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

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

MR. DAVID A. KASDAN
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On behalf of the Respondent:

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WITNESS: PAGE

ROBERT HOWSE

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1 P R O C E E D I N G S
2 PRESIDENT ORREGO VICUÑA: Good morning. We
3 have this morning Professor Robert Howse as the
4 author of an expert's opinion, and he will be
5 examined by Mr. Appleton to begin with.
6 ROBERT HOWSE, INVESTOR'S WITNESS, CALLED
7 PRESIDENT ORREGO VICUÑA: Would you,
8 please, Professor Howse, read the statement that you
9 have before you.
10 THE WITNESS: Yes, Mr. President.
11 I solemnly declare upon my honor and
12 conscience that I shall speak the truth, the whole
13 truth, and nothing but the truth.
14 PRESIDENT ORREGO VICUÑA: Thank you,
15 Mr. Howse.
16 Mr. Appleton, please.
17 MR. APPLETON: Good morning, Mr. President
18 and Members of the Tribunal.
19 And just to confirm that we have--we are in
20 an open session and thateverything is being
21 broadcast with respect to the public by way of
22 closed circuit TV here at facilities of the World

09:02:46 1 Bank.

2 DIRECT EXAMINATION

3 BY MR. APPLETON:

4 Q. Good morning, Professor Howse. I'm glad

5 that you were able to make it here. I understand

6 you had to travel some considerable distance to be

7 here, and I appreciate the fact that you could come

8 and the Members of the Tribunal have accomodated you

9 in terms of their schedule.

10 You filed an expert opinion in these

11 proceedings which is set out in the binder before

12 you.

13 A. That is correct.

14 Q. And attached to your opinion is your

15 curriculum vitae. If I could direct the Tribunal to

16 the curriculum vitae, please, it follows from

17 Page 13 of Professor Howse's Report, and I'm just

18 going to take a minute to go through some of these

19 things.

20 A. Certainly.

21 Q. I see, Professor Howse, you have an LL.M.

22 from the Harvard Law School?

09:03:32 1 A. That is correct.

2 Q. And you are currently the Lloyd C. Nelson

3 Professor of International Law at the New York

4 University School of Law?

5 A. Correct.

6 Q. And you were previously the Alene and Allen

7 F. Smith Professor of Law at the University of

8 Michigan at Ann Arbor?

9 A. Yes.

10 Q. You were also a member of the faculty of

11 the World Trade Institute in Bern, Switzerland?

12 A. Yes.

13 Q. You have also taught law at the Hebrew

14 University of Jerusalem, the University of Paris

15 Pantheon-Sorbonne, at Tsinghua University, the

16 Osgoode Hall Law School, the University of Toronto,

17 Tel Aviv University, and the Harvard Law School?

18 A. Correct.

19 Q. Have I missed anything in that list?

20 A. No, I think that list is correct.

21 Q. Fine.

22 You also served as the Second Secretary and

09:04:21 1 Vice Consul at the Canadian Embassy in Belgrade?
2 A. Yes.
3 Q. And you were also a member of the Policy
4 Planning Secretariat of the Department of External
5 Affairs of the Government of Canada?
6 A. Yes.
7 Q. Included in your CV is an extensive list of
8 publications, including numerous books and
9 peer-reviewed articles on topics of International
10 Trade Law and general topics of international law,
11 and they're too numerous for me to go through, but
12 those are correct?
13 A. Yes, I would think to think that it's an
14 extensive list.
15 Q. Okay. Thank you.
16 Professor Howse, may I direct you, please,
17 to Paragraph 16 of the Report that you filed,
18 Page 5?
19 A. Yes, I'm there.
20 Q. You can also find that at Tab 1 of the
21 binder that's before everyone in this room.
22 Now, in Paragraph 16 you discuss how the

09:05:23 1 principles of international law of State
2 responsibility are relevant to the NAFTA, especially
3 in cases of NAFTA breaches or violations within
4 NAFTA Article 1116. I'm actually going to ask,
5 perhaps we can put 1116 up on the screen. We will
6 just leave it there. To the extent it's helpful,
7 but we all have NAFTA, so you can feel free to refer
8 to whatever you would like.
9 Would you please share with the Tribunal
10 your conclusions in this regard, Professor Howse.
11 A. Well, a key operative concept in 1116 is
12 the concept of a breach of the NAFTA, and one of the
13 questions that, you know, has been involved in
14 interpreting 1116 is what constitutes a breach,
15 which acts can be breaches.
16 And in my opinion, based upon what I
17 consider to be the applicable international law, the
18 Law of State Responsibility as reflected in the ILC
19 Articles, I have come to the conclusion that a
20 breach is any act of a State that is not in
21 conformity with an obligation regardless of its
22 origin and character, and that's from ILC

09:06:46 1 Article 12. So, a breach could be based on or could
2 be induced by a statute that's not in conformity
3 with an obligation, or it could be induced by
4 administrative action or action by judicial organs.
5 And each of these acts would be a breach in
6 that each of them is not in conformity with an
7 obligation under the Treaty.
8 Q. Okay. And so you have explained how
9 breaches and measures come together. Is that what
10 you're trying to refer to? Well, actually, maybe
11 you're referring to something else in Paragraph 18.
12 Maybe I can direct you to Paragraph 18 of your
13 statement.
14 Could you discuss the--here you discuss the
15 definition of measure.
16 A. Yes.
17 So, a question that often arises--and this
18 has arisen also in the context of the law of the
19 World Trade Organization on which I have written a
20 great deal, too, is what is the nature of a breach
21 in relation to a statutory scheme. And so, as we
22 know, you know, a statutory scheme could contain

09:08:12 1 obligations or requirements that would in and of
2 themselves violate international obligations. It
3 depends on what the scheme says, and it depends on
4 what the obligation is.
5 And similarly, in the application or
6 administration of a statutory scheme, there could
7 also be violations of standards of conduct that are
8 prescribed by treaties. There the wrongfulness of
9 the conduct would flow from the specific actions,
10 discretionary actions, of officials or other actors
11 engaged in the application/interpretation of the
12 statutory scheme.
13 And what I address myself to in the expert
14 opinion is a view that I think is erroneous, which
15 is the notion that in relation to the application of
16 1116 in particular or in relation to a limitation
17 period, that if a statutory scheme falls itself
18 outside of the limitation period in the sense that
19 it was originally enacted, you know, in that
20 earlier--at that earlier point in time that--then it
21 is impossible to bring a claim for wrongfulness,
22 international wrongfulness, that arises from

09:09:46 1 breaches of obligations in the application or
2 administration of the scheme.
3 In other words, if I want to challenge the
4 application or administration of a scheme or any
5 wrongful conduct that arises or might arise out of
6 that, I have to challenge the statutory scheme
7 itself within--within the time period. And in some
8 sense, the State responsibility, then, is exhausted
9 by the scheme itself. Essentially, the State is
10 immunized from responsibility for later actions
11 where there are breaches of obligations flowing from
12 administrative or judicial behavior or judicial--or
13 behavior of any actor of the State that is acting in
14 the context of the scheme.
15 Q. I'm going to turn to that in a moment. I
16 just want to just get a couple of basics underway
17 first, if that's okay.
18 When you talk about governmental action,
19 which you've referred to, I assume that's by what we
20 mean by measure is a governmental--well, what is a
21 measure?
22 A. A measure is any act or omission of a

09:11:08 1 Party.

2 Q. And who is a Party?

3 A. The States Parties to NAFTA in this case.

4 Q. And there are extent of obligations covered

5 by the NAFTA, but the Parties are only the

6 signatories to the NAFTA; is that correct?

7 A. Correct.

8 Q. Okay. So, the parties to NAFTA can engage

9 in governmental action through measures. Measures

10 are actions or omissions. Do I basically have it?

11 A. Yes.

12 Q. Okay. So, I'm trying to understand, then,

13 how far does the definition of Government go under

14 international law? So, for example, if you look at

15 Article 105 of the NAFTA which describes the extent

16 of obligation, it describes that the Government of

17 Canada in this case is responsible for actions at

18 its Federal level and is responsible for actions at

19 the Provincial--we call it the subnational level,

20 which would be Provinces and municipalities and

21 entities in that way.

22 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 MR. APPLETON: Keep going, please.
12 MS. TABET: Sorry--
13 MR. APPLETON: The witness is in the middle
14 of an answer. It's absolutely inappropriate to cut
15 the witness off. If you have know an objection, you
16 can make it at the end of his answer, but he's in
17 when the middle of giving his answer.
18 THE WITNESS: So, one would have to ask
19 whether these bodies are exercising elements of
20 governmental authority.
21 MR. APPLETON: I believe Ms. Tabet has
22 something to do say.

09:14:22 1 MS. TABET: I believe the subject matter of
2 Mr. Howse's Report is on time bar, and you're now
3 discussing issues of attribution. I'm prepared to
4 give some latitude to an expert witness, but it is
5 significantly beyond the scope of the Report and the
6 issue that Mr. Howse has addressed in his Report.
7 MR. APPLETON: Ms. Tabet, if you carefully
8 read Professor Howse's Report, you would see that it
9 deals exactly with the issues of breach. He
10 specifically deals with attribution and breach, and
11 the ILC Articles referred specifically to provisions
12 of this along the way. If you would like to make
13 your objections, you seem to have no problem making
14 objections each day. I have no problem with making
15 a motion, but--
16 MS. TABET: Could you please point me to
17 the paragraphs in his Affidavit where he discussed
18 attribution.
19 PRESIDENT ORREGO VICUÑA: No. Will you
20 please refrain, both counsel, from engaging in
21 direct debates. The question is whether attribution
22 as a subject is part of Professor Howse's Report or

09:15:23 1 is not. Ms. Tabet has indicated that she does not
2 mind that you refer to that, but not as the, of
3 course, central issue in relation to the question of
4 the time bar.
5 So, if you would please take that into
6 consideration when elaborating, that would be
7 helpful.
8 MR. APPLETON: Mr. President, I was very
9 careful to exactly give reference, so, for example,
10 in this question, when we started this, we were
11 referring to Paragraph 16 of Professor Howse's
12 opinion, and we started from that. And that
13 discusses the ILC Article and the issue that deals
14 with breach of international obligation, and then I
15 asked him to explain that in the context of the
16 NAFTA, which arises directly out of Article 1116,
17 and 1116 discusses what a Party is. If we look up
18 on the screen, 1116(1) refers to Party, capital P.
19 I've asked him to explain that, and also--so I've
20 asked him to explain what that means, and I've asked
21 him to clarify that. That's directly in his Report.
22 It's directly in the issue that's before us, and I

09:16:25 1 don't mean to debate this. I'm just saying that I
2 believe it's full out, well within what he's here to
3 discuss, and I would like to have the latitude to
4 just discuss that.
5 PRESIDENT ORREGO VICUÑA: Yes, the issue is
6 not whether it is or it is not related. As I
7 mentioned, the issue is whether it is a central
8 focus of the Report or it is not. To the extent
9 that it is an issue that might be discussed by
10 Professor Howse in conjunction with the central
11 point that he makes in his expert opinion, that's
12 fine, and he will be the best judge, so will you
13 proceed on those bases.
14 BY MR. APPLETON:
15 Q. So, Professor Howse, we were discussing the
16 issue of measure. We were discussing the issue of
17 what would constitute Government in the measure, and
18 you had discussed the issue under Article 5 of the
19 ILC Articles, and I'd asked you the question
20 specifically about FTEAC and TEAC. And so my
21 question that I was hoping that we would get to, and
22 I'm still going to pose to you, in the context of

09:17:34 1 this ILC Article and the context of the issue of
2 breach as set out in Paragraph 16 and Article 12 of
3 the ILC Rules, can you tell me in your view how does
4 action by third Parties fit into State
5 responsibility. And perhaps I will give you free
6 reign how you'd like to answer that, but if you have
7 an example, that's good. You don't have to give an
8 example, but just try and answer the question as
9 best as you see fit.
10 A. Well, I would like to distinguish here two
11 issues. One is the issue of attribution of
12 responsibility to actors who are not organs or not
13 formally part of the State apparatus because they're
14 exercising elements of governmental authority.
15 And a second set of situations where the
16 nature of the primary obligation in the Treaty is
17 such that a failure to, as it were, discipline or
18 direct the actions of private Parties could be a
19 violation and therefore engage State responsibility.
20 So, to give an example from a prior NAFTA
21 case, I'm sure that we are all familiar with the
22 Loewen Case, where although the Tribunal found

09:19:16 1 obviously that the claim could not be upheld for
2 certain procedural reasons on the substance, it
3 found a violation of fair and equitable treatment
4 because of conduct by actors who were not State
5 actors and would not have been considered so under
6 the ILC Articles; namely, the legal counsel for the
7 plaintiffs, who essentially was taking a strategy of
8 whipping up, as it were, national bias or prejudice,
9 in this case against Canadians. And what the
10 Tribunal held was that there was a violation of fair
11 and equitable treatment not because there was
12 attribution to the State of the behavior of counsel,
13 but because of the failure of the judicial organs in
14 this case to control those abuses, to constrain them
15 and to prevent them from interfering with and
16 compromising the integrity of the process. And so,
17 that was the violation of fair and equitable
18 treatment. It ultimately stemmed from the conduct
19 of these non-State actors, and yet engaged State
20 responsibility, even though there wasn't attribution
21 under the ILC Articles.
22 Just because of the inherent obligation of

09:20:54 1 fair and equitable treatment in this context meant
2 protecting the integrity of the process against
3 abusive action by private Parties.
4 PRESIDENT ORREGO VICUÑA: May I interrupt
5 just a second there. You see, the question is this:
6 What the Tribunal would be particularly interested
7 in finding out is your view on whether a given
8 measure that has been directly or indirectly either
9 attributed or be part of the inherent State
10 responsibility of a State Party is subject or not
11 subject to a limitation because of the three year
12 and the subject that you discuss about whether it is
13 continuing and the effects and so forth, because you
14 see the point, if I understood well, Ms. Tabet, in
15 order to discuss whether there will be a time limit,
16 it has to be a measure that, however it got to be,
17 it is the Government. Otherwise, it wouldn't be
18 here.
19 So, that's the distinction that I'm trying
20 to introduce so that we will address really concerns
21 us.
22 THE WITNESS: Right. And so, as I try and

09:22:29 1 suggest in my Report, in order to interpret 1116(2),
2 in order to interpret the time bar, we have to
3 understand what each of the breaches is, and I think
4 that's why we have been just been discussing what
5 possible acts or omissions constitute breaches that
6 engage State responsibility.
7 And so the question then becomes once we
8 have a good concept of what possible acts or
9 omissions are breaches, how does the three-year
10 period apply to them?
11 Well, I would then distinguish between
12 several different, you know, situations. I've
13 mentioned a situation where the statute has been
14 enacted, you know, prior to the date established by
15 the time bar. So, if that's the case, then, you
16 know, we have to ask how would that affect a claim
17 that there is wrongful conduct involved in the
18 administration or implementation of the statute.
19 And my view, as expressed in the opinion,
20 is that if these are distinct legal wrongs, then
21 these are breaches that have occurred, you know,
22 after that point in time established by the time

09:24:10 1 bar, and therefore the time bar doesn't apply to
2 them. They are independently wrongful. They arise
3 in the context of the application of a statutory
4 scheme that was enacted prior to that date. That's
5 part of the context. But the actual wrongful
6 conduct being alleged is wrongful conduct that has
7 occurred occurred after that date, conduct not of
8 the legislative organs necessarily, although it
9 could be of their amendments, but conduct of
10 administrative organs or judicial organs perhaps.
11 And so though those are separate wrongs,
12 but the wrongfulness of that conduct after that
13 date, of course, has to be proven by the Claimant.
14 But if the Claimant can prove that wrongfulness in
15 the meaning of the ILC Articles behavior not in
16 conformity of what's required by NAFTA on the part
17 of, you know, of State actors after that date, then
18 those are independent breaches that have occurred,
19 you know, within the limitation period. That's
20 essentially the position that I've tried to outline.
21 BY MR. APPLETON:
22 Q. All right. Well, then, we have already

09:25:40 1 started in then to look at issues about the time bar
2 which start at Paragraph 12 of your Report. Perhaps
3 we will just continue right along with this. Maybe
4 we can discuss these issues.
5 I just wanted to point out for the record
6 that the case before, just before the President's
7 question that he referred to, and I will try just to
8 keep the record together as much as I can, you are
9 referring to the Loewen Case, and that is Canada's
10 authority at Tab 73, and so to the extent I can
11 point that out along the way, we will just keep the
12 record together.
13 And so, there seem to be three cases that
14 seem to be at issue with respect to the time bar:
15 Grand River, UPS, and Feldman. You've discussed
16 some of these issues with respect to your opinion,
17 and you've read the response opinion from Professor
18 Reisman.
19 A. Yes.
20 Q. Why don't you just give us your views on
21 that and let the Tribunal understand your views on
22 this matter.

09:26:47 1 A. Well, let's begin with the UPS Case. The
2 UPS Case, in my view, articulates the current state
3 of international law with respect to the notion of
4 continuous breach. That is to say, a breach that
5 consists in a series of acts over a period of time.
6 And, of course, this poses an issue with
7 respect to a time bar where some of the Acts in the
8 series have occurred prior to the date of
9 prescription established by the time bar and some of
10 them afterwards. What do we do in such a case?
11 And here really the issue is how to operate
12 the time bar in a manner consistent with the
13 principles of State responsibility--that there is,
14 as a general matter, State responsibility for every
15 act that is not in conformity with an obligation.
16 And as the UPS Tribunal, as I understand it, states,
17 essentially the way that one applies a time bar in
18 light of that general, you know, principle of
19 international law, rule of State responsibility, is
20 that one does not bar claims arising out of those
21 acts in the series that occur after that date, but
22 at the same time, you know, one realizes that the

09:28:34 1 time bar has modified to a certain extent State
2 responsibility in that there is no State
3 responsibility for those acts in the series that
4 have occurred prior to that date.
5 So, what this really means is that--is that
6 State responsibility is, in a sense, truncated by
7 virtue of the time bar. So, in cases of continuous
8 breach, it is extremely important for the Tribunal,
9 the Treaty interpreter, to be able to assess what
10 harms have occurred, what discrete harms have
11 occurred to the Claimant by virtue of the Acts in
12 the series that have taken place after that date
13 which, of course, may involve in some instances
14 important factual determinations.
15 So, we have here a situation where a time
16 bar truncates without undermining the basic
17 principle of State responsibility; that is to say
18 that unless otherwise specified, there should be
19 responsibility for every breach. Every breach is an
20 internationally wrongful act.
21 Q. So, that was the first case UPS. Before we
22 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

09:31:27 1 course of action, and that 1116, therefore,
2 following the UPS model, says that you can only go
3 for three years before the time you brought your
4 claim, that that cuts the damages off.
5 A. Correct.
6 So that in the absence of 1116(2), the
7 general principle of State responsibility would
8 apply, which is that there is responsibility for
9 every past wrongful act. There is retrospective
10 responsibility. There is responsibility for
11 reparations.
12 But what this does, as I say, is it
13 truncates it. It's says that that State
14 responsibility, at least for reparations, you know,
15 is limited to those acts in the series that occurred
16 after the date established by the limitation period.
17 Q. You used a heard word that we haven't heard
18 before, reparation. That comes from international
19 law?
20 A. Yes.
21 Q. Can you tell me where?
22 A. The ILC Articles.

09:32:33 1 Q. Okay. Let's turn, then, to Grand River. I
2 think we'd all like to talk a little bit about that.
3 Perhaps you could share with the Tribunal your views
4 about the applicability of the Grand River Case to
5 this particular task that's before you.
6 A. Well, here I think we need to look at more
7 of the language of 1116(2). So as I said, in order
8 to apply this limitation period, one has to
9 understand the meaning of the breach, and we've just
10 been discussing that. But we also need to go beyond
11 that, and we need to understand what knowledge of
12 the alleged breach and knowledge of incurrence of
13 loss or of damage mean as well. It's not enough
14 just to understand what the breach is. It's also
15 important to understand what these expressions mean.
16 And that's where the Grand River opinion
17 assists us because in that case, the Tribunal did
18 consider the question of what constitutes knowledge
19 of alleged breach and knowledge that the Investor
20 has incurred loss or damage.
21 So that on the facts of Grand River as they
22 appeared to the Tribunal, as the Tribunal sets out

09:33:59 1 its understanding of them in its ruling, in that
2 case the Claimant was subject to a specific
3 statutory obligation that was imposed on the
4 Claimant prior to the date established by the
5 three-year limitation period. And on the basis of
6 the exact nature of that obligation, the Tribunal
7 came to the conclusion that the Claimant had
8 acquired or should have acquired both knowledge of
9 the alleged breach and knowledge that they had
10 incurred loss or damage at that time prior to the
11 date established by the limitation period.
12 And as the Tribunal said, you know, the
13 obligation in the statute to which it was referring
14 in that part of the ruling--and we will come to that
15 other part of the ruling in a second--was one that
16 was precise and quantifiable, so they should have
17 known exactly the nature of the nonconforming act
18 because it was evident from the face of the
19 legislation, and secondly, because of the precision
20 with which the obligation that burdened them was
21 articulated. It admitted of no element of
22 uncertainty, of discretion, or variability even

09:35:50 1 though the obligation ultimately would have to be
2 discharged, you know, after the date that
3 the--established by the limitation period.
4 So, that tells us something about what it
5 means to have knowledge of the alleged breach and
6 knowledge that you have incurred loss or damage.
7 You have to have knowledge, first of all, of the
8 full legal implications of the wrongful act for you;
9 and, secondly, you have to have full and precise
10 knowledge of the economic implications, the material
11 implications. And both of these have to be present
12 before the date established by the time bar.
13 Q. If there is an absence of transparency or
14 legal security, could you have knowledge, in your
15 view?
16 A. No. The Tribunal in Grand River
17 articulates, I think, very eloquently the
18 proposition that an investor that is a sophisticated
19 business actor ought to know the laws that apply to
20 them at a particular period of time, and that there
21 was no reason why this sophisticated business actor
22 that had been operating in this regulated sector

09:37:06 1 should not have been aware of the legal requirements
2 to which it was subject at that particular--at that
3 particular time, prior to the date established by
4 the limitation period.
5 Now, what does this assume? It assumes
6 that there is a transparent, stable Legal Framework
7 that at least a sophisticated Investor with good
8 legal or perhaps also in some instances accounting
9 or other regulatory advice or expert advice can know
10 both the precise nature of the framework and the
11 obligations, the burdens to which it's being
12 subject, and also figure out, you know, what the
13 exact nature of the costs or of those are to the
14 business.
15 And my understanding from the pleadings and
16 also from reading the testimony in this case is that
17 one of the important elements of the Claimant's case
18 here is that, in fact, there is a substantive
19 violation of the NAFTA because they have been unable
20 to benefit from a transparent, stable Regulatory
21 Framework, where decisions are made grounded in the
22 statute, grounded in rules, grounded in publicly

09:38:43 1 available methodologies that are either stable or
2 amended or evolved in accordance with some kind of,
3 again, open, transparent administrative process.
4 And, therefore, in some sense, the very
5 substance of the claim in this case is kind of the
6 mirror image or opposite of the situation in Grand
7 River, where the Investor was faced before the time
8 period with a clear, transparent, very precise Legal
9 Framework to which they were subject, and the
10 Tribunal said, well, since you were subject to very
11 clear precisely defined legal and Regulatory
12 Framework at that time, you should have been aware
13 of that. That's reasonable.
14 Q. Now, Professor Howse, I wonder if you might
15 turn to the case that you referred to Paragraph 41
16 of your opinion, which is the Feldman Case. I also
17 note that the Feldman Case has been discussed by the
18 1128 submission of the Government of the United
19 States of America. And you received a copy of the
20 1128 submission, sir?
21 A. Yes, correct.
22 Q. Okay. So, I just wonder if you might help

09:40:11 1 the Tribunal understand how the Feldman Case was a
2 factor in your consideration here.
3 A. Well, my understanding of the ruling of
4 Feldman, you know, on the question of 1116, the
5 limitation period, reflects, you know, the clarity
6 of 1116, which is that the Tribunal does not have
7 jurisdiction to provide relief with respect to those
8 breaches that have occurred prior to the date
9 specified by the limitation period. And, you know,
10 I do not think that Feldman, you know, did
11 exclude--it clearly did not exclude the possibility
12 for relief for breaches that occurred after that
13 date.
14 Q. All right. But in Feldman the Tribunal
15 didn't actually say the time limits only run from
16 the end of a continuing act, did they?
17 A. No.
18 Q. So, why is Feldman relevant here?
19 A. I don't understand why it's relevant except
20 as just a kind of obvious application of the idea of
21 a limitation period as applying to those, you
22 know--to those alleged breaches that occurred before

09:41:50 1 that particular moment in time.

2 Q. Professor Reisman, in his Supplemental
3 Affidavit, he refers to the Mondev Case as
4 Paragraph 21 of the supplement. Could you give us
5 your views on the applicability of Mondev.

6 A. Well, in Mondev, there were two distinct
7 claims that arose out of the conduct towards the
8 Claimant, towards the Investor. One was a claim for
9 expropriation that was time-barred, and another was
10 a claim for--to access to justice in the domestic
11 legal system of the host State in order to have
12 redress or compensation for the conduct towards
13 that--towards the Investor.

14 And so, in the case of the expropriation
15 claim, as I recall, the Tribunal in Mondev held that
16 that claim was time-barred in the sense that the
17 relevant breach had occurred within the, you know,
18 the period stipulated by the limitation period, but
19 on the other hand the failure to provide access, the
20 alleged failure to provide access to justice was, in
21 some sense, a continuing act, assuming it could be
22 proven, and therefore it was not time-barred.

09:43:44 1 Q. I'm going to turn to some other issues
2 covered in your opinion because your opinion didn't
3 just cover 1116.
4 A. Sure.
5 Q. But before I go there, I want to ask you,
6 is there anything else that you feel you want to add
7 with respect to 1116 based on your opinion of what
8 Professor Reisman's supplemental opinion or the 1128
9 opinion or the question that we've already had just
10 to make sure that we get this part finished before
11 we move to the next?
12 A. I think it's important in understanding
13 1116 that we try and really grasp the core of
14 Professor Reisman's view; and it seems to me that
15 this view is premised on the notion that in the case
16 of a continuous breach, a series of related actions
17 that are wrongful or violations of obligations, that
18 if there is such a series that the Claimant is under
19 an obligation if it wants to be able to challenge
20 any of the actions in the series to challenge the
21 first one, or at least at the point at which it knew
22 that this action or should have known it was a

09:45:13 1 breach and that a damage or harm flowed from that
2 action.
3 I just see nothing in international law to
4 support this restrictive view, and certainly nothing
5 in 1116 of the NAFTA.
6 And I think this view is really contrary to
7 common sense, because normally when a new Regulatory
8 Framework comes into place that in some way
9 importantly restricts the operation of an investor's
10 business, what they try and do is they try and live
11 with it. Usually the first instinct is not to go
12 and contentiously challenge the Government in
13 litigation. They may not like the Regulatory
14 Framework, but they're figure we're here, we've
15 invested a lot of money, and we will try to work
16 with the Government and assume that there is good
17 faith, and that if the framework is applied in a
18 transparent, and fair, and evenhanded manner, in a
19 stable manner, well, we can probably adjust our
20 business to live with it, to work with it, even if
21 we don't initially like it.
22 So, what this suggests is that--is that,

09:46:25 1 you know, even if it eventually proves to be
2 eventually the case, that the framework is not
3 administered in a transparent, open, good faith,
4 consistent way, that because the Investor didn't
5 resort to litigation the first time that an act
6 occurred that might be interpreted as a breach,
7 they've lost any possibility of bringing a claim.
8 Basically, this view seems to me to
9 encourage litigiousness, and to almost immediately
10 lock an investor with issues with the way a
11 Regulatory Framework is operated into a kind of
12 confrontational mode with the Government.
13 So, I think it has not only is it not based
14 on the text of 1116, but I think it has very
15 negative policy implications that we have to be
16 concerned about in light of the broad purposes of
17 the NAFTA, which is to facilitate, include
18 implicitly, at least to me, facilitating a good
19 relationship between the Investor and the host
20 State, where the first resort, when issues emerge
21 with a Regulatory Framework, is not to international
22 litigation but to a process of attempting to work

09:47:53 1 with a regulatory scheme, assuming good faith that
2 it will be applied in a manner that does not create
3 or does not involve breaches of the Standards of
4 Conduct that are required by the NAFTA.
5 Q. Okay, so I'm going to turn to another area.
6 I want to make sure we've got everything on this
7 section done.
8 Now, I'm going to ask that you look at your
9 Report at Paragraph 8--it's on Page 3--where you
10 discuss the concept of systemic integration. This
11 is where you start to discuss the issues of
12 interpretation of the NAFTA.
13 I note that Professor Reisman did not seem
14 to share your view, but I'm going to ask you to
15 explain your view about systemic integration and so
16 the Tribunal can understand your conclusions in your
17 report, please.
18 A. Well, let me first of all simply remind us
19 from whence this expression "systemic
20 integration"--from where it's drawn. I did not
21 invent this expression. I found it in a document of
22 the International Law Commission that I think both

09:49:10 1 in academia and in international legal practice has
2 become an important reference point for our
3 understanding of some very important features of the
4 international legal system. And these features
5 relate to the existence of multiple often
6 overlapping legal regimes and fora and--which exist
7 in a certain way alongside what one would call
8 general or framing principles and rules of
9 international law, such as rules of the State
10 responsibility in the ILC Articles and rules on
11 treaty interpretation in the Vienna Convention on
12 the Law of Treaties.
13 So, how is a treaty interpreter to
14 interpret specific provisions in one treaty in one
15 particular regime and in one particular forum
16 realizing that this treaty regime exists within a
17 broader universe of international law?
18 And using the expression "systemic
19 integration," my understanding is that the
20 International Law Commission has taken the view that
21 the appropriate approach is to bring, where
22 relevant--where relevant--principles and rules from

09:50:44 1 outside that specific treaty or treaty regime to
2 bear--to bring them to bear on the interpretation of
3 the particular treaty and the provisions in
4 question, always governed by relevancy.
5 So, is this a particularly novel or
6 original statement? Well, one might either like or
7 dislike that specific catchword "systemic
8 integration," but really in a much more, I suppose,
9 pedestrian or obvious way, it's built into the NAFTA
10 itself, because if one looks to Article 102(2) of
11 the NAFTA, it says that the Parties shall interpret
12 and apply the provisions of this agreement in light
13 of its objectives, one; and, two, in accordance with
14 applicable rules of international law--applicable
15 rules of international law. And--so, that means
16 applicable rules of international law that are found
17 elsewhere than the agreement itself; otherwise, this
18 provision would be a meaningless tautology.
19 Now, where do we go to figure out how one
20 would apply the NAFTA in accordance with applicable
21 rules of international law? Well, are the rules of
22 the Vienna Convention on the Law of Treaties

09:52:12 1 applicable? Are the ILC Articles applicable?
2 Arguably, to the extent that these reflect customary
3 law, they are applicable, at least to the extent
4 there is no conflict, no actual conflict.
5 And one of the canons, I think, of
6 interpretation that is expressed by this catchword
7 "systemic integration" and that is very--that I'm
8 very sympathetic to and I have expressed this in a
9 range of scholarly writings over quite a number of
10 years is the idea that one should avoid conflicts.
11 One should assume that States negotiating in one
12 forum and making solemn treaty obligations to each
13 other are not doing so in such a way as to undermine
14 or render ineffective obligations to each other that
15 they've made in some other--in some other context
16 that are equally solemn and have an equal status in
17 terms of the hierarchy of norms in international
18 law.
19 So, it's an important task of treaty
20 interpretation, arguably, to interpret a treaty, to
21 the extent possible, to make effective all the
22 various international legal obligations that the

09:53:38 1 Parties have entered into. And so, in interpreting
2 this Treaty, we don't want to undermine
3 unnecessarily obligations that the Parties have in
4 some other international legal regime.
5 Now, there may be conflicts, and unless we
6 are talking about jus cogens, which I don't think is
7 applicable in this case, peremptory norms like
8 against torture and so on, the fact is that in a
9 treaty Parties can contract out of other applicable
10 rules.
11 Now, there are principles and rules
12 governing such contracting out. It would need to be
13 explicit, it and would need to be evidenced by clear
14 wording in a treaty, but it is possible, given the
15 nonhierarchical relationship between treaty and
16 custom as it's classically understood in
17 international law for a treaty to contain certain
18 limited specified defined carve-outs from these
19 rules.
20 But one should not--I think this was a
21 canon of interpretation already present in the ELSI
22 Case, which we all are very familiar with. One

09:54:51 1 should not lightly assume that the Parties have
2 contracted out of these--out of such rules and
3 principles without explicit textual evidence that
4 they've done so.
5 Q. If we turn to the next paragraph of your
6 Report, you talk about Article 103 of the NAFTA, and
7 you've suggested that that is relevant, Article 103
8 discusses the relation of the NAFTA to other
9 agreements. That's the title. We will put it up on
10 the slide.
11 Do you have anything to say about how that
12 Article, which talks about the GATT and other
13 things, is relevant to the considerations that
14 you've talked about about systemic integration?
15 A. Yeah. Article 103 makes it plain that the
16 broader--one of the broader international legal
17 contexts in which the NAFTA is to be interpreted and
18 applied is the context of the rights and obligations
19 that the Parties to NAFTA have as, I guess, at the
20 time Contracting Parties of the GATT and today
21 members of WTO, and so here it specifies a
22 particular part of the broader international legal

09:56:27 1 universe that's relevant up to the NAFTA.

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

12 And I think this goes also to objectives of
13 NAFTA. The objectives are elaborated in light of
14 certain principles and rules. And the principles
15 appear--include national treatment,
16 most-favored-nation treatment, and transparency.
17 And these are terms that are recognizable and
18 cognizable to the Parties and around which the
19 Parties have, as it were, prior State practice
20 because these are terms--these are principles that
21 underpin the rights and obligations that are
22 referred to in Article 103, the existing rights and

09:58:02 1 obligations under the GATT. So, the rights and
2 obligations under the GATT, and specifically those
3 that relate to these structural, these fundamental
4 principles--national treatment, most-favored-nation
5 treatment, and transparency--that constitute this
6 part of this broader legal universe to which the
7 NAFTA Treaty interpreter must focus attention
8 pursuant to 103.
9 Q. Okay. Well, in fact, while you were giving
10 your answer, I've put Article 102 up because you
11 specifically--I just wanted to make sure I
12 understand what you were referring to here.
13 So, in Article 102, I see that we have part
14 one sort of sets out the chapeau, sets out some
15 principles and rules of the NAFTA. I just wonder if
16 you could explain to us as an interpretive area what
17 you believe these mean. So, for example, it says
18 "specifically through its principles and rules,
19 including national treatment." You see that on the
20 screen?
21 A. Yes.
22 Q. Could you please share with the Tribunal

09:59:12 1 your conclusions in this regard with respect to--in
2 fact, I will just ask you to each of the three, so
3 we will start with national treatment, and just
4 explain what that means.
5 A. Well, national treatment, as a general
6 concept, refers to the notion that there is an
7 obligation to treat no less favorably economic
8 actors from other Parties than one's own like
9 economic actors. And so, depending upon the nature
10 of the substantive field to which a specific
11 national-treatment provision applies, whether it's
12 goods, services, investment, intellectual property,
13 what the relevant economic actor is or activity will
14 differ somewhat.
15 So, in the case of services and investment,
16 it may be enterprises in like circumstances. In the
17 case of trade in goods, it's like products and so on
18 and so forth.
19 So, the essential obligation is that
20 obligation of treatment no less favorable which goes
21 to, as it were, the competitive playing field, the
22 relationship between certain domestic and certain

10:00:55 1 economic actors from other Parties. And what
2 determines which economic actors from domestic
3 actors are compared in relation to actors from other
4 Parties is this notion of likeness. That controls
5 who is being compared in order to apply this
6 standard of treatment no less favorable for actors
7 or activities of other Parties.
8 Q. So, that's with respect to national
9 treatment. What about most-favored-nation
10 treatment?
11 A. Well, most-favored-nation treatment really
12 deals with the relationship of treatment of the
13 Parties or a Party that is a signatory to NAFTA to
14 treatment of other States, whether signatories or
15 not, and says that one has to grant the most
16 favorable treatment one grants to any State to other
17 Parties of NAFTA.
18 Q. Is nationality-based discrimination part of
19 the principles of national treatment or
20 most-favored-nation treatment, in your opinion?
21 A. Well, I would say, first of all, that I do
22 not believe in the context of NAFTA that

10:02:35 1 nationality-based discrimination is the applicable
2 legal test. Certainly, where treatment less
3 favorable of economic actors from other Parties
4 occurs. One of the motivations or circumstances in
5 which that can happen may be if such discrimination
6 exists, but the inquiry is not going to be focused
7 on such discrimination, even though such a
8 motivation might be probative as to whether
9 treatment no less favorable occurs.
10 Maybe I could illustrate this in a rather
11 simple way, which is that nationality-based
12 discrimination under NAFTA is a violation of the
13 standard of fair and equitable treatment in 1105.
14 There, one has an inquiry that includes inquiry into
15 the existence of such discrimination.
16 So, again to refer back to the Loewen Case,
17 where the Tribunal was dealing with alleged
18 nationality-based discrimination, bias or prejudice
19 against Canadians or Canadian businesses, the
20 Tribunal found prima facie again because it
21 dismissed the claim on grounds of a prima facie
22 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

10:05:20 1 opinion on in his opinion, and it's a provision of
2 the NAFTA about the interpretation of this issue. I
3 just don't feel that this is appropriate to have
4 this argument at this time at all, but I would ask
5 that my friend please stop reiterating the same
6 objection. We have been very clear at the direction
7 of the Tribunal to say exactly where it's relevant
8 to the opinion. I don't think it's appropriate,
9 sir.
10 PRESIDENT ORREGO VICUÑA: To the extent
11 that the subject is in the opinion, it is certainly
12 appropriate, but the question again, if I may
13 reiterate it, is that, on occasions I myself get
14 lost of what is the connection of that argument even
15 if it is in the opinion, of course, to the central
16 issue of the time bar? Say, for example, you have
17 discussed national treatment, most-favored-nation
18 treatment, fine. There's no doubt there is a
19 reference or some discussion in your opinion. But
20 how does that relate to the question of the time
21 bar, which is the subject of jurisdiction that is
22 before us?

10:06:34 1 THE WITNESS: Yes, Mr. President.
2 PRESIDENT ORREGO VICUÑA: So, that's the
3 sort of thing I would like you to keep in mind, not
4 to necessarily answer me now.
5 THE WITNESS: Well, I would like, if I may,
6 Mr. President, to give a brief answer. And I think
7 it's the part of the context of this difference of
8 views that has emerged between myself and Professor
9 Reisman.
10 And Professor Reisman, in the reply that he
11 filed to my opinion, questioned why I was bringing
12 in matters of GATT and WTO Law into my discussion of
13 the time-bar issue. And, in my opinion, I refer to
14 the way in which GATT and WTO Law has developed in
15 terms of distinguishing as distinct violations of a
16 treaty that stem from a statute itself a law as such
17 and those violations that stem from individual
18 applications.
19 So, I feel that's highly relevant to
20 understanding some of the issues in this case
21 concerning applying the time bar, given Professor
22 Reisman's view or what I understand him--his view to

10:07:57 1 be, that, you know, if the statute is enacted before
2 the date established by the time bar, then the time
3 bar, you know, really applies to applications of
4 that same statute.
5 And what I think I was trying to
6 illustrate, simply illustrate, by reference to the
7 WTO Regime is that the way in which the general
8 principles of State responsibility are understood in
9 the WTO is different, which is that you could have
10 quite distinct claims of a violation based on the
11 law as such versus very distinct claims that arise
12 from individual applications.
13 And so--and here in 103, if we bring 102
14 and 103 together, I think this line of questioning
15 suggests that there is a sound basis in the text of
16 the NAFTA for averting to certain principles or
17 concepts that may actually be found in GATT or WTO
18 Law, and it's in that connection that I believe I
19 was being asked to respond, well, what is the
20 evidence for that? The principles found in these
21 other agreements are intended by the NAFTA drafters
22 to be brought into the reading of NAFTA. And I was

10:09:22 1 alluding to 102 and 103 together as explaining why
2 that might be appropriate, that the drafters had in
3 mind that this would be part of the international
4 legal universe that a treaty interpreter was
5 intended to consider in actually reading and
6 applying particular provisions of the NAFTA itself.
7 PRESIDENT ORREGO VICUÑA: Thank you.
8 BY MR. APPLETON:
9 Q. And so, let's talk about what this Tribunal
10 needs to do to interpret the NAFTA itself. You have
11 taken us through Article 102, which says in
12 Article 102(2) on the screen that the provisions of
13 the agreement are to be interpreted in light of its
14 objectives set in Paragraph 1 and in accordance with
15 the applicable rules of international law.
16 And Article 1131--I think I have that
17 somewhere--Article 1131, which is the governing law,
18 also sets out that the Tribunal shall decide the
19 issues in dispute in accordance with this agreement
20 on NAFTA and applicable rules of international law.
21 It also says that interpretation by the
22 commission of the provision of this NAFTA Agreement

10:10:39 1 shall be binding on the Tribunal established under
2 this section. Correct?
3 A. Yes, that's correct.
4 Q. And so, I see that in Paragraph 5 of your
5 opinion you refer to the Vienna Convention on the
6 Law of Treaties.
7 Let's go back to 102.
8 Would that be an applicable rule of
9 international law that's set out in Article 102(2)?
10 A. I believe so, yes, at least those
11 provisions of the Vienna Convention that are widely
12 viewed as customary law.
13 Q. And so you refer to Articles 31 and 32 in
14 your opinion to be guideposts to assist this
15 Tribunal with respect to the interpretation of this
16 agreement?
17 A. Yeah, correct.
18 Q. And so, one of the issues that is at issue
19 for this Tribunal, potentially, is that there is a
20 common position on some types of issues not related
21 to facts but with respect to some issues about law
22 in the 1128 submissions of the Government of the

10:11:59 1 United Mexican States, the United States and, it
2 appears, Canada. Could you tell us, with respect to
3 the Vienna Convention and with respect to the NAFTA,
4 its governing law on Article 102, what the effect of
5 that might be.
6 A. Well, there is a--there has not been an
7 agreement between the Parties with respect to the
8 interpretation of 1116. There are perhaps--and I
9 suppose this is what you're alluding to--you know,
10 common elements and observations of these various
11 Parties that have been made in the context of this
12 particular litigation.
13 And I suppose this goes to the question of
14 whether the provision of the Vienna Convention that
15 you cite positions taken by Parties or intervening
16 Parties in a litigation if they have common elements
17 can be considered State practice.
18 My view is that these kinds of positions
19 can be only of limited value in terms of State
20 practice, and, you know, part of the reason is that
21 Parties take a position in specific cases that may
22 relate to their interests and underlying

10:14:11 1 interpretations of facts in those particular cases.
2 And I think that distinguishes this kind of practice
3 from practice where there is agreement either, you
4 know, evidenced through the minutes of a meeting, a
5 political negotiation, and understanding that's
6 omitted by the Parties or their Ministers or legal
7 advisors as to general matters of interpretation;
8 that is to say, not connected to the alignment of
9 interests in a particular--in a particular dispute.
10 I mean, that being said, I wouldn't go to
11 the opposite extreme and say that positions that
12 have been taken by Parties of a particular dispute
13 are irrelevant to State practice. I simply think we
14 have to be cautious in reading the Vienna Convention
15 in that way.
16 Q. And if I can just go back to Article 1131,
17 you see 1131(2). Would that process be the type of
18 process that you would referring to by expressing a
19 common intention?
20 A. Yes.
21 So, in the case of the NAFTA in particular,
22 it seems to provide a vehicle or mechanism for the

10:15:47 1 possibility of such an interpretation.

2 Q. And could such an interpretation actually

3 create a modification to the NAFTA, or could it just

4 deal with interpretation of a provision of the

5 NAFTA, based on your knowledge of the powers in the

6 NAFTA and the Free Trade Commission?

7 A. Well, my understanding of the word

8 "interpretation" is that interpretation does not

9 either add to or diminish the actual rights and

10 obligations under the agreement. It simply

11 expresses an understanding of what those--of what

12 those mean.

13 And--now, one would have to distinguish

14 international agreements that don't have an explicit

15 provision on amendment from those that do. I think

16 that the issue of where interpretations might spill

17 over into a modification of rights and obligations

18 becomes important where there is an amending formula

19 in the Treaty, and so the--so, there is another

20 process that's established by the Treaty itself for

21 the modification of obligations. And, in each

22 instance, one would then have to determine which is

10:17:22 1 the appropriate mechanism. Is the subject matter of
2 this action by the Parties an interpretation in
3 which they would be operating under 1131(2) or an
4 amendment in which case they would be operating
5 under the specific amendment provisions of the
6 NAFTA, and they would have to follow those
7 provisions.
8 Q. How many years have you now been a
9 professor at an American law faculty?
10 A. Since 1998.
11 Q. So, several years.
12 A. Yes.
13 Q. It's now 11 years?
14 A. Yes. If I can count, yes.
15 Q. Okay. So, if you wanted to amend the NAFTA
16 in the United States, you would have to follow the
17 process for amending a treaty? Is that...
18 A. Well, I have to be careful here because
19 even though I have been a law professor for 11
20 years, when I consider the expertise of some of my
21 colleagues on the law of foreign relations of the
22 United States, I have to speak with some humility,

10:18:31 1 people like, for example, Professor Golove, in that
2 I do not consider myself in the sense that
3 Professors such as Golove would do, an expert in the
4 foreign relations law of the United States.
5 And there is an issue that actually arose
6 with NAFTA itself in the U.S. courts about the
7 practice of creating or amending international
8 commercial obligations through executive
9 congressional agreements as opposed to through
10 treaty power.
11 I do teach this, but only in introductory
12 courses, and I have to say that despite many, you
13 know, lengthy and useful conversations with
14 colleagues who I would deem to be experts in this
15 field, I would not feel entirely comfortable
16 providing an opinion as an expert witness on this
17 manner.
18 Q. That's fine. We will excuse you from that
19 assignment, Professor Howse.
20 Is there anything else that you would like
21 to add? Because I'm going to be finishing now, and
22 I just want to make sure that with respect to your

10:19:44 1 opinion, I want to make sure that you had the
2 opportunity to tell the Tribunal anything else that
3 you may have missed with respect to your opinion
4 itself, sir.
5 A. I would only add that I have great respect
6 for Professor Reisman, and I have been trying
7 throughout my consideration of his views to grasp
8 some of the underlying concerns.
9 And I suppose that one of them--and I think
10 that this concern was pointed out at one point by
11 the Grand River Tribunal--is the risk of abuse or
12 bad faith with respect to the bringing of claims
13 when there is a time bar and when, you know, there
14 are some actions within the prescribed period and
15 some actions not. And there is, of course, in
16 almost all cases some risk that a Party would use
17 the rules of State responsibility or abuse them to
18 bring a surprise action or to play strategic games
19 of some sort not consistent with good faith within
20 the dispute-settlement process.
21 And I do think that one always has to
22 interpret a provision like a time bar in light of

10:21:18 1 the concept of good faith and the integrity of the
2 process of settlement of disputes. I think that's
3 consistent with general international law.
4 But I would also say based on what I know
5 from both the pleadings and the testimony in this
6 case that it does not give rise to considerations of
7 an abusive use of the dispute-settlement process.
8 It seems from what I can gather that the Claimant
9 has been quite forthright and reasonable in the way
10 in which they have pursued their concerns with the
11 Government and in the timing of their claim. I see
12 no--not the least indication that this would be a
13 case where the requirement of good faith or the
14 integrity of dispute settlement would put in issue,
15 you know, the genuine claim that wrongful acts have
16 occurred for which there is State responsibility
17 outside of the time-barred period.
18 Q. Thank you very much, Professor Howse.
19 Counsel for Canada may now have some questions for
20 you.
21 PRESIDENT ORREGO VICUÑA: Thank you,
22 Professor Howse.

10:22:46 1 Do you think, Ms. Tabet, that it might be a
2 good point to have a 15-minute break?
3 MS. TABET: Why don't I ask my questions.
4 I only have a few.
5 PRESIDENT ORREGO VICUÑA: Not a problem.
6 CROSS-EXAMINATION
7 BY MS. TABET:
8 Q. Good morning, Mr. Howse.
9 A. Good morning.
10 Q. You were part of Mr. Appleton's team in the
11 UPS Case; isn't that right?
12 A. I worked as a consultant.
13 Q. And you also worked as a consultant for
14 Mr. Appleton in the Pope & Talbot case, I believe?
15 A. In the Pope & Talbot case, I appeared as an
16 expert witness.
17 Q. You did.
18 And you were hired by Mr. Appleton with
19 respect to other cases, I believe?
20 A. Yes. I have done work as a consultant. I
21 stress "consultant" because I have not acted as an
22 attorney or counsel. And, in fact--yes.

10:23:53 1 Q. Thank you, Mr. Howse.
2 MS. TABET: I have no further questions.
3 PRESIDENT ORREGO VICUÑA: Thank you,
4 Ms. Tabet.
5 We will have--
6 MR. APPLETON: Mr. President, I would just
7 like to redirect one moment on questions arising
8 from Ms. Tabet.
9 PRESIDENT ORREGO VICUÑA: Which is the
10 question?
11 MR. APPLETON: Which is the question?
12 PRESIDENT ORREGO VICUÑA: Which is the
13 question?
14 MR. APPLETON: I would like to make the
15 question.
16 PRESIDENT ORREGO VICUÑA: Yes.
17 REDIRECT EXAMINATION
18 BY MR. APPLETON:
19 Q. Professor Howse, how many years did you
20 work for the Government of Canada?
21 A. I worked as a full-time employee of the
22 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

10:25:51 1 subject.
2 THE WITNESS: Certainly.
3 Well, the principle of transparency, my
4 understanding of it also to impart derives fro its
5 appearance in the GATT, and so I understand
6 transparency to entail a publicly available Legal
7 Framework to the investor or economic actor in that
8 framework to know that the rules that are applied in
9 an objective, nonarbitrary manner, that reasons are
10 provided where appropriate which would normally be
11 the case for decisions that affect the Investor in
12 this particular case, or the economic actor that is
13 affected by them.
14 So, I understand transparency as
15 encompassing both elements of publicity, elements of
16 the rule of law, and elements of administrative
17 fairness.
18 ARBITRATOR DAM: Just a follow-up question.
19 Most-favored-nation treatment and national treatment
20 are found in the law in General Agreement on Tariffs
21 and Trade and so forth, but I'm not too clear about
22 the major sources with regard to the principle of

10:27:39 1 transparency. Where would one look for an
2 explication in the official documents and so forth
3 of the principle of transparency?
4 THE WITNESS: Well, again, if one is
5 prepared to entertain my view that part of the
6 relevant legal universe is the GATT and WTO, one
7 would look to Article X of the GATT which the
8 drafters of the NAFTA would have been aware, and
9 that contains, you know--it's called "transparency,"
10 that article, and it gives the considered view of
11 what the Contracting Parties to the GATT and the now
12 WTO members have in mind the principle of concept of
13 transparency, at least in that sense an application
14 to trade in goods.
15 Now, I'm less familiar with them, but I
16 believe there are also transparency provisions in a
17 number of other WTO treaties with respect to
18 technical regulations, with respect also to trade in
19 services, for example.
20 So, one could look there, and one could
21 look at references to transparency or the underlying
22 content of it in other decisions by NAFTA Tribunals

10:29:12 1 or other tribunals that are considering
2 "transparency" in relation to the concept of fair
3 and equitable treatment. And one example would be
4 Tecmed, for instance. So, those are some of the
5 sources.
6 I would also say that there is an
7 increasing emerging interest in defining and
8 applying the concept of transparency in other
9 international fora, and just a few weeks ago I was
10 in Geneva at a meeting of UNCTAD where I was asked
11 to comment on some proposals in UNCTAD for a
12 transparency principle that would apply in the
13 investment context, and so I think this is really
14 starting to develop now.
15 And while what's being proposed at UNCTAD
16 has not yet been agreed as a matter of law--and, in
17 fact, one of the reasons they brought me there is
18 they were interested in how, given my experience
19 with the WTO and NAFTA, I could give them a sense of
20 how to concretize as law this transparency principle
21 for investment that would be multilateral.
22 So, I think there is a range of material,

10:30:41 1 increasingly so, that gives some points of reference
2 for understanding the substance and contours of this
3 principle.
4 ARBITRATOR DAM: Thank you very much.
5 PRESIDENT ORREGO VICUÑA: Thank you.
6 ARBITRATOR ROWLEY: Professor Howse, absent
7 a breach of NAFTA, in your opinion, is Canada
8 entitled to impose export controls on products,
9 including logs?
10 THE WITNESS: Absent a breach of NAFTA, is
11 Canada entitled to impose such controls?
12 ARBITRATOR ROWLEY: Correct.
13 THE WITNESS: That would lead us into, I
14 think, a quite extensive discussion of how the law
15 of the WTO applies to the case of export
16 prohibitions and restrictions on exports.
17 I did not opine on that in my Report, and I
18 think it is quite a complex question. There is one
19 ruling of a WTO Panel that addressed the question of
20 whether an export restraint regime could constitute
21 an actionable subsidy. In some sense, the content
22 of that Report is dicta because the Panel did not

10:32:46 1 view the case as yet ripe. So, there is that set of
2 issues.
3 The United States has argued that one could
4 be able to conceive of an export-restraint scheme as
5 a subsidy, and I think it's fair to say that view is
6 controversial. And, in particular, there is the
7 question under the WTO Rules of what would
8 constitute financial contribution. There are
9 certain defined meanings in Article 1 of the
10 Subsidies of Countervailing Measures Agreement about
11 what is a financial contribution.
12 I mean, I could continue to, you know, talk
13 about this, but since this is not something on which
14 I have prepared an opinion for this Tribunal, again
15 being very cautious and aware of the complexities of
16 WTO Law, you know, I would be cautious in offering a
17 detailed legal view on this question outside of the
18 NAFTA, as you say.
19 ARBITRATOR ROWLEY: If you're not
20 comfortable, I assume with your background you would
21 be in a position to say whether export controls were
22 legal under a sovereign's and within a sovereign's

10:34:26 1 jurisdiction, absent a breach of NAFTA or absent a
2 breach of the WTO? But if you're not comfortable--
3 THE WITNESS: Well, Article XI of the GATT,
4 you know, prohibitions and restrictions on
5 exportation are banned. However, you know, the case
6 of primary products is trickier.
7 And so, one of the reasons why I'm
8 uninclined to offer a sort of yes-or-no view is
9 that--is that I think that one question would be to
10 what extent there is a limited--how broad or narrow
11 this exception for primary products of certain, you
12 know, products like that is to be interpreted.
13 And then there is also, of course, the
14 question of Article XX. In certain cases of
15 national crisis, it is possible to impose
16 restrictions that otherwise would violate provisions
17 of the GATT, where the national welfare is greatly
18 jeopardized by, for example, a shortage of some
19 essential commodity.
20 But--so, I don't think the Regime is so
21 straightforward. There is the general rule, which
22 is these kinds of measures are banned; that's stated

10:36:12 1 in Article XI. There are some limited exceptions
2 within Article XI itself, and then there is question
3 of the applicability of the general exceptions under
4 Article XX. And as we know, the devil, you know, is
5 in the details, and so if you ask me can I tell you
6 right now which schemes could be operated consistent
7 with WTO Law and which not, we would need to know a
8 great number of facts, including the policy
9 justifications and the bona fides and strength for
10 the policy justifications for the controls. But the
11 default rule is that they're banned, subject to
12 certain kinds of limitations and exceptions.
13 Maybe I am answering your question after
14 all in a manner that would be possible to answer it
15 in an abstract level.
16 ARBITRATOR ROWLEY: Banned under the GATT?
17 THE WITNESS: Yes. Article XI is the
18 operative provision.
19 ARBITRATOR ROWLEY: Is the GATT part of the
20 customary international--
21 THE WITNESS: No. No. Now, that again is
22 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

10:40:35 1 available methodologies and so on.

2 And my question is this: Is one not able

3 to be aware of the fact when faced with the

4 situation that decisions are being made under a

5 scheme where there is an absence of those items:

6 publicly available methodologies, stable

7 environments, open, transparent administrative

8 processes and the like?

9 The concept that I'm getting at is, is

10 there a distinction? If a tribunal could say an

11 investor could have been aware of a breach of the

12 situation because it was--because of the nature of

13 the system, which was a precise system, could one

14 not be aware of a breach if the breach arose out of

15 the imprecise nature of the system, if I may precis

16 it, for prescription purposes?

17 THE WITNESS: Well, I don't think so

18 because what "imprecise," I suppose, means is that a

19 statutory scheme affords considerable discretion to

20 administrators or judicial or quasi-judicial actors

21 in some instances to interpret that scheme, to

22 develop appropriate methodologies, to engage in

10:42:49 1 rule-making and so forth. So, a scheme could entail
2 or grant a considerable amount of discretion; in
3 other words, it could be fairly open-ended. And
4 that's quite consistent, I think, with an
5 expectation that through what we would consider the
6 apparatus of modern administrative law in a
7 democracy under the rule of law, it would be made
8 precise through administrative action that's
9 consistent with the values of administrative
10 fairness and the rule of law, even though the scheme
11 itself in some sense is quite open-ended and allows
12 for a considerable amount of discretion in the sense
13 that the statute allows for that.
14 ARBITRATOR ROWLEY: Turning to another
15 area, you were talking about the establishment of
16 the date from which the limitation period of 1131
17 runs, or 1116 runs, earlier in your--how does one
18 establish the date?
19 THE WITNESS: Well, perhaps we could put
20 1161 (sic) back on the board--
21 ARBITRATOR ROWLEY: 1116.
22 THE WITNESS: --1116 back on the screen,

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

10:45:53 1 is--that violates the obligations of the agreement,
2 whether it is on the face of the statute or
3 regulation or whether it occurs through
4 implementation or application or the exercise of
5 discretion under that statutory scheme.
6 So, that's the first stage. What do we
7 consider to be a breach for purposes of applying
8 that.
9 ARBITRATOR ROWLEY: Can I stop you at the
10 breach and take you on from there because I have a
11 question that flows from that.
12 THE WITNESS: Yeah.
13 ARBITRATOR ROWLEY: So, if an actor
14 understands that there has been a breach and
15 understands that there is damage, does the
16 prescription run from that point, and does it
17 preclude that actor suing later, based on a further
18 breach?
19 THE WITNESS: Based on a further breach?
20 ARBITRATOR ROWLEY: Yes, because here, let
21 us say--
22 THE WITNESS: No, not based on a further

10:47:12 1 breach. In other words, if the basis of the claim
2 is a further breach, then we need to apply the
3 limitation period to that further breach.
4 ARBITRATOR ROWLEY: So, now let's apply it
5 to this case. And you talked about attribution
6 earlier, and you talked about attribution in
7 connection with the acts of private parties and
8 attributing their--or attributing breach to the
9 Government because of a failure to discipline
10 private parties. So, I want you to go with me on an
11 assumption. The assumption is that there were
12 so-called "acts of blockmail" in a particular year;
13 that those acts were corrupt; that the Claimants
14 complained to the Government that those acts were
15 taking place and that they were being damaged and
16 the Government failed to act, and we will assume
17 that failure to act was a breach of the NAFTA.
18 On those facts, do we have a start date for
19 a limitation period just on those facts?
20 THE WITNESS: So--I think--I think we do.
21 And State responsibility would be--so, State
22 responsibility, you know, would be engaged at the

10:49:28 1 point of which the Investor knew or ought to have
2 known that the State has failed or State actors have
3 failed in their obligation to remedy or control the
4 abuses, an obligation which would argumentatively,
5 again because we're talking about an assumption be
6 contrary to, let's say, 1105, and as a result of
7 that failure that they knew or should have known
8 that they were suffering a particular loss or
9 damage.
10 So, that would be the point at which I
11 think one would make the limitation period
12 effective. One would calculate the date on that
13 basis.
14 ARBITRATOR ROWLEY: All right. Now, stay
15 with the assumption that the actor in question does
16 not initiate NAFTA proceedings within three years
17 from that date. But just take another date, five
18 years from that date, it initiates proceedings. As
19 I understand your testimony, it would be all right
20 to do so if the blockmailing continued.
21 THE WITNESS: Well, I think we have to be
22 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.

10:52:42 1 Again, I'm here as an expert on the law and
2 not on the facts of the Regime, so I'm just stating
3 for purposes of clarity and so we don't
4 misunderstand each other how I understand this
5 blockmailing to work.
6 So, under the rules of State responsibility
7 arguably under fair and equitable treatment, the
8 State would have a responsibility to correct or
9 discipline each such--
10 ARBITRATOR ROWLEY: We are assuming that.
11 THE WITNESS: For each such abuse. So--I
12 mean, if they bring--so each episode of blockmailing
13 would--the failure to remedy each episode would be a
14 separate internationally wrongful act, so, you know,
15 one would then ask when did these episodes of
16 blockmailing occur? When did they--you know, when
17 could one reasonably have expected that the
18 Government would correct these abuses?
19 Now, this is under fair and equitable
20 treatment. Each failure to correct the abuse, I
21 think, would be considered an internationally
22 wrongful act, assuming that 1105 of NAFTA does apply

10:53:56 1 to make this an obligation of the State, okay. But
2 each--but then one would have to consider a separate
3 claim perhaps for full protection and security, but
4 that would be a separate claim--
5 ARBITRATOR ROWLEY: The substantive nature
6 of the claim is irrelevant to me. I'm just
7 interested in whether there is a second bite at the
8 cherry.
9 So, the testimony is, even though there is
10 knowledge of the same sort of breach in five years
11 back, you can bring another action five years out
12 because there is a separate breach.
13 THE WITNESS: Right, if it's separate. And
14 that would be a matter for determining whether it is
15 separate or not.
16 And since I'm not here to testify on the
17 exact facts about blockmailing, you know, I have to
18 just limit myself to what I can give an expert
19 opinion on, which is that each breach attracts State
20 responsibility; and, therefore, the fact that there
21 was a previous breach that was not sued upon in the
22 limitation period doesn't mean that when there is a

10:55:15 1 subsequent breach, if it's a separate and distinct
2 legal injury, that you can't sue on it, even though
3 there might be some generic relationship or some
4 generic similarity of the conduct, you know, in each
5 case. It doesn't mean that it's not an
6 independently separate internationally wrongful act.
7 ARBITRATOR ROWLEY: My final question, and
8 it's a question really for us, but it's a question
9 of whether the prescription-period issue under
10 1116(2) is a matter for our jurisdiction, or is it a
11 matter of defense? Have you considered that issue?
12 THE WITNESS: Well, I'm aware of the view
13 expressed by the Tribunal in Feldman on that issue,
14 and I guess it's in Paragraph 62. And the Feldman
15 Tribunal seemed to suggest that this does go to
16 jurisdiction.
17 However, I have to say again, my best
18 opinion as an expert in international law is that I
19 don't see evidence of a strong consensus in
20 international law, you know, one way or the other.
21 It might depend upon specific features of the Regime
22 and the sources of--the sources of the Tribunal's,

10:57:12 1 you know, authority, whether it's a State-to-State
2 dispute and it's based on a compromise or whether in
3 this instance, you know, it's based upon a consent
4 to arbitrate as evidenced in these specific Treaty
5 provisions.
6 ARBITRATOR ROWLEY: We are talking about
7 this case. It's an investor may not make a claim.
8 Are you affected at all by the words "an
9 investor may not make a claim" as opposed to words
10 such as "the Tribunal may not hear a claim made by
11 an investor"? Does that affect?
12 THE WITNESS: I don't think absent other
13 contextual factors--I'm not--I'm happy to be
14 forthcoming if you would--if you would share with me
15 sort of what's on your mind in terms of what turns
16 on this. Absent other contextual factors, I would
17 not make a great deal of this difference in formula
18 of words, but it might be meaningful in a broader
19 context if we had a sense of what, you know--what
20 underlying values or purposes of the system are at
21 stake.
22 ARBITRATOR ROWLEY: It's not so much--what

10:58:28 1 turns on it is I assume that you are giving expert
2 testimony on the prescription period, and you may
3 have considered this point, but I'm entirely happy
4 to leave it there.
5 THE WITNESS: Right. But as I say, I'm
6 aware of the point because it was explicitly
7 considered in the Feldman Case with respect to
8 NAFTA, and the Feldman Tribunal held that this did
9 go to jurisdiction, and all I'm saying is I'm not
10 sure, based upon my overall knowledge of
11 international law, whether as a general matter they
12 were basing themselves here on the specific
13 interpretation of the Chapter of NAFTA or whether
14 they felt that this was premised upon some more
15 structural principle or premise of international law
16 as it relates to the settlement of disputes.
17 I mean, we can--I mean, we can all read the
18 paragraph; and, in the European sense of the word,
19 it just doesn't seem to be motivated. It presents a
20 conclusion, but it's relatively short on the legal
21 reasoning and sources of that conclusion.
22 So, I have to say that this is a matter for

10:59:53 1 argument, and because of my overall view of
2 international law is not a highly formalistic one, I
3 think the answer is going to be contextual and
4 depend on what's at stake for each particular
5 regime.
6 PRESIDENT ORREGO VICUÑA: Right. Thank you
7 so much, Professor Howse.
8 Professor Dam has a question and a
9 follow-up.
10 ARBITRATOR DAM: I wanted to follow up on
11 the line of inquiry of Mr. Rowley.
12 Let us assume that the period of
13 limitation--the limitations period does then run
14 from a period of blockmailing which is established
15 under the circumstances he indicated. What would
16 then be open to the Claimant with regard to the
17 other aspects of the statutory scheme? Could
18 it--could a Claimant collect damages, assuming he
19 establishes his case, with regard to not cases or
20 instances of which there was no blockmailing
21 established? Or how broadly then could Claimant
22 base its claim? Presumably, it couldn't go back to

11:01:20 1 the statute itself, but could it attack the entire
2 administration of the statute because it could show
3 an act of blockmailing at one point for limitations
4 purposes?
5 In other words, does the basis for the
6 establishment of the limitations period have
7 implications for the scope of the relief available?
8 THE WITNESS: Yes, precisely for the scope
9 of the relief available in the sense that it's still
10 open to make a claim or make one's claim partly
11 based upon features of the scheme that may violate
12 obligations under the NAFTA. It's just that that,
13 you know, relief will be truncated. Due to the
14 operation of the limitation period, you will not get
15 relief with respect to the loss or damage you
16 suffered that you should have been aware of within,
17 you know, prior to the date established by the
18 limitation period. But to the extent that the
19 violations that have come from the scheme itself are
20 continuing and reinforced through its continued
21 administration and application, that certainly
22 still, you know, engages a State responsibility.

11:03:05 1 It's just that you can't go back and make a claim
2 that, you know, for damage or loss you should have
3 already known that you have suffered, you know,
4 prior to that, prior to that date.
5 ARBITRATOR DAM: Well, I could ask many
6 more detailed questions, but I don't think it would
7 be appropriate--having to do with just what you
8 said, but I don't think it would be appropriate at
9 this point. Thank you very much.
10 PRESIDENT ORREGO VICUÑA: Thank you. I
11 have a couple of questions in which I would like to
12 engage your help to try to clarify my own mind after
13 having read with great detail Professor Reisman's
14 and your own views and being generally interested in
15 the subject.
16 I can see quite clearly the two, say,
17 typical situations. A breach takes place before the
18 limitation period, say, let's call it the critical
19 date. It is a onetime act, it's exhausted, it ends
20 there. That is obviously beyond the possibility of
21 bringing a claim. It's before, and nothing was
22 done.

11:04:33 1 It is equally evident that if you have a
2 breach that comes after the critical date but within
3 the three years, say, that will follow, that will
4 fall within the jurisdiction, too. Those are the
5 two, I think.
6 Now, the area with which I am a bit
7 concerned is the one that bridges that critical date
8 going from before to after. There is first the
9 question of whether the kind of acts that had been
10 described as continuing acts, in some cases they
11 have been described also as composite acts. Whether
12 an act emerging from a measure that was taken before
13 the critical date but continues to be applied like
14 happens many times the critical date comes about,
15 and it continues to be applied.
16 Well, you expressed the view that every
17 time--the view that every time it's implemented, it
18 will amount to a breach because it's a fresh
19 situation, a fresh act, and so forth.
20 Now, a first question in that respect is
21 this: Would you agree or not agree with the idea
22 that the limitation period is renewed every time

11:06:15 1 that implementation takes place? Because that is
2 one of the concerns of Professor Reisman, that this
3 might be going on eternally if the limitation period
4 is postponed every time that there is a measure
5 adopted or implemented, and three years again and
6 three years and three years and three years, and it
7 never ends.
8 So, would you guess or would you believe
9 that that is appropriate or that in spite that it
10 might be a onetime occasion, it should not go on
11 forever?
12 THE WITNESS: Well, it sort of reminds me
13 of some venting that a friend of mine was doing
14 recently who was saying, you know, when will my wife
15 stop complaining about my snoring? And I replied,
16 well, when you stop snoring, she will stop
17 complaining.
18 And basically, you know, the reason that
19 the limitation period is renewed is that there is a
20 new wrongful act. And so, if you cease to engage in
21 internationally wrongful conduct, then your State
22 responsibility ceases. To the extent to which you

11:07:38 1 keep engaging an internationally wrongful conduct,
2 you will still attract State responsibility for the
3 conduct, just as my friend will continue to attract
4 complaints by his wife about his snoring until he
5 does something about it and stops it. And so,
6 that's basically the principle.
7 Now there is, however, another--there is
8 wording here we shouldn't forget, and this goes also
9 to my response to Professor Dam in saying that there
10 is State responsibility for each new breach. It's
11 still limited by the principle that, you know, that
12 the three years run when you acquired or should have
13 acquired knowledge of the alleged breach and the
14 loss and damage. So, let's take the case of the
15 continuing application of a statute.
16 If we have a situation like Grand River
17 where even though the statute might be continuing in
18 application, the exact nature of the breach and its
19 legal consequences, plus the exact damage or harm
20 should have been known within the three-year period,
21 the time bar still applies. It's not that as a
22 matter of the international law of State

11:08:51 1 responsibility that these aren't new breaches. They
2 are new breaches, but they should have been, you
3 know, as it were, you know, to the extent that
4 they're simply derivative from the legal framework
5 as completely know and determinate as well as the
6 losses being known and determinate and quantifiable
7 within that--before that three-year period, then
8 State responsibility will still be limited by or
9 truncated by the limitation period.
10 So, the situation where there will be
11 continuous State responsibility is where there is a
12 continuous breach, but the nature of the wrongful
13 act, the exact name of the wrongful act, plus the
14 exact nature of the loss or damage that flows from
15 it could not have been known prior to, you know,
16 that date.
17 PRESIDENT ORREGO VICUÑA: Yes. Well, I
18 have a second question relating to the same
19 discussion, which connects to a point you mentioned
20 earlier that the normal latitude of an investor will
21 not to be engaged in confrontation since the very
22 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."

11:12:05 1 Now, they bring the claim, fine, and then
2 the discussion pops up, but the question is this:
3 It is, I believe, evident that Article 1116(2)
4 requires a cumulative situation of first knowing
5 about the Act and an accumulation knowing about the
6 loss or the damage.
7 Now, say in this scenario I depicted to
8 you, if during the first part of the situation the
9 loss was known but it had not become unbearable,
10 that happens at a later point after the three years,
11 how do you take that situation into account as far
12 as the limitation period goes? You knew before of
13 both elements, but there is one which had not sort
14 of become manifest or unacceptable or whatever else.
15 Would that second situation allow the Tribunal to
16 hear the claim, if it's jurisdictional? How do you
17 see that sort of situation?
18 THE WITNESS: Well, let's answer on the
19 basis of a couple of different scenarios or
20 assumptions. One is that the only breach is the
21 actual framework or scheme and question as opposed
22 to there being distinctively wrongful acts, you

11:14:11 1 know, after the cutoff date that are in the context
2 of the application of the scheme. So let's take the
3 Grand River situation, okay, where the breach with
4 respect to--which there is concern about over the
5 limitation period, you know, relates to this
6 measure, alleged breach of, you know, requiring
7 deposits in escrow accounts. So, that's the breach.
8 And then the question is what about the loss or
9 damage from it?
10 And on your scenario, the Investor goes
11 through a learning process of just to what kind of
12 loss or damage they're actually having to confront?
13 At the beginning of the scenario, they're kind of
14 optimistic that, you know, there might not be much
15 loss or damage or that if the scheme is applied in a
16 certain way, they may actually be able to adapt
17 their business practices, and they might be able to
18 operate in this new environment without any
19 long-term loss or damage to their business.
20 And then later on, they actually find out
21 that the loss or damage is of a much different
22 magnitude and a much greater threat to the viability

11:15:45 1 of their business.
2 And I think the answer to the question of
3 whether the claim could be heard really comes in the
4 interpretation of the words here, and I think Grand
5 River is useful. I mean, why do they not know at
6 the outset of the magnitude and nature of the loss
7 or damage, its significance for their business? Did
8 they not know because of blind optimism or a failure
9 to hire appropriate experts to figure out the impact
10 on business operations of specific obligations in
11 the statute, or do they not know just because of the
12 inherent degree of uncertainty and imprecision in
13 the measure that you are describing that no
14 reasonable Investor would be able to go out and
15 really predict--a reasonable Investor, a reasonably
16 shrewd businessperson would not have been able to
17 predict or estimate anything like that nature or
18 magnitude of damage, you know, at the time at which
19 the measure was enacted; i.e., before the cutoff
20 date.
21 So, one would have to interpret those
22 facts, I think, very carefully. If they should have

11:17:14 1 had knowledge, not only it's not just a matter of
2 whether they acquired it but should have had
3 knowledge, which means that, okay, they were just
4 wildly optimistic. They made, you know, a bad call
5 that the Legal Framework was relatively precise, and
6 they should have gone out and gotten lawyers and
7 accountants and economists who would have told them,
8 look, if these very precise obligations are applied
9 to you over the next five years, you're
10 basically--or 10 years, they are going to drive you
11 out of business. That is clear and evident from the
12 framework that was in place, you know, before the
13 cutoff date. And if they say, oh, well, we don't
14 believe these people, they're pessimists, we are
15 just going with our gut feeling that it's all going
16 to work out okay," well, I would say, well, that the
17 meaning of should have first acquired means that a
18 reasonably prudent businessperson should have known
19 the kind of magnitude of loss or damage to their
20 business that would necessarily determinately result
21 from this framework at the time at which the
22 framework was enacted. And in some kinds of

11:18:24 1 instances like Grand River, the answer may be yes.
2 They should have known, it was quantifiable as the
3 Tribunal said, what burden this was going to impose
4 on their business, even though the burden would come
5 down the road; right? Six months or whatever down
6 the road. I mean, any reasonably shrewd
7 businessperson with the advice of a lawyer or
8 accountant would know what the burden is at the time
9 at which, you know, the framework is enunciated.
10 PRESIDENT ORREGO VICUÑA: One last question
11 that is connected to what you are now describing.
12 Does the idea or the concept that once the
13 Investor will know about the Act or the alleged
14 breach and the laws or damage, even if on
15 preliminary basis as a prudent investor and so
16 forth, does that mean that there is a legal dispute
17 at that stage, or could it be read to be a situation
18 that happened and only after the critical date the
19 Investor comes up and says, no, look, this is too
20 bad, I'm going to claim against it and so, and the
21 rest of the scenario follows?
22 Now, let me make a comparison for which I

11:20:08 1 will be hated by everybody in the room, but it will
2 help me and perhaps you. If this were the ICSID
3 Convention, which is it's not--I will just mention
4 it--the essence would be whether there is a legal
5 dispute. Events might have happened before a
6 particular treaty came into force, and that's fine,
7 they're all there and so forth, but what matters is
8 whether the legal dispute in which the parties were
9 engaged was before the Treaty in that example or
10 after. If it was after, it falls within the
11 jurisdiction, even if it connects to events that
12 were there before.
13 What happens in the NAFTA? Would that be
14 of any relevance, or would you say there is no
15 relevance at all; and irrespectively when you say
16 there was a legal dispute, the minute you knew about
17 the national intervention loss and the critical date
18 came, you are out? Would you care to elaborate on
19 that.
20 THE WITNESS: Well, it seems to me that it
21 would be very difficult, you know, to countenance a
22 claim based upon that--that did not fall within

11:21:45 1 1116(2) based upon importing a further assumption
2 that there may be situations where the--where even
3 though there was knowledge of the alleged breach and
4 of the loss and damage, there was not yet a legal
5 dispute.
6 And so, maybe the kind of situation you
7 might be alluding to, and I figured it has to do
8 with one particular aspect maybe of the Feldman Case
9 is where is--is where the Investor knows of the
10 breach and knows of the damage, but they claim
11 they're being in some sense led on by the Government
12 or State, that it's kind of sort of encouraging
13 them, you know, that the problem is going to be
14 solved, you know, we will fix it and so on.
15 And so, on that basis they delay, and so,
16 you know, even though they have knowledge of the
17 breach and the damage, they fail to file within the
18 time frame because they had been led to believe in
19 some sense that the Government is in the process of
20 correcting the problem.
21 Is that the kind of scenario you're
22 thinking of? Well, you know, I would just consider,

11:23:22 1 you know, the way in which the Feldman Tribunal
2 analyzed that particular kind of problem, and in
3 particular its discussion of whether there could be
4 an estoppel of some sort, you know, set up. If the
5 Government or the State makes representations that
6 the problem is going to be corrected that caused the
7 Investor to believe there no longer is a legal
8 dispute and therefore they delay beyond the
9 limitation period in bringing proceedings, can they
10 now bring proceedings based upon, you know, setting
11 up a kind of estoppel that the State is estopped
12 from strictly relying on the limitation period as a
13 defense by virtue of the fact of having made
14 representations on which the Investor relied that
15 caused them to delay bringing proceedings.
16 And I think it's fair to say that the
17 Feldman Tribunal gave a very limited play to the
18 possibility of there being an estoppel. And again,
19 the facts and the law are often very connected. And
20 so my sense is the Tribunal wasn't persuaded in
21 Feldman that whatever the Government represented
22 constituted the kind of representation that could

11:24:53 1 create that kind of reliance interest and could
2 essentially, you know, toll or top the limitation
3 period from running. It doesn't mean there couldn't
4 be an egregious case of bad faith where, you know, a
5 tribunal would think it's necessary, you know, to
6 remedy that bad faith or misrepresentation that
7 induces the Investor to believe that the dispute
8 isn't solved or not to bring a claim within the
9 limitation period.
10 There might be facts where that are so
11 egregious that a tribunal would say that, indeed,
12 you know, the correct interpretation is that by its
13 behavior the State has forfeited the ability to use
14 a time bar as a defense in this particular instance
15 because we always have to remember that
16 international legal obligations are to be
17 interpreted and applied in good faith.
18 An example of bad faith will often, I
19 think, provoke a tribunal to want to seek, you know,
20 a remedy.
21 PRESIDENT ORREGO VICUÑA: Thank you so
22 much, Professor Howse.

11:26:21 1 And I think we are now ready to close down?
2 Questions arising further?
3 MS. TABET: No, I believe we will address
4 Mr. Howse's comments in argument.
5 MR. APPLETON: I have one brief question
6 arising out of the question that--actually the very
7 first question made by Mr. Rowley. I have been
8 patiently waiting to get this one in.
9 FURTHER REDIRECT EXAMINATION
10 BY MR. APPLETON:
11 Q. It was a very interesting question to me,
12 and it's the question if I can just take you back
13 through all of this, I'm going to ask you to assume
14 something. It's a question about the WTO
15 consistency of the Regime. So, Professor Howse,
16 could you just assume that the provision of low-cost
17 logs to Canadian domestic sawmill from Private
18 Forest Landowners was considered to be a financial
19 contribution? I know that's an issue, so let's just
20 assume that. And the products of those Canadian
21 domestic mills were exported to another country.
22 Doesn't make any difference what country. It's just

11:27:38 1 exported. Could that provision of low-cost wood
2 constitute a WTO inconsistent export subsidy by
3 Canada?
4 A. Yes, I think that's definitely possible,
5 depending upon the facts, and that's possible
6 because the jurisprudence is clear that both de
7 facto and de jure export subsidies, you know, are
8 prohibited under the WTO Law.
9 MR. APPLETON: Great, I have nothing
10 further. Thank you very much.
11 MS. TABET: A brief follow-up question.
12 RECROSS-EXAMINATION
13 BY MS. TABET:
14 Q. Mr. Howse, log export controls are
15 specifically allowed under Chapter Three of NAFTA,
16 aren't they?
17 A. Yes, and I believe that's why Mr. Rowley
18 was very clear to frame his question in terms of the
19 situation outside of any--outside of NAFTA. My
20 understanding is he wanted to know about what the
21 law would be but for the provisions of NAFTA that
22 address this specifically.

11:28:58 1 Q. And in your view, does this Tribunal have
2 jurisdiction to deal with WTO issues, Mr. Howse?
3 A. I do not--I mean, jurisdiction to deal with
4 those issues, well, if you're asking is the WTO Law
5 the governing law, the answer is no, except to the
6 extent that WTO Law has been incorporated in various
7 provisions of NAFTA, which it has. And I think part
8 of the reason that there is that specific provision
9 that addresses these kinds of export restraints is
10 that the general WTO rules with respect to, you
11 know, prohibitions and restrictions on exportation
12 have been essentially incorporated into NAFTA.
13 Q. But for the purpose of determining whether
14 log export controls are legal, this Tribunal should
15 consider only NAFTA law, shouldn't it?
16 A. Whether the controls are legal?
17 Q. Whether log export controls are a
18 breach--what this Tribunal has to concern itself
19 with is whether the NAFTA provisions allow log
20 export controls.
21 A. Which claim of the Investor are you
22 referring to here?

11:30:19 1 Q. I'm following up on the discussion about
2 the validity of log export controls.
3 A. So--I see. So, what you're asking is if an
4 investor in a hypothetical case were to come before
5 a NAFTA Chapter Eleven Tribunal and instead of in
6 its claim stating that there has been a violation of
7 an operative provision of NAFTA where instead to
8 state the claim that there has been an operative--a
9 violation of an operative provision one of the WTO
10 covered agreements, would the Tribunal have
11 jurisdiction over that claim? I think the answer in
12 such a hypothetical case is no, that the Investor or
13 their counsel would have made a mistake. If you're
14 asking could or should a NAFTA Tribunal consider the
15 legality under the WTO where it's relevant to
16 adjudicating a claim of a violation or breach of the
17 NAFTA, yes. If it were relevant, to--
18 Q. And how could it be relevant to determine
19 the WTO whether log export controls are a violation
20 of WTO Law in the context of a NAFTA Tribunal?
21 A. Well, one would have to examine a specific
22 claim of a breach of the NAFTA. And if he were to

11:31:50 1 refer me to a specific claim of a breach of an
2 operative provision of the NAFTA where this
3 might--where WTO Law might be relevant, I could
4 discuss the relevance. It really depends upon what
5 the claim is of a breach of the NAFTA. That's why
6 the NAFTA is the governing law.
7 But I certainly don't think that it's in
8 principle impossible that a view of whether there
9 has been a breach of the NAFTA might be affected by
10 whether or not another agreement or another
11 international legal rule has been violated. There
12 might be some relationship. It all depends upon,
13 you know, the operative provision of the NAFTA that
14 one is adjudicating. So, if you tell me what the
15 operative provision is and say, okay, do I think
16 that WTO consistency could possibly come into
17 appropriately interpreting X or Y clause of NAFTA, I
18 would give you an opinion.
19 So, I think in some instances it might be
20 relevant, and as I say, there are some cases where
21 GATT or WTO obligations have essentially been
22 incorporated into NAFTA.

11:33:14 1 Q. Okay. I will read you Annex 301(3) of the
2 NAFTA that says: "Articles 301 and 309 shall not
3 apply to controls by Canada on the export of logs of
4 all species."
5 In your view, in that context, should there
6 be consideration of a NAFTA Tribunal of WTO Law with
7 respect to export controls?
8 A. Well, I think that provision narrowly
9 applies only to say that the specific operative
10 provisions in question, you know, that you can
11 maintain such a scheme, notwithstanding those
12 specific provisions.
13 So, if there were--I don't think this
14 applies in Investor-State dispute settlement. If
15 there were a State-to-State case where a claim was
16 being brought under what is it?--301 and what is the
17 other?
18 Q. It's 309.
19 A. Yeah. If a claim was being brought of a
20 violation of those provisions of NAFTA, then, you
21 know, a defense against those provisions would be
22 the exception you're mentioning.

11:34:28 1 But by its very terms, the exception only
2 speaks to situations where the claim is based upon
3 the specific operative provisions of NAFTA to which
4 it is stated as an exception. It doesn't say that
5 that export controls are legal notwithstanding
6 anything in NAFTA, like the language of, say,
7 Article 20 of the GATT, notwithstanding anything in
8 this agreement, this is permitted. It says--you
9 know, they're only permitted not--that they're
10 permitted notwithstanding these two particular
11 operative provisions of Chapter Three. It speaks
12 nothing to whether one could bring this in a
13 relevant case concerning Chapter Eleven of NAFTA as
14 opposed to Chapter Three.
15 Q. Thank you, Mr. Howse.
16 PRESIDENT ORREGO VICUÑA: Thank you,
17 Professor Howse. We appreciate your participation,
18 and you are now excused.
19 (Witness steps down.)
20 PRESIDENT ORREGO VICUÑA: We are ready to
21 proceed with a few housekeeping matters, but we will
22 deliberate for a minute.

11:38:53 1 (Tribunal conferring.)

2 PRESIDENT ORREGO VICUÑA: Right. Well,

3 thank you so much.

4 We were discussing a few thoughts for

5 tomorrow.

6 Well, first, I take it that you have agreed

7 to have your time split in, say, up to

8 two-and-a-half hours for the main presentation and

9 reserving one half hour for the points that you

10 would like to clarify or develop later; is that

11 understood?

12 MS. TABET: Yes.

13 MR. APPLETON: My understanding was a

14 little different. I thought it was three hours; you

15 could reserve up to half hour, but you know I'm

16 happy to just do that. That's very practical and

17 simple, and it makes logistics simple, too.

18 PRESIDENT ORREGO VICUÑA: Yes. Now, the

19 second thought related to that is those are

20 maximums. If someone uses two hours instead of

21 two-and-a-half hours, the surplus is not cumulative

22 to what comes next, just to avoid that, oh, I only

11:44:45 1 half an hour more, no, no. Up to two-and-a-half and
2 up to half. That's important.
3 Now, the questions that we would like you
4 to address in particular, we assume, of course, that
5 you will be addressing the whole spectrum of the
6 major issues. That goes without saying. But within
7 that, if you could further elaborate as much as you
8 wish on two Articles in particular, Article 1116 and
9 the critical date and the question of the time
10 limitation and so, on the one hand; and, on the
11 other one, 1105 as a specific kind of standard and
12 eventual breach.
13 And for that, it would be useful if you
14 could identify each of the measures of
15 implementation or so that you considered that are in
16 violation of that Article and why; and, of course,
17 the aggregate of the whole number of individual
18 measures so as to have a view both of the individual
19 and of the total. And relate all of that to
20 Article 1105 as you see that it is relevant to
21 understand precisely which is the nature and the
22 extent of the breach you are putting forth or

11:46:33 1 defending against.

2 But, I mean, there is not that you have to

3 concentrate on that, but it would be interesting to

4 have some further thoughts on that, if those areas

5 have come up a number of times, and then we would

6 like to be more clear about it.

7 Okay?

8 MS. TABET: Thank you for that guidance.

9 PRESIDENT ORREGO VICUÑA: No complaints?

10 MR. APPLETON: You just made our life much

11 easier. No problem. Any other guidance you want to

12 give us, we're very happy to take.

13 PRESIDENT ORREGO VICUÑA: This is just to

14 recall however we organize the time tomorrow, we are

15 certainly beginning at 9:00, but particularly that

16 we have to close shortly before 4:00. So, however

17 we organize our breaks or lunch or so, then we would

18 have to do that.

19 And we have the time, if you add three and

20 three at the most, it's six, that would mean, say,

21 nine to three, and if we take a break and a short

22 break for lunch or so, that should do it, but just

11:48:14 1 to keep that in mind because it's an important
2 thought.
3 MR. APPLETON: Mr. President, if I could
4 just go through the timing with you for a moment
5 because I think it will affect. If we were to
6 assume that each side is to speak for two-and-a-half
7 hours of that allocation just for the sake of
8 planning and we started at 9:00 and we had no
9 procedural motions, so we go from nine to 11:30,
10 presumably without a break. If we had a break, I
11 would suggest that be the lunch break.
12 PRESIDENT ORREGO VICUÑA: It could be.
13 MR. APPLETON: Is that possible or not.
14 Okay, we might have a five-minute break in there.
15 And then let's say we went for a 45-minute
16 lunch, which then let us start at 2:15, that
17 would--sorry, 12:15. Take a short lunch break at
18 11:30. That would then let us come back at 12:15.
19 12:15 for two-and-a-half hours--
20 PRESIDENT ORREGO VICUÑA: No, no, not
21 two-and-a-half hours.
22 MR. APPLETON: Sorry. No, no, no, I will

11:49:20 1 try this again slowly.
2 Because I am just saying as the math comes
3 together, it's very difficult to get you to 4:00
4 p.m. unless we're very diligent. Two-and-a-half
5 hours goes from nine to 11:30. Then I'm suggesting
6 that there be a 45-minute lunch break, and the
7 reason for that is that if we go at 12:15 and then
8 go for two-and-a-half hours, that takes us to 2:45.
9 PRESIDENT ORREGO VICUÑA: Correct.
10 MR. APPLETON: Each side still has 30
11 minutes of responsive time, which would take us then
12 with no breaks between to 3:45, and you want to have
13 a 4 p.m., so all I'm pointing out is lunch would
14 need to be shorter. We would need to be careful
15 about break time on that schedule. That's all.
16 PRESIDENT ORREGO VICUÑA: Absolutely. You
17 can eat less tomorrow and this will be quite all
18 right.
19 That also means then that if I finish any
20 earlier, we have to adjust to have an earlier lunch
21 so that we get--
22 PRESIDENT ORREGO VICUÑA: That will

11:50:24 1 probably depend on the caterer, not on the Tribunal.
2 MR. APPLETON: All right. I want everyone
3 to be perfectly clear.
4 (Tribunal conferring.)
5 PRESIDENT ORREGO VICUÑA: Well, we have
6 considered further the situation of the time
7 allocation, and we would like to suggest the
8 following: To begin earlier tomorrow, 8:00, so that
9 we would follow from eight to 1:30--8:00 to 1:00,
10 sorry, and that would be the five hours with a very
11 short break in between, and that would put the
12 central part of the closings on the record.
13 And then to have the short lunch and the
14 short period of further comments, and all of this is
15 because it's eventually necessary for the Tribunal
16 to make some questions as well. And then if we
17 follow the very strict schedule that we have figured
18 out, we might be a bit short of that and then start
19 running around.
20 Do you have any problem with 8:00?
21 MR. APPLETON: We appreciate the Tribunal's
22 suggestion. My preference would be to start at 9:00

11:53:36 1 in the morning, and my sense is that I think we can
2 keep to the schedule, and I appreciate the sense of
3 dealing with this. I was just pointing out that we
4 had to be tight on our time. But, of course, the
5 determination is yours, but we would--my preference
6 would be to start at 9:00 as we had scheduled.
7 PRESIDENT ORREGO VICUÑA: Yes--no, I think
8 everyone's preference would be to start at 9:00.
9 Now, the problem is that we don't want
10 anyone to rush around. I think it's better to do it
11 with great calm, and everyone will say whatever it
12 wants to do leisurely, and then the Tribunal, if
13 there are questions, no one rushing, and we will end
14 certainly before 4:00 because that is a must, and
15 David will stop typing at 3:55.
16 Okay. Thank you very much. 8:00 tomorrow,
17 then.
18 (Whereupon, at 11:46 a.m., the hearing was
19 adjourned until 8:00 a.m. the following day.)
20
21
22

CERTIFICATE OF REPORTER

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

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

____

DAVID A. KASDAN