not require nationality-based discrimination as one of its elements.
Thus, in the Loewen Case, the Tribunal found that discrimination on the basis of nationality against the Canadian Claimant was properly considered under NAFTA Article 1105. In fact, we could add that given the national treatment obligation is entirely about nationality-based discrimination, it would be completely redundant from what's already provided from the freedom from discrimination and the protections we have under Article 1105 of the NAFTA. National treatment only requires Government evenhandedness between domestic and foreign actors competing in the same marketplace.
So, yes, you need diversity of nationality, but you don't need nationality-based discrimination. This is the only function of the likeness test that we would have to look at. The host Government only has to treat the Investor of another NAFTA party no less favorably where the competitor is in

competition with the domestic Investor, and thus the focus has to be on evidence that there exists a domestic investor that is directly competing with the complainants in the same marketplace. The investors and investments have to be competing. The Methanex case illustrates that it's not be enough that there be a substitution effect between two products that are manufactured by two companies, such as when the domestic company sells more widgets and the foreign investor sells fewer gadgets. Such a substitution effect may be of significance to economists, but the NAFTA party limited their national treatment obligation in NAFTA Article 1102 to situations where is there is a domestic Investor competing in the same business and for the same customers. Thus, the Tribunal needs to ask whether Merrill & Ring is competing with others in the same business for the same customers.

And here is the evidence we have led and proven on this matter. Merrill & Ring competes with producers from outside of British Columbia. Canada accepts that Merrill & Ring's B.C. Coastal logs, in

fact, have competed with logs produced from outside of British Columbia, such as logs from Alberta. Both Merrill & Ring and Alberta logs have been used by Bob Bay, an Idaho-based log user. His evidence made it clear that he did not care about the regulatory jurisdiction of a log. He simply buys logs on the basis of species, size, dimension, and costs.

Similarly, Merrill & Ring's logs compete with logs produced in the Interior of British Columbia. This is especially the case with logs from the Interior Wet Belt of British Columbia. These logs are described in the Affidavit of Christian Schadendorf. Mr. Schadendorf describes how he received standing exemptions from the Canadian Federal Government for the trees grown on his federally regulated lands in the Interior of British Columbia. Merrill & Ring's logs compete with the logs produced by Island Timberlands on the North Coast of the British Columbia. Mr. Ringma testified that he produces logs from these lands that compete with Merrill & Ring. There is no

material difference in the logs that are produced from these northern areas and the logs produced in the southern areas.

Finally, there is the issue of how Merrill & Ring's Federal trees compete with the provincially regulated trees. Now, trees are not like vintage wine. There is no difference at all between a tree grown on Merrill & Ring's federally regulated land and on its provincially regulated land. This is not like Château Mouton or Château Pétrus and there being a slight difference in the terroir and the sense about it. Buyers do not seek out trees grown on lands by particular regulator. Indeed, the regulator of B.C.'s private timberlands was basically set by a historical accident based on whether the land was first purchased before or after March 12, 1906. A tree is not different because of its regulator. The tree does not grow differently because of its regulator. The purchaser of the tree doesn't seek out a log based on the regulator. In essence, a tree is just a tree, and a log is just a log. The label imposed based by the measure simply

does not address the realities of the differences in this defined product market.

Every NAFTA Chapter Eleven panel that has reached the issue of like circumstances has dealt with the question of whether the Investor of the other NAFTA party is competing in the same business for the same customers. Obviously, judgments have to be made about how much overlap there is concerning the business and the customers. Again, we have produced clear evidence that Merrill & Ring and other producers from outside British Columbia, the Interior of British Columbia, the northern Coast of British Columbia, and from federally regulated areas are rivals to Merrill & Ring in the Canadian marketplace for logs.

So, while in other cases Tribunals have had to make difficult and subtle judgments about the required degree of competition, the closeness of the competitive relationship is simply not one of the factors you need to look at in this case.

Now, there is an ongoing debate concerning the extent to which even where we established like

10:08:49 circumstance and treatment no less favorable, we have to consider whether public policy considerations may nevertheless make the treatment in question justifiable under the NAFTA. We do not need to resolve this debate because there is only one public policy purpose that's set out in Notice 102, and this is to address a shortage of wood in Canada. This could only be a bona fide public policy purpose if there was, in fact, a shortage of wood in Canada. Yet, there is significant evidence that there is no shortage of wood, nor is that it's likely to exist, and this evidence has been provided by various experts and is consistent throughout this entire proceeding.

Professor Pearse filed a report in this claim. Professor Pearse is a distinguished forestry economist from the University of British Columbia, and was Canada's former Chair of the royal commission studying log exports from British Columbia. He concluded that there was no connection between Canada's goal and the stated Regime objective.

10:10:00 Furthermore, in a Canadian courtroom and under oath, John Cook admitted that this test was not used--that was in from the TimberWest case.

Furthermore, if one accepts that shortage is an actual rather than an illusory public policy in Canada, the test used in the scheme really has no logical connection to determining in any given instance if there is a shortage or a surplus.

The record is clear that while Canada claims the purpose of the Regime is to address the adequacy of log supply for British Columbia, this is not what it does. In sum, the purported purpose of the scheme--indeed, the only purpose--is to address an illusive public policy problem. Whatever role public policy might have in shaping or limiting public policy in NAFTA, a public policy addressing itself to an illusory issue would have no such rule.

This goes to the state of affairs for which the express purpose is used to disguise. The state of affairs is if domestic producers had to pay the full world price, they would not remain competitive in global markets. The problem is not a shortage of

10:11:21 wood but shortage of efficiency on the part of producers. This scheme is aimed at protecting inefficient domestic producers by giving them access to raw materials at below world prices. The effect is achieved not through the contribution of the taxpayers of Canada to the support of this inefficient domestic industry, but rather by commandeering the property of the Investor, Merrill & Ring. In this sense the scheme, once we consider its actual rather than its purported purpose, contradicts the core of national treatment. It imposes a burden on foreign firms to provide a benefit to domestic firms. The only case in which Merrill & Ring could obtain some corresponding or mitigating benefit would be--I actually can't think of where they would get any. It's just--actually as I think about it, it's just inconceivable to me that they would actually get any. It's a complete one-way street. It's completely unfair, and it's also a violation of national treatment.

So, let us recap the differences in treatment between Merrill & Ring and other

10:12:32 competitors and consider whether Canada has shown that even though the treatment is different, it is nevertheless no less favorable. In other words, that equality of competitive opportunities is respected, despite the differences in treatment.

So, first, let's turn to the situation of Alberta and other Provinces in Canada.

Canada grants automatic export access to all logs seeking export from Provinces outside of British Columbia. There is no requirement for Surplus Tests. There is no requirement to deal with special rules about log length, species, and sort. There is a clear difference in treatment. Canada does not attempt to argue that the treatment provided outside of British Columbia is as favorable as that provided on the B.C. South Coast.

Let's turn to the Interior.

Canada grants better treatment to logs seeking export from the Interior of British Columbia than is provided to Merrill & Ring. For example, the evidence of Christian Schadendorf established that Canada provided a standing exemption to logs on

his Federal timber marked Lands. That company is Pluto Darkwoods in the Interior of British Columbia. It is very simple that this is a better level of treatment.

For Pluto Darkwoods, there is no requirement to harvest its federally regulated trees and manufacture a log before applying for a Surplus Test. And in the Interior, there is no Government requirement to deal with special rules about log length, species, and sort. This is a clear difference in treatment and a better level of treatment than that provided to Merrill & Ring. And Canada does not attempt to argue that the treatment provided in the Interior is as favorable as that provided on the B.C. South Coast, and it simply is not.

Let's look at the B.C. North and the Mid-Coast. Canada grants better treatments to logs seeking export from the North and Mid Coast of British Columbia than is provided to Merrill & Ring. Richard Ringma is a competitor of Merrill & Ring who operates on private forest lands in northern British

Columbia. His evidence established that Canada provided a standing exemption to logs produced on trees from federally regulated lands on the North Coast. He confirmed that these North Coast logs get better treatment compete directly with the same buyers as his logs from the South Coast.

Mr. Stutesman has testified that North Coast wood competes with Merrill & Ring South Coast wood. It's very simple to see that this North Coast wood and these North Coast wood manufacturers receive better treatment than Merrill & Ring.

And on the North Coast, log manufacturers with standing exemptions are not required to harvest the trees and manufacture a log before applying for a Surplus Test. They don't have to apply at all. Similarly, the Northern Coast manufacturer doesn't have to meet any Government regulations to deal with special rules about log length, species, and sort. They can deliver exactly what their buyers want when the buyers want them. This is a better level of treatment than that provided to Merrill & Ring, and yet again Canada does not attempt to argue that the

treatment provided on the north Coast is as favorable as that provided on the B.C. South Coast because it simply is not.

Then we have the issue of provincially regulated lands and federally regulated lands. Canada grants better treatment to logs seeking export from Provincial timber marked lands in British Columbia than is provided to Merrill & Ring because Merrill & Ring has most federally timber marked lands. Constitutional law expert and former British Columbia Deputy Minister of Intergovernmental Affairs Jim Matkin provided a witness statement in this case. Mr. Matkin confirmed in his Witness Statement that Canada has exclusive jurisdiction over exports.

He also confirmed that there is a political understanding between Canada and the Province of British Columbia that Canada will respect the export exemption decisions taken by the Cabinet of British Columbia. Canada uses its discretion to automatically accept the decisions of the Government of British Columbia with respect to these

provincially regulated logs. Export logs that are regulated by British Columbia can, and often do, get better treatment than export logs regulated by Canada alone.

Mr. Kurucz and Mr. Stutesman have confirmed in their Witness Statements that wood from the South Coast produced from Federal and Provincial Lands are indistinguishable to log buyers. The logs compete directly and without regard to the regulator of the wood. Provincial timber marked wood is eligible for export exemptions. Federal timber marked wood from private landowners are never officially eligible for exemptions, but we have seen the example of Pluto Darkwoods to see that Federal regulated wood can and has been given an exemption. And, of course, there is no reason why Canada cannot provide as favorable treatment to South Coast export logs as that provided to others in Canada. And yet again, Canada does not attempt to argue that the treatment provided to Pluto Darkwoods is as favorable as that provided on the B.C. South Coast because it simply is not.

10:18:24 Now I would like to turn to the issue of performance requirements. The NAFTA sets out a series of specific trade distorting practices that have been banned by the NAFTA. These practices known as performance requirements--could we put them on the screen, perhaps. Do you have Article 1106. If we don't, I will just argue without.

There are three specific practices that are at issue in this claim. Article 1106(1)(b), (c), and (e). I think we will turn first to the issue. First we will turn to the issue of Article 1106(1)(b). And this is the requirement or the prohibition again achieving a given level or percentage of domestic content.

Notice 102 states that logs in a remote area can only be advertised if you have a specific volume, that has a given volume that has to be not less than 2,800 cubic meters and not more than 15,000 cubic meters. Because Merrill & Ring was informed that they were in a remote Coastal region, they had to follow the given minimum and maximum export levels from their properties.

10:19:50 Of course, NAFTA Article 1106(1)(b) says that a government can't engage in these policies that achieve a given level of domestic content, and the word given means any specific level. This was the conclusion of the Pope & Talbot Tribunal that considered this very specific question. It's just very clear that it is completely inconsistent.

For Article 1106(1)(c), this says you cannot purchase, use, or accord a preference to goods produced in Canada. Canada's requirement to first manufacture logs from standing trees before an Export Permit can be issued violates this NAFTA obligation.

Let's just go back, that you have your trees that are growing, and if you have a standing exemption, you don't have to cut them before you can arrange to sell them. Your customer could come, they could pick what they want, you can put in exactly the standard that you would want. If you have to cut them first, first of all, you have terminated the life of a product you have been growing for a long time, and that is a requirement

10:21:04 to get the permit. And then if you have to cut them again certain lengths, sort them into certain ways, and there are ways that may give a preference to the local B.C. sawmills but not the ways your clients want them, you have another problem.

Now, the Investor filed a Witness Statement from a Canadian Customs lawyer, Darrell Pearson. He states that manufacturing of a tree into a log constitutes the production of a good. You're changing a living tree, one custom tariff is one thing, into a log is something else. Canada hasn't challenged Mr. Pearson's reasoning and even admits that Merrill & Ring's logs constitute goods itself.

The Tribunal knows that not everyone in British Columbia has to first harvest these logs before applying for an export license. These log growers with standing greens do not need to first harvest or manufacture logs before applying for an Export Permit. Merrill & Ring, because it cannot obtain such exemptions is required to manufacture its trees. This is a requirement in order to be able to obtain the Export Permit. In essence it's

10:22:18 almost as if you have to pay the drops forward. You are required to keep this economic activity on that site and in Canada, and you might not decide to do that economic activity at that time. And eventually you will do that activity or maybe you may sell the property and may never do that activity. But now you're required to do that activity as a result of the Regime, and that is a violation of Article 1106(1)(c).

In addition, Article 1106(1)(e), it makes it impossible to relate--and I will just go back to the text here because I can't read it on the screen here, I'm sorry--to relate in any way sales to the volume or value of exports or foreign exchange earnings. And in this case, here we are definitely relating sales to the value of or volume of exports. The Regime does that automatically and every time.

As a result, we have three types of violations. Remember, Article 1106 is a very technical section. That's what it's about. It does not have customary international law that goes with it, but you're required to follow, in fact, not only

10:23:40 in the NAFTA did Canada and United States and Mexico agree to apply these performance requirement prohibitions to themselves as a group. They actually unilaterally decided that they were not going to apply them to anybody. They decided that this would be a general bonding obligation for all investments of all kinds around the world. It was a broad declaration that these types of industrial policies were to be prevented and that they would not engage in those routes, and that's why it's so important that we are able to canvass them today.

Now, I would like to turn to the issue of time limitations.

The Tribunal can dismiss Canada's argument that Merrill & Ring's claim is time-barred under NAFTA Article 1116 in two easy steps. Neither steps requires a determination of facts. The Tribunal need only consider one uncontested fact and one simple law. The uncontested fact is that all of Merrill & Ring's--sorry, all of the claims that Canada says that are time-barred are claims in regard to actions that, regardless of when they

10:24:52 started, were continuing within three years of Merrill & Ring making its claim. Indeed, all of Canada's actions creating those breaches are basically continuing today.

Throughout its written pleadings, Canada has never contested this fact. Time limitations do not bar a claim that is still continuing. The commentary and case law is unanimous in this regard. The International Law Commission has addressed the issue and said, "In the case of a continuing wrongful act, the start of a pure description can be established only after the end of the time of commission of the wrongful act itself."

The International Law Commission's views reflect the unanimous view of international tribunals. Every Tribunal to consider the issue has concluded that time limits do not bar a continuing act. Such tribunals include the European Commission On Human Rights and Inter-American Commission on Human Rights. And I would like to draw your attention to of the comments from one of those tribunals just to demonstrate how emphatic was its

10:26:02 support for the rule that time limits do not bar continuing acts. This is the Debecher case. You will find it in the Investor's book of authorities at Tab 16, and this is a case before the European Commission On Human Rights. And what they said was: "When the Commission receives an application concerning a permanent state of affairs, the problem of"--and this keeps referring to the limitation period--they just said the period "can arise only after the state of affairs has ceased to exist."

In its written pleadings, the Claimant has referred the Tribunal to three other decisions of the European Commission On Human Rights and two decisions of the Inter-American Commission on Human Rights, and a decision of the International Court of Justice and a decision of NAFTA Chapter Eleven Tribunal arriving at the same emphatic conclusion, and those cases are all cited at Paragraphs 496 to 497 of the Claimant's Memorial and 405 to 411 of the Claimant's Reply.

Now, the Tribunal decision in Grand River, despite Canada's claim to the contrary, reinforces

10:27:09 the existing case law on continuous breach. The Tribunal states, and I'm going to quote--and this is a quote from Paragraph 86 of Grand River, which you will find in the Respondent's book of authorities at Tab 57: "In the circumstances here, the Tribunal has difficulty seeing how NAFTA Articles 1116(2) and 1117(2) can be interpreted to bar considerations of the merits of properly presented claims challenging important statutory provisions that were enacted within three years of a filing of the claim and then allegedly cause significant injury, even if those provisions are related to earlier events. As the Permanent Court observed, while "a dispute may presuppose the existence of some prior situation or fact, it does not follow that the dispute arises in regard to the situation or fact."

The Mondev and Feldman Tribunals both considered the merits of claims regarding events that occurring during the three-year limitation period, even though they were linked to and required consideration of events prior to the limitation period or the NAFTA's entry into force in Mondev.

The Tribunal considered and rejected the Claimant's assertion that it had suffered a denial of justice in connection with state court proceedings occurring after the NAFTA entered into force, although the dispute underlying the litigation arose years later.

And in Feldman, the Tribunal awarded damages in respect of discrimination occurring during the three-year limitation period, but its analysis of this and other claims again required consideration of earlier events.

In addition, in Grand River, the Tribunal opined on when an investor should become aware of loss or damage from a breach. The Tribunal made clear that such awareness depends upon the Investor being able to ascertain in exact terms the nature of the economic burden flowing from the breach. Hence, in Paragraph 82 of the Grand River Decision, the Tribunal said this: "It believes 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

noncompliance is to incur loss or damage as those terms are ordinarily understood." It's obvious from the facts that the statutory framework to which Merrill & Ring has been subject in this case cannot possibly be qualified as a clear and precisely quantified statutory obligation. Every violation of an obligation is a breach, regardless of its origin or character. The question is not whether we are dealing with a violation on the face of a statute or the application or implementation of a statute by judicial or administrative organs. All such violations are breaches according to the ILC Articles, and therefore within the meaning of NAFTA Article 1116(2).

Article 12 of the ILC Rules does not provide any special definition of breach; and therefore, pursuant to NAFTA Article 102, we apply to the rules of international law State responsibility as codified in the ILC Articles.

Similarly, a breach is still a breach, even if it's related to one of a series of actions that are in itself a breach. If the specific incident or

behavior itself constitutes a breach, even if other incidents or behaviors are in breach and closely related to it, again the definition in ILC Article 12 applies, regardless of its relationship to other events or situations.

PRESIDENT ORREGO VICUÑA: Mr. Appleton, you will have noticed that you have taken now the two-and-a-half hours, and you're entitled to the discount that we took because of the break and questions and other things. You are on the discounted time.

MR. APPLETON: Well, Mr. President, my understanding is we had almost a 15-minute break. The Secretary can tell me how long the break was. She took note of it.

PRESIDENT ORREGO VICUÑA: Yes. I am talking, Mr. Appleton, please.

You will be allowed as much time as we used both in the break and in the questions of the Tribunal.

MR. APPLETON: Yes. Perfect.

PRESIDENT ORREGO VICUÑA: But it's just to

point you that we are doing that discounted time at present.

MR. APPLETON: I understand that I'm on borrowed time now, yes, sir.

PRESIDENT ORREGO VICUÑA: Thank you.

MR. APPLETON: Canada and Professor Reisman suggests that the decision in Grand River is a superior decision to the UPS Decision in relation to continuous breach. Grand River is not a decision of continuous breach. Grand River is a decision about when the Investor had or should have had knowledge of breach, and the loss or damage flowing from it. In Grand River, the Tribunal, consistent with the UPS Decision, distinguished between different breaches. It found that as noted, State responsibility for breaches arising out of conduct that could not have been known or anticipated before the cutoff date is not affected just because those later breaches have some relationship to the earlier ones. This is consistent with the UPS Decision on continuous breach. The tribunals solidify the underlying principle in Article 12 that every act is

10:33:27 a breach. It's important to realize that strictly speaking, the Grand River Tribunal was not dealing with a continuous breach at all. It was dealing with a distinct later breach within the limitation period. These were distinct legal injuries.

The ILC's understanding of breach is confirmed by the broad meaning given to the expression of measure in the NAFTA, and measure is any act of omission of a State, regardless of its particular legal or administrative form or any other special feature. It is helpful to consider why international tribunals have been generally unanimous on this point.

The simple fact is that time barring continuing acts does not fulfill the purposes of time bars. In its written pleadings, the Investor drew from the international decisions to identify these purposes. Canada again did not challenge its purposes and did not add any further purposes. And the purposes of time bars are the following:

One, the promotion of legal certainty and stability once a decision has been taken;

10:34:39 Two, ensuring that there is evidence of the dispute.

Barring claims, impugning continuing said actions fulfills neither of these purposes. The State's continuing breach of its Treaty obligations undermines certainty and stability.

Furthermore, the continuing action continually generates new evidence. This fact is borne out by this dispute itself in which much of the evidence dates from after the year 2003. In summary, it is universally accepted that time limits do not bar continuing acts. All of the claims Canada says are time-barred are in regard to acts that were continuing within three years of the claim. Those claims cannot be time-barred. The facts demonstrate that Merrill & Ring became aware of all of Canada's breaches since December 2007.

Sorry. Since December 2003. I'm sorry, I misspoke.

Regardless of the continuing nature of Canada's breaches, Merrill & Ring's claims are therefore not time-barred because Merrill & Ring

10:35:54 became aware of the breach less than three years before it brought its claim on December 27, 2006.

Now, before identifying the time Merrill & Ring became aware of Canada's breach, I would like to quickly address an argument raised by Canada in its opening. Canada argued that Merrill & Ring ought to have been aware of every single one of the breaches at issue in this claim in 1998, when Notice 102 was issued. This argument is absolutely absurd.

First, none of Merrill & Ring's claims directly impugn Notice 102. Canada's breaches through the actions of Canada and British Columbia are all examples of the exercise of discretion under a Regime that permits such unfairness to occur. In fact, it allows such unfairness to flourish. Under Canada's argument, every Chapter Eleven claim impugning any governmental administrative action taken under Notice 102 would have been time-barred from the year 2000 on. Indeed, under Canada's argument within three years of any statute delegating governmental authority and any claim about the misuse of that authority would be

10:37:05 time-barred, Canada's argument is absolutely and simply absurd.

So, to conclude our submission, in response to Canada's argument that Merrill & Ring's claims are time-barred, this Tribunal can dispense with this argument in two easy steps. The Tribunal need only be aware of one uncontested fact and a simple law, uncontested fact is that every one of the actions out of which the claims arise were within three years of the date of the claim. The simple law is that time limits do not bar continuing acts.

And in any event, the facts in the record demonstrate that all of Merrill & Ring's claims fall well within the three-year limitation period.

Mr. President, Members of the Tribunal, as we walk through the trees of this Regime and the blockmail it causes, we all have a different experience, but it's clear that the forest remains the same. I thank you for your time this morning. I'm going to provide an answer for Mr. Rowley. It's Paragraph 63? Yes, I think that's what you page, yes, Page 63 is still there, and I thank you for

your time this morning.

Thank you.

PRESIDENT ORREGO VICUÑA: Thank you, Mr. Appleton.

Now, I suggest that we take a 10-minute break now.

May I mention one thing that it could be useful. You have mentioned, and the same probably will be the case of Canada, a number of citations to a decision, to pages of the record, to witness testimonies, and statements and so. It might be useful if we could have as a Tribunal after the hearing, although not right now, a list of all those citations in connection to the reference in the transcript. Of course, one can find them in the record we have, and most we have seen, but eventually, to connect one source with the other might be easier if we have a guide for that.

MR. APPLETON: I assume you would like each side to produce that with respect--I'll try it again. I presume you would like each side to send something to the Tribunal identifying the sources at

some point after the hearing; is that correct?

PRESIDENT ORREGO VICUÑA: That's correct.

ARBITRATOR ROWLEY: Counsel, just one point. Earlier, we mentioned that in the closings that counsel might wish to allow time for questions from the Tribunal. I'm the only one who has asked any questions so far, and I have held myself back because it was clear that Mr. Appleton and Claimant was going forward and was likely to use this time and it's done so, and it may well be that Canada will be doing the same.

We were just talking among ourselves about the ability to put questions to you for which we think answers may be of interest to us.

So, assuming that Canada will use its two-and-a-half hours this morning, would it be this afternoon--well, I presume it will be this afternoon that we are going to consider that, and the question is, do we do that after lunch and before you have your second bite of the cherry, or do you want to give over your second bite of the cherry to us? But, I mean, that's a question I'm raising, but I am

indicating to you both now that I am likely to have some questions. We've got a time issue.

MS. TABET: As for Canada, we are perfectly happy if you wish to interrupt us in the course of the presentation and ask the questions, and we will adjust our time accordingly to fit within the two-and-a-half hours. If you want to put questions at the lunch hour, additional questions or questions that you have not had the chance to ask, then we would, of course, be perfectly happy to devote our Reply to those questions.

PRESIDENT ORREGO VICUÑA: I believe the best alternative is to have the questions immediately after the lunch break. Whether you may wish to answer them in your replies or differently, that will be all right. But at least that you will have that in mind as questions that could be eventually looked at; correct? All right.

Great. Thank you. So, we have 10 minutes' break.

(Brief recess.)

PRESIDENT ORREGO VICUÑA: We are ready to

resume the closings now, and we shall hear from Ms. Tabet on behalf of the Respondent. If you please.

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

MS. TABET: Thank you, Mr. President and Members of the Tribunal.

We have distributed Canadian's Core Bundle which we will be referring to in the context of our closing arguments.

Before I start, let me outline the plan of Canada's presentation. We will focus on the two issues that were flagged by the Tribunal, so the issue of time bar and the allegations of breach of the minimum standard of treatment.

Now, because the Investor has also raised today national treatment performance requirement and expropriation, we will address those allegations, but briefly.

And finally, we will also address the Investor's damages claim. This morning Mr. Appleton summarized the Investor's case by saying it's not like we do business in the United States; and one of

10:59:55 their witnessed said that, without the 49th Parallel logs would just keep going on. And that is the Investor's case. They don't want to be subject to Canadian regulation, and they want to make more profit. It's not a about violation of minimum standard of treatment or national treatment of a Chapter Eleven obligation, and this Tribunal only has jurisdiction to consider Chapter Eleven obligations, not questions of constitutionality as the Investor would have you do.

And it's not a question of whether log export controls are good public policy or whether they're necessary. That's not the jurisdiction of this Tribunal. This is not a judicial review. And if Merrill & Ring wanted to challenge this, they could have gone to Canadian courts, but they didn't.

There are three fundamental problems as we saw this week with the Investor's case. The first one is that NAFTA does allow, and the NAFTA Parties did contemplate Canada's log export controls.

The second is that Merrill & Ring's claims are time-barred.

11:01:10 And the third, as I've just said, is that none of the allegations fit within Chapter Eleven obligations, and that notwithstanding Mr. Appleton's efforts to turn 1105 into an equitable jurisdiction for this Tribunal.

So, let's me address this morning the time-bar issue because it is the first issue that the Tribunal must consider as it relates to Tribunal's jurisdiction. And on Monday, Mr. Rowley asked whether Article 1106--sorry, 1116--was a jurisdictional provision. The answer to that question is yes. NAFTA Article 1116 provides the right to Investors to sue directly a Party to the NAFTA. Without the article, the right does not exist.

So, the Article provides a right, but also limits the exercise of the right.

Let's look at the text of the Article.

Now, the first paragraph of 1116 provides the jurisdiction rationae materiae of the Tribunal. It limits the matters over which the Tribunal has jurisdiction, and it says that the Tribunal only has

11:02:36 jurisdiction over Section A of Chapter Eleven and certain provisions of Chapter Fifteen.

The second paragraph limits the Tribunal's jurisdiction as to time, the ratione temporis jurisdiction. And it says that the Investor has to act within three years of having acquired knowledge of the breach and loss arising from that breach.

So, to use an example, if the investor made a complaint under Chapter Twelve, the Tribunal would decline jurisdiction because it doesn't have competence over that matter. And the same is true for the time bar provided at Paragraph (b) of Article 1116.

So, the structure of the Article and instruct of the first paragraph confirms that it is a jurisdictional provision. It's not necessary, in other words, for the Article to start with the Tribunal only has jurisdiction in matters within three years for it to be a jurisdictional provision.

The requirements in that Article go to the fundamental issue of Canada's consent to arbitrate the disputes under Section B of NAFTA Chapter

11:03:53 Eleven. If you turn to Article 1122 of NAFTA, it's the Article dealing with consent to arbitration, and it clearly states that Canada only consents in accordance with the Procedures set out in the agreement.

Now, Article 1101 has been termed as the gateway to Chapter Eleven, and that's the Article that sets the scope of Chapter Eleven.

But for the purpose of a tribunal established under Section B of NAFTA Chapter Eleven, Article 1116 is the second gateway. In other words, the requirements of 1116 must also be satisfied. And for that, I refer you to the Tribunal in Methanex in the Award, the Partial Award, of August 7, 2002, at Paragraph 120. The Tribunal was considering the jurisdictional requirement for a Chapter Eleven Tribunal and said the following, and I quote in part Paragraph 120: "In order to establish the necessary consent to arbitration, it is sufficient to show, one, that Chapter Eleven applies in the first place; i.e., that the requirements of Article 1101 are met; and, two, that

11:05:22 a claim has been brought by a Claimant Investor in accordance with Articles 1116 or 1117.

Now, other NAFTA Tribunals such as Feldman, Mondev, and Grand River have interpreted the time bar in Article 1116(2) as a jurisdictional provision.

Now, turning to this case, the evidence on the record and what you heard this week confirms that the Investor knew of both the alleged breach and resulting damages prior to December 27, 2003, the three-year cutoff date, and the Investor has tried to get around this in three ways.

First, it has tried to argue that it did not know with precision the damages resulting from the breach until after the cutoff date.

And, second, it has tried to get around the time bar by arguing that it is a continuing measures and that, as a continuing measures, the three-year time bar is continuously renewed. As a result of that, the Investor says, three years only act as a limitation on damages.

The third way the Investor has tried to get

11:06:51 around this is by arguing that what is at issue are separate legally distinct measures. I will address those three arguments, but none of them have any merit.

Essentially, it is Canada's position that all the Investor's claims are barred because the company has been operating under the Regime for several decades, and therefore must have acquired knowledge of any alleged breach and damage long before the cutoff date.

So, let me turn to the first argument, which is that the investors should have known the damages. The evidence before you establishes without any doubt that the Investor first acquired knowledge of the alleged breach before 2003, and I will just refer you--put on the screen some of the time lines, the critical dates which I have referred to earlier in my presentation and over the course of the week. So, the December 27, 2006, Notice of Arbitration, which means that the cutoff date is December 27, 2003. And the two dates at issue, 1998, when Notice 102 was issued, and 1999, when the

11:08:16 B.C. Export Procedures were issued.

You heard in cross-examination this week Mr. Schaaf say that back in 1997 and 1998, he knew of the measures at issue in this arbitration. I refer you to Pages 184 of the transcripts.

And in the cross-examination, I refer Mr. Schaaf to several of the letters where they were complaining of the Regime to Department of Foreign Affairs and International Trade. Those letters are at Tab 13, 14, 18, 19, and 21 of your Core Bundle. But take a look at what Mr. Schaaf said. It's very clear that the same concerns in the letters that were made back in '97 and '98 in relation to Notice 23 and Notice 102 are the complaints that are before you now. In particular, they raise complaints with respect to the Surplus Test, blockmail, the competition, and operation of the Advisory Committee, as well as standing exemptions.

And as early as April 1998, if we can turn to Page 189 of the transcripts, Mr. Schaaf says, admitted that the Investor did put DFAIT on notice that it was monitoring the effects of the Regime.

11:10:24 They said they were closely following the process.

Now, this is inconsistent with the fact that Investor nevertheless attempts to argue that it did not have knowledge at the time of the damages and that it could not gain knowledge of damage until the Regime was applied in each specific case.

Now, the Investor tries to explain this in the following way, and I refer you to Paragraph 112 of the Reply. It's also on the screen before you. It argues that it did not know with sufficient precision the losses that it would suffer at the time. But the cases dealing with time bar under NAFTA do not require--have concluded that the Investor is not required to know the exact extent of damages, and this was the conclusion in particular of the Mondev Tribunal. I refer you to Paragraph 87 of the Mondev Decision, which is also at Tab 3 of your Core Bundle.

And the Mondev Tribunal specifically says that a Claimant may not know it has suffered loss or damage--sorry, a Claimant may know it has suffered loss or damage even if the extent or quantification

of the loss or damage is still unclear.

Now, this was also the conclusion of the Tribunal in Grand River, and the facts of the Grand River Case illustrate this well. In that case, the Master Settlement Agreement and the escrow statutes of various states require manufacturers to place funds in escrow with respect of each sale of cigarettes by the following year.

So, the quantity of loss was determined not by the statute, but by the volume of sale by each manufacturer during the course of the year. So, obviously, the volume would vary over time. But nevertheless, the Grand River Tribunal accepted that. The Claimant was in a position to have sufficient knowledge of the breach and damage and so of the loss it has suffered as a result of the Master Settlement Agreement and the escrow statutes themselves, even if later periods--in later periods the volume would vary.

I refer you in particular to Tab 4 of your Core Bundle, where you will find the Grand River Award, and if you want to look at Paragraphs 82 and

83, those address that specific issue.

Now, in the present case, the Investor's claim that it did not have sufficient precise knowledge of losses is not credible, and it lacks credibility for two reasons:

The first is that is it contradicts the Investor's claims with respect to damages where it claims that future lost profits and therefore implying that the future costs of Notice 102 can be ascertained with sufficient certainty.

And the second reason is that the Investor operated under the Regime for many years even before Notice 102. And it was a regular user of the Regime. Therefore, it could have very good knowledge of the effects of the Regime on its business.

Indeed, Ms. Korecky explained that Notice 23 and Notice 102 were virtually identical, essentially the same; therefore, long before Notice 102, they knew how the Regime would operate.

And Mr. Schaaf in his Affidavit at Paragraph 32, says that based on our experience, and

I quote, "Based on our experience selling in other markets, we know exactly what the international market value of our B.C. log is, and we know exactly how much loss we incur."

Now, in any event, again, after a few months of operating under Notice 102, it would have been sufficient for the Investor to acquaint himself with Procedures and the damages resulting.

The only conclusion the Tribunal can come to is that the Investor essentially sat on its hands for eight years before bringing this claim to arbitration.

Now, turning to the Investor's interpretation of continuous measure as renewing the time bar, what the Tribunal has to decide with respect to Article 1116(2) is how it applies to a claim brought in relation to a continuous course of conduct, and that's what is at issue here, the continuous application of the Regime.

The Investor's argument is contrary to the express terms of 1116(2), and it is also contrary to the agreement of the NAFTA Parties as to the

interpretation of the time bar provision in respect to a continuing course of conduct.

I have already talked about the ordinary meaning of the provision in my introduction. I won't go over this again, but it is important to focus on the fact that this is a rather unique provision. The terms of this provision are not found in other dispute-settlement provisions of the NAFTA, and they're not found in the cases from the human rights cases that Mr. Appleton has cited.

So, this is what the Tribunal has to apply. It's not human rights cases in the under European courts. It is not international law. Article 1116(2) is lex specialis, and it is the governing law that the Tribunal has to apply.

Now, the Grand River Decision considered 1116(2) and says that it is--and I'm quoting from Paragraph 29 of the decision on objections to jurisdiction that you will find at Tab 4, and it says in respect of 1116 that it is a clear and rigid limitation, and it's not subject to suspension, prolongation, or other qualification. And the

Feldman decision award is also to that effect.

So, because it is a jurisdictional provision and it goes to the parties' consent to arbitrate, the Tribunal has to give careful consideration to the terms chosen by the Parties, and the key term here is the term "first." So, the focus of the provision for the purpose of jurisdiction is on when the Investor first acquired knowledge of breach and loss. Obviously, the first occurrence of breach--of knowledge of breach cannot occur repeatedly, and this is something that Professor Reisman points out in his opinion at Paragraph 29.

The Investor's interpretation renders the terms "first" meaningless. One cannot acquire--first acquire knowledge multiple times.

ARBITRATOR ROWLEY: Could I stop you there for a minute, and you can either answer this now or after lunch.

MS. TABET: Please.

ARBITRATOR ROWLEY: Is it not possible to look up at the word "first" and to say that that

modifies or deals with the alleged breach? So, don't look at the opinion of Professor Reisman, but look at the words of 1116(2). And one would, if one took Professor Howse's view that a breach of the NAFTA or of the minimum standard of treatment occurs each time a State fails to respect an obligation, then the first acquisition of knowledge of a breach may well have been years ago, but the first acquisition of knowledge of the breach alleged in this claim may well be within three years of the claim if each breach constitutes or each nonfulfillment of an obligation constitutes a breach.

Now, if that's right, then it seems to me what Canada needs to do is to say focus on the question of whether the nature of the breaches alleged by Claimant in this case are so similar and so repetitive from the time of the introduction of the measure--that's the 102 measure--that they fall into the category of repetitiveness of breach that Grand River was speaking of.

MS. TABET: I will actually turn to this in

a second, but essentially--essentially the answer to your question is--and what Professor Howse cannot respond to yesterday is because he did not want to delve into the facts, but there is--the facts have to be considered in this case, and what we are talking about, what the Investor is complaining about is a routine application of Notice 102.

So the issue that I will come to is, is that theory that there is a legally distinct act that occurred in the relevant period, is that a valid theory? And it isn't because you cannot distinguish what is happening in the market from the Regime itself, and with two very small exceptions which we will specifically address in the context of each breach.

ARBITRATOR DAM: Could I just put the question in different terms, and here I do not have the experience of my two colleagues with regard to NAFTA decisions on procedure, but I do have a great deal of knowledge about American procedural law under the Federal Rules. And I see why no reason there cannot be more than one breach per case, and

one possible limitation would be because it was not--that was not how the case was begun in the initial position of the Claimant, but at least under the Federal rules you conform the--in fact, you conform the complaint to the proof after the case is over. So, I just don't know how to phrase the question in terms of established NAFTA case law decisions, but I see no reason why we must think of this as a single breach and therefore have call it continuing if we wish to extend the limitations period, if there are a series of concrete decisions over time, which are not necessarily inextricable from the Notice 102, because Notice 102 doesn't talk a lot about these Procedures that were adopted and how individual cases were handled.

MS. TABET: Well, I want to take you to the specific facts with respect to each obligation because I think in theory you're absolutely right. There can be distinct legal breaches.

The determination you will have to make is whether the Investor is complaining really of distinct legal facts of breaches, applications, or

11:25:22 are they really just complaining of the Surplus Test itself, of the Regime that was set up by the parties. And I will show you that really what they're complaining are just the Regime itself, is what was said by the Regime, and how it's always been meant to be applied and has continuously been applied.

And that in that case, if that's what they're complaining of, you have to come to the conclusion that the claim is time-barred.

Before I turn to this issue of the legally distinct acts, and if that's what is at issue here, I want to bring your attention to the fact of the agreement of the three NAFTA Parties. And Professor Howse yesterday said in his testimony that there is really no agreement or that it should not be given much weight. But take a look at what the three NAFTA Parties have agreed to. They have specifically said that a continuing course of conduct does not renew the limitation period under 1116(2) or 1117(2). That's from the U.S. submission at Paragraph 2. Mexico agreed with that submission,

11:26:38 and it is also consistent with the submission of the Government of Canada.

This Tribunal should give considerable weight to the interpretation that was agreed by the three NAFTA Parties. Under Vienna Convention, Article 31(3), this is something the Tribunal should take into account, and the Canadian Cattlemen Case, which was a case brought against the United States which you will find at Tab 10 of your authorities, agreed that the NAFTA Parties can agree on an interpretation within the meaning of the Article 31(3) of the Vienna Convention without using the process referred to in Article 1131 of NAFTA.

I refer you in particular to Paragraphs 185, 186, and 188 of the Canadian Cattlemen Case that you find at Tab 10 of your authorities. Even if you were not to consider it a subsequent agreement within the meaning of Article 31(3)(a), it is a concordant, consistent, and common practice of the NAFTA Parties, as it has been consistently agreed to by the NAFTA Parties and argued by the NAFTA Parties.

11:28:19 Let me address the NAFTA cases dealing with time bar, and I have referred to some of these decisions, but really there are two decisions that deal with the issue of continuing measure and how the time bar applies to continuing measures. There is the UPS Decision and the Grand River Decision.

Now, the two decisions are contradictory, and we have in our submissions explained why the UPS Decision is wrong. Mr. Appleton has somewhat mischaracterized the Grand River Decision, so let me take you to it. Okay, the Master Settlement Agreement in that case dated from 1998. The escrow laws that were passed pursuant to the Master Settlement Agreement dated from the--there were various in various states, but essentially from the period 1999 to 2000.

Now, Mr. Appleton has said that Grand River did not deal with the continuing measure, but it clearly did because it was contemplating the Master Settlement Agreement and the escrow laws.

And there were a number of other things that happened after the escrow laws and Master

11:29:45 Settlements Agreement. There were amendments that were made, complementary legislations in 2001 and 2002, and some amendments in 2003-2004. If the Grand River Tribunal, if there was only the escrow laws and Master Settlement Agreements, those two continuing measures, the Tribunal would have concluded it had no jurisdiction, but it did find jurisdiction only on those events that happened after the cutoff date because it considered they were a legally distinct act because they were amendments to legislation or an additional piece of legislation.

Now, in this case, I will explain why there are no legally distinct act at issue. Let me take you to Professor Reisman's opinion at Paragraph 19. Professor Reisman notes that one can certainly imagine scenarios in which a distinction can be drawn between a regulation or a law and the application to a particular case. For example, the law does not violate a Chapter Eleven obligation, but the way in which it is applied in a particular case does, and that's a good reason for separating

the law from its application. And that's also consistent with what the three NAFTA Parties agree.

However, in this case, it's very difficult to distinguish Notice 102 from the individual application. Take a look at Paragraph 119 of the Investor's Reply, for example.

I will not read it out loud. It's a lengthy submission, but essentially while the Investor has tried to separate continuing--the continuing allegations from noncontinuing measures by just saying it's the application in each case, they really haven't provided any evidence or brought a case against each application. In fact, they seem to suggest that it is, for all intents and purposes, indistinguishable.

Now, this week, we heard some new evidence regarding particular applications. For example, there were allegations that Notice 102--that the Surplus Test was used in an abusive way by certain buyers. That is a nonroutine application of Notice 102. Arguably, that's a legally distinct act that you could consider. But if this is the case the

Investor wanted to bring, they should have provided details of these instances in its submissions to allow Canada to respond to these. And no evidence was supported to go with these vaguely worded allegations.

And if you look at the Investor's damages case, they have made no attempt to quantify damages flowing from these particular instances of misapplication. The only conclusion you can come to is that the Investor's case was never about misapplication of the Regime. What it is complaining of is the Regime itself.

Now, we will in the context of dealing with each of the obligations and the allegations under each Article address why there is no legally distinct act and why the claim is time-barred.

Just to conclude on the issue of time bar, because the Investor's challenge we will show you it doesn't arise of particular legally distinct acts, the routine application does not renew the limitation period and restart three-year time bar; and you should, therefore, decline jurisdiction.

ARBITRATOR ROWLEY: Just stopping you for a moment, you referred to new evidence brought this week about allegations that Notice 102 and the Surplus Test was used in an abusive way by certain buyers, and you went on to say that this is a nonroutine application of Notice 102 and arguably that's a legally distinct act.

So we are clear, the abusive use by certain buyers of the Notice 102 Regime is blockmailing?

MS. TABET: Well, you would like to address it in the context of blockmailing because it's Canada's submission that the term has been used for all kinds of things.

ARBITRATOR ROWLEY: All right. But this--

MS. TABET: And you will try to--I think we have to understand what the term blockmailing is and try to separate what goes on in the market and negotiations, the legitimate offer that stop--that result in a log being declared nonsurplus from issues like targeting or violations of the 90-day rule.

ARBITRATOR ROWLEY: What I'm concerned

about is what you said a few minutes ago about new evidence that was--that certain buyers use Notice 102 in an abusive way, and that might well be a legally distinct act. And I want to know what you're talking about so I know what--to the extent that you're making an admission or concession, I want to know what you're talking about.

MS. TABET: Okay. I was specifically talking about, for example, an issue of targeting by the buyer, and I want to address that in the context of 1105 because there is also problems of attribution to the Government of Canada of behavior of the buyers. So, there are a number of issues that arise out of that. But for the purpose of time bar, one can imagine that if you're not talking about a routine application of Notice 102, if there is something that's contrary to the rules of Notice 102, like a violation of the 90-day rule, if the Tribunal were to conclude that it could be attributed to the Government, then perhaps that could be a legally distinct act within the three-year time bar.

But perhaps if you give me a few minutes, I will ask my colleague, Mr. Dumberry, to present the law on Article 1105, and we will come back to each of the allegations of blockmail.

PRESIDENT ORREGO VICUÑA: I have, Ms. Tabet, one additional question that you may wish to consider now or later, which is how do you relate to the discussion you have just developed, the reference that Article 1101 makes to measures adopted or maintained? If you, for example, follow the distinction of Professor Reisman that it is different, the law from the application and that those may give place to different breaches and eventually claims and so forth to the extent that distinct is made in actual fact, but would the maintenance of a measure as opposed to the adoption be itself the subject of a claim which might occur after the time period? I mean, after the period has allowed you to claim after the three years?

MS. TABET: Well, there is no question that the maintenance of a measure, as Professor Howse said, is also subject to Chapter Eleven, so--it's

not only the law, but the application of a measure is also subject to Chapter Eleven. But the issue is how the time bar applies and how the provision first acquired knowledge of breach applies.

And if you are to give meaning to those terms, you cannot conclude that a continuous measure, so a piece of legislation that is continuously applied never becomes out of time.

PRESIDENT ORREGO VICUÑA: But what would be the meaning of maintain? Onetime act, first application?

MS. TABET: No, I think 1101 deals with the scope of the chapter, and we have to keep in mind that for the purpose of NAFTA generally, if you look at the provisions of dispute settlement in Chapter Twenty, for example, from State to State, they could complain of the legislation, the United States could complain of the maintenance of the measure. There is not that time bar that you find in Article 1116 with respect to the other NAFTA Parties. That's a limitation with respect to investor-State dispute settlement.

PRESIDENT ORREGO VICUÑA: I see. Thank you.

MR. DUMBERRY: Good morning. My presentation is divided in two parts. Ms. Tabet will discuss with the issue of blockmailing after my presentation, so this presentation only deals with 1105, notwithstanding blockmailing. In the first part of my presentation, I will deal with the test under 1105. In the second part, I will examine the specific allegations that have been raised by Merrill about the Log Expert Control Regime. There, Canada will address whether or not each specific allegation is time-barred.

After that, Canada will demonstrate that in any event, so even if one considers that the allegation is not time-barred, none of the allegation rises to the level of a breach of international law.

Article 1105 reads as follows: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full

protection and security."

So, what does "international" mean in the context of this provision? It has always been clear for all three NAFTA Parties that in the context of 1105 the word "international" means the minimum standard of treatment that all States must give to foreign investors under customary international law. The proper meaning to be given to Article 1105 was confirmed by the NAFTA note of Interpretation in 2001. Let it be clear that the Note is the official and definitive meaning to be given to this provision. The Note is binding, and it must be applied by this Tribunal. Therefore, under Article 1105, Canada must accord to foreign Investor a treatment that is in accordance with the minimum standard existing under customary international law. That is the test as this Tribunal must apply.

Now, the Investor has put forward a different test in its Reply. The Investor has transformed Article 1105 into a protection against measures that the Investor feels are unreasonable. So, under the Investor's test, Canada would be in

breach of Article 1105 each time that, and I quote, "There is no reasonable relationship between Canada's actions and a rational policy." This is obviously not the proper test that needs to be applied by this Tribunal.

Under Article 1105, the Investor must prove that Canada's action has breached a rule of customary international law. Now, Merrill has been referring through this arbitration to several so-called obligations like transparency, good faith, et cetera, arguing that they are now part of customary international law. We have addressed this issue in our Counter-Memorial as well as in our Rejoinder. I just want to briefly touch upon two points that were made this morning with respect to this issue.

The first is transparency. So, the Investor alleged that transparency is now part of customary international law. But yesterday, Professor Howse, who is an expert on international, said, and I quote from the transcript, "You said that the concept of transparency is really starting

to develop now."

He also said that there was an increasing emerging interest in the concept of transparency in international law. Now, that seems to me that this is clearly not a concept that is part of customary international law if there is a growing interest in such a concept. Clearly, transparency, according to Professor Howse, is not part of customary international law.

ARBITRATOR ROWLEY: Do you have a transcript reference?

MR. DUMBERRY: Yes. It's at Page 1018. It's on the screen now.

MS. TABET: 1318.

MR. DUMBERRY: 1318, yes. So, the other issue I would like to talk about briefly here is legitimate expectation, so clearly legitimate expectation must be based on representation made by a Government at the time when the investment was made. In this case, no specific representations were made by Canada to Merrill. There is no evidence on the record that when Merrill started

investing in Canada over a hundred years ago, it was given any assurances and that it relied on those assurances. There is no evidence on the record.

Canada has always said that Merrill would be subject to Notice 102, and has always said that Merrill will be treated fairly and in an equitable fashion, just like any other log producers, whether they be Canadian or American. A good example of that is a letter dated 1st of June '98 that was sent to Merrill. And this letter is found at Korecky's Affidavit Exhibit 43. In any event, none of the allegations that have raised by Merrill in these proceedings rise to the level of what is considered a violation of international law.

And we need to go back here to what is the goal of this provision. So, what is the goal of 1105? The goal is to ensure that a treatment given by a State to a foreign Investor does not fall below an established minimum threshold, a minimum level. Under NAFTA, the threshold to come to the conclusion that a State has committed a violation of international law, of customary international law,

is high. This has been--this is the conclusion that has been reached by all NAFTA Tribunals so far.

The First Instance is the S.D. Myers Tribunal. The Tribunal explained that to find a breach of Article 1105, the treatment given to a foreign Investor must, and I quote, "rise to the level that is unacceptable from the international perspective."

According to the Thunderbird Tribunal, the treatment must be, and I quote, grave enough to shock a sense of judicial propriety.

This is a very high threshold. The threshold is not that of a single breach, as apparently Professor Howse said yesterday. The threshold is much higher than that.

Merrill has raised a number of different allegations in the context of this 1105 claim. At the end of this week, it seems that Merrill is, in fact, making two different broad categories of allegation. The first one is that FTEAC membership is biased. The second one is that there is secrecy and lack of transparency.

11:48:44 I will now briefly examine these two different allegations as well as to some more specific ground which have been included under the heading of these two allegations.

It is necessary to go into the details of the specific allegation for three reasons: The first is that most of these allegations are actually time-barred. The second one is that it will be clear after our demonstration that these allegations are just, in fact, minor administrative irritants often relying on factual mischaracterization or exaggeration. Canada has already demonstrated that none of these allegations amounts to a violation of international law, so let's now first examine the first group of allegations that are made.

This is the complaint that the membership of the FTEAC is biased. FTEAC is composed of neutral specialists of the industry. It includes individuals that have worked in the past, are working now for companies that are both selling and buying logs in B.C. So, there is no general bias against companies buying logs. There is no general

11:50:10 bias against sellers in this system. FTEAC has also a well balanced geographical representation.

ARBITRATOR DAM: You needn't face this now, but there seems to be some difference between the parties as to what the facts are here. I know that I think, as Ms. Korecky said that what you just said, but do we have the names and affiliations of the Committees at various times? Maybe some of the firms are on both sides.

MR. DUMBERRY: Yes, we do.

ARBITRATOR DAM: Particular firms on both sides of the transactions.

I think if there were more specific information in the record, that would be very useful to look at, and not just a single sentence to that effect.

MR. DUMBERRY: I suggest that there is such information. I suggest that after the break we come up with the proper affiliation of each member, and that will show--

ARBITRATOR DAM: It would be useful to have that pointed out for us. Not now in the oral

11:51:23 argument, but some way.

ARBITRATOR ROWLEY: Could I just add to that while you're going to do it, if there is any evidence in the record that Canada or the Province sought out membership from the log exporting community or the timber growing community, bring that to our attention as well.

MR. DUMBERRY: I will certainly do so in about maybe two minutes.

So, let's come back to the allegation of bias of the membership. The allegation is also made that individually and collectively FTEAC members have an interest in setting the price for logs low. This is not true. The members are so only assessing the Market Price and based on that they make recommendation on the fairness of offers. FTEAC ultimately is an independent and impartial advisory buyer, but the first question that needs to be asked here is whether or not this allegation of bias is time-barred. So, when did Merrill first complain about this issue?

Well, in fact, it's in a letter dated 13

11:52:43 April 1998, so 13 April, that's 13 days after the entry into force of Notice 102. In this letter, Merrill wrote to Mr. Jones and complained about this. You will have in your Common Bundle at Tab 13 that letter. I'm not going to read the letter, but reference is made to the makeup of FTEAC that gives us, Merrill, great concern. Mention is made of obvious conflict of interest, and towards the end of that letter there is a reference to the principle of fairness which requires that the Committee makeup should be changed.

So, what is clear is that by April 1998, Merrill had already complained that FTEAC membership was biased. April '98 is therefore the critical date in that context. This is the date when Merrill first acquired knowledge of the alleged breach and the damage. From that date of April '98, it had three years to file a NAFTA Chapter Eleven claim. It did not.

So, the general allegation raised by the Investor regarding FTEAC's biased membership is time-barred.

11:54:09 So, let's assume now for a second that this argument, this general allegation is not time-barred. The next step for this Tribunal would be to determine whether or not this allegation is in breach of customary international law of Article 1105.

So, under the general category of this allegation by its membership, Merrill is, in fact, complaining about three different things. I will now briefly examine these three different things.

The first one is Merrill complaining that no private landowner are allowed to become members of FTEAC. Well, this is simply not true. As explained by Mr. Cook in his Affidavit, several invitations have been made in the past to private landowners to join FTEAC. He provided specific minutes of meetings specifically dealing with the appointment of private landowners on FTEAC. You will find such an example at Tab 15 of the Core Bundle of Documents we gave you. It is therefore false to say that private landowners are prohibited from becoming members of FTEAC. As a matter of

11:55:36 fact, one current member of FTEAC--well, Mr.--I'm not going to mention his name, so we don't have to go into closed session. This individual is a private landowner, one current FTEAC member.

ARBITRATOR ROWLEY: Is that confidential? Can you not identify him?

MR. DUMBERRY: Well, it's Mr. Taylor.

Another allegation raised by the Investor is the complaint that he has never been consulted by FTEAC concerning the appointment of FTEAC members. Well, this is also inaccurate. Mr. Cook explained in his Affidavit that FTEAC has specifically consulted with Merrill concerning the appointment of one individual in particular, and in that case Merrill supported the nomination of that individual to FTEAC.

The relevant minutes of meeting is found at Tab 16 of the Core Bundle of Documents.

In any event, there is no general obligation to consult with each individual industry members regarding the composition of an advisory body like FTEAC. Merrill's allegation clearly does

11:57:08 not amount to a violation of international law.

A third allegation under the umbrella of general bias is that FTEAC does not have any guidelines on potential issues of conflict of interest of its members. Merrill first complained about this issue back in April 1998. This is Tab 13 of the Core Bundle of Documents. So, from that date, April '98, the Investor had three years to bring a claim under NAFTA Chapter Eleven. It did not. Therefore, the allegation of conflict of interest is time-barred.

Let's nevertheless look at the allegation in itself to determine whether or not it is in breach of Article 1105.

First of all, there is no general obligation under Canadian law or international law whereby an Advisory Committee like FTEAC only making recommendation, not decision, must adopt guidelines on the issue of potential conflict of interest of its members.

Second, Merrill did not provide any concrete evidence of any FTEAC recommendation that

11:58:35 was actually made in circumstances where there was a reasonable suspicion of conflict of interest. There is nothing on the record.

Merrill also did not explain how the absence of any such guideline on conflict of interest would have any concrete effect on its business.

In any event, the allegation raised by Merrill of the absence of guidelines is wrong. FTEAC has developed in the past procedural guidelines to deal effectively with potential issues of conflict of interest whenever they actually arise in real life. It doesn't matter whether these guidelines are not in written form. What matters is that they exist, that they are well-known to all members of FTEAC, and that they are always applied. Mr. Cook has testified that whenever an FTEAC member has any kind of business relationship with the company advertising the logs or the sawmill making an offer, well, that member will always be asked to leave the room, the meeting, before any discussion take place on the issue. The member will be invited

back in the meetings room only at the end of the discussion on this matter.

In his Affidavit, Mr. Cook provided several uncontested examples of minutes of meetings where these guidelines were actually applied. One example is found at Tab 17 of the Core Bundle of Documents.

Now, Mr. Appleton this morning refers to all of this as a "silly charade." Canada believes that the allegation that there exists no guidelines on conflict of interests is false. And even if there were no guidelines on conflict of interest, this would not clearly not amount to a violation of international law.

So, let's now examine the second group of allegations. So, the first group of allegations was membership of FTEAC is biased. The second one is the complaint about the secrecy and the lack of transparency in FTEAC.

First thing that needs to be said is that FTEAC is an Advisory Committee making a recommendation. FTEAC does not make any decision. Only the Minister makes decisions. In fact, the

Minister can disregard an FTEAC recommendation. So FTEAC recommendation are not determinative of the issue.

So, this morning Mr. Appleton asked the following question: Who really takes the decision here? Well, it is the Minister.

Contrary to what Mr. Schaaf seems to believe, the decision of the Minister is open for judicial review before the Federal Court of Canada. For obvious reason, this fact is never mentioned by the Investor.

In any event, the standard of transparency and fairness for an administrative body is clearly not the same as for a judicial body. This was clearly established recently in the case of Thunderbird, which is a NAFTA case. So, in this case the Tribunal had to deal with some alleged administrative irregularities. The Tribunal ruled that when deciding whether such irregularities shock a sense of judicial propriety, these irregularities must be measured against the requirement of due process in relation to administrative decision which

are less stringent than those applicable to judicial proceedings.

So, this is true under international law, and it's also true under Canadian Law. And the famous case here is the Baker Case. In the Baker Case, the Tribunal explained that there is a large spectrum. So on the one end of the spectrum, the closer you get to a judicial decision which is final and without appeal, the higher the requirement of procedural fairness and transparency is. Canada submits that FTEAC is at the complete opposite of the spectrum here. FTEAC is clearly not like a judicial body. FTEAC's only make recommendation, not decision. If a company is unhappy with an FTEAC recommendation, it can still write a letter to the Minister to have this recommendation overruled, that's one. Second point, it can still start a judicial review before the Federal Court of Canada. So, there is still room to challenge if you're unhappy with a decision.

Under the general category of secrecy, Merrill is, in fact, complaining about five

different things. I will briefly examine these five different allegation, and I will show that they are, A, time-barred; and, B, not breach of Article 1105.

ARBITRATOR ROWLEY: Am I right that the Thunderbird decision is not in your bundle?

MR. DUMBERRY: I think the relevant passage is not in our bundle.

ARBITRATOR ROWLEY: Then at some stage later give us some reference to where we find it in the record.

MR. DUMBERRY: The reference is at Paragraph 200 of the decision, which is found in our exhibit to our Counter-Memorial at Exhibit 136.

So, we have just discussed the general allegation of FTEAC being the lack of transparency of FTEAC. Under this general heading, there are five different allegations. I would like now to turn to the first one.

Merrill is complaining that it's not allowed to make submission to FTEAC about the fairness of offers made on its logs on the Bi-Weekly List. The first question that needs to be addressed

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here is whether or not the allegation is time-barred. Merrill first complained about this issue in a letter dated 18 April 1998. It complained that it did not have the opportunity to make submission to FTEAC. This letter is found at Tab 14 of the Core Bundle.

At Page 2 of letter, it says, there is no opportunity for exporters to make direct submission to FTEAC to fully plead their case. So the critical date in this--with respect to this issue is April 1998. The Investor had three years to file a NAFTA claim on this specific issue. It did not. Therefore, this allegation is time-barred.

But let's assume for a second that the allegation is not time-barred, and let's address the issue of whether or not this allegation is founded and it's in breach of customary international law.

Ms. Korecky, as shown in her Affidavit, that the Investor has made numerous written submissions to FTEAC regarding the fairness of offers made on his logs. You will find at Tab 19 and 20 of the Common Bundles at least two examples

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of written submission made by Merrill complaining about offers that were made on its logs.

So, faced with such undisputed evidence about written submission, the Investor is now complaining about something else. Now it complains that it cannot make oral submission to FTEAC.

First of all, under most legal system there exists no absolute right to make oral submission before an administrative body. It really depends on the circumstances and the type of forum. It is really interesting to note that in the Baker Case the Supreme Court of Canada, no less, held that there was no absolute right for oral hearing, and you must remember that in the context, that's the context of the deportation of an individual. The Tribunal will appreciate that the deportation of an individual results in much dire consequences than not being able to export logs.

There is one reason, at least one reason why FTEAC meetings are not open to the public. And that is to protect business confidential information related to the log advertised on the list. There is

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absolutely nothing secret or unfair about that. Mr. Appleton this morning said, and he rightly said, that Merrill has a right to be heard, and he's right. But here, Merrill is given a full opportunity to present its case to FTEAC, to the Minister, or to the Federal Court by writing a letter and making representation.

In any event, the Investor simply never requested the permission to make any oral representation here. Merrill could have been allowed to make oral presentation or representation had it simply asked for it in the first place. It never did.

In her Affidavit, Ms. Korecky explained that DFAIT in the past has, indeed, allowed log producers to make oral presentation to FTEAC, and one good example is Mr. Ringma. He gave representation to FTEAC because he asked for it.

The mere fact that Merrill did not make any oral submission to FTEAC clearly does not amount to a violation of international law.

ARBITRATOR DAM: Could I just ask a

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question. A lot of your points here depend upon the notion that FTEAC is an Advisory Committee. That, of course, is no doubt formally correct, but is it correct in fact? And I think the other side is challenging that, if, in fact, it makes the decisions in the overwhelming majority of cases, and I hope you will address that more factually at some point. I don't want to interrupt you, but I noticed as you have gone along, a lot of your points depend upon FTEAC being an Advisory Committee, including the one you just discussed.

MR. DUMBERRY: I think I can address it right now.

If TEAC was a truly a decision-making body making final decisions, then Ms. Korecky would not be in a position to draft memo and send it to Minister and ask him to disregard these recommendation, and we have concrete example on the record where the Minister disregarded an FTEAC recommendation based on advice of Ms. Korecky, who thought that simply, to put it bluntly, FTEAC was wrong here.

12:10:40 ARBITRATOR ROWLEY: Let me add to that question. Assume that we are persuaded by the Investor that de facto FTEAC and TEAC are making decisions as regards fair market value and whether the--there is a surplus. Does it make any difference as regards the points you're making at all?

MR. DUMBERRY: Well, first, Canada believed this is not true, first thing.

Second thing, that even if you assume that ultimately FTEAC is making these decisions, these decisions can be reviewed before a Federal Court. And other companies in a similar situation than Merrill have actually decide to take that path. Merrill has decided not to do anything and take a different path. But it is open--the recourse before Federal courts is open, for the Minister's decision, of course.

It may be something that we will address further after lunch, if that is okay.

Further, another allegation that is made by Merrill is that it does not know what are the

12:12:00 detailed criteria used by FTEAC to make recommendation on their Surplus Test. Well, the first question again and again that need to be addressed here is whether or not this allegation is time-barred. The record shows that Merrill first complained of this issue in a letter dated January 30th, 1997, so even before the entry into force of Notice 102, Merrill was already complaining about that based on previous experience on their Notice 23. This example, this letter is found at Tab 21 of the common Bundle.

The Investor had three years from that date to file a NAFTA claim. It did not. Therefore, the allegation, this allegation, is time-barred.

But let's look at the allegation per se. Is this a violation of international law? There is no general obligation in most legal system for an Advisory Committee to make public the criteria it uses when making recommendation. In any event, the basic criterion used by FTEAC is well-known to all log producers, including Merrill.

The basic criterion is set out in Notice

12:13:21 102 which speak about the fairness of offers made on logs. FTEAC will assess whether or not an offer made on logs advertised on the list represents the fair market value in light of the Market Price for logs of a similar type and quality in the domestic market during the period when the offer is made. The general practice adopted by FTEAC is that an offer will be considered fair market value whenever it meets or closely match within a maximum rate of 5 percent the prevailing Domestic Market Price.

Merrill has been operating under Notice 102 for 10 years. It knows about this fair market value criterion. There is nothing secretive, arbitrary, or unfair about this criterion. This is clearly not the type of breach--this is clearly not an example of a breach of customary international law. Another allegation made by Merrill is that FTEAC recommendation on whether or not to grant a surplus status is always accepted by the Minister. In other words, the Minister rubber-stamps these allegations--these recommendations. There is no evidence on the record as to when Merrill first made

12:14:48 this first round of complaint, but let's nevertheless have a look at the allegation itself and determine whether or not this is a breach of Article 1105.

Well, in fact, FTEAC recommendations are just one factor that must be considered by the Minister when deciding whether or not to issue an Export Permit. The Minister must take into account other factors. In her Affidavit, Ms. Korecky provided several examples--and this is important--several examples where that involved Merrill where the Minister actually disregarded an FTEAC recommendation based on such other relevant factors. The example, the relevant example, will be found at Tab 22 of the Core Bundle of Documents that you have in front of you.

In any event, Merrill completely failed to explain how this allegation could even be considered a breach of customary international law.

Another allegation raised by the Investor is that it is not clear what is considered a remote area for the purpose of the advertisement of logs.

Merrill does not provide any evidence as to when it first complained about this, so it is simply impossible to determine whether or not the allegation is time-barred. We don't know when they first complain.

In any event, the ground of complaint is not accurate. The requirement under Notice 102, to advertise a minimum volume of 2,800 cubic meters in remote area is clear, and it is also well understood by all industry players. The criteria to determine what is a remote area are set out in a document which you have in front of you at Tab 23 of the Core Bundle.

As explained by Mr. Cook this week, the issue simply never arises. Companies, they know whether or not they're in remote area or not, and they very, very rarely call FTEAC or TEAC to get a determination as to whether or not they are in remote or nonremote area.

In any event, as explained by Mr. Cook in his Affidavit, this volume requirement does not impose any additional burden on a company like

Merrill. Whether or not Merrill's land is considered remote, it will anyway have to tow its logs, and it will incur the normal costs related to such an activity.

Mr. Cook explained in his Affidavit that, in fact, Merrill does not operate in a remote area and that the requirement does not apply to Merrill.

Now, Merrill alleges that it was told in 1999 by a BCMoF official, Mr. Walders, that its land was, in fact, in remote area. Even if that conversation did take place, Mr. Walders was simply mistaken. Theodosia is not considered a remote area.

Now, considering that Merrill's alleged having suffered damages as a result of this land being considered or designated as remote, why has Merrill never attempted in the last 10 years to question or challenge this remote designation? In the last 10 years, Merrill has had frequent discussion or contacts with DFAIT and BCMoF officials. Never once was the issue of remoteness raised.

The only question that this Tribunal must ask itself with respect to this remote allegation is the following: Even assuming like Mr. Walders did make this inaccurate representation about Theodosia being considered a remote area 10 years ago, and even assuming that Merrill did, in fact, rely on such representation, does this really amount to a violation of international law? To quote from the Thunderbird Tribunal, does this treatment amount to a gross denial of justice or manifest arbitrariness failing below accepted international standard? The answer clearly is no.

One final last allegation: Merrill complains that it cannot get standing exemption on its land, and that is unfair. Well, these exceptions are provided in certain areas of B.C. The truth of the matter is that none of Merrill's land would qualify for these exemptions. Merrill's lands do not suffer from the economic hardship and ecological devastation that these exemptions were meant to address. There is nothing unfair about that. In any event, Merrill's allegation is

time-barred. In a letter dated April 13, 1998, Merrill complained these exception were not included in Notice 102. And you will find this letter at Tab 13 of the Core Bundle of Documents.

So, in conclusion, most of the allegation raised by Merrill under its Article 1105 claim are time-barred. Merrill alleges that the Log Expert Control Regime, "flies in the face of the most fundamental aspect of the rule of Law. That's in his Reply at Paragraph 16, that it represents basic unfairness. That's at the first paragraph of its Memorial.

In fact, what Merrill really complains about are just trivial administrative irritants based on factual exaggeration. The only question that this Tribunal must ask itself is whether these allegations are a breach of Article 1105, is this the type of treatment a foreign Investor, that, to quote the Thunderbird Tribunal, grave enough to shock a sense of judicial propriety? Canada submits that none of these trivial administrative allegations individually breach Article 1105 and

that even taken together collectively as a group, they do not reach the level of a breach of Article 1105.

Therefore, this claim should be dismissed.

Okay. With respect, to answer one of your questions, Professor Dam, the membership of FTEAC you will find in John Cook's Affidavit, the first Affidavit, at pages--at Paragraph 32 to 39, and also at Paragraph 47 to 50. And Canada has addressed this issue in its Counter-Memorial at Paragraph 58--no, 581 to 589.

Thank you.

PRESIDENT ORREGO VICUÑA: Before you leave, Professor Dumberry, I have a question for you. If you would help me to clarify my own mind which, after six days of clearing it might be a kind of impossible task, but irrespective, you have worked, and I do know because I have participated in a meeting where you interrogated Sir Arthur Watts about the issues of state succession in the Balkans, and you have worked on that subject, and, of course, there you have a few conventions but not very

decisive and lots of customary law decisions of all sort of tribunals a long time, which has been revived because of the Balkans War.

My interest is this: It is true that if one takes customary law in the most classic expression, one would find things like the shock unacceptable, the sort of Neer Claim Decision and so forth, bit--and here kind of the clarification I would like to have: Has this not greatly evolved a long time to include certainly that, but in addition a number of other things that have been happening and that might have been the subject of concern generally speaking? For example, if you take the old subject of diplomatic protection, State responsibility in what's called "the Law of International Claims," you find in Moorechurch (ph.) one of the first comprehensive writers, a thorough analysis which shows many, many different kind of issues, not just the extreme shock.

Then if we follow on to the Harvard Draft where Professor Baxter and so on were the directors, and to some extent at the same time the first

International Law Commission Reports on State responsibility and so forth, they all dealt with international minimum standards, again you find a whole menu of many different judicial decisions.

Now, of course, how much of a judicial decision comes into customary law or not, it's a question to be appreciated in relying on the specifics.

But in any event, assume just for the sake of argument that the kind of very hard line shock and an acceptable standard that we have heard about would have evolved into something more, say, comprehensive to cover other situations that might be, of course, serious. It's another question of being just as light event, serious, but eventually not to the extent of being a shock or for such a disgrace.

How would you figure that out in terms of Article 1105 and (Mark) the fact that a reference by the article to international law and the FTC to customary law, international minimum standard does not in itself define what is the content of those

words in actual fact in respect of specific issues raised as a breach of minimum standard? Would you like to elaborate just a bit, either now or later, I don't mind, but--

MR. DUMBERRY: I think I can address the point briefly and you may want to go back after lunch.

The first point I need to mention is of course customary international law has evolved and is in a continuing evolution, there is no doubt. But in the context of NAFTA, the reference you e to shock, this is a rather recent decision by a NAFTA Tribunal in Thunderbird. Of course, it refers to ELSI, which is an older decision, but the standard there is very high, and it's in the context of NAFTA. And in our pleadings, written pleadings, we have argued that it may be that the evolution of the fair and equitable treatment clause, standalone clause, where you have no reference to international law or custom, it may be that in this context, that this context is different from Article 1105. But clearly in the context of Article 1105, fair and

equitable treatment is linked to customary international law, and this has an impact on how you should look at these allegations.

In the context we have fair and equitable treatment per se, and argument with be made that this means that broader rights should be given to foreign investors. But this is outside of NAFTA Chapter Eleven. This is in a context of other treaties that include Clause with different wording and different scope.

So, no doubt the evolution of customary international law is real, but in the context of NAFTA, it needs to remain customary international law. Tribunals should not go further than that.

PRESIDENT ORREGO VICUÑA: Certainly, we would agree on that, but is it not right to say that any of these citations you may hear of the NAFTA cases where the high threshold was followed are, in turn, based on customary law? They, of course, are, because they're applying NAFTA. Well, but if customary law has changed, maybe a tribunal or other Tribunal may not have spotted the specific change,

but say objectively the change is there. Is it inappropriate for another NAFTA Tribunal to say, in applying NAFTA, I'm referring to customary law, but when I open this little box called customary law I find also gadgets inside, and I'm going to see which is the most closely related to the complaint. Would that, indeed, be the right reading of these cases?

MR. DUMBERRY: I think it is up for the Investor to actually prove that customary international--let's assume for a second that customary international law is the quote you referred to in Thunderbird, okay? Shocking. The Investor has the burden of proof to explain how this evolution took place. It needs to prove that this is no longer the case, and there is an evolution of customary international law. We have no evidence of that. There is no evidence on the record that there is such a rapid evolution of customary international law on the subject.

So, Canada argues that what was decided in Thunderbird only a few years ago is still the applicable law. And it may be that if we all come

together here in 20 years it will be a different law applicable, but at the very least it would be, your know, the task of the Investor to bring forward cases, doctrine, element of State practice, anything. In this case, a reference was made to a few cases outside of the NAFTA Agreement, and these cases are not supportive at all of the theory of the rapid, extra rapid evolution of customary international law.

PRESIDENT ORREGO VICUÑA: Okay. Thank you very much, Professor Dumberry.

So, we follow on now?

MS. TABET: I will be addressing blockmail. I just wonder if this is an appropriate time to take a few minutes break.

PRESIDENT ORREGO VICUÑA: How much is the time Eloise, deducting Tribunal questions?

SECRETARY OBADIA: So far, Canada has used one hour and six minutes.

PRESIDENT ORREGO VICUÑA: And including the Tribunal?

SECRETARY OBADIA: The Tribunal, well, from

this morning I have 31 minutes for the Tribunal.

PRESIDENT ORREGO VICUÑA: Okay.

ARBITRATOR ROWLEY: The Investor started at roughly at eleven, so it's an hour an a half with our questions.

PRESIDENT ORREGO VICUÑA: You have the rest of your time, and if you can accommodate within that the questions, that's fine, otherwise, you have the time. So we won't worry about it.

Okay, so we break until 12:45, promptly.

MS. TABET: Yes.

PRESIDENT ORREGO VICUÑA: Thank you.

(Brief recess.)

PRESIDENT ORREGO VICUÑA: Okay. So, we will get started. Do you mind if Mr. Appleton is not yet here?

MR. BOROWICZ: Not at all.

PRESIDENT ORREGO VICUÑA: Okay. Thank you. You don't mean anything by that, do you?

So, we will hear from Ms. Tabet now, please.

MS. TABET: This Tribunal has heard a lot

of evidence this week on the issue of so-called "blockmail." And various people have referred to blockmail in various ways, so the Tribunal needs to consider carefully what is at issue, and it needs to do that to consider a number of issues. It needs to consider whether the conduct can be attributed to the Government, it needs to consider the specific allegation to know if it's time-barred, and it also needs to see if there is any evidence of that specific type of action, and finally if that kind of action is a breach of Article 1105.

So, for the purpose of responding to these allegations, we have divided the allegations of blockmail in four categories. The first one, the first situation is the situation of bona fide offers that are made on logs advertised for sale. And this is the situation where the buyer genuinely had the need for the logs and makes an offer.

In order for the offer to be declared valid, the offers have to be fair market value. And you heard from Mr. Cook and Ms. Korecky and my colleague Mr. Dumberry describe how the process in

TEAC and FTEAC provides the recommendation of the fair market value of the offer to the Minister and that after having reviewed the market and after having considered all the relevant factors with respect to the boom advertised.

Now, I want to put this in context.

Can we go to this line. Okay. There are--if you look at all the years in the relevant period, 2004, 2005, 2006, there are only eight booms in the relevant period that were declared nonsurplus. That's from the 670 advertised by Merrill & Ring. So, in '97, 98 percent of their logs advertised are granted surplus and are eligible for export. The remaining 2 or 3 percent of those receive domestic fair market value.

Now, the Investor and other Federal landowners like Mr. Ringma do not want to have to go through the Surplus Test, and they would prefer that instead of having to sell their logs on the domestic market and respond to the domestic need, they would prefer to sell them internationally. But Merrill & Ring does not have a right to export, and I have

already referred you to Chapter 3 of NAFTA which specifically provides that Canada can impose log export controls.

And Mr. Appleton has referred to the log export--sorry, the Export Import Permit Act that puts in place the log export controls and where the Ministry has to satisfy itself that there is adequate supply.

So, you heard this week and in fact again today, the Investor challenged whether this Surplus Test responds--there is a need for the Surplus Test, and whether it really responds to a real need in the market. But recall Mr. Low when his testimony when he was asked why half of the Best Market Prices were from Canadian Market Prices and on Canadian sales. And he explained that those were cases where the market was such that there was no need in Canada and therefore no offers on advertised logs on Surplus Test.

I refer you to the transcripts of Mr. Low at Page 995 and 996.

Essentially, he--look at Line 18 of

Page 995. Essentially, Mr. Low admits that the Surplus Test responds to the needs, so when there is a need there are more offers.

This is also consistent with what you heard from Mr. Bustard. He explained that in some periods where the supply was short, mills were looking at the advertised logs and were interested in making offers. If you look at Page 807 and 808 of the transcript, where this is from Mr. Bustard's testimony, he said, I would say in the last two years they probably haven't looked at the list at all with the market being so poor.

In addition to this, the Department of Foreign Affairs and international trade will recommend that the Minister grant an Export Permit when it considers and concludes that the company making the offer does not have a need for the booms on which it makes an offer, and there was an example provided by Ms. Korecky in her testimony on Wednesday. I won't refer to the name of the company, but you can find the example referred at the transcript of Day 3 at Page 640 to--sorry, 643.

If Merrill & Ring was not satisfied in any event of the final decision of the Minister whether or not to grant the surplus status, you would have thought that you would find evidence of this on the record of letters to the Minister, complaints to the Minister, or evidence that Merrill & Ring challenged the Minister's decision in Federal Court, but it never did.

Now, with respect to these offers, these bona fide offers made from the Surplus Test, what the Investor is challenging is clearly the system itself. It's not--it's the routine application of the Surplus Test to respond to domestic need.

And it's not the Tribunal's role to decide whether or not the Surplus Test properly addresses market shortages. I refer you in particular to Tab 180 of the Core Bundle to the S.D. Myers Decision at Paragraph 261, where the S.D. Myers Tribunal said that the Chapter Eleven Tribunal does not have an open-ended mandate to second-guess Government decision making.

Now, turning back to my four

categories--so, just to conclude on this one, because it is an attack on the system as a whole on the Surplus Test as a whole, it is clear that it is time-barred with respect to these--to those bona fide offers that were refined where the booms were declared to be nonsurplus.

Now, let me turn to the second type of blockmail, the second category of what the Investor called blockmail, I should say, and that's the negotiations between buyers and sellers once the log is advertised for sale.

Again, you heard from Mr. Bustard this week who has experienced both buying and selling the logs, and so has been on both sides of the fence, and you heard him say that in his view what is at issue is just normal business negotiations, not any kind of intimidation or wrongdoing. Obviously the buyers and the sellers, as always, the seller tries to get the best price and the buyer tries to get the lowest price. But these negotiations never--the Government never becomes involved in the negotiation and never becomes aware of the specific terms of the

negotiation.

And therefore the conduct of these private parties in the market cannot be attributed to the Government of Canada.

You heard Professor Howse yesterday suggest that Loewen stood for the authority that the conduct of the lawyer in that case because he was making discriminatory remarks could be attributed to the Government, but that's not what the Loewen award says. The Loewen Award--the Loewen Tribunal was considering whether the judge by allowing this kind of conduct denied due process to the Claimant, to the litigator, the litigant in that case, so it does not stand for the proposition that the conduct of a private party can be attributed to the Government. In fact, if you turn to Tab 12, I believe, of our Core Bundle, where we have included the ILC draft Articles on State Responsibility, you will see that in very rare cases can the conduct of private parties be attributed to the State. And if you look at the examples in the commentary, the example, one of the examples that's given is, for example, where

the State failed to prosecute the prevention of a crime in bringing justice to a criminal, and it's the Talini Case of 1923.

Similarly, if you look at Articles 8 and 9 of the draft article, it's in very specific limited circumstances that the conduct of private parties can be attributed to the Government.

Now, here the negotiations that the Government does not become aware of cannot be attributed to Canada, and in particular given the fact that when there are abuses Canada does discipline the abuses, and I will come to that in the second, the two last categories in a moment.

Now, we heard a lot of reference to the fact that logs are held hostage and that a ransom has to be paid, and that that was used--there is some leverage from the buyer that is used to block the advertised logs. But again, the offer has to be at a Fair Market Price; and, if not, the logs will be granted surplus status.

So--and in any event, I would add that Merrill is not forced to sell to that company that

makes an offer. It can always sell to anybody else. On the other hand, the buyer when it makes an offer has to abide by the offer.

Now, let me refer you to Page 838 of the transcript from Mr. Bustard's testimony. And you heard the Investor's witnesses and their views of the negotiations as some kind of ransom process, but you also heard from Mr. Bustard, again a much more credible witness given that he's both been a buyer and a seller, and he's explained that--this is--the buyer is just trying to satisfy its need. They're not trying to hold anybody hostage. They don't want to break the business relationship. They're essentially trying to satisfy a need and enter into good faith negotiations with the seller.

Let me turn to the issue of evidence because this is particularly problematic with respect to these allegations in relation to negotiations that go on in the market, and my colleagues will address this in the context of the damages aspect, but you have no evidence before you to conclude that if the negotiations were--resulted

in a domestic Fair Market Price, if, for example, a substitute boom was offered as a result of these negotiations, it may have been a boom that was at a lower quality, and it may well have been that the boom, the price paid by the buyer was a Fair Market Price. We have no evidence to quantify this so-called ransom or, in fact, no evidence that there is such a ransom or inappropriate leverage by the buyer.

In fact, some of the comments that were made with respect to that leverage simply don't make any sense. You heard Mr. Low when he referred to blockmailing occurring after the Surplus Test, so after a surplus status was granted to a boom, and he said, he was trying to explain the fact that 60 percent of Merrill & Ring--sorry, of Merrill & Ring's logs that receive surplus status get exported, and he was saying, well, that's because of blockmailing, but obviously once a company received a Surplus Letter there is no more so-called leverage by the buyer, even assuming that there was some to start with.

On the issue of time bar, this is a bit of a complex allegation from the perspective of quantifying the time bar. To the extent that the claim is about leverage generally resulting from the Surplus Test, which, in my view, it certainly seems to be the case, and the evidence suggested it is the case, then it has to be time-barred because it results from the system that is set up, and that's very clear in Notice 102 and the system that has been applied since Notice 102 and before that, Notice 23.

In fact, I refer you to Tab 16 of Ms. Korecky's Affidavit and to Mr. Schaaf's cross-examination at Page 183.

This refers to a letter where Merrill & Ring complained that the system is manipulated by participants, and that participants blocked his sales. Again, this is a kind of vaguely worded allegation. No evidence of specific instance where there was manipulation was ever provided to the Government. But this letter is dated 1998, so it establishes that to the extent that they are

complaining of the system, and the leverage that it supposedly gives buyers, then this issue is time-barred.

ARBITRATOR ROWLEY: Can you give us a reference to the letter.

MS. TABET: Yes. It's at Tab 16 of Ms. Korecky's Affidavit. It's a letter of April 18, 1999, by Pomerance, Merrill & Ring's counsel, to Mr. Jones of DFAIT.

So, it's at Tab 14 of your Core Bundle as well, if you want to look at it. And I have it on the screen.

Now, arguably, if the complaint is with respect to specific threats in a particular case, it may not be time-barred, but again it would not be attributable to the Government because--and there is no evidence of this on the record, and the reason I say it's not attributable to the Government is because Merrill & Ring did not bring any of this to the attention--any specific case to the attention of the Government.

I would like to turn, then, to the third

13:03:08 category of so-called "blockmailing," and that deals with the non bona fide offers, and in particular to what Ms. Korecky referred to as targeting.

ARBITRATOR ROWLEY: Just before we leave that, I raised a question earlier on, and you said you would deal with it in blockmailing. As I understand the distinction you're making, you're saying if the complaint that the Investor makes as determined by the Tribunal is really a generic complaint about time barring, then--about blockmailing--then that is time-barred because of that letter. If, however, they are making a specific complaint about a specific act of so-called "blockmailing" within the last three years of the date of their request, then that is actionable and not time-barred?

MS. TABET: Yes, potentially, but again my other two points were that there is no evidence, and they cannot be attributed.

ARBITRATOR ROWLEY: I understand that. I just wanted to get the distinction.

MS. TABET: Correct.

13:04:31 So, the third and fourth category arguably the issue of targeting and the violation of the 90-day rule can be qualified as conduct that's not--that is not flowing from the routine application of Notice 102.

But the evidence before you is that DFAIT has investigated any wrongdoing allegation whenever it was actually raised by a company with any degree of specific evidence. In her testimony this week as well as in her two Witness Statements, Ms. Korecky provided concrete examples showing that Canada properly addressed and resolved any wrongdoing allegation reported by Merrill & Ring and other log producers. In her testimony of Day 3 at Page 634, she said she carefully looked into the complaints, and if she needed further information, will conduct both the company making the offer and the one that advertised the logs and sought clarification. And then she said that she would make the recommendation to the Minister on action to take.

She also said that it was DFAIT's practice so the Department of Foreign Affairs and

13:05:48 International Trade's practice to take action and grant surplus status whenever it concludes that logs that are being advertised were targeted by a buyer.

I refer you to, in particular, to Tab 48 of Ms. Korecky's Affidavit, where you will see an example of a specific complaint and the response of the Government to that specific complaint. I have put on the screen a summary of the two specific complaints that were brought to the attention of the Government and what the Government did about them.

Now, let me turn to the violations of the 90-day rule, which also have been referred to during the course of the week. There are three only--so, the 90-day rule is the rule that is found in Section 4.3 of Notice 102. So, if there is a violation of that rule, obviously it's not an issue of a routine application of Notice 102.

Ms. Korecky has both in her testimony this week and in her Witness Statements provided examples of violations of the 90-day rule and the fact that the Government has taken action and put companies, as was colloquially referred to, in the "penalty

13:07:53 box." The fact that the Government takes action when there is violation of Notice 102 certainly establishes that the Government does not condone inappropriate behavior by private parties, and that it does ensure that the Government does try to ensure that the Notice 102 is respected by all the players in the market.

So, arguably, while the targeting and the violations of 90-day rules are within the time bar, the conduct cannot be attributed to the Government because the Government takes action to redress any wrongful doing; and, therefore, there can also be no breach of Article 1105.

And for these reasons, the allegations of what the Investor refers to as blockmailing have to be dismissed.

Unless you have further questions, I will turn to Canada's arguments on Article 1102.

Canada's argument is very simple. The title of Article 1102 is national treatment. As the title indicates, the standard that Canada owes the Investor is treatment that it gives to its

13:09:17 nationals, and that's the standard that Merrill & Ring received. The measures at issue simply make no distinctions between American and Canadian log producers. And Merrill & Ring has not disputed these facts this week, and they have not alleged suffering nationality-based discrimination. On that ground alone, Canada says that the claim should fail.

You heard Mr. Appleton advance his theory of 1102, and obviously the Investor views it as a very broad protection for what they see as any measure that has any sort of negative impact on them, but this kind of interpretation has been consistently rejected by NAFTA Tribunals, and the NAFTA Tribunals have instead found that the Article requires--prohibits nationality-based discrimination. I refer you to Paragraph--I refer you to the Feldman Award in that respect, but other NAFTA Tribunals such as the Loewen and GAMI Tribunals have taken the same position.

Essentially, the Investor's claim is about regulatory distinctions between different

13:11:23 jurisdictions. The Investor would make Article 1102 an instrument for deregulation instead of an instrument prescribing nondiscrimination, but that's not what the NAFTA Parties had intended. The legal test that the Tribunal should apply is the following:

First, is the treatment at issue accorded by a party?

Second, is the treatment complained of accorded in like circumstances? And only then can the Tribunal ask whether the treatment accorded to the Investor is less favorable than that accorded to domestic investors. It is up to the Investor to establish these three elements. This is the test that was recognized in the UPS Award and in several other Awards.

Differences of treatment on their own do not establish a breach of national treatment. The comparison has to be made with treatment accorded by the same Government in like circumstances to foreign and domestic Investors. In order to distinguish between cases of legitimate regulatory distinction

13:12:41 and cases of nationality-based discrimination, the Tribunal has to properly apply a like circumstances test.

And with respect to that, I will make two points, first, that whether log producers or whether their logs are in competition as the Investor suggests is not a determinative consideration. And the second is that policy considerations that explain different treatment are relevant.

The Investor's test for identifying a proper comparator does not help the Tribunal identify whether there is nationality-based discrimination, and the paint factory that I used earlier this week illustrates this. The approach to substitute like circumstances for a like product test has been rejected by many tribunals in the past, and because it ignores the text of Article 1102. To be sure, the fact that two products may compete, two products of the Investor and a foreign Investor may compete, is a relevant factor, but it's certainly not the only factor. The like-circumstances analysis cannot be confined to

13:14:06 that single factor.

Well, the Investor has spent a lot of time to try to establish competition. I will not go through this because we don't think it's a relevant consideration, but I do refer you to Ms. Korecky's supplementary Affidavits at Paragraphs 34 to 36, Mr. Tapp's Affidavit, and Canada's Rejoinder, where we establish clearly that the logs do not compete.

The Investor tries to summarily dismiss the policy objectives by challenging the validity of the measure and the policy objective that the measure tries to accomplish. That's not the relevant test. The issue is whether, for example, by making distinctions in standing application in the north versus on the south, the issue is, is there any nationality-based discrimination, or is there a legitimate policy consideration that explains why in the north certain producers receive different treatment than in the south?

Now, I won't take you through all of the Investor's national treatment allegations because there are eight of them, and it's rather lengthy.

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I will deal briefly with some of the ones that have come up this week. The first three I will deal together which relate to Notice 102 and the Surplus Test and the fact that the Surplus Test doesn't apply in other Provinces.

And there, the Tribunal's consideration of the issue really has to begin with is there any evidence of nationality-based discrimination, but you heard from Mr. Ringma this week, and Mr. Ringma, I refer you to the transcripts earlier this week where Mr. Ringma admitted that they are a Canadian Ringma, and they're subject to the Regime under the Surplus Test in the very same way as Merrill & Ring. In fact, Mr. Ringma was obviously complaining about the very same things as Merrill & Ring as was evident during his testimony.

Now, the fact that these domestic comparators receive the same treatment should be at the very least a strong indication that the Investor has not rebutted that there is simply no nationality-based discrimination.

I want to come back to the standing

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13:17:25 exemption, and I will quickly skip over the other ones.

There was a great deal of confusion as to where standing exemptions apply and where they don't, Provincial Land versus Federal Land, but what has been clear this week is that as you heard from Mr. Ringma, he does not receive standing exemptions either. Canadian Federal log producers do not receive standing exemptions, the very same way that Merrill & Ring does not receive standing exemptions. The distinction when standing exemption is granted is a response to certain needs in the north in certain areas, and it's not an issue of nationality.

So, that should be sufficient for you to conclude that there is no nationality-based discrimination.

I will turn to my colleague, Ms. Di Pierdominico, to address the 1106 allegations.

MS. DI PIERDOMENICO: Thank you. Good afternoon, Members of the Tribunal.

Canada's legal argument on 1106 is also

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13:18:53 found at Tab 1 of Canada's bundle of core documents, but from the outset I would like to remind the Tribunal of Ms. Tabet's argument on the time bar of earlier today, to the extent that the Investor complains of requirements of the Log Export Control Regime under Article 1106, they are, in fact, time-barred pursuant to Article 1116(2). But I would also like to address the merits of the Investor's claim under Article 1106 today.

The Investor attempts to mischaracterize some of the requirements and incidental effects of the Log Export Regime into several prohibitive performance requirements under Article 1106(1). The Investor's claim ignores that Article 1106 provides an exhaustive list of prohibited performance requirements. Since none of the Investor's allegations are listed under Article 1106(1), its claim is without merit.

I will be making Canada's 1106 argument in three parts: First, briefly review the purpose of the performance requirements Article; second, I will review the text of Article 1106; and, finally, I

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13:20:12 will look at the claims made by the Investor in its written submissions.

Turning now to the purpose of Article 1106, which is entitled "Performance Requirements," generally speaking, the term "performance requirements" is used to describe some measures that host States use to achieve economic and social objectives in the domestic economy, such as increased employment or development goals. Historically, States have used performance requirements to achieve certain goals in their economy as a condition to operate in the domestic market. Some of these performance requirements have been found to be particularly problematic because they distort investment decisions. Under NAFTA Article 1106(1), the NAFTA Parties sought to prohibit seven specific performance requirements that may distort investment decisions.

It is especially important to note that Article 1106(1) only prohibits the requirements specifically listed in that Article. There are countless other requirements that may be imposed or

placed upon investments without running afoul of Article 1106; and, therefore, host economies may regulate in the public interest for many valid reasons. Unlike what the Investor appears to suggest, not all regulation imposed on an investment will be a prohibited performance requirement under Article 1106(1), which brings me now to the second part of my presentation, which is the test under Article 1106(1).

Let's begin with the text, as one always should. It provides that no party may impose or enforce any of the following requirements or enforce any commitment or undertaking in connection with the establishment, acquisition, expansion, management, conduct, or operation of an investment of an investor of a Party or of a non-Party in its territory.

Now, as I mentioned before, Article 1106(1) prohibits certain specific performance requirements, but only at issue today are those under Paragraphs (a), (c), and (e). As you know, the Investor has changed its 1106 claim today, during Mr. Appleton's

closing arguments, by alleging a new claim under Paragraph (b). It goes without saying that this is not an appropriate--that this is not appropriate for the Investor to change its claim at this late stage; and, therefore, I will only be reviewing the Investor's claim under Paragraphs (a), (c), and (e) as detailed in its written submissions.

At this time--I will review these claims a little bit more in detail later on, but at this time I just want to highlight to this Tribunal that it may not consider any other limitations or restrictions beyond those that are specifically listed at Paragraphs (a), (c), and (e). This is so because Article 1106(5) states that Article 1106(1) does not apply to any requirement other than the requirements set out in that provision.

Indeed, both disputing parties have pointed out in their pleadings that this Tribunal must find that Canada has imposed a measure that fits squarely within the plain reading of the list of performance requirements under Article 1106(1); thus, in order to prove a breach, the Investor must establish first

that Canada imposes or enforces a requirement or enforces a commitment or undertaking; second, that the requirement is in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment; and, third, that such requirement is listed under Paragraphs (a), (c), or (e).

If the complaint does not allege a performance requirement listed in Paragraphs (a), (c), or (e) of Article 1106(1), it fails; and, fundamentally, that's the problem here because none of the Investor's claims fall within the meaning of those paragraphs, which brings me to the final part of my presentation: the Investor's claims.

As I stated previously, the Investor takes issue under Article 1106 several aspects of the Log Expert Control Regime, namely the minimum volume requirements to advertise remote logs on the Bi-Weekly List, which we now have established is so-called "Remoteness Rule"; the requirement to metrically scale its logs in accordance with the B.C. scale; the requirement to cut and sort its logs

in accordance with the Coast Market End Use Sort Descriptions; and the fact that the Investor is "forced" to hire more log retrieval and towing services than it otherwise would.

So, the question for this Tribunal is whether any of these allegations amount to the prohibited performance requirements in Paragraphs (a), (c), or (e), beginning with the Investor's first claim under Article 1106(1)(a), which prohibits a NAFTA party from exporting--from requiring investors to export at a given level a percentage of goods or services. Therefore, Paragraph (a) prohibits a NAFTA Party from forcing an investment to export its goods or services as a condition to operate in the host economy.

The Investor alleges that the minimum and maximum volume requirements to advertise logs from its remote locations violates Article 1106(1)(a), but Canada has already provided ample evidence that the Remoteness Rule does not apply to Merrill & Ring, and that the Remoteness Rule is not even a requirement because all Merrill & Ring has to do is

13:25:47 tow its logs to a nonremote location and advertise from there.

But the clear fact here is that the Remoteness Rule is only a requirement to advertise; it's not a requirement to export. Once its logs are declared surplus, the Investor is free to export however many logs it wants, if it wants. So, without an actual requirement to export, there can be no claim under Article 1106(1)(a).

The Investor's second and third claims are both made under Article 1106(1)(c), which prohibits a NAFTA Party from imposing a requirement to purchase, use, or accord a preference to goods produced or services provided in its territory. Paragraph (c), therefore, prevents the NAFTA Party from requiring investors to favor local inputs over foreign inputs in their production decisions.

The Investor's second claim alleges that Canada compels Merrill & Ring to accord a preference to goods produced in its territory because it must cut, sort, and scale its logs in accordance with the Coast Market End Use Sort Descriptions and the B.C.

13:26:57 scale.

Merrill & Ring also complains that the Remoteness Rule compels it to create a good of a particular size, for instance in packages of not less than 2,800 cubic meters and not more than 15,000 cubic meters.

The sum of these requirements, in Merrill & Ring's view, forces it to accord a preference to a particular good produced in Canada, so here Merrill & Ring is complaining that it's required to give a preference to its own goods. But none of the measures complained of by Merrill & Ring fall within the plain meaning of a requirement to accord a preference to a good produced in Canada. The cut, sort, scale and remote advertising requirements that the Investor complains of have nothing to do with where the logs are produced, and they do not force Merrill & Ring to accord a preference to logs produced in Canada in its investment decisions. The Investor will always produce Canadian logs because that's where the Investor has chosen to grow them.

The Investor goes on to allege that, if it

13:28:04 were not for the Log Export Regime, it would produce another good. Presumably, this other good would be a boom of logs that's cut, sort, and scaled in a manner that is different than the Coast End Use Sort Descriptions as well as the B.C. scale. But these requirements to measure, sort, and advertise in certain volumes do not actually give a preference to a good in Canada. The Investor produces the same logs no matter how they are prepared or assembled for export approval.

The Surplus Testing Procedure in no way changes the inherent quality of the logs; therefore, by ignoring the purpose of Article 1106(1)(c), the Investor's allegation completely misses the mark because the cut, sort, scale, and advertising requirements are not local content rules and in no way forces the Investor to use local inputs in its production decisions.

I mean, let's be frank here: The Investor is complaining about having to accord a preference to its own goods. That's not the type of claim that's contemplated by Article 1106.

13:29:10 The Investor's third complaint also made under Article 1106(1)(c) alleges that it must accord a preference to services provided in Canada because it must cut, sort, and scale its logs in Canada. And the Investor also complains that it must hire in Canada retrieval services when log booms break up while awaiting the Surplus Testing Procedure, and finally that the Remoteness Rule requires Merrill & Ring to hire extra towing services in Canada.

Dealing first with the Investor's complaint about having to hire more towing and retrieval services, nothing in Notice 102 stipulates that the Investor must hire these services. This is simply not a requirement that's imposed upon the Investor and, therefore, cannot be subject to a performance requirements case.

Now, the fact that the Investor is required to measure and sort its booms according to Canadian market practice and standard weights and measures is not a performance requirement to accord a preference to a service in Canada because, first, the Investor could do all of these things itself--there is no

requirement to accord a preference to a Canadian service provider to do these things; and, second, it's really important to look at what's being asked of the Investor, to measure its logs in accordance with Canadian standards. A measurement requirement does not force the Investor to give a preference to local services.

Moreover, Canada does not prevent the Investor from sorting and scaling its logs in accordance with the preferences of its international clientele. In fact, the Investor has already admitted that it does dual-scale its logs to the preference of its clients abroad.

So, again, by ignoring the purpose of Article 1106(1)(c), the Investor misses the point because Canada is not imposing a requirement that the Investor shift any of its production decisions by imposing this sort of measurement requirement. So, without an actual requirement to favor local inputs over foreign ones, there is no claim under Article 1106(1)(c).

The Investor's fourth and final claim I

will deal with very quickly here. In essence, the Investor again complains that the Remoteness Rule is in violation of Article 1106(1)(c)--Article 1106, but this time under Paragraph (e). But again, this claim is without merit because the Remoteness Rule relates to advertising, not export or sale volumes. It makes no link between what an investor sells within Canada and what it exports. And without such a link, there can be no claim under Paragraph (e). So, in the final analysis, the Investor has not established that any of the requirements to export under Canada's Log Export Regime amount to the performance requirements of Paragraphs (a), (c), and (e).

And so, that concludes my argument on 1106. Unless the Tribunal has any comments, I will turn the floor over to Professor Lévesque.

PRESIDENT ORREGO VICUÑA: Thank you very much.

When will we get the PowerPoint you used if we don't have them yet? I couldn't find them.

ARBITRATOR ROWLEY: You can't find them?

Then check later.

MS. LEVESQUE: Good afternoon. In the next few minutes I will demonstrate why Merrill & Ring's expropriation claim under Article 1110 should be rejected. Merrill & Ring has not been substantially deprived of its investment in Canada, and as such, the Investor cannot meet the test required to show an expropriation in this case.

Before focusing on the legal arguments as such, I would like to review a few key facts: Merrill & Ring has operated its logging business operation for years without Government interference or control, and it does so to this day. The Government doesn't direct its operation or intervene in management activities of any kind. The Government has not taken any physical assets of the Investor. Merrill & Ring has sold its logs on the domestic and export market for years, earning substantial profits, and it does so to this day. The Investor could have exported more logs than it chose to export. Finally, Merrill & Ring plans to continue its operations in Canada for a number of

years, as attested by Mr. Schaaf himself.

These facts are not consistent with a finding of expropriation under international law. In the next few minutes, I would like first to review the legal test that the Tribunal should apply when making its decision under Article 1110; and, second, I would like to explain why the Investor's approach should be rejected. So, first a legal test.

To make a finding of expropriation under Article 1110, the Tribunal must find a substantial deprivation of an investment. As you heard this morning, this is not disputed by the Investor. Also, when analyzing the alleged deprivation, the Tribunal should consider Merrill & Ring's investment as a whole, including Merrill & Ring the enterprise, its log, its land. This is consistent with the approach taken by the Investor in its Memorial where it argued that Merrill & Ring had lost control over critical parts of its business operation, that it loses physical control over the logs under the operation of the Regime, and its logs suffer

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substantial physical damage as a result of the operation of the Regime.

It's also consistent with the section of the Investor's Reply where referring to its interests in realizing fair value for its log on international market, it argues, and I quote, "Merrill & Ring is not claiming that this interest is a standalone investment on its own. Rather, its claim is that this is an inextricable part of a bundle of rights and interests that make up its investment."

Different formulation of the substantial deprivation test can be found in arbitral awards. In this case, whatever formulation the Tribunal uses, Merrill & Ring's claims fail. The Investor's right--the Investor's rights have not been rendered useless. The Investor's enterprise has not been brought to a standstill. The Investor's fully able to use, enjoy, and dispose of its property. The enjoyment of the Investor's property has not been neutralized.

Canada, in the course of these proceedings,

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has rebutted the claims of interference and assertion of Government control over activities or property of the Investor, and I refer the Tribunal to Canada's Counter-Memorial at Paragraphs 755-775. And what's critical is that the Investor has not provided any answer to counter Canada's evidence.

This, then, should be the end of the story: No substantial deprivation, no expropriation under 1110, but no. The Investor in its Reply has changed its claim, undoubtedly aware of the weakness of the first one. Merrill & Ring now presents a whole new theory of the case, now claims that the only investment the Tribunal should consider in the course of its deliberation on Article 1110 is the Investor's interest in realizing fair market value for its log on the international market.

Which brings me to my second point: Why the Tribunal should reject the Investor's newfound approach. Two reasons: First, the Investor's alleged interest is not an investment under Article 1139 capable of being expropriated; and, second, the Investor's approach renders the test of

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substantial deprivation meaningless.

So, first, Canada submits that the alleged interest in realizing fair value for its logs on the international market is nothing but the fabrication by Investor used to fit the claim where it doesn't belong. Such interests--no such interest is recognized as being an investment under Article 1139 of NAFTA. When one really thinks of it, the so-called "interest" is nothing but an alleged price differential: The difference between the value Merrill & Ring has been getting for its logs and the fair value it would like to get for its logs.

I will pause here to note that, as a matter of fact, Canada rejects, as you've heard this week, the veracity of the Export Premium theory presented by the Investor, and my colleague, Scott Little, will address this point. But even if a price differential does exist, let's just assume that for a moment it would still not constitute an investment under NAFTA. An opportunity to make profits and more accurately in this case to make more profits than one already makes is not an investment under

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the NAFTA. This so-called "interest" is more akin to a damage claim.

What do I mean? I mean that it's the evaluation by the Investor of what it considers to be its loss as a result of the Regime. It's really an evaluation of damages. It's not akin to an investment as defined under NAFTA.

The second reason why the Tribunal should reject the Investor's argument is the following: They render the test of substantial deprivation meaningless, irrelevant. The artificial narrowing of the investment allegedly taken allows the Investor to claim, and I quote, "Once the investment at issue in NAFTA Article 1110 has been so defined, then the question about the extent of interference with that investment fades away." Canada has not merely interfered with this investment in some partial or ephemeral way. Canada has completely taken this investment away from Merrill & Ring. This is not just a partial taking; it is a completely taking.

Well, of course, if the investment is

artificially reduced to the narrowest interest possible, one will always find a substantial, even a total, deprivation. The reasoning makes a finding of expropriation inevitable in all cases.

The Investor's position actually leads the absurd result that there is expropriation each time the Investor does not realize a sale at a price it considers fair. This would leave the determination of the existence of an expropriation under Article 1110 to the subjective view of the Investor. International law, on the contrary, requires an objective determination of substantial deprivation. As such, this Tribunal--this approach, sorry, should be rejected by the Tribunal.

So, in conclusion, Merrill & Ring started out with an expropriation claim that could not be substantiated. Canada has provided ample evidence to that effect. So, in its Reply, the Investor changed its tactic. The Tribunal should see through these maneuvers and reject Merrill & Ring's claim under Article 1110. Canada has in no way, shape, or form expropriated Merrill & Ring's investment in

Canada.

Thank you.

PRESIDENT ORREGO VICUÑA: Thank you.

MS. LEVESQUE: If you don't have any questions?

PRESIDENT ORREGO VICUÑA: No, not for the time being, at least.

MS. LEVESQUE: My colleague, Scott Little, will address you on damages.

PRESIDENT ORREGO VICUÑA: Now, I must remind you that the official allocation of time is over. You were playing on the discount. If you're familiar with soccer, you will know what that means.

MS. TABET: We will be brief on damages.

PRESIDENT ORREGO VICUÑA: Official time is over, you play as much as you were interrupted or deducted from the normal play.

So, Mr. Little.

MR. LITTLE: I don't anticipate I will be much more than 20 minutes, Mr. President.

So, good afternoon. I will be presenting Canada's argument on the Investor's damages claim.

Now, the attached slide summarizes the Investor's damages claim. In our submissions, I will be covering the following points:

First, I will review some of the general guiding principles applicable to damages in NAFTA Chapter Eleven arbitrations.

Second, I will provide a summary of the evidence and testimony demonstrating the flaws in the Investor's claim and why in light of the guiding principles it's without merit. And, in the end, I will be asking you to conclude that the Investor has failed to demonstrate that it's incurred loss as a result of the NAFTA violations that it's alleged.

So, by way of introduction, we would like to highlight the following three basic guiding principles for your consideration of the Investor's damages claim. These are:

First, the objectives of a damages award;

Second, and most importantly, causation;

And, third, the evidentiary standard the Investor must meet to make out its case.

Let's start with the objective. The

objective of an award of damages is reparation: To put the Investor in the position it would have been had the breach not occurred. The objective of reparation is implicit in both the NAFTA test and applicable rules of international law. With reference to the text of the Agreement, Article 1116 permits an investor to submit a claim that a NAFTA Party has breached an obligation under Chapter Eleven and that the Investor has incurred loss or damage arising out of the breach.

The applicable rules of international law also focus on the goal of reparation. International law requires full reparation for the injury caused by the internationally wrongful act.

Now, a corollary to the principle of reparation is that an award should not exceed what is needed to restore the investor to the status quo. There can be no double claiming of damages.

A further corollary to the principle of reparation is that a causal relationship must be demonstrated between the alleged wrongdoing and injury in order to trigger the responsibility to

13:44:48 repair. As noted by the NAFTA Tribunal in the ADM arbitration, any determination of damages under principles of international law require a sufficiently clear, direct link between the wrongful act and the alleged injury. A damages claim must be appropriate as a direct consequence of the wrongful act.

Now, there is one further point to be made regarding causation: Damages which are too speculative, indirect, remote or uncertain to be the consequences of an alleged breach by their very nature do not satisfy the causation requirement.

This leads us to the third guiding principle: The evidentiary standard applicable to the damages claim. A party making a claim has the burden of proving each element of its claim. As noted by the Thunderbird Tribunal, the party alleging a violation of international law giving rise to international responsibility has the burden of proving its assertion. Now, in Canada's submission, this standard requires a credible methodology that allows for the independent testing

13:46:06 of conclusions on damages that the Claimant asks the Tribunal to draw. It also requires a methodology to be objective and free of bias.

So, let's consider the Investor's approach to damages. Canada submits that the Investor did not adhere to the principles that we just summarized, and that the evidence you've heard warrants rejection of Merrill & Ring's damages methodology and permits you to find that the Investor has failed to discharge its burden. Our reasons are as follows: First, the Investor fails to demonstrate the existence of a causal link between the alleged NAFTA violations on the one hand and the damages that it claims on the other; and, second, the Investor's approach to damages is flawed and biased.

Merrill & Ring would like you to believe that proving its damages is a simple matter, but in making this claim, Merrill & Ring is avoiding its legal burden and effectively delegating it to you. You have no positive reliable evidence of the damages being claimed.

13:47:25 First and most fundamental, the Investor hasn't provided sufficient evidence of causation. Let's consider the Investor's specific allegations summarized on the attached slide. There is many of them. Nowhere in the damages analysis of the Investor does it provide the Tribunal with a sufficiently clear direct link between these many alleged violations and the losses that it claims. Instead, the Investor has provided you with one omnibus damages claim for all alleged violations based on some combination of its Lost Export Premiums analysis and its claim for the incremental costs of compliance with the Regime.

Now, what the Investor should have demonstrated was a connection between each violation and the damages alleged to flow from each alleged violation. Let's apply this requirement to one of the investors' Article 1105 claims which were outlined in Paragraph 1.41 of Mr. Low's Expert Report; for example, its complaint about the lack of clarity in the difference in treatment between remote and nonremote landowners under the so-called

13:48:47 "Remoteness Rule."

So establish causation under its current framework in which it claims Lost Export Premiums and incremental costs, the Investor should have provided specific evidence demonstrating that the Remoteness Rule actually prevents it from realizing the alleged Lost Export Premium that it claimed under Article 1105; or, B, results in all of the additional costs that make up its Article 1105 claim, for example the extra costs of towing and storage.

A cost calculation was made in respect of the incremental costs of towing and storage, but the analysis didn't demonstrate how these costs or what portion of them are attributable to the alleged lack of clarity in the concept of "remoteness."

ARBITRATOR ROWLEY: May I just interrupt for a minute. We have Page 15 of your slide deck with the culled out part which obscures what's underneath, so at a later stage could we have a clean copy of Page 15 so we have a copy of all the allegations?

MR. LITTLE: Yes, absolutely.

Now, the claim for Lost Export Premiums, a significant; portion of the Investor's case is based on its case for Lost Export Premiums, and the claim for Lost Export Premiums is also problematic from a causation perspective.

First, the raft analysis presumes a but-for scenario under which Merrill & Ring is free to export all of its logs without the restrictions of Notice 102, and this is illustrated by the following exchange that I had with Mr. Low in the context of his cross-examination.

This but-for fails to consider that in the absence of Notice 102, there would still be log export controls in British Columbia on the Export and Import Permits Act. The Minister would still have to satisfy him or herself that there is an adequate supply of logs in the domestic market, and Merrill & Ring would not necessarily be free to export all of its log volumes.

Now, the Investor also claims that it was denied Lost Export Premiums on sales it was forced

to make domestically as a result of being denied surplus status.

Now, here it's important to remember, hearkening back to the slide that Ms. Tabet introduced in her comments on blockmail, that only 18 of Merrill & Ring's boom--and I believe there was an error on the record earlier; it was stated that there were eight booms, it's actually 18 booms, were declared nonsurplus during the Past Loss Period. From a causation perspective, the Investor hasn't provided specific evidence of how potential violations of NAFTA Article 1105 resulted in the denial of surplus status on these booms. For example, the unfair targeting of logs are violations of the 90-day rule.

The Investor also claims Lost Export Premiums on sales it was allegedly forced to make domestically in the absence of a denial of surplus status. It does so on the ground that it's forced to enter into negotiation, for example, in which it must offer a substitution boom to a domestic buyer in order to ensure that a specific raft makes it

through the Surplus Testing Procedure.

However, the damages claimed in the raft analysis don't isolate these alleged substitution sales or distinguish them from other domestic sales. Nor has the Investor provided evidence that a specific negotiation resulted in a raft being sold on the domestic market when Merrill & Ring actually intended for it to be sold on the export market.

Finally, the Investor provided no evidence that substitution rafts have achieved less than domestic fair market value. All we can know is that these negotiations resulted in Merrill & Ring being able to export the logs that it had actually originally intended for sale on the international market, which is what it wanted in the first place.

Now, finally, the Investor claims it was denied premiums on rafts that were actually exported because these rafts suffered damages due to delay or had to be discounted due to suboptimal cuts or couldn't be sold under a long-term contract, all because of the Regime. Again, no evidence was provided that these alleged problems caused the

differential between actual export prices and the Best Market Prices claimed by the Investor.

Recall also the fact that many of the Best Market Prices the Investor used were actually based on export sales of logs from British Columbia that were subject to the Regime. The use of these sales as comparators to calculate damages on other sales that were subject to the Regime undermines the entire theory, in our submission. It demonstrates that there is no solid causal link between the Regime and the premiums alleged to have been lost on export sales.

Now, a minor point, the other prong of the Investor's case is its claim based on the cost of the Regime, and we submit that it's equally as flawed. There is nothing special or unique about these costs. In claiming them as damages, the Investor's burden was to establish that they're attributable to the Regime. And with the exception of the fee-in-lieu, the Investor simply hasn't provided sufficient evidence demonstrating how the Tribunal might identify the portion of the costs

that are attributable to the Regime.

I should note at this point, I just have a few slides which may--which are going to introduce confidential information, so we are going to have to go into closed session, which would just require the absence of Mr. Cook.

(End of open session. Confidential business information redacted.)

CONFIDENTIAL SESSION

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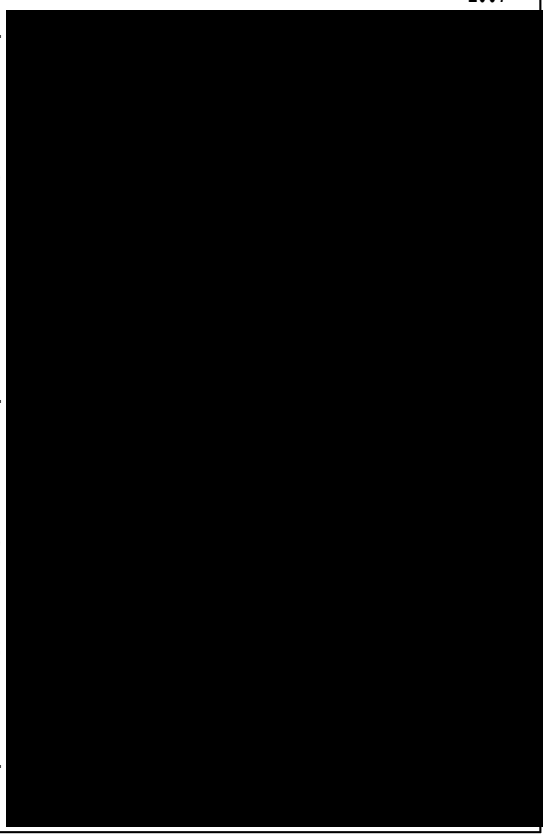

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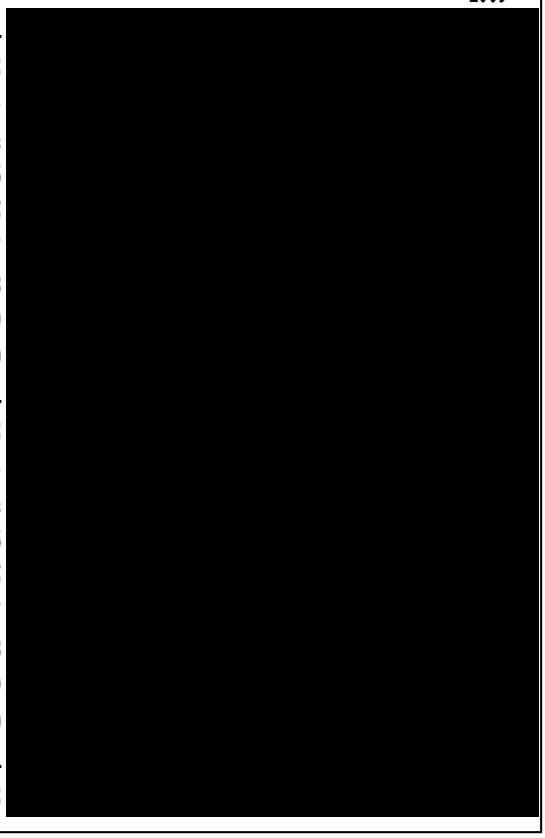

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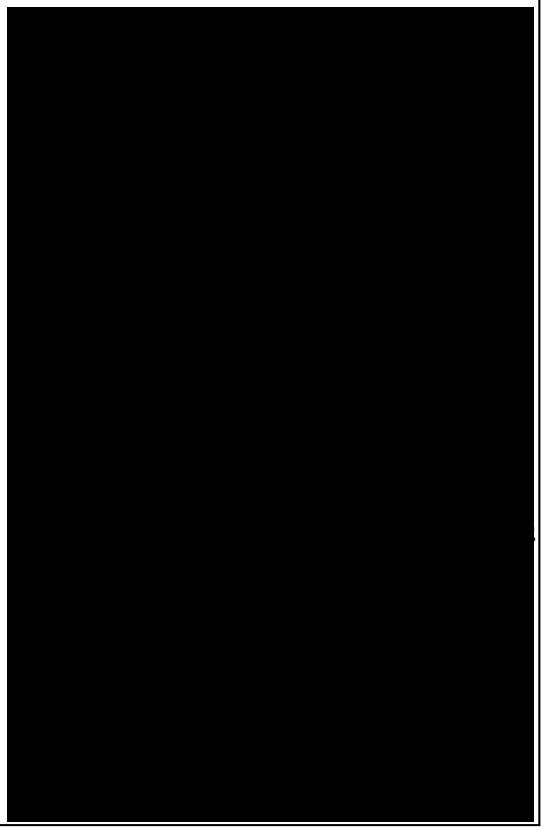

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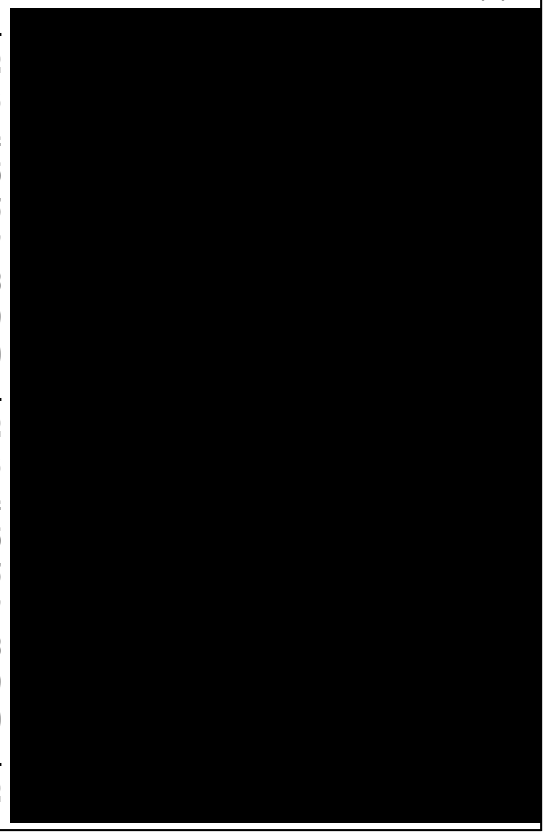

14:04:32 [redacted]

PRESIDENT ORREGO VICUÑA: Thank you, Mr.

14:05:38 Little.

We will reserve questions for after lunch. So, what I suggest that we do is the following: If we break now for lunch until 2:30, then we will have up to 15 minutes for the Tribunal to put the questions, to be immediately followed by up to half an hour for each party, and that would lead us to 3:45, at which point we must break and break absolutely.

MR. APPLETON: Mr. President, in light of the time, I think it might be helpful for the Tribunal to know that I do not intend to use my rebuttal time, and so as a result, since I won't be making a rebuttal, there will be no issues arising out of my rebuttal for the other side. Instead, what I would prefer for us to do is use the time available to answer the Tribunal's questions. I think that would be a more useful way to go. And given where we are in the process, I thought it would be better to let you know my intentions now at this point, now that I've heard the closing from the other side, and so that might provide you with more

14:07:04 time to deal with this and make it easier.

PRESIDENT ORREGO VICUÑA: Ms. Tabet is in agreement. Thank you for that suggestion. In that case, we might take half an hour, not to press everyone badly, and be back, say, 2:40, 2:35.

MR. APPLETON: I would like to make one point, though, and apparently I got this from the presentation of Ms. Di Pierdominico, I did misspeak when I gave my presentation this morning and I wanted to make sure before we came back that I intended to refer to Article 1106(1)(a), and I apparently said 1106(1)(b) early in the morning. And so, in fact, it was correct for her to respond to that on the basis of what we had in the pleading, and I just wanted to make sure it was clear that I had no intention of bringing another claim with respect to that matter today.

PRESIDENT ORREGO VICUÑA: Okay. Thank you. We will consider it, then.

We will break and be back at 2:35, please, thank you very much.

(Whereupon, at 2:08 p.m., the hearing was

14:08:21 adjourned until 2:45 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT ORREGO VICUÑA: Well, good afternoon. The parties had good news for the Tribunal that there would be no further discussions, and in reciprocity, the Tribunal has good news for the parties, that there will be no further questions, except one, which is totally aside the substance of the hearing, which is whether you think that the discussion that you raised earlier in the week about evidence that it's not--that it is new evidence, whether you think it's still relevant to keep into account, or not entirely?

MS. TABET: Yes, Canada still maintains its objection to the new evidence by the Investor this week and its witnesses.

PRESIDENT ORREGO VICUÑA: So, in that case, the Tribunal has discussed the issue, and the conclusion is the following: We would like to ask you in a matter of a few days--say a week or 10 days--for the reason saying this is new evidence because A, B and C, and then to have the Investor answering on that, saying, "I don't believe it's not

new because X, Y, and Zed."

The Tribunal will not go into the exercise of correcting the record or dropping P's--no. I think that would be overcomplicated for everyone, but it will give us a good ground to decide ourselves which is evidence that we should be using or not in our deliberations and our work. That's as far as we would like to go. So, if it is all right for each of you to provide one after the other, of course.

MR. APPLETON: I'm nodding yes.

PRESIDENT ORREGO VICUÑA: Okay.

MS. TABET: Do you have a specific date in mind, Professor?

PRESIDENT ORREGO VICUÑA: No, I actually have not looked at the calendar, but for example, end of next week.

MS. TABET: Would Monday, June 1st, be acceptable?

PRESIDENT ORREGO VICUÑA: Yes, it would be quite good. Would that be all right for Canada? Very simply, we don't want any elaborate discussion,

"it's new because it's not found here or there," and then to have a week from then, say, the Investor saying, "I believe it is not new because I regard it here or here."

MR. APPLETON: That would actually pose a slight problem for me. I would like to say yes. The reason is I'm doing an annulment hearing exactly in that week, and so if it would not cause a problem, and I assume it will be a fairly large task, it would be significantly better for us if we would have either a two-week period or--I think that's probably the best thing, just say two weeks because it will be impossible for me to be able to properly do the annulment hearing and to look at the evidence, and it will require me to look at the evidence.

PRESIDENT ORREGO VICUÑA: Fair enough. If you would like, we could split the period in half and half instead of being June 1, it would be what? June 8? Would that be all right? No, one week further than that.

MR. APPLETON: Yes. I give Canada another

week, for me an extra week.

PRESIDENT ORREGO VICUÑA: You will be ready by when? June 15?

MR. APPLETON: Yes, I think that would be more than perfect for me.

PRESIDENT ORREGO VICUÑA: So, we will figure out with Eloise and let you have a specific date, but that's probably the idea, a week or 10 days.

And very simply stated. Please don't feel you need to write a Memorial on that.

Good. That's excellent.

Well, we have come to the end of the hearing, and we would like, as your Tribunal, to thank--

MS. TABET: I'm sorry, just before we do so, we would obviously, were the Tribunal to come to a decision, we would be grateful for an opportunity to make submissions on the issue of costs, if necessary, after the Tribunal's Award on the Merits.

PRESIDENT ORREGO VICUÑA: Three weeks, four weeks from now that we have each of your submissions

at the same time, and then to provide the opportunity to comment on each other's submissions, and then the Tribunal would have the whole information before actually getting to any point near a decision in these coming weeks. Would that be agreeable?

ARBITRATOR ROWLEY: That would be to include your own bill of costs, so if Claimant were seeking costs in the event of success, it would say, "Here are our costs, this is why we should have them," and vice versa, and then you can each comment one week after the first period on each other's submissions both as to whether an award should be made in event of success or partial success, and a comment on the reasonableness of the claim for costs.

MR. APPLETON: With respect to the timing of that, often when you have a case with many experts and many other issues, it sometimes takes a little bit of time to get all the bills in at the end. I would be concerned that maybe three or four weeks after the hearing might just not be quite

enough time, unless--well, if you would like to make an award very quickly, we would give you a bill of costs very quickly for the parties to comply, and I'm sure that Ms. Tabet will join me in saying we are always happy for Tribunals to render awards more quickly than less quickly. If you think we might have a little bit more time for that, it would be more convenient to give us a little bit more time to get our bill of costs together.

PRESIDENT ORREGO VICUÑA: Fair enough. We will let you know, then, what is an appropriate point. And, of course, we are planning to work as much as possible and as fast as possible, but the things are never instant, so we would still need your submissions before that.

Fine. Are we all set in that respect? Well, so--you're going on say something?

MR. APPLETON: Just before you close, if that's your intention.

PRESIDENT ORREGO VICUÑA: Yes.

MR. APPLETON: I just wanted to take the opportunity, and I'm sure Ms. Tabet will join me in

any event, and she will speak for herself, to thank the Secretary of the Tribunal for all the extensive hard work she's done for the parties; and, of course, David Kasdan for the excellent transcription job that he has done.

And I don't know who the people are who are doing the AV, but whoever is facilitating for the public, this has been particularly important, but we don't see them; they're hidden away. But I understand they have done a remarkable job, and I would like to thank them.

And, of course, the Members of the Tribunal who didn't believe we could get this done in the time period that we did is probably the most transcript I have never seen in any hearing that I have yet done in terms of getting so many witnesses in a short period of time, so I would like to thank everyone, and I'm sure that Ms. Tabet will have some comments to make, as well.

PRESIDENT ORREGO VICUÑA: Thank you very much, Mr. Appleton.

Well, in fact, it was the Tribunal who was

going to thank the parties for the very active cooperation and the fact that we have been able to handle the whole case via e-mails, which is rather unusual, but it's extremely helpful, and I have exchanged thoughts on that with a couple of colleagues, like Mona and your Canadian expert on e-mails and so, so that has been very pleasant and very expedited to come to terms.

And certainly thank all your colleagues from both sides, your experts and witnesses, have enjoyed listening to them; Eloise for sure, she has worked very well and very much, and she will still have to do a little work; and David; and our technical colleagues. And, of course, we have had the pleasure to be joined by our NAFTA colleagues from the Government of Mexico and the State Department of the USA. So, we have enjoyed being all able to exchange thoughts either on the microphones or away and be sort of more aware of all the subtleties of all the case.

So, thank you so much, and we will be in touch by correspondence.

(Whereupon, at 3:02 p.m., the hearing was adjourned.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

_____
DAVID A. KASDAN