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

In the Matter of Arbitration:
Between:

MERRILL & RING FORESTRY L.P.,

Investor,

and

GOVERNMENT OF CANADA,

Respondent.

HEARING ON JURISDICTION AND THE MERITS

Friday, May 22, 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 9:02 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:

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PRESIDENT ORREGO VICUÑA: Good morning. We have this morning Professor Robert Howse as the author of an expert's opinion, and he will be examined by Mr. Appleton to begin with.

ROBERT HOWSE, INVESTOR'S WITNESS, CALLED

PRESIDENT ORREGO VICUÑA: Would you, please, Professor Howse, read the statement that you have before you.

THE WITNESS: Yes, Mr. President.

I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.

PRESIDENT ORREGO VICUÑA: Thank you, Mr. Howse.

MR. APPLETON: Good morning, Mr. President and Members of the Tribunal.

And just to confirm that we have--we are in an open session and that everything is being broadcast with respect to the public by way of closed circuit TV here at facilities of the World
DIRECT EXAMINATION

BY MR. APPLETON:

Q. Good morning, Professor Howse. I'm glad that you were able to make it here. I understand you had to travel some considerable distance to be here, and I appreciate the fact that you could come and the Members of the Tribunal have accommodated you in terms of their schedule.

A. You filed an expert opinion in these proceedings which is set out in the binder before you.

A. That is correct.

Q. And attached to your opinion is your curriculum vitae. If I could direct the Tribunal to the curriculum vitae, please, it follows from Page 13 of Professor Howse's Report, and I'm just going to take a minute to go through some of these things.

A. Certainly.

Q. I see, Professor Howse, you have an LL.M. from the Harvard Law School?
A. That is correct.

Q. And you are currently the Lloyd C. Nelson Professor of International Law at the New York University School of Law?

A. Correct.

Q. And you were previously the Alene and Allen F. Smith Professor of Law at the University of Michigan at Ann Arbor?

A. Yes.

Q. You were also a member of the faculty of the World Trade Institute in Bern, Switzerland?

A. Yes.

Q. You have also taught law at the Hebrew University of Jerusalem, the University of Paris Pantheon-Sorbonne, at Tsinghua University, the Osgoode Hall Law School, the University of Toronto, Tel Aviv University, and the Harvard Law School?

A. Correct.

Q. Have I missed anything in that list?

A. No, I think that list is correct.

Q. Fine.

You also served as the Second Secretary and
Vice Consul at the Canadian Embassy in Belgrade?

A. Yes.

Q. And you were also a member of the Policy Planning Secretariat of the Department of External Affairs of the Government of Canada?

A. Yes.

Q. Included in your CV is an extensive list of publications, including numerous books and peer-reviewed articles on topics of International Trade Law and general topics of international law, and they're too numerous for me to go through, but those are correct?

A. Yes, I would think to think that it's an extensive list.

Q. Okay. Thank you.

Professor Howse, may I direct you, please, to Paragraph 16 of the Report that you filed, Page 5?

A. Yes, I'm there.

Q. You can also find that at Tab 1 of the binder that's before everyone in this room.

Now, in Paragraph 16 you discuss how the
principles of international law of State

responsibility are relevant to the NAFTA, especially
in cases of NAFTA breaches or violations within
NAFTA Article 1116. I'm actually going to ask,
perhaps we can put 1116 up on the screen. We will
just leave it there. To the extent it's helpful,
but we all have NAFTA, so you can feel free to refer
to whatever you would like.

Would you please share with the Tribunal
your conclusions in this regard, Professor Howse.

A. Well, a key operative concept in 1116 is
the concept of a breach of the NAFTA, and one of the
questions that, you know, has been involved in
interpreting 1116 is what constitutes a breach,
which acts can be breaches.

And in my opinion, based upon what I
consider to be the applicable international law, the
Law of State Responsibility as reflected in the ILC
Articles, I have come to the conclusion that a
breach is any act of a State that is not in
conformity with an obligation regardless of its
origin and character, and that's from ILC
Article 12. So, a breach could be based on or could be induced by a statute that's not in conformity with an obligation, or it could be induced by administrative action or action by judicial organs. And each of these acts would be a breach in that each of them is not in conformity with an obligation under the Treaty.

Q. Okay. And so you have explained how breaches and measures come together. Is that what you're trying to refer to? Well, actually, maybe you're referring to something else in Paragraph 18. Maybe I can direct you to Paragraph 18 of your statement.

Could you discuss the--here you discuss the definition of measure.

A. Yes.

So, a question that often arises--and this has arisen also in the context of the law of the World Trade Organization on which I have written a great deal, too, is what is the nature of a breach in relation to a statutory scheme. And so, as we know, you know, a statutory scheme could contain
obligations or requirements that would in and of
themselves violate international obligations. It
depends on what the scheme says, and it depends on
what the obligation is.

And similarly, in the application or
administration of a statutory scheme, there could
also be violations of standards of conduct that are
prescribed by treaties. There the wrongfulness of
the conduct would flow from the specific actions,
discretionary actions, of officials or other actors
engaged in the application/interpretation of the
statutory scheme.

And what I address myself to in the expert
opinion is a view that I think is erroneous, which
is the notion that in relation to the application of
1116 in particular or in relation to a limitation
period, that if a statutory scheme falls itself
outside of the limitation period in the sense that
it was originally enacted, you know, in that
earlier--at that earlier point in time that--then it
is impossible to bring a claim for wrongfulness,
international wrongfulness, that arises from
breaches of obligations in the application or administration of the scheme.

In other words, if I want to challenge the application or administration of a scheme or any wrongful conduct that arises or might arise out of that, I have to challenge the statutory scheme itself within--within the time period. And in some sense, the State responsibility, then, is exhausted by the scheme itself. Essentially, the State is immunized from responsibility for later actions where there are breaches of obligations flowing from administrative or judicial behavior or judicial--or behavior of any actor of the State that is acting in the context of the scheme.

Q. I'm going to turn to that in a moment. I just want to just get a couple of basics underway first, if that's okay.

When you talk about governmental action, which you've referred to, I assume that's by what we mean by measure is a governmental--well, what is a measure?

A. A measure is any act or omission of a
Q. And who is a Party?
A. The States Parties to NAFTA in this case.
Q. And there are extent of obligations covered by the NAFTA, but the Parties are only the signatories to the NAFTA; is that correct?
A. Correct.
Q. Okay. So, the parties to NAFTA can engage in governmental action through measures. Measures are actions or omissions. Do I basically have it?
A. Yes.
Q. Okay. So, I'm trying to understand, then, how far does the definition of Government go under international law? So, for example, if you look at Article 105 of the NAFTA which describes the extent of obligation, it describes that the Government of Canada in this case is responsible for actions at its Federal level and is responsible for actions at the Provincial--we call it the subnational level, which would be Provinces and municipalities and entities in that way.
Could you please explain to me in this case
09:12:14 1 where we have counsels to the bodies, FTEAC, TEAC,

2 are you familiar with what I mean?

3 A. Yes.

4 Q. You've read some of the transcripts?

5 A. Yes, I have.

6 Q. If I recall, you've read day one and two,

7 and perhaps did you get a chance to read Day 3 when

8 you came down from New York?

9 A. Yes, I did.

10 Q. So, you have seen some things.

11 A. Yes.

12 Q. So, if I use a term that you're not

13 familiar with, just stop me, and I'll make sure that

14 we--by this point we are all very familiar with some

15 of these acronyms, but in the real world they might

16 not be.

17 And so, with respect to FTEAC or TEAC,

18 would that be covered within the purview of

19 governmental action or of Governments, to be

20 precise?

21 A. Well, the applicable rules here are the

22 rules in the ILC Articles, once again, which
09:13:09 1 determine which acts, including by persons or
2 entities that are not formally part of Government or
3 organs of Government can be attributable to the
4 State. And so one relevant Article is Article 5,
5 which says that even an actor who may be formally
6 not a State actor essentially, if they are
7 exercising elements of governmental authority,
8 nevertheless those acts may be attributed to the
9 State. So, we would have to ask the question
10 whether--
11
12 MR. APPLETON: Keep going, please.
13 MS. TABET: Sorry--
14 MR. APPLETON: The witness is in the middle
15 of an answer. It's absolutely inappropriate to cut
16 the witness off. If you have know an objection, you
17 can make it at the end of his answer, but he's in
18 when the middle of giving his answer.
19 THE WITNESS: So, one would have to ask
20 whether these bodies are exercising elements of
21 governmental authority.
22 MR. APPLETON: I believe Ms. Tabet has
23 something to do say.
MS. TABEL: I believe the subject matter of Mr. Howse's Report is on time bar, and you're now discussing issues of attribution. I'm prepared to give some latitude to an expert witness, but it is significantly beyond the scope of the Report and the issue that Mr. Howse has addressed in his Report.

MR. APPLETON: Ms. Tabel, if you carefully read Professor Howse's Report, you would see that it deals exactly with the issues of breach. He specifically deals with attribution and breach, and the ILC Articles referred specifically to provisions of this along the way. If you would like to make your objections, you seem to have no problem making objections each day. I have no problem with making a motion, but--

MS. TABEL: Could you please point me to the paragraphs in his Affidavit where he discussed attribution.

PRESIDENT ORREGO VICUÑA: No. Will you please refrain, both counsel, from engaging in direct debates. The question is whether attribution as a subject is part of Professor Howse's Report or
is not. Ms. Tabet has indicated that she does not
mind that you refer to that, but not as the, of
course, central issue in relation to the question of
the time bar.

So, if you would please take that into
consideration when elaborating, that would be
helpful.

MR. APPLETON: Mr. President, I was very
careful to exactly give reference, so, for example,
in this question, when we started this, we were
referring to Paragraph 16 of Professor Howse's
opinion, and we started from that. And that
discusses the ILC Article and the issue that deals
with breach of international obligation, and then I
asked him to explain that in the context of the
NAFTA, which arises directly out of Article 1116,
and 1116 discusses what a Party is. If we look up
on the screen, 1116(1) refers to Party, capital P.
I've asked him to explain that, and also--so I've
asked him to explain what that means, and I've asked
him to clarify that. That's directly in his Report.
It's directly in the issue that's before us, and I
don't mean to debate this. I'm just saying that I believe it's full out, well within what he's here to discuss, and I would like to have the latitude to just discuss that.

PRESIDENT ORREGO VICUÑA: Yes, the issue is not whether it is or it is not related. As I mentioned, the issue is whether it is a central focus of the Report or it is not. To the extent that it is an issue that might be discussed by Professor Howse in conjunction with the central point that he makes in his expert opinion, that's fine, and he will be the best judge, so will you proceed on those bases.

BY MR. APPLETON:

Q. So, Professor Howse, we were discussing the issue of measure. We were discussing the issue of what would constitute Government in the measure, and you had discussed the issue under Article 5 of the ILC Articles, and I'd asked you the question specifically about FTEAC and TEAC. And so my question that I was hoping that we would get to, and I'm still going to pose to you, in the context of
this ILC Article and the context of the issue of breach as set out in Paragraph 16 and Article 12 of the ILC Rules, can you tell me in your view how does action by third Parties fit into State responsibility. And perhaps I will give you free reign how you'd like to answer that, but if you have an example, that's good. You don't have to give an example, but just try and answer the question as best as you see fit.

A. Well, I would like to distinguish here two issues. One is the issue of attribution of responsibility to actors who are not organs or not formally part of the State apparatus because they're exercising elements of governmental authority.

And a second set of situations where the nature of the primary obligation in the Treaty is such that a failure to, as it were, discipline or direct the actions of private Parties could be a violation and therefore engage State responsibility.

So, to give an example from a prior NAFTA case, I'm sure that we are all familiar with the Loewen Case, where although the Tribunal found
obviously that the claim could not be upheld for certain procedural reasons on the substance, it found a violation of fair and equitable treatment because of conduct by actors who were not State actors and would not have been considered so under the ILC Articles; namely, the legal counsel for the plaintiffs, who essentially was taking a strategy of whipping up, as it were, national bias or prejudice, in this case against Canadians. And what the Tribunal held was that there was a violation of fair and equitable treatment not because there was attribution to the State of the behavior of counsel, but because of the failure of the judicial organs in this case to control those abuses, to constrain them and to prevent them from interfering with and compromising the integrity of the process. And so, that was the violation of fair and equitable treatment. It ultimately stemmed from the conduct of these non-State actors, and yet engaged State responsibility, even though there wasn't attribution under the ILC Articles. Just because of the inherent obligation of
fair and equitable treatment in this context meant
protecting the integrity of the process against
abusive action by private Parties.

PRESIDENT ORREGO VICUÑA: May I interrupt
just a second there. You see, the question is this:
What the Tribunal would be particularly interested
in finding out is your view on whether a given
measure that has been directly or indirectly either
attributed or be part of the inherent State
responsibility of a State Party is subject or not
subject to a limitation because of the three year
and the subject that you discuss about whether it is
continuing and the effects and so forth, because you
see the point, if I understood well, Ms. Tabet, in
order to discuss whether there will be a time limit,
it has to be a measure that, however it got to be,
it is the Government. Otherwise, it wouldn't be
here.

So, that's the distinction that I'm trying
to introduce so that we will address really concerns
us.

THE WITNESS: Right. And so, as I try and
suggest in my Report, in order to interpret 1116(2),
in order to interpret the time bar, we have to
understand what each of the breaches is, and I think
that's why we have been just been discussing what
possible acts or omissions constitute breaches that
engage State responsibility.

And so the question then becomes once we
have a good concept of what possible acts or
omissions are breaches, how does the three-year
period apply to them?

Well, I would then distinguish between
several different, you know, situations. I've
mentioned a situation where the statute has been
enacted, you know, prior to the date established by
the time bar. So, if that's the case, then, you
know, we have to ask how would that affect a claim
that there is wrongful conduct involved in the
administration or implementation of the statute.

And my view, as expressed in the opinion,
is that if these are distinct legal wrongs, then
these are breaches that have occurred, you know,
after that point in time established by the time
bar, and therefore the time bar doesn't apply to
them. They are independently wrongful. They arise
in the context of the application of a statutory
scheme that was enacted prior to that date. That's
part of the context. But the actual wrongful
conduct being alleged is wrongful conduct that has
occurred after that date, conduct not of
the legislative organs necessarily, although it
could be of their amendments, but conduct of
administrative organs or judicial organs perhaps.
And so though those are separate wrongs,
but the wrongfulness of that conduct after that
date, of course, has to be proven by the Claimant.
But if the Claimant can prove that wrongfulness in
the meaning of the ILC Articles behavior not in
conformity of what's required by NAFTA on the part
of, you know, of State actors after that date, then
those are independent breaches that have occurred,
you know, within the limitation period. That's
essentially the position that I've tried to outline.

BY MR. APPLETON:

Q. All right. Well, then, we have already
started in then to look at issues about the time bar
which start at Paragraph 12 of your Report. Perhaps
we will just continue right along with this. Maybe
we can discuss these issues.

I just wanted to point out for the record
that the case before, just before the President's
question that he referred to, and I will try just to
keep the record together as much as I can, you are
referring to the Loewen Case, and that is Canada's
authority at Tab 73, and so to the extent I can
point that out along the way, we will just keep the
record together.

And so, there seem to be three cases that
seem to be at issue with respect to the time bar:
Grand River, UPS, and Feldman. You've discussed
some of these issues with respect to your opinion,
and you've read the response opinion from Professor
Reisman.

A. Yes.

Q. Why don't you just give us your views on
that and let the Tribunal understand your views on
this matter.
A. Well, let's begin with the UPS Case. The UPS Case, in my view, articulates the current state of international law with respect to the notion of continuous breach. That is to say, a breach that consists in a series of acts over a period of time.

And, of course, this poses an issue with respect to a time bar where some of the Acts in the series have occurred prior to the date of prescription established by the time bar and some of them afterwards. What do we do in such a case?

And here really the issue is how to operate the time bar in a manner consistent with the principles of State responsibility— that there is, as a general matter, State responsibility for every act that is not in conformity with an obligation.

And as the UPS Tribunal, as I understand it, states, essentially the way that one applies a time bar in light of that general, you know, principle of international law, rule of State responsibility, is that one does not bar claims arising out of those acts in the series that occur after that date, but at the same time, you know, one realizes that the
time bar has modified to a certain extent State responsibility in that there is no State responsibility for those acts in the series that have occurred prior to that date.

So, what this really means is that State responsibility is, in a sense, truncated by virtue of the time bar. So, in cases of continuous breach, it is extremely important for the Tribunal, the Treaty interpreter, to be able to assess what harms have occurred, what discrete harms have occurred to the Claimant by virtue of the Acts in the series that have taken place after that date which, of course, may involve in some instances important factual determinations.

So, we have here a situation where a time bar truncates without undermining the basic principle of State responsibility; that is to say that unless otherwise specified, there should be responsibility for every breach. Every breach is an internationally wrongful act.

Q. So, that was the first case UPS. Before we turn to the other two cases, did you--in the UPS
09:30:11 1 Case, did they not give some meaning to the
2 Article 1116 obligation with respect to damages?
3 A. Yes. And I understood what I just observed
4 to be along those lines; namely, when I say that
5 State responsibility is truncated, State
6 responsibility under Chapter Eleven of NAFTA, or at
7 least this part of it, is State responsibility for
8 damages. That is the nature of State
9 responsibility. And so, when I say that State
10 responsibility is truncated, in the sense that there
11 is no State responsibility in respect of those acts
12 in the series that have occurred before the date
13 established by the limitation period, that's what I
14 mean, that there is no responsibility for damages.
15 That's the essence of State responsibility with
16 respect to these provisions of NAFTA.
17 Q. So, if I understand what you're saying,
18 you're suggesting that Article 1116 with respect to
19 the time limitation, because it does say something
20 else, but if 1116 was not in the NAFTA, then a
21 Claimant like Merrill & Ring could claim for older
22 damages throughout the entire period of a continuous
course of action, and that 1116, therefore,
following the UPS model, says that you can only go
for three years before the time you brought your
claim, that that cuts the damages off.

A. Correct.

So that in the absence of 1116(2), the
general principle of State responsibility would
apply, which is that there is responsibility for
every past wrongful act. There is retrospective
responsibility. There is responsibility for
reparations.

But what this does, as I say, is it
truncates it. It's says that that State
responsibility, at least for reparations, you know,
is limited to those acts in the series that occurred
after the date established by the limitation period.

Q. You used a heard word that we haven't heard
before, reparation. That comes from international
law?

A. Yes.

Q. Can you tell me where?

A. The ILC Articles.
Q. Okay. Let's turn, then, to Grand River. I think we'd all like to talk a little bit about that. Perhaps you could share with the Tribunal your views about the applicability of the Grand River Case to this particular task that's before you.

A. Well, here I think we need to look at more of the language of 1116(2). So as I said, in order to apply this limitation period, one has to understand the meaning of the breach, and we've just been discussing that. But we also need to go beyond that, and we need to understand what knowledge of the alleged breach and knowledge of incurrence of loss or of damage mean as well. It's not enough just to understand what the breach is. It's also important to understand what these expressions mean.

And that's where the Grand River opinion assists us because in that case, the Tribunal did consider the question of what constitutes knowledge of alleged breach and knowledge that the Investor has incurred loss or damage.

So that on the facts of Grand River as they appeared to the Tribunal, as the Tribunal sets out
its understanding of them in its ruling, in that case the Claimant was subject to a specific statutory obligation that was imposed on the Claimant prior to the date established by the three-year limitation period. And on the basis of the exact nature of that obligation, the Tribunal came to the conclusion that the Claimant had acquired or should have acquired both knowledge of the alleged breach and knowledge that they had incurred loss or damage at that time prior to the date established by the limitation period.

And as the Tribunal said, you know, the obligation in the statute to which it was referring in that part of the ruling--and we will come to that other part of the ruling in a second--was one that was precise and quantifiable, so they should have known exactly the nature of the nonconforming act because it was evident from the face of the legislation, and secondly, because of the precision with which the obligation that burdened them was articulated. It admitted of no element of uncertainty, of discretion, or variability even
though the obligation ultimately would have to be discharged, you know, after the date that
the--established by the limitation period.

So, that tells us something about what it means to have knowledge of the alleged breach and
knowledge that you have incurred loss or damage.
You have to have knowledge, first of all, of the full legal implications of the wrongful act for you;
and, secondly, you have to have full and precise knowledge of the economic implications, the material
implications. And both of these have to be present before the date established by the time bar.

Q. If there is an absence of transparency or legal security, could you have knowledge, in your view?
A. No. The Tribunal in Grand River articulates, I think, very eloquently the proposition that an investor that is a sophisticated business actor ought to know the laws that apply to them at a particular period of time, and that there was no reason why this sophisticated business actor that had been operating in this regulated sector
should not have been aware of the legal requirements
to which it was subject at that particular--at that
particular time, prior to the date established by
the limitation period.

Now, what does this assume? It assumes
that there is a transparent, stable Legal Framework
that at least a sophisticated Investor with good
legal or perhaps also in some instances accounting
or other regulatory advice or expert advice can know
both the precise nature of the framework and the
obligations, the burdens to which it's being
subject, and also figure out, you know, what the
exact nature of the costs or of those are to the
business.

And my understanding from the pleadings and
also from reading the testimony in this case is that
one of the important elements of the Claimant's case
here is that, in fact, there is a substantive
violation of the NAFTA because they have been unable
to benefit from a transparent, stable Regulatory
Framework, where decisions are made grounded in the
statute, grounded in rules, grounded in publicly
available methodologies that are either stable or amended or evolved in accordance with some kind of, again, open, transparent administrative process. And, therefore, in some sense, the very substance of the claim in this case is kind of the mirror image or opposite of the situation in Grand River, where the Investor was faced before the time period with a clear, transparent, very precise Legal Framework to which they were subject, and the Tribunal said, well, since you were subject to very clear precisely defined legal and Regulatory Framework at that time, you should have been aware of that. That's reasonable.

Q. Now, Professor Howse, I wonder if you might turn to the case that you referred to Paragraph 41 of your opinion, which is the Feldman Case. I also note that the Feldman Case has been discussed by the 1128 submission of the Government of the United States of America. And you received a copy of the 1128 submission, sir?

A. Yes, correct.

Q. Okay. So, I just wonder if you might help
the Tribunal understand how the Feldman Case was a factor in your consideration here.

A. Well, my understanding of the ruling of Feldman, you know, on the question of 1116, the limitation period, reflects, you know, the clarity of 1116, which is that the Tribunal does not have jurisdiction to provide relief with respect to those breaches that have occurred prior to the date specified by the limitation period. And, you know, I do not think that Feldman, you know, did exclude--it clearly did not exclude the possibility for relief for breaches that occurred after that date.

Q. All right. But in Feldman the Tribunal didn't actually say the time limits only run from the end of a continuing act, did they?

A. No.

Q. So, why is Feldman relevant here?

A. I don't understand why it's relevant except as just a kind of obvious application of the idea of a limitation period as applying to those, you know--to those alleged breaches that occurred before
Q. Professor Reisman, in his Supplemental Affidavit, he refers to the Mondev Case as Paragraph 21 of the supplement. Could you give us your views on the applicability of Mondev. A. Well, in Mondev, there were two distinct claims that arose out of the conduct towards the Claimant, towards the Investor. One was a claim for expropriation that was time-barred, and another was a claim for--to access to justice in the domestic legal system of the host State in order to have redress or compensation for the conduct towards that--towards the Investor. And so, in the case of the expropriation claim, as I recall, the Tribunal in Mondev held that that claim was time-barred in the sense that the relevant breach had occurred within the, you know, the period stipulated by the limitation period, but on the other hand the failure to provide access, the alleged failure to provide access to justice was, in some sense, a continuing act, assuming it could be proven, and therefore it was not time-barred.
Q. I'm going to turn to some other issues covered in your opinion because your opinion didn't just cover 1116.

A. Sure.

Q. But before I go there, I want to ask you, is there anything else that you feel you want to add with respect to 1116 based on your opinion of what Professor Reisman's supplemental opinion or the 1128 opinion or the question that we've already had just to make sure that we get this part finished before we move to the next?

A. I think it's important in understanding 1116 that we try and really grasp the core of Professor Reisman's view; and it seems to me that this view is premised on the notion that in the case of a continuous breach, a series of related actions that are wrongful or violations of obligations, that if there is such a series that the Claimant is under an obligation if it wants to be able to challenge any of the actions in the series to challenge the first one, or at least at the point at which it knew that this action or should have known it was a
breach and that a damage or harm flowed from that
action.

I just see nothing in international law to
support this restrictive view, and certainly nothing
in 1116 of the NAFTA.

And I think this view is really contrary to
common sense, because normally when a new Regulatory
Framework comes into place that in some way
importantly restricts the operation of an investor's
business, what they try and do is they try and live
with it. Usually the first instinct is not to go
and contentiously challenge the Government in
litigation. They may not like the Regulatory
Framework, but they're figure we're here, we've
invested a lot of money, and we will try to work
with the Government and assume that there is good
faith, and that if the framework is applied in a
transparent, and fair, and evenhanded manner, in a
stable manner, well, we can probably adjust our
business to live with it, to work with it, even if
we don't initially like it.

So, what this suggests is that--is that,
09:46:25 1 you know, even if it eventually proves to be
eventually the case, that the framework is not
administered in a transparent, open, good faith,
consistent way, that because the Investor didn't
resort to litigation the first time that an act
occurred that might be interpreted as a breach,
they've lost any possibility of bringing a claim.

Basically, this view seems to me to
encourage litigiousness, and to almost immediately
lock an investor with issues with the way a
Regulatory Framework is operated into a kind of
confrontational mode with the Government.

So, I think it has not only is it not based
on the text of 1116, but I think it has very
negative policy implications that we have to be
concerned about in light of the broad purposes of
the NAFTA, which is to facilitate, include
implicitly, at least to me, facilitating a good
relationship between the Investor and the host
State, where the first resort, when issues emerge
with a Regulatory Framework, is not to international
litigation but to a process of attempting to work
with a regulatory scheme, assuming good faith that
it will be applied in a manner that does not create
or does not involve breaches of the Standards of
Conduct that are required by the NAFTA.

Q. Okay, so I'm going to turn to another area.
I want to make sure we've got everything on this
section done.

Now, I'm going to ask that you look at your
Report at Paragraph 8--it's on Page 3--where you
discuss the concept of systemic integration. This
is where you start to discuss the issues of
interpretation of the NAFTA.

I note that Professor Reisman did not seem
to share your view, but I'm going to ask you to
explain your view about systemic integration and so
the Tribunal can understand your conclusions in your
report, please.

A. Well, let me first of all simply remind us
from whence this expression "systemic
integration"--from where it's drawn. I did not
invent this expression. I found it in a document of
the International Law Commission that I think both
in academia and in international legal practice has become an important reference point for our understanding of some very important features of the international legal system. And these features relate to the existence of multiple often overlapping legal regimes and fora and—which exist in a certain way alongside what one would call general or framing principles and rules of international law, such as rules of the State responsibility in the ILC Articles and rules on treaty interpretation in the Vienna Convention on the Law of Treaties.

So, how is a treaty interpreter to interpret specific provisions in one treaty in one particular regime and in one particular forum realizing that this treaty regime exists within a broader universe of international law?

And using the expression "systemic integration," my understanding is that the International Law Commission has taken the view that the appropriate approach is to bring, where relevant--where relevant--principles and rules from
outside that specific treaty or treaty regime to bear--to bring them to bear on the interpretation of the particular treaty and the provisions in question, always governed by relevancy.

So, is this a particularly novel or original statement? Well, one might either like or dislike that specific catchword "systemic integration," but really in a much more, I suppose, pedestrian or obvious way, it's built into the NAFTA itself, because if one looks to Article 102(2) of the NAFTA, it says that the Parties shall interpret and apply the provisions of this agreement in light of its objectives, one; and, two, in accordance with applicable rules of international law--applicable rules of international law. And--so, that means applicable rules of international law that are found elsewhere than the agreement itself; otherwise, this provision would be a meaningless tautology.

Now, where do we go to figure out how one would apply the NAFTA in accordance with applicable rules of international law? Well, are the rules of the Vienna Convention on the Law of Treaties
there is no conflict, no actual conflict. And one of the canons, I think, of interpretation that is expressed by this catchword "systemic integration" and that is very--that I'm very sympathetic to and I have expressed this in a range of scholarly writings over quite a number of years is the idea that one should avoid conflicts. One should assume that States negotiating in one forum and making solemn treaty obligations to each other are not doing so in such a way as to undermine or render ineffective obligations to each other that they've made in some other--in some other context that are equally solemn and have an equal status in terms of the hierarchy of norms in international law.

So, it's an important task of treaty interpretation, arguably, to interpret a treaty, to the extent possible, to make effective all the various international legal obligations that the
Parties have entered into. And so, in interpreting this Treaty, we don't want to undermine unnecessarily obligations that the Parties have in some other international legal regime.

Now, there may be conflicts, and unless we are talking about jus cogens, which I don't think is applicable in this case, peremptory norms like against torture and so on, the fact is that in a treaty Parties can contract out of other applicable rules.

Now, there are principles and rules governing such contracting out. It would need to be explicit, it and would need to be evidenced by clear wording in a treaty, but it is possible, given the nonhierarchical relationship between treaty and custom as it's classically understood in international law for a treaty to contain certain limited specified defined carve-outs from these rules.

But one should not--I think this was a canon of interpretation already present in the ELSI Case, which we all are very familiar with. One
should not lightly assume that the Parties have contracted out of these--out of such rules and principles without explicit textual evidence that they've done so.

Q. If we turn to the next paragraph of your Report, you talk about Article 103 of the NAFTA, and you've suggested that that is relevant, Article 103 discusses the relation of the NAFTA to other agreements. That's the title. We will put it up on the slide.

Do you have anything to say about how that Article, which talks about the GATT and other things, is relevant to the considerations that you've talked about about systemic integration?

A. Yeah. Article 103 makes it plain that the broader--one of the broader international legal contexts in which the NAFTA is to be interpreted and applied is the context of the rights and obligations that the Parties to NAFTA have as, I guess, at the time Contracting Parties of the GATT and today members of WTO, and so here it specifies a particular part of the broader international legal
universe that's relevant up to the NAFTA.

And so, if the Parties are affirming their rights and obligations under the GATT, then that means that there is almost an explicit statement that one would be interpreting the NAFTA in such a manner as not to be inconsistent with those obligations. How can they affirm the obligations and then invite the NAFTA Treaty interpreter to read those obligations in a different manner than the obligations they've just in another breath been affirming?

And I think this goes also to objectives of NAFTA. The objectives are elaborated in light of certain principles and rules. And the principles appear--include national treatment, most-favored-nation treatment, and transparency. And these are terms that are recognizable and cognizable to the Parties and around which the Parties have, as it were, prior State practice because these are terms--these are principles that underpin the rights and obligations that are referred to in Article 103, the existing rights and
obligations under the GATT. So, the rights and
obligations under the GATT, and specifically those
that relate to these structural, these fundamental
principles--national treatment, most-favored-nation
treatment, and transparency--that constitute this
part of this broader legal universe to which the
NAFTA Treaty interpreter must focus attention
pursuant to 103.

Q. Okay. Well, in fact, while you were giving
your answer, I've put Article 102 up because you
specifically--I just wanted to make sure I
understand what you were referring to here.

So, in Article 102, I see that we have part
one sort of sets out the chapeau, sets out some
principles and rules of the NAFTA. I just wonder if
you could explain to us as an interpretive area what
you believe these mean. So, for example, it says
"specifically through its principles and rules,
including national treatment." You see that on the
screen?

A. Yes.

Q. Could you please share with the Tribunal
we will start with national treatment, and just explain what that means.

A. Well, national treatment, as a general concept, refers to the notion that there is an obligation to treat no less favorably economic actors from other Parties than one's own like economic actors. And so, depending upon the nature of the substantive field to which a specific national-treatment provision applies, whether it's goods, services, investment, intellectual property, what the relevant economic actor is or activity will differ somewhat.

So, in the case of services and investment, it may be enterprises in like circumstances. In the case of trade in goods, it's like products and so on and so forth.

So, the essential obligation is that obligation of treatment no less favorable which goes to, as it were, the competitive playing field, the relationship between certain domestic and certain
10:00:55 1 economic actors from other Parties. And what
determines which economic actors from domestic actors are compared in relation to actors from other Parties is this notion of likeness. That controls who is being compared in order to apply this standard of treatment no less favorable for actors or activities of other Parties.

Q. So, that's with respect to national treatment. What about most-favored-nation treatment?

A. Well, most-favored-nation treatment really deals with the relationship of treatment of the Parties or a Party that is a signatory to NAFTA to treatment of other States, whether signatories or not, and says that one has to grant the most favorable treatment one grants to any State to other Parties of NAFTA.

Q. Is nationality-based discrimination part of the principles of national treatment or most-favored-nation treatment, in your opinion?

A. Well, I would say, first of all, that I do not believe in the context of NAFTA that
nationality-based discrimination is the applicable legal test. Certainly, where treatment less favorable of economic actors from other Parties occurs. One of the motivations or circumstances in which that can happen may be if such discrimination exists, but the inquiry is not going to be focused on such discrimination, even though such a motivation might be probative as to whether treatment no less favorable occurs.

Maybe I could illustrate this in a rather simple way, which is that nationality-based discrimination under NAFTA is a violation of the standard of fair and equitable treatment in 1105. There, one has an inquiry that includes inquiry into the existence of such discrimination.

So, again to refer back to the Loewen Case, where the Tribunal was dealing with alleged nationality-based discrimination, bias or prejudice against Canadians or Canadian businesses, the Tribunal found prima facie again because it dismissed the claim on grounds of a prima facie violation of 1105. It did not find violation of
10:04:20 1 1102 because, as I think the Tribunal correctly
2 concluded, 1102 entails a comparison of businesses
3 in a competitive relationship. That's what the
4 inquiry is directed to and not really to as such the
5 existence of national bias or prejudice.
6 MS. TABET: I'm sorry, I fear we have
7 strayed yet again very far from the issue of time
8 bar.
9 MR. APPLETON: Ms. Tabet, excuse me, I
10 don't want to debate with Ms. Tabet while the
11 witness is on, but the witness has put in a Witness
12 Statement that dealt with more than time bar. We
13 are entitled to have the witness give direct
14 evidence on opinion. His opinion is very clear.
15 Ms. Tabet has had his opinion for many, many months.
16 She's filed a full responsive opinion on this
17 opinion.
18 It would be completely unfair and
19 inappropriate to restrict the witness to not give
20 testimony on the Witness Statement that is clearly
21 and fully before this Tribunal. And I'm asking him
22 specifically to comment on provisions he gave an
opinion on in his opinion, and it's a provision of
the NAFTA about the interpretation of this issue. I
just don't feel that this is appropriate to have
this argument at this time at all, but I would ask
that my friend please stop reiterating the same
objection. We have been very clear at the direction
of the Tribunal to say exactly where it's relevant
to the opinion. I don't think it's appropriate,
sir.

PRESIDENT ORREGO VICUÑA: To the extent
that the subject is in the opinion, it is certainly
appropriate, but the question again, if I may
reiterate it, is that, on occasions I myself get
lost of what is the connection of that argument even
if it is in the opinion, of course, to the central
issue of the time bar? Say, for example, you have
discussed national treatment, most-favored-nation
treatment, fine. There's no doubt there is a
reference or some discussion in your opinion. But
how does that relate to the question of the time
bar, which is the subject of jurisdiction that is
before us?
THE WITNESS: Yes, Mr. President.

PRESIDENT ORREGO VICUÑA: So, that's the sort of thing I would like you to keep in mind, not to necessarily answer me now.

THE WITNESS: Well, I would like, if I may, Mr. President, to give a brief answer. And I think it's the part of the context of this difference of views that has emerged between myself and Professor Reisman.

And Professor Reisman, in the reply that he filed to my opinion, questioned why I was bringing in matters of GATT and WTO Law into my discussion of the time-bar issue. And, in my opinion, I refer to the way in which GATT and WTO Law has developed in terms of distinguishing as distinct violations of a treaty that stem from a statute itself a law as such and those violations that stem from individual applications.

So, I feel that's highly relevant to understanding some of the issues in this case concerning applying the time bar, given Professor Reisman's view or what I understand him--his view to
be, that, you know, if the statute is enacted before the date established by the time bar, then the time bar, you know, really applies to applications of that same statute.

And what I think I was trying to illustrate, simply illustrate, by reference to the WTO Regime is that the way in which the general principles of State responsibility are understood in the WTO is different, which is that you could have quite distinct claims of a violation based on the law as such versus very distinct claims that arise from individual applications.

And so--and here in 103, if we bring 102 and 103 together, I think this line of questioning suggests that there is a sound basis in the text of the NAFTA for averting to certain principles or concepts that may actually be found in GATT or WTO Law, and it's in that connection that I believe I was being asked to respond, well, what is the evidence for that? The principles found in these other agreements are intended by the NAFTA drafters to be brought into the reading of NAFTA. And I was
alluding to 102 and 103 together as explaining why
that might be appropriate, that the drafters had in
mind that this would be part of the international
legal universe that a treaty interpreter was
intended to consider in actually reading and
applying particular provisions of the NAFTA itself.

PRESIDENT ORREGO VICUÑA: Thank you.

BY MR. APPLETON:

Q. And so, let's talk about what this Tribunal
needs to do to interpret the NAFTA itself. You have
taken us through Article 102, which says in
Article 102(2) on the screen that the provisions of
the agreement are to be interpreted in light of its
objectives set in Paragraph 1 and in accordance with
the applicable rules of international law.

And Article 1131--I think I have that
somewhere--Article 1131, which is the governing law,
also sets out that the Tribunal shall decide the
issues in dispute in accordance with this agreement
on NAFTA and applicable rules of international law.

It also says that interpretation by the
commission of the provision of this NAFTA Agreement
shall be binding on the Tribunal established under this section. Correct?

A. Yes, that's correct.

Q. And so, I see that in Paragraph 5 of your opinion you refer to the Vienna Convention on the Law of Treaties.

Let's go back to 102.

Would that be an applicable rule of international law that's set out in Article 102(2)?

A. I believe so, yes, at least those provisions of the Vienna Convention that are widely viewed as customary law.

Q. And so you refer to Articles 31 and 32 in your opinion to be guideposts to assist this Tribunal with respect to the interpretation of this agreement?

A. Yeah, correct.

Q. And so, one of the issues that is at issue for this Tribunal, potentially, is that there is a common position on some types of issues not related to facts but with respect to some issues about law in the 1128 submissions of the Government of the
United Mexican States, the United States and, it appears, Canada. Could you tell us, with respect to the Vienna Convention and with respect to the NAFTA, its governing law on Article 102, what the effect of that might be.

A. Well, there is a--there has not been an agreement between the Parties with respect to the interpretation of 1116. There are perhaps--and I suppose this is what you're alluding to--you know, common elements and observations of these various Parties that have been made in the context of this particular litigation.

And I suppose this goes to the question of whether the provision of the Vienna Convention that you cite positions taken by Parties or intervening Parties in a litigation if they have common elements can be considered State practice.

My view is that these kinds of positions can be only of limited value in terms of State practice, and, you know, part of the reason is that Parties take a position in specific cases that may relate to their interests and underlying
interpretations of facts in those particular cases. And I think that distinguishes this kind of practice from practice where there is agreement either, you know, evidenced through the minutes of a meeting, a political negotiation, and understanding that's omitted by the Parties or their Ministers or legal advisors as to general matters of interpretation; that is to say, not connected to the alignment of interests in a particular--in a particular dispute. I mean, that being said, I wouldn't go to the opposite extreme and say that positions that have been taken by Parties of a particular dispute are irrelevant to State practice. I simply think we have to be cautious in reading the Vienna Convention in that way.

Q. And if I can just go back to Article 1131, you see 1131(2). Would that process be the type of process that you would referring to by expressing a common intention?

A. Yes.

So, in the case of the NAFTA in particular, it seems to provide a vehicle or mechanism for the
possibility of such an interpretation.

Q. And could such an interpretation actually create a modification to the NAFTA, or could it just deal with interpretation of a provision of the NAFTA, based on your knowledge of the powers in the NAFTA and the Free Trade Commission?

A. Well, my understanding of the word "interpretation" is that interpretation does not either add to or diminish the actual rights and obligations under the agreement. It simply expresses an understanding of what those--of what those mean.

And--now, one would have to distinguish international agreements that don't have an explicit provision on amendment from those that do. I think that the issue of where interpretations might spill over into a modification of rights and obligations becomes important where there is an amending formula in the Treaty, and so the--so, there is another process that's established by the Treaty itself for the modification of obligations. And, in each instance, one would then have to determine which is
the appropriate mechanism. Is the subject matter of
this action by the Parties an interpretation in
which they would be operating under 1131(2) or an
amendment in which case they would be operating
under the specific amendment provisions of the
NAFTA, and they would have to follow those
provisions.

Q. How many years have you now been a
professor at an American law faculty?
A. Since 1998.
Q. So, several years.
A. Yes.
Q. It's now 11 years?
A. Yes. If I can count, yes.
Q. Okay. So, if you wanted to amend the NAFTA
in the United States, you would have to follow the
process for amending a treaty? Is that...
A. Well, I have to be careful here because
even though I have been a law professor for 11
years, when I consider the expertise of some of my
colleagues on the law of foreign relations of the
United States, I have to speak with some humility,
people like, for example, Professor Golove, in that
I do not consider myself in the sense that
Professors such as Golove would do, an expert in the
foreign relations law of the United States.

And there is an issue that actually arose
with NAFTA itself in the U.S. courts about the
practice of creating or amending international
commercial obligations through executive
congressional agreements as opposed to through
treaty power.

I do teach this, but only in introductory
courses, and I have to say that despite many, you
know, lengthy and useful conversations with
colleagues who I would deem to be experts in this
field, I would not feel entirely comfortable
providing an opinion as an expert witness on this
manner.

Q. That's fine. We will excuse you from that
assignment, Professor Howse.

Is there anything else that you would like
to add? Because I'm going to be finishing now, and
I just want to make sure that with respect to your
opinion, I want to make sure that you had the
opportunity to tell the Tribunal anything else that
you may have missed with respect to your opinion
itself, sir.

A. I would only add that I have great respect
for Professor Reisman, and I have been trying
throughout my consideration of his views to grasp
some of the underlying concerns.

And I suppose that one of them—and I think
that this concern was pointed out at one point by
the Grand River Tribunal—is the risk of abuse or
bad faith with respect to the bringing of claims
when there is a time bar and when, you know, there
are some actions within the prescribed period and
some actions not. And there is, of course, in
almost all cases some risk that a Party would use
the rules of State responsibility or abuse them to
bring a surprise action or to play strategic games
of some sort not consistent with good faith within
the dispute-settlement process.

And I do think that one always has to
interpret a provision like a time bar in light of
the concept of good faith and the integrity of the
process of settlement of disputes. I think that's
consistent with general international law.

But I would also say based on what I know
from both the pleadings and the testimony in this
case that it does not give rise to considerations of
an abusive use of the dispute-settlement process.

It seems from what I can gather that the Claimant
has been quite forthright and reasonable in the way
in which they have pursued their concerns with the
Government and in the timing of their claim. I see
no--not the least indication that this would be a
case where the requirement of good faith or the
integrity of dispute settlement would put in issue,
you know, the genuine claim that wrongful acts have
occurred for which there is State responsibility
outside of the time-barred period.

Q. Thank you very much, Professor Howse.

Counsel for Canada may now have some questions for
you.

PRESIDENT ORREGO VICUÑA: Thank you,

Professor Howse.
Do you think, Ms. Tabet, that it might be a good point to have a 15-minute break?

MS. TABET: Why don't I ask my questions.

I only have a few.

PRESIDENT ORREGO VICUÑA: Not a problem.

CROSS-EXAMINATION

BY MS. TABET:

Q. Good morning, Mr. Howse.

A. Good morning.

Q. You were part of Mr. Appleton's team in the UPS Case; isn't that right?

A. I worked as a consultant.

Q. And you also worked as a consultant for Mr. Appleton in the Pope & Talbot case, I believe?

A. In the Pope & Talbot case, I appeared as an expert witness.

Q. You did.

And you were hired by Mr. Appleton with respect to other cases, I believe?

A. Yes. I have done work as a consultant. I stress "consultant" because I have not acted as an attorney or counsel. And, in fact--yes.
Q. Thank you, Mr. Howse.

MS. TABET: I have no further questions.

PRESIDENT ORREGO VICUÑA: Thank you,

Ms. Tabet.

We will have--

MR. APPLETON: Mr. President, I would just like to redirect one moment on questions arising from Ms. Tabet.

PRESIDENT ORREGO VICUÑA: Which is the question?

MR. APPLETON: Which is the question?

PRESIDENT ORREGO VICUÑA: Which is the question?

MR. APPLETON: I would like to make the question.

PRESIDENT ORREGO VICUÑA: Yes.

REDIRECT EXAMINATION

BY MR. APPLETON:

Q. Professor Howse, how many years did you work for the Government of Canada?

A. I worked as a full-time employee of the Government of Canada for three-and-a-half years, and
10:24:38 1 I have acted as a consultant to the Government of
2 the Canada for many years after that.
3 Q. And are these opinions in this Legal
4 Opinion provided to the Tribunal your opinions, sir?
5 A. Yes, they are.
6 Q. Thank you.
7 QUESTIONS FROM THE TRIBUNAL
8 ARBITRATOR DAM: I do have a brief
9 question, and I'm not--I was just going through the
10 NAFTA Treaty and am unable to locate the exact
11 provision you were talking about when you were
12 talking about the most-favored-nation treatment and
13 national treatment, and we never got to the
14 principle of transparency, and I wonder if you could
15 elaborate on that.
16 I have to say personally that while I did
17 teach international law on point, I don't recall
18 much attention to the principle of transparency in
19 those early days of my teaching career, and so
20 perhaps this is more of a personal question that's
21 perhaps relevant to this proceeding, but in any
22 event I would appreciate a few sentences on that
THE WITNESS: Certainly.

Well, the principle of transparency, my understanding of it also to impart derives from its appearance in the GATT, and so I understand transparency to entail a publicly available Legal Framework to the investor or economic actor in that framework to know that the rules that are applied in an objective, nonarbitrary manner, that reasons are provided where appropriate which would normally be the case for decisions that affect the Investor in this particular case, or the economic actor that is affected by them.

So, I understand transparency as encompassing both elements of publicity, elements of the rule of law, and elements of administrative fairness.

ARBITRATOR DAM: Just a follow-up question. Most-favored-nation treatment and national treatment are found in the law in General Agreement on Tariffs and Trade and so forth, but I'm not too clear about the major sources with regard to the principle of
transparency. Where would one look for an explication in the official documents and so forth of the principle of transparency?

THE WITNESS: Well, again, if one is prepared to entertain my view that part of the relevant legal universe is the GATT and WTO, one would look to Article X of the GATT which the drafters of the NAFTA would have been aware, and that contains, you know--it's called "transparency," that article, and it gives the considered view of what the Contracting Parties to the GATT and the now WTO members have in mind the principle of concept of transparency, at least in that sense an application to trade in goods.

Now, I'm less familiar with them, but I believe there are also transparency provisions in a number of other WTO treaties with respect to technical regulations, with respect also to trade in services, for example.

So, one could look there, and one could look at references to transparency or the underlying content of it in other decisions by NAFTA Tribunals
or other tribunals that are considering "transparency" in relation to the concept of fair and equitable treatment. And one example would be Tecmed, for instance. So, those are some of the sources.

I would also say that there is an increasing emerging interest in defining and applying the concept of transparency in other international fora, and just a few weeks ago I was in Geneva at a meeting of UNCTAD where I was asked to comment on some proposals in UNCTAD for a transparency principle that would apply in the investment context, and so I think this is really starting to develop now.

And while what's being proposed at UNCTAD has not yet been agreed as a matter of law--and, in fact, one of the reasons they brought me there is they were interested in how, given my experience with the WTO and NAFTA, I could give them a sense of how to concretize as law this transparency principle for investment that would be multilateral.

So, I think there is a range of material,
increasingly so, that gives some points of reference for understanding the substance and contours of this principle.

ARBITRATOR DAM: Thank you very much.

PRESIDENT ORREGO VICUÑA: Thank you.

ARBITRATOR ROWLEY: Professor Howse, absent a breach of NAFTA, in your opinion, is Canada entitled to impose export controls on products, including logs?

THE WITNESS: Absent a breach of NAFTA, is Canada entitled to impose such controls?

ARBITRATOR ROWLEY: Correct.

THE WITNESS: That would lead us into, I think, a quite extensive discussion of how the law of the WTO applies to the case of export prohibitions and restrictions on exports.

I did not opine on that in my Report, and I think it is quite a complex question. There is one ruling of a WTO Panel that addressed the question of whether an export restraint regime could constitute an actionable subsidy. In some sense, the content of that Report is dicta because the Panel did not
view the case as yet ripe. So, there is that set of
issues.

The United States has argued that one could
be able to conceive of an export-restraint scheme as
a subsidy, and I think it's fair to say that view is
controversial. And, in particular, there is the
question under the WTO Rules of what would
constitute financial contribution. There are
certain defined meanings in Article 1 of the
Subsidies of Countervailing Measures Agreement about
what is a financial contribution.

I mean, I could continue to, you know, talk
about this, but since this is not something on which
I have prepared an opinion for this Tribunal, again
being very cautious and aware of the complexities of
WTO Law, you know, I would be cautious in offering a
detailed legal view on this question outside of the
NAFTA, as you say.

ARBITRATOR ROWLEY: If you're not
comfortable, I assume with your background you would
be in a position to say whether export controls were
legal under a sovereign's and within a sovereign's
jurisdiction, absent a breach of NAFTA or absent a breach of the WTO? But if you're not comfortable--

THE WITNESS: Well, Article XI of the GATT, you know, prohibitions and restrictions on exportation are banned. However, you know, the case of primary products is trickier.

And so, one of the reasons why I'm uninclined to offer a sort of yes-or-no view is that--is that I think that one question would be to what extent there is a limited--how broad or narrow this exception for primary products of certain, you know, products like that is to be interpreted.

And then there is also, of course, the question of Article XX. In certain cases of national crisis, it is possible to impose restrictions that otherwise would violate provisions of the GATT, where the national welfare is greatly jeopardized by, for example, a shortage of some essential commodity.

But--so, I don't think the Regime is so straightforward. There is the general rule, which is these kinds of measures are banned; that's stated
in Article XI. There are some limited exceptions within Article XI itself, and then there is question of the applicability of the general exceptions under Article XX. And as we know, the devil, you know, is in the details, and so if you ask me can I tell you right now which schemes could be operated consistent with WTO Law and which not, we would need to know a great number of facts, including the policy justifications and the bona fides and strength for the policy justifications for the controls. But the default rule is that they're banned, subject to certain kinds of limitations and exceptions.

Maybe I am answering your question after all in a manner that would be possible to answer it in an abstract level.

ARBITRATOR ROWLEY: Banned under the GATT?

THE WITNESS: Yes. Article XI is the operative provision.

ARBITRATOR ROWLEY: Is the GATT part of the customary international--

THE WITNESS: No. No. Now, that again is a simple answer. I think that there might be some
10:37:39 1 norms expressed in the GATT that are considered to
2 be specialized applications of principles of
3 customary international law. I mean, there are
4 special rules and principles of State responsibility
5 in the GATT, some of which--and the WTO agreements
6 like with dispute-settlement understanding, some of
7 which simply apply customary law, some of which
8 modify it in some explicit way. But I think it
9 would be correct to say generally that unlike, for
10 example, human rights treaties that the practice in
11 the GATT has not generated specific new norms of
12 customary international law that mirror or are based
13 upon particular GATT provisions.
14 But definitely you could look at provisions
15 in the GATT and various WTO treaties that you could
16 say yes, some of these reflect customary
17 international law. For example, the possibility of
18 retaliation or countermeasures in the case of
19 noncompliance has some relationship to, you know,
20 the law of countermeasures in customary
21 international law. And one panel, the foreign sales
22 corporation--
10:39:06 1 ARBITRATOR ROWLEY: I don't think I need
2 that much detail.
3 THE WITNESS: Okay.
4 ARBITRATOR ROWLEY: You talked about the
5 Grand River Case, and you talked about the weight of
6 that decision insofar as it concerned prescription,
7 as I understood what you're saying, and I will
8 paraphrase it, because they were sophisticated
9 investors and with good legal and accounting advice,
10 and there was a scheme that was precise and
11 well-known. They were able to determine whether
12 there was a breach at a certain stage. Am I right
13 so far?
14 THE WITNESS: Yes, I think so.
15 ARBITRATOR ROWLEY: And then you drew a
16 comparison, and when you were talking about what you
17 believed was at issue here, which was that there was
18 a substantive violation of the NAFTA because
19 Claimants were faced with an untransparent, unstable
20 regulatory regime where decisions, and I'm quoting
21 you now, were not grounded in the statute, not
22 grounded in rules, not grounded in publicly
available methodologies and so on.

And my question is this: Is one not able
to be aware of the fact when faced with the
situation that decisions are being made under a
scheme where there is an absence of those items:
publicly available methodologies, stable
environments, open, transparent administrative
processes and the like?

The concept that I'm getting at is, is
there a distinction? If a tribunal could say an
investor could have been aware of a breach of the
situation because it was--because of the nature of
the system, which was a precise system, could one
not be aware of a breach if the breach arose out of
the imprecise nature of the system, if I may precis
it, for prescription purposes?

THE WITNESS: Well, I don't think so
because what "imprecise," I suppose, means is that a
statutory scheme affords considerable discretion to
administrators or judicial or quasi-judicial actors
in some instances to interpret that scheme, to
develop appropriate methodologies, to engage in
rule-making and so forth. So, a scheme could entail
or grant a considerable amount of discretion; in
other words, it could be fairly open-ended. And
that's quite consistent, I think, with an
expectation that through what we would consider the
apparatus of modern administrative law in a
democracy under the rule of law, it would be made
precise through administrative action that's
consistent with the values of administrative
fairness and the rule of law, even though the scheme
itself in some sense is quite open-ended and allows
for a considerable amount of discretion in the sense
that the statute allows for that.

ARBITRATOR ROWLEY: Turning to another
area, you were talking about the establishment of
the date from which the limitation period of 1131
runs, or 1116 runs, earlier in your--how does one
establish the date?

THE WITNESS: Well, perhaps we could put
1161 (sic) back on the board--

ARBITRATOR ROWLEY: 1116.

THE WITNESS: --1116 back on the screen,
1328

10:44:20 1 because it will be helpful.
2 ARBITRATOR ROWLEY: Yes, good.
3 THE WITNESS: Okay. So, the relevant
4 concepts are alleged breach and knowledge that the
5 investor has occurred.
6 ARBITRATOR ROWLEY: Speak into the
7 microphone, please.
8 THE WITNESS: So, the relevant concepts
9 are, first of all, the alleged breach; and,
10 secondly, the knowledge that the Investor had or
11 should have had of the alleged breach and that they
12 incurred loss or damage.
13 So, in order to know whether three years
14 have elapsed from the date on which they should
15 have--they first acquired or should have acquired
16 knowledge of the alleged breach and knowledge that
17 they have incurred loss or damage, we first of all
18 have to know what the alleged breach is. We have to
19 have some conception of what breach we are talking
20 about. And I have taken the view, as you know from
21 my opinion and my remarks, I guess, a bit earlier
22 this morning, that a breach includes any act that
is--that violates the obligations of the agreement, whether it is on the face of the statute or regulation or whether it occurs through implementation or application or the exercise of discretion under that statutory scheme. So, that's the first stage. What do we consider to be a breach for purposes of applying that.

ARBITRATOR ROWLEY: Can I stop you at the breach and take you on from there because I have a question that flows from that.

THE WITNESS: Yeah.

ARBITRATOR ROWLEY: So, if an actor understands that there has been a breach and understands that there is damage, does the prescription run from that point, and does it preclude that actor suing later, based on a further breach?

THE WITNESS: Based on a further breach?

ARBITRATOR ROWLEY: Yes, because here, let us say--

THE WITNESS: No, not based on a further
breach. In other words, if the basis of the claim is a further breach, then we need to apply the limitation period to that further breach.

ARBITRATOR ROWLEY: So, now let's apply it to this case. And you talked about attribution earlier, and you talked about attribution in connection with the acts of private parties and attributing their—or attributing breach to the Government because of a failure to discipline private parties. So, I want you to go with me on an assumption. The assumption is that there were so-called "acts of blockmail" in a particular year; that those acts were corrupt; that the Claimants complained to the Government that those acts were taking place and that they were being damaged and the Government failed to act, and we will assume that failure to act was a breach of the NAFTA.

On those facts, do we have a start date for a limitation period just on those facts?

THE WITNESS: So—I think—I think we do.

And State responsibility would be—so, State responsibility, you know, would be engaged at the
point of which the Investor knew or ought to have
known that the State has failed or State actors have
failed in their obligation to remedy or control the
abuses, an obligation which would argumentatively,
again because we're talking about an assumption be
contrary to, let's say, 1105, and as a result of
that failure that they knew or should have known
that they were suffering a particular loss or
damage.

So, that would be the point at which I
think one would make the limitation period
effective. One would calculate the date on that
basis.

ARBITERATOR ROWLEY: All right. Now, stay
with the assumption that the actor in question does
not initiate NAFTA proceedings within three years
from that date. But just take another date, five
years from that date, it initiates proceedings. As
I understand your testimony, it would be all right
to do so if the blockmailing continued.

THE WITNESS: Well, I think we have to be
precise about what blockmailing--
10:51:17 1 ARBITRATOR ROWLEY: Speak straight into the
2 microphone.
3 THE WITNESS: Perhaps the volume can be
4 adjusted. I'm pretty well touching it.
5 ARBITRATOR ROWLEY: All right. But perhaps
6 I was not right in my question. Let me try it
7 again.
8 Five years from then, the actor or investor
9 initiated proceedings. The blockmailing having
10 continued, the complaints having continued, and the
11 Government having continued to fail to act to stop
12 the corrupt practice.
13 THE WITNESS: Well, perhaps I haven't fully
14 understood "blockmailing," but from what I could
15 gather, blockmailing is a specific action, a kind of
16 ransom type behavior that occurs in individual
17 instances where an economic actor may be seeking to
18 engage in an export transaction. And the fact that
19 it has to go through this process of--that involves
20 advertising for offers and so on allows the
21 possibility of engaging in this kind of abusive
22 behavior.
Again, I'm here as an expert on the law and not on the facts of the Regime, so I'm just stating for purposes of clarity and so we don't misunderstand each other how I understand this blockmailing to work.

So, under the rules of State responsibility arguably under fair and equitable treatment, the State would have a responsibility to correct or discipline each such--

ARBITRATOR ROWLEY: We are assuming that.

THE WITNESS: For each such abuse. So--I mean, if they bring--so each episode of blockmailing would--the failure to remedy each episode would be a separate internationally wrongful act, so, you know, one would then ask when did these episodes of blockmailing occur? When did they--you know, when could one reasonably have expected that the Government would correct these abuses?

Now, this is under fair and equitable treatment. Each failure to correct the abuse, I think, would be considered an internationally wrongful act, assuming that 1105 of NAFTA does apply
to make this an obligation of the State, okay. But each--but then one would have to consider a separate claim perhaps for full protection and security, but that would be a separate claim--

ARBITRATOR ROWLEY: The substantive nature of the claim is irrelevant to me. I'm just interested in whether there is a second bite at the cherry.

So, the testimony is, even though there is knowledge of the same sort of breach in five years back, you can bring another action five years out because there is a separate breach.

THE WITNESS: Right, if it's separate. And that would be a matter for determining whether it is separate or not.

And since I'm not here to testify on the exact facts about blockmailing, you know, I have to just limit myself to what I can give an expert opinion on, which is that each breach attracts State responsibility; and, therefore, the fact that there was a previous breach that was not sued upon in the limitation period doesn't mean that when there is a
subsequent breach, if it's a separate and distinct legal injury, that you can't sue on it, even though there might be some generic relationship or some generic similarity of the conduct, you know, in each case. It doesn't mean that it's not an independently separate internationally wrongful act.

ARBITRATOR ROWLEY: My final question, and it's a question really for us, but it's a question of whether the prescription-period issue under 1116(2) is a matter for our jurisdiction, or is it a matter of defense? Have you considered that issue?

THE WITNESS: Well, I'm aware of the view expressed by the Tribunal in Feldman on that issue, and I guess it's in Paragraph 62. And the Feldman Tribunal seemed to suggest that this does go to jurisdiction.

However, I have to say again, my best opinion as an expert in international law is that I don't see evidence of a strong consensus in international law, you know, one way or the other. It might depend upon specific features of the Regime and the sources of--the sources of the Tribunal's,
you know, authority, whether it's a State-to-State
dispute and it's based on a compromise or whether in
this instance, you know, it's based upon a consent
to arbitrate as evidenced in these specific Treaty
provisions.

ARBITRATOR ROWLEY: We are talking about
this case. It's an investor may not make a claim.
Are you affected at all by the words "an
investor may not make a claim" as opposed to words
such as "the Tribunal may not hear a claim made by
an investor"? Does that affect?

THE WITNESS: I don't think absent other
contextual factors--I'm not--I'm happy to be
forthcoming if you would--if you would share with me
sort of what's on your mind in terms of what turns
on this. Absent other contextual factors, I would
not make a great deal of this difference in formula
of words, but it might be meaningful in a broader
context if we had a sense of what, you know--what
underlying values or purposes of the system are at
stake.

ARBITRATOR ROWLEY: It's not so much--what
turns on it is I assume that you are giving expert

testimony on the prescription period, and you may

have considered this point, but I'm entirely happy

to leave it there.

THE WITNESS: Right. But as I say, I'm

aware of the point because it was explicitly

considered in the Feldman Case with respect to

NAFTA, and the Feldman Tribunal held that this did

go to jurisdiction, and all I'm saying is I'm not

sure, based upon my overall knowledge of

international law, whether as a general matter they

were basing themselves here on the specific

interpretation of the Chapter of NAFTA or whether

they felt that this was premised upon some more

structural principle or premise of international law

as it relates to the settlement of disputes.

I mean, we can--I mean, we can all read the

paragraph; and, in the European sense of the word,

it just doesn't seem to be motivated. It presents a

conclusion, but it's relatively short on the legal

reasoning and sources of that conclusion.

So, I have to say that this is a matter for
argument, and because of my overall view of
international law is not a highly formalistic one, I
think the answer is going to be contextual and
depend on what's at stake for each particular
regime.

PRESIDENT ORREGO VICUÑA: Right. Thank you
so much, Professor Howse.

Professor Dam has a question and a
follow-up.

ARBITRATOR DAM: I wanted to follow up on
the line of inquiry of Mr. Rowley.

Let us assume that the period of
limitation—the limitations period does then run
from a period of blockmailing which is established
under the circumstances he indicated. What would
then be open to the Claimant with regard to the
other aspects of the statutory scheme? Could
it—could a Claimant collect damages, assuming he
establishes his case, with regard to not cases or
instances of which there was no blockmailing
established? Or how broadly then could Claimant
base its claim? Presumably, it couldn't go back to
the statute itself, but could it attack the entire
administration of the statute because it could show
an act of blockmailing at one point for limitations
purposes?

In other words, does the basis for the
establishment of the limitations period have
implications for the scope of the relief available?

THE WITNESS: Yes, precisely for the scope
of the relief available in the sense that it's still
open to make a claim or make one's claim partly
based upon features of the scheme that may violate
obligations under the NAFTA. It's just that that,
you know, relief will be truncated. Due to the
operation of the limitation period, you will not get
relief with respect to the loss or damage you
suffered that you should have been aware of within,
you know, prior to the date established by the
limitation period. But to the extent that the
violations that have come from the scheme itself are
continuing and reinforced through its continued
administration and application, that certainly
still, you know, engages a State responsibility.
It's just that you can't go back and make a claim that, you know, for damage or loss you should have already known that you have suffered, you know, prior to that, prior to that date.

ARBITRATOR DAM: Well, I could ask many more detailed questions, but I don't think it would be appropriate--having to do with just what you said, but I don't think it would be appropriate at this point. Thank you very much.

PRESIDENT ORREGO VICUÑA: Thank you. I have a couple of questions in which I would like to engage your help to try to clarify my own mind after having read with great detail Professor Reisman's and your own views and being generally interested in the subject.

I can see quite clearly the two, say, typical situations. A breach takes place before the limitation period, say, let's call it the critical date. It is a onetime act, it's exhausted, it ends there. That is obviously beyond the possibility of bringing a claim. It's before, and nothing was done.
It is equally evident that if you have a breach that comes after the critical date but within the three years, say, that will follow, that will fall within the jurisdiction, too. Those are the two, I think.

Now, the area with which I am a bit concerned is the one that bridges that critical date going from before to after. There is first the question of whether the kind of acts that had been described as continuing acts, in some cases they have been described also as composite acts. Whether an act emerging from a measure that was taken before the critical date but continues to be applied like happens many times the critical date comes about, and it continues to be applied.

Well, you expressed the view that every time--the view that every time it's implemented, it will amount to a breach because it's a fresh situation, a fresh act, and so forth.

Now, a first question in that respect is this: Would you agree or not agree with the idea that the limitation period is renewed every time
that implementation takes place? Because that is one of the concerns of Professor Reisman, that this might be going on eternally if the limitation period is postponed every time that there is a measure adopted or implemented, and three years again and three years and three years and three years, and it never ends.

So, would you guess or would you believe that that is appropriate or that in spite that it might be a onetime occasion, it should not go on forever?

THE WITNESS: Well, it sort of reminds me of some venting that a friend of mine was doing recently who was saying, you know, when will my wife stop complaining about my snoring? And I replied, well, when you stop snoring, she will stop complaining.

And basically, you know, the reason that the limitation period is renewed is that there is a new wrongful act. And so, if you cease to engage in internationally wrongful conduct, then your State responsibility ceases. To the extent to which you
keep engaging an internationally wrongful conduct,

you will still attract State responsibility for the

conduct, just as my friend will continue to attract

complaints by his wife about his snoring until he

does something about it and stops it. And so,

that's basically the principle.

Now there is, however, another--there is

wording here we shouldn't forget, and this goes also

to my response to Professor Dam in saying that there

is State responsibility for each new breach. It's

still limited by the principle that, you know, that

the three years run when you acquired or should have

acquired knowledge of the alleged breach and the

loss and damage. So, let's take the case of the

continuing application of a statute.

If we have a situation like Grand River

where even though the statute might be continuing in

application, the exact nature of the breach and its

legal consequences, plus the exact damage or harm

should have been known within the three-year period,

the time bar still applies. It's not that as a

matter of the international law of State
responsibility that these aren't new breaches. They
are new breaches, but they should have been, you
know, as it were, you know, to the extent that
they're simply derivative from the legal framework
as completely know and determinate as well as the
losses being known and determinate and quantifiable
within that--before that three-year period, then
State responsibility will still be limited by or
truncated by the limitation period.

So, the situation where there will be
continuous State responsibility is where there is a
continuous breach, but the nature of the wrongful
act, the exact name of the wrongful act, plus the
exact nature of the loss or damage that flows from
it could not have been known prior to, you know,
that date.

PRESIDENT ORREGO VICUÑA: Yes. Well, I
have a second question relating to the same
discussion, which connects to a point you mentioned
earlier that the normal latitude of an investor will
not to be engaged in confrontation since the very
adoption of the measure, but will try to see how he
11:10:28 1 can survive with it.
  2 Now, let's take that as the situation here.
  3 Let us say there is a Notice 102 enacted, and then
  4 the Claimant, now Claimant will say, well, I'm aware
  5 there is this measure. I know, and this is the
  6 first date I took notice of it.
  7 Now, Mr. Merrill goes to Mr. Ring and tells
  8 him, look, but let's not make fuss about it. Let's
  9 try to see whether we can cope with it. Say, okay,
 10 fine, that's fine. And this goes on for two, three
 11 years until the three-year time comes. They know
 12 there is a measure, they know that there is a loss,
 13 but they still believe they can live with it, but
 14 the three years come about. The critical date is
 15 on.
  16 And at some point later, Mr. Ring comes to
  17 Mr. Merrill and tells him, "Look, my dear cousin or
  18 partner"--I'm not sure what's the connection--"this
  19 is going a bit too far, where losses that one
  20 thought that might be manageable come now, and
  21 they're turning to be too much. I think we have to
  22 claim."
Now, they bring the claim, fine, and then
the discussion pops up, but the question is this:
It is, I believe, evident that Article 1116(2)
requires a cumulative situation of first knowing
about the Act and an accumulation knowing about the
loss or the damage.

Now, say in this scenario I depicted to
you, if during the first part of the situation the
loss was known but it had not become unbearable,
that happens at a later point after the three years,
how do you take that situation into account as far
as the limitation period goes? You knew before of
both elements, but there is one which had not sort
of become manifest or unacceptable or whatever else.
Would that second situation allow the Tribunal to
hear the claim, if it's jurisdictional? How do you
see that sort of situation?

THE WITNESS: Well, let's answer on the
basis of a couple of different scenarios or
assumptions. One is that the only breach is the
actual framework or scheme and question as opposed
to there being distinctively wrongful acts, you
know, after the cutoff date that are in the context of the application of the scheme. So let's take the Grand River situation, okay, where the breach with respect to—which there is concern about over the limitation period, you know, relates to this measure, alleged breach of, you know, requiring deposits in escrow accounts. So, that's the breach. And then the question is what about the loss or damage from it?

And on your scenario, the Investor goes through a learning process of just to what kind of loss or damage they're actually having to confront? At the beginning of the scenario, they're kind of optimistic that, you know, there might not be much loss or damage or that if the scheme is applied in a certain way, they may actually be able to adapt their business practices, and they might be able to operate in this new environment without any long-term loss or damage to their business.

And then later on, they actually find out that the loss or damage is of a much different magnitude and a much greater threat to the viability
of their business.

And I think the answer to the question of whether the claim could be heard really comes in the interpretation of the words here, and I think Grand River is useful. I mean, why do they not know at the outset of the magnitude and nature of the loss or damage, its significance for their business? Did they not know because of blind optimism or a failure to hire appropriate experts to figure out the impact on business operations of specific obligations in the statute, or do they not know just because of the inherent degree of uncertainty and imprecision in the measure that you are describing that no reasonable Investor would be able to go out and really predict--a reasonable Investor, a reasonably shrewd businessperson would not have been able to predict or estimate anything like that nature or magnitude of damage, you know, at the time at which the measure was enacted; i.e., before the cutoff date.

So, one would have to interpret those facts, I think, very carefully. If they should have
had knowledge, not only it's not just a matter of whether they acquired it but should have had knowledge, which means that, okay, they were just wildly optimistic. They made, you know, a bad call that the Legal Framework was relatively precise, and they should have gone out and gotten lawyers and accountants and economists who would have told them, look, if these very precise obligations are applied to you over the next five years, you're basically--or 10 years, they are going to drive you out of business. That is clear and evident from the framework that was in place, you know, before the cutoff date. And if they say, oh, well, we don't believe these people, they're pessimists, we are just going with our gut feeling that it's all going to work out okay," well, I would say, well, that the meaning of should have first acquired means that a reasonably prudent businessperson should have known the kind of magnitude of loss or damage to their business that would necessarily determinately result from this framework at the time at which the framework was enacted. And in some kinds of
instances like Grand River, the answer may be yes.

They should have known, it was quantifiable as the Tribunal said, what burden this was going to impose on their business, even though the burden would come down the road; right? Six months or whatever down the road. I mean, any reasonably shrewd businessperson with the advice of a lawyer or accountant would know what the burden is at the time at which, you know, the framework is enunciated.

PRESIDENT ORREGO VICUÑA: One last question that is connected to what you are now describing.

Does the idea or the concept that once the Investor will know about the Act or the alleged breach and the laws or damage, even if on preliminary basis as a prudent investor and so forth, does that mean that there is a legal dispute at that stage, or could it be read to be a situation that happened and only after the critical date the Investor comes up and says, no, look, this is too bad, I'm going to claim against it and so, and the rest of the scenario follows?

Now, let me make a comparison for which I
11:20:08 1 will be hated by everybody in the room, but it will
help me and perhaps you. If this were the ICSID
Convention, which is it's not--I will just mention
it--the essence would be whether there is a legal
dispute. Events might have happened before a
particular treaty came into force, and that's fine,
they're all there and so forth, but what matters is
whether the legal dispute in which the parties were
engaged was before the Treaty in that example or
after. If it was after, it falls within the
jurisdiction, even if it connects to events that
were there before.

What happens in the NAFTA? Would that be
of any relevance, or would you say there is no
relevance at all; and irrespectively when you say
there was a legal dispute, the minute you knew about
the national intervention loss and the critical date
came, you are out? Would you care to elaborate on
that.

THE WITNESS: Well, it seems to me that it
would be very difficult, you know, to countenance a
claim based upon that--that did not fall within
116(2) based upon importing a further assumption
that there may be situations where the--where even
though there was knowledge of the alleged breach and
of the loss and damage, there was not yet a legal
dispute.

And so, maybe the kind of situation you
might be alluding to, and I figured it has to do
with one particular aspect maybe of the Feldman Case
is where is--is where the Investor knows of the
breach and knows of the damage, but they claim
they're being in some sense led on by the Government
or State, that it's kind of sort of encouraging
them, you know, that the problem is going to be
solved, you know, we will fix it and so on.

And so, on that basis they delay, and so,

you know, even though they have knowledge of the
breach and the damage, they fail to file within the
time frame because they had been led to believe in
some sense that the Government is in the process of
correcting the problem.

Is that the kind of scenario you're
thinking of? Well, you know, I would just consider,
you know, the way in which the Feldman Tribunal analyzed that particular kind of problem, and in particular its discussion of whether there could be an estoppel of some sort, you know, set up. If the Government or the State makes representations that the problem is going to be corrected that caused the Investor to believe there no longer is a legal dispute and therefore they delay beyond the limitation period in bringing proceedings, can they now bring proceedings based upon, you know, setting up a kind of estoppel that the State is estopped from strictly relying on the limitation period as a defense by virtue of the fact of having made representations on which the Investor relied that caused them to delay bringing proceedings.

And I think it's fair to say that the Feldman Tribunal gave a very limited play to the possibility of there being an estoppel. And again, the facts and the law are often very connected. And so my sense is the Tribunal wasn't persuaded in Feldman that whatever the Government represented constituted the kind of representation that could
create that kind of reliance interest and could
essentially, you know, toll or top the limitation
period from running. It doesn't mean there couldn't
be an egregious case of bad faith where, you know, a
tribunal would think it's necessary, you know, to
remedy that bad faith or misrepresentation that
induces the Investor to believe that the dispute
isn't solved or not to bring a claim within the
limitation period.

There might be facts where that are so
egregious that a tribunal would say that, indeed,
you know, the correct interpretation is that by its
behavior the State has forfeited the ability to use
a time bar as a defense in this particular instance
because we always have to remember that
international legal obligations are to be
interpreted and applied in good faith.

An example of bad faith will often, I
think, provoke a tribunal to want to seek, you know,
a remedy.

PRESIDENT ORREGO VICUÑA: Thank you so
much, Professor Howse.
And I think we are now ready to close down?

Questions arising further?

MS. TABELT: No, I believe we will address Mr. Howse’s comments in argument.

MR. APPLETON: I have one brief question arising out of the question that--actually the very first question made by Mr. Rowley. I have been patiently waiting to get this one in.

FURTHER REDIRECT EXAMINATION

BY MR. APPLETON:

Q. It was a very interesting question to me, and it’s the question if I can just take you back through all of this, I’m going to ask you to assume something. It’s a question about the WTO consistency of the Regime. So, Professor Howse, could you just assume that the provision of low-cost logs to Canadian domestic sawmill from Private Forest Landowners was considered to be a financial contribution? I know that’s an issue, so let’s just assume that. And the products of those Canadian domestic mills were exported to another country. Doesn’t make any difference what country. It’s just
exported. Could that provision of low-cost wood constitute a WTO inconsistent export subsidy by Canada?

A. Yes, I think that's definitely possible, depending upon the facts, and that's possible because the jurisprudence is clear that both de facto and de jure export subsidies, you know, are prohibited under the WTO Law.

MR. APPLETON: Great, I have nothing further. Thank you very much.

MS. TABET: A brief follow-up question.

RECROSS-EXAMINATION

BY MS. TABET:

Q. Mr. Howse, log export controls are specifically allowed under Chapter Three of NAFTA, aren't they?

A. Yes, and I believe that's why Mr. Rowley was very clear to frame his question in terms of the situation outside of any--outside of NAFTA. My understanding is he wanted to know about what the law would be but for the provisions of NAFTA that address this specifically.
Q. And in your view, does this Tribunal have jurisdiction to deal with WTO issues, Mr. Howse?

A. I do not--I mean, jurisdiction to deal with those issues, well, if you're asking is the WTO Law the governing law, the answer is no, except to the extent that WTO Law has been incorporated in various provisions of NAFTA, which it has. And I think part of the reason that there is that specific provision that addresses these kinds of export restraints is that the general WTO rules with respect to, you know, prohibitions and restrictions on exportation have been essentially incorporated into NAFTA.

Q. But for the purpose of determining whether log export controls are legal, this Tribunal should consider only NAFTA law, shouldn't it?

A. Whether the controls are legal?

Q. Whether log export controls are a breach--what this Tribunal has to concern itself with is whether the NAFTA provisions allow log export controls.

A. Which claim of the Investor are you referring to here?
Q. I'm following up on the discussion about the validity of log export controls.

A. So—I see. So, what you're asking is if an investor in a hypothetical case were to come before a NAFTA Chapter Eleven Tribunal and instead of in its claim stating that there has been a violation of an operative provision of NAFTA where instead to state the claim that there has been an operative—a violation of an operative provision one of the WTO covered agreements, would the Tribunal have jurisdiction over that claim? I think the answer in such a hypothetical case is no, that the Investor or their counsel would have made a mistake. If you're asking could or should a NAFTA Tribunal consider the legality under the WTO where it's relevant to adjudicating a claim of a violation or breach of the NAFTA, yes. If it were relevant, to--

Q. And how could it be relevant to determine the WTO whether log export controls are a violation of WTO Law in the context of a NAFTA Tribunal?

A. Well, one would have to examine a specific claim of a breach of the NAFTA. And if he were to
refer me to a specific claim of a breach of an
operative provision of the NAFTA where this
might--where WTO Law might be relevant, I could
discuss the relevance. It really depends upon what
the claim is of a breach of the NAFTA. That's why
the NAFTA is the governing law.

But I certainly don't think that it's in
principle impossible that a view of whether there
has been a breach of the NAFTA might be affected by
whether or not another agreement or another
international legal rule has been violated. There
might be some relationship. It all depends upon,
you know, the operative provision of the NAFTA that
one is adjudicating. So, if you tell me what the
operative provision is and say, okay, do I think
that WTO consistency could possibly come into
appropriately interpreting X or Y clause of NAFTA, I
would give you an opinion.

So, I think in some instances it might be
relevant, and as I say, there are some cases where
GATT or WTO obligations have essentially been
incorporated into NAFTA.
Q. Okay. I will read you Annex 301(3) of the NAFTA that says: "Articles 301 and 309 shall not apply to controls by Canada on the export of logs of all species."

In your view, in that context, should there be consideration of a NAFTA Tribunal of WTO Law with respect to export controls?

A. Well, I think that provision narrowly applies only to say that the specific operative provisions in question, you know, that you can maintain such a scheme, notwithstanding those specific provisions.

So, if there were--I don't think this applies in Investor-State dispute settlement. If there were a State-to-State case where a claim was being brought under what is it?--301 and what is the other?

Q. It's 309.

A. Yeah. If a claim was being brought of a violation of those provisions of NAFTA, then, you know, a defense against those provisions would be the exception you're mentioning.
But by its very terms, the exception only speaks to situations where the claim is based upon the specific operative provisions of NAFTA to which it is stated as an exception. It doesn't say that that export controls are legal notwithstanding anything in NAFTA, like the language of, say, Article 20 of the GATT, notwithstanding anything in this agreement, this is permitted. It says—you know, they're only permitted not—that they're permitted notwithstanding these two particular operative provisions of Chapter Three. It speaks nothing to whether one could bring this in a relevant case concerning Chapter Eleven of NAFTA as opposed to Chapter Three.

Q. Thank you, Mr. Howse.

PRESIDENT ORREGO VICUÑA: Thank you, Professor Howse. We appreciate your participation, and you are now excused.

(Witness steps down.)

PRESIDENT ORREGO VICUÑA: We are ready to proceed with a few housekeeping matters, but we will deliberate for a minute.
(Tribunal conferring.)

PRESIDENT ORREGO VICUÑA: Right. Well, thank you so much.

We were discussing a few thoughts for tomorrow.

Well, first, I take it that you have agreed to have your time split in, say, up to two-and-a-half hours for the main presentation and reserving one half hour for the points that you would like to clarify or develop later; is that understood?

MS. Tabet: Yes.

MR. APPLETON: My understanding was a little different. I thought it was three hours; you could reserve up to half hour, but you know I'm happy to just do that. That's very practical and simple, and it makes logistics simple, too.

PRESIDENT ORREGO VICUÑA: Yes. Now, the second thought related to that is those are maximums. If someone uses two hours instead of two-and-a-half hours, the surplus is not cumulative to what comes next, just to avoid that, oh, I only
half an hour more, no, no. Up to two-and-a-half and up to half. That's important.

Now, the questions that we would like you to address in particular, we assume, of course, that you will be addressing the whole spectrum of the major issues. That goes without saying. But within that, if you could further elaborate as much as you wish on two Articles in particular, Article 1116 and the critical date and the question of the time limitation and so, on the one hand; and, on the other one, 1105 as a specific kind of standard and eventual breach.

And for that, it would be useful if you could identify each of the measures of implementation or so that you considered that are in violation of that Article and why; and, of course, the aggregate of the whole number of individual measures so as to have a view both of the individual and of the total. And relate all of that to Article 1105 as you see that it is relevant to understand precisely which is the nature and the extent of the breach you are putting forth or
defending against.

But, I mean, there is not that you have to concentrate on that, but it would be interesting to have some further thoughts on that, if those areas have come up a number of times, and then we would like to be more clear about it.

Okay?

MS. TABET: Thank you for that guidance.

PRESIDENT ORREGO VICUÑA: No complaints?

MR. APPLETON: You just made our life much easier. No problem. Any other guidance you want to give us, we're very happy to take.

PRESIDENT ORREGO VICUÑA: This is just to recall however we organize the time tomorrow, we are certainly beginning at 9:00, but particularly that we have to close shortly before 4:00. So, however we organize our breaks or lunch or so, then we would have to do that.

And we have the time, if you add three and three at the most, it's six, that would mean, say, nine to three, and if we take a break and a short break for lunch or so, that should do it, but just
to keep that in mind because it's an important thought.

MR. APPLETON: Mr. President, if I could just go through the timing with you for a moment because I think it will affect. If we were to assume that each side is to speak for two-and-a-half hours of that allocation just for the sake of planning and we started at 9:00 and we had no procedural motions, so we go from nine to 11:30, presumably without a break. If we had a break, I would suggest that be the lunch break.

PRESIDENT ORREGO VICUÑA: It could be.

MR. APPLETON: Is that possible or not.

Okay, we might have a five-minute break in there. And then let's say we went for a 45-minute lunch, which then let us start at 2:15, that would--sorry, 12:15. Take a short lunch break at 11:30. That would then let us come back at 12:15. 12:15 for two-and-a-half hours--

PRESIDENT ORREGO VICUÑA: No, no, not two-and-a-half hours.

MR. APPLETON: Sorry. No, no, no, I will
try this again slowly.

Because I am just saying as the math comes together, it's very difficult to get you to 4:00 p.m. unless we're very diligent. Two-and-a-half hours goes from nine to 11:30. Then I'm suggesting that there be a 45-minute lunch break, and the reason for that is that if we go at 12:15 and then go for two-and-a-half hours, that takes us to 2:45.

PRESIDENT ORREGO VICUÑA: Correct.

MR. APPLETON: Each side still has 30 minutes of responsive time, which would take us then with no breaks between to 3:45, and you want to have a 4 p.m., so all I'm pointing out is lunch would need to be shorter. We would need to be careful about break time on that schedule. That's all.

PRESIDENT ORREGO VICUÑA: Absolutely. You can eat less tomorrow and this will be quite all right.

That also means then that if I finish any earlier, we have to adjust to have an earlier lunch so that we get--

PRESIDENT ORREGO VICUÑA: That will
probably depend on the caterer, not on the Tribunal.

MR. APPLETON: All right. I want everyone to be perfectly clear.

(Tribunal conferring.)

PRESIDENT ORREGO VICUÑA: Well, we have considered further the situation of the time allocation, and we would like to suggest the following: To begin earlier tomorrow, 8:00, so that we would follow from eight to 1:30--8:00 to 1:00, sorry, and that would be the five hours with a very short break in between, and that would put the central part of the closings on the record.

And then to have the short lunch and the short period of further comments, and all of this is because it's eventually necessary for the Tribunal to make some questions as well. And then if we follow the very strict schedule that we have figured out, we might be a bit short of that and then start running around.

Do you have any problem with 8:00?

MR. APPLETON: We appreciate the Tribunal's suggestion. My preference would be to start at 9:00
in the morning, and my sense is that I think we can
keep to the schedule, and I appreciate the sense of
dealing with this. I was just pointing out that we
had to be tight on our time. But, of course, the
determination is yours, but we would--my preference
would be to start at 9:00 as we had scheduled.

PRESIDENT ORREGO VICUÑA: Yes--no, I think
everyone's preference would be to start at 9:00.

Now, the problem is that we don't want
anyone to rush around. I think it's better to do it
with great calm, and everyone will say whatever it
wants to do leisurely, and then the Tribunal, if
there are questions, no one rushing, and we will end
certainly before 4:00 because that is a must, and
David will stop typing at 3:55.

Okay. Thank you very much. 8:00 tomorrow,
then.

(Whereupon, at 11:46 a.m., the hearing was
adjourned until 8:00 a.m. the following day.)
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.

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DAVID A. KASDAN