

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

BETWEEN:

MERRILL & RING, L.P. ("Merrill & Ring")

Investor

AND

GOVERNMENT OF CANADA ("Canada")

Party

**INVESTOR'S OBSERVATIONS ON
PRELIMINARY OBJECTIONS**

Appleton & Associates International Lawyers
77 Bloor St. West, Suite 1800
Toronto, ON M5S 1M2
Tel: (416) 966-8800
Fax: (416) 966-8801

1. Canada seeks to have some contentions about the Investor's claim, which it included in its Statement of Defense, determined on a preliminary basis, in advance of a full hearing on the merits of the claim.
2. For the following reasons, Canada's position is untenable and inappropriate:
 - a. Canada's contentions are based on a misapprehension and mischaracterization of the Investor's claim:
 - i. Canada's position on timeliness under Article 1116(2) inaccurately restates the Claim as a challenge to only one federal measure -- Notice to Exporters 102 (Notice 102);
 - ii. Canada omits any reference to the specific measures that have been taken within the three year period immediately pre-dating the submission of the Arbitration Claim on December 27, 2006 or to those measures which are continuing today; and
 - iii. The Investor's Claim does not challenge the British Columbia *Forestry Act*.
 - b. In any event, the issues raised by Canada's objections are so intertwined with factual issues relating to the merits that they cannot be properly determined on a preliminary application, and can only be joined to the merits for a fair adjudication in the context of all the facts.
3. The Investor's claim challenges both measures that occurred after December 27, 2003, and measures that began before December 27, 2003 but that are still continuing. Canada thereby misapprehends the claim when it asserts that it is only about the application of Notice 102.
4. To assist the Tribunal, the Investor has prepared a Statement of Particulars which it has appended as an annex to these observations. The Statement of Particulars reviews the timeframe related to Canada's measures raised in this claim and provides examples based on the evidence available to the Investor at this time. This Statement is set out as Annex "A".
5. It is important to note that international law is clear that time limit rules, like those in NAFTA Article 1116(2), do not operate to prevent claims against wrongful governmental measures that are still continuing.
6. This Tribunal should be aware that Canada made the same argument about the meaning of NAFTA Article 1116(2) in *UPS v. Canada*. The *UPS* NAFTA Tribunal specifically

rejected Canada's time limitations arguments in Article 1116(2) on the basis of the international law or continuous breaches. The *UPS* Tribunal found that continuous government measures, first enacted more than six years before that submission of the claim to arbitration and well-known to the Investor, were within the jurisdiction of a NAFTA Chapter 11 tribunal, and were not barred by the operation of NAFTA Article 1116(2).

I. MISCHARACTERIZATION OF THE CLAIM

A. Mischaracterization of Breach Alleged in the Investor's Claim

7. Canada asserts that the Investor's claim challenges one federal measure - namely the Department of Foreign Affairs and International Trade's Notice to Exporters Number 102. Canada's assertion is not correct.
8. The Claim actually challenges measures taken by the Government of Canada since December 26, 2003. The Investor challenges both continuing measures that began before this time but are continuing today as well as non-continuing measures that occurred solely after this time. These measures relate to the Investment and have resulted in restrictions on the Investor's ability to operate, manage and conduct its operations. These measures are wholly inconsistent with Canada's obligations set out in Section A of NAFTA Chapter 11. All of these measures have occurred within three years of the issuance of the Investor's claim which was done on December 27, 2006.
9. The Investor provides examples of these measures in Annex A to this Submission. The Investor anticipates that the information request process in this arbitration will provide additional evidence of measures taken by Canada since December 27, 2006 that will be relevant to the determinations that need to be made by this Tribunal.
10. The Investor does not seek damages for any measure taken by Canada before a period of three years prior to the submission of this claim to arbitration. Indeed, all damages sought are for measures taken within the three year period or for harm caused after that time arising from Canada's continuing actions that violate the NAFTA.

B. Mischaracterization of the Claim Regarding the BC *Forestry Act*

11. Canada argues that the Tribunal has no jurisdiction over a claim challenging the BC *Forestry Act* because the Act does not relate to the Investor, as required by NAFTA Article 1101.¹ The Investor has never raised a challenge to the *Forestry Act*.

¹ Canada's Statement of Defense at paras. 58 - 60.

12. The Investor has challenged Canada's discretion to apply various provincial measures on an *ad-hoc* basis to British Columbia-based private timberland owners who are regulated by the Canadian federal government. In addition, the Investor has challenged Canada's unfair practice of permitting export exemptions to those eligible under the BC *Forestry Act* when it does not extend the same treatment to private timberland owners subject to federal regulation.²
13. Although some British Columbia government measures are involved in the complex factual mix at issue in this case, they have not been challenged by the Investor in this arbitration. It is Canada's adoption of these measures by its Department of Foreign Affairs and International Trade in its application of its log export control measures that is squarely at issue.

II. OBJECTIONS INTERTWINED WITH MERITS ARE UNSUITABLE FOR PRELIMINARY DETERMINATION

14. The UNCITRAL Rules, which govern this arbitration, enable the Tribunal to defer its consideration of Canada's objections to its consideration of the merits of the dispute. Article 21(4) of the UNCITRAL Rules states:

In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.³

15. The NAFTA Chapter 11 Tribunal in *Feldman v. Mexico* exercised the same powers under the ICSID Additional Facility Rules to defer to the merits stage of the dispute its consideration of Mexico's objection that the claim was time barred. The Tribunal deferred a determination of the issue because it required "a substantial analysis of facts."⁴

² See Merrill & Ring Notice of Intent at para. 24: "DFAIT's refusal to allow standing timber exemptions on the same terms as those available to provincially regulated landowners violates NAFTA Chapter 11 provisions ...;" Statement of Claim at para. 37: "... private timber companies are treated more favorably than Merrill & Ring. The private timber companies benefit from standing timber exemptions that are not available to Merrill & Ring;" Notice of Arbitration at para. 10: "This regime is administered in an arbitrary and discriminatory manner that allows the Investor's competitors to benefit from exemptions that are denied to the Investor ...;" and para. 28: "... DFAIT's application of the Federal Surplus Test violates NAFTA Article 1102 by treating Merrill & Ring and its investments less favorably than certain investors and investments in British Columbia subject to provincial regulation. It does so by denying Merrill & Ring exemptions that are available to exporters from provincially regulated lands."

³ UNCITRAL Arbitration Rules, Tab 30.

⁴ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues; 2000 WL 34535548 (December 6, 2000), Tab 33 at para. 49.

16. This Tribunal should similarly exercise its power under Article 21(4) to defer a determination on Canada's contention that the claim is time barred until it has had a full opportunity to assess all the facts of the claim, and to make its determination in that context. Just like in *Feldman*, consideration of Canada's contention requires a substantial analysis of the facts.
17. To illustrate more clearly why Canada's timeliness contention cannot be determined without a substantial analysis of the facts relevant to the merits of the case, we attach, as an annex, a general outline of the Investor's position on the merits of Canada's timeliness contention. (Annex "B").
18. The Tribunal cannot rule on Canada's objection without ruling whether Canada's acts are still continuing today. Such a ruling requires a substantial analysis of those acts.
19. There are also evidentiary and factual issues relating to the kind and nature of conduct that may amount to both continuing and fresh applications of a measure for the purpose of Article 1116(2).
20. In general, this claim requires a careful fact-based examination of breaches of Canada's obligation to provide treatment in accordance with international law, including fair and equitable treatment and full protection and security. One aspect of this part of the claim, for example, includes measures addressing Canada's appointment of non-impartial persons for the purpose of exercising discretionary powers with respect to the Investments at issue in the claim. As this aspect of the claim relates to specific appointments, contextual evidence is necessarily required to assess the timeliness of the claim.
21. Since the Tribunal needs to consider Canada's contentions in light of a full assessment of the merits to enable it to dispositively rule on them, holding a preliminary proceeding that cannot so enable it to do so is neither expeditious nor practical, and would be greatly prejudicial to a full and fair hearing of the claim.

III. RELIEF SOUGHT

22. The Investor requests that the Tribunal does not dedicate a preliminary phase to hear Canada's objections but hears those objections with its consideration of the evidence during the merits hearing of the claim.

All of which is respectfully submitted.

Submitted this 9th day of November, 2007.

A handwritten signature in cursive script, appearing to read "Barry Appleton", written over a horizontal line.

Barry Appleton
for Appleton & Associates International Lawyers
Counsel for the Investor, Merrill & Ring, L.P.

ANNEX A

STATEMENT OF PARTICULARS PROVIDING EXAMPLES OF GOVERNMENT MEASURES CHALLENGED IN THE NAFTA CLAIM

1. The Investor hereby sets out examples of particulars regarding measures at issue in this arbitration. The purpose of this Statement of Particulars is to address timeline concerns. All of the issues raised in this Statement will need to be properly determined by the Tribunal based on evidence to be adduced at a hearing in this arbitration.

I. Non-continuing measures since December 27, 2003

2. Merrill & Ring challenges four categories of non-continuing measures that have occurred since December 27, 2003. Specific examples of measures from each of these categories was set out with particularity within the pleadings already filed by the Investor. These four categories of non-continuing measures are as follows:

- a. Each time since December 27, 2003 that Canada has provided export permission for logs produced from British Columbia Timber Sales lands in a manner more favourable than persons, like the Investor, seeking export permission for logs produced from private pre-March 12, 1906 forest lands;¹
- b. Each time since December 27, 2003 that Canada has used its discretion to grant standing timber exemptions to landowners subject to provincial regulation, but failed to grant such exemptions to land owners subject to federal regulation;²
- c. Each time since December 27, 2003 that Canada has required Merrill & Ring to follow specific requirements in order to apply for an export permit under Notice 102.³
- d. Each time since December 27, 2003 that Canada has administered the Federal Surplus Test unfairly, including the following examples:
 - i) on each occasion after December 27, 2003 that Merrill & Ring applied for an export permit under Notice 102, requiring Merrill & Ring to undergo

¹ See Merrill & Ring Statement of Claim at para. 35: "BCTS is treated more favorably than Merrill & Ring."

² See Merrill & Ring Statement of Claim at para. 35: "The Province of British Columbia grants standing timber exemptions to provincial Crown land that are not available to federally-regulated land. For example, in 2002, Order in Council No. 121 exempted timber originating within the Prince Rupert Forest Region. This exemption allowed up to 35 per cent of the logs harvested in the timber supply area to be automatically exported for a period of three years."

³ See Merrill & Ring Notice of Intent at para. 20: and Statement of Claim at para. 51, listing **C-1(b)(ii)**

C-1(b)(ii) successfully blocking export of Merrill & Ring's logs in 2004, 2006 and 2005, respectively.

arbitrary requirements;⁴

- ii) allowing 'blockmailing' since December 27, 2003;⁵
- iii) allowing non *bona fide* purchasers to block logs from export since December 27, 2003, including failing to reject a bid by Interfor in 2005, even though Interfor was using Canadian logs in its US mills, and failing to reject C-1(b)(ii) bids since December 27, 2003, even though C-1(b)(ii) and C-1(b)(i) and C-1(b)(iv) which regularly purchases logs for export to Japan;
- iv) appointing people with apparent conflicts of interest to sit on the FTEAC since December 27, 2003, including the appointment of Jim Probyn on February 6, 2004, and Thomas Pierre on January 14, 2005;
- v) allowing the blocking of decisions to block Merrill & Ring's exports of the following rafts without explaining the criteria on which those decisions were based:

Raft	Blocking company	Sale date
MRE-4-97-476	C-1(b)(ii) and C-1(b)(iv)	
MRM-4-97-731		
MRT-4-97-203		
MRS-5-97-222		
MRT-5-97-334		
MRT-5-97-319		

- vi) failing to provide an appeal or review procedure for the same decisions.

⁴ See Merrill & Ring Statement of Claim at para. 49: "In 2004, Merrill & Ring paid Welco Lumber Co. over US\$16,000 in compensation for toredo damage, an insect infestation that occurs when logs remain in water for extended periods of time."

⁵ See Merrill & Ring Notice of Intent at para. 25 and Statement of Claim at para. 50: "Domestic purchasers abuse their ability to block the export of logs for their own benefit".

II. Continuing measures

3. Merrill & Ring has raised challenges to four continuing measures within its pleadings, namely:
 - a. Canada's preferential treatment of log export requests for logs produced from lands managed by British Columbia Timber Sales in comparison to requests for logs produced from federally regulated timberlands, such as those owned by Merrill & Ring;⁶
 - b. Canada's preferential granting of standing timber export exemptions to landowners subject to provincial regulation, without providing the same exemptions to landowners subject to federal regulation;⁷
 - c. Canada's continued application of Notice 102.⁸
 - d. Canada's unfair administration of the federal surplus test⁹ by:
 - i) applying arbitrary time and sort requirements;¹⁰
 - ii) encouraging 'blockmailing' by bidders to obtain concessions;¹¹

⁶ See Merrill & Ring Statement of Claim at para. 35: "BCTS is treated more favorably than Merrill & Ring."

⁷ See Merrill & Ring Notice of Intent at para. 24: "DFAIT's refusal to allow standing timber exemptions on the same terms as those available to provincially regulated landowners violates NAFTA Chapter 11 provisions ...;" Statement of Claim at para. 37: "... private timber companies are treated more favorably than Merrill & Ring. The private timber companies benefit from standing timber exemptions that are not available to Merrill & Ring;" Notice of Arbitration at para. 10: "This regime is administered in an arbitrary and discriminatory manner that allows the Investor's competitors to benefit from exemptions that are denied to the Investor ...;" and para. 28: "... DFAIT's application of the Federal Surplus Test violates NAFTA Article 1102 by treating Merrill & Ring and its investments less favorably than certain investors and investments in British Columbia subject to provincial regulation. It does so by denying Merrill & Ring exemptions that are available to exporters from provincially regulated lands."

⁸ See Merrill & Ring Notice of Intent at para. 28: "Canada has acted in a continuous manner inconsistent with at least five provisions of the NAFTA through the perpetuation, operation and administration of the surplus testing procedures for log exports in British Columbia since at least January 2004;" Statement of Claim at para. 39: "Private landowners in other Canadian provinces are treated more favorably than Merrill & Ring;" Notice of Arbitration at para. 27: "Timber land owners in other Canadian provinces may export logs harvested from these lands without meeting the requirements of the Federal Surplus test. As a result, Merrill & Ring and its investments in British Columbia receive less favorable treatment ..."

⁹ See Merrill & Ring Notice of Intent at para. 26: "The arbitrary and unfair administration of the log export regime violates Canada's obligations under NAFTA Chapter 11 ...;" and para. 28: "Canada has acted in a continuous manner inconsistent with at least five provisions of the NAFTA through the perpetuation, operation and administration of the surplus testing procedures for log exports in British Columbia since at least January 2004;" Statement of Claim at para. 45: "Canada fails to provide Merrill & Ring with the international law standard of treatment through the operation of six measures: ...;" Notice of Arbitration at para. 10: "This regime is administered in an arbitrary and discriminatory manner that allows the Investor's competitors to ... abuse export permit procedures."

¹⁰ See Merrill & Ring Notice of Intent at para. 25: "The time frame required for FTEAC to administer the federal surplus test is arbitrary and unfair;" Statement of Claim at para. 49: "The time frame and sort requirements required for FTEAC to administer the Federal Surplus Test are arbitrary and unfair."

- iii) encouraging non *bona fide* purchasers to block logs from export;¹²
- iv) allowing FTEAC's members' conflicts of interest to continue unchecked;¹³
- v) allowing decisions that are not transparent;¹⁴
- vi) allowing decisions based on unknown criteria;¹⁵ and
- vii) failing to provide procedures for appeal or review of decisions.¹⁶

¹¹ See Merrill & Ring Notice of Intent at para. 25 and Statement of Claim at para. 50: "Domestic purchasers abuse their ability to block the export of logs for their own benefit."

¹² See Merrill & Ring Notice of Intent at para. 25: "... FTEAC permits purchasers to submit non *bona fide* offers;" Statement of Claim at para. 48: "FTEAC permits domestic purchasers to submit non *bona fide* offers."

¹³ See Merrill & Ring Notice of Intent at para. 25: "The composition of FTEAC results in procedural unfairness. Many of the members of FTEAC are domestic log processors. In addition, some of the members of FTEAC are competitors of the potential log exporter. This means that decisions on offers are made in part by individuals who have a direct interest in obtaining lower cost logs or by competitors;" Statement of Claim at para. 46: "The members of FTEAC include **C-1(b)(iv)** which either export logs from British Columbia, process logs in British Columbia, or both."

¹⁴ See Merrill & Ring Notice of Intent at para. 25 and Statement of Claim at para. 47: "There is no transparency or legal security in the FTEAC administrative process."

¹⁵ See Merrill & Ring Notice of Intent at para. 25 and Statement of Claim at para. 47: "The federal government does not provide exporters with the criteria considered by FTEAC or DFAIT in making their determinations."

¹⁶ See Merrill & Ring Notice of Intent at para. 25 and Statement of Claim at para. 47: "There is no codified process for appeal or review of an FTEAC recommendation."

ANNEX B

SUMMARY OF INVESTOR'S POSITION ON THE MERITS OF CANADA'S TIMELINESS OBJECTION

1. The Investor provides this summary of the law to assist the Tribunal in its consideration of how to address Canada's preliminary objections. This summary sets out the legal infrastructure the Tribunal will need to apply to its determination of the evidence after it has had a chance to consider it.

THE LAW RESPECTING NAFTA ARTICLE 1116(2)

I. THE INTERNATIONAL LAW PRINCIPLE OF CONTINUOUS BREACH

2. NAFTA Article 1116(2) states:

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

3. NAFTA Article 1137(1)(c) provides that "[a] claim is submitted to arbitration under this Section when the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party."¹ Canada received Merrill & Ring's Notice of Arbitration on December 27, 2006. Consequently, Article 1116(2) bars the claim if Merrill & Ring first acquired, or should have first acquired, knowledge of the breach and knowledge that it incurred damage before December 27, 2003.
4. NAFTA Article 1116(2) does not bar the claim because the Investor only challenges Canada's measures occurring after December 27, 2003. Since the measures occurred after December 27, 2003, the Investor first acquired knowledge of the breach caused by those measures, as well as the Investor's damages, after that date, consistent with this article.
5. The Investor only challenges Canada's measures occurring after December 27, 2003 because the Investor only challenges:
 - a. measures that began before December 27, 2003, but are continuing today; and
 - b. non-continuing measures occurring entirely after December 27, 2003.

¹ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 2000 WL 34535548 (December 6, 2000), Tab 33 at para. 44 confirms that the receipt of the Notice of Arbitration interrupts the running of the limitation period for the purposes of Article 1116(2).

6. The breaches alleged in the claim occurred after December 27, 2003. The damages sought in this claim flow from these alleged breaches of Canada's NAFTA obligations. Accordingly, the claim as asserted is properly within the requirements of NAFTA Article 1116(2).
7. International law is clear that time limit rules, such as the one expressed in NAFTA Article 1116(2), do not operate to prevent the making of claims against wrongful governmental measures that are still continuing. For example, the *UPS* NAFTA Tribunal applied the international law principle about continuous breaches to reject Canada's objection that continuous government measures, first enacted more than six years before the submission of the claim and well-known by that Investor, were outside the jurisdiction of a NAFTA Chapter 11 tribunal and were barred through the operation of NAFTA Article 1116(2).

II. CANADA BREACHED THE NAFTA THROUGH MEASURES THAT ARE CONTINUING TODAY

8. Canada breaches the NAFTA through four measures that began before December 27, 2003, but are continuing today. These claims are consistent with Article 1116(2) because time limit provisions, such as Article 1116(2), do not bar claims challenging acts that are still continuing.

A. Time Limit Provisions Do Not Bar Claims Challenging Continuing Acts

9. The International Law Commission has confirmed that time limit rules do not prohibit claims challenging acts that are still continuing because time limits only begin at the end of a continuing act.²
10. Professor Joost Pauwelyn confirmed this principle in his *British Yearbook of International Law* study of continuing acts. In that study he stated that "[t]he general principle is that a claim can only be inadmissible on the ground of lapse of time once the breach has ceased to exist, that being the earliest date from which any time limit can possibly start to run."³
11. NAFTA tribunals have consistently applied the principle identified by the International Law Commission and Professor Pauwelyn. In dismissing Canada's argument that claims

² *International Law Commission Report* on its 30th Session (1978), Tab 34 at 91, n. 437:

... in the case of a 'continuing' wrongful act, however, this *dies [a quo]* of the time limit] can be established only after the end of the time of commission of the wrongful act itself.

³ The Concept of a "Continuing Violation" of an International Obligation: Selected Problems, Professor Joost Pauwelyn, 66 *British Yearbook of International Law* 415 (1996) Tab 35 at 431.

challenging legislation enacted more than six years before the submission of the claim were time barred under Article 1116(2), the *UPS* Tribunal said:

... continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law and Canada has provided no special reason to adopt a different rule here.⁴

12. The *Feldman* NAFTA Tribunal reached the same conclusion. In that case, the Tribunal considered a claim that Mexico had breached its NAFTA obligations by failing to rebate tax expenses to the investor. Mexico first refused to rebate the taxes in 1990, but continued to refuse to rebate until the investor brought a claim in 1999. Even though the investor claimed more than three years after the measure began, the Tribunal rejected Mexico's argument that the claim was time barred and went on to find that Mexico's continuing act breached the NAFTA.⁵
13. Other international tribunals have also refused to bar claims challenging acts that are still continuing. In finding that a claim challenging a provision of the Belgian Penal Code passed many years earlier was not time barred by the six month limitation in the *European Convention on Human Rights*, the European Commission on Human Rights said:

... when the Commission receives an application concerning ... a permanent state of affairs ... the problem of the six months period specified in Article 26 can arise only after this state of affairs has ceased to exist; whereas in the circumstances, it is exactly as though the alleged violation was being repeated daily thus preventing the running of the six months period.⁶

⁴ *UPS v. Canada*, Award on the Merits, June 11, 2007, at Tab 32 para. 28. Canada's arguments in that arbitration, which are very similar to their arguments in the present claim, are set out in paragraphs 503 -524 of Canada's Counter-Memorial on Merits, Tab 45.

⁵ The Tribunal said: "The inescapable fact is that the Claimant has been effectively denied IEPS rebates for the April 1996 through November 1997 period, while domestic export trading companies have been given rebates not only for much of that period but through at least May 2000 ..." *Marvin Roy Feldman Karpa v. United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1, 2002 WL 32818521 (16 December 2002), Tab 36 at para. 187. The Tribunal went on to say "...the factual pattern in this case ... demonstrates a pattern of official action (or inaction) over a number of years, as well as de facto discrimination that is actionable under Article 1102" (Tab 36 at para. 188).

⁶ *De Becker*, Yearbook of the European Convention on Human Rights, 2 (1958-9), 214, Tab 37 at 244. See also the decisions of the European Court and Commission of Human Rights in: *Kevin McDaid and Others v. the United Kingdom*, ECHR Application No. 25681/94, 9 April 1996, Tab 38 at 140: "Insofar as the applicants complain that they are victims of a continuing violation to which the six month is inapplicable, the Commission recalls that the concept of a "continuing situation" refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims"; *Hilton v. UK*, ECHR Application No. 12015/86, 6 July 1988, Tab 39 at 13: "The Commission further recalls that the six months rule ... does not apply to a complaint which concerns a continuing situation."

The Inter-American Commission on Human Rights has also refused to bar claims regarding acts that are still continuing.⁷ For example, in finding that a claim challenging provisions of the Chilean constitution enacted eighteen years earlier was not time barred by the six month limitation in the *American Convention on Human Rights*, the Commission said:

... in relation to the grounds of inadmissibility contained in Article 46(1)(b) of the Convention, which was alleged by the Chilean State and referred to the six-month period for submitting the complaint, the Commission indicated that the consequences or the legal and factual effects of the Constitutional provisions that have been called into question, as well as their invariable and continuing application ... since 1990, extend to the date of submission of the complaint and even afterwards, which definitely makes the provisions of the American Convention invoked by petitioners applicable to this situation.⁸

14. International tribunals do not apply limitation provisions to continuing acts because prohibiting a claim while the wrongful government action continues would not serve the purposes behind such limitations. Tribunals and commentators generally recognize that time limits such as NAFTA Article 1116(2) have two main purposes: to enable the respondent to collect evidence in its defence and to provide certainty and stability.⁹
15. Prohibiting claims challenging continuing acts fulfils neither of these purposes. The continuing action continually generates new evidence and the state's continuing breach of its treaty obligations undermines certainty and stability. Aside from failing to fulfil the purposes of time bars, prohibiting claims challenging continuing state action also produces the absurd result that states could breach their obligation forever if investors miss their window to claim.

B. NAFTA Article 1116(2) is Consistent with International Law in Not Barring Claims Challenging Continuing Acts

16. NAFTA Article 1116(2) is consistent with the international law rule that time limit provisions do not bar claims challenging continuing acts. Both the *Feldman* and *UPS* NAFTA Tribunals refused to apply Article 1116(2) to bar claims challenging acts that were still continuing. The Tribunals refused to bar the claims because international law

⁷ *Peter Blaine v. Jamaica*, Case 11.827, Report No. 96/98, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7. rev. Tab 40 (1998); *Neville Lewis v. Jamaica*, Case 11.825, Report No. 97/98, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 327 (1998) Tab 41 at para. 52.

⁸ *Andres Aylwin Azocar and Otros v. Chile*, Case 11.863, Report No. 137/99, OEA/Ser.L/V/II.106 Doc. 3 rev. (1999), Tab 42 at para. 27.

⁹ *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Decision on Preliminary Objections, [1992] ICJ Reports 240, Tab 43 at 255; *Peter Blaine v. Jamaica*, Tab 40 at para. 52; *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Final Award, 2000 WL 34514091 (December 8, 2000) Tab 44 at paras. 102 - 105.

accepts that in continuing an action inconsistent with international law, a state is taken to repeat that action every day and, therefore, commits a separate breach of international law every day. The claimant first becomes aware of this separate breach every day and, therefore, cannot be time barred while the state continues to breach its obligation.

17. Hence, the *UPS* Tribunal said:

... continuing courses of conduct constitute continuing breaches of legal obligations and *renew* the limitation period accordingly.¹⁰

A continuing act can only *renew* a limitation period if the act is interpreted as repeated every day. The *UPS* Tribunal went on to say:

This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. The use of the term 'first acquired' is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquired further information confirming the conduct or allowing more precise computation of loss. The *Feldman* tribunal's conclusion on this score buttresses our own.¹¹

18. The *UPS* Tribunal's decision is consistent with the landmark decision of the European Commission on Human Rights in *De Becker*. In that case, the Commission said that, because the act was continuing, "it is exactly as though the alleged violation was being repeated daily thus preventing the running of the six months period."¹² Dozens of subsequent decisions of the European Commission and the Court of Human Rights have referred to *De Becker* as authority on the effect of continuing acts.¹³

C. NAFTA Article 1116(2) Cannot Bar the Investor's Claims Challenging Canada's Measures that are Continuing Today

19. Given that time limit provisions, such as NAFTA Article 1116(2), do not bar claims challenging acts that are still continuing, the Article cannot bar the Investor's claims challenging Canada's measures that began before December 27, 2003, but are continuing today, namely:

¹⁰ *UPS v. Canada*, Award on the Merits, June 11, 2007, Tab 32 at para. 28, emphasis added.

¹¹ *UPS v. Canada*, Award on the Merits, June 11, 2007, Tab 32 at para. 28.

¹² *De Becker*, Yearbook of the European Convention on Human Rights, 2 (1958-9), 214, Tab 37 at 244.

¹³ See, for example, *Thomas McFeeley and Others v. United Kingdom*, 8317/178, 15 May 1980, Tab 46 at paras. 24-26.

- a. Canada's preferential treatment of British Columbia Timber Sales;
- b. Canada's failure to grant standing timber exemptions to Merrill & Ring;
- c. Canada's unfair administration of Notice 102; and
- d. Canada's application of Notice 102.