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:
MERRILL & RING, L.P.,
  Claimant,
and
GOVERNMENT OF CANADA,
  Respondent.

FIRST PROCEDURAL MEETING

Thursday, November 15, 2007
The World Bank
1800 G Street, N.W.
U Building
Conference Room 3-345
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to notice, at 11:04 a.m. before:

PROF. FRANCISCO ORREGO VICUÑA, President
PROF. KENNETH DAM, Arbiter
MR. J. WILLIAM ROWLEY, Arbiter

B&B Reporters
529 14th Street, S.E. Washington, DC 20003
(202) 544-1903
Also Present:

MR. HOWARD GEAR
Secretary to the Tribunal

Court Reporter:

MR. DAVID A. KASHWAP, SIM-CHE
B&B Reporters
123 4th Street, N.E.
Washington, D.C. 20003
(202) 347-2245

APPEARANCES: (Continued)

On behalf of the Respondent:

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Trade Law Bureau
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and International Trade
125 Sussex Drive
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APPEARANCES:

On behalf of the Claimant:

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MR. RICH GALLOW
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Suite 1602
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On behalf of Merrill & King:

MR. H. R. SCHAEP

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11:06:23 1 11:06:30 1
COMMITMENT OF THE ARBITRATION

PRESIDENT CHROMIE: Well, item two is
the reference to the commencement of arbitration. Just
for the sake of completeness, as I mentioned, that the
arbitration is deemed to have commenced upon the
Respondent's receipt of the Claimant's Notice of
Arbitration. We do not have the date for that.

PRESIDENT CHROMIE: I could circulate that to
you.

PRESIDENT CHROMIE: Okay.

PRESIDENT CHROMIE: As I say, Canada was served on
December 27, 1996, and that would be the appropriate
date. I'm certain Mr. Appleton would agree.

PRESIDENT CHROMIE: It's the same date of
the-

MR. APPLETON: The NAPA says the arbitration
of the Claim of Arbitration occurs when the Notice of
Arbitration or the Notice of Arbitration Statement of
Claim are submitted, and that was on December the
20th, 1996.

PRESIDENT CHROMIE: Correct. Okay. That's
very good.

11:09:30 1

12

11:10:43 1 CONSTITUTION OF THE TRIBUNAL

PRESIDENT CHROMIE: Well, then, we have item
three on the constitution of the Tribunal, which is
the standard language on the constitution itself in
the terms of appointments. And then in respect to the
declarations of the Members and disclosure and, of
course, we did follow the IBA Guidelines that was
requested by the parties, and this was sent around on
the 7th of November, if I remember rightly.

Now, on this point, there has been, in the
past-but I gather that it is over-some discussion about
the appointment of one arbitrator in respect of what
ICCO was requested or not requested to do, but, if I
am, right, that it's considered settled. Would that be
the case, Mr. Appleton?

MR. APPLETON: Mr. President, I think we are
happy to do the language that you have here.

and I think, formally for the record, while we had
some concerns about the timing of Mr. Howley's
appointment, we had no problem with Mr. Howley's
ability to serve. It was just a question of whether
he was appointed at the time that Canada led
11:13:32 1 capacity—unless the provisions set out in the NAFTA.
2 we would have preferred that Canada had made the
3 appointment earlier, which is what would have been
4 called the "open period," the period when they are
5 entitled as a party to appoint a dispute party with
6 a small fee. But the fact of the matter is, we are
7 very happy to have Mr. Bowery here as a member of this
8 Tribunal, and we have no objection whatsoever.
9 And, furthermore, in light of the ISA
10 disclosures, which we think are the best practices
11 that should be followed, we have absolutely no
12 reservations at this time, and we would like to put
13 this formally on the record.
14
15 PERSBENT CHAIRMAN: Thank you very much.
16 Does Canada have any comment on that?
17 MR. KINSEL: Not at all.
18 PERSBENT CHAIRMAN: Not at all. Thank you.
19 So, we are done with that three.
20 EXCLUSION OF LIABILITY
21 PERSBENT CHAIRMAN: Then there is item four,
22 which is the exclusion of liability. This is also a
23 rather standard clause in many current arbitrations.
24
25 11:15:30 1 and it covers two aspects—one is liability itself, and
26 the other one is what is called in subsequent
27 procedures that might be done in terms of challenges,
28 or else—and we would like to hear whether the parties
29 are in agreement in respect of this language or you
30 have any suggestions to this effect.
31 MR. APPLEGATE: Thank you, Mr. President.
32 Mr. Kinzel and I had the opportunity to discuss this
33 this morning specifically to be able to address.
34 You should have that, together, we have a
35 great deal of institutional experience when it came
36 to NAFTA arbitrations here; I think that's probably
37 safe to say. This is the first time in a NAFTA
38 arbitration that we have ever seen this language at
39 all on the exclusion of liability. It is not at all
40 the norm that we have seen here. And, furthermore, I
41 have done a fair bit of practice in terms of Bilateral
42 Investment Treaty arbitrations. We have also never
43 used that in any arbitration I have been familiar
44 with; but, of course, the Members of the Panel have
45 far more experience on investor-state arbitrations. I'm
46 sure, than I do. But it's fairly, from our

11:16:41 1 perspective, somewhat unusual.
2 On the other hand, we are not prepared to
3 throw the baby out with the bath water. We have no
4 problem with the first paragraph. Yes, jointly,
5 counsel thought we are not very comfortable with the
6 second paragraph. We don't think that it's—or
7 hopefully, although we think it is not very likely,
8 that the second paragraph would ever be a necessity,
9 but we don't think it would be appropriate to get it
10 in at this time. I thought it was important that
11 counsel were in agreement on this because it's a
12 somewhat delicate point. But if, Mr. Kinzel, you
13 have anything to add . . .
14 MR. KINSEL: I think simply to reiterate
15 what Mr. Applegate said, it's not a clause that we have
16 seen in the NAFTA cases, and I'm not completely
17 certain that it would be necessary. Frankly, I don't
18 think so, but obviously that's a judgment that lies
19 more in the Tribunal's bailiwick than ours, but
20 certainly it is not a clause that we have ever seen or
21 worked with before, and we wanted to raise that with
22 you.

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11:17:05 1 Arbitration Rules, NAPA and UNICOM in particular.
2 In case something that you agree with?
3 no. APPELLANT: For the record, to assist the
4 transcription, especially in light of the noise, we
5 just record that both counsel have confirmed yet to
6 number four and number six, then.
7 PRESIDENT CHAIR(3): Thank you.
8 APPELLANT: Argue[able] Law.
9 PRESIDENT CHAIR(3): Then we have the
10 applicable law.
11 Are there any remarks in respect of the
12 applicable law? No, that's it?
13 MR. KINNAR: It's much easier in a NAPA
14 case than it is under an ISICD case. It's spelled out
15 specifically in the NAPA. I believe we don't have to
16 have the usual discussion about that.
17 PRESIDENT CHAIR(3): Absolutely. It's of great
18 help.
19 PLACE OF ARBITRATION
20 PRESIDENT CHAIR(3): Well, then there is the
21 question of the place of arbitration, which, of
22 course, has not been decided. And, on this point, we

11:19:10 1 that.
2 PRESIDENT CHAIR(3): Maybe, if I may suggest
3 this, it would be preferable to go through the
4 standard agenda first and then deal.
5 APPELLANT: To the extent that such as that we won't
6 interfere with the standard clauses that are easier to
7 deal with.
8 MR. KINNAR: I think that would be a good
9 way to proceed, thank you.
10 PRESIDENT CHAIR(3): Thank you.
11 APPELLANT: I concur, and then in this
12 way, we could basically get through this very quickly.
13 get the standard out, and we know that there are just
14 a couple of issues that seem to be contentious. It
15 should make for easier discussion. If everyone is
16 amenable, I think that's excellent.
17 PRESIDENT CHAIR(3): Right. That's very good.
18 That is our--well, this particular item has
19 a second paragraph to it, which is the conduct of
20 hearings. I'm not too sure, but maybe I have
21 overlooked, was there an agreement of the parties to
22 have the hearings in Washington?

11:18:07 1 have, indeed, the submissions from both parties and
2 their arguments.
3 So, on this, I would like to ask both
4 parties if you have anything additional or different.
5 From what you sent in in writing so as to illustrate
6 the Tribunal further, and it is certainly a matter
7 which the Tribunal will not declare right now, but it
8 will take a few days' time to do that, on the basis of
9 your submissions; and, if you have anything to add,
10 this would be the occasion to do that.
11 MW. KINNAR:
12 MR. KINNAR: I have some further submissions
13 that I would like to make which are in reply solely to
14 those of Mr. Appellant. As the Tribunal will note, we
15 exchanged our submissions simultaneously, and as we
16 did not know what the other was saying. My points
17 will be solely in response to new points that are
18 raised. I don't intend, of course, to repeat anything
19 that Canada has said.
20 I'm glad to do that later, if you would like
21 to, or certainly do it now in the context of going
22 through the draft order, and I await your direction on

11:20:32 1 MR. APPELLANT: I think no. I believe that
2 both sides have agreed that, notwithstanding any
3 determination of the place of arbitration, that we
4 have agreed to have the hearings in Washington, D.C.
5 That's my understanding. I believe Mr. Kinnar has
6 put that in writing, but I leave it to Canada just to
7 confirm.
8 MR. KINNAR: Canada agrees to having
9 hearings in Washington. We consented to ISICD
10 administration and, obviously, hearings in Washington
11 or anywhere elsewhere the Tribunal might think is
12 appropriate in these circumstances. Obviously, that
13 was without prejudice to the place of arbitration, and
14 that a discussion we will have later on this
15 morning.
16 PRESIDENT CHAIR(3): Fine, thank you so much.
17 MR. APPELLANT: So, that is done and noted.
18 SOURCE OF DOCUMENTS AND COPIES OF INSTRUMENTS
19 PRESIDENT CHAIR(3): Then there is the question
20 of the service of documents, which basically is that
21 communications be sent first among the parties and
22 simultaneously to ISICD and the Secretary of the
have that problem, so we love electronic. And on
2 ICSD cases, we do everything we can to encourage
3 electronic transmission, specifically for that
4 purpose. But, because hard copies are necessary and
5 useful, I just think that maybe we could address it in
6 that way, and I'm sure that that make a simple way
7 for everybody to proceed.
8
9 PERSIDENT DRUD: Yes, Howard.
10
11 PERSIDENT DRUD: I would just say, as long as
12 a hard copy is also provided to the ICSD Secretary,
13 so we it the files.
14
15 MR. APPLETON: I think we are all in
16 agreement for that.
17
18 PERSIDENT DRUD: Okay, one question
19 to Howard. If I understand rightly, then, of course,
20 ICSD would send everything, both e-mails and papers
21 and couriers and faxes and such, but, in addition
22 this would be sent directly to Tribunal Members, is
23 that the idea?
24 ADMINISTRATOR DUN: Just to rite one point, I
25 don't think it needs to be in here, but faxes are
26 fine, but you have to know you have e-mails certain
27
28
29 11:31:31 1 Tribunal, who would normally be in charge of the
30 distribution of all these documents.
31 And then there is the reference to the formal
32 in terms of MR and e-mails and do or do so forth,
33 and some paper-copy submissions, if necessary, and
34 faxes and transmission under certain circumstances.
35 This, I understand, Howard, is the standard
36 ICSD practice?
37
38 PERSIDENT DRUD: Yes. Have you any
39 comments on this?
40
41 MR. APPLETON: We are very happy. We think
42 it's a very efficient way to go and, if the Tribunal
43 is comfortable with it, we are delighted to proceed in
44 this way.
45
46 MR. KENNEDY: we put in the record the e-mail
47 addresses and, secondary, the exact addresses to which
48 paper copies are to be sent. I assume, separately to
49 each Tribunal member, although one possibility would
50 be to send it simply to ICSD to forward it on to
51 Tribunal members. I suspect sending directly to
52 Tribunal Members is more efficient, and we simply ask
53 that the correct mail address be placed in the
54 Procedural Order.
55
56 MR. APPLETON: If I could speak to that, what
57 I suggest we just put a notice provision--it could be
58 as same to the Order--rather than make it a part of
59 the Order. And I think it's very important that one
60 of the differences of the ICSD/UNITED process
61 rather than the ICSD process is that the
62 communications do not have to go to the ICSD to be
63 transmitted to the Members of the Tribunal.
64
65 And while I love the idea of being able to
66 deposit instruments with the ICSD, I don't want that
67 to have to be another step in the process because,
68 alone 9/11, the process for ICSD to get paper in each
69 more complicated, everyone at the World Bank Group,
70 and there is a special process that it gone out of the
71 boxes, it has to be sorted, and it adds a lot of
72 delay. So it's hard to anticipate how long that
73 takes and where that goes, and I don't want to delay
74 the other process. Basically, it's much more
75 convenient to send the Members of the Tribunal a copy
76 of material. Of course, everything electronic doesn't
77 11:31:41 1 circumstances. So, there should be an e-mail
78 notification if there is a fax, in which case some
79 questions whether the fax is the best way of
80 communicating, because I have a problem that
81 frequently I have faxes that I don't realize I have
82 because of my particular custom of travel and so
83 forth.
84
85 MR. APPLETON: I think we are prepared
86 to the difficulty is, because I as well travel
87 extensively, in that there can be a situation where
88 I don't have access to e-mail but I could get a fax.
89 You have faxes all over the world. But the idea, I
90 think, is, wherever possible, I think we are all
91 agree to send some type of e-mail. If there is a
92 fax-and, from our perspective, there is some
93 extraordinary reasons, we would probably prefer to do
94 things by e-mail generally at the preferred way of
95 having things--I just don't want to prejudice the
96 ability to be able to send something because of,
97 in case, the alights I put that in the Order, that's
98 exactly when the e-mail goes down. Like, in our
99 office, the entire e-mail for this section of
100
11:31:58 1 Washington, D.C., for—was it Verison or
2 Allstream?—the Allstream is done for this morning.
3 So, since 5:30 a.m., we have been done, and we would
4 not have been able to send anything. I actually had
5 to pick up my e-mail going to a hotspot.
6 PRESIDENT CHENDE: So, it's well-taken, so we
7 will proceed that way.
8 And then, Howard, we would have to just
9 clarify that this goes to Tribal Members, as well.
10 SECRETARY DRAHN: Yes.
11 PRESIDENT CHENDE: Because it could be read
12 as if everything had to be sent to INED, and then
13 that would be sort of an additional step that would
14 delay things.
15 SECRETARY DRAHN: It says here in the first
16 paragraph, 'Will write communications'—in the first
17 paragraph, it stipulates: 'All written communications
18 by one part of the Tribunal shall be copied
19 simultaneously to the other party and to INED
20 Tribunal counsel.'
21 PRESIDENT CHENDE: Right, okay. That's fine.
22 Thanks.

11:37:00 1 Are parties okay with that?
2 3 MR. ELUMIEN: Yes.
3 4 We want us to copy you, do you want us to copy
5 Noloe Shelia and you?
6 SECRETARY DRAHN: Both.
7 MR. APPALATCH: Both? All right. We are
8 happy to copy wherever we like. So long as we know,
9 we will send everybody. That's a beautiful thing
10 about e-mail.
11 SECRETARY DRAHN: What I propose is that, in
12 the attached certification, I will indicate in there to
13 whom all material should be copied within the INED
14 Secretariat.
15 MR. APPALATCH: Excellent.
16 PRESIDENT CHENDE: Great, thank you.
17 PROCEEDINGS: So, item 16, it's
18 already agreed to, procedural language, which is
19 English.
20 There is an additional reference to evidence
21 that might not be in English, which does not appear

11:39:40 1 very much to be the case here, but still...
2 And, in that case, they would have to be
3 translated into English. That's a standard item.
4 MR. APPALATCH: I believe we are all in
5 agreement here.
6 PRESIDENT CHENDE: Okay. That's very good.
7 MR. ELUMIEN: Are you in agreement?
8 MR. APPALATCH: Yes, I am. Thank you.
9 CONFIDENTIALITY
10 PRESIDENT CHENDE: Then there is the
11 confidentiality questions that we can again leave to
12 discuss at the end of this agenda—
13 POWER TO FIX TIME LIMITS
14 PRESIDENT CHENDE: --and proceed to the
15 question of the power to fix time limits, which is the
16 kind of standard clause.
17 Would you be in agreement with that as well,
18 Mr. Appalatch?
19 MR. APPALATCH: Yes.
20 MR. ELUMIEN: Yes, that's fine.
21 PRESIDENT CHENDE: Thank you.
22 WRITTEN AND ORAL PROCEEDINGS—ORDER

27

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19 MR. APPALATCH: Yes.
20 MR. ELUMIEN: Yes, that's fine.
21 PRESIDENT CHENDE: Thank you.
22 WRITTEN AND ORAL PROCEEDINGS—ORDER

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Then I suggest, then—

SECRETARY DREW: My suggestion is this last sentence be deleted.

PRESIDENT GREEN: No, not to be deleted, but it's a sort of understanding that there is no need for reserving.

SECRETARY DREW: Okay.

MR. APPERTON: We might—that when I first read this, I was a little confused by the word 'reserve' because we thought you meant 're-serve.'

which might be re-serve rather than reserve, which means deliberate and hold back.

PRESIDENT GREEN: There is a lack there.

MR. APPERTON: Yes, but we have no problem

with the context here, and we are happy to be in agreement. And the parties all agree that what you have is what you have, and you don't need to have any additional reunions again. And as long as you have the materials, we are all very happy to go from there.

PRESIDENT GREEN: Right. So, if you can

introduce your small hitches, that would be great.

Well, perhaps the last paragraph best would

be relevant at this point, which is that if there is a mistake of a given reply or statement or rejoiner

for whatever reason that one might agree to that in the schedule, then that doesn't mean admissions—it's simply a procedural facility—so any adverse

inference or so.

Would you like to have that? Any thoughts on

it?

MR. APPERTON: Fine with me. We have no

objections to it.

We haven't seen this before, but I'm happy to

learn new tricks, and we have no problems whatsoever with this.

MR. ZIMMERS: We are also happy with this.

What I would have said, though, is I don't believe that it's necessary right now. The parties have basically joined issues through the initial claim and defense, and it's probably not necessary. If we are going to do it, obviously, we would like to keep open the possibility of a rejoinder with the paragraph

at the end concerning an adverse inference; but I do suggest that it's probably not necessary in this case.

Again, we will look at it

again, and we will get back to you before the end of the meeting, as well.

MR. APPERTON: What I take very clearly from this—and I think this is the important point for us all—is that we think it's a very polite and gentle

admission to the parties to not repeat themselves and that perhaps in responsive pleadings just be

responsive, and if that's the intention of the

Trial panel, I think we have received that very clearly.

PRESIDENT GREEN: It was more innocent than that, but still it looks better as you put it.

Please, thank you for that.

SECRETARY DREW: We've got our phones into

poetry.

PRESIDENT GREEN: Yes, right.

Well, then we have item—well, of course, we 16 leave pending the question of the particular schedule and bifurcation that would come in at this point, and we will talk about it in a few minutes' time.

MOTION PROCEDURE

PRESIDENT GREEN: Again, a standard clause.

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MOTION PROCEDURE

PRESIDENT GREEN: Again, a standard clause.
Mr. APPELTON: We have item 15. On this item, I suggest, if I could meet very briefly at the break in a few minutes' time with counsel for each party so as to mention a couple of items, but that we would be applicable to letter A in particular if I remember rightly.

And then there would be letter B, which we might discuss now, if you wish, which is the reimbursement of expenses, including one that is not expressly mentioned, but we should perhaps do that because it's again standard practice, which is the question of travel time, which ICDID doesn't always apply, but maybe should be referenced explicitly.

I think there is a limit--as I right, it's suggested--of eight hours a day or as the longest time allowance. Would that be agreed to? In letter B, with the reference to travel time, and then 20 that would be perhaps more complete. Then there is the matter of administrative and the administrative and support services.
21:46:39 1 became available to the parties. And out of a
2 continuing obligation of disclosure, it was disclosed
3 by one party to the other party, and the Tribunal
4 decided to move the hearing by four weeks or five
5 weeks so everyone would have time to be able to absorb
6 the nature of that evidence.
7 Would you call that a cancellation? I mean,
8 that's the only time--as far as I know, there has
9 never been a cancellation from my hearing we have
10 ever been involved with, but to the extent that there
11 might be a rescheduling, especially something caused
12 by the Tribunal, I think we should try to clarify
13 that, if we are going to have this clause.
14 So, I don't think it's unfair. I think it's a
15 actually a very good idea that helps focus the minds
16 of the parties about what we are doing here and the
17 costs that are associated with it, but I would just
18 like to make sure that I understand what you would
19 want to do in that type of circumstance.
20 PRESENT CHAIR: Yes. Well, generally
21 speaking, the thought of applying a cancellation fee
22 is related to the fact that an arbitrator might have
23
24 21:46:42 1 reasonable one. It is intended to guard against the
25 Tribunal losing time by reason not of its own conduct
26 but by reason of the conduct of the case or the
27 parties' inability to proceed.
28 1 If a hearing is moved and canceled and
29 2 not, perhaps by design but because of the
30 3 nature of the case, it makes sense that the
31 4 parties are not in a position to go forward, that
32 5 that the Tribunal is responsible for the
33 6 costs that are associated with it, but I would just
34 7 want to make sure that I understand what you would
35 8 want to do in that type of circumstance.
36 PRESENT CHAIR: Yes. Well, generally
37 speaking, the thought of applying a cancellation fee
38 is related to the fact that an arbitrator might have
39
40 21:46:47 1 blocked a given date and, because of that, refused
41 2 to give it work, so eventually's up to a
42 3 rescheduling. But, of course, that will be something
43 4 which is, I suppose, to be taken up on the
44 5 circumstances of the case. For example, say the
45 6 Tribunal itself would say, "Okay, we better postpone
46 7 this for a week or two or three or four." Well, that
48 9 it would be absurd because it would be the Tribunal
49 10 itself deciding, it is but the kind of issues. But so
50 12 I think that I have had just one occasion in which
51 13 it happened and in which the postponement was for
52 14 about six months, and it did apply.
53 15 But I'm happy to hear from our colleagues
54 16 whether you had cases in which this has happened.
55 17 ARBITRATION ROLUME: A word or two about this
56 18 particular clause. There are a variety of
57 19 cancellation clauses in current use around the world
58 20 in arbitrations. This one happens to be the one that
59 21 it is not, technically speaking, the ICMA clause, but
60 22 it is the clause adopted for use in EUCA arbitrations.
61 23 It's probably the most moderate of the cancellation
62 24 clauses, and so I agree with Mr. Appleton that it is a
63
42

COMMUNITY APPEALS VAT TO ALL EUROPEAN NATIONS WHO
are sitting in a given arbitration, and the clause is
simply to have the parties supplement the costs in the
4 aspect of the incident. Either in some cases
5 it's done directly to the Arbitrator, but in others,
6 of course, it could be done through the administrative
7 handling of ICCID in this case, I suppose. Would that
8 be a possibility?
9
INCHERTON ENRIO: Well, that's a more tricky
10 issue. I mean, ICCID is part of the World Bank Group,
11 and there are certain privileges and immunities, and
12 the World Bank Group always seeks to avoid being
13 involved in the payment of the VAT or an issue
14 concerning the VAT. What the World Bank typically
15 does is situations in which VAT is involved and the
16 parties to a particular matter want to include VAT
17 somewhere, which is given up the amount that's paid to
18 cover any VAT.

AKRINTHA NOKETHI: I have provided a clause
19 to the Members of the Tribunal to deal with VAT, but
20 we thought we would discuss it with you before putting
21 it in a draft.

43

THE REASONS I HAVE DONE SO IS, IN PREVIOUS
2 cases where I have been involved and a Canadian entity
3 has been involved as one of the parties, and that
4 Canadian entity has been responsible for part of the
5 bill, part of my bill, usually held, in some
6 circumstances, I'm obliged to charge VAT. So, in this
7 case, I'm not sure whether that applies when the party
8 is in the Canadian Government.
9
10 So, over to Mr. Xinsear for a moment, and
11 then I will come back to my issues, if any, remaining.
12
MRS. KENNEDY: Thank you.

13 WELL, this tweaked my interest yesterday as a
14 Canadian who takes GST as such as everybody, so we asked
15 our Revenue Department whether this would, indeed, be
16 payable, and they got back to us, and they told us, in
17 effect, in this circumstance, because the hearings are
18 in Washington and fees will be payable through ICID,
19 services are rendered in Washington. It certainly
20 wouldn't be subject to GST. So, that's what I was
21 agreed yesterday by the CRA, Canada Revenue Agency.

AKRINTHA NOKETHI: If they would like to
22 give me a letter to that effect, I would be happy with

44

MR. KENNEDY: And this actually was an issue
3 that came in another HAYK case, and is it the case that
4 Members of the Tribunal, very happily were all
5 subjected to having to charge GST on their fees. This
6 was in the Myers case. In that case, there was a
7 Canadian Arbitrator. HAYK is not, in fact, there were
8 two Canadian Arbitrators in that case—and the
9 President was from the U.S., Martin Hunter, and there
10 was a lot of unhappiness.
11 So, the difficulty here is that—and they
12 asked on the record specifically the Government of
13 Canada to provide assurances in the record to deal
14 with this, and so there would need to be a ruling on
15 something on this issue if we wanted to be able to
16 rely on it.
17
18 What we are saying is this has already
19 occurred, so I don't want there to be any omissions.
19 I guess that's the whole purpose here. I'm very
20 interested to see what it is that you have proposed by
21 way of wording, but we have some concerns.
22 In all cases to come, we would figure it

45

111564 1 ort, but I would be very loath as someone who operates
2 a law firm in the Canada as well as the United States,
3 we are very careful to meet and follow all the
4 appropriate taxation laws in each of the jurisdictions
5 very, very carefully.
6
7 MRS. KENNEDY: If I may, the Myers case had
8 hearings in Canada, and that was the difference. The
9 service was rendered in Canada. But I think perhaps
10 the easy way to get through this is to see the
11 proposed clause and to add something to the effect of
12 'if payable, then, at cost, at cost, and that's a
13 way to end this discussion, perhaps.
14
15 AKRINTHA NOKETHI: If I could end my
16 discussion quite as quickly, I was just going to say
17 that, in Melbourne, for example, our tax people
18 determined that we were obliged; and in that case, it
19 was a case similar to this, we had ICID act as
20 administrator—that is all—they were the fund
21 holder—we started with the ICDA holding funds, and
22 then we moved to it ICID—and what I did was I
23 rendered two separate accounts always one to the
24 Claimant; one to the Respondent, the U.S. Government.
The one that was considered to Claimant, the Canadian party had whatever our GST tax on it, and it was paid.
and that Claimant grossed up its contributions and was obliged to do that.
So, I'm happy for us. If the President agrees, for us to circulate after the break the 7th clause. I don't know whether it says 'it payable',
but I would be quite happy to have 'it payable.' But
9. I would be quite unhappy to have to pay the GST myself.

PRESIDENT CURRIN: It does begin exactly
saying that, unless one is to the extent that the fees
of arbitrators are subject to GST, according to the
applicable tax laws, of course, at court, the parties
shall—but we will have this, Howard, copied and
 circulated to you.

ARBITRATION NOTICE: What I suggest that we do
is that, if the President agrees, I think it really
only applies to me, if the two Canadian parties and I
can have a direct discussion on this and see if we can
come to a resolution as to whether it is payable or
not.

PRESIDENT CURRIN: Well, there is just one
2 Canadian party.

PRESIDENT CURRIN: Yes, forgive me, there
would be in this kind of case.

MR. CURRIN: Mr. Tabak, just makes a very
good point, that Mathesons had a place of arbitration
is Washington, so that makes it even more complicated.
But I'm certainly pleased to proceed this way.
Mr. Dowley.

ARBITRATION NOTICE: One of the difficulties
in that I live and work and I'm a professional in
Canada, and I don't do my work as a case only during
the five days when we are at a hearing.

ARBITRATION NOTICE: Okay. Fine. So, subject
to a further discussion of wording and so forth, the
principle is that normally it would not be taxable;
but, if it is, it would be supplementary amount for
the same amount of the tax.

Fine, thank you so much.

APPOINTMENT OF COSTS AND ADVANCE PAYMENTS
PRESIDENT CURRIN: Then we have item 21,
which is apportionment of costs and payments, and that

PRESIDENT CURRIN: I have not had any change, and the deposites have been
made, we are told by ICIBID, and so that's all done
with.
PRESIDENT CURRIN: And, finally, there is a
paragraph on professional assistance, which we suggest
is relevant, but particularly thinking maybe it's not
the case or it is— I don't know get— of, for example,
the expert that will help the Tribunal to evaluate a
given damage or given utilization, if that were the
11 case, that be considered part of the expenses of
the arbitration and not personal expenditures of
arbitrators. That's the gist of the clause.
MR. DAVIS: This is a common clause, and
we have absolutely no problem with it. You put the
writing in that we would need that whoever that person
you would appoint would have to meet the same type of
13 impartiality and independence. We have no problem
with that.

Things that help the Tribunal to be able to
21 move things along are very happy to assist with.

PRESIDENT CURRIN: Thank you.

MR. BINNER?

MR. CURRIN: We are equally happy with that.

My only question would be, when I first read this,
I wondered if this was so somebody who would be
2 giving legal assistance to the Tribunal, while I think
3 perhaps we need other issues. If it's simply factual
4 or expert assistance, then there is no objection
5 whatsoever.

PRESIDENT CURRIN: No objection. That would
be terrible to have to rely on legal advice.

MR. CURRIN: If it is, in fact, expert, I
10 think we will cross that bridge when we get to it, but
11 WPAST Article 1333 provides for experts, and I think
12 the Tribunal appointed one, and the RULES
13 have specific procedures. Assuming we get to that
14 stage, obviously we will go through those procedures.
15 But, in principle, in terms of covering the
16 remuneration, this clause is certainly appropriate.

PRESIDENT CURRIN: Fine, thank you so much.

So, that would cover the standard agenda that we
have before us. But before breaking for a few
17 minutes, I would like to ask the parties whether they
have any other agenda item that they would wish to
raise, aside, of course, of the pending issues that we
will address after the break.

Mr. APPRENTON: There is one issue I would
like to canvass with the Tribunal. I didn't put it
into our joint prepared Order, but it's a
question—and I think it's fair, as we get to know
each other today—on what type of reasonable
expectation the Tribunal has about the timelines of
11 bringing an award out. And the reason I say that is,
12 I wrote an article in Global Arbitration Review,
13 looking at the amount of time the tribunals have been
taking in various venues to be able to render awards
on jurisdictions, on merits and things like that, and I
thought that it might be fair because sometimes the
17 expectations of the parties aren't the same, and
18 certainly we have our client representation, even
19 Schafr, here with us today, and I thought it might be
20 just useful to—originals are going to suggest
21 actually an order, something in the order, like they
22 have with the Montreal Chamber which is a six-month

rule, but I thought maybe it might just better to
raise the issue and see what type of sense the
1 Tribunal has.

Certainly, this has been the—as the Tribunal
has gotten back to the parties very, very quickly, and
we really appreciate that, but I just thought rather
than put it into an order that we might discuss it for
a moment.

FREIBERG (ORDER): Absolutely.

Mr. ELLIOTT: Do you have any views on that?

MR. ELLIOTT: No. I understand the Tribunal
works as fast as it can, and I would rather you take
the time it need than not any kind of limitation, so
I don't have a position on it.

FREIBERG (ORDER): Thank you.

Well, as sort of a general reaction to it,
there are two aspects, one which is definitely that
the Tribunal would like to proceed as expeditiously as
possible. That's a bit within the style of the
16 Members of the Tribunal, and we would be more than
delighted to do that.

Now, at this stage, it's difficult to say,
particularly in terms of if we are going to discuss
bifurcation or not, and it will, of course, change a
bit because bifurcation, by its very nature, takes a
few more months if it delves straight into the
merits. That is one aspect that we have not yet

However, while I have had the experience with
six months under the Spanish law in arbitration, it
seems to be a bit of, not much, so much for the Tribunal, I
might mention, but for the parties. Occasionally,
they feel there is such a pressure to come up with
time, and there is little allowance for extending
two more weeks and so. But definitely, and subject
to bifurcation on bifurcation, we would like to do it
as quickly as it is reasonable and allowing all
parties to say all they have to say before coming
anywhere close to a decision, of course. But that's
of course, very vague and general, but that's the way
it is.

MR. APPRENTON: Just to clarify, I wasn't
looking at six months in total for the entirety of the
proceeding, which, in fact, the standstill and the

Spanish rule. I was just looking at the time for
deliberation. And deliberation time, of course,
is very much focused on the nature of the facts, what's
the case, with the nature of what there is. I just
thought it was fair at the beginning of the process
for the parties to let the Tribunal know how long it
can be very difficult on the parties to wait a very long
period of time, and generally a year in a long period
of time. Six months—well, in jurisdictions these
months are not that long. Six months is around the
average now—used to be shorter—but we have some
difficulties where we had 18 months, and that's why I
just thought it was fair to raise to the Tribunal
Members a sense about this.

ARBITRATION LAW: Could I, just by way of
clarification, ask whether you are saying that you
would like some clarification as to how long after all
the parties' submissions have been made at any
stage, whether it is a preliminary issue like
bifurcation or the final determination, how long we
think it will take us to do it—is that right—as it
doesn't run into these problems with the cooperation


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11:41:34 I of the parties.

2 MR. APPOLLO: Yes, Mr. Dam, you have hit it
3 exactly.
4
5 I think it's helpful to just to manage the
6 expectations of the parties to give them an idea, say,
7 Well, we think we should be able to revert back to
8 you in three months or four months, but otherwise we
9 get the situation where we are out a year, and we will
10 get a nice letter from me saying, that according to
11 the study, you are slightly past the deadline, maybe
12 you could tell us a little update. And thus sometimes
13 the Tribunal will respond, and sometimes they won't.
14 Then it will go 18 months, and then we will have to
15 contact over to the General Council at the World Bank
16 Group and say, Can you have a little check? By
17 then, we will have sent seven letters to Mr. Jean and
18 Ms. Smith, saying: Could you please tell us what's
19 going on, because the reasons people come to
20 arbitration is to find an expeditious way, and they
21 don't know what's going on.
22 And so, what I was hoping, rather than just,
23 have this as a legal type of debate and discussion.

11:42:15 I was to see this just as a way to help the parties'
2 expectations. It's all. That's the purpose. I'm
3 not looking to formalize it or legitimate it. Just
4 to help everybody understand, and that's why I'm
5 saying, It's really just a question. It's not an
6 alternative plan or a new order or anything else. But
7 that's where I think arbitration really abuses.
8
9 If you could help us just to get a sense of
10 your feelings, I just think it helps everybody in this
11 process.
12
13 PRESIDENT CHENG: Good point, and we are
14 entirely in agreement.
15
16 Maybe what we could do is to suggest a
17 general wording to the effect that the Tribunal will
18 do its best efforts to come up as expeditiously. I
19 hesitate to come back because we don't know at this
20 stage, but definitely it would not be a question of
21 18 years. Most definitely, I suppose you all agree to
22 that. We should...
23
24 ARBITRATOR DAM: Well, certainly I think the
25 only conceivable problem would arise if one of the
26 arbitrators were involved in a very lengthy

11:43:01 arbitration with many, many days, months, weeks of
2 hearings and so forth, and it's impossible to figure
3 out exactly when we are. But it wouldn't be to me,
4 speaking only for myself, we have every incentive to
5 finish things as promptly as feasible. But I'm just
6 speaking for myself.
7
8 PRESIDENT CHENG: I suppose that's your case
9 as well, Bill?
10
11 ARBITRATOR DAM: I try to do things as
12 expeditiously as possible.
13
14 PRESIDENT CHENG: Good. So, you can be
15 reassured that we will be back to you before you might
16 wish.
17
18 MR. APPOLLO: It cuts both ways, thank you.
19
20 PRESIDENT CHENG: Okay. That's great.
21
22 Mine, I appreciate very much your composition
23 and good points, and we take them all in, and we will
24 be back to you on two items that we have Palling on
25 the question of the admissions of rejoinder and so
26 and some others that I noted along the way, serving as
27 a witness in some case after this proceeding.
28
29 So, I suggest that we take a break for now.

11:46:13 Fifteen minutes? Would that be convenient to you all?
2 And we would be back and discuss the pending issues
3 of place of arbitration, confidentiality, bifurcation,
4 and schedule, and the production of evidence. Would
5 that be it, I gather?
6
7 Mrs. thank you very much.
8
9 (Brief recess.)
10
11 PRESIDENT CHENG: We are ready to resume now
12 our meeting, and we have some answers for you right
13 away.
14
15 The first is that the Tribunal reviewed the
16 two paragraphs that were still subject to some
17 clarification. The first was the one concerning
18 the section on the omission of liability, the
19 question of being called as a witness or so, and we
20 agree that it is not really necessary, so we can drop
21 that particular paragraph and keep just paragraph one
22 of number four. So, we will delete that, if you agree
23 with that.
24
25 MR. APPOLLO: Yes.
26
27 PRESIDENT CHENG: Then we have the paragraph
28 at the end of the written and oral proceedings in

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13:45:10 | respect of if a party chooses not to submit a
2 | Beijinger, or a Beijinger or a Beijinger—this is not
3 | going to be taken as anything adverse—and that we
4 | would like to keep, if you agree to it. basically from
5 | the point of view that b) helps to make sure that if
6 | anyone doesn't feel that it has any thing to say
7 | further, there is no need to say it because there will
8 | be no adverse inference. `Well, you didn't say it,
9 | well, nothing happens.'
10 | MR. AAPPLIN: I just want to clarify, of
11 | course, if a party doesn't file a Reply, I submit that
12 | means the other side cannot file a Beijinger?
13 | ARBITRATION RULES: Correct.
14 | PRESIDENT GRIDDO: Correct.
15 | MR. AAPPLIN: I wanted to make sure that we
16 | are clear on this.
17 | PRESIDENT GRIDDO: That is correct, because
18 | each is supposed to react to the other--
19 | MR. AAPPLIN: To the other. I just wanted
20 | to make sure we are all on the same wavelength.
21 | PRESIDENT GRIDDO: okay.
22 | MR. KINNUMA: My only question is, will there

13:46:58 | hopefully give some comfort to arbitrators as well.
2 | So, I would ask if perhaps we could forward
3 | on this, and I will get back to that as quickly as
4 | possible as soon as I get back to Ottawa, and I will
5 | speak with Mr. Appleton in advance of getting back to
6 | the Tribunal, if that would be acceptable.
7 | PRESIDENT GRIDDO: Absolutely.
8 | Is that all right with you?
9 | MR. AAPPLIN: Could we go off the record for
10 | a moment?
11 | PRESIDENT GRIDDO: Yes, certainly
12 | (Hush hush of the record.)
13 | PRESIDENT GRIDDO: So, now we are quite ready
14 | to move into the pending issues, beginning with the
15 | place of arbitration. Would the Claimant,
16 | Mr. Appleton, think that you have additional
17 | to mention in respect of what you have already stated
18 | submitted?
19 | MR. AAPPLIN: Yes, Mr. President. We
20 | actually have some additional comments to make in
21 | light of some of the views that have been expressed by
22 | Canada, and apparently Mr. Kinnuma had indicated to us

13:46:58 | be a date, Reply by a certain date, Beijinger by a
2 | certain date?
3 | PRESIDENT GRIDDO: Well, yes, because that
4 | way we will hold in the schedule.
5 | Well, the third pending item on the
6 | Tribunal's side was the question of MAT at the end of
7 | paragraph 2 and, in that respect, a draft wording
8 | has been circulated, too, which we thought would cover
9 | eventual situations—hopefully they will not occur
10 | but, if they do, they will be subject to a procedure
11 | to deal with it in this way. Have you had a chance to
12 | look at it?
13 | MR. KINNUMA: I have, and I thank you.
14 | I wonder if I would be allowed to take this
15 | back to Canada and speak to the Canada Revenue people
16 | and ask then if they have any particular comment. My
17 | sense was that it would matter to the
18 | characterization, certainly for the Canadian G7.
19 | Whether the money come through the OECD Declarant.
20 | Which I think is preferable. And I would also ask
21 | them if they could perhaps give some kind of a
22 | statement for the record for the Tribunal that would

13:50:53 | that she has comments to make in light of some our
2 | views. So, it appears you have to hear from both of
3 | the parties. Who would you like to hear from first?
4 | PRESIDENT GRIDDO: Well, certainly the
5 | Claimant.
6 | MR. AAPPLIN: Then I'm going to ask
7 | Mr. Qillus if he would address the Tribunal briefly on
8 | some of these issues.
9 | PRESIDENT GRIDDO: Thank you.
10 | MR. QULLIS: Thank you.
11 | MR. PRESIDENT, in many respects, the parties
12 | submissions with regard to the place of arbitration
13 | are quite similar. Both parties, for example, relied
14 | on the UNCTAD Notes. There is one area here the
15 | submission differ significantly, and it's on that
16 | area that I would like to concentrate briefly this
17 | morning.
18 | Specifically, Canada relied specifically
19 | within its submissions on the factor of neutrality.
20 | And the Investor did not specifically rely on the
21 | factor of neutrality within its submissions. The
22 | Investor did rely on the factor of equality in a sense

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11:53:13 1 that the factor of neutrality overlaps somewhat with the 2 factor of objectivity. Indeed, the principle of 3 neutrality can be expressed, that simply the fact that 4 parties before a court are treated equally, 5 Nevertheless, Canada did specifically address the 6 factor of neutrality, and we feel that we should 7 respect to the specific submission, give that the 8 investor did not specifically address the issue in its 9 submissions.

10 Indeed, we are grateful to Canada for 11 specifically raising the issue of neutrality because 12 we feel that perhaps the factor of neutrality more 13 than any other factor helps illustrate why a city in 14 Canada cannot be a place of arbitration, and there are 15 two main reasons for that. The first is Canada’s 16 stated position with regard to the standard of review 17 of NAFTA Chapter Eleven Awards in Canada, and the 18 second is Canada’s sovereign powers before its courts 19 in Canada.

20 The investor believes that, because of these 21 two reasons, a city in Canada can never be a neutral 22 place for the arbitration, and let us address these 23 reasons in turn, first starting with Canada’s 24 stated position on the standard of review.

In the investor’s submission, we refer the 4 Tribunal to Canada’s comments for the metallic 5 judicial review court. The metallic court was a 6 court of the British Columbia that reviewed the NAFTA 7 Chapter Eleven Decision in Metallic against Canada.

8 And, in that judicial review, Canada said—and I’m 9 going to quote now the same quote that we include in 10 our submission—Canada said that NAFTA Chapter Eleven 11 awards are not supposed to be worthy of judicial 12 deference and are not supposed to be protected by a high 13 standard of review. And if the Tribunal would like 14 to see that quote, you can find it at Tab 13 of the 15 submissions we appended to our submission.

16 Specifically at paragraph 17, and it’s repeated again 17 somewhat at paragraph 18.

18 We subsequently, Chapter Eleven Tribunal 19 commented on what Canada had to say in the Metallic 20 judicial review case. Firstly, the Tribunal said 21 it was deeply troubled by Canada’s position and, 22 indeed, partly relied on Canada’s submission to choose

11:54:07 1 a place of arbitration that was outside of Canada.

2 Subsequently, the Pope & Talbot Tribunal also said 3 that it was troubled by Canada’s submission, and the 4 Tribunal said that it, too, would have relied on that 5 factor to choose a place of arbitration outside of 6 Canada, if the arbitration in Pope & Talbot was not so 7 far progressed.

8 Despite these comments of the P&F and the 9 Pope & Talbot Tribunals, Canada subsequently, in 10 another judicial review case, reiterated the same 11 argument. Indeed, in the Myers judicial review, 12 Canada argued once again that NAFTA Chapter Eleven 13 awards should not be accorded a high level of 14 deference.

15 Canada’s position with regard to the standard 16 of review in Canadian courts can be contrasted with 17 the standard of review in courts in the United States, 18 Where the United States has never argued that a court 19 should accord any lower standard of deference to a 20 NAFTA Chapter Eleven Award and, indeed, Where United 21 States courts interpret the Federal Arbitration Act 22 using the United States law as its face.
a test of correctness.
2 And while the court found for other reasons
3 it did not need to address the issue, it went on to
4 offer dicta to say, indeed, it agreed that the test
5 for reviewing the Tribunal was to see to the
6 decision to take jurisdiction was, indeed, a test of
7 correctness.
8 So, the first answer is the first part to the
9 answer to your question. Mr. Hawley, is, indeed, that
10 the standard applied to the courts is important, and
11 we believe that, on that issue, the standard applied
12 by Canadian courts is also suspect and does
13 demonstrate that Canadian courts—or Canadian cities
14 cannot be a neutral venue for the arbitration.
15 The second part to the answer of your
16 question is Canada’s submissions before those courts
17 are also very important because Canada’s submissions
18 before those courts indicate the admissions that
19 Canada is likely to make in the future. It indicates
20 the submissions that Canada is likely to make, if
21 Canada seeks to review any award coming from this
22 Tribunal, and, therefore, it indicates the standard of

actually requested by the applicant. Canadian has not
1 only argued that its access to Information Act gives
2 it its power, but the Canadian Federal Court has
3 accepted Canada’s position in a case that I respect
4 and will talk a little bit later. A Canadian Federal
5 Court did, indeed, confirm that, in response to a
6 request from anyone in Canada, from any citizens in
7 Canada, that Canada can provide information that is
8 a NAFTA Chapter Eleven arbitration that had been
9 designated as confidential by the Tribunal and go
10 beyond the actual request to Canada.
11 So, the first sovereign power that Canada has
12 identified in this arbitration is its sovereign power
13 arising from the access to information Act. The
14 second sovereign power is once again something I
15 suspect we will touch on later this afternoon, but as
16 the power arising under Canada’s Evidence Act and
17 specifically Section 39 of that Evidence Act.
18 Section 39 of Canada’s Evidence Act gives
19 Canada the right to refuse to disclose information
20 that is requested if a clerk of the Privy Council in
21 Canada certifies for that information contains

review that Canada will seek to hold a court reviewing
2 any award coming from this Tribunal. If that answers
3 your question, Mr. Hawley.
4 I would like to leave now the issue of the
5 standard of review that Canada seeks to apply to its
6 courts and address the second reason why Canada—a
7 city in Canada cannot provide a neutral venue for the
8 arbitration, and this is because of the sovereign
9 powers that Canada enjoys. Indeed, Canada has pointed
10 out, in its submissions to the Tribunal, to particular
11 sovereign powers that are important to this issue, and
12 I suspect we shall hear a little more on these
13 sovereign powers later on this afternoon, but I shall
14 address them briefly now.
15 The first is the sovereign power arising from
16 the Canadian Access to Information Act. Canada argues
17 that its Access to Information Act gives it the right
18 to respond to a request for information from anyone in
19 Canada or a resident of Canada to respond to such a
20 request by providing information that is being
21 designated by this Tribunal as confidential and not
22 only that, by providing more information that is
70
13:05:41 1 So, the second reason that we believe so
2 Canada city can provide a central venue for the
3 arbitration is because of the sovereign powers that
4 Canada enjoys. Now, this situation can be contrasted
5 to the situation in U.S. cities, and particularly the
6 situation in Washington, D.C., which the Investor has
7 proposed as an appropriate place of the arbitration.
8 In Washington, D.C., for example, the Investor enjoy
9 33 such special powers and the parties would appear
10 before a Washington, D.C. court as equal parties.
11 Nevertheless, Canada argued in its submissions that
12 Washington, D.C., is not a central venue. However,
13 Canada’s own authorities that are relying on its
14 submissions demonstrate that that’s not the case.
15 Indeed, those authorities demonstrate that,
16 because Washington, D.C., is the home of the ICEDU,
17 is a central venue, and I would like to refer the
18 Tribunal specifically to the authorities in which
19 Canada relies. I would like to refer the Tribunal to,
20 first of all, the decision of the ICSID Tribunal, which
21 believed Canada provided at Tab 4 of its authorities,
22 and I would like to refer the Tribunal specifically to

71
13:05:47 1 paragraph 21 of that decision.
2 I would like also to refer the Tribunal to
3 the Multan decision upon which Canada also relied,
4 and which the Tribunal can find at Tab 9 of Canada’s
5 authorities and, within that decision, I would like
6 to refer to the tribunal specifically to paragraph 10.
7 Of course, those authorities on which Canada
8 relies support or buttress the authorities on which
9 the Claimant has already relied in its submissions.
10 and I would like to refer the Tribunal specifically to
11 the ICSID decision, which the Tribunal can find at Tab 9
12 of the Investors’ authorities and, specifically to
13 paragraph eight of that Decision. All of these three
14 decisions say that Washington, D.C., is a central
15 venue for an arbitration because Washington, D.C., is
16 the home of the ICEDU.
17 So, just to conclude the Investors’ responses
18 to Canada’s submissions with regard to the place of
19 arbitration, we respond specifically to the one
20 issue of centrality because it was an issue that
21 Canada relied on specifically in its pleadings and to
22 which the Respondent— to which the Investor did not

72
13:06:15 1 specifically address, and we are grateful to Canada
2 for relying on the issue of centrality because we
3 believe more than any other factor perhaps the factor
4 of centrality demonstrates that no city in Canada can
5 ever be a central place for the arbitration. Courts
6 in Canada are subject to Canada’s submission that they
7 should apply a lower standard of review to MPAA
8 Chapter Eleven Decisions, and courts in Canada are
9 also subject to Canada’s sovereign powers.
10 There are no such concerns with Washington,
11 D.C., and for that reason, the Investor submits that
12 the Tribunal should make Washington, D.C., as the
13 place of the arbitration.
14 Unless the Tribunal has no other questions, I
15 would turn to Ms. Ellison and Canada.

73
13:06:59 1 submissions.
2 It is, in fact, all deplorable whether
3 centrality is a relevant factor in choosing a place of
4 arbitration in Chapter Eleven cases. In particular,
5 Article 3139, which is the appropriate Article, says
6 that MPAA cases have to be in one of the MPAA States
7 and doesn’t say anything to the effect that it must be
8 the State not implicated. So, clearly the MPAA
9 courts contemplated place of arbitration being in
10 the home State of one of the disputing parties.
11 Perhaps more importantly is what’s happened
12 in practice. The fact that in every single case
13 against the United States has had Washington, D.C., as
14 the place of arbitration. It would seem to be a bit
15 of a double standard if when Canada, as the
16 Respondent, could never have a city in Canada as
17 the place of arbitration. The fact is also that
18 several Canadian cases have located or had the place
19 of arbitration in Canada, in particular Montreal and
20 Toronto. So, centrality, if it is a concern at all,
21 certainly has not been strictly applied in these
22 context.

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13:07:43 1 Neutrality and, perhaps better said, equality 2 would also not lead you to Washington, D.C. The fact 3 is that Washington is the capital city of the 4 country that you have chosen, and, if that is a nonneutral 5 location, surely it is as nonneutral as Ottawa and 6 would lead you to conclude that Vancouver would be the 7 appropriate place. As you know, Vancouver is one of 8 the places suggested by Canada.

9 Finally, with respect to the laws of the 10 seat of the World Bank, there again is a debate in the 11 NAFTA case law on that. The Canada Tribunal is 12 particularly well-equipped with the fact that Washington 13 and the World Bank is to confirm the physical location of 14 the hearing with the legal seat of the arbitration, 15 and we would agree with the Canada Tribunal in that 16 respect and suggest that the fact of the ICID is here 17 should not affect the Tribunal's determination about 18 place of arbitration. That Canada is at Tab 6, 19 paragraph 22, of Canada's submission.

20 Second question on place of arbitration is 21 the Investor's submission on jurisdiction in its brief 22 that Washington was a neutral location.

13:10:13 1 the Tribunal obviously has to balance this. It seems 2 fairly clear to me that the balance is Vancouver, 3 Ottawa, or Washington. The only factor at all that is 4 any way could tilt this arbitration to Washington is 5 the fact that the parties have consistently agreed to 6 the ICSID administration. There is not one single other 7 fact that's relevant.

8 So, if I might, I would like to provide this 9 to my friend and the Tribunal simply because I 10 think it is a very good visual summary of relevant facts 11 and the exercise that the Tribunal will have to go 12 through in this arbitration.

13 I then would just like to go to the question 14 of Canada and the availability of Canada and its 15 arbitral law. That's obviously one of the factors 16 under the UNCITRAL organisational Notes and one that the 17 Investor has spent a considerable amount of time on in 18 its submission.

19 The first point to make is that NAFTA Chapter 20 Eleven Tribunals— it approximates. 21 (Pause.)

22 Ms. KARKOS: NAFTA Chapter Eleven Tribunals 23

13:08:57 1 Obviously, Washington is not any default location for 2 place of arbitration in these cases. This ignores the 3 express wording of Article 1119, and I call the 4 Tribunal Members' attention to the fact that 1120(a) 5 says that where a question arises about place of 6 arbitration under either an ICSID Convention or 7 Additional Facility case, it will be determined in 8 accordance with the ICSID Additional Facility Rules. 9 Those give the Tribunal discretion to look at the 10 circumstances. That is exactly the same kind of 11 exercise, of course, that the Tribunal has to go 12 through under the applicable rules here, which are the 13 UNCITRAL Rules.

14 And so, in our view, what matters is the 15 facts of the individual case. We have canvassed those 16 facts in our submissions; and, for convenience's sake, 17 we have a chart here which I would like to provide to 18 my friend and to the Tribunal, which basically takes 19 the relevant facts about place of arbitration, about 20 the circumstances of the arbitration, from the 21 Statement of Claim and Statement of Defense, and put 22 them in a chart. To be honest, at the end of the day,

13:11:23 1 have universally held that Canada and United States 2 have equally suitable laws. Nobody—no Tribunal—has 3 said otherwise or even suggested otherwise. Canada 4 has the Commercial Arbitration Act and the Code based 5 on the UNCITRAL Model Law.

6 The Investor then suggests that Canada 7 somehow becomes unsuitable because of the position 8 that the Canadian Government took on the first 9 set-aside application of Chapter Eleven matters, and 10 Canada strongly disagrees with this.

11 Plain of all, this view is based on some 12 comments made in the HUG case and in the Pope case 13 which the Investor has cited to you. And I mention that 14 these views have never been majority views. Canada 15 has included, for the sake of completeness, all of the 16 relevant cases here, and I would like to point you to 17 particular to the Canada case at Tabs 4, paragraph 20; 18 the ABF case, which is found at Tab 6, paragraphs 21 to 31; and the Waste Management case, which is at Tab 24 22 and paragraph 24. Those three tribunals here have all 23 said they were not in the least troubled by the 24 submissions Canada made in the Metalclad case, and
78

13:12:54 I that this did not in any case make Canada an
1

unavoidable place of arbitration.
2

They made the very important point, which
3

4

Number One, they made, that there were positions of
5

Canada as a litigant. They should not be confused
6

with the positions of the Canadian judiciary. It is
7

serving that Canada has an independent judiciary that
8

establishes the level of deference after hearing
9

parties' submissions, and the fact is that is exactly
10

What they did. They affirmed the highest level of
11

defERENCE, and they rejected the submissions made by
12

Canada and Mexico.
13

So, the judiciary exercised its independence
14

quite cleanly and affirmed a very high level of
15

deferece. That high level of deference has been
16

affirmed in every single case in Canada. There
17

is in the Medical case with Justice Tyrce, at paragraph
18

30 and following. This was followed by the Federal
19

Court of Canada in the Myers case. And I might note
20

as an aside, were there any set-asides proceeding to
21

come out of this arbitration, it would be that court,
22

the Federal Court of Canada, which would be seated.
23

79

13:13:54 I that court in the Myers case, at paragraphs 30 to
2

42, again reaffirmed the highest level of deference.
3

And then again the Ontario Superior Court and the
4

Ontario Court of Appeal. In the Myers case, at
5

paragraphs 14 to 43, once again affirmed the highest
6

level of deference.
7

So, at the end of the day, there is no less a
8

level of deference in Canada than in the United
9

States, and Canada as a litigant in
10

the first NAFTA Chapter Eleven set-asides surely does
11

not make Canada an unavoidable place for arbitration. .
12

ABSENTEE ROBINS: Could I interject with a
13

question?
14

MS. KENNEDY: Please.
15

ABSENTEE ROBINS: Why is it that you say
16

that the Federal Court would be seated if there is a
17

challenge against an award, if a seat in Canada were
18

chosen?
19

MS. KENNEDY: Under the Commercial Code, it
20

would be the Federal Court—okay. The Federal Court
21

is—the option is the Federal Court or the Superior
22

Court is the place of arbitration. Assuming it was

80

13:15:03 I Ottawa or Ontario, then presumably you could go to the
2

Superior Court or the Federal Court. And Ms. Tabet
3

reminds me that it would be one of these two places
4

selected by the party initiating the set-aside. This
5

is in the Commercial Arbitration Act. I think, at
6

Sections 5 and 6.
7

ABSENTEE ROBINS: I was just surprised when
8

you said it was the Federal level.
9

MS. KENNEDY: No, I think that's fair. I
10

misspoke. It would be one of those chosen by the
11

party initiating the set-aside.
12

At the end of the day, then, Canada's
13

position is that the independent judiciary has spoken
14

and that there is a high level of deference, that this
15

is no reason to disgracify Canada.
16

The next question I would just like to talk
17

to us or speak to quickly to the whole question of
18

support services and the fact that this case is in
19

Washington being a criteria that would lead you to
20

suggest Washington is an appropriate place of
21

arbitration. And I would simply like to underline
22

the decision about what is an appropriate place

for arbitration in the U.S.
would be relevant in choosing a place of arbitration.  
1.  Because Canada is bound by mandatory provisions in  
2.  the legislation.  So, it is irrelevant to place of  
3.  arbitration.  The Tribunal will speak to this later.  
4.  question of access and cannot establish confidence later in the  
5.  urban or confidentiality, but it is again, in our  
6.  arbitration, a principle with respect to finding a place of  
7.  arbitration.  So, in summary—and we have provided you with  
8.  our chart—the Tribunal has to go through the exercise  
9.  of balancing based on the circumstances of this case.  
11.  and, in our submission, either Ottawa or Vancouver  
12.  would be the most appropriate place of arbitration.  

Thank you.  

PRESIDENT GHONE:  Thank you, Mr. Klauser.  

So, we now have heard both parties on the  

question of the place of arbitration, and all the  

statements we have heard indeed supplement what we  

have read.  So, it’s taken, and the Tribunal will have  

10.  that is to say, for consideration of the issue in the  

next few weeks.  

So, thank you very much for that Mr. Dallas,  

Mr. Klauser.  

MR. GALLOW:  Sorry to interrupt,  

Mr. President, I wonder whether the Investor might  

have an opportunity to respond briefly to the points  

that we have just been raised by Canada.  

PRESIDENT GHONE:  Yes, you will have every  

opportunity.  

MR. GALLOW:  Thank you.  We will try and be  

as brief as we can.  

Canada raised six points, and I would like to  

respond to each of them if I might, very briefly.  

First of all, with regard to the Access to  

Information Act and the Evidence Act, Mr. Appliance  

will be addressing these acts in detail a little later;  

so, and I will defer to him to respond to  

Mr. Klauser’s comments.  

Second, Mr. Klauser referred to Article 1338  

of the NAFTA and the 1118 of the NAFTA  

20.  and argued that Article 1118 of the NAFTA  

specifically contemplated that the capital city of the  

Respondent could be an appropriate place of  

arbitration perhaps that was my understanding of what  

Mr. Klauser said.  If that is, indeed, what  

Mr. Klauser was submitting, I would like to refer the  

Tribunal to the submission that the Investor made with  

regard to Chapter Twenty of the NAFTA, where within  

Chapter Twenty the NAFTA parties included specific  

rules for arbitration under Chapter Twenty, and the  

parties included within those rules that the place of  

arbitration would always be the capital city of the  

Respondent’s State.  The NAFTA parties chose not to  

include such a rule within Chapter Eleven, and the  

exclusion of such a rule within Chapter Eleven  

indicates that the NAFTA parties believed that the  

capital city of the Respondent’s State was an  

inappropriate place of arbitration.  

The second point that Mr. Klauser made was  

with regard to Washington, D.C., as the capital of the  

Investor’s home country.  Just to respond to that  

point, I would refer to the Tribunal to the  

Netherlands Decision, which is a decision on which Canada relied  

in its written submissions and is included as an  

authority to those submissions.  

In the Netherlands Decision, specifically at  

paragraph 38 of that Decision, the Tribunal considered  

the issues of a city as the capital of the Investor’s  

home country, and what the Tribunal said was that the  

important factor is not the capital cities of the home  

country of the Investor.  The important factor is in  

fact, the State of the Investor.  

And the Netherlands Tribunal said that, so long  

as the Tribunal—as long as the place of arbitration  

is not in the home State of the Investor, then the  

Netherlands Tribunal found that the place of arbitration  

would be neutral.  

The third factor to which Mr. Klauser  

referred was, I believe, enunciated in the spreadsheet  

that she has just distributed to the Investor and to  

the Tribunal, and the Investor duly has not had  

time to review the spreadsheet in detail, and we look  

forward to doing that.  But I would like to make one  

point with regard to the spreadsheet at this point.  

And in a sense it addresses a point I also talked  

about earlier with regard to our response to Canada’s  

written submissions, and that is that, here, Canada is  

listed a series of factors going to Vancouver and

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13:21:03 1 Ottawa and Washington. What Canada has not addressed
2 is the actual practical consequences of nominating a
3 place of arbitration, and the practical consequences
4 of nominating a place of arbitration is that the
5 courts of that country then both assist the Tribunal.
6 as we progress through the arbitration, and also have
7 the right to review any award that the Tribunal comes
8 up with. And on the practical consequences of
9 nominating a city within Canada as a place of
10 arbitration, the Invercater has submitted that no city
11 in Canada can be neutral.
12 Indeed, Canada makes much of the fact that
13 there is very little in the column referring to
14 Washington, D.C.; and, indeed, the ICIDU sitting in
15 that final column does look very lonely compared to
16 the factors of Vancouver and Ottawa. However, I think
17 it's important to make the point which the Invercater has
18 been arguing, that the Invercater would accept any city
19 within the United States as the appropriate place of
20 arbitration for the main reason that the Invercater does
21 not believe that a city in Canada can be a neutral
22 place in arbitration. The Invercater is happy to accept.

13:21:23 1 New York, Chicago. The Invercater would be particularly
2 happy to accept Miami as the place of arbitration.
3 But the Invercater, I think, needs to make the point
4 that we have suggested Washington because it is
5 convenient and in terms we are used, but we would also
6 be willing to accept other places, other cities in the
7 United States, as the appropriate place of
8 arbitration.
9 The fourth point that Canada made was
10 directly in response to the point that I made earlier
11 with regard to Canada's submissions on the standard of
12 review before Canadian courts, and Canada responded to
13 the case to which the Invercater referred earlier with
14 reference to the CAFC, AIP, and Waste Management
15 Decisions. Once again, we have not had time to review
16 these decisions since Canada has mentioned them a few
17 minutes ago, but I think it's worth making one
18 observation with regard to these cases, and that is
19 that in each of these cases–CAFC, AIP, and Waste
20 Management–Canada was the respondent state, and
21 therefore, whatever the Tribunal said in regard to
22 Canada's submissions before its local courts with

13:25:30 1 regard to the standard of judicial review, those
2 tribunals could well have been influenced by the fact
3 that Canada was not the Respondent State and,
4 therefore, may not have been likely to make such a
5 decision to any judicial review of awards coming out
6 of these cases.
7 There are specific points to which I
8 would like to respond to what Mr. Klassen said
9 earlier, unless Mr. Appleton has anything wise to
10 add...
11 
12 MR. APPLETION: Maybe you will allow me for a
13 moment.
14 
15 MR. KLASSEN: Given Mr. Appleton was directly
16 involved in the Myers case, perhaps it's appropriate
17 he should speak to that.
18 
19 MR. APPLETION: As counsel in the Myers
20 initial review, I didn't otherwise want to interrupt
21 Mr. Klassen, and I normally wouldn't do this, but I
22 actually have a copy of the Federal Court decision in
23 the Myers case with me, and I will actually hand up to
24 the Tribunal—and I'm going to give Mr. Klassen the
25 benefit of having Mr. Klassen's copy, which he has

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11:36:37 AM 1 all.
2 ABORTIONS ROMLEY: May I just ask a question 3 about that.
4 seeing aside the special pleading power that 5 might be attributed to a sovereign appearing before 6 its own courts, in it not your position also that the 7 standard of review applied by the Canadian courts and 8 the Federal Court in particular here is lower than in 9 the United States?
10 MR. APPLETION: Our position is that the 11 standard of review has been applied at a lower level 12 in some cases, and that the position taken by the 13 Government of Canada consistently before the various 14 levels--I understand that we think that's very, very 15 important--the basis of the findings--and, in fact. 16 some of the courts have made that finding, and that's 17 what our problem is, because basically--the Federal 18 Arbitration Act based on this point is identical to 19 the UNCITRAL Model Law--they're very, very 20 similar--and Canada is an UNCITRAL Model Law country. 21 So, we think the laws are roughly equivalent. 22 It's a how they are being applied that's a problem here.

11:37:37 AM 1 Ask when we address the other issues, you will get 2 more of a flavor as to some of our concerns about this 3 special pleading that the government has with respect 4 to the Brazilian act and special pleading they have 5 with respect to the access to Information Act and the 6 issues that could arise from other acts that we don't 7 even know about at this point, but where Canada has 8 special status or standing with respect to their 9 courts, and that's why because otherwise it would be 10 very convenient to have an arbitration in toto. 11 But the fact of the matter is that we feel at 12 this point, because of these findings, it wouldn't be, 13 neutral; that's why we have taken so much focus and 14 effort here because we just want everyone to be 15 treated here the same, and that's what Article 15 of 16 the UNCITRAL Model Law says, and what NAFTA Article 1115 17 also says.
18 I hope that answers your question.
19 PRESIDENT ORSHO: Thank you.
20 Have you finished, Mr. Callas?
21 MR. CALLAS: Yes.
22 PRESIDENT ORSHO: Thank you.

11:39:30 AM 1 Would you like to add any further points?
2 MR. FORDHAM: Yes, thank you.
3 First of all, I was a bit reluctant to start 4 handing you a piece of paper, a graphical one, if 5 you're going to be looking at the Myers case, what 6 Canada has put together for you in each of the 7 judicial review Article 1116 set aside cases. There 8 is an article, Myers, and Palmaison at the Ontario 9 Supreme Court--Osgoode Court, ponders us, and the 10 Ontario Court of Appeal. I think perhaps it's best 11 that you have that full record in front of you. So, 12 if I might provide you with these--and I have one for 13 Mr. Appletion, as well.
14 MR. APPLETION: Does that include the document 15 I was about to hand out?
16 MR. FORDHAM: That's correct. It's a full 17 compilation of those cases.
18 [Comment off microphone.]
19 MR. FORDHAM: The second question in the 20 argument that Canada made about Article 1116 of the 21 NAFTA, and I think Mr. Callas disagreed with it. The 22 point really is that Article 1116 says that place of

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13:31:35 I think of reasoning that was being put forward in the
2 IRS and a Talo case, and that is why we have
3 from then to your attention. The fact that the
4 majority of Tribunals have not agreed with the concern
5 that the position of Canada as a diligent seaway
6 takes Canada as a place of arbitration.
7 Finally, the question is Canada having a
8 special standing before its courts or special
9 prescriptive, quite frankly, it's just intro, and I
10 could point you to hundreds of cases that I have lost
11 before the Federal Court of Canada arguing on behalf
12 of the government that there is no proof needed. The
13 fact is we have an independent judiciary, and lack
14 sovereignty, Canada, hasn't yet any kind of special
15 power or special standing and certainly none that
16 would in any way affect Canada as a place of
17 arbitration.
18 Thank you.
19 PRESIDENT DESROUX: Thank you very much.
20 So, we have heard from both parties in
21 respect of the place of arbitration, and then we shall
22 take into account all this wealth of information and

13:34:15 I don't see evidence you are in agreement on the IBA Rules,
1 accept... not entirely?
2 MR. APLINGTON: It appears that what's
3 happened on the area of evidence is that we have
4 proposed a specific rule. We are keenly focused on
5 the IBA Rules but is not the IBA Rules. We believe
6 the IBA Rules can't be applicable directly into an
7 investor-state context but would provide helpful
8 guidance. So, therefore, we have actually drafted and
9 proposed a specific rule that we think that should be
10 used. I can't speak for Mr. Kissner, but I believe
11 that Canada is more specifically generally of the IBA
12 Rules sort of in total, but I leave it to Mr. Kissner
13 on that.
14 PRESIDENT DESROUX: Okay, let us leave that,
15 then, towards the end, and we begin with the question
16 of jurisdiction.
17 Well, on this point, I would reverse the
18 order and ask Mr. Kissner to start as the party that
19 would like to have eventually objections to
20 jurisdiction and hear from Canada first.
21 MR. KISSNER: Well, thank you.

13:34:41 I came back to you with a conclusion in a short period
1 of time after this meeting.
2 Now, we have to aim to try to be over in this
3 meeting about, say, 2:30, and then to have the time to
4 to write-to review the dictates. This I mentioned not
5 to apply any pressure on the parties, but simply to
6 suggest that if you have aspects that would take more
7 of your time than others, then we deal briefly with
8 those that are shorter and at length with those that
9 are long. And because we don't want you to pass out
10 of hunger, we invite you to take anything while we are
11 hearing the different views, and we can have that as a
12 sort of mini-lunch.
13 Great. Thank you.
14 So, would you like to address next the issues
15 of confidentiality, which is in a sense linked, or do
16 that later on...
17 MR. APLINGTON: We could do that now.
18 PRESIDENT DESROUX: We could do perhaps
19 jurisdiction, whatever you prefer.
20 PRESIDENT DESROUX: We could do perhaps
21 confidentiality which is important, too, and
22 confidentiality together with that. I gather that

13:35:31 As the Tribunal knows, Canada, in its
1 defense, had an objection to jurisdiction based on
2 Notice 102 and the claim was time-barred, and
3 also raised objections to jurisdiction on the R.C.
4 Forest Act and that being both time-barred and not
5 relating to the Investor. As I understand, the
6 investor has now confirmed that it does not challenge
7 the R.C. Forest Act as a matter, and so the only
8 question that Canada is requesting it be reconsidered in
9 the question of whether Notice 102 is, in fact, in
10 time-barred under Murth Chapter 11(6)(b).
11 Our position is clear: THE NATIONAL RULES
12 contain a presumption that preliminary objections will
13 be dealt with on a preliminary basis—obviously, it's
14 still a matter within the discretion of the
15 Tribunal—and, in our case, it is both appropriate and
16 possible here. This is a substantial and not a
17 frivolous objection. Article 11(3)(f) has what might
18 be called "a plus specialty," a very clear limitation
19 period based on when the Investor first acquired
20 knowledge or should have first acquired knowledge of
21 the breach and the damage. And I know by the end of
obviously did know about this. Instead, what it did was to try to create these allegations by labeling them as "continuing breaches", and, in that respect, it is the entire basis of the case. Obviously, Canada's position is contrary to that. In our view, there is a clear and express limitation period. It talks about when knowledge is first acquired, and Article 1115 makes the continuation of a breach absolutely irrelevant. The breach can continue forever. It doesn't matter when it finishes or when it's a final or how long it continues because what MONT 2154 directs the Tribunal and the parties to is the date of first acquiring knowledge. That's what matters. So, the idea of a continuing breach, formally, is irrelevant and does not avoid the very clear language of Article 1115.

Canada's submission today, and obviously when we argue this ultimately, will be that the correct interpretation is in the Grand River case, which we have provided to you. The Tribunal, for some reason, doesn't cite the Grand River case, but it will be obviously an important and pivotal case when we come

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of those are pleaded in and of themselves as a breach of NAFTA. What are you examples of the application of Motion 101, which clearly in the policy or progress in dispute in this matter.

And, in our submission, simply by giving recent examples what the Claimant itself calls "particularities" cannot make these—cannot make what is otherwise just an example of something that has happened since 1989 into something that is a fresh, new subject of inquiry for a Chapter 11 proceeding. As you stand, All of this is simply repetition of recent examples. And, in fact, interestingly, in its submission, the Claimant even suggests that they will be finding more examples of things that happened after December 2006 when they filed their claim. The fact that you could collect as many of these examples as you want, but they are merely anecdotal examples, repetitive examples, and they are not breaches in and of themselves, and they do not allow the Claimant to avoid the 1113 limitation period. And, in this respect, I can do no better, frankly, than the Grand

River Tribunal, which you will find at Tab 15 of the collective that Canada provided to you.

If you turn to paragraph 61, which is found at page 35, you will find that the Grand River Tribunal based a very, very similar kind of argument as you were hearing from the Investor today, again directed not to have the limitation period applied. That was rejected outright by the Grand River Tribunal.

And they said, "At the hearing, the Claimants advanced further argument to the effect that the limitations period under Articles 1113(1) and 1117(1) applied separately to each contested measure taken by each State implementing the RMA." That was the Master Settlement Agreement in that case. Whereas, they maintain there is not one limitation period but many. This is not how the Claimants pleaded their case.

Their pleadings did not indicate, except in a limited and anecdotal way, the particular States and times where their products were sold. Instead, the claims were directed against the adoption and enforcement of the escrow stating and other measures in a generic way.

And that is exactly what we have here. If you look at the claim what are being called here as "continuing" or "harm continuing breaches" are merely examples of what was pleaded in the claim to be at issue in this Tribunal.

be the Tribunal said in Grand River, "This analysis seems to render limitation periods

Ineffective in any situation involving a series of 11 smaller and related actions by a Respondent State since the Claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries." In other words, there is something artificial and overly incorrect about knowing about a policy and having it applied to you since April of 1989, and yet being able to get out of bed every day and say "there is a new and fresh claim, and I have got three more years to pursue it." That's the problem with the analysis here and, in Canada's view, the reason that this should easily be bifurcated and that there is a substantial and reasonable argument to be made.

Finally, on the issue of whether the facts are intertwined with the merits, obviously Canada disagrees. If we were to bifurcate this matter, we would not have to go into any of the merits. We would not be addressing argument to things like, for example, comparators, as you would have to do, if you dealt with a settlement treatment issues. You would not have to look at comparative third parties that you will have to do to deal with the key, one of the breaches alleged. You will not have to look at whether there is customary international law minimum standard applicable in this case and what that might be. All of these are what are going to have to be looked at in the context of merits.

Were you to bifurcate, you would have to look at a very small, limited, and uncontroversial record that would enable you to make a decision; and, if successful, no one would have to go any further than or expand continuing this claim.

So, we would ask that the matter be bifurcated, and we look forward to addressing in detail at a preliminary hearing the objection Canada
104

12:46:45 1 I bring up on time-bar.
2 Thank you.
3 PRESIDENT GERRARD: Thank you, Mr. Kinser.
4 I now see we will have the possibility for the
5 Claimant.
6 You want to ask a question?
7 JURISDICTION ENGINEER: Yes, one or two
8 questions. If I may.
9 1 think you’re directing us to the
10 proposition that the breach, the alleged breach, is
11 the promulgation of Notice 140, not its
12 implementation. Do I understand that correctly?
13 MR. KINSER: No. It’s fairness—sorry, the
14 breach has been set out by the Claimant in its
15 claim and I believe we’ve resolved what the Claimant
16 said, and it was. I believe implementation.
17 administration—I’m trying to find the exact quote—which
18 I apologize—but it is more than simple promulgation of
19 the legislation. That is how the claim has been
20 framed. That is obviously the claim Canada has to
21 respond to.

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12:49:31 1 Claimants’ new category of so-called unsanctioning
2 breach.
3 So, we take the claim as it was pleaded, but
4 we don’t believe that there is any—any that has
5 been—that’s nor was released as a breach that falls
6 before the limitation period.
7 JURISDICTION ENGINEER: And the tight
8 circumscribed record that we would decide on would be
9 the pleadings as exchanged plus memorials of argument;
10 is that what we understand from your proposed
11 schedule?
12 MR. KINSER: Yes. Our schedule is in the
13 substance. We would propose to put in, obviously,
14 the Memorial. We will attach an affidavit. There
15 will be limited factual evidence, but it will not be
16 controversial. It will be finally the kind of thing,
17 for example, a list of how many times the permit was
18 issued or the surplus text applied.
19 And then we would also—really, that’s what
20 the record would be. So, I’m not saying there would
21 be no facts or there would not be facts beyond what’s
22 found in the pleadings—there will be—but they are

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T1:47:25 1 The point really being made here is that the
2 kind of thing that’s done in the implementation and
3 administration, issuing export permits, applying the
4 surplus text, that has been done day in and day out.
5 Hundreds of times every single year under Notice 140.
6 By simply saying, “No, and it was done again on
7 January 1st, 2005,” doesn’t make a new breach. These
8 are evidence or samples—our friends have even called
9 them “particulars”—but they are not citing new
10 breaches. They are not saying, for example, there was
11 something in the way Canada issued the surplus text on
12 December 20, 2006, in and of itself was a breach of
13 the minimum standard. What they are saying is a
14 program that is repetitively administered in the same
15 way and has been since December 1st—April 1st of 1998
16 continues to be done that way. There is nothing new.
17 There is nothing different.
18 And by citing this sort of day-to-day routine
19 stamped the permit and saying all this is a new
20 breach, well, that’s not what has been claimed here,
21 and that’s our argument with respect to the whole
22 issue of so-called continuing breach and then the

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13:49:43 1 limited, and they are uncontroversial, as I say,
2 PRESIDENT GERRARD: Mr. Appleton, please.
3 MR. APPLINGTON: Thank you, Mr. President.
4 Let’s just try to unpack this and figure out
5 what’s the most efficient single way to move forward.
6 First, Canada has asserted the Investor’s
7 claim. The Investor’s claim is, in fact, about the
8 implementation of Canada’s export control policy
9 under December 27, 2003. Our view is that the entire
10 claim is manifestly within the jurisdiction of this
11 Tribunal. To assist, we provided a statement of
12 Particulars to give some samples. Each of these
13 samples are, in fact, samples of a breach of the
14 NAFTA. I could have drafted the claim with an array of
15 lists and lists and lists, but that’s not what the
16 claim—it’s much easier to provide in the claim, and
17 all our regimentation with the claim. In so express
18 this is about the implementation of Canada’s measure.
19 had, in fact, there are very different types
20 of factual issues that arise that cause problems not
21 of different biologically distinct that are involved.
22 It’s not the same type of thing, and we have put in
111 12:51:47 I suggest to you there are going to be a lot of facts 2 because although Canada has repeated the same actions 3 year after year—and that is true—Canada purports to 4 say now that it is exempt from Tribunal review when it 5 repeats these actions. But we are going to suggest to 6 you the case law, not just the ISR case, but case law 7 suggests to you that Canada's position is simply 8 wrong.

9 Now, as a matter of fact, in the ISR, 10 Tribunal, Canada spends a tremendous amount of time 11 and effort talking about customary Act issues that had 12 been known by the Investor, and they put in the same 13 type of evidence, a letter of complaint from ISR, 14 seven and a half years before the claim was brought. 15 within the NAFTA term, so it's after NAFTA is into 16 force seven-and-a-half years before.

17 So, this very specific question was 18 specifically canvassed by a NAFTA Tribunal so exactly 19 the same circumstances, and that Tribunal found that, 20 if you have a continuous breach, and that is the 21 international law way of dealing with this we followed 22 by the ITC and is well established, that you look to

112 12:53:31 1 the continuing pattern of actions and, therefore, if 2 we have an issue about continuous breach, we must, by 3 necessity, look carefully at the factual record.

4 Now, what NAFTA 2116(4), that provision that 5 we are talking about here, where it creates a 6 rule—and I will agree that it's a very special rule. I 7 will agree that international law generally doesn't 8 deal heavily with concepts of extinctive prescription 9 of time limits. It creates a time-limit rule, but 10 that would be used, for example, in the situation 11 where you have a breach of contract. You have 12 something, you have an action that's completed, and 13 then you have a three-year period. That's where it 14 runs. And international law generally would not 15 create a time limit or, to the extent that 16 international law does create a time limit, this is 17 more a question really for the "Histoire de France" 18 Maximale—is anything else, but they would look at 19 a 50-year or 100-year period when you don't have 20 availability of witnesses and other things like that, 21 there is not a standard limitation period in 22 international law.

113 12:56:01 So, that's really what the finding was in 1 the ISR. They said, "Well, this is a continuing breach." 2 You are not exempt from Tribunal review merely because 3 you're able to continue the wrongful behaviour over a 4 period of time and, therefore, get out of the 5 jurisdiction of the Tribunal. We referred to it in 6 the ISR as the "Torture Test." You couldn't just 7 continue to torture someone again and again and again 8 but not kill him and then say, "Well, three years 9 you're out of luck, the Tribunal no longer has 10 jurisdiction." 11 That's not what the purpose of the NAFTA is 12 about, and that's not what the purpose of 13 international law adjudication is about, and that's 14 why the International Law Commission has specific 15 rules about continuous breach and all types of cases 16 that have come to that conclusion, and we would be 17 ignoring that entirely, and that, in our view, cannot 18 be correct. That's why international law supports 19 this concept.

20 But, to the extent that Canada's 21 objections—just to come back, to the extent that
125
13:55:16 1. Canada's objections are, 'Well, there is an action, and there was a measure that occurred a number of years ago and, therefore, it's exempt,' we would say this is basically frivolous, that Canada's objection, basically they have brought this forward before. They knew they have an uphill road here, and the fact of the matter is that the UBS Tribunal carefully considered this, carefully looked at this, and we believe they came to the right conclusion on this very particular obligation, and we believe it's up to you to make your own determination, but we think that's what that means.
12. Not, to the extent that Canada's objection is not frivolous—and I don't believe that Canada is being frivolous generally here—then this Tribunal needs to consider evidence, and it needs to make rulings with respect to that evidence about whether the breaches were involved, in fact, are continuous.
13. Now, this determination of the continuous period, whether they fall within the three-year period, whether there is a single breach, I have been asked about the information and

116
13:57:49 1. this Tribunal, and other fairness and treatment issues which are redolent. And while we say there could be more and we put it in our particular, as we find more information we will supply more documents, we hope, and of course we will get to that, but should this Tribunal agree that we're entitled to some information from the government, we believe that there will be even more examples of specific types of behavior that it violates the NAFTA.
14. And if you want to say, 'Well, it's all within the rubric of Reporters 102,' but there are all types of issues. Some of them have started before the three-year period, and some three years before the claim was filed on December 27, 2006, as just before December 27, 2003, is sort of our cut-off. So, the extent that they are before that period but are continuous, we would say (113/1) doesn't prevent them, and that's exactly the question that OBI had to look at, and that factual determination has to be
15. carefully determined by this Tribunal, and we would say it's virtually identical to the determination of facts that this Tribunal necessarily needs to make for

117
1. So, holding a preliminary jurisdictional hearing would be highly duplicative of resources and, in our view, very inefficient. If this Tribunal needs to consider these facts—and we believe they do need to consider these facts to do merita—and they have to consider these facts again to be able to look at these preliminary projections, we think that would be just a tremendous waste and indecent burden.
2. And more importantly, delaying the hearing on
3. the merit of the case is the face of a ruling that really could be made right away on Canada's objections—that is, to join it to the merits—would be highly prejudicial to the investor who really has a right to have the hearing here or this claim heard in a fair and expeditious manner. And we think, though, that a separate consideration of the potential implications of holding a separate jurisdictional hearing is improper. Because Mr. Birner has suggested that that would be the right thing and would not be particularly burdensome, and has made some suggestions of things that we wouldn't have to look at.

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119:14:14 1 would say that would be very prejudicial to the 2
3 investor.
4 So, what we would say is that the fairness-the 5
6 water risk allocation of these two options would be 7
8 to join Canada's objections to the merits and defer 9
10 answering it until the completion of the proceeding 11
12 of the merits. 13
14 Now, now, surprisingly, referral of objections 15
16 that have any possible factual aspects to it, that's 17
18 the option most commonly selected by arbitration. 19
20 panels become expedient and fairness are the 21
22 cornerstone values of arbitration, and so it's in 23
24 light of these specific considerations in light of 25
26 Canada's request that we ask the Tribunal to join 27
28 Canada's objection to the merits because we're going 29
30 to have go there.
31 Our suggestion, in any event, is that after we 32
33 went through that Whole process you would to end 34 up joining it to the merits in an event because of 35
36 the nature of what they are seeking, and that's 37
38 why—that's why we are suggesting today that you join 39
40 their objections, which they have properly raised in 41

120

120:4:21 1 their Statement of Defense, and that we have this done 2
3 as part of the merits because they're intrinsically 4
5 listed.
6 # PRESENTED BY: Thank you, Mr. Appleton.
7 let me ask you a question just for clarifying 8
9 some aspects of the argument.
10 It is quite clear in my mind which would be 11
12 the situation of the kind of claim that has occurred 13
14 after December 31, 2003. To the extent that there are 15
16 these breaches and claims, of course, they're not 17
18 subject to any limitation period. Now, I also 19
20 understood quite well that, if you have a breach 21
22 before and that breach continues after December 27, 23
24, 2003, you are regarding that as a Claimable breach, 25
26 well.
27
28 Now, this is a question: Would you be, in 29
30 your claim as to respect of that continuing breach, 31
32 claiming, say, for the damages that that might have 33
34 caused after December 31, 2003, only, or you would be 35
36 saying, because this happened after December 27, 37
38, 2003, even if it goes back 30 years—well, it's not exactly 39
40, but whatever it is—I'm claiming for the damages 41

122

122:4:21 1 that arose in the early start and are continuing until 2
3 this day I'm claiming for. That question I would like 4
5 to have sort of more clarity in my mind, which I didn't 6
7 sort of quite grasp from the argument.
8 # MR. APPELTON: I believe in the admission or 9
10 this point we specifically address that point, but I 11
12 will give you the answer, but—what paragraph is 13
14 it—its paragraph 15.
15
16 Not but let me tell you so it's absolutely clear 17
18 for everybody, we are only claiming damage three 19
20 years before the filling of this claim. All damages 21
22 come from December 31, 2003, forward. We have not 23
24 claimed one cent before that period of time. 25
26 # PRESIDENT (SPO): Okay.
27 # MR. APPELTON: And part of our problem with 28
29 this whole issue is that there is a tremendous lack of 30
31 transparency. That's one of the investors claims 32
33 here. So, it's very difficult for us, without having 34
35 the assistance of the Tribunal for a limited bit 36
37 focused document production or information request 38
39 process, to get some of the answers be able to nail 40
down even more. That's why the Statement of 41

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16:05:20 1

Particulars which I thought were obviously very
helpful to get out on everyone can see it, were set as
samples because we may very well find that we have
47 opinions on other issues but, until there is
5 some documentation, we can't tell you the particular
6 dates, but those are particular dates that are well
7 within the three-year period.
8 And that's why we say this Tribunal is going
to have jurisdiction to go ahead anyway on those
9 questions, and since we are going to be there, we want
10 to find what is the simplest, most efficient way that
11 is also fair to the parties involved. It would just
12 not be fair to the Investor to just look at Canada's
13 characterization of this issue without looking at the
14 fundamental factual elements, and I'm afraid that's
15 the Tribunal's job. You need to go there. That's our
16 problem here.
17
18 P resident (indexed): Fine. Thank you.
19
20 Would you have anything to add, Mr. Signer?
21
22 Mr. Signer: I would like to say... For the
23 record here, I'm very concerned, and I would like to
24 at least put it out very clearly right now, what we
25 124

16:17:41 1

So, I would urge you in particular to look
2 at the claim. As best that we have are samples and not
3 new breaches, and not new submissions, you have heard
4 them, but we would like to register how very concerned
5 we are that this appears to be some rolling claim
6 make-it-up/add on as you go along.
7 For the record, we do not believe document
8 production is necessary. We believe that—for the
9 jurisdictional objections, obviously. We believe that
10 this can be, as I say and said throughout, this is
11 uncontroversial and limited factual record, so it's
12 very impossible.
13 Mr. Appleton spoke about a right for your
14 claim to be heard, almost your day in court, but the
15 fact is NAFTA—since we, SECTION 71 (4) says
16 the opposite. It says there is a presumption that
17 jurisdictional objections will be heard on a
18 preliminary basis, not a presumption that you will
19 have the full day in court.
20 Finally, the full day in court here, let's
21 not fool ourselves, is going to be a long and confu
22 sion.
23
24 You have claims of breach of national
26 125

16:16:17 1

bear Mr. Appleton saying it's just a claim about
2 things that have happened in the last three years.
3 What we have received is a Statement of Particulars
4 that has all sorts of new and different issues, so
5 we call them. There are things that are not in the
6 claim that Canada never answered to in the defense
7 because they weren't pleaded as the claim. In his
8 submissions, he said that he will probably discover
9 new cases.
10 Well, I'm very concerned because, frankly, my
11 understanding is that this claim is what frames the
12 breach. An Investor has to say, 'Here is what I say
13 breaches NAFTA Chapter 11 relating, and they can't
14 continue to add on in Amendments of Particulars, let's
15 see what we find in documents. This is a problem and
16 a concern, and frankly we would like to say very
17 clearly we are very worried about this because this is
18 what we are seeing right now. All of a sudden there
19 are new breaches that were never mentioned in here,
20 and we are told today, yes, there is another breach,
21 and we will find some more as we go along. Well,
22 there can't be that kind of situation.
23
24 16:08:44 1

treatment, most favored nation treatment, minimum
2 standard of treatment, performance requirement, and
3 nonproprietary. Dealing with this first as a
4 jurisdictional objection is a much more expedient
5 and much more cost-efficient way to go, and that is
6 why Canada has suggested that that is how we proceed.
7 President (indexed): Thank you, Mr. Signer.
8 Mr. Bowley, please.
9 Arbitrator (indexed): Mr. Signer, does this
10 Tribunal at this stage, in your client's position,
11 have jurisdiction with respect to allegations of
12 breaches of NAFTA occurring after the December 2003
13 date and for damages arising thereupon? That's the
14 first question.
15 Mr. Signer: The first question is yes, if.
16 and that is a big if here, if there were allegations
17 in this claim of breaches in and of themselves of
18 breaches that happened after December 2003, then
19 the claim is timely in that respect, and damages obviously
20 would flow.
21 Our submission is that, when you read this
22 claim carefully, that is not the case. What it's
14:33:13 1 claiming is a frontal attack on a policy that was
2 promulgated in April of 1999 and has been applied to
3 Merrill & Ring hundreds of times a year the same way
4 since that date, and that just anyly, "oh, and it
5 also happened in 2009" is simply a device to get
6 around the Article 1318 (2) time limitation.
7 6. So, the straight answer to your question,
8 obviously, is yes, but we don't believe that that is
9 what has been claimed here, and that's why looking at
10 the claim in very careful, and our submission is
11 simply repetitive examples of implementation of this
12 policy doesn't get you out of the problem that this
13 policy was promulgated and has been implemented since
14 1999 all in the same way.
15
16 ARBITRATOR RENVY: Second question. If
17 there are credibly alleged breaches occurring after
18 December 2005 and damages—sorry, before 2005,
19 credibly alleged breaches before 2005, the damages for
20 which become known only after the bite point of the
21 limitation period, is it Canada's position that we
22 have jurisdiction over such claims? I am saying
23 credibly alleged. I know you said there may not be
24
14:33:29 1 the fact in they are saying that they are not allowed
2 to sell their products on the international market and
3 get a better price, every time that Canada apparently
4 disallows them from doing so, they have knowledge of
5 the loss because they sell it for a domestic price and
6 not an international price.
7 7. So, there is no suggestion whatsoever in this
8 claim that there is an inability to discover losses.
9 8. In fact, it's almost instantaneous because the prices
10 are set there for all to know, and there are people in
11 the industry. We know in this case, and Canada has
12 placed it, that the first application was rejected in
13 April of 1999 and that there was loss there. So,
14 right away we know they have the loss, and that's
15 why Canada brings up the suggestion.
16 ARBITRATOR DAW: This goes to either party of
17 both.
18 16. I'm a little unsure as to exactly what the
19 facts are here as to how the system works. I just
20 heard from Ms. Kinner that the subsequent impacts
21 were more or less mechanical, but, on the other hand,
22 are there allegations that so, there was a lot of
23
14:35:51 1 any, but that's an issue.
2 2. MS. KINNER: First of all, you. If there
3 are credibly alleged breaches after December 2005—let
4 me address the first part, which I understood was
5 after.
6 ARBITRATOR RENVY: No, I changed it.
7 7. Credibly changed breaches before, but the damages for
8 which become known only after.
9 9. MS. KINNER: On the law, it's very clear
10 that all you have to know is the fact of damage. You
11 don't have to know a precise quantification.
12 So, if there was a credibly alleged breach
13 before December 2005, and you had absolutely no clue
14 whatsoever of any potential damages—you thought there
15 were none—and then you found out later there were
16 damages after 2005, well, you, that's when the
17 limitation period would happen. But if there were
18 breach alleged before December 2005, and you could
19 credibly know about loss—out exact amount, but the
20 fact of loss—then you have a limitation problem. And
21 on the facts of this case, it's very clear, and as I
22 say, the lawyer has never even argued about this,
23
14:36:47 1 discretion used and, therefore, you have to look at
2 the actual actions in understanding the way the system
3 worked; there are two completely different
4 situations, it seems to me, and I'm a little unclear
5 as to exactly what is being—what is at stake here.
6 ARBITRATOR RENVY: Would you please like to
7 answer that.
8 MS. KINNER: In our submission, there are no
9 kind of allegations about market distortion or
10 anything like that that would purport knowledge of
11 the fact of damages. What's clear here is that you
12 know, you apply, you know once a month that the
13 application will be considered by this commission, the
14 PXDs and that they will issue a decision, and you
15 know that you will sell at the domestic or the
16 international price. You know that one is less than
17 the other. To the extent that it might be greatly
18 different because of some particular market distortion
19 in that year in, frankly, irrelevant to the knowledge
20 of fact of loss or damage.
21 Again, it goes back to the point you don't
22 need know the exact amount. What you need to know for
23
the tailing of the limitation period in the fact of
loss or damage, and so there is nothing in the record
in the pleadings that would lead you to conclude or
that would allow you to say that any kind of
special factor like that postponed knowledge of damage
sufficient to trigger the limitation period in the

MR. APPELTON: Professor Sam, I would like to
9

address this specifically. This is from—there are a
couple of points.
10 Number one, this claim is very much about the
11 specific implementation that's done over a period of
12 time and the specific types of actions. It is not a
13 mechanical/mechanistic type of claim which is exactly
14 why we think there is such a tremendous danger of
15 having a jurisdictional phase without having any of
16 the evidence that's here.
17 For example, this claim deals with the
18 appointment of specific people in 2005 to the FTCAC,
19 the Federal Timber Import Advisory Committee, that
deals specifically with applications, has specific
20 conditions of interest about specific log home, and we
21

be very specific to be able to deal with this. They
22 have specific interest for themselves, for their
23 industry, for their approach—that's one example.
24 There are examples about log blocking, where companies
25 have either interests that are involved where the use
26 of the governmental apparatus isn't done in a fair or
27 appropriate manner, or untransparent manner that
28 causes tremendous types of loss.
29 We have issues of damage caused by excessive
30 delays that are caused in this process, and these
delays come at different times. This is not because
31 we are required to have a formality to fill out a form
32 or do something.
33 I recently had the opportunity to go with
34 Mr. Fisk and actually go out and see the extent of
35 some of this damage in some of the logging areas so I
36 could see for myself and describe to this tribunal the
37 nature of exactly what takes place. And when we get
38 to that opportunity, I now have a new-found
39 appreciation of exactly what has been gone through by
40 this company and the people that work for them because
41 of the nature of what has been done.

16:18:13 1 These all deal with discretionary types of
2 actions as an ongoing period, and to somehow say,
3 "Well, we have a rule that allows this discretion, but
4 we are going to ignore the discretionary element in
5 its application, the violations of other parts of the
6 NAFTA framework that's there because somehow they come
7 out of a rule at we had from before," which is the
8 admission of Mr. Kinner, we have done a hundred
9 times. The nays, in fact, they actually do it
10 biweekly, so they only do it 24 times a year for that
11 side, but there are lots of other things that go on,
12 that somehow would not be fair or appropriate. That's
13 what this claim is about.
14 This claim is not about we don't like a rule.
15 This claim is about how it's been implemented, how
16 there is a pattern of unfairness because you have the
17 Government of British Columbia, who, involved as a
18 governmental entity, is involved in administering FTCAC
19 and FTCAC. FTCAC is an "FF" put into FTCAC, FTCAC is a
20 provincial body. It's administered and follows
21 provincial rules. The Federal Government makes it
22 FTCAC by having someone in Ottawa generally get on the

16:17:18 1

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<td>14:35:11 1 not complaining of the regime, if they’re complaining of specific things in the last three years, we should at least have specifically what they are. 4 So, I agree completely with the concept of notion pleading. That’s what we have. But the fact is we are entitled to have the exact measures in breach, and we keep hearing this things here, and that’s certainly alarms me, and that’s why we have raised that. 14 MR. APPELLATE: Professor Orrego, if I could answer that question, in fact, I had actually intended to answer this question before, but I got so muddled up about talking about the notice, and I’m sorry, I apologize for that, that I didn’t get a chance to address this point. 16 First of all, let’s look at what the UNCTAD Rules say, and I will tell you what some of the cases have said because this has occurred before, and the core law is very clear here. And the rule in notion pleading. That is the rule. This was brought by—Canada complained in the Pope case, Canada complained in the YPS case, and they both came to</td>
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<td>14:37:24 1 Article 106, this issue of not knowing, this issue of having arbitrary or inequitable treatment or discriminatory treatment. In that regard, it is part of that NAFTA obligation. 5 So, number one you can’t have it both ways. You can’t say, ‘Well, you have to know everything up front, but—if the breach is because of that,” and we pleaded three types of allegations in the claim. 9 Everything in this is together, but it’s a series of 10 conducts in implementation of a form of legislation, and other regulation that’s involved here. 11 And so, in fact, when we talk about the 13 measures, “measure” even governmental acts as defined in NAFTA. In Article 101, “measure” has a broad definition that involves laws, regulations, policies, practices, requirements, various types of things, and what we have done is indicate what the measures are, but the measures aren’t the breaches. What our requirement here is to indicate what the breaches are, and the breaches are with respect to the national treatment, and we have a concern about most-favored-nation treatment, and that really is an</td>
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<td>140</td>
<td>14:38:13 1 basically exactly the same conclusion, which is the 2 notice pleading, but the UNCTAD Rules tell us. They 3 tell us, first of all, in Article 3 that all we need 4 to talk about is a general notice of the claim and an 5 indication of the amounts involved. That’s Article 3 6 paragraph 3(1). 7 In addition, we are entitled to make 8 amendments under Article 31. It says, ‘During the 9 course of the arbitral proceedings, either party may 10 amend or supplement his claims or defenses unless the 11 arbitral tribunal considers it inappropriate to allow 12 such amendments having regard to the delay making it 13 or prejudice to the other party.” It goes on, but 14 that’s the main point. 15 And what the ruling was in VDS very clearly 16 was that we had an obligation to put this out in our 17 Memorial, because by that point we had had the 18 benefit of some information requests back and forth. 19 And the difficulty that we have here is that one of 20 our allegations is about nontransparency. We can’t 21 get this information because they haven’t made it 22 available, which in itself is actionable under NAFTA</td>
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141 | 14:39:36 1 interpretive concern. 2 Let’s get this out now so we all understand. 3 Our concern is about really the meaning of Article 4 1119 and to the extent that you may find that Canada 5 has given a better meaning of international law 6 standards of care in another third party Treaty than 7 you have in the NAFTA, then 1119 is involved. 8 Otherwise, there is no need for 1119. And since there 9 is an interpretive principle of most favored nation 10 treatment, in any event, for out of an abundance of 11 caution we included 1119, but we are not alleging a 12 separate 1119 action here. We are just saying that 13 you have an obligation to follow 1119 in your 14 determination of the meaning of 1119. And since there 15 happens to be an interpretive principle that way, we 16 don’t think we really need to do it; but, if we do it 17 plead it, we are not going to be able to do it. 18 That’s exactly why we have done that. 19 18 So, we are looking at a breach of national 20 treatment. We are looking at a breach of the 21 international law standard of treatment in 1119. We 22 are looking at specific breaches of performance |
143 
14:36:45 1 requirement rules in Canada's legislation that do not 
2 comply with specific obligations in Article 111 of 
3 the NAFTA, just like a tax act that is specifically 
4 laid out there, so we see that, and we are looking at 
5 appropriateness conduct in Article 1110. That there are 
6 the breaches. These are all pleaded. The measures 
7 have to fit in within the breaches, and we have done 
8 that with tremendous (a) with notice, but (b) with no 
9 tremendous specificity specifically to help the 
10 Tribunal and Canada.
11 And I'm not sure what else we are required 
12 or, to be honest, is appropriate or fair at this time 
13 to do until we have document production from Canada to 
14 be able to cut through this problem, and then maybe we 
15 could narrow the issues down, even reduce them, we 
16 hope.
17 PRESIDENT GREGG: Well, thank you very much.
18 That has been a most illuminating discussion on both 
19 sides. So, of course, the Tribunal will consider all 
20 these items and views in the coming days and be back 
21 to you with a conclusion that will need to have all 
22 the necessary elements that we have in front of us.

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14:37:18 1 talk about what document production would look like.
2 So, again, I think that would not take a long time,
3 unless you want to have a debate about the EIA Rules
4 themselves, and that could take some time. I don't
5 know where you want to go. That would be my sense.
6 Then we could probably talk about some
7 thing, but it would be depending on where you want to
8 go or other issues.
9 PRESIDENT GREGG: How long do you envisage
go generally?
10 MR. CHAIR: I think perhaps 15 minutes would
11 do to cover both confidentiality and document
12 production. But again, there is a number of things in
13 the submissions from the Claimants that we haven't had
14 a chance to address and particularities on the
15 Confidentiality Order and the proposed document
16 production. I may have a solution in order not to
17 have to address it in detail here, but again it will
18 depend on how the Tribunal wants to do this.
19 PRESIDENT GREGG: Okay. Thank you.
20 [Tribunal conferring;]
21 PRESIDENT GREGG: Fine. We suggest that we

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14:38:04 1 How may I ask you one thing about the
2 expected progress. We still have the question of
3 confidentiality and production of evidence. How long
4 would you generally think that might take?
5 MR. APPLEGRE: I believe—I need to walk you
6 through the Applecross and Privy Council decision. Once
7 we can discuss the meaning of that, I think that takes
8 about three or four minutes. I think I need about
9 three minutes of observations, so my sense is I need 10
10 minutes total to be on the liberal side to talk
11 about confidentiality.
12 Because we provided a draft order—and, in
13 fact, in light of the observations raised by Canada, I
14 actually have amended the order because there were two
15 issues they raised that I think need to be addressed
16 in the draft order, and so I'm trying to find simple
17 answers for the Tribunal there.
18 On the issue of document production, we have
19 put a draft order in. We want to flag an issue which
20 we think, in light of everything else since it has
21 already been raised about Section 39 of the Evidence
22 Act, we probably just need to flag it, and we could

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14:38:33 1 have a short break until a quarter to 3:00 and then
2 recesses for what probably would be 15 minutes on
3 each side for both pending issues. And then we would
4 have to consider the revision of the draft Minutes and
5 so as to be ready with some conclusion.
6 Would that be agreeable? Okay. So, you are
7 invited to take up something new.
8 (Brief recess.)
9 PRESIDENT GREGG: We are ready to proceed,
10 and then we have the question of confidentiality, and
11 we ask the Claimant to speak on that first.
12 MR. APPLEGRE: Thank you very much,
13 Mr. President.
14 As you know, the parties have been unable to
15 agree on the content of a Confidentiality Order, and
16 you will see before you two different agreements, one
17 that was proposed by Canada and goes back as early as
18 March of 2007, and the other is the agreement that we
19 annexed to our submission as Annex A.
20 And, in fact, after I had finished going
21 through this, I found two areas that still need to be
22 addressed, so we are actually going to propose a
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15:05:13 1 revised Annex A at the end of my presentation.

2 The two drafts reflect a fundamental
3 difference and guiding principle, and Canada says that
4 in the same words in this Tribunal law to be made
5 subject to Canada's Access to Information Act. The
6 Investor says that this is an international law
7 tribunal that it is governed by international
8 agreement and that your orders not need to be subject
9 to the operation of Canadian law. And this same was
10 recently considered by the Federal Court of Canada in
11 relation to a Confidentiality order made in the US
12 NAFTA Tribunal, and that's the case of Appleton and
13 Privy Council Office, and that's why I can speak to
14 this directly because I'm afraid I am Mr. Appleton
15 from Appleton and Privy Council Office, and you can
16 ask me any questions that you would like with respect
17 to that case because I'm in a particularly good spot
18 to be able to answer them.
19 But what that case clearly demonstrates is
20 why this Tribunal should not agree to make the
21 Confidentiality order subject to Canada's Access to
22 Information Act because, if you do so, you are going

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15:08:39 1 to irreparably unde the equality of the disputing
2 parties, and that's not something we are allowed to do:
3 as a Tribunal because of NAFTA article 1115 and, of
4 course, the general principles of equality of the
5 parties that's enshrined in UNCTAR Article 11.
6 Now, as a rule of two cities, there is a rule
7 of two orders. We have the Pope & Talbot Order,
8 and we have the US Order. And in the Pope & Talbot case,
9 the Tribunal's Order followed what it calls through
10 the standard form of international arbitration
11 confidentiality agreements; and in the US case, the
12 fundamental difference is they added some words saying
13 that the Order would be subject to Canada's domestic
14 access to Information Act requirements. Now, you will
15 see in our submissions why we think, in fact, Canada
16 is not actually subject to the Access to Information
17 requirements. I'm not going to spend more time
18 focusing on that because we don't have a lot of time,
19 and we have not put it out in our pleadings.
20 But the consequences of decisions made by
21 this Tribunal demonstrate why you think that you should
22 not be following the US model in this case. And let

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15:07:56 1 am explain to you what happened in the US-covery. In
2 the Appleton and Privy Council case arising out of the
3 US Orders,
4 we, after the US Tribunal issued its Order,
5 Canada received requests under its Access to
6 Information Act, and this request could be made by
7 anyone who was resident of Canada or any citizen of
8 Canada can make a request. And the applicant sought
9 all information mentioning Apple and the Associate, our
10 law firm, and NAFTA Chapter Eleven. But Canada
11 responded by offering to disclose documents produced
12 during the US NAFTA claim that were marked as
13 confidential and were not submitted to the US
14 Confidentiality Order.
15 Now, our law firm objected to the release of
16 these documents, and that's especially the case since
17 many of the documents did not even mention Apple's
18 Associate or NAFTA Chapter Eleven. They didn't
19 mention it, but they were still part of the release.
20 And they were released because the act gives Canada
21 discretion to choose what to release or not. So, once
22 someone triggers this process, Canada is entitled to

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15:09:49 1 use its absolute discretion as to what to release.
2 And even if released material doesn't conform to the
3 request, it's up to Canada to deal with it.
4 So, obviously, we are very concerned about
5 this. We went to the Federal Court, and the Federal
6 Court ruled that because the US Confidentiality Order
7 was made subject to the Access to Information Act,
8 that Canada had the discretion to decide to choose
9 what it wishes to disclose under the Act, and that the
10 act is made to allow Canada to disclose as much as
11 possible, and we could not rely on the US
12 Confidentiality Order to prevent the release of these
13 documents. And they actually distinguished the Pope &
14 Talbot Order from the US Orders.
15 And they said that we could not complain that
16 more was produced than what was requested. The court
17 ruled that, fundamentally, the applicant has no ability to
18 argue that the Access to Information
19 Coordinator—there is one in every Federal
20 institution—made any error in deciding to disclose
21 more than what was asked for, so Canada released the
22 documents.
Now, in addition to this issue, this was-and been the deal breaker, which made it very difficult for us to function, which is why we have to come to

Mr. SCRAF: Periods not?

Mr. APPELLATOR: Do you want a HAPTA Article

Mr. SCRAF: Thank you all.

Mr. SCHOF: Thank you.

Mr. SCHOF: Sorry, Mr. Schaf, just to clarify, Merrill & King is very interested in having some type of discussions, but we want an agreement to cover settlement and privilege issues, and that wasn't available, so that's the first failure.

Second problem with this Order is that it doesn't apply to previously exchanged information, and there is some previously exchanged information in this record, and that was also an issue that we found out from the Appleton and Privy Council case, and that seriously that needed to have a provision, as we put that in.

Then there is the issue of if Canada wants to share information with Aboriginal governments to be

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Then there is the issue of if Canada wants to share information with Aboriginal governments to be
151:31:1 1 151:31:1 1
1 2 because we don't think Canada's access to information
2 3 act actually governs. We believe the international
3 4 tribunal in that regard by the currently existing
4 5 laws and regulations.
5 6 7 But, in fact, Canada's act set out its submission
8 9 to the Tribunal here the terms of the access to
8 10 information act.
9 11 And if you look carefully at Article 20-1
9 12 13 believe its 21(1) of the Access to Information act,
13 14 you will see that Canada is precluded from releasing
15 16 certain types of information, and that information is
15 17 financial, commercial, scientific, or technical
16 18 information that is confidential business information
16 19 and is treated consistently in a confidential manner
17 20 by the party to which it relates, including—sorry,
17 21 22 I'm reading my act. I'm not reading theirs, sorry.
17 23 24 What that says—but it starts the same
17 25 26 way—Confidential Information--do we have a copy of
17 27 28 this? I think it might make my life easier.
18 29 The wording is now addressed. If you look at
20 21 my Annex A, and you look at the top of page 2, which
21 22 is handed to you, the wording comes directly from

151:31:1 1 151:31:1 1
1 2--because even if we would say agenda
2 3 or order that they have wouldn't permit that, and so we
3 4 think actually that's not a bad idea for them to be
4 5 able to share, but they have to share with the
5 6 provinces so that they are going to be bound by the
6 7 order.
7 8 So, in our revised order which we are about
8 9 to present to you, we have actually put wording in
10 that would require Canada to—if they're going to give
10 11 this confidential information to the provinces, that
11 12 those provinces have to be made aware of the terms of
11 13 the order, and the provinces here to agree to follow
12 13 the obligations as if they were a party to the
13 14 agreement. Just like under NAFTA Article 1104, the
14 15 non-disagreement NAFTA parties, if they request
16 17 information, they're entitled to see the evidence
16 18 or the materials, so they have to take on the same
16 17 basis. That's the NAFTA, and we think that's
17 18 appropriate, but it needs to be in an order, and so we
18 19 have put that in.
19 20 And then, finally, Canada's form of order
20 21 that doesn't address confidentiality of information at the
22 conclusion of the arbitration, and that's a problem
23 because this Tribunal could be finished, and then what
24 do we do if there is a peasant?
25 26 Now, in looking at Canada's submission, we
26 27 though, we basically went to find a simple solution.
27 28 And do you have a copy of the Canada's submission?
29 30 Order?
30 31 So, what we thought, rather than make it more
31 32 difficult for this Tribunal, we thought we might have
32 33 a simple answer.
33 34 Could you hand these up, please?
34 35 So, what I have suggested is a revised
35 36 order—let's give them all to Canada first. Next, I
36 37 could hand this to Canada so they could look at
37 38 this right away? I usually like to give materials to
38 39 counsel first.
39 40 What I have tried to do is add specifically
40 41 something that would fit within the terms of Canada's
41 42 Access to Information Act because--
42 43 MS. KHERRAH: What are we looking at?
43 44 MR. APPLETHER: I will get you there.
15:19:14 Mr. Tabet: I am concerned about the confidentiality order. I want to make sure it is understood that the statement made by the Tribunal is simply that the information is confidential and that we will not be discussing the actual content of the information. Ms. Appleton: I agree. We will ensure that the confidentiality order is respected.

15:19:22 Mr. Tabet: I am concerned about the confidentiality order. I want to make sure it is understood that the statement made by the Tribunal is simply that the information is confidential and that we will not be discussing the actual content of the information.

15:19:24 Ms. Appleton: I agree. We will ensure that the confidentiality order is respected.

15:19:26 Mr. Tabet: I am concerned about the confidentiality order. I want to make sure it is understood that the statement made by the Tribunal is simply that the information is confidential and that we will not be discussing the actual content of the information.

15:19:30 Ms. Appleton: I agree. We will ensure that the confidentiality order is respected.

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15:20:01 Mr. Tabet: I am concerned about the confidentiality order. I want to make sure it is understood that the statement made by the Tribunal is simply that the information is confidential and that we will not be discussing the actual content of the information.

15:20:05 Ms. Appleton: I agree. We will ensure that the confidentiality order is respected.

15:20:09 Mr. Tabet: I am concerned about the confidentiality order. I want to make sure it is understood that the statement made by the Tribunal is simply that the information is confidential and that we will not be discussing the actual content of the information.

15:20:13 Ms. Appleton: I agree. We will ensure that the confidentiality order is respected.

15:20:17 Mr. Tabet: I am concerned about the confidentiality order. I want to make sure it is understood that the statement made by the Tribunal is simply that the information is confidential and that we will not be discussing the actual content of the information.

15:20:21 Ms. Appleton: I agree. We will ensure that the confidentiality order is respected.

15:20:25 Mr. Tabet: I am concerned about the confidentiality order. I want to make sure it is understood that the statement made by the Tribunal is simply that the information is confidential and that we will not be discussing the actual content of the information.

15:20:29 Ms. Appleton: I agree. We will ensure that the confidentiality order is respected.

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15:20:45 Mr. Tabet: I am concerned about the confidentiality order. I want to make sure it is understood that the statement made by the Tribunal is simply that the information is confidential and that we will not be discussing the actual content of the information.

15:20:49 Ms. Appleton: I agree. We will ensure that the confidentiality order is respected.
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25:04:111
1 Interpretation and the particular context of NAFTA.
2 which some tribunals have referred to as achieving the
3 highest level of transparency.
4 On the specific point of the Access to
5 Information being contrary to the equality of the
6 parties under the—as set out in the WNTBNA Rules,
7 Canada's position is that the Access to Information
8 Act is, in fact, inconsistent with the NAFTA's
9 objective of transparency and not in any way contrary
10 to equality of the parties. I think it's pretty clear
11 that the disclosure of the information obligations
12 impose an obligation on Canada that can be both to its
13 benefit—set to its benefit, but rather it can also be
14 to the benefit of the Claimant.
15 Many Claimants have, in fact, used Canada's
16 Access to Information to obtain documents in advance
17 of arbitrations against Canada, so I don't think it's
18 so much a question of equality as a question of
19 obligations that do apply to any State sovereign,
20 which, in the NAFTA context, are consistent with the
21 objective that the parties have set out for
22 transparency in Chapter Eleven proceedings.

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25:05:30
1 In addition, it's important to point out that
2 the Access to Information Act itself achieves a
3 balance between this transparency objective and
4 protection of certain confidential information. You
5 have the Access to Information Act in the materials in
6 front of you and, as Mr. Appleton recognized, there
7 are certainly exemptions in the Access to Information
8 Act, including protection of business confidential
9 information, a process for notification to parties
10 whose information may be at issue and may be
11 disclosed, and a process of review by domestic courts.
12 And on that, let me just briefly address the Appleton
13 case versus the Privy Council Office and the points
14 raised by Mr. Appleton.
15 It seems to me that, contrary to the
16 assertions made by Mr. Appleton, the case illustrates
17 very well that there are some controls and exceptions
18 to release of information in the Access to Information
19 Act. One of the notable things is that ITM did not
20 object, was not a party to this litigation, and it was
21 not bullied by the release of the information at
22 issue. If you look at the case itself that you have

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25:06:51:1
1 In the materials before you, a what was at issue was a
2 lot of procedural correspondence that didn't contain
3 any business confidential information, and a lot of
4 the business confidential information that could have
5 been disclosed was not disclosed because it was
6 outside of the protections of the Access to
7 Information Act.
8 So, really, I don't think the case is
9 particularly relevant and certainly does not assist
10 Mr. Appleton in arguing that it breaches equality of
11 the party in any particular way.
12 Let me now turn to certain of the
13 particular points raised in the draft confidentiality
14 Order and the concerns that the Claimants have raised
15 in their submissions on the Confidentiality Order. I
16 think some of these are pretty basic, but given we
17 haven't had a chance to respond to them, I want them
18 to be on the record, so I will try to do it in as
19 efficient a way as possible.
20 The first concern that is raised is in the
21 submission as that Canada does not properly identify
22 the disputing parties. I don't think that's really a

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25:06:09
1 The issue, however. We would note that we don't think
2 it's appropriate to vaguely refer to Merrill & King
3 and affiliated companies. We would like to have a
4 clear idea of the parties that are party to the
5 confidentiality agreements and, therefore, we suggest
6 that it be Merrill & King and the Respondent, the
7 Government of Canada.
8 The second concern is that is raised is
9 concern that Canada added wording that would permit
10 the Government of Canada to designate information as
11 confidential based on its own domestic law, and I
12 think this refers to the issue we have been discussing
13 on access to information, but it also refers to the
14 language that Canada had proposed to the effect that
15 nothing in the Order shall be considered a waiver of
16 any claim of privileges. So, I think the purpose of
17 this clause is to not designate any confidential
18 information. It's more related to the issue of claim
19 of privileges, and we are just missing by this
20 language that there is—that the confidentiality
21 agreement doesn't affect that.
22 We also suggest that the confidentiality

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15:29:28 I order should not deal with production of documents
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2 issue, as Mr. Appleton suggests, that the issue of
3 document production is separate from the issue of
4 confidentiality, and it will come back and make
5 separate comments on the issue of document production
6 after-at a later stage.
7 The third point that is raised in the
8 submissions on the Confidentiality Order is with
9 respect to the provision confidentiality as in may
10 apply up to settlement or consultations, and frankly
11 Canada doesn't see it as appropriate to have a
12 provision in the Confidentiality Order dealing with
13 the conduct of consultations, but we are more than
14 happy to engage separately with Mr. Appleton to
15 provide for appropriate provisions to deal with any
16 discussion that could take place in the content of
17 those consultations or settlement discussions. I
18 think those certainly usually proceed as a separate
19 matter from the arbitration, and it would confuse the
20 issue to deal with it in the Confidentiality Order
21 here.
22 The fourth matter raised in the submission.
15:30:30 I deals with obligations pursuant to 1137 and 1139 of
2 the NAFTA. In principle, Canada agrees that are
3 non-extant capital of 49 Parties, the United States
4 and Mexico, should be entitled to receive evidence and
5 written submissions and treat the information as if
6 they were disputing Parties, and this is recognized in
7 the Free Trade Commission Note of Interpretation.
8 We would just like to raise a few points, let
9 me just address the additional point that Mr. Appleton
10 raised with respect to sharing of information with the
11 Provinces. We agree in principle subject to looking
12 at particular language that Mr. Appleton would
13 propose-we haven't had a chance to fully review it,
14 but in principle we agree that they would be as well
15 subject to the same obligations under the
16 Confidentiality Order as if they were a party to the
17 Confidentiality Order.
18 I would just raise, to finish my submissions,
19 a couple of points that are in Mr. Appleton's draft
20 Confidentiality Order which we think are not
21 appropriate. The first one relates—additional to
22 the submissions I have already made, the first one

15:23:15 I relates to second level of confidentiality that is
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2 proposed in Mr. Appleton's draft Confidentiality Order
3 to deal with restricted access information. Briefly,
4 I would say that is probably unnecessary in this
5 case. We can't foresee any need for such active
6 information that only goes to counsel and not to the
7 parties themselves. I think it adds an additional
8 level of complexity, and we would propose that
9 this language be included.
10 I just want to make sure I'm covering
11 everything that has been raised.
12 Just one point: on the destruction or return
13 of information at the end of the proceeding, which is
14 in Mr. Appleton's draft. Unfortunately, Canada is now
15 in a difficult position and cannot-we have been given
16 advice that we cannot agree to the kind of language,
17 and it would be contrary to our libertarian Andrews Act
18 and our access to information Act, and so we would ask
19 that this language be removed, and we cannot consent
20 to this language in the Confidentiality Order.
21 Thank you.
22 PRESIDENT UNWIN: Thank you, Mr. Tabet.

18:34:04 I MR. APPLINGTON: I have brief comments, if
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2 Tribunal Members don't have any questions.
3 PRESIDENT UNWIN: Be heard.
4 MR. APPLINGTON: Very brief.
5 First of all, Mr. Tabet has encouraged you to
6 change the terms of the draft Minutes. We have no
7 problem with reference to Annex 1137(4), that could
8 quite properly be there. I have a lot of problems
9 with you in putting in as part of the governing law
10 the Free Trade Commission Note of Interpretation
11 here. I'm just going to delve into this briefly.
12 I think the easiest thing about this would be
13 not to do this because I think we need to make
14 some formal submissions, but if we look at Article
15 1131 of the NAFTA which is the governing law, it says
16 that interpretation by the Commission of the provisions
17 of this agreement shall be binding on the Tribunal
18 established under this section, so there is no
19 question that the Free Trade Commission is entitled to
20 interpret a provision. But what it's not entitled to
21 do is change the NAFTA if we are not interpreting a
22 provision.
And so, one of the things that we are looking at... and I have a copy here of the Free Trade Agreement notice that Mr. Tabet was referring to--and I think it's helpful to know what the NAFTA parties think. But it doesn't mean that it governs. And, for example, they have said in paragraph 2 of this Order that the parties further reaffirm that the Governments of Canada, the United States and Mexico may share with officials of the respective Federal, state and provincial governments all relevant documents in the course of dispute settlement under NAFTA Chapter 11, including confidential information. That's fine, but that isn't governing. That's just an expression.

Now, I have already agreed to specifically prevent that from happening by being in the terms of the Order. I think that's the right way to do it, but I don't believe that this document is governing. So, to the extent that Canada asks you to put this in because...
I resolved that matter.

Settlement privilege is a very important issue, and when we are talking about confidentiality, that's why settlement privilege comes in. And Article 1118, 1119 consultations are part of settlement privilege.

 Arbitration needs to preserve the right of the parties to be able to narrow issues in dispute, and if that requires disclosure that may be by without prejudice, they should be confidential. They should not be produced to this Tribunal. If it's going to make this job easier for you, I think you should be happy that we are able to do that, and as far as Canada went to give as a document that they are frightened later might make it into the record, I don't want to prevent them from doing that. I want to encourage discussion and delete, which is why we have been seeking this, and so that's why we would like this order to apply to that, as well. It's basically the international public policy side more than anything else.

Restricted access information. Mr. Tabet suggested that she can't understand why we might want to see that, and Canada's view is that this would be unnecessary. I will tell you exactly why we need to have this, because in a situation of the Pope's Talbot case, which involved lumber manufacturers rather than raw logs—different industry, actually—but in that case, there were all types of issues about who received quota, who received permits to be able to export, and there was concern that it would be anti-competitive. Information, and they didn't—the Government of Canada was concerned about providing the information because then a market player could have access to information that other players wouldn't have. To prevent that from being an issue, that's why we proposed restricted access to Information Act. Access to Information Act.

Mr. Tabet: I think that's the last time. I have to leave.

25:42:18 2 There, I don't think it's overly complex. We used it

with respect to the US case, and it worked very well in that situation.

Final point about destruction. I'm afraid that—well, I do not disagree with the fact, the statement—I'm not in a position to agree or disagree—I have no knowledge—but what legal advice has been given to Mr. Friston or Mr. Tabet about the destruction of documents. What I could tell you is that provisions that required documents to be destroyed at the end of a case are common in the WTO and, to the extent that Canada has been party to the WTO cases that are there, and we have made reference to that—are they also looking at the same information? Also, there was also an agreement to let the terms of the legal rules for the Chapter Twenty, and so, if it's in the NAFTA legal rules for 23, Chapter Twenty which are being applied, I thought that would be appropriate because the issue here is how to protect the confidential information.

25:42:18 1 Now, at the end of the day, if we have an order that is going to protect the confidentiality, especially of restricted access information, then I think that's fair. But, in another case that didn't go to the Federal Court, in the F.D. Myers case, the Government of Canada decided to take the personal tax returns of Mr. Myers and disclose them under Canada's Access to Information Act, and Mr. Myers was very unhappy. He wanted to have those back. And rather than have to go to court, we looked at this, and he felt that it wasn't worth his while to have to fight in court after he has been fighting for years. He was successful in this case. One is awarded in NAFTA, and then he had to go to judicial review. He certainly didn't want to have to go again.

So, he wasn't very happy, though, to have his personal financial records made available under the Access to Information Act, to the extent that was thought they were going to be disclosed, and he didn't want to pay to have a fight. He didn't have the appetite for continued litigation. I think that is not unreasonable. That's why we got
If, at the end of the day, the Tribunal has an order that is binding, which I think we can do now, and I have no problem not worrying about destruction, but I do need an order that is going to be binding equally on both sides, and I think that we have now provided a mechanism that doesn’t have to set up a conflict between Canada’s domestic law and the international law. If we want to have that fight, we have had that fight before, and I’m prepared to go there, but I think it’s not necessary. It’s not a fight that needs to be there.

Mr. Tabet: Yes, sorry. I will make it brief, and I will not be tempted by responding to all of Mr. Appleton’s points, but the one key point that I want to make is there are two key points I would like to raise.

First, the proposal by Mr. Appleton that I have just had a chance to look at would doom all information to be business information; I think, is an interesting proposal, but certainly it twists the reality. If there is legitimate business confidential information, or tax return information, those things should be exempt under Canada’s Access to Information Act.

Now, to try to make documents that deal with procedural issues, to deem them business confidential so they would be exempt under Canada’s Access to Information Act, I fear, is not something that our courts, if we were ever reviewed, would look favorably upon. So, I don’t think this mechanism is something that we can accept or that would resolve any problems.

The second point I would like to make is just to confirm with Mr. Appleton whether there is an agreement on open hearings because we haven’t addressed this issue, and I thought there was an agreement to have open hearings, but I would like to confirm it in the record.

Presidency: Would you like to do that now?

Mr. Appleton: If Ms. Tabet has finished her submissions, I’m happy to. If she’s not, I wanted her to finish her submissions first.

To permit things to be released, we put in proposals that permit redacted information to be dealt with. You will see that. That’s all before this Tribunal. So, (a) we would propose that the hearings be open, and we are prepared to have them open by way of clear-circuit feeds, as I think that’s the way they usually do it here. Well, for example, if there is restricted access information, that session or that part of the session where that information is held to be not open because of the nature of the information needs to be protected. And we had that in the US cases, and that was very easy to do. But we would insist that that happens, and we think that that could happen again.

So, we have absolutely no problem. I thought we had made this very clear to Canada before, but just to make sure that we are very clear here, we are in favor of this, but we need to make sure that we do it so that I don’t think the situation later on that Canada tells them they are unable to produce documents because then they can’t be—we can’t control that there are confidential documents from the government won’t be released otherwise, or if there is an issue that deals with deliberative process, and we are going to say you as a tribunal have to decide whether something is privileged. It’s not up to Canada to say, “There may or may not be a document, and we are not going to tell you.”
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16:47:53 1 confidential because there is confidential
2 information. I don't want Canada to be able to say.
3 We are not going to produce this information because.
4 at the end of the day, we can't protect the sensitivity
5 around that. We need to have these safeguards. And
6 then this Tribunal can make its own determination.
7 both of privileges and of the weight that any of the
8 evidence needs to have.
9 PROSECUTING COUNSEL: Mine. Thank you.
10 Does that take care of your point?
11 MS. PRICE: Yes, thank you.
12 PROSECUTING COUNSEL: Well, on this point, I
13 would like perhaps to request that both parties, to
14 the extent possible, might help the Tribunal in one
15 particular respect, which is to draw a sort of
16 comparative text of the two Confidentiality Orders
17 that have been suggested, your revised, within I
18 suppose in the last effort, and our original one or an
19 revised as you wish. So the Tribunal could have, say,
20 paragraph by paragraph say this is what the Claimant
21 proposes, if eventually there is a special reason or
22 argued this is what the Respondent proposes or

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16:49:37 I agree to or disagree because of some specific
2 reason. I think that would be very helpful because
3 the debate has been quite interesting, but at the same
4 time it can become sort of confusing because there are
5 things going back and forth. Would you think that
6 that is feasible proposition?
7 [Tribunal confering.]
8 ARBITRATION PARTY: I had been thinking along
9 the same lines, and I think we are so far exactly the
10 same thing, but my proposition would be that the
11 parties get together and produce an agreed order to
12 the extent that they can. Where there are points of
13 disagreement, give us alternatives. We have heard
14 your reasoning. If you want to add a little, but it's
15 only going to be face or fire claims that we are
16 going to have to deal with. And in other matters that
17 I have dealt with, that's been a sensible solution.
18 MS. PRICE: Mr. Bowray, the parties have
19 been trying to get an agreed draft of an order for
20 more than eight-and-a-half months. There have been-
21 would love-in other words, if you would like to, I
22 would like us to hang out heads together harder rather

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16:59:11 I think softer. What I mean here is that we have not
2 been able to agree because of this fundamental first
3 problem about whether it should be subject to the Act
4 or not, and then we haven't been able to get anywhere.
5 I thought we would be able to have an agreed order
6 here today, with the exception of this issue about the
7 applicability of Canada's Access to Information Act.
8 So, what I'm concerned about, just to be very
9 blunt is, is that you are going to ask us to come up with
10 something, and instead you are going to get a whole
11 pile of new argument from us, and what we are telling
12 you is we are having a problem here, sir.
13 ARBITRATION PARTY: Maybe I could have
14 another go at it.
15 We have heard you. You have written very
16 good submissions that we found very helpful. You have
17 seen given to us so probably twice each today orally.
18 I don't think we need to hear that further. What we
19 want is one piece of paper where there are areas of
20 agreement. Where there is no agreement, Mr. Appleton,
21 put in your clause which accepts and put in your
22 clause which includes. The Tribunal will decide. We

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16:59:40 I don't want a great deal more argument. I don't think.
2 Perhaps I speak for agreed.
3 PROSECUTING COUNSEL: No, no.
4 ARBITRATION PARTY: No.
5 MS. PRICE: We are perfectly prepared to do
6 that.
7 PROSECUTING COUNSEL: To the extent possible
8 that you might make an additional effect to agree on
9 something that is agreeable. If it's not agreeable, it
10 is not agreeable. Of course. But let me mention to
11 you one very particular point that might be helpful in
12 the context of an agreed order which is that,
13 Mr. Appleton, you referred to the MTO experience. In
14 one panel that is actually working, there has been a
15 very interesting mechanism because of the same
16 questions, questions relating to transparency but not
17 the same time confidentiality, and the situation has
18 been that there are two stages to it, 1) submissions
19 that are made public and circulated and posted in Web
20 pages and so forth, and followed by a separate
21 presentation of the same issue which contains
22 confidential information, what they called MTO.

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15:53:14 1 business confidential information; or HER, highly 2 sensitive business information. Some of the letter 3 goes to third parties and some out. 4 And, finally, there's a taping, eavesdropping, 5 of the whole operation relating to the public 6 hearings, not to the private element with confidential 7 sides of it, and that's shown to the public 8 generally, which can go into a big room and see what 9 the parties had to say on the video of the public 10 session. 11 It's very complicated, in fact, from the 12 point of view of its actual operation, but the 13 principles involved, which is the interesting point, 14 are very clear. 15 So, if you might look into that— 16 MR. TARRANT: I think this is very similar to 17 what we have, in fact, agreed upon and have done in 18 previous cases, including DGR, where we have redacted 19 the draft Confidentiality Order. A lot of what we 20 have already agreed upon provides that there should be 21 also a redacted version provided, and Mr. Appleton just 22 confirmed that we would have part of the hearing 23

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15:55:16 1 create a wall between the lawyers and their clients. 2 So, as much as it could be avoided, we would recommend 3 that. And if it does arise, we would look at these 4 kinds of protections. 5 MR. APPLLETON: Our problem is that, if this 6 arises, then we have to get the Tribunal back 7 together. And since we already have the wording and 8 we already have the practice that would work, I don't 9 see why we would be disadvantaged by having the 10 wording. If it arises, then we have it. 11 I mean, we have nothing that we think 12 conceivably could be restricted access. It's all 13 information that would come, we would expect, from the 14 Government of Canada or from some other branch of 15 another government that they receive, but we don't 16 want to have a process that is going to slow down the 17 ability to get information, and that's in my view we 18 like to see it in this order because if we are going 19 to think about it, we might as well think about it. 20 If they don't use it, that's great. It's all there 21 before you.

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21 HARRISON HOMELY: But it is the
16:07:22] 1 think that the CRM Guidelines—I like them. I use
2 them in other things. They're good in other
3 applications. I just don't think that they're exactly
4 the right things, and that's why we think
5 usual order, which makes it very clear to the parties
6 what they have to do. We want to avoid disagreements.
7 We don't want this Tribunal to be bogged down with
8 information issues in terms of document rights. It's
9 not in anybody's interest to do that.
10 PRESIDENT GRUNDF: Yes, the point is taken
11 that there are two different approaches to it.
12 And then for the purpose of the Mission, we
13 would just refer to the fact that the Tribunal will
14 take a decision in terms of production of evidence or
15 so and so that here is any way or either way
16 because we have to collect, of course, on what we have,
17 read and heard.
18 Yes?
19 MR. TANRT: Would you—as I pointed out, we
20 have not responded to the differences in the draft
21 Procedural Order, Document Production Order; yet.
22 (signed) by Mr. Appelton. We could probably do this

16:08:07] 1 We will be back to you on
2 that before we close so as to give it some
3 consideration.
4 Well, we have come, if we understand rightly,
5 to the end of our discussion.
6 MR. TANRT: Sorry, there is an additional
7 point. We will—Mr. Appelton has made several
8 references to when he would like document production,
9 and we haven't had a chance to address that. I know
10 we will try to argue to some kind of—of as much as
11 possible of a schedule if there is bifurcation or no
12 bifurcation.
13 But one key point I want to raise now is that I
14 think there is fundamental disagreement on
15 whether—first of all, whether there is a need for
16 document production. If there is bifurcation, Canada
17 does not believe there is any need for any document
18 production. We would be the party that would have
19 to make the case, bear the burden of proving our
20 jurisdictional objection, and we do not ask for
21 document production.
22 And the second point is, if there is as

16:16:13] 1 fairly quickly and briefly in written form after this
2 meeting, if you wish to to
3 PRESIDENT GRUNDF: Yes, I think that the very
4 same kind of exercises we were discussing in terms of
5 the confidentiality order would be quite appropriate.
6 To the point that if there is agreement of certain
7 things; e.g., if there is not, why, and then we would
8 look into whatever making again the utmost effort to
9 come to some agreement.
10 MR. APPERTON: Can we set a very specific
11 deadlines? Shall we say five days or something so that
12 we force the situation and actually get something to
13 you? What would be best to enable the Tribunal to be
14 able to resolve this? You tell us, and we will do it.
15 Please be brief on us. Do not be nice to us because
16 we want it done effectively, and all we will do
17 is have more reasons as to why we can't agree rather
18 than why we will agree. So, I will be happy if you
19 tell us you want something tonight. I have to fly
20 somewhere, but I will do it tonight. I really think
21 that we need your direction. You might want to
22 reserve for a moment.

16:16:38] 1 bifurcation, Canada would request that the document
2 production only take place after the admission of the
3 Memorial and Counter-Memorial. And the reason for us
4 making this is, as you heard Mr. Sifonari, we are very
5 concerned about assertions made in the submission that
6 Mr. Appelton is going to make his case only once he
7 gets our document, that he is not able to make his
8 case or specify the measures that have breached the
9 INFRA, and at this point that he will tell us later
10 what his case is once he sees our documents.
11 PRESIDENT GRUNDF: Well, the Tribunal is
12 thinking precisely to take a short time now to discuss
13 that very issue of general guidelines about
14 bifurcation or no bifurcation, and then, in that
15 light, to hear what we show you agreed schedule and
16 insert all of that into the Minutes.
17 Now, what—do we have any place around here
18 where we can retire?
19 (Pause.)
20 MR. APPERTON: I would like to address a
21 point. Why don't we get this resolved first and then
22 we will—
PRESIDENT OBAMA: A separate point?

MR. APOSTOLI: I would like to respond to something, but let's get this underway first and then— or if you would like to retire—

PRESIDENT OBAMA: Yes, we'll retire now.

MR. APOSTOLI: I need to practitioners point out that it will be impossible, and it would be unfair to the Breivik to claim in this case to have them in a position to do the valuation of damages without having production of documents from the government that are in their possession, so that to this new suggestion that just came out now that there should be summaries first and then new document production, that that is, in our view, is very novel, but it's not very practical; that the practical time-tested and fair and efficient way to deal with this is to have some document production, have that done, have the Memorial filed. Then the purpose of the reply and rejoinder Memorials is just to raise issues so one is caught by the surprise. Otherwise, what is the purpose of this second round of pleadings, and then you will you have a need for a third round of pleading.

Chairman McCollum has met to consider the question of the bifurcation or consolidation, and it has come to a conclusion; but before letting you make the conclusion, we would like to explain you the rationale for it, which is quite simply a question concerning the efficiency and expediency of the process, which is that, to begin with, there will be events that might prove to be breaches after December 27, 2003. Those will have to be looked at on the merits before it will be a rather uncertain situation. So, even if there was good ground to look at some jurisdictional aspects before, that actually happens is that we will have, in any event, to go to the merits or join the merits at that other stage because of the fact that there would be the need to come up with the substantial evidence on which the events and the breaches and the damages connected to that.

And because of all of that, we thought that it's preferable to join jurisdiction to the merits, not to have bifurcation, and have all the arguments both on jurisdiction and the merits come together. And then of course, they will all be available for realization what is under the tribunal's jurisdiction and what is not, and in that context what has been proven as a breach after 2003 or not proven as a breach after 2003, so it will come together.

Of course, feel comfortable that there is no prejudgment at all of any of the issues that you have touched on. It's simply a question that we felt that we would have to get there most likely in any event.

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16:51:41 1 I did it better to get straight there and not to make
an intermediate stop on the way.
2 3 Well, having said that, we understand that
4 you have come with an intention in hope of a
5 schedule, or not quite
6 (Comment off microphone.)
7 Me. APPRENTICE: Sorry.
8 9 We are prepared to sit down quickly right
now. We will obviously need to have a document;
10 process of some form to be able to deal with this. We
11 have prepared that we are prepared to make our first
12 document request as early as December last, and
13 that would be very quickly, but that's why we would
14 need to have an order or process. If you think it's
15 going to take a longer time than that for the Tribunal
16 to make an order, then we need to get some indication
17 of that from you because that would obviously affect
18 the timing and what we would have to do here.
19 PRESIDENT GREENO: You mean an order on
20 production?
21 Me. APPRENTICE: Well, we would call it an
22 'information request order' because the documents
23 could be interrogatory requests we are going to ask for, as
24 well.
25 PRESIDENT GREENO: Okay. Now, one question,
26 Me. KIMMER: Would Canada be in agreement about
27 beginning with document production, the whole exercise
28 to begin with document production, then the Memorial
29 on the Berlin and the Counter-Memorial, and then et
30 cetera, et cetera?
31 Me. KIMMER: I wanted to raise that because
32 our preference would be, and we think that it would be
33 more efficient in this case, if we went first to
34 Memorial and Counter-Memorial so that the issues are
35 very clear. The Tribunal will have a very good idea
36 about what is in and isn't in debate and, therefore, be
37 in a much better position to assess any kind of
38 differences between the parties so's properly
39 producible or not.
40 41 So, our preference would be, quite frankly,
42 to have a first set out memorials, then document
43 production as needed, and then Reply and Rejoinder
44 Memorials.
45 And if I might, there is a second issue, and
46 16:54:13 1 I think it certainly goes to the same concern that we
47 have, we spoke earlier about a Statement of Reply and
48 a Statement of Rejoinder, which I would assume would
49 be the first thing here - I'm sure they could be done
50 in a short period of time, 10-15 days each - but given
51 what we have heard today and our concerns that there
52 seems to be a very fluid definition of what measures
53 are taken, we would very much like to ask that we have
54 the first Statement of Reply by the Invester, a
55 Rejoinder statement by Canada, and then go into, if
56 the Tribunal seems fit, either memorials, which would
57 be our preference, or document production and then
58 memorials.
59 But I can't state strongly enough how
60 concerned we are that this will be some kind of
61 rolling definition of the case, and we will never know
62 what we are supposed to be answering, and that's what
63 we really would like to make sure is addressed.
64 PRESIDENT GREENO: Would you allow us one and
65 a half minute?
66 Me. APPRENTICE: Before you deliberate, perhaps
67 if I could have a moment, first of all, during the
68 break, I talked to Ms. Kimmie and Ms. Tubat. I had
69 misunderstood what we were talking about on the agenda
70 because when we talked about the Statement of Reply
71 and Statement of Rejoinder, it was under the word
72 "jurisdiction," and so I believe, or I believed, that
73 you're talking about Replies and Rejoinders in the
74 jurisdictional phase. But Ms. Kimmie is of the view, and
75 I believe from the conversation we had,
76 understanding is correct, that you were talking about
77 the Statement of Reply or Statement of Rejoinder
78 generally for the case rather than Reply and Rejoinder
79 in jurisdiction. It's just the way it was listed, I
80 thought you were referring to that. That's not the
81 standard way generally that REPS in cases are handled,
82 number one.
83 Number two, we have no further information to
84 be able to provide. The reason why we can't do a
85 Memorial without having the document production in the
86 same room I can't do anything more with the
87 Statement of Reply or - it's the same problem, that we
88 are stupid without having - we know what we have to
89 ask for. That's why we are prepared to move ahead
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...
17:01:43 I this didn't apply to them. So, that would be one
2 issue. That's the area where all the data is held by
3 the Government of Canada. And without having that
4 done, they can't do that. So, that's a very
5 fundamental problem. That's why we came here to seek
6 another order.
7 So, to the extent that you want to report
8 without that data, that's fine, but I can't give you a
9 report that's going to be meaningful. So, what we get
10 is a lot of legal argument, which is fine—we are
11 prepared to do that—but I can't give you the type of
12 evidence that we would normally have in that phase.
13 And since we are preparing to make it more efficient
14 by not having to iterate multiple times from quantum, but
15 putting it altogether, that's why we needed to have
16 that information. That's really most profoundly a
17 problem for me there, but also a problem, but we can
18 deal with it in respect to responses on other sessions
19 with respect to the operation of the regime. But
20 since we have all types of information we cannot get
21 and since the allegations are about the inability to
22 get information, we have a problem.

17:03:38 I suppose—I didn't see that in particular, but that
1 re the proper duty the answer or
2 3 Counsell-General in 90 days following the first, or
3 4 because, at this point, there would be the document
4 5 production process. There would be a simultaneous
5 6 request by the parties once a week after the
6 7 Counsell-General. Such would tell each other, "This
7 8 is what I need."
8 9 One week after that, counsel, yourselves,
9 10 would meet to consider if there is any difficulty or
10 11 if you're all in agreement and so. Still, one week
11 12 after that, the parties would formally agree or object
11 13 and say, "No, this we cannot provide," or, "Yes,
11 14 delightful, here you are."
11 15 DR. APPELHEIM: Two weeks after or one week
15 16 after the meeting?
16 17 PRESIDENT GRIFFIN: One week after the
17 18 meeting.
18 19 HARRINGTON ROMAY: One week after the
19 20 meeting.
20 21 PRESIDENT GRIFFIN: Yes, one week after the
21 22 meeting of counsel.
22 23 Then there would be one further week to apply
22 24 to the Tribunal for the settlement of any difference.

17:04:16 I Now, I'm not asking you to reconsider your
1 decision—you have made your decision—I’m just
2 explaining to you there is going to be very
3 significant limitations in what we are able to
4 provide, and we should be dealing with that now before
4 we book times for hearings that then we would not be
5 able to meet, and that's what I'm worried about.
6 PRESIDENT GRIFFIN: We did consider, in fact, the
7 alternative scenario you were mentioning, but
8 because of the various reasons I did mention, it's not
9 likely that you have started a very serious claim just
10 because of thinking that there would be potential
11 damages because you have the confinement and the
12 elements at hand to show what is in your claim and your
13 expectations and your arguments and so on, and then
14 take it from there. If you need the documents, there
15 will be that stage, and then both parties would be
16 able to discuss it back and forth, and then there
17 would be, of course, the hearing.
18 Well, in that scenario, the Tribunal proposes
19 to you the following: First, Memorial on the Merits
20 30 days after the Minister has been finalized, I
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17:15:06 1 is a three-week process—I have it wrong, Mr. Rowley?
2 Can you help me because I'm confused here.
3 EXPECTATION: Well, after receipt of the
4 Counter-Memorial is the document-prohibiting phase.
5 One week after we conclude the Counter-Memorial, there
6 is a simultaneous request—all right—concerning
7 document production. One week thereafter, counsel
8 meet to discuss, they can come to terms on document
9 production, at return. One week thereafter, the
10 parties inform the Tribunal as to the outcome of their
11 discussion and whether or not they're negotiating the
12 Tribunal to make a ruling on the request.
13 EXPECTATION: No. I believe it works
14 this way: One week after specific printed
15 rifle-shot shotgun requests for discollage, you then
16 have a two-week period in which to make production or
17 refuse production or agree that production will be
18 made. Within that week, the President has indicated
19 that counsel should meet because the Tribunal feels
20 it is essential for you to meet and come to grips.
21 One week following the two-week period, you
22 will make an application to the Tribunal, if advised.

17:12:54 1 reward is going to build in all these ideas, and then,
2 we have decided that it would be enough for the
3 President to sign on behalf of the Tribunal and for
4 each of you to sign as well, for each party to sign,
5 and then we would be delighted to have you hang it on
6 the wall afterwards. And we let Professor Dan leave
7 with our gratitude for his help.
8 ASST SECRETARY: Thank you all very much.
9 MS. KNUMEN: May I address one issue on the
10 timing here?
11 PRESIDENT GRACHOFF: Yes, of course.
12 MS. KNUMEN: The concern that we have is the
13 document production. First of all, could I ask for
14 clarification? I hope that I understood it correctly.
15 PRESIDENT GRACHOFF: Yes, please.
16 MS. KNUMEN: First of all, perhaps you could
17 request what the schedule will be in terms of document
18 production.
19 PRESIDENT GRACHOFF: Yes. One week after the
20 Counter-Memorial, requests, simultaneous requests, by
21 both parties to each other. One week after that,
22 counsel meet to discuss the overall situation. One

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17:17:31 2 PRESIDENT GRACHOFF: Correct.
3 EXPECTATION: After that, the Tribunal
4 will decide as quickly as it is able. Following the
5 Tribunal decision, the 30-day period begins to run for
6 the reply.
7 PRESIDENT GRACHOFF: Well, sorry, I should add
8 one element. In that decision, the Tribunal should
9 direct the parties to produce the documents by a
10 certain date. As from that date, we count the 30
11 days. I had jumped it over because it was embodied in
12 the context.
13 EXPECTATION: TROBANIC: The Tribunal would also
14 intend to put in this order that if there is to be
15 an application to the Tribunal for documents that
16 have been refused by the other side, that the party
17 applying—by and by he that shall be
18 applying—wll do so supported by a further schedule.
19 And everybody probably knows what that is, but so
20 there is no misunderstanding, a column on the
21 left-hand side listing each document that is
22 requested, the next column provides as articulated
23 description of why the document is relevant and

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17:31:30 I you would like to make it three and it's involved in the period to produce or to refuse, it has to be the same period.

17:31:35 PRESIDENT CHURCH: The additional week for that. Would that be enough for you? Or are you?

17:31:39 MS. KIMMERS: Or problem is we have to collect the documents to know what we could remove, and that is difficult. If we could have two additional weeks, that would be more helpful.

17:31:43 PRESIDENT CHURCH: Two additional following the counsel's meeting.

17:31:44 MS. APPLETEN: We are looking at one week for the request, then there is going to be a four-week period in other words, there would be counsel meeting in one week-and then there will be three weeks after that to see whether there are refusals. It seems a little-there seems a little log to me.

17:31:52 PRESIDENT CHURCH: Again, I don't want to be a stick in the mud. I will do whatever you want. I just need to find a way that is going to be efficient-that's all-and then we will go from there. I mean, tell me what you like, and we will just do it. I need to make sense

17:31:59 1 material to your case. The next column is the opposing party's objections as to why the document is irrelevant, immaterial, hardly relevant, possibly even that is not related to any thing, and the next column is left blank for the Tribunal so it can go through.

17:32:04 So, assuming that both sides aren't able to agree on everything and there are counterarguments, there will be one or two documents from which the Tribunal can work without reference to any other documents. So, if the parties decide to exchange 20 letters of instructions to each other as to why documents are irrelevant or inappropriate and fishing and overreaching, you know that's a state secret, the Tribunal serves them and doesn't have to pursue its way through it. It just has one document, and it can make its decisions based on an assessment of that one document.

17:32:22 PRESIDENT CHURCH: Okay.

17:32:23 MS. KIMMERS: We are happy to go with that procedure. The concern we have is that it needs to be a little more elongated. Certainly, I know in the government context and I have Mr. Appleten we have

17:32:30 3 I litigated with him before—had large documents. requests. We obviously would do our utmost, but I could tell you now one-week or even the two-week period is going to be too short to realistically do a good job and do justice to it, and so I would ask if the Tribunal will consider elongating that process a bit. The process is terrific, but the time frames are too attenuated certainly in the government context. And we will do our utmost, but I have now that does cause concern, and we wanted to raise it.

17:32:40 PRESIDENT CHURCH: That, I think, is reasonable.

17:32:45 Would you agree to have a slightly longer?

17:32:49 MS. APPLETEN: I think three weeks would be fine.

17:32:51 We have done this with governments before with two weeks. They seem to do it.

17:32:54 The problem, of course, is nobody likes any schedule. I'm not crazy about this. It's very difficult for us. They're a small company, they will have things in different places, but we are going to do it. Whatever you tell us we are going to do, if
17:24:19 1  the Counter-Nuclears, simultaneous requests by the 2 parties. One week thereafter, the counsel met to 3 consider the overall situation. Two weeks 4 thereafter—that’s the one to be extended—the parties 5 react and Mr. 6. We cannot submit— and now 6 week after that, the application to the Tribunal with 7 the appropriate Radiata documents to us it would be 8 easier to decide. 9 All right? Does that look reasonable? 10 And after the Tribunal issues its decision, it 11 will send this documents to be produced by each a date, 12 and following that the rest—and we will support it 13 you shortly dates for a hearing. Not right now 14 because it’s good for all of you to be able to look at 15 schedule. 16 17:27:19 1 but very quickly. 2 So, Howard, you’re all set? 3 4 5 MR. APPLINGTON: Anything else from us right 6 now? 7 PRESIDENT CHORDS: I think not, unless you 8 have any other time that you would like to raise. 9 MR. APPLINGTON: I want to ask if the Tribunal 10 had any other questions or anything else that would 11 make things smoother or easier? 12 PRESIDENT CHORDS: No. 13 MR. APPLINGTON: We appreciate, it’s been a 14 complicated day, and this was the smallest procedural 15 agenda we have ever had, and it’s gone about as long 16 as I ever had. I can only imagine if we had the usual 17 ICTD IC or 24-hour agenda, we would have been here 18 all right. 19 But if you’re comfortable—I think we have 20 anything to add, but I believe Mr. Kinney does. 21 MR. KINNEY: The only point is I don’t 22 believe that we have filled in the omissions for the 23 Tribunal fee, and I don’t know if you would like us to 24 come back to that, or if that’s a matter that has been 25

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27:25:17 1 from written. This case we would have it altogether, 2 so it’s a possibility of adding a day at most, I 3 think. My sense is five should be sufficient at this 4 time. I think that—I don’t think it gets better with 5 having more days generally, but I’m in your hands. 6
7 PRESIDENT CHORDS: Mon– Fri or Tuesday to Friday 8
9 MR. KINNEY: We would be glad to have that 10 reserved—we think that’s more than ample—and three 11 days would be appropriate. So, out of caution, that 12 would be fine. 13
14 PRESIDENT CHORDS: So, we would support to 15 you dates, and then you react to those whether they 16 are feasible for all of you. 17
18 MR. KINNEY: To the extent you can give us 19 suggestions because we are going to have to block time 20 for experts, block time with clients. You need to 21 block time—you time is the most difficult to find. 22 So I’m sure we could do that. We have a year, but 23 let’s see if it blocks it now. 24
25 PRESIDENT CHORDS: We will get to it 26 promptly, not right now because we have to discuss it.
CERTIFICATE OF REPORTER

I, David A. Kasdan, RR-C0B, Court Reporter, do hereby certify that the foregoing proceedings were atmospherically 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, nor, 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
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