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

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

MR. J. WILLIAM ROWLEY, Arbitrator

Also Present:

MR. HOWARD DEAN,
Secretary to the Tribunal

Court Reporter:

MR. DAVID A. KASDAN, RDR-CRR
B&B Reporters
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APPEARANCES:

On behalf of the Claimant:

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On behalf of Merrill & Ring:

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APPEARANCES: (Continued)

On behalf of the Respondent:

MS. MEG KINNEAR
MS. SYLVIE TABET
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C O N T E N T S

C O N T E N T S (Continued)

P R O C E E D I N G S

PRESIDENT ORREGO: Good morning. We are very pleased to welcome you on behalf of the Tribunal, and become acquainted with all of you, particularly myself and having had the occasion to do so in other cases, and express to you that we will be devoting the best of our efforts to help the parties to come to a resolution of the differences that are present that are on the table, so you can count certainly on that.

Well, as you know, we have some draft Minutes before us that were first suggested by both parties jointly; and then, on the basis of those submissions, we built in a few aspects that the Tribunal thought would be useful more than anything for the sake of completeness and covering some of the general issues that the NAFTA rules usually--I'm sorry, the UNCITRAL Rules usually require, although some are really aspects that are supplementary to those that were there already.

So, the Tribunal would like to propose to you, if you all agree, to go item by item, and then see in respect of each whether there is anything

11:04:58 additional that you want to state or the submissions you have made, particularly in respect of the pending issues do contain all the arguments. We have those and we read those, so we would invite you to make only comments that are additional or new or different from what you already had to say and not necessarily to repeat what we already know about.

So, are you agreed to that, to go item by item? Okay.

THE PARTIES

PRESIDENT ORREGO: Well, first, we have the reference to "the parties." I suppose that there is no mistake there, but if there is, of course, you are welcome to send in an amendment and say, "No, my name is not exactly that" or so. And the same holds true for the addresses and particularly the e-mails, which have proven to be very effective in this case.

Any corrections?

MS. KINNEAR: If I may, I have several very small housekeeping items.

In the preamble, as you will soon realize, Ms. Tabet is going to be a spokesperson for Canada as

11:06:26 well, and so perhaps where it speaks to spokespeople for Canada, it could be Ms. Tabet and Ms. Kinnear.

Again, a very small item in paragraph one; it speaks to disputing parties. And as I'm sure you will realize, NAFTA has many idiosyncratic statements, and one of them is that disputing parties is a small "p" because NAFTA always uses capital "P" for the NAFTA States. So, as I say, that's a very small thing; but, as we are going through that, perhaps it's worth doing that.

Otherwise, in terms of the parties, it is all correct. One of our counsel who will be joining us here, but is not here today, perhaps should be added to this list, although it's not necessary, but we will have one more counsel as part of Canada's team in this file. It is Mr. Raahool Watchmaker, and I can give you his address and e-mail address written down, which is probably more simple, at the break.

PRESIDENT ORREGO: That's fine.

Howard, would you please note those names.

MS. KINNEAR: And those would be my comments on paragraph one. Mr. Appleton may have some, as

11:07:47 well.

MR. APPLETON: Thank you.

First, I would like to thank the President and Members of the Tribunal and, of course, our friend Mr. Dean and his team here at ICSID for putting everything here together on this beautiful day in Washington, D.C. We thank everybody for change of times and venue and the place, and all the other flexibilities that go on, and I know Ms. Kinnear joins me in expressing thanks to everyone here.

On this issue number one, I notice that there is a slight error in terms of our address. I will just provide that to Mr. Dean.

In addition, I just want to make it very clear that this list--the same point, actually, that Ms. Kinnear actually made, that this is just an indicative list now at this point, and it's--

PRESIDENT ORREGO: Exactly.

MR. APPLETON: --and that, so that if we add counsel or change counsel and all of those things, it doesn't require to be done by way of the Order.

I do think it might be useful, though, for us

11:08:38 to provide some information to Mr. Dean about ways of dealing with e-mail, since particularly it looks like we are going to be relying on e-mail. And I travel extensively, as I know many of the Members of the Tribunal do, so I think it's important we have a way of making sure that multiple people get it and that at least one of them is sort of in one of our main offices or at least some time zone that we can expect rather than the unexpected.

But these are all administrative matters that I don't think need to take up time now. I just want to point out that as long as the Tribunal is amenable to that as a mode of conveyance, we are just trying to find practical, simple answers, and I think our system works best in that way.

PRESIDENT ORREGO: Fine. There is certainly agreement on that to expedite and facilitate communication, so it shall not be a problem. Just let us know who and where to send a copy and so, and we will proceed that way. And the same holds true for Canada.

Right.

11:09:39 COMMENCEMENT OF THE ARBITRATION

PRESIDENT ORREGO: 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.

SECRETARY DEAN: I could circulate that to you.

PRESIDENT ORREGO: Okay.

MS. KINNEAR: If I may, Canada was served on December 27, 2006, and that would be the appropriate date. I'm certain Mr. Appleton would agree.

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

MR. APPLETON: The NAFTA says the submission 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 27th, 2006.

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

11:10:43 CONSTITUTION OF THE TRIBUNAL

PRESIDENT ORREGO: Well, then, we have item three on the constitution of the Tribunal, which is the standard language on the constitution itself in 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 is over--some discussion about the appointment of one Arbitrator in respect of what ICSID 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 (A) adopt the language that you have here; and I think, formally for the record, while we had some concerns about the timing of Mr. Rowley's appointment, we had no problem with Mr. Rowley's ability to serve. It was just a question of whether he was appointed in the time that Canada had

11:12:12 capacity--under the provisions set out in the NAFTA, we would have preferred that Canada had made the appointment earlier, which is what would have been called the "green period," the period when they are entitled as a party to appoint--a disputing party with a small "P." But the fact of the matter is, we are very happy to have Mr. Rowley here as a member of this Tribunal, and we have no objection whatsoever.

And, furthermore, in light of the IBA disclosures, which we think are the best practices that should be followed, we have absolutely no reservations at this time, and we would like to put that formally on the record.

PRESIDENT ORREGO: Thank you very much.

Does Canada have any comment on that?

MS. KINNEAR: Not at all.

PRESIDENT ORREGO: Not at all. Thank you.

So, we are done with item three.

EXCLUSION OF LIABILITY

PRESIDENT ORREGO: Then there is item four, which is the exclusion of liability. This is also a rather standard clause in many current arbitrations,

11:13:20 and it covers two aspects--one is liability itself, and the other one is not being called in subsequent procedures that might be done in terms of challenges or else--and we would like to hear whether the parties are in agreement in respect of this language or you have any suggestions to this effect.

MR. APPLETON: Thank you, Mr. President. Ms. Kinnear and I had the opportunity to discuss this this morning specifically to be able to address.

You should know that, together, we have a great deal of institutional experience when it comes to NAFTA arbitration here; I think that's probably safe to say. This is the first time in a NAFTA arbitration that we have ever seen this language at all on the exclusion of liability. It is not at all the norm that we have seen here. And, furthermore, I have done a fair bit of practice in terms of Bilateral Investment Treaty arbitration. We have also never used that in any arbitration I have been familiar with; but, of course, the Members of the Panel have far more experience on investor-State arbitration, I'm sure, than I do. But it's fairly, from our

11:14:41 perspective, somewhat unusual.

On the other hand, we are not prepared to throw the baby out with the bath water. We have no problem with the first paragraph. But, jointly, counsel thought we are not very comfortable with the second paragraph. We don't think that it's--or hopefully, although we think it's not very likely, that the second paragraph would ever be a necessity, but we don't think it would be appropriate to put it in at this time. I thought it was important that counsel were in agreement on this because it's a somewhat delicate point. But if, Ms. Kinnear, you have anything to add...

MS. KINNEAR: I think simply to reiterate what Mr. Appleton said, it's not a clause that we have seen in the NAFTA cases, and I'm not completely certain that it would be necessary. Frankly, I don't think so, but obviously that's a judgment that lies more in the Tribunal's bailiwick than ours, but certainly it is not a clause that we have ever seen or worked with before, and we wanted to raise that with you.

11:15:45 PRESIDENT ORREGO: Right.

Would Ken or Bill have a comment to make?

(Tribunal conferring.)

PRESIDENT ORREGO: Well, we will look again into the matter and be back to you before the end of the meeting to suggest whatever is considered urgent in that re-examination. So, thank you for those remarks.

ARBITRATION JURISDICTION

PRESIDENT ORREGO: Then we have the arbitration jurisdiction. This, of course, refers to the fact that it is a tribunal under NAFTA, but, of course, it does not prejudge or preempt the discussion on whether there is actual jurisdiction to hear the case or not, as you know only too well from your own exchange, so that's taken.

Would that be agreeable, too?

MS. KINNEAR: Yes.

MR. APPLETON: (Nods head.)

PRESIDENT ORREGO: Okay.

ARBITRATION RULES

PRESIDENT ORREGO: Then the applicable

Arbitration Rules, NAFTA and UNCITRAL in particular.
Is that something that you agree with?
MR. APPLETON: For the record, to assist the transcription, especially in light of the noise, we just record that both counsel have confirmed yet to number five and number six, then.
PRESIDENT ORREGO: Thank you.

APPLICABLE LAW

PRESIDENT ORREGO: Then we have the applicable law.
Are there any remarks in respect of the applicable law? No, that's it?
MR. APPLETON: It's much easier in a NAFTA case than it is under an ICSID case. It's spelled out specifically in the NAFTA. I believe we don't have to have the usual discussion about that.
PRESIDENT ORREGO: Absolutely. It's of great help.

PLACE OF ARBITRATION

PRESIDENT ORREGO: Well, then there is the question of the place of arbitration, which, of course, has not been decided. And, on this point, we

have, indeed, the submissions from both parties and their arguments.
So, on this item, I would like to ask both parties if you have anything additional or different from what you sent in in writing so as to illustrate the Tribunal further, and it is certainly a matter which the Tribunal will not decide right now, but it will take a few days' time to do that, on the basis of your submissions; and, if you have anything to add, this would be the occasion to do that.
Ms. Kinnear?
MS. KINNEAR: I have some further submissions that I would like to make which are in reply solely to those of Mr. Appleton. As the Tribunal will note, we exchanged our submissions simultaneously, and so we did not know what the other was saying. My points will be solely in response to new points that are raised. I don't intend, of course, to repeat anything that Canada has said.
I'm glad to do that later, if you would like to, or certainly do it now in the context of going through the draft Order, and I await your direction on

that.
PRESIDENT ORREGO: Maybe, if I may suggest this, it would be preferable to go through the standard agenda first and then address the pending issues to the extent that each--so that we won't interfere with the standard clauses that are easier to deal with.
MS. KINNEAR: I think that would be a good way to proceed, thank you.
PRESIDENT ORREGO: Thank you.
MR. APPLETON: I concur, and then in this way, we could basically get through this very quickly, get the standards out, and we know that there are just a couple of issues that seem to be contentious. It should make for easier discussion. If everyone is amenable, I think that's excellent.
PRESIDENT ORREGO: Right. That's very good.
Then we have--well, this particular item has a second paragraph to it, which is the conduct of hearings. I'm not too sure, but maybe I have overlooked, was there an agreement of the parties to have the hearings in Washington?

MR. APPLETON: I think so. I believe that both sides have agreed that, notwithstanding any determination of the place of arbitration, that we have agreed to have the hearings in Washington, D.C. That's my understanding. I believe Ms. Kinnear has put that in writing, but I leave it to Canada just to confirm.
MS. KINNEAR: Canada agrees to having hearings in Washington. We consented to ICSID administration and, obviously, hearings in Washington or anywhere elsewhere the Tribunal might think is appropriate in those circumstances. Obviously, that was without prejudice to the place of arbitration, and that's a discussion we will have later on this morning.
PRESIDENT ORREGO: Fine, thank you so much. So, that is done and noted.

SERVICE OF DOCUMENTS AND COPIES OF INSTRUMENTS

PRESIDENT ORREGO: Then there is the question of the service of documents, which basically is that communications be sent first among the parties and simultaneously to ICSID, and the Secretary of the

11:21:35 Tribunal, who would normally be in charge of the distribution of all these documents.

And then there is the reference to the former in terms of PDF and e-mails and dates and so forth, and some paper-copy submissions, if necessary, and faxes and transmissions under certain circumstances.

This, I understand, Howard, is the standard ICSID practice?

SECRETARY DEAN: Yes.

PRESIDENT ORREGO: Okay. Do you have any comments on this?

MR. APPLETON: We are very happy. We think it's a very efficient way to go; and, if the Tribunal is comfortable with it, we are delighted to proceed in this way.

MS. KINNEAR: We put in the record the e-mail addresses and, secondly, the exact addresses to which paper copies are to be sent, I assume, separately to each Tribunal Member, although one possibility would be to send it simply to ICSID to forward it on to Tribunal Members. I suspect sending directly to Tribunal Members is more efficient, and we simply ask

11:22:52 that the correct mail address be placed in the Procedural Order.

MR. APPLETON: If I could speak to that, what I suggest we just put a notice provision--it could be an annex to the Order--rather than make it a part of the Order. And I think it's very important that one of the differences of the NAFTA/UNCITRAL process rather than the ICSID process is that the communications do not have to go to the ICSID to be communicated to the Members of the Tribunal.

And while I love the idea of being able to deposit instruments with the ICSID, I don't want that to have to be another step in the process because, since 9/11, the process for ICSID to get paper is much more complicated, everyone at the World Bank Group, and there is a special process that it goes out of the house, it has to be vetted, and it adds a lot of delay. And it's hard to anticipate how long that takes and where that goes, and I don't want to delay the other process. Basically, it's much more convenient to send the Members of the Tribunal a copy of material. Of course, everything electronic doesn't

11:23:51 have that problem, so we love electronics. And on ICSID cases, we do everything we can to encourage electronic transmission, specifically for that purpose. But, because hard copies are necessary and useful, I just think that maybe we could address it in that way, and I'm sure that that makes a simple way for everybody to proceed.

PRESIDENT ORREGO: Yes, Howard?

SECRETARY DEAN: I would just say, as long as a hard copy is also provided to the ICSID Secretariat, so we it for the files.

MR. APPLETON: I think we are all in agreement for that.

PRESIDENT ORREGO: Okay. Now, one question to Howard. If I understand rightly, then, of course, ICSID would send everything, both e-mails and papers and couriers and faxes and whatnot, but, in addition this would be sent directly to Tribunal Members; is that the idea?

ARBITRATOR DAM: Just to raise one point, I don't think it needs to be in here, but faxes are fine, but you have to know you have one under certain

11:24:56 circumstances. So, there should be an e-mail notification if there is a fax, in which case some question whether the fax is the best way of communicating, because I have a problem that frequently I have faxes that I don't realize I have because of my particular customs of travel and so forth.

MR. APPLETON: I think we are prepared to--the difficulty is, because I as well travel extensively, is that there can be a situation where I don't have access to e-mail but I could get a fax. You have faxes all over the world. But the idea, I think, is, wherever possible, I think we are all agreed to send some type of e-mail. If there is a fax--and, from our perspective, unless there is some extraordinary reason, we would probably prefer to do things by e-mail generally as the preferred way of having things--I just don't want to preclude the ability to be able to send something because, of course, the minute I put that in the Order, that's exactly when the e-mail goes down. Like, in our office, the entire e-mail for this section of

11:25:58 Washington, D.C., for--was it Verizon or Allstream?--the Allstream is done for this morning. So, since 5:00 a.m., we have been down, and we would not have been able to send anything. I actually had to pick up my e-mail going to a hotspot.

PRESIDENT ORREGO: So, it's well-taken, so we will proceed that way.

And then, Howard, we would have to just clarify that this goes to Tribunal Members, as well.

SECRETARY DEAN: Yes.

PRESIDENT ORREGO: Because it could be read as if everything had to be sent to ICSID, and then that would be sort of an additional step that would delay things.

SECRETARY DEAN: It says here in the first paragraph, "All written communications"--in the first paragraph, it stipulates, "All written communications by one part of the Tribunal shall be copied simultaneously to the other party and to ICSID Tribunal counsel."

PRESIDENT ORREGO: Right, okay. That's fine. Thanks.

11:27:09 SECRETARY DEAN: Are parties okay with that?

MS. KINNEAR: Yes.

MR. APPLETON: Mr. Dean, can you confirm, do you want us to copy you? Do you want us to copy Eloise Obadia and you?

SECRETARY DEAN: Both.

MR. APPLETON: Both? All right. We are happy to copy wherever you like. So long as we know, we will send everybody. That's a beautiful thing about e-mail.

SECRETARY DEAN: What I propose is that, in the attached notification, I will indicate in there to whom all material should be copied within the ICSID Secretariat.

MR. APPLETON: Excellent.

PRESIDENT ORREGO: Great, thank you.

PROCEDURAL LANGUAGE

PRESIDENT ORREGO: Well, item 10, it's already agreed to, procedural language, which is English.

There is an additional reference to evidence that might not be in English, which does not appear

11:28:07 very much to be the case here, but still...

And, in that case, they would have to be translated into English. That's a standard item.

MR. APPLETON: I believe we are all in agreement here.

PRESIDENT ORREGO: Okay. That's very good.

Ms. Kinnear, are you in agreement?

MS. KINNEAR: Yes, I am. Thank you.

CONFIDENTIALITY

PRESIDENT ORREGO: Then there is the confidentiality question that we can again leave to discuss at the end of this agenda--

POWER TO FIX TIME LIMITS

PRESIDENT ORREGO: --and proceed to the question of the power to fix time limits, which is the kind of standard clause.

Would you be in agreement with that as well, Mr. Appleton?

MR. APPLETON: Yes.

MS. KINNEAR: Yes, that's fine.

PRESIDENT ORREGO: Thank you.

WRITTEN AND ORAL PROCEDURES-PLEADINGS: NUMBER,

11:29:05 SEQUENCE, TIME LIMITS

PRESIDENT ORREGO: Well, then there is the question of the issue of written and oral proceedings, time limit and sequence and so.

The only thing that's already decided in this respect is that both parties have submitted the Notice of Arbitration and Statement of Claim for the Claimant and the Statement of Defense for the Respondent with the respective dates. And although sometimes there is the question of reserving, particularly the Notice of Arbitration that was before the Tribunal has considered it, but I think we all can state we have it and read it and don't need to be reserved in the formal way.

Are we all agreed on that?

MR. APPLETON: Yes. And, in fact, the NAFTA rules really dispense with that problem, but we are happy to stipulate that. We have no problem with that.

PRESIDENT ORREGO: Yes. So, it will be clear we are all aware that they do exist and we have them. Okay.

Then I suggest, then--

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

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

SECRETARY DEAN: Okay.

MR. APPLETON: We might, though--when I first read this, I was a little confused by the word "reserve" because we thought you mean "re-serve," which might be re-serve rather than reserve, which means deliberate and hold back.

PRESIDENT ORREGO: There is a dash there.

MR. APPLETON: 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 submissions again. And as long as you have the materials, we are all very happy to go from there.

PRESIDENT ORREGO: Right. So, if you can introduce your small hyphen, that would be great.

Well, perhaps the last paragraph here would

be relevant at this point, which is that if there is nonservice of a given reply or statement or rejoinder for whatever reason that one might agree to that in the schedule, then that doesn't mean admissions--it's simply a procedural facility--nor any adverse inference or so.

Would you like to have that? Any thoughts on it?

MR. APPLETON: Fine with me. We have no objections to it.

We haven't seen this before, but I'm happy to learn new tricks, and so we have no problems whatsoever with this.

MS. KINNEAR: 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 issue 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 no adverse inference; but I do suggest that it's probably not necessary in this case.

PRESIDENT ORREGO: Okay. We will look at it again, and we will get back to you before the end of the meeting, as well.

MR. APPLETON: What I take very clearly from this--and I think this is the important point for us all--is that I think it's a very polite and gentle admonition to the parties to not repeat themselves and that perhaps in responsive pleadings just be responsive. And if that's the intention of the Tribunal, I think we have received that very clearly.

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

Fine, thank you for that.

ARBITRATOR DAM: He's put our prose into poetry.

PRESIDENT ORREGO: Yes, right.

Well, then we have item--well, of course, we 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.

MOTIONS PROCEDURE

PRESIDENT ORREGO: Again, a standard clause,

which is the motions procedure that you can find in paragraph 14. That's a standard, too.

MR. APPLETON: The only question we have is whether you want to have the motions procedure or you want to have a procedure for leave for a motion.

There are two ways that are followed. To be very honest, I usually have the one that asks for leave; but, at the end of the day, if someone really wants a motion, you have all the material there anyways, there is really no point asking for the leave because the party just sends all the materials in anyways; and by that time it's so substantial, if you are going to deny it, you are just going to deny it. If you are going to grant it, it's not going to be on the basis of leave. So, I think we are happy with it, but I just wanted to make sure that that was your intention, you didn't want to seek leave before a motion is made. But, if you're happy with that, I think we have no objection.

PRESIDENT ORREGO: Ms. Kinnear?

MS. KINNEAR: We're happy with the clause as drafted, and I think a process of seeking leave is an

11:34:49 extra formality that probably doesn't give much benefit.

PRESIDENT ORREGO: So, we would have the motions straight on to that extent.

MR. APPLETON: We just want to make sure you are comfortable with that, that's all.

PRESIDENT ORREGO: That's not a problem.

PRODUCTION OF EVIDENCE AND WITNESS STATEMENTS

PRESIDENT ORREGO: Then we have item 15, production of evidence and witness statements, and this we have to discuss as a pending issue, so we will leave that for a few minutes' time.

QUORUM

PRESIDENT ORREGO: We have quorum, which is again a standard clause, plus a small addition which is nothing new, either, in respect of eventual hearing on procedural matters, if that will be a serious matter that cannot be solved any other way.

Would you be comfortable with the quorum paragraphs?

MS. KINNEAR: Canada is happy with the clause as drafted.

11:36:20 MR. APPLETON: We concur.

PRESIDENT ORREGO: Thank you.

DECISIONS OF THE TRIBUNAL

PRESIDENT ORREGO: Decisions of the Tribunal, paragraph 17, is also very standard.

So, we are agreed to that, I assume? Thank you.

RECORD OF HEARINGS/DATES OF SUBSEQUENT SESSIONS

PRESIDENT ORREGO: Then there is item 18, the record of hearings in terms of transcription and LiveNote and corrections of transcripts and so forth, which is very standard, too.

MS. KINNEAR: For the record, Canada is fine with 16, 17, 18, and 19.

MR. APPLETON: If you don't want to go through those items, I think we can stipulate and concur on those, as well, and then we can talk about 20.

PRESIDENT ORREGO: Records and dates of submissions, the date of sessions, and so forth?

MR. APPLETON: Yes.

PRESIDENT ORREGO: Fine. That's very good.

11:37:21 FEES AND EXPENSES OF THE TRIBUNAL; ADMINISTRATIVE SERVICES

PRESIDENT ORREGO: Then we have item 20. 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 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 ICSID doesn't always apply but maybe should be referenced explicitly.

I think there is a limit--am I right, Howard?--of eight hours a day as a cap as the longest time allowance. Would that be agreed to you? In letter B, with the reference to travel time, and then that would be perhaps more complete.

Then there is ICSID administration, and then there is the administrative and support services.

11:39:14 Would that be agreeable to all the parties?

MR. APPLETON: We agree on this. Absolutely.

PRESIDENT ORREGO: Okay.

Then there is the item of a cancellation fee, which sometimes it is addressed, sometimes not. The feeling is that it would be helpful, particularly to encourage parties not to cancel any meetings, but are there any views on that?

MR. APPLETON: Mr. President, this is another clause we never had in any of our cases; however, I don't think it is unreasonable. I think it's very important that we all recognize that the Members of the Tribunal have to block a period of time, and that that is not something that's very easy for you to reallocate. But I think one of the things we might want to clarify in view of cancellation and not having the hearing, well, what happens if you reschedule the hearing?

For example, there was a case involving Canada and the American investor in Canada, the Myers case, the case that is already before us in some other things; and, in the Myers case, a piece of evidence

11:40:30 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 cancellation? I mean,
8 that's the only time--as far as I know, there has
9 never been a cancellation from any 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 in.
14 So, I don't think it's unfair. I think it's
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 PRESIDENT ORREGO: Yes. Well, generally
21 speaking, the thought of applying a cancellation fee
22 is related to the fact that an arbitrator might have

11:41:37 1 blocked a given date and, because of that, refused to
2 give it work, so eventually it applied to a
3 rescheduling. But, of course, that will be something
4 which is, I suppose, to be taken up on the
5 circumstances of the case. For example, say the
6 Tribunal itself would say, "Look, we better postpone
7 this for a week or two or three or four." Well, that
8 would be absurd because it would be the Tribunal
9 itself deciding, but it is the kind of issues. But on
10 this I must say I have had just one occasion in which
11 it happened and in which the postponement was for
12 about six months, and it did apply.
13 But I'm happy to hear from our colleagues
14 whether you had cases in which this has happened.
15 ARBITRATOR ROWLEY: A word or two about this
16 particular clause. There are a variety of
17 cancellation clauses in current use around the world
18 in arbitrations. This one happens to be the one that
19 it is not, technically speaking, the LCIA clause, but
20 it is the clause adopted for use in LCIA arbitrations.
21 It's probably the most moderate of the cancellation
22 clauses, and so I agree with Mr. Appleton that it is a

11:43:14 1 reasonable one. It is intended to guard against the
2 Tribunal losing time by reason not of its own conduct
3 but by reason of the conduct of the case or the
4 parties' inability to proceed.
5 If a hearing is moved and canceled and
6 reheard, it depends on the reason for the move. If it
7 is sometimes you simply have to reschedule because the
8 parties are not in a position to go forward, that
9 calls for a cancellation. And if, on the other hand,
10 it is something spelled out here, incapacity or
11 illness of an arbitrator, no cancellation. There is a
12 halfway house that is not covered, and I think the
13 best thing, rather than to try to write it perfectly,
14 it to leave it as it is but with this Tribunal being
15 open-minded to hear from the parties, should that
16 arise.
17 MR. APPLETON: So, you mean the word "may"
18 here is the discretionary element?
19 ARBITRATOR ROWLEY: Yes.
20 MR. APPLETON: I'm happy with that. I just
21 wanted to get a better understanding--I don't want
22 there to be a misunderstanding with anyone here.

11:44:31 1 That's the whole idea of this session today, and so I
2 appreciate, Mr. Rowley, for you to explain working
3 from--I suspect it came from the LCIA vernacular, but
4 I was hoping that that was the explanation I was going
5 to get.
6 PRESIDENT ORREGO: Yes, that is correct.
7 MS. KINNEAR: Canada is agreeable to
8 proposing it that way. Thank you.
9 PRESIDENT ORREGO: Thank you.
10 Well, there is one other item that's not
11 included in this particular paragraph, which is the
12 question of eventual taxes, indirect taxes, not income
13 taxes for which an individual is liable in his own
14 country, but this came up as a consequence in some
15 arguments that Mr. Appleton made in the context of the
16 seat of arbitration. It has nothing to do with fees,
17 but it reminded all of us that there is this question,
18 and Canada, if I'm not mistaken, in particular, but
19 eventually elsewhere from the point of view of VAT or
20 some other tax. For example, in Europe, the
21 International Chamber of Commerce has developed a very
22 specific clause to that effect because the European

Community applies VAT to all European nationals who are sitting in a given arbitration, and the clause is simply to have the parties supplement the costs in the amount of those indirect taxes. Either in some cases it's done directly to the Arbitrator, but in others, of course, it could be done through the administrative handling of ICSID in this case, I suppose. Would that be a possibility?

SECRETARY DEAN: Well, that's a more tricky issue. I mean, ICSID is part of the World Bank Group, and there are certain privileges and immunities, and the World Bank Group always seeks to avoid being involved in the payment of the VAT or an issue concerning the VAT. What the World Bank typically does in situations in which VAT is involved and the parties to a particular matter want to include VAT somehow, which is gross up the amount that's paid to cover any VAT.

ARBITRATOR ROWLEY: I have provided a clause to the Members of the Tribunal to deal with VAT, but we thought we would discuss it with you before putting it in a draft.

The reason I have done so is, in previous cases where I have been involved and a Canadian entity has been involved as one of the parties, and that Canadian entity has been responsible for part of the bill, part of my bill, usually half, in some circumstances, I'm obliged to charge VAT. So, in this case, I'm not sure whether that applies when the party is the Canadian Government.

So, over to Ms. Kinnear for a moment, and then I will come back to my issues, if any, remaining.

MS. KINNEAR: Thank you.

Well, this tweaked my interest yesterday as a Canadian who hates GST as much as anybody, so we asked our Revenue Department whether this would, indeed, be payable, and they got back to us, and they told us, in effect, in this circumstance, because the hearings are in Washington and fees will be payable through ICSID, services are rendered in Washington, it certainly wouldn't be subject to GST. So, that's what I was advised yesterday by the CRA, Canada Revenue Agency.

ARBITRATOR ROWLEY: If they would like to give me a letter to that effect, I would be happy with

it, but...

MR. APPLETON: And this actually was an issue that arose in another NAFTA case, and in that case the Members of the Tribunal very unhappily were all subjected to having to charge GST on their fees. This was in the Myers case. In that case, there was a Canadian arbitrator, Ed Chasen--in fact, there were two Canadian Arbitrators in that case--and the President was from the U.K., Martin Hunter, and there was a lot of unhappiness.

So, the difficulty here is that--and they asked on the record specifically the Government of Canada to provide assurances in the record to deal with this, and so there would need to be a ruling or something on this issue if we wanted to be able to rely on it.

What we are saying is this has already occurred, so I don't want there to be any surprises. I guess that's the whole purpose here. I'm very interested to see what it is that you have proposed by way of wording, but we have some concerns.

It all comes to costs, we would figure it

out, but I would be very loath as someone who operates a law firm in the Canada as well as the United States, we are very careful to meet and follow all the appropriate taxation laws in each of the jurisdictions very, very carefully.

MS. KINNEAR: If I may, the Myers case had hearings in Canada, and that was the difference. The service was rendered in Canada. But I think perhaps the easy way to get through this is to see the proposed clause and to add something to the effect of "if payable, then," et cetera, et cetera, and that's a way to end this discussion, perhaps.

ARBITRATOR ROWLEY: If I could end my discussion quite as quickly, I was just going to say that, in Methanex, for example, my tax people determined that we were obliged; and, in that case, it was a case similar to this, we had ICSID act as administrator--that is all--they were the fund holder--we started with the LCIA holding funds, and then we moved it to ICSID--and what I did was I rendered two separate accounts always: one to the Claimant; one to the Respondent, the U.S. Government.

The one that was rendered 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 clause. I don't know whether it says "if payable," but I would be quite happy to have "if payable." But I would be quite unhappy to have to pay the GST myself.

PRESIDENT ORREGO: It does begin exactly saying that, insofar and to the extent that the fees of Arbitrators are subject to VAT, according to the applicable tax laws, et cetera, et cetera, the parties shall--but we will have this, Howard, copied and circulated to you.

ARBITRATOR ROWLEY: 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's payable or not.

PRESIDENT ORREGO: Well, there is just one Canadian party.

ARBITRATOR ROWLEY: Yes, forgive me, there would be in this kind of case.

MS. KINNEAR: Ms. Tabet just makes a very good point, that Methanex had a place of arbitration in Washington, so that makes it even more complicated. But I'm certainly pleased to proceed this way, Mr. Rowley.

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

PRESIDENT ORREGO: 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.

APPORTIONMENT OF COSTS AND ADVANCE PAYMENTS

PRESIDENT ORREGO: Then we have item 21, which is apportionment of costs and payments, and that

has not had any change, and the deposits have been made, we are told by ICSID, and so that's all done with.

PROFESSIONAL ASSISTANCE TO ARBITRATORS

PRESIDENT ORREGO: 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 yet--of, for example, the expert that will help the Tribunal to evaluate a given damage or given situation, if that were the case, that that be considered part of the expenses of the arbitration and not personal expenditures of arbitrators. That's the gist of the clause.

MR. APPLETON: This is a common clause, and we have absolutely no problem with it. You put the wording in that we would need that whoever that person you would appoint would have to meet the same types of impartiality and independence. We have no problem with that.

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

PRESIDENT ORREGO: Thank you.

Ms. Kinnear?

MS. KINNEAR: We are equally happy with that. My only question would be, when I first read this, I wondered if this was to be somebody who would be giving legal assistance to the Tribunal, which I think perhaps has some other issues. If it's simply factual or expert assistance, then there is no objection whatsoever.

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

MS. KINNEAR: If it is, in fact, expert, I think we will cross that bridge when we get to it, but NAFTA Article 1133 provides for experts, and I think the Tribunal appointed one, and the UNCITRAL Rules have specific procedures. Assuming we get to that stage, obviously we will go through that procedure; but, in principle, in terms of covering the remuneration, this clause is certainly appropriate.

PRESIDENT ORREGO: Fine, thank you so much.

So, that would cover the standard agenda that we have before us. But before breaking for a few 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.

(Off the record.)

MR. APPLETON: There is some issue I would like to canvass with the Tribunal. I didn't put it into our proposed joint Order, but it's a question--and I think it's fair, as we get to know each other today--as to what type of reasonable expectation the Tribunal has about the timeliness of bringing an award out. And the reason I say that is, I wrote an article in Global Arbitration Review, looking at the amount of time the tribunals have been taking in various venues to be able to render awards on jurisdiction, on merits and things like that, and I thought that it might be fair because sometimes the expectations of the parties aren't the same, and certainly we have our client representative, Norm Schaaf, here with us today, and I thought it might be just useful to--I originally was going to suggest actually an order, something in the Order, like they have with the Stockholm Chamber which is a six-month

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

Certainly, this has been the--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.

PRESIDENT ORREGO: Absolutely.

Ms. Kinnear, do you have any views on that?

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

PRESIDENT ORREGO: 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 expediently as possible. That's a bit within the style of the 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 than if it delves straight into the merits. That is one aspect that we have not yet touched upon.

However, while I have had the experience with six months under the Spanish law in arbitration, it tends to be a tight, not so much for the Tribunal, I might mention, but for the parties. Occasionally, they feel there is such a pressure to come up with things, and there is little allowance for extending two more months and so. But definitely, and subject to discussion 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. APPLETON: Just to clarify, I wasn't looking at six months in total for the entirety of the proceeding, which is, in fact, the Stockholm 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 issue, with the nature of what's there. I just thought it was fair at the beginning of the process for the parties to let the Tribunal know that it can be very difficult on the parties to wait a very long period of time, and generally a year is a long period of time. Six months--well, in jurisdiction, three months is not that long. Six months is around the average now--used to be shorter--but we have had some situations 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.

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

of the parties.

MR. APPLETON: Yes, Mr. Dam, you have hit it exactly.

I think it's helpful to just to manage the expectations of the parties to give them an idea, say, "Well, we think we should be able to revert back to you in three months or four months," but otherwise we get the situation where we are out a year, and we will get a nice letter from me saying, that according to the study, you are slightly past the deadline, maybe you could tell us a little update. And then sometimes the Tribunal will respond, and sometimes they won't. Then it will go 14 months, and then we will have to contact over to the General Counsel at the World Bank Group and say, "Can you have a little check." By then, we will have sent seven letters to Mr. Dean and Ms. Obadia, saying, "Could you please tell us what's going on," because the reason people come to arbitration is to find an expeditious way, and they don't know what's going on.

And so, what I was hoping, rather than just have this as a legal type of debate and discussion,

was to use this just as a way to help the parties' expectations. That's all. That's the purpose. I'm not looking to formalize this or legalize this. Just to help everybody understand, and that's why I'm asking. It's really just a question. It's not an alternative plan or a new order or anything else. But that's where I think arbitration really shines.

If you could help us just to get a sense of your feelings, I just think it helps everybody in this process.

PRESIDENT ORREGO: Good point, and we are entirely in agreement.

Maybe what we could do is to suggest a general wording to the effect that the Tribunal will do its best efforts to come up as expeditiously. I hesitate to name months because we don't know at this stage, but definitely it would not be a question of years. Most definitely. I suppose you all agree to that. We should--

ARBITRATOR DAM: Well, certainly I think the only conceivable problem would arise if one of the Arbitrators were involved in a very lengthy

arbitration with many, many days, months, weeks of hearings and so forth, and it's impossible to figure out exactly where we are. But it would seem to me, speaking only for myself, we have every incentive to finish things as promptly as feasible. But I'm just speaking for myself.

PRESIDENT ORREGO: I suppose that's your case as well, Bill?

ARBITRATOR ROWLEY: I try to do things as speedily as possible.

PRESIDENT ORREGO: Good. So, you can be reassured that we will be back to you before you might wish.

MR. APPLETON: It cuts both ways, thank you.

PRESIDENT ORREGO: Okay. That's great.

Fine, I appreciate very much your corporation and good points, and we take them all in, and we will be back to you on two items that we have pending on the question of the admissions of rejoinders and so and some others that I noted along the way, serving as a witness in some case after this proceeding.

So, I suggest that we take a break for, what?

Fifteen minutes? Would that be convenient to you all? And we would be back and discuss the pending issues: place of arbitration, confidentiality, bifurcation, and schedule, and the production of evidence. Would that be it, I gather?

Fine, thank you very much.

(Brief recess.)

PRESIDENT ORREGO: We are ready to resume now our meeting, and we have some answers for you right away.

The first is that the Tribunal reviewed the two paragraphs that were still subject to some clarification. The first one is the one concerning the section on the exclusion of liability, the question of being called as a witness or so, and we agree that it is not really necessary, so we can drop that particular paragraph and keep just paragraph one of number four. So, we will delete that, if you agree with it.

MS. KINNEAR: Yes.

PRESIDENT ORREGO: Then we have the paragraph at the end of the written and oral proceedings in

12:43:10 respect of if a party chooses not to submit a Rejoinder, or a Reply or a Rejoinder--this is not going to be taken as anything adverse--and that we would like to keep, if you agree to it, basically from the point of view that it helps to make sure that if anyone doesn't feel that it has anything to say further, there is no need to say it because there will be no adverse inferences, "Well, you didn't say it, well, nothing happens."

MR. APPLETON: I just want to clarify, of course, if a party doesn't file a Reply, I submit that means the other side cannot file a Rejoinder?

ARBITRATOR ROWLEY: Correct.

PRESIDENT ORREGO: Correct.

MR. APPLETON: I wanted to make sure that we are clear on this.

PRESIDENT ORREGO: That is correct, because each is supposed to react to the other--

MR. APPLETON: To the other. I just wanted to make sure we are all on the same wavelength.

PRESIDENT ORREGO: Okay.

MS. KINNEAR: My only question is, will there

12:44:09 be a date, Reply by a certain date, Rejoinder by a certain date?

PRESIDENT ORREGO: Well, yes, because that way we will build in the schedule.

Well, the third pending item on the Tribunal's side was the question of VAT at the end of paragraph 20; and, in that respect, a draft wording has been circulated, too, which we thought would cover eventual situations--hopefully they will not occur; but, if they do, they will be subject to a procedure to deal with it in this way. Have you had a chance to look at it?

MS. KINNEAR: I have, and I thank you.

I wonder if I would be allowed to take this back to Canada and speak to the Canada Revenue people and ask them if they have any particular comment. My sense was that it would matter to the characterization, certainly for the Canadian GST, whether the money comes through the ICSID Secretariat, which I think is preferable. And I would also ask them if they could perhaps give some kind of a statement for the record for the Tribunal that would

12:45:28 hopefully give some comfort to arbitrators as well.

So, I would ask if perhaps we could forebear on this, and I will get back to that as quickly as possible as soon as I get back to Ottawa, and I will speak with Mr. Appleton in advance of getting back to the Tribunal, if that would be acceptable.

PRESIDENT ORREGO: Absolutely.

Is that all right with you?

MR. APPLETON: Could we go off the record for a moment?

PRESIDENT ORREGO: Yes, certainly.

(Discussion off the record.)

PRESIDENT ORREGO: So, now we are quite ready to move into the pending issues, beginning with the place of arbitration. Would the Claimant, Mr. Appleton, think that you have additional elements to mention in respect of what you have already stated submitted?

MR. APPLETON: Yes, Mr. President. We actually have some additional comments to make in light of some of the views that have been expressed by Canada, and apparently Ms. Kinnear has indicated to us

12:50:53 that she has comments to make in light of some our views. So, it appears you have to hear from both of the parties. Who would you like to hear from first?

PRESIDENT ORREGO: Well, certainly the Claimant.

MR. APPLETON: Then I'm going to ask Mr. Gallus if he would address the Tribunal briefly on some of these issues.

PRESIDENT ORREGO: Thank you.

MR. GALLUS: Thank you.

Mr. President, in many respects, the parties' submissions with regard to the place of arbitration are quite similar. Both parties, for example, relied on the UNCITRAL Notes. There is one area where the submissions differed significantly, and it's on that area that I would like to concentrate briefly this morning.

Specifically, Canada relied specifically within its submissions on the factor of neutrality, and the Investor did not specifically rely on the factor of neutrality within its submissions. The Investor did rely on the factor of equality in a sense

12:52:10 that the factor of equality overlaps somewhat with the factor of neutrality. Indeed, the principle of neutrality can be expressed, that simply the fact that parties before a court are treated equally. Nevertheless, Canada did specifically address the principle of neutrality, and we feel that we should respond to the specific submission, given that the Investor did not specifically address the issue in its submissions.

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

The Investor believes that, because of these two reasons, a city in Canada can never be a neutral place for the arbitration, and let me address these

12:53:37 two reasons in turn, first starting with Canada's stated position on the standard of review.

In the Investor's submissions, we refer the Tribunal to Canada's comments for the Metalclad judicial review court. The Metalclad court was a court of the British Columbia that reviewed the NAFTA Chapter Eleven Decision in Metalclad against Mexico. And, in that judicial review, Canada said--and I'm going to quote now the same quote that we include in our submission--Canada said that "NAFTA Chapter Eleven Awards are not supposed to be worthy of judicial deference and not supposed to be protected by a high standard of review." And if the Tribunal would like to see that quote, you can find it at Tab 12 of the authorities we appended to our submission, specifically at paragraph 12, and it's repeated again somewhat at paragraph 30.

Two subsequent Chapter Eleven Tribunals commented on what Canada had to say in the Metalclad judicial review case. Firstly, the UPS Tribunal said it was deeply troubled by Canada's position and, indeed, partly relied on Canada's submission to choose

12:54:57 a place of arbitration that was outside of Canada. Subsequently, the Pope & Talbot Tribunal also said that it was troubled by Canada's submission, and the Tribunal said that it, too, would have relied on that factor to choose a place of arbitration outside of Canada, if the arbitration in Pope & Talbot was not so far progressed.

Despite these comments of the UPS and the Pope & Talbot Tribunals, Canada subsequently, in another judicial review case, reiterated the same argument. Indeed, in the Myers judicial review, Canada argued once again that NAFTA Chapter Eleven Awards should not be accorded a high level of deference.

Canada's position with regard to the standard of review in Canadian courts can be contrasted with the standard of review in courts in the United States, where the United States has never argued that a court should accord any lower standard of deference to a NAFTA Chapter Eleven Award and, indeed, where United States courts interpret the Federal Arbitration Act using the United States on its face.

12:56:19 So, the first reason we believe that Canada--a city in Canada can never provide a neutral venue for the arbitration is because of Canada's stated position with regard to the standard of review in Canadian courts.

ARBITRATOR ROWLEY: Could I ask you a question on that. Would the more relevant question as to neutrality of venue be how the courts treat arbitral awards as opposed to one of the litigating parties' arguments?

MR. GALLUS: I think there are two answers to your question, Mr. Rowley. The first is, indeed, a relevant question with regard to neutrality is what the standard of judicial review is that is applied by the court. And, indeed, on that issue, we believe that the standard applied by Canadian courts is also suspect. I refer the Tribunal in particular to the standard of review that was applied by the Myers Tribunal or by the Myers court, where Canada in that case argued that, on the issue of whether the Tribunal had appropriately taken jurisdiction, Canada argued that the test that should be applied by the court was

a test of correctness.

And while the court found for other reasons it did not need to address the issue, it went on in obiter dicta to say, indeed, it agreed that the test for reviewing the Tribunal award with regard to the decision to take jurisdiction was, indeed, a test of correctness.

So, the first answer or the first part to the answer to your question, Mr. Rowley, is, indeed, that the standard applied to the courts is important, and we believe that, on that issue, the standard applied by Canadian courts is also suspect and does demonstrate that Canadian courts--or Canadian cities cannot be a neutral venue for the arbitration.

The second part to the answer of your question is Canada's submissions before those courts is also very important because Canada's submissions before those courts indicates the submissions that Canada is likely to make in the future. It indicates the submissions that Canada is likely to make, if Canada seeks to review any award coming from this Tribunal; and, therefore, it indicates the standard of

review that Canada will seek to hold a court reviewing any award coming from this Tribunal. If that answers your question, Mr. Rowley.

I would like to leave now the issue of the standard of review that Canada seeks to apply to its courts and address the second reason why Canada--a city in Canada cannot provide a neutral venue for the arbitration, and this is because of the sovereign powers that Canada enjoys. Indeed, Canada has pointed out, in its submissions to the Tribunal, to particular sovereign powers that are important to this issue, and I suspect we shall hear a little more on these sovereign powers later on this afternoon, but I shall address them briefly now.

The first is the sovereign power arising from the Canadian Access to Information Act. Canada argues that its Access to Information Act gives it the right to respond to a Request for Information from anyone in Canada or a resident of Canada to respond to such a request by providing information that is being designated by this Tribunal as confidential; and not only that, by providing more information that is

actually requested by the applicant. Canadian has not only argued that its Access to Information Act gives it its power, but the Canadian Federal Court has supported Canada's position in a case that I suspect we will talk a little bit later. A Canadian Federal Court did, indeed, confirm that, in response to a request from anyone in Canada, from any citizen in Canada, that Canada can provide any documents from a NAFTA Chapter Eleven arbitration that had been designated as confidential by the Tribunal and go beyond the actual request to Canada.

So, the first sovereign power that Canada has identified in this arbitration is its sovereign power arising from the Access to Information Act. The second sovereign power is once again something I suspect we will touch on later this afternoon, but as the power arising under Canada's Evidence Act and specifically Section 39 of that Evidence Act.

Section 39 of Canada's Evidence Act gives Canada the right to refuse to disclose information that is requested if a clerk of the Privy Council in Canada certifies for that information contains

deliberations, cabinet deliberations. The important aspect of Section 39 of the Evidence Act is that that assertion cannot be challenged, and Canada has argued in its submissions that this NAFTA Chapter Eleven Tribunal can also not challenge that assertion. Canada argues that as soon as the clerk of the Privy Council in Canada designates a document or a class of documents as classified or privileged because they demonstrate cabinet deliberations, then this Tribunal cannot review that decision.

So, in its submissions already, Canada has identified these two sovereign powers, and we believe that these sovereign powers and other sovereign powers demonstrate why a city in Canada cannot be a neutral venue for the arbitration. First of all, the sovereign powers are not powers enjoyed by the Investor, and already there is inequality between the powers before a Canadian court. Secondly, there is the danger that, if Canada seeks to rely on these powers in this case, and if the Tribunal takes a different position, Canada may seek to challenge any award as contrary to its public policy.

13:02:41 So, the second reason that we believe no Canada city can provide a neutral venue for the arbitration is because of the sovereign powers that Canada enjoys. Now, this situation can be contrasted to the situation in U.S. cities, and particularly the situation in Washington, D.C., which the Investor has proposed as an appropriate place of the arbitration. In Washington, D.C., for example, the Investor enjoys no such special powers and the parties would appear before a Washington, D.C. court as equal parties. Nevertheless, Canada argued in its submissions that Washington, D.C., is not a neutral venue. However, Canada's own authorities that are relying on its submissions demonstrates that that's not the case.

Indeed, those authorities demonstrates that, because Washington, D.C., is the home of the ICSID, it is a neutral venue, and I would like to refer the Tribunal specifically to the authorities on which Canada relies. I would like to refer the Tribunal to, first of all, the decision of the ADF Tribunal, which believed Canada provided at Tab 4 of its authorities, and I would like to refer the Tribunal specifically to

13:03:57 paragraph 21 of that decision.

I would also like to refer the Tribunal to the Methanex decision upon which Canada also relied, and which the Tribunal can find at Tab 7 of Canada's authorities; and, within that decision, I would like to refer the Tribunal specifically to paragraph 39.

Of course, these authorities on which Canada relies support or buttress the authorities on which the Claimant has already relied in its submissions, and I would like to refer the Tribunal specifically to the UPS Decision, which the Tribunal can find at Tab 8 of the Investors' authorities, and specifically to paragraph eight of that Decision. All of these three decisions say that Washington, D.C., is a neutral venue for an arbitration because Washington, D.C., is the home of the ICSID.

So, just to conclude the Investor's response to Canada's submissions with regard to the place of arbitration, we responded specifically to the one issue of neutrality because it was an issue that Canada relied on specifically in its pleadings and to which the Respondent--to which the Investor did not

13:05:15 specifically address, and we are grateful to Canada for relying on the issue of neutrality because we believe more than any other factor perhaps the factor of neutrality demonstrates that no city in Canada can ever be a neutral place for the arbitration. Courts in Canada are subject to Canada's submission that they should apply a lower standard of review to NAFTA Chapter Eleven Decisions, and courts in Canada are also subject to Canada's sovereign powers.

There are no such concerns with Washington, D.C., and for that reason, the Investor submits that the Tribunal should make Washington, D.C., as the place of the arbitration.

Unless the Tribunal has no other questions, I would turn to Ms. Kinnear and Canada.

PRESIDENT ORREGO: Thank you, Mr. Gallus.

We shall now hear from Ms. Kinnear, please.

MS. KINNEAR: Thank you.

I have six points I would like to address in reply to the submissions on place of arbitration. The first one is with respect to neutrality and equality which have been placed together in the Investor's

13:06:29 submissions.

It is, first of all, debatable whether neutrality is a relevant factor in choosing a place of arbitration in Chapter Eleven cases. In particular, Article 1130, which is the appropriate Article, says that NAFTA cases have to be in one of the NAFTA States and doesn't say anything to the effect that it must be the State not implicated. So, clearly the NAFTA drafters contemplated place of arbitration being in the home State of one of the disputing parties.

Perhaps more importantly is what's happened in practice. The fact is that every single case against the United States has had Washington, D.C., as the place of arbitration. It would seem to be a bit of a double standard if when Canada, as the Respondent, it could never have a city in Canada as the place of arbitration. The fact is also that several Canadian cases have located or had the place of arbitration in Canada, in particular Montreal and Ottawa. So, neutrality, if it is a concern at all, certainly has not been strictly applied in this context.

13:07:42 Neutrality and, perhaps better said, equality would also not lead you to Washington, D.C. The fact is that Washington is the capital city of the Investor's home country; and, if that is a nonneutral location, surely it is as nonneutral as Ottawa and would lead you to conclude that Vancouver would be the appropriate place. As you know, Vancouver is one of the places suggested by Canada.

Finally, with respect to the issue of the seat of the World Bank, there again is a debate in the NAFTA case law on that. The Canfor Tribunal in particular suggested that the fact that Washington ahs the World Bank is to confuse the physical location of the hearing with the legal seat of the arbitration, and we would agree with the Canfor Tribunal in that respect and suggest that the fact of the ICSID is here should not affect the Tribunal's determination about place of arbitration. That Canfor case is at Tab 6, paragraph 22, of Canada's submissions.

Second question on place of arbitration is the Investor's submission or suggestion in its brief that Washington is somehow a default location.

13:08:57 Obviously, Washington is not any default location for place of arbitration in these cases. This ignores the express wording of Article 1130, and I call the Tribunal Members' attention to the fact that 1130(a) says that where a question arises about place of arbitration under either an ICSID Convention or ICSID Additional Facility case, it will be determined in accordance with the ICSID Additional Facility Rules. Those give the Tribunal discretion to look at the circumstances. That is exactly the same kind of exercise, of course, that the Tribunal has to go through under the applicable rules here, which are the UNCITRAL Rules.

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

13:10:13 the Tribunal obviously has to balance this. It seems fairly clear to me that the balance is Vancouver, Ottawa, or Washington. The only factor at all that in any way could link this arbitration to Washington is the fact that the parties have consensually agreed to ICSID administration. There is not one single other fact that's relevant.

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

I then would just like to go to the question of Canada and the suitability of Canada and its arbitral law. That's obviously one of the factors under the UNCITRAL Organizing Notes and one that the Investor has spent a considerable amount of time on in its submission.

The first point to make is that NAFTA Chapter Eleven Tribunals--I apologize.

(Pause.)

MS. KINNEAR: NAFTA Chapter Eleven Tribunals

13:11:22 have universally held that Canada and United States have equally suitable laws. Nobody--no Tribunal--has said otherwise or even suggested otherwise. Canada has the Commercial Arbitration Act and the Code based on the UNCITRAL Model Law.

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

First of all, this view is based on some comments made in the UPS case and in the Pope case which the Investor has cited to you. The fact is that these views have never been majority views. Canada has included, for the sake of completeness, all of the relevant cases here, and I would like to point you in particular to the Canfor case at Tab 6, paragraph 25; the ADF case, which is found at Tab 4, paragraphs 14 to 16; and the Waste Management case, which is at Tab 10 and paragraph 26. Those three tribunals have all said they were not in the least troubled by the submissions Canada made in the Metalclad case, and

13:12:50 that this did not in any case make Canada an unsuitable place of arbitration.

They made the very important point, which Member Rowley has made, that these were positions of Canada as a litigant. They should not be confused with the positions of the Canadian judiciary. It is obvious that Canada has an independent judiciary that establishes the level of deference after hearing parties' submissions, and the fact is that is exactly what they did. They affirmed the highest level of deference, and they rejected the submissions made by Canada and Mexico.

So, the judiciary exercised its independence quite clearly and affirmed a very high level of deference. That high level of deference has been affirmed in every single 1136 case in Canada. There is the Metalclad case with Justice Tysoe, at paragraph 50 and following. This was followed by the Federal Court of Canada in the Myers case. And I might note as an aside, were there any set-aside proceedings to come out of this arbitration, it would be that court, the Federal Court of Canada, which would be seized.

13:13:54 And that court in the Myers case, at paragraphs 33 to 42, again reaffirmed the highest level of deference. And then again the Ontario Superior Court and the Ontario Court of Appeal in the Feldman case, at paragraphs 34 to 43, once again affirmed the highest level of deference.

So, at the end of the day, there is no less a level of deference in Canada than in the United States, and the position of Canada as a litigant in the first NAFTA Chapter Eleven set-asides surely does not make Canada an unsuitable place for arbitration.

ARBITRATOR ROWLEY: Could I interject with a question?

MS. KINNEAR: Please.

ARBITRATOR ROWLEY: Why is it that you say that the Federal Court would be seized if there is a challenge against an award, if a seat in Canada were chosen?

MS. KINNEAR: Under the Commercial Code, it would be the Federal Court--okay. The Federal Court is--the option is the Federal Court or the Superior Court in the place of arbitration. Assuming it was

13:15:03 Ottawa or Ontario, then presumably you could go to the Superior Court or the Federal Court, and Ms. Tabet reminds me that it would be one of those two places selected by the party initiating the set-aside. This is in the Commercial Arbitration Act, I think, at Sections 5 and 6.

ARBITRATOR ROWLEY: I was just surprised when you said it was the Federal level.

MS. KINNEAR: No, I think that's fair. I misspoke. It would be one of those chosen by the party initiating the set-aside.

At the end of the day, then, Canada's position is that the independent judiciary has spoken and that there is a high level of deference, that this is no reason to disqualify Canada.

The next question I would just like to talk to or speak to quickly is the whole question of support services and the fact that this case is in Washington being a criteria that would lead you to suggest Washington is an appropriate place of arbitration, and I would simply like to underline there the decision about what is an appropriate place

13:16:04 of arbitration is a very different decision than a decision about location of hearings. It's agreed and not at all in debate that hearings can be held in Washington. I assume that they will be. Canada is amenable to hearings being held in Washington or any other location that the Tribunal thinks is appropriate in the circumstances. So, that is a nonissue and, frankly, a nonfactor in determining place of arbitration.

We have talked a little bit about GST this morning, and I don't think there is anything further to say about that, but we will get back to you as we are undertaking to do so.

And, finally, I would like to just address quickly the matter raised by Mr. Gallus with respect to the Access to Information Act and the Canada Evidence Act; in particular, cabinet confidence.

Sadly or happily, the fact is that those are mandatory statutes, the Access to Information Act, much like the American FOIA, Freedom of Information Act, those apply to Canada no matter where the place of arbitration is. So, that is not a factor that

would be relevant in choosing a place of arbitration because Canada is bound by mandatory provisions in that legislation. So, it is irrelevant to place of arbitration. Ms. Tabet will speak to the whole question of access and cabinet confidence later in the rubric of confidentiality, but it is again, in our submission, a nonissue with respect to finding a place of arbitration.

So, in summary--and we have provided you with our chart--the Tribunal has to go through the exercise of balancing based on the circumstances of this case. Not a single circumstance leads you to Washington, and, in our submission, either Ottawa or Vancouver would be the most appropriate place of arbitration.

Thank you.

PRESIDENT ORREGO: Thank you, Ms. Kinnear.

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 that in its mind for consideration of the issue in the next few weeks.

So, thank you very much for that Mr. Gallus, Ms. Kinnear.

MR. GALLUS: Sorry to interrupt, Mr. President, I wonder whether the Investor might have an opportunity to respond briefly to the points that had just been raised by Canada.

PRESIDENT ORREGO: Yes, you will have every opportunity.

MR. GALLUS: 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 those, if I might, very briefly.

First of all, with regard to the Access to Information Act and the Evidence Act, Mr. Appleton will be addressing these acts in detail a little later on, and I will defer to him to respond to Ms. Kinnear's comments.

Second, Ms. Kinnear referred to Article 1130 of the NAFTA and argued that Article 1130 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

Ms. Kinnear said. If that is, indeed, what Ms. Kinnear 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 Ms. Kinnear 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 to refer the Tribunal to the Methanex Decision, which is a decision on which Canada relied in its written submissions and is included as an authority to those submissions.

In the Methanex Decision, specifically at

paragraph 38 of that Decision, the Tribunal considered the issue 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 Methanex Tribunal said that, so long as the Tribunal--so long as the place of arbitration is not in the home State of the Investor, then the Methanex Tribunal found that the place of arbitration would be neutral.

The third factor to which Ms. Kinnear referred was, I believe, encaptured in the spreadsheet that she has just distributed to the Investor and to the Tribunal, and the Investor obviously 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 of 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

13:22:03 Ottawa and Washington. What Canada has not addressed is the actual practical consequences of nominating a place of arbitration, and the practical consequences of nominating a place of arbitration is that the courts of that country then both assist the Tribunal as we progress through the arbitration, and also have the right to review any award that the Tribunal comes up with. And on the practical consequences of nominating a city within Canada as a place of arbitration, the Investor has submitted that no city in Canada can be neutral.

Indeed, Canada makes much of the fact that there is very little in the column referring to Washington, D.C.; and, indeed, the ICSID sitting in that final column does look very lonely compared to the factors of Vancouver and Ottawa. However, I think it's important to make the point what the Investor has been arguing, that the Investor would accept any city within the United States as the appropriate place of arbitration for the main reason that the Investor does not believe that a city in Canada can be a neutral place in arbitration. The Investor is happy to accept

13:23:13 New York, Chicago. The Investor would be particularly happy to accept Miami as the place of arbitration. But the Investor, I think, needs to make the point that we have suggested Washington because it is convenient and is where we are now, but we would also be willing to accept other places, other cities in the United States, as the appropriate place of arbitration.

The fourth point that Canada made was directly in response to the point that I made earlier with regard to Canada's submissions on the standard of review before Canadian courts, and Canada responded to the cases to which the Investor referred earlier with reference to the Canfor, ADF, and Waste Management Decisions. Once again, we have not had time to review these decisions since Canada has mentioned them a few minutes ago, but I think it's worth making one observation with regard to these cases, and that is that in each of these cases--Canfor, ADF, and Waste Management--Canada was not the Respondent State; and, therefore, whatever the Tribunal said in regard to Canada's submissions before its local courts with

13:24:20 regard to the standard of judicial review, those tribunals could well have been influenced by the fact that Canada was not the Respondent State and, therefore, may not have been likely to make such a decision to any judicial review of awards coming out of those cases.

Then there are specific points to which I would like to respond to what Ms. Kinnear said earlier, unless Mr. Appleton has anything else to add...

MR. APPLETON: Maybe you will allow me for a moment.

MR. GALLUS: Given Mr. Appleton was directly involved in the Myers case, perhaps it's appropriate he should speak to that.

MR. APPLETON: As counsel in the Myers initial review, I didn't otherwise want to interrupt Mr. Gallus, and I normally wouldn't do this, but I actually have a copy of the Federal Court decision in the Myers case with me, and I will actually hand up to the Tribunal--and I'm going to give Ms. Kinnear the benefit of having Mr. Gallus's copy, which he has

13:25:23 marked, to specifically point out that paragraph 58 of that judicial review, what the judge says specifically says that, on the two issues raised by Canada and Mexico--they go to the jurisdiction or scope to submission of arbitration--the standard of review on the pure question of law is correctness. On the next question of law and fact is reasonableness. So, there is no question that this is actually what the court said, and that's why because I was there, and I recall exactly what was in the Award.

Our problem is that to have neutrality means that you shouldn't have special prerogative or privilege for standing as well as by your status, and all we are seeking is to have that same neutral position, and so the difficulty that we have isn't that we think the arbitration law in Canada is very good. It's just that the position that has been advanced with respect to that that makes it difficult in the circumstance, and all we are seeking is just to have the two parties that are to the arbitration, being Canada and Merrill & Ring, to have the same type of standing before a court that reviews them. That's

13:26:37 all.

ARBITRATOR ROWLEY: May I just ask a question about that.

Leaving aside the special pleading power that might be attributed to a sovereign appearing before its own courts, is it not your position also that the standard of review applied by the Canadian courts and the Federal Court in particular here is lower than in the United States?

MR. APPLETON: Our position is that the standard of review has been applied at a lower level in some cases, and that the position taken by the Government of Canada consistently before the various levels--I understand that we think that's very, very important--on the basis of the findings--and, in fact, some of the courts have made that finding, and that's what our problem is, because basically--the Federal Arbitration Act based on this point is identical to the UNCITRAL Model Law--they're very, very similar--and Canada is an UNCITRAL Model Law country.

So, we think the laws are roughly equivalent. It's how they are being applied that's a problem here.

13:27:57 And when we address the other issues, you will get more of a flavor as to some of our concerns about this special standing that the government has with respect to the Evidence Act and special standing they have with respect to the Access to Information Act and the issues that could arise from other acts that we don't even know about at this point, but where Canada has special status or standing with respect to their courts, and that's why because otherwise it would be very convenient to have an arbitration in Canada.

But the fact of the matter is that we feel at this point, because of those finding, it wouldn't be neutral; that's why we have taken so much focus and effort here because we just want everyone to be treated here the same, and that's what Article 15 of the UNCITRAL Rules says, and what NAFTA Article 1115 also says.

I hope that answers your question.

PRESIDENT ORREGO: Thank you.

Have you finished, Mr. Gallus?

MR. GALLUS: Yes.

PRESIDENT ORREGO: Thank you.

13:28:50 Would you like to add any further points?

MS. KINNEAR: Yes, thank you.

First of all, I was a bit reluctant to start handing you chunks of paper, and I apologize, but if you're going to be looking at the Myers case, what Canada has put together for you is each of the judicial review Article 1136 set-aside cases. There is Metalclad, Myers, and Feldman at the Ontario Supreme Court--Superior Court, pardon me, and the Ontario Court of Appeal. I think perhaps it's best that you have that full record in front of you. So, if I might provide you with those--and I have one for Mr. Appleton, as well.

MR. APPLETON: Does that include the document I was about to hand out?

MS. KINNEAR: That's correct. It's a full compilation of those cases.

(Comment off microphone.)

MS. KINNEAR: The second question is the argument that Canada made about Article 1130 of the NAFTA, and I think Mr. Gallus misapprehended it. The point really is that Article 1130 says that place of

13:30:19 arbitration will be in one of Canada, Mexico, or the United States, and the point being made out of that is that the NAFTA parties were happy and, in fact, required arbitrations to be placed in one of the States and did not require it to be in the State not involved; i.e., if neutrality was that important, they would have said in a case such as this one, we would all have to go to Mexico City. That's not what they said.

Obviously, the NAFTA drafters comprehended place of arbitration being in either the Respondent's State or the home State of the Investor, and that that would be determined based on the circumstances of each case; in this case, for example, based on the application of the criteria in the UNCITRAL Notes.

The next point I would like to quickly speak to is the question about Canfor, ADF, and Waste Management. And, of course, these authorities were provided last week to my friends. The point there, the fact that Canada was not a Respondent, is totally irrelevant to the reasoning in those cases. Those cases had tribunals saying they did not accept the

kind of reasoning that was being put forward in the UPS and Pope & Talbot case, and that is why we have drawn them to your attention. The fact that the majority of tribunals have not agreed with the concern that the position of Canada as a litigant somehow taints Canada as a place of arbitration.

Finally, the question of Canada having a special standing before its courts or special prerogative, quite frankly, it's just untrue, and I could point you to hundreds of cases that I have lost before the Federal Court of Canada arguing on behalf of the government that there is proof needed. The fact is we have an independent judiciary, and the sovereign, Canada, hasn't got any kind of special powers or special standing and certainly none that would in any way affect Canada as a place of arbitration.

Thank you.

PRESIDENT ORREGO: Thank you very much.

So, we have heard from both parties in respect of the place of arbitration, and then we shall take into account all this wealth of information and

come back to you with a conclusion in a short period of time after this meeting.

Now, we have to aim to try to be over in this meeting about, say, 2:15, and then to have the time to write--to review the minutes. This I mentioned not to apply any pressure on the parties, but simply to suggest that if you have aspects that would take more of your time than others, then we deal briefly with those that are shorter and at length with those that are long. And because we don't want you to pass out of hunger, we invite you to take anything while we are hearing the different views, and we can have that as a sort of mini-lunch.

Great. Thank you.

So, would you like to address next the issue of confidentiality, which is in a sense linked, or do that later or...

MR. APPLETON: We could do that or jurisdiction, whatever you prefer.

PRESIDENT ORREGO: We could do perhaps jurisdiction which is important, too, and confidentiality together with evidence. I gather that

on evidence you are in agreement on the IBA Rules, except--no, not entirely?

MR. APPLETON: It appears that what's happened on the area of evidence is that we have proposed a specific order, which is loosely focused on the IBA Rules but is not the IBA Rules. We believe the IBA Rules can't be applicable directly into an investor-State context but would provide helpful guidance; so, therefore, we have actually drafted and proposed a specific rule that we think that should be used. I can't speak for Ms. Kinnear, but I believe that Canada is more supportive generally of the IBA Rules sort of in total, but I leave it to Ms. Kinnear on that.

PRESIDENT ORREGO: Okay. Let us leave that, then, towards the end, and we begin with the question of jurisdiction.

Well, on this point, I would reverse the order and ask Ms. Kinnear to start as the party that would like to have eventually objections to jurisdiction and hear from Canada first.

MS. KINNEAR: Well, thank you.

As the Tribunal knows, Canada, in its defense, had an objection to jurisdiction based on Notice 102 and that the claim was time-barred, and also we raised objections to jurisdiction on the B.C. Forest Act and that being both time-barred and not relating to the Investor. As I understand, the Investor has now confirmed that it does not challenge the B.C. Forest Act as a measure, and so the only question that Canada is requesting it be bifurcated is the question of whether Notice 102 is, in fact, time-barred under NAFTA Chapter 1116(2).

Our position is clear: The UNCITRAL Rules contain a presumption that preliminary objections will be dealt with on a preliminary basis--obviously, it's still a matter within the discretion of the Tribunal--and, in our case, it is both appropriate and possible here. This is a substantial and not a frivolous objection. Article 1116(2) has what might be called a "lex specialis," a very clear limitation period based on when the Investor first acquired knowledge or should have first acquired knowledge of the breach and the damage. And I know by the end of

this you will certainly be tired of hearing me say "first acquired," but it is a very clear, a very specific, and a very focused limitation period in Article 1116.

Bifurcating this matter would save cost and time. In fact, what it would do in this case, if Canada were to succeed, would be to eliminate the need for any further proceedings. It is also practical because it can be decided on the basis of a limited and uncontroversial record and save time and cost for all concerned.

Now, the Investor, not surprisingly, has tried to avoid bifurcation, and they do so, from my reading certainly of their submissions, in two main ways. The first is by stating that they have pleaded both what they call "continuing breaches"--i.e., breaches that apparently began before December 2003 but continued past that date--and what they have termed "noncontinuing breaches"; those would be breaches that apparently began after December 2003 and would not, in and of themselves, be time-barred.

The Investor's second main objection here to

bifurcation is that, in their view, the facts so intertwined with the merits of the case that bifurcation could not practically be achieved, and these are the points I would like to address.

First of all, on the question of continuing breach--and I'm very aware that today, obviously, we are not going to and we should not be trying to address the merits of the actual objection--this is a question simply about whether or not to bifurcate. Nonetheless, it's quite important--so that the Tribunal understands that Canada does raise a substantive objection that can be dealt with preliminarily, it's important for us to look a little bit at the claim and at the argument that the Investor is making.

What the Investor has done is to list numerous examples of breaches that apparently occurred before December 2003 and to say that these are clearly time-barred. It is very telling that the Investor never denies that it knew about these events and that it knew about loss flowing from misconduct. And, frankly, this cannot credibly be denied because

obviously it did know about this. Instead, what it does is it tries to shield these allegations by labeling them as a "continuing breach"; and, in that respect, it cites to you the UPS 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 1116 makes the continuation of a breach absolutely irrelevant. The breach can continue forever. It doesn't matter when it finishes or when it's final or how long it continues because what NAFTA 1116 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, frankly, is irrelevant and does not avoid the very clear language of 1116.

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 Investor, for some reason, doesn't cite the Grand River case, but it will be obviously an important and pivotal case when we come

to the merits of this whole discussion.

I would note also the UPS case doesn't cite Grand River, and my only speculation would be that Grand River was decided once UPS had started deliberating and perhaps wasn't cited to them, but for today's purposes, the important point is that there is both a substantial and reasonable legal argument.

With respect to noncontinuing breach, the Investor in its submissions for the procedural meeting has labeled various categories of conduct that it calls "noncontinuing measures," and it points to events which apparently occurred after December 2003; and, hence, the Investor submits that they are not time-barred.

When you look at those--and I would urge the Tribunal, when you're deliberating, to very carefully at the kind of facts that are being addressed here, and in particular at the annex called "Statement of Particulars" that the Investor has given to you--you will see that these are in no way breaches. These are not claimed breaches of NAFTA. What these are are simply examples of conduct. They are examples before

December 2003, examples after December 2003, but none of these are pleaded in and of themselves as a breach of NAFTA. What they are are examples of the application of Notice 102, which clearly is the policy or program that's in dispute in this matter.

And, in our submission, simply by giving recent examples what the Claimant itself calls "particulars" cannot make these--cannot make what is otherwise just an example of something that has been happening since 1998 into something that is a fresh, new subject of inquiry for a Chapter Eleven Tribunal. 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 is 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 1116 limitation period. And, in this respect, I can do no better, frankly, than the Grand

River Tribunal, which you will find at Tab 32 of the authorities that Canada provided to you.

If you turn to paragraph 81, which is found at page 35, you will find that the Grand River Tribunal heard a very, very similar kind of argument as you are 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 1116(2) and 1117(2) applied separately to each contested measure taken by each State implementing the MSA." That was the Master Settlement Agreement in that case. "Hence, 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 statutes and other measures in a generic

manner."

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

As the Tribunal said in Grand River, "This analysis seems to render limitation periods ineffective in any situation involving a series of similar 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 surely incorrect about knowing about a policy and having it applied to you since April of 1998, and yet being able to get out of bed every day and say, "Here 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 national treatment issue. You would not have to look at comparative third parties that you will have to do to deal with MFN, 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 those 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 to any further time or expense 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

13:46:09 is bringing on time-bar.
Thank you.
PRESIDENT ORREGO: Thank you, Ms. Kinnear.
So, now we will have the possibility for the Claimant.
You want to ask a question?
ARBITRATOR ROWLEY: Yes, one or two questions, if I may.
One or two questions, Ms. Kinnear.
I think you're directing us to the proposition that the breach, the alleged breach, is the promulgation of Notice 102, not its implementation. Do I understand that correctly?
MS. KINNEAR: No. In fairness--sorry, the breach has been set out by the Claimant in its claim, and I believe we cited verbatim what the Claimant said, and it was, I believe, implementation, administration--I'm trying to find the exact quote--I apologize--but it is more than simple promulgation of the legislation. That is how the claim has been framed. That is obviously the claim Canada has to respond to.

13:47:25 The point really being made here is that the kind of thing that's done in the implementation and administration, issuing export permits, applying the surplus test, that has been done day in and day out, hundreds of times every single year under Notice 102. By simply saying, "Oh, and it was done again on January 1st, 2005," doesn't make a new breach. These are evidence or examples--my friends have even called them "particulars"--but they are not citing new breaches. They are not saying, for example, there was something in the way Canada issued the surplus test on December 20, 2006, in and of itself was a breach of the minimum standard. What they are saying is a program that is repetitively administered in the same way and has been since December 1st--April 1st of 1998 continues to be done that way. There is nothing new. There is nothing different.
And by citing this sort of day-to-day routine stamped the permit and saying all this is a new breach, well, that's not what has been claimed here, and that's our argument with respect to the whole issue of so-called continuing breach and then the

13:48:33 Claimant's new category of so-called noncontinuing breach.
So, we take the claim as it was pleaded, but we don't believe that there is anything that has been--that's new or raised as a breach that falls before the limitation period.
ARBITRATOR ROWLEY: And the tight circumscribed record that we would decide on would be the pleadings as exchanged plus memorials of argument; is that what we understand from your proposed schedule?
MS. KINNEAR: Yes. Our schedule is in the submissions. We would propose to put in, obviously, the Memorial. We will attach an affidavit. There will be limited factual evidence, but it will not be controversial. It will frankly be the kind of thing, for example, a list of how many times the permit was issued or the surplus test applied.
And then we would also--really, that's what the record would be. So, I'm not saying there would be no facts or there would not be facts beyond what's found in the pleadings--there will be--but they are

13:49:42 limited, and they are uncontroversial, as I say.
PRESIDENT ORREGO: Mr. Appleton, please.
MR. APPLETON: Thank you, Mr. President.
Let's just try to unpack this and figure out what's the most efficient simple way to move forward.
First, Canada has misstated the Investor's claim. The Investor's claim is, in fact, about the implementation of Canada's log export control policy since December 27, 2003. Our view is that the entire claim is manifestly within the jurisdiction of this Tribunal. To assist, we provided a Statement of Particulars to give some examples. Each of those examples are, in fact, examples of a breach of the NAFTA. I could have drafted the claim with annexes of lists and lists and lists, but that's not what the claim--it's much easier to provide in the claim, and all our requirement is with the claim, is to express this is about the implementation of Canada's measure.
And, in fact, there are very different types of factual issues that arise that cause problems out of different biweekly auctions that are involved. It's not the same type of thing, and we have put in

13:51:03 material in the pleadings already about specific types of unfairness with respect to the adjudicative body that has created these experts that have conflicts of interests that are involved in adjudicating about log exports. We talked about all types of problems, what's called "blockmail," where the government, in essence, permits competitors to use the governmental system to block things. These are all different types of issues, all applying different aspects of NAFTA-protected obligations, like fair and equitable treatment or from arbitrary or discriminatory treatment, other types of issues.

So, there is absolutely no question that the claim fits within the provisions of the NAFTA. But then Canada says that the claim should be rejected because it knew or ought to have known about Canada's measures three years before the claims were brought, and they suggest this is just a very simple question. Ms. Kinnear just said this again, and this doesn't really require any significant factual determination, at least Ms. Kinnear this time has at least admitted there would be facts, and the fact we are going to

13:52:16 suggest to you there are going to be a lot of facts because although Canada has repeated the same actions year after year--and that is true--Canada purports to say now that it is exempt from Tribunal review when it repeats these actions. But we are going to suggest to you the case law, not just the UPS case, but case law suggests to you that Canada's position is simply wrong.

Now, as a matter of fact, in the UPS Tribunal, Canada spends a tremendous amount of time and effort talking about Customs Act issues that had been known by the Investor, and they put in the same type of evidence, a letter of complaint from UPS, seven and a half years before the claim was brought, within the NAFTA zone, so it's after NAFTA is into force seven-and-a-half years before.

So, this very specific question was specifically canvassed by a NAFTA Tribunal on exactly the same circumstance, and that Tribunal found that, if you have a continuous breach, and that is the international law way of dealing with this as followed by the ILC and is well established, that you look to

13:53:31 the continuing pattern of actions; and, therefore, if we have an issue about continuous breach, we must, by necessity, look carefully at the factual record.

Now, what NAFTA 1116(2), that provision that we are talking about here, where it creates a rule--and I will agree that it's a lex specialis. I will agree that international law generally doesn't deal heavily with concepts of extinctive prescription of time limits. It creates a time-limit rule, but that would be used, for example, in the situation where you have a breach of contract. You have something, you have an action that's completed, and then you have a three-year period. That's where it runs. And international law generally would not create a time limit or, to the extent that international law does create a time limit, this is more a question really for the "Institute de Trois Nacionale" than anything else, but they would look at a 50-year or 70-year period when you don't have availability of witnesses and other things like, that there is not a standard limitation period in international law.

13:54:34 So, that's really what the finding was in UPS. They said, "Well, this is a continuing breach." You are not exempt from Tribunal review merely because you're able to continue the wrongful behavior over a period of time and, therefore, get out of the jurisdiction of the Tribunal. We referred to it in the UPS as the "torture test." You couldn't just continue to torture someone again and again and again but not kill them and then say, "Well, three years you're out of luck, the Tribunal no longer has jurisdiction."

That's not what the purpose of the NAFTA is about, and that's not what the purpose of international law adjudication is about, and that's why the International Law Commission has specific rules about continuous breach and all types of cases that have come to that conclusion, and we would be ignoring that entirely, and that, in our view, cannot be correct. That's why international law supports this concept.

But, to the extent that Canada's objections--just to come back, to the extent that

13:55:36 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 know they have an uphill road here, and the fact of the matter is that the UPS 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.

But, 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 that were involved, in fact, are continuous.

Now, this determination of the continuous period, whether they fit within the three-year period, whether Merrill & Ring knew about the information and

13:56:40 when they knew of the damage requires a significant fact-based determination, and it cannot be done just on the basis of what's in the pleadings because it requires to go deeper. We have no choice because of the nature of what is being sought here, and we would suggest this is very much like what we are going to have to do with merits.

If we thought it was simple, we would say "Do this." It's in everybody's interest to have a simple dispositive answer, but we need to go through carefully this record, and that's going to require document production from Canada to deal with this issue of continuity; it's going to require witnesses; it's going to require cross-examination before the Tribunal. This is not a simple thing that you can just look at this record--we need to go more--because of the nature of looking at this continuous breach, which is an integral question, which was not put before you in Canada's objections. That's why we say they have misstated this.

And again, we are looking at fair and equitable treatment, the appointment of the Members of

13:57:47 this Tribunal, and other fairness and treatment issues which are redolent. And while we say there could be more and we put in our particulars, as we find more information and as there will be some document production, 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.

And if you want to say, "Well, it's all within the rubric of Exporters 102," but there are all types of issues. Some of them have started before the three-year period, and that's three years before the claim was filed on December 27, 2006, so just before December 27, 2003, is sort of our cut-off. So, the extent that they are before that period but they continue, we would say 1116(2) doesn't prevent them, and that's exactly the question that UPS had to look at. And that factual determination has to be 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

13:58:55 merits.

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 fact--and we believe they do need to consider these facts to do merits--and they have to consider these facts again to be able to look at these preliminary projections, we think that would be just be a tremendous undue and inordinate burden.

And more importantly, delaying the hearing on the merits in 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 unduly prejudicial to the Investor who really has a right to have the hearing heard or this claim heard in a fair and expeditious manner. And we think, though, that the Tribunal would need to consider what are the potential implications of holding a separate jurisdictional hearing? Because Ms. Kinnear 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.

14:00:05 Now, if no separate preliminary phase is held and Canada succeeds on its contention at the end of the day, then the only disadvantage to the process is a possible waste of some hearing days because the bulk of what we would need to look at is going to be heard anyways. Yes, there are some other issues that need to be canvassed as well, but the bulk of the issues are the same issues because we need to go through the nature of the breaches because of the issue of continuity, continuous breach.

And there are, of course, cost implications, and this Investor understands and is willing to accept that this is a financial risk on that, and it would be up to this Tribunal to determine with respect to that, but the costs to Canada for proceeding on that basis in light of these other facts that need to be determined is relatively insignificant. And, on the other hand, if a separate preliminary phase is held and Canada fails on its contention, then all the hearing time spent on the preliminary phase is unnecessary, and resolution of the Investor's claim on the merits will have been seriously delayed, and we

14:01:14 would say that would be very prejudicial to the Investor.

So, what we would say is that the fairer--the better risk allocation of these two options would be to join Canada's objections to the merits and defer answering it until the completion of the proceeding of the merits.

Now, not surprisingly, deferral of objections that have any possible factual aspects to it, that's the option most commonly selected by arbitration panels because expedition and fairness are the cornerstone values of arbitration, and so it's in light of those specific considerations and in light of Canada's request that we ask the Tribunal to join Canada's objection to the merits because we're going to have go there.

Our suspicion, in any event, is that after we went through that whole process you would have to end up joining it to the merits in any event because of the nature of what they are seeking, and that's why--that's why we are suggesting today that you join their objections, which they have properly raised in

14:02:22 their Statement of Defense, and that we have this done as part of the merits because they're inextricably linked.

PRESIDENT ORREGO: Thank you, Mr. Appleton.

Let me ask you a question just for clarifying some aspects of the argument.

It is quite clear in my mind which would be the situation of the kind of claim that has occurred after December 27, 2003. To the extent that there are those breaches and claims, of course, they're not subject to any limitation period. Now, I also understand quite well that, if you have a breach before and that breach continues after December 27, 2003, you are regarding that as a claimable breach, as well.

Now, this is a question: Would you be, in your claim as to respect of that continuing breach, claiming, say, for the damages that that might have caused after December 27, 2003, only, or you would be saying, because this happened after December 27, '03, even if it goes back 10 years--well, it's not exactly 10, but whatever it is--I'm claiming for the damages

14:04:06 that arose in the early start and are continuing until this day I'm claiming for. That question I would like to have sort of more clear in my mind, which I didn't sort of quite grasp from the argument.

MR. APPLETON: I believe in the submission on this point we specifically address that point, but I will give you the answer, but--which paragraph is it'--it's paragraph 10.

But let me tell you, so it's absolutely clear for everybody, we are only claiming damages three years before the filing of this claim. All damages come from December 27, 2003, forward. We have not claimed one cent before that period of time.

PRESIDENT ORREGO: Okay.

MR. APPLETON: And part of our problem with this whole issue is that there is a tremendous lack of transparency. That's one of the Investors claims here. So, it's very difficult for us, without having the assistance of the Tribunal for a limited but focused document production or information request process, to get some of the answers to be able to nail down even more. That's why the Statement of

Particulars, which I thought was obviously very helpful to get out so everyone can see it, were set as examples because we may very well find that we have suspicions about other issues; but, until there is some documentation, we can't tell you the particular dates, but those are particular dates that are well within the three-year period.

And that's why we say this Tribunal is going to have jurisdiction to go ahead anyways on those questions, and since we are going to be there, we want to find what is the simplest, most efficient way that is also fair to the parties involved. It would just not be fair to the Investor to just look at Canada's characterization of this issue without looking at the fundamental factual elements, and I'm afraid that's the Tribunal's job. You need to go there. That's our problem here.

PRESIDENT ORREGO: Fine. Thank you.

Would you have anything to add, Ms. Kinnear?

MS. KINNEAR: I would like to--yes. For the record here, I'm very concerned, and I would like to at least put it out very clearly right now, what we

hear Mr. Appleton saying is it's just a claim about things that have happened in the last three years. What we have received is a Statement of Particulars that has all sorts of new and different instances, as we calls them. There are things that are not in the claim that Canada never answered to in the defense because they weren't pleaded as the claim. In his submissions, he said that he will probably discover new ones.

Well, I'm very concerned because, frankly, my understanding is that this claim is what frames the breach. An investor has to say, "Here is what I say breaches NAFTA Chapter Eleven," and they can't continue to add on in Statements of Particulars, let's see what we find in documents. This is a problem and a concern, and frankly we would like to say very clearly we are very worried about this because this is what we are seeing right now. All of a sudden there are new breaches that were never mentioned in here, and we are told today, yes, there is another breach, and we will find some more as we go along. Well, there can't be that kind of situation.

So, I would urge you in particular to look the claim. At best that we have are examples and not new breaches, and so our submissions, you have heard them, but we would like to register how very concerned we are that this appears to be some rolling claim make-it-up/add-on as you go along.

For the record, we do not believe document production is necessary. We believe that--for the jurisdictional objection, obviously. We believe that this can be, as I say and said throughout, this is uncontroversial and limited factual record, so it's very impossible.

Mr. Appleton spoke about a right for your claim to be heard, almost your day in court, but the fact is NAFTA--excuse me, UNCITRAL Article 21(4) says the opposite. It says there is a presumption that jurisdictional objections will be heard on a preliminary basis, not a presumption that you will have the full day in court.

Finally, the full day in court here, let's not fool ourselves, is going to be a long and costly event. You have claims of breach of national

treatment, most favored nation treatment, minimum standard of treatment, performance requirement, and expropriation. Dealing with this first as a jurisdictional objection is a much more expeditious and much more cost-efficient way to go, and that is why Canada has suggested that that is how we proceed.

PRESIDENT ORREGO: Thank you, Ms. Kinnear.

Mr. Rowley, please.

ARBITRATOR ROWLEY: Ms. Kinnear, does this Tribunal at this stage, to your client's position, have jurisdiction with respect to allegations of breaches of NAFTA occurring after the December 2003 date and for damages arising therefrom? That's the first question.

MS. KINNEAR: The first question is yes. If, and that is a big if here, if there were allegations in this claim of breaches in and of themselves of breaches that happened after December 26, 2003, the claim is timely in that respect, and damages obviously would flow.

Our submission is that, when you read this claim carefully, that is not the case. What it's

claiming is a frontal attack on a policy that was promulgated in April of 1998 and has been applied to Merrill & Ring hundreds of times a year the same way since that date; and that just saying, "Oh, and it also happened post 2003" is simply a device to get around the Article 1116(2) time limitation.

So, the straight answer to your question, obviously, is yes, but we don't believe that that is what has been claimed here, and that's why looking at the claim is very careful, and our submission is simply repetitive examples of implementation of this policy doesn't get you out of the problem that this policy was promulgated and has been implemented since 1998 all in the same way.

ARBITRATOR ROWLEY: Second question. If there are credibly alleged breaches occurring after December 2003 and damages--sorry, before 2003, credibly alleged breaches before 2003, the damages for which become known only after the biting point of the limitation period, is it Canada's position that we have jurisdiction over such claims? I am saying credibly alleged. I know you said there may not be

any, but that's an issue.

MS. KINNEAR: First of all, yes. If there are credibly alleged breaches after December 2003--let me address the first part, which I understood was after.

ARBITRATOR ROWLEY: No, I changed it. Credibly changed breaches before, but the damages for which become known only after.

MS. KINNEAR: On the law, it's very clear that all you have to know is the fact of damages. You don't have to know a precise quantification.

So, if there was a credibly alleged breach before December 2003, and you had absolutely no clue whatsoever of any potential damages--you thought there were none--and then you found out later there were damages after 2003, well, yes, that's when the limitation period would happen. But if there were breach alleged before December 2003, and you could credibly know about loss--not exact amounts, but the fact of loss--then you have a limitation problem. And on the facts of this case, it's very clear, and as I say, the Investor has never even argued about this,

the fact is they are saying that they are not allowed to sell their products on the international market and get a better price, every time that Canada apparently disallows them from doing so, they have knowledge of the loss because they sell it for a domestic price and not an international price.

So, there is no suggestion whatsoever in this claim that there is an inability to discover losses. In fact, it's almost instantaneous because the prices are out there for all to know, and these are people in the industry. We know in this case, and Canada has pleaded it, that the first application was rejected in April of 1998 and that there was loss there. So, right away we know they knew of the loss, and that's why Canada brings up the suggestion.

ARBITRATOR DAM: This goes to either party or both.

I'm a little unsure as to exactly what the facts are here as to how the system works. I just heard from Ms. Kinnear that the subsequent impacts were more or less mechanical; but, on the other hand, are there allegations that no, there was a lot of

discretion used and, therefore, you have to look at the actual actions in understanding the way the system worked? Those are two completely different situations, it seems to me, and I'm a little unclear as to exactly what is being--what is at stake here.

PRESIDENT ORREGO: Would you please like to answer that.

MS. KINNEAR: In our submission, there are no kind of allegations about market distortion or anything like that that would postpone knowledge of the fact of damages. What's clear here is that you know, you apply, you know once a month that the application will be considered by this committee, the FTEAZ and that they will issue a decision, and you know that you will sell at the domestic or the international price. You know that one is less than the other. To the extent that it might be greatly different because of some particular market distortion in that year is, frankly, irrelevant to the knowledge of fact of loss or damage.

Again, it goes back to the point you don't need know the exact amount. What you need to know for

14:16:00 the tolling of the limitation period is 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 conclude that any kind of special factor like that postponed knowledge of damage sufficient to trigger the limitation period in the NAFTA.

MR. APPLETON: Professor Dam, I would like to address this specifically. This is from--there are a couple of points.

Number one, this claim is very much about the specific implementation that's done over a period of time and the specific types of actions. It is not a mechanical/mechanistic type of claim which is exactly why we think there is such a tremendous danger of having a jurisdictional phase without having any of the evidence that's here.

For example, this claim deals with the appointment of specific people in 2005 to the FTEAC, the Federal Timber Export Advisory Committee, that deals specifically with applications, have specific conflicts of interest about specific log booms, and we

14:17:18 be very specific to be able to deal with this. They have specific interest for themselves, for their industry, for their approach--that's one example. There are examples about log blocking, where companies have either interests that are involved where the use of the governmental apparatus isn't done in a fair or appropriate manner, or nontransparent manner that causes tremendous types of loss.

We have issues of damage caused by excessive delays that are caused in this process, and these delays come at different times. This is not because we are required to have a formality to fill out a form or do something.

I recently had the opportunity to go with Mr. Schaaf and actually go out and see the extent of some of this damage in some of the logging areas so I could see for myself and describe to this Tribunal the nature of exactly what takes place. And when we get to that opportunity, I now have a new-found appreciation of exactly what has been gone through by this company and the people that work for them because of the nature of what has been done.

14:18:19 These all deal with discretionary types of actions on an ongoing period, and to somehow say, "Well, we have a rule that allows this discretion, but we are going to ignore the discretionary unfairness in its application, the violations of other parts of the NAFTA framework that's there because somehow they come out of a rule at we had from before," which, in the admission of Ms. Kinnear, we have done a hundred times. She says, in fact, they actually do it biweekly, so they only do it 26 times a year for that side, but there are lots of other things that go on, that somehow would not be fair or appropriate. That's what this claim is about.

This claim is not about we don't like a rule. This claim is about how it's been implemented, how there is a pattern of unfairness because you have the Government of British Columbia, who, involved as a governmental entity, is involved in administering TEAC and FTEAC. FTEAC is an "F" put onto TEAC. TEAC is a provincial body. It's administered and follows provincial rules. The Federal Government makes it FTEAC by having someone in Ottawa generally get on the

14:19:33 phone and talk to the TEAC people who have all been deputized for that power at that time.

So, it's basically like suggesting to this Tribunal--no offense to Mr. Dean, but all of a sudden, Mr. Dean, you are now a Member of the Tribunal only to the extent for the Federal authority and everybody else here is a member of your panel only to that extent. But they provide you with the information--the Province provides it--and the Province is involved here through B.C. Timber Sales, BCTS, as a direct competitor or market player, and yet they are using that governmental authority to be able to be involved in the regulation, which is all Canada's.

The problem we have is that there is a lot of provincial activity here, but all the discretion and all of the actions are being done by Canada at the Federal level. That's why we don't challenge the B.C. provincial measures because the B.C. provincial measures don't technically--they should have no effect on us, but, in fact, they do because they are adopted and followed by the Federal Government in its

discretion but in a nontransparent way. We can even get--we have application of provincial laws to us. We don't even know what those laws are because the Federal Government has never promulgated them, but yet they have applied them.

That's why the facts are so important here and in the nature of the measure. And this isn't just something that has been happening for such a long time. It happened at different times and in different ways. That's why we need to look at this. That's why it is just--I can agree with Ms. Kinnear that this is a worthy question, but it has got to be in the basis of the analysis of what's going on here. And so the pleading that we have put in deals with that, and the factors that we are looking at that deal with that, and that's the question that's before this Tribunal, and that's why it's not a simple basis.

But what we do know is that there are certainly actions that fit so clearly within the three-year window that this Tribunal is still going to be there, and as a result that the Tribunal is going to be there after, and we are still going to have to

look carefully at the nature of this issue. That's why we say it's just not efficient to do this twice. We are going to otherwise be stuck doing it twice. That's what we think isn't helpful.

We are fully prepared to meet our burden and to prove the case, but we would really just like to do it once because we are going to have to pull all types of witnesses and all types of issues and all types of evidence, and you, as the Tribunal, are going to have to make determinations about it.

PRESIDENT ORREGO: Right. Ms. Kinnear?

MS. KINNEAR: If I might, I would just like to ask very clearly, in fairness, Canada should know the case that it's supposed to meet, and what I have heard in Mr. Appleton's submissions is all sorts of new things. If nothing else comes out of today's discussion, may we ask that Mr. Appleton please give us a list of exactly what the claims are that he alleges breached NAFTA because we--of the measures because we have heard new measures today. We got a list of particulars which the Investor apparently claims are measures. We are just hearing new things

every time.

And so, to rely on equality and efficiency and fairness and all of the things we have talked about today, if nothing else, we would like to have a list certain of the measures Mr. Appleton claims breaches the NAFTA. That's only fair because that's the case Canada has got to meet, and what I'm hearing today is there are all sorts of things that keep coming up that are brand new that we haven't heard of before.

ARBITRATOR DAM: Could I ask just a general question from my orientation.

Under the Federal Rules of the United States for litigation in the District Courts, the general idea is notice pleading, and you don't have to plead all of your detailed case. It emerges with the evidence. I take it that's not your view of the rule we are operating under here because of your emphasis--unless, of course, the initial claim was so clearly based on the initial legislation that you could, on that basis, exclude any evidence of what happened later.

What standard are we using here? What is the law that governs this, or what are the precedents that govern this kind of question for our decision?

MS. KINNEAR: Like in domestic practice, you do not have to plead all of the evidence, obviously, but you do have to plead each measure in dispute, and what we are hearing today is they're new and different measures, measures in and of themselves, breaches in and of themselves, and that's not in the claim. If they truly are going to be part of the examination of this Tribunal and perhaps a basis for liability, they need to be listed specifically.

So, I'm not asking, and I don't think it's appropriate to ask, for any kind of specific complete list of breach. What I'm asking for is a specific and complete list of what are the measures that the Investor claims breaches NAFTA. We have heard all of a sudden, and we see in the particulars apparently something in 2004 when Mr. So-and-So and someone else was on a committee. This is new. This is different. And if that is, in and of itself, a breach, Canada should be put on notice by the Claimant. If they're

not complaining of the regime, if they're complaining of specific things in the last three years, we should at least know specifically what they are.

So, I agree completely with the concept of notice pleading. That's what we have. But the fact is we are entitled to know the exact measures in breach, and we keep hearing new things here, and that certainly alarms me, and that's why we have raised that.

MR. APPLETON: Professor Orrego, if I could answer that question, in fact, I had actually intended to answer this question before, but I got so worked up about talking about the nature, and I'm sorry, I apologize for that, that I didn't get a chance to address this point.

First of all, let's look at what the UNCITRAL Rules say, and I will tell you what some of the cases have said because this has occurred before, and the case law is very clear here. And the rule is notice pleading. That is the rule. This was brought by--Canada complained in the Pope case, Canada complained in the UPS case, and they both came to

basically exactly the same conclusion, which is the notice pleading, but the UNCITRAL Rules tell us. They tell us, first of all, in Article 3 that all we need to talk about is a general nature of the claim and an indication of the amounts involved. That's Article 3 paragraph 3(e).

In addition, we are entitled to make amendments under Article 20. It says, "During the course of the arbitral proceedings, either party may amend or supplement his claim or defense unless the arbitral tribunal considers it inappropriate to allow such amendments having regard to the delay making it or prejudice to the other party." It goes on, but that's the main point.

And what the ruling was in UPS very clearly was that we had an obligation to put this out in our Memorial, because by that point we have had the benefit of some information requests back and forth. And the difficulty that we have here is that one of our allegations is about nontransparency. We can't get this information because they haven't made it available, which in itself is actionable under NAFTA

Article 1105, this issue of not knowing, this issue of having arbitrary and inequitable treatment or discriminatory treatment. In that regard, it is part of that NAFTA obligation.

So, somehow 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 those types of allegations in the claim. Everything ties in together, but it's a series of conducts in implementation of a form of legislation and other regulation that's involved here.

And so, in fact, when we talk about the measures, "measures" mean governmental acts as defined NAFTA. In Article 201, "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

interpretive concern.

Let's get this out now so we all understand. Our concern is about really the meaning of Article 1105 and to the extent that you may find that Canada has given a better meaning of international law standards of care in another third party Treaty than you have in the NAFTA, then 1103 is involved. Otherwise, there is no need for 1103. And since there is an interpretive principle of most favored nation treatment, in any event, for out of an abundance of caution we included 1103, but we are not alleging a separate 1103 action here. We are just saying that you have an obligation to follow 1103 in your determination of the meaning of 1105. And since there happens to be an interpretive principle that way, we don't think we really need to do it; but, if we don't plead it, we are not going to be able to do it. That's exactly why we have done that.

So, we are looking at a breach of national treatment. We are looking at a breach of the international law standard of treatment in 1105. We are looking at specific breaches of performance

14:29:45 requirement rules in Canada's legislation that do not comply with specific obligations in Article 1106 of the NAFTA, just like a Tax Act that is specifically laid out there, so we see that. And we are looking at expropriatory conduct in Article 1110. That those are the breaches. Those are all pleaded. The measures have to fit in within the breaches, and we have done that with tremendous (a) with notice, but (b) with no tremendous specificity specifically to help the Tribunal and Canada.

And I'm not sure what else we are required or, to be honest, is appropriate or fair at this time to do until we have document production from Canada to be able to cut through this problem, and then maybe we could narrow the issues down, even reduce them, we hope.

PRESIDENT ORREGO: Well, thanks very much. That has been a most illuminating discussion on both sides. So, of course, the Tribunal will consider all these items and views in the coming days and be back to you with a conclusion that will tend to have all the necessary elements that we have in front of us.

14:31:04 Now, may I ask you one thing about the expected progress. We still have the question of confidentiality and production of evidence. How long would you generally think that that might take?

MR. APPLETON: I believe--I need to walk you through the Appleton and Privy Council decision. Once we can discuss the meaning of that, I think that takes about three or four minutes. I think I need about three minutes of observations, so let's say I need 10 minutes in total to be on the liberal side to talk about confidentiality.

Because we provided a draft Order--and, in fact, in light of the observations raised by Canada, I actually have amended the Order because there were two issues they raised that I think need to be addressed in the draft Order, and so I'm trying to find simple answers for the Tribunal there.

On the issue of document production, we have put a draft Order in. We want to flag an issue which we think, in light of everything else since it has already been raised about Section 39 of the Evidence Act, we probably just need to flag it, and we could

14:32:18 talk about what document production would look like. So, again, I think that would not take a long time, unless you want to have a debate about the IBA Rules themselves, and that could take some time. I don't know where you want to go. That would be my sense.

Then we could probably talk about some timing, but it would be depending on where you want to go on other issues.

PRESIDENT ORREGO: How long do you envisage generally?

MS. TABET: I think perhaps 15 minutes would do it to cover both confidential and document production. But again, there is a number of things in the submissions from the Claimants that we haven't had a chance to address and particulars on the Confidentiality Order and the proposed document production. I may have a solution in order not to have to address it in detail here, but again it will depend on how the Tribunal wants to do this.

PRESIDENT ORREGO: Okay. Thank you.

(Tribunal conferring.)

PRESIDENT ORREGO: Fine. We suggest that we

14:34:33 have a short break until a quarter to 3:00 and then reconvene for what probably would be 15 minutes on each side for both pending issues. And then we would have to consider the revision of the draft Minutes and so as to be ready with some conclusion.

Would that be agreeable? Okay. So, you are invited to take up something now.

(Brief recess.)

PRESIDENT ORREGO: We are ready to proceed, and then we have the question of confidentiality, and we ask the Claimant to speak on that first.

MR. APPLETON: Thank you very much, Mr. President.

As you know, the parties have been unable to agree on the content of a Confidentiality Order, and you will see before you two different agreements, one that was proposed by Canada and goes back as early as March of 2007, and the other is the agreement that we annexed to our submission as Annex A.

And, in fact, after I had finished going through this, I found two areas that still need to be addressed, so we are actually going to propose a

15:05:23 revised Annex A at the end of my presentation.

The two drafts reflect a fundamental difference and guiding principle, and Canada says that in the Order made by this Tribunal has to be made subject to Canada's Access to Information Act. The Investor says that this is an international law tribunal and that it's convened by international agreement and that your orders not need to be subject to the operation of Canadian law. And this issue was recently considered by the Federal Court of Canada in relation to a Confidentiality Order made in the UPS NAFTA Tribunal, and that's the case of Appleton and Privy Council Office, and that's why I can speak to this directly because I'm afraid I am Mr. Appleton from Appleton and Privy Council Office, and you can ask me any questions that you would like with respect to that case because I'm in a particularly good spot to be able to answer them.

But what that case clearly demonstrates is why this Tribunal should not agree to make the Confidentiality Order subject to Canada's Access to Information Act because, if you do so, you are going

15:06:39 to irreparably erode the equality of the disputing parties, and that's not something we are allowed to do as a Tribunal because of NAFTA Article 1115 and, of course, the general principle of equality of the parties that's enshrined in UNCITRAL Article 15.

Now, as a tale of two cities, there is a tale of two orders. We have the Pope & Talbot Order, and we have the UPS Order. And in the Pope & Talbot case, the Tribunal's Order followed what it calls through the standard form of international arbitration confidentiality agreement; and, in the UPS case, the fundamental difference is they added some words saying that the Order would be subject to Canada's domestic Access to Information Act requirements. Now, you will see in our submissions why we think, in fact, Canada is not actually subject to the Access to Information requirements. I'm not going to spend more time focusing on that because we don't have a lot of time, and we have set it out in our pleadings.

But the consequences of decisions made by this Tribunal demonstrate why we think that you should not be following the UPS model in this case. And let

15:07:54 me explain to you what happened in the UPS--sorry, in the Appleton and Privy Council case arising out of the UPS Order.

Now, after the UPS Tribunal issued its Order, Canada received requests under its Access to Information Act, and this request could be made by anyone who was resident of Canada or any citizen of Canada can make a request. And the applicant sought all information mentioning Appleton & Associates, our law firm, and NAFTA Chapter Eleven. But Canada responded by offering to disclose documents produced during the UPS NAFTA claim that were marked as confidential and were submitted subject to the UPS Confidentiality Order.

Now, our law firm objected to the release of these documents, and that's especially the case since many of the documents did not even mention Appleton & Associates or NAFTA Chapter Eleven. They didn't mention it, but they were still part of the release. And they were released because the act gives Canada discretion to choose what to release or not. So, once someone triggers this process, Canada is entitled to

15:09:09 use its absolute discretion as to what to release. And even if released material doesn't conform to the request, it's up to Canada to deal with it.

So, obviously, we are very concerned about this. We went to the Federal Court, and the Federal Court ruled that because the UPS Confidentiality Order was made subject to the Access to Information Act, that Canada had the discretion to decide to choose what it wishes to disclose under the Act, and that the act is made to allow Canada to disclose as much as possible, and we could not rely on the UPS Confidentiality Order to prevent the release of these documents. And they actually distinguished the Pope & Talbot Order from the UPS Order.

And they said that we could not complain that more was produced than what was requested. The court said, fundamentally the applicants have no ability to argue that the Access to Information Coordinator--there is one in every Federal institution--made any error in deciding to disclose more than what was asked for, so Canada released the documents.

15:10:19 Now, I want to point out, there was nothing wrong with the Canadian courts in the making of this decision. The Canadian courts did exactly what they are required to do under the Canadian law. What we complain about is the discretion used by the Canadian Government in terms of this Order and, in fact, this case. The Merrill & Ring case is heavily about the use of discretion as well, so this seems to be a continuous type of issue.

But, in this case, in Appleton and Privy Council, the problem is that, for the UPS Claimant, they thought they were putting materials in that they were going to be confidential. They had an order they thought that was going to govern, the Tribunal had an order they thought was going to government, and that Canada used its powers, its sovereign powers, as special standing to be able to deal with that to be able to release more, and it did not violate the terms of the Order, according to the court, but certainly violated the spirit and the objective of that process.

And so, now, the benefit for us is we know exactly what could happen if this Tribunal makes an

15:11:25 order based on the UPS model. In light of Appleton and Privy Council, it was a lot of work to go to the Federal Court. It was not an easy fight. It took a lot of time and effort. But, in light of that, we now know that, regardless of whether the documents asked for or not or regardless of whether their designee is confidential or not, Canada has the discretion to be able to release that material. And, of course, there is no equality here because Merrill & Ring does not. Merrill & Ring is going to comply strictly and totally with the terms of any Confidentiality Order, keep all of Canada's information confidential; but, because of this provision of domestic law, Canada doesn't.

So, Canada's proposed Order here replicates the UPS Order. Out problem is that Canada's proposed Order replicates the UPS Order, and we say that can provide no equality to the parties, and that because the Investor, of course, strictly would have to comply and Canada will not.

Now, in addition to this issue, this was--had been the deal breaker, which made it very difficult for us to function, which is why we have to come to

15:12:37 the Tribunal. It's clear between the parties that correspond that we are unable to agree we need to have a ruling here, but there are some other problems with Canada's draft Order, and I will just read what they are, and we have tried to address them, and that found some additional problems, and that's why we have a revised order.

The first is that their Order doesn't apply to consultations. The NAFTA mandates a consultation process, Article 1118, and that's why we sought this Order. We sought the Order as early as, I believe it was, January or late December of 2006, saying we would like to have consultations with the parties to see if we could resolve issues here, and no consultations have taken place because we haven't been able to get a Confidentiality Order.

And Mr. Schaaf, who is leaving here, we know that he wanted a consultation--Mr. Schaaf, before you leave, you want a consultation, a NAFTA Article 1118 consultation, in this case?

MR. SCHAFF: Pardon me?

MR. APPLETON: Do you want a NAFTA Article

15:13:32 1118 consultation with Canada? Does Merrill & Ring want one in this case? We are on the record.

MR. SCHAFF: Yes. I wasn't sure what part of the proceedings that you were referring to specifically, but yes.

MR. APPLETON: Have a safe trip. We wish you the best. Thank you.

MR. SCHAFF: Thank you all.

MR. APPLETON: Sorry. Mr. Schaaf, just to clarify, Merrill & Ring 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 obviously that needed to have a provision, so we put that in.

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

able to defend its case, like the Government of British Columbia. Right now, the Confidentiality Order that they have wouldn't permit that, and so we think actually that's not a bad idea for them to be able to share, but they have to share with the Provinces so that they are going to be bound by the Order.

So, in our revised Order which we are about to present to you, we have actually put wording in that would require Canada to--if they're going to give this confidential information to the Provinces, that those Provinces have to be made aware of the terms of an order, and the Provinces have to agree to follow the obligations as if they were a party to the agreement. Just like under NAFTA Article 1129, the nondisputing NAFTA parties, if they request information, they're entitled to them so the evidence or the materials, so they have to take it on the same basis. That's the NAFTA, and we think that's appropriate, but it needs to be in an order, and so we have put that in.

And then, finally, Canada's form of Order

doesn't address confidentiality of information at the conclusion of the arbitration, and that's a problem because this Tribunal could be finished, and then what do we do if there is a question?

Now, in looking at Canada's submission, though, we basically want to find a simple solution.

And do you have a copy of the Confidentiality Order?

So, what we thought, rather than make it more difficult for this Tribunal, we thought we might have a simple answer.

Could you hand these up, please?

So, what I have suggested is a revised order--let's give them also to Canada first. Nick, could you hand this to Canada so they could look at this right away? I usually like to give materials to counsel firstly.

What I have tried to do is add specifically something that would fit within the terms of Canada's Access to Information Act because--

MS. KINNEAR: What are we looking at?

MR. APPLETON: I will get you there.

--because even if--we would say arguendo because we don't think Canada's Access to Information Act actually governs. We believe the international tribunal is not bound by the municipal law in this area. But, in fact, Canada set out in its submission to the Tribunal here the terms of the Access to Information Act.

And if you look carefully at Article 20--I believe it's 21(b) of the Access to Information Act, you will see that Canada is precluded from releasing certain types of information, and that information is financial, commercial, scientific, or technical information that is confidential business information and is treated consistently in a confidential manner by the party to which it relates, including--sorry, I'm reading my order. I'm not reading theirs, sorry. What that says--but it starts the same way--"Confidential information"--do we have a copy of this? I think it might make my life easier.

The wording is now addressed. If you look at my Annex A, and you look at the top of page 2, which is handed to you, the wording comes directly from

21(b), and we have to require--thank you--I need their submission--that it be financial, commercial, scientific, or technical information supplied by third parties that has been treated as confidential information by those third parties.

In other words, if this Tribunal is--deems the information provided here, which will come from third parties, to be financial, commercial, scientific, or technical information, then, in fact, Canada no longer has a discretion that is unfettered; and, therefore, even though we still don't think this should be made subject to the Act, any difficulty that Canada still says that it would have its Act should be gone because there will be clarity in this agreement that the information fits that requirement, that it is confidential, and that that confidence needs to be followed by that government.

Furthermore, if we are going to include subnational governments, each and every subnational government of Canada has its own Access to Information Act--in the United States it's called FOIA, the Freedom of Information Act--and we would need to have

15:19:06 wording that would protect them, and we think this wording should also provide that, as well.

So, to the extent that this Tribunal could help us get through this difficult part, we think the rest should be pretty easy, but we really want this Tribunal's help because I don't think it's fair to make Merrill & Ring have to go through what Appleton had to do in Appleton and Privy Council. And it wasn't the Tribunal's fault--nobody knew--but now that we know, we think that we need to address this issue, and that's why I have taken the time to walk you through this today.

PRESIDENT ORREGO: Thank you, Mr. Appleton.

Can we hear Ms. Kinnear now. Sorry, Ms. Tabet.

MS. TABET: Yes, thank you, Mr. President.

Let me just first refer you to the draft Procedural Order that you have circulated to us and make a couple of comments on that.

First, I notice that, in addition to the UNCITRAL Rules which are listed under "confidentiality," we should probably, consistent with

15:20:13 the governing law, refer to the relevant Articles of NAFTA, including Annex 1137(4), which provides for--

PRESIDENT ORREGO: You're looking at what?

MS. TABET: The draft Procedural Order.

PRESIDENT ORREGO: The draft Minutes?

MS. TABET: Yes, the draft Minutes.

So, in accordance with the governing law, I suggest that we also refer to the relevant NAFTA provisions governing transparency that would be including Annex 1137(4) of NAFTA and the Free Trade Commission Note of Interpretation, which Mr. Appleton and Ms. Kinnear have referred to and are in the material before you.

In particular, the Free Trade Commission expressly provides for general disclosure of information, subject to specific exceptions such as protection of business confidential information. So, I think it is relevant to refer to that. We would also suggest including language there that would make the Tribunal's Confidentiality Order apply to these proceedings.

And I will now turn to the substance of what

15:21:21 should be in the Confidentiality Order and address first the application of the Access to Information Act and the comments that Mr. Appleton has made today as well as in his submissions, and then some of the other additional points that have been raised by Mr. Appleton in his submissions and the ones again raised today.

On the Access to Information Act, I won't repeat our submissions, but basically our position is very clearly that nothing in the NAFTA qualifies Canada's domestic disclosure obligations, and what we are asking the Tribunal to do is to recognize the application of the Access to Information Act and to reject the Claimant's position, which would essentially put Canada in a situation where it cannot comply with both the Access to Information obligations and with the Tribunal's Confidentiality Order.

As we have pointed to in our submissions, there is no general duty of confidentiality, and there is a number of NAFTA cases, including Loewen and the FTC Note of Interpretation that reaffirmed that. And, in fact, the domestic disclosures law apply to NAFTA

15:22:41 arbitration and to the two NAFTA Parties--capital "P" Parties.

There is a number of cases which we referred to in our submissions. I won't repeat them, but essentially Metalclad and UPS as well as the Mondev case which recognizes that in the U.S. case that the Freedom of Information Act applied.

Let me just address some of the authorities cited by Mr. Appleton in his submission. In particular, there is a reference to the Methanex case for the proposition that confidentiality should be absolute, and I think that's not a correct reading of the Methanex case. In fact, I will circulate the proper Procedural Order in Methanex which made it very clear that information--it did contemplate that information could be disclosed under the U.S. Freedom of Information Act, notwithstanding the provisions of the Confidentiality Order.

Again, the Claimant has referred to the IBA Rules as providing for absolute confidentiality, but I think it's important in the NAFTA context to look at the IBA Rules together with the FTC Note of

15:24:10 Interpretation and the particular context of NAFTA, which some tribunals have referred to as achieving the highest level of transparency.

On the specific point of the Access to Information being contrary to the equality of the parties under the--as set out in the UNCITRAL Rules, Canada's position is that the Access to Information Act is, in fact, inconsistent with the NAFTA's objective of transparency and not in any way contrary to equality of the parties. I think it's pretty clear that the disclosure of the information obligations impose an obligation on Canada that can be both to its benefit--not to its benefit, but rather it can also be to the benefit of the Claimant.

Many Claimants have, in fact, used Canada's Access to Information to obtain documents in advance of arbitrations against Canada, so I don't think it's so much a question of equality as a question of obligations that do apply to any State sovereign, which, in the NAFTA context, are consistent with the objective that the parties have set out for transparency in Chapter Eleven proceedings.

15:25:30 In addition, it's important to point out that the Access to Information Act itself achieves a balance between this transparency objective and protection of certain confidential information. You have the Access to Information Act in the materials in front of you; and, as Mr. Appleton recognized, there are certain exemptions in the Access to Information Act, including protection of business confidential information, a process for notification to parties whose information may be at issue and may be disclosed, and a process of review by domestic courts. And on that, let me just briefly address the Appleton case versus the Privy Council Office and the points raised by Mr. Appleton.

It seems to me that, contrary to the assertions made by Mr. Appleton, the case illustrates very well that there are some controls and exceptions to release of information in the Access to Information Act. One of the notable things is that UPS did not object, was not a party to this litigation, and it was not troubled by the release of the information at issue. If you look at the case itself that you have

15:26:51 in the materials before you, what was at issue was a lot of procedural correspondence that didn't contain any business confidential information, and a lot of the business confidential information that could have been disclosed was not disclosed because it was outside of the protections of the Access to Information Act.

So, really, I don't think the case is particularly relevant and certainly does not assist Mr. Appleton in arguing that it breaches equality of the party in any particular way.

Let me now just turn to certain of the particular points raised in the draft Confidentiality Order and the concerns that the Claimants have raised in their submissions on the Confidentiality Order. I think some of them are pretty basic, but given we haven't had a chance to respond to them, I want them to be on the record, so I will try to do it in as efficient a way as possible.

The first concern that is raised in the submission is that Canada does not properly identify the disputing parties. I don't think that's really an

15:28:09 issue. However, we would note that we don't think it's appropriate to vaguely refer to Merrill & Ring and affiliated companies. We would like to have a clear idea of the parties that are party to the confidentiality agreement; and, therefore, we suggest that it be Merrill & Ring and the Respondent, the Government of Canada.

The second concern that is raised is a concern that Canada added wording that would permit the Government of Canada to designate information as confidential based on its own domestic law, and I think this refers to the issue we have been discussing on Access to Information, but it also refers to the language that Canada had proposed to the effect that nothing in the Order shall be considered a waiver of any claim of privilege. So, I think the purpose of this clause is not to designate any confidential information. It's more related to the issue of claim of privilege, and we are just ensuring by this language that there is--that the confidentiality agreement doesn't affect that.

We also suggest that the Confidentiality

15:29:28 Order should not deal with production of documents issue, as Mr. Appleton suggests, that the issue of document production is separate from the issue of confidentiality, and I will come back and make separate comments on the issue of document production after--at a later stage.

The third point that is raised in the submissions on the Confidentiality Order is with respect to the provision confidentiality as it may apply up to settlement or consultations, and frankly Canada doesn't see it as appropriate to have a provision in the Confidentiality Order dealing with the conduct of consultations, but we are more than happy to engage separately with Mr. Appleton to provide for appropriate provisions to deal with any discussion that could take place in the context of those consultations or settlement discussions. I think those certainly usually proceed as a separate matter from the arbitration, and it would confuse the issue to deal with it in the Confidentiality Order here.

The fourth matter raised in the submission

15:30:52 deals with obligations pursuant to 1127 and 1129 of the NAFTA. In principle, Canada agrees that any nondisputing capital "P" Parties, the United States and Mexico, should be entitled to receive evidence and written submissions and treat the information as if they were disputing Parties, and this is recognized in the Free Trade Commission Note of Interpretation.

We would just like to raise a few--sorry, let me just address the additional point that Mr. Appleton raised with respect to sharing of information with the Provinces. We agree in principle subject to looking at particular language that Mr. Appleton would propose--we haven't had a chance to fully review it, but in principle we agree that they would be as well subject to the same obligations under the Confidentiality Order as if they were a party to the Confidentiality Order.

I would just raise, to finish my submissions, a couple of points that are in Mr. Appleton's draft Confidentiality Order which we think are not appropriate. The first one relates--in addition to the submissions I have already made, the first one

15:32:15 relates to second level of confidentiality that is proposed in Mr. Appleton's draft Confidentiality Order to deal with restricted access information. Briefly, I would say that this is probably unnecessary in this case. We can't foresee any need for such restrictive information that only goes to counsel and not to the parties themselves. I think it adds an additional level of complexity, and we would not propose that this language be included.

I just want to make sure I'm covering everything that has been raised.

Just one point on the destruction or return of information at the end of the proceeding, which is in Mr. Appleton's draft. Unfortunately, Canada is now in a difficult position and cannot--we have been given advice that we cannot agree to this kind of language, and it would be contrary to our Librarian Archives Act and our Access to Information Act, and so we would ask that this language be removed, and we cannot consent to this language in the Confidentiality Order.

Thank you.

PRESIDENT ORREGO: Thank you, Mr. Tabet.

15:34:06 MR. APPLETON: I have brief comments, if Tribunal Members don't have any questions.

PRESIDENT ORREGO: Go ahead.

MR. APPLETON: Very brief.

First of all, Ms. Tabet has encouraged you to change the terms of the draft Minutes. We have no problem with reference to Annex 1137(4). That could quite properly be there. I have a lot of problems with you in putting in as part of the governing law the Free Trade Commission Notes of Interpretation here. I'm just going to delve into this briefly.

I think the easiest thing about this would be not to do this because then I think we need to make some formal submissions, but if we look at Article 1131 of the NAFTA which is the governing law, it says that interpretation by the Commission of the provision of this agreement shall be binding on the Tribunal established under this section, and so there is no question that the Free Trade Commission is entitled to interpret a provision. But what it's not entitled to do is change the NAFTA if we are not interpreting a provision.

15:35:10 And so, one of the things that we are looking at--and I have a copy here of the Free Trade Commission notice that Ms. Tabet was referring to--is that not every aspect in there interprets a provision. Some of them are just in there on an extra basis--in fact, they're quite extraneous--and I think it's helpful to know what the NAFTA parties think, but it doesn't mean that it governs.

And so, for example, they have said in paragraph D 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 to happen and be in the term 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

15:36:11 then what's going to happen, I'm afraid, is in the next case they're going to say, "Well, look, what happened is the Merrill & Ring Tribunal said this is governing," and then we are going to have a fight about that, and we obviously have had no argumentation to deal with that. And I don't really want to go there. What I'm actually asking you is to not go there without--if you want to go there, I would like us to make submissions on the point. If you do want to go there, it's much more complicated, and is unnecessary for your Minutes.

So, I guess all I'm saying is I don't consent to that part, and I'm asking you that this is a much more deep matter and that I would rather we not have to go there today. If you want, though, I'm prepared to make formal submissions now. If not, I would like to deal with the rest of Ms. Tabet's comments, if that's okay.

PRESIDENT ORREGO: I think it is preferable to go on with the rest.

MR. APPLETON: I was hoping you were going to say that, Mr. President.

15:37:05 Now, Ms. Tabet gave some evidence about the nature of UPS and their views in the Appleton and Privy Council case. I don't think that was appropriate because, (a) it was not correct; and (b) she is not in position to give evidence on behalf of UPS. UPS did not have standing in that case. Mr. Appleton and Appleton & Associates had standing in the case, which is why I would be delighted to be the party before the court.

So, the fact that UPS wasn't there doesn't say anything about their concerns, but for the record I'm happy to tell you, as I am their counsel, that they were not very happy. And I don't think it's unreasonable that any claimants--any investor would be happy that if they think there is an order and things are being marked as confidential that that confidentiality isn't met. I think the expectation of parties to arbitration is if they submit something to be confidential, they expect that to be the case, and certainly UPS respected the confidentiality provisions, and certainly so will Merrill & Ring. There is absolutely no question about that.

15:38:09 Ms. Tabet is concerned about lack of precision in the draft Order where it says the disputing parties are Merrill & Ring and its affiliates. I'm happy to make it Merrill & Ring Forestry L.P., which is the named party in the claim. That should make no difference whatsoever and if that will make it easier.

I think the real concern that Ms. Tabet really had but didn't say is that she didn't want this order to only relate to the Government of Canada, and it's really because she was concerned that we were not going to be able to deal with the subnational government issue. And this has been the subject matter of other orders and other fights in other tribunals, that Canada basically wanted to release it without having any confidentiality provisions. And I don't want to even go there because it won't be necessary since now we have an agreement on it, and Canada has agreed with us, but the only appropriate way to govern people receiving confidential materials is to make them subject to the Order, and that is the appropriate way to deal with this, and I think we have

15:39:06 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 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 discussions that may be 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 so if Canada wants to give us 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 debate, 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. Ms. Tabet suggested that she can't understand why we might want to see that, and Canada's view is that this would be

15:40:15 onerous. I will tell you exactly why we need to have this, because in a situation of the Pope & Talbot case which involved lumber manufacturers rather than raw logs--different industry, actually--but in that case, there was all types of issues about who received quota, who received permits to be able to export, and there was concern that it would be anticompetitive information, and they didn't--the Government of Canada was concerned about producing 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 terms.

If, in fact, this is not going to be a problem, and the Department of Foreign affairs, the Export/Import Control Bureau that deals with this has no problem, then we are happy with that. I think our client would love to be able to see information. That's what clients always want to do anyways so they could help us and assess it. But, to the extent that that would cause an antitrust issue, we don't want that to be the problem. That's why the provision's

15:41:18 there. I don't think it's overly onerous. We used it with respect to the UPS 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 Ms. Kinnear or Ms. 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--sure they are--and they looked at the civilian aircraft cases, a particular provision that was in that. And in addition, there was also as part of the terms of the Model Rules for the Chapter Twenty.

And so, if it's in the NAFTA Model Rules for Chapter Twenty which are being applied, we thought that would be appropriate because the issue here is how to protect the confidential information.

15:42:30 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 S.D. Myers case, the Government of Canada decided to take the personal tax returns of Mr. Myers and disclose those under Canada's Access to Information case, 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 when he thought they were going to otherwise be covered, but they were--they were 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 put

that in.

If, at the end of the day, the Tribunal has an order that is binding, which I think we can do now, then 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--I mean, 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.

PRESIDENT ORREGO: Thank you.

Further points?

MS. 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--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 that would deem 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 have to 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 it 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 agreement on open hearings because we haven't addressed this issue, and I thought there was agreement to have open hearings, but I would like to confirm it on the record.

PRESIDENT ORREGO: 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.

MS. TABET: Yes.

PRESIDENT ORREGO: She has, yes.

MR. APPLETON: With respect to the issue of transparency generally, I think this merits a short discussion.

Number one, we are strongly in favor of transparency, and so it's because of the ability to be able to file materials that need to stay confidential because they're proprietary and business related that we need to have this Confidentiality Agreement and that we need to be able to deal with the issue of transparency.

To our view, when we put in proposals that 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 closed-circuit feeds, as I think that's the way they usually do it here. But, for example, if there is restricted access information, that session or that

part of the session where that information is would have to be not open because of the nature of the information that needs to be protected. And we had that in the UPS case, and that was very easy to effectuate, and that's why we were able to make that occur, and we think 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 want the situation later that Canada tells me they are unable to produce documents because then they can't be--we can't control that these 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; but, if it is, we are not going to produce under our Evidence Act." You have to decide, and that question in your determination, that has to be

confidential because there is confidential information. I don't want Canada to be able to say, "We are not going to produce this information because, at the end of the day, we can't protect the security around that. We need to have those safeguards." And then this Tribunal can make its own determinations, both of privilege and of the weight than any of the evidence needs to have.

PRESIDENT ORREGO: Fine. Thank you.

Does that take care of your point?

MS. TABET: Yes, thank you.

PRESIDENT ORREGO: Well, on this point, I would like perhaps to request that both parties, to the extent possible, might help the Tribunal in one particular respect, which is to draw a sort of comparative text of the two Confidentiality Orders that have been suggested, your revised, which I suppose is the last effort, and our original one or as revised as you wish. So the Tribunal could have, say, paragraph by paragraph say this is what the Claimant proposes, if eventually there is a special reason or argument; this is what the Respondent proposes or

agrees to or disagrees because of some specific reason. I think that would be very helpful because the debate has been quite interesting, but at the same time it can become sort of confusing because there are things going back and forth. Would you think that that is feasible proposition?

(Tribunal conferring.)

ARBITRATOR ROWLEY: I had been thinking along the same lines, and I think we are saying exactly the same thing, but my proposition would be that the parties get together and produce an agreed order to the extent that they can. Where there are points of disagreement, give us alternatives. We have heard your reasoning. If you want to add a little, but it's only going to be four or five clauses that we are going to have to deal with. And in other matters that I have dealt with, that's been a sensible solution.

MR. APPLETON: Mr. Rowley, the parties have been trying to get an agreed draft of an order for more than eight-and-a-half months. There have been--I would love--in other words, if you would like to, I would like us to bang our heads together harder rather

than softer. What I mean here is that we have not been able to agree because of this fundamental first problem about whether it should be subject to the Act or not, and then we haven't been able to get anywhere. I thought we would be able to have an agreed order here today, with the exception of this issue about the applicability of Canada's Access to Information Act.

So, what I'm concern about, just to be very blunt, is that you are going to ask us to come up with something, and instead you are going to get a whole pile of new argument from us, and what we're telling you is we are having a problem here, sir.

ARBITRATOR ROWLEY: Maybe I could have another go at it.

We have heard you. You have written very good submissions that we found very helpful. You have now given it to us probably twice each today orally. I don't think we need to hear that further. What we want is one piece of paper where there are areas of agreement. Where there is no agreement, Mr. Appleton, put in your clause which accepts and put in your clause which includes. The Tribunal will decide. We

don't want a great deal more argument, I don't think. Perhaps I speak for myself.

PRESIDENT ORREGO: No, no.

ARBITRATOR DAM: No.

MS. TABET: We are perfectly prepared to do that.

PRESIDENT ORREGO: To the extent possible that you might make an additional effort to agree on something that is agreeable; if it's not agreeable, it is not agreeable, of course. But let me mention to you one very particular point that might be helpful in the context of an agreed order which is that, Mr. Appleton, you referred to the WTO experience. In one panel that is actually working, there has been a very interesting mechanism because of the same questions, questions relating to transparency but at the same time confidentiality, and the situation has been that there are two stages to it, (1) submissions that are made public and circulated and posted in Web pages and so forth, and followed by a separate presentation of the same issue which contains confidential information, what they called BCI,

15:53:04 business confidential information; or HSBI, highly sensitive business information. Some of the latter goes to third parties and some not.

And, finally, there is a taping, videotaping, of the whole operation relating to the public hearings, not to the private element with confidential sides of it, and that is shown to the public generally, which can go into a big room and see what the parties had to say on the video of the public sessions.

It's very complicated, in fact, from the point of view of its actual operation, but the principles involved, which is the interesting point, are very useful.

So, if you might look into that--

MS. TABET: I think this is very similar to what we have, in fact, agreed upon and have done in previous cases, including UPS, where we have redacted the draft Confidentiality Order. A lot of what we have already agreed upon provides that there should be also redacted version provided, and Mr. Appleton just confirmed that we would have--part of the hearing

15:54:24 would be closed when dealing with that confidential information, so it's very much the same.

PRESIDENT ORREGO: That's the kind of thought.

Eventually, if you distinguished between confidential information, that it's somehow restricted, and hyperconfidential information which is not to be--not even to yourselves, that might be in a sense helpful from the point of view that you might be able to do some things with one and yet not--and yet with other part of it. Say, for example--sorry to interrupt--say, for example, the question of sending these over for comments by the State's parties. You might wish to have comments on some things, but you may not wish to have comments on a number of other things.

MS. TABET: I really don't know if the issue of hypersensitive information or restricted access information will arise in this case. I suggest we defer the matter until if and when that issue arises, and we can have the provisions to deal with that. It is very burdensome upon the parties because it does

15:55:36 create a wall between the lawyers and their clients. So, as much as it could be avoided, we would recommend that. And if it does arise, we would look at those kinds of protections.

MR. APPLETON: Our problem is that, if this arises, then we have to get the Tribunal back together. And since we already have the wording and we already have the practice that would work, I don't see why we would be disadvantaged by having the wording. If it arises, then we have it.

I mean, we have nothing that we think conceivably could be restricted access. It's all information that would come, we would expect, from the Government of Canada or from some other branch of another government that they receive, but we don't want to have a process that is going to slow down the ability to get information, and that's why we would like to see it in this order because if we are going to think about it, we might as well think about it. If they don't use it, that's great. It's all there before you.

ARBITRATOR ROWLEY: Put it in the

15:56:37 alternative.

MR. APPLETON: Apparently, it will have to be in the alternative because we have no agreement, as you find most of the order will be in the alternative. But we will give you exactly what you would like.

PRESIDENT ORREGO: Well, item by item because sometimes a comparison without the line by line becomes more difficult.

MS. TABET: And my only concern, and just to be perfectly honest, in previous cases where we have--including the UPS case, where we have had that alternative, it's been abused, and it's been very difficult--everything was designated not as business confidential but as restricted information and, therefore, was made very difficult to share information.

PRESIDENT ORREGO: Well, we'll see how it works.

So, are we ready to look at the last question, production of evidence?

(Tribunal conferring.)

PRESIDENT ORREGO: Can we discuss briefly the

15:58:48 question of production of evidence? I say "briefly" because a number of persons have to catch planes and other needs, so if we could look into that as to illuminate the Tribunal, always in the understanding that what we have already as submissions is available. And to the extent there is anything new or additional, we would be pleased to hear that briefly.

MR. APPLETON: Mr. President, perhaps I might suggest an alternative that might be more efficient.

The submissions are there. There is an issue about--that arises all the time. We brought it to your attention. It's in the materials. We don't want this to be a surprise if it arises again, and we already know that this issue is going to arise because we have been notified of this that this is likely to happen from Canada in the letter. So, this is about the use of Section 39 of the Canada Evidence Act. Other tribunals have dealt with it. You have the materials there. The other tribunals have said it doesn't apply because you don't have power to compel evidence, you can't be bound by it, and a certificate not made under the Act has no power in any event, so

16:00:09 we don't need to go there.

I am proposing that we not have any argumentation on that because you're aware of this issue, but I do think it would be useful for us to look at what information request order would look like because we think that if there is going to be a likelihood that there is going to be need for information, and that means that we propose that there be information that supplied basically three ways to get information. As a tribunal, you get information by documents, you get information by witnesses, you get information perhaps by interrogatory.

PRESIDENT ORREGO: But that is what your draft Order is about?

MR. APPLETON: Yes.

We have it there. To the extent you might have questions that might be relevant, we think that an order itself is what we need to need to do rather than just reliance back on the IBA Rules, so that's what would be, I suggest--in other words, we think there should be an order. We have taken this order from other NAFTA tribunals looking at these issues for

16:01:08 things that we think would work, and the idea is to find as simple a process as possible. And given the fact that you already know our view that there is a need for document production or information requests in this case, we think it's important, but I don't want to waste any time. I don't want to talk about it in esoteric elements. I would like to talk about something very specific. That's really where our views are.

PRESIDENT ORREGO: Right, thank you.

Ms. Tabet, will you agree to that?

MS. TABET: Well, in fact, Canada's position is we are prepared to agree to the IBA Rules as guidelines. We haven't had an opportunity to respond to the draft Document Production Order that Mr. Appleton has submitted. I don't know if it would be most useful to go into this today or if you would like us to address this in writing. Perhaps the simpler way to do it is to just refer to the IBA Guidelines and the draft Minutes.

And as Mr. Appleton suggests, we could deal with issues of privilege if and when they arise. I

16:02:13 mean, objections to jurisdiction.

MR. APPLETON: Mr. President, we can't agree to the IBA Guidelines. That's our problem. That's why we suggested a rule, and the IBA Guidelines--as guidelines, this is what we think--we have something like that. We think it really is necessary to have something.

So our problem is, let's say that you decide that you want to have a jurisdictional phase. We are going to need start getting information of document production right away to be able to deal with that. Let's say, instead, you decide you want to join the jurisdictional objections to merits. We are going to want to have documents or information requests right away to get the case underway.

Any way we do this, we really need for this Tribunal to come up with in terms of an order very quickly, and that's why we produced something to try to bring this debate forward. And most tribunals--the parties actually haven't submitted something on this. Tribunals have just given us an order. We have no problem with you giving us an order, but we don't

16:03:22 think that the IBA Guidelines--I like them. I use them in other things. They're good in commercial arbitration. I just don't think that they're exactly the right thing here, and that's why we thought an actual order, which makes it very clear to the parties what they have to do. We want to avoid disagreements. We don't want this Tribunal to be bogged down with information issues in terms of document fights. It's not in anybody's interest to do that.

PRESIDENT ORREGO: Yes, the point is taken that there are two different approaches to it.

And then for the purpose of the Minutes, we would just refer to the fact that the Tribunal will take a decision in terms of production of evidence or so and not do that here in any way or either way because we have to reflect, of course, on what we have read and heard.

Yes?

MS. TABET: Would you--as I pointed out, we have not responded to the differences in the draft Procedural Order, Document Production Order, put forward by Mr. Appleton. We could probably do this

16:04:33 fairly quickly and briefly in written form after this meeting, if you wish us to.

PRESIDENT ORREGO: Yes, I think that the very same kind of exercise we were discussing in terms of the confidentiality order would be quite appropriate to the point that if there is agreement of certain things, fine; if there is not, why. And then we would look into whichever making again the utmost effort to come to some agreement.

MR. APPLETON: Can we set a very specific deadline? Shall we say five days or something so that we focus the attention and actually get something to you? What would be best to enable the Tribunal to be able to resolve this? You tell us, and we will do it. Please be harsh on us. Do not be nice to us because we won't get it done effectively, and all we will do is have more reasons as to why we can't agree rather than why we will agree. So, I would be happy if you tell us you want something tonight. I have to fly somewhere, but I will do it tonight. I really think that we need your direction. You might want to reserve for a moment.

16:05:57 PRESIDENT ORREGO: We will be back to you on that before we close so as to give it some consideration.

Well, we have come, if we understand rightly, to the end of our discussion.

MS. TABET: Sorry, there is an additional point. We well--Mr. Appleton has made several references to when he would like document production, and we haven't had a chance to address that. I know we will try to agree to some kind of--as much as possible of a schedule if there is bifurcation or no bifurcation.

But one key point I want to raise now is I think there is fundamental disagreement on whether--first of all, whether there is a need for document production. If there is bifurcation, Canada does not believe there is any need for any document production. We would be the party that would have to make the case, bear the burden of proving our jurisdictional objection, and we do not ask for document production.

And the second point is, if there is no

16:06:58 bifurcation, Canada would request that the document production only take place after the submission of the Memorial and Counter-Memorial. And the reason for us asking this is, as you heard Ms. Kinnear, we are very concerned about assertions made in the submission that Mr. Appleton is going to make his case only once he gets our document, that he is not able to make his case or specify the measures that have breached the NAFTA, and at this point that he will tell us later what his case is once he sees our documents.

PRESIDENT ORREGO: Well, the Tribunal is thinking precisely to take a short time now to discuss that very issue of general guidelines about bifurcation or nonbifurcation, and then, in that light, to have what we shown your agreed schedule and insert all of that into the Minutes.

Now, that--do we have any place around here where we can retire?

(Pause.)

MR. APPLETON: I would like to address a point. Why don't we get this resolved first and then we will--

PRESIDENT ORREGO: A separate point?

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

PRESIDENT ORREGO: Yes, we'll retire now.

MR. APPLETON: I need to practically point out that it will be impossible, and it would be unfair to the Investor in this claim 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 memorials first and then have document production, that that is, in our view (a) 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 Memorials filed. Then the purpose of the Reply and Rejoinder Memorials is just to raise issues so no one is caught by the surprise. Otherwise, what is the purpose of this second round of pleadings, and then you will have a need for a third round of pleading.

So, at the end of the day, this case has been pleaded. We know what it is. The pleadings meet the requirements as set out in the UNCITRAL Rules. We have indicated where the measures are. We have indicated what was precisely where the breaches are. We have given a general indication of what the damages are required. It is a notice pleading. That's how the rules work, and that's how the case law works. And change all of a sudden in the middle would be very difficult.

It may be that the government doesn't want to produce documents. Maybe they do want to produce documents. I don't know. But we should be entitled to seek production which has to be reasonable and fair and has to be connected to what we are talking about--all of those things. But, at the end of the day, we should be entitled to get that material so that you can know exactly what's going on, we could know exactly what's going on, and that's how that process works. And that's why we would be opposed to this new suggestion that Ms. Tabet suggested. I just can't see how the experts that are going to be

necessary here would be able to provide any value. They're going to say we can't do this because they're missing, we need this record from the government, we need to have this information about total volumes or whatever else, and that's why I just can't see practically why that would work.

PRESIDENT ORREGO: Okay. We will have all that in mind from the point of view of trying to figure out how we should proceed next.

So, if you don't mind, that we leave you all for a few minutes, we will be discussing it and be back shortly.

(Tribunal conferring outside the room.)

PRESIDENT ORREGO: Well, the Tribunal has met to consider the question of the bifurcation or nonbifurcation, and it has come to a conclusion; but, before letting you know 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 the extent that 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, what actually happens is that we will have, in any event, to go to the merits or join to 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 are 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 to have all the arguments both on jurisdiction and the merits come together. And then, of course, they will all be available for realize 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,

16:51:42 so it was better to go straight there and not to make an intermediate stop on the way.

Well, having said that, we understand that you have come up with something in terms of a schedule, or not quite?

(Comment off microphone.)

MR. APPLETON: Sorry.

We are prepared to sit down quickly right now. We will obviously need to have a document process of some form to be able to deal with this. We have proposed that we are prepared to make our first document request as early as December the 1st, and that would be very quickly, but that's why we would need to have an order or process. If you think it's going to take a longer time than that for the Tribunal to make an order, then we need to get some indication of that from you because that would obviously affect the timing and what we would want to do here.

PRESIDENT ORREGO: You mean an order on production?

MR. APPLETON: Well, we would call it an "information request order" because the documents

16:53:05 could be interrogatories we are going to ask for, as well.

PRESIDENT ORREGO: Okay. Now, one question, Ms. Kinnear, would Canada be in agreement about beginning with document production, the whole exercise to begin with document production, then the Memorial on the Merits and the Counter-Memorial, and then et cetera, et cetera?

MS. KINNEAR: I wanted to raise that because our preference would be, and we think that it would be more efficient in this case, if we went first to Memorial and Counter-Memorial so that the issues are very clear. The Tribunal will have a very good idea about what is and isn't in debate and, therefore, be in a much better position to assess any kind of differences between the parties on what's properly producible or not.

So, our preference would be, quite frankly, to have a first set of memorials, then document production as needed, and then Reply and Rejoinder Memorials.

And if I might, there is a second issue, and

16:54:12 I think it certainly goes to the same concern that we have, we spoke earlier about a Statement of Reply and a Statement of Rejoinder, which I would assume would be the first stage here--I'm sure they could be done in a short period of time, 10-15 days each--but given what we have heard today and our concern that there seems to be a very fluid definition of what measures at issue, we would very much like to ask that we have the first Statement of Reply by the Investor, a Rejoinder statement by Canada, and then go into, if the Tribunal sees fit, either memorials, which would be our preference, or document production and then memorials.

But I can't state strongly enough how concerned we are that this will be some kind of rolling definition of the case, and we will never know what we are supposed to be answering, and that's what we really would like to make sure is addressed.

PRESIDENT ORREGO: Would you allow us one and a half minute.

MR. APPLETON: Before you deliberate, perhaps if I could have a moment, first of all, during the

16:55:14 break, I talked to Ms. Kinnear and Ms. Tabet. I had misunderstood what we were talking about on the agenda because when we talked about the Statement of Reply and Statement of Rejoinder, it was under the word "jurisdiction," and so I believe, or I believed, that you're talking about Replies and Rejoinders in the jurisdictional phase. But Ms. Kinnear is of the view, and I believe from the conversation now that her understanding is correct, that you were talking about the Statement of Reply or Statement of Rejoinder generally for the case rather than Reply and Rejoinder in jurisdiction. It's just the way it was listed, I thought you were referring to that. That is not the standard way generally that NAFTA cases have unfolded, number one.

Number two, we have no further information to be able to provide. The reason why we can't do a Memorial without having the document production is the same reason I can't do anything more with the Statement of Reply or--it's the same problem, that we are stymied without having--we know what we have to ask for. That's why we are prepared to move ahead

quickly on that, but without that type of information we can't go any further, and that's why we are seeking this process, and I think it's fair for you to know that I can't say anything more.

To the extent that I just went through this to try to compile these examples of particulars, and as we were going through it, we said, "Well, we think this is something here, but we don't know." But these are all the types of things that would become self-evident by way of a document production, information production process. And then if there is no evidence of it, it doesn't need to be there at all. If there is evidence of it, it needs to be there. But that's--you just need to know, that's our problem.

Our problem is, you know, I'm not advantaged by telling you anything that doesn't make sense or anything we don't have. We have what we have, and we have tried to put that all out, so I can say nothing more to you than what I have done with this Statement of Particulars. And so, to the extent that we have basically flung the doors open and shown you everything that's in the pantry, we have shown you all

the ingredients, I now need some more food, and the only way of getting that is to have a process to deal with that, and we are prepared to work expeditiously and quickly in a very focused way to do that, but that is really what we need.

(Tribunal conferring.)

PRESIDENT ORREGO: The Tribunal can come back quickly on this particular item because, in fact, we discussed it before rejoining in the room.

In terms of precisely because of questions of efficiency, we believe first that there is no need to have a Reply or a Rejoinder in terms of the sort of startup process. It is the possibility, under UNCITRAL Rules, at least a third round, but we feel that it wouldn't add more than what we have heard at this stage.

In contrast, we believe, and we considered specifically this, that the process should begin with the Memorial on the Merits to be followed by the answer or Counter-Memorial on the Merits, and each party there will have to provide the witness statements or factual information or everything it

reasonably has at hand in order to justify and prove the claim it is making. Documents, expert reports, whatever each party feels is necessary.

And, at that stage, once that stage is over, to have the document production stage, properly so, in terms that you will be able to know what is still missing, what additional items you might need to have a process of document production, to be followed by the Reply and the Rejoinder as the aftermath of all the exercise, and, of course, the hearing.

So, that is what actually the Tribunal would like to propose to you, and we even have not dates but time schedules, if you would like to have that, unless you have it already, among yourselves.

(Comment off microphone.)

MR. APPLETON: We would like to know what you have in mind, and we could go from there. Obviously, not having the document production means that, for example, I can give you my expert report on damages very quickly because, without having the materials about the volume of the market, they told us that they can't do very much. They required that information

from the government to be able to do it. So, if you would like to do it, that means that my responsive report is going to have to be really like a new report, and then there is going to be an issue of responding again. That's--I came with the specific problem. That's why.

PRESIDENT ORREGO: But even in that context, you would be able to acquire everything you needed after the first round, and to have every possibility of discussing whatever you have got in terms of document production in the second round. It doesn't end up with the first shot.

MR. APPLETON: It may just be necessary, then, to have a third round, which is what I'm trying to avoid. I'm trying to avoid for the experts--for example, one of the issues that are going to be here is going to be the impact that if the provisions of the log export control regime didn't apply to Merrill & Ring, Merrill & Ring then is able to sell, and the issue that is going to be here, then, is what is the impact of its ability to be able to sell outside of that regime? In other words, but for the fact that

this didn't apply to them. So, that would be one issue. That's an area where all the data is held by the Government of Canada. And without having that data, they can't value that. So, that's a very fundamental problem. That's why we came here to seek another order.

So, to the extent that you want to report without that data, that's fine, but I can't give you a report that's going to be meaningful. So, what we get is a lot of legal argument, which is fine--we are prepared to do that--but I can't give you the type of evidence that we would normally have in that phase. And since we are proposing to make it more efficient by not having to bifurcate merits from quantum, but putting it altogether, that's why we needed to have that information. That's really most profoundly a problem for me there, but also a problem, but we can deal with it with respect to response on other issues with respect to the operation of the regime. But since we have all types of information we cannot get and since the allegations are about the inability to get information, we have a problem.

Now, I'm not asking you to reconsider your decision--you have made your decision--I'm just explaining to you there is going to be very significant limitations in what we are able to provide, and we should be dealing with that now before we book times for hearings that then we would not be able to meet, and that's what I'm worried about.

PRESIDENT ORREGO: We did consider, in fact, the alternative scenario you were mentioning, but because of the various reasons I did mention, it's not likely that you have started a very serious claim just because of thinking that there would be potential damages because you have the convincement and the elements at hand to show what is your claim and your expectations and your arguments and so on, and then take it from there. If you need the documents, there will be that stage, and then both parties would be able to discuss it back and forth, and then there would be, of course, the hearing.

Well, in that scenario, the Tribunal proposes to you the following: First, Memorial on the Merits 90 days after the Minutes have been finalized, I

suppose--I didn't see that in particular, but that would be the proper date; the answer or Counter-Memorial in 90 days following the first, of course. At that point, there would be the document production process. There would be a simultaneous request by the parties one week after the Counter-Memorial. Each would tell each other, "This is what I need."

One week after that, counsel, yourselves, would meet to consider if there is any difficulty or if you're all in agreement and so. Still, one week after that, the parties would formally agree or object and say, "No, this we cannot provide," or, "Yes, delighted, here you are."

MR. APPLETON: Two weeks after or one week after the meeting?

ARBITRATOR ROWLEY: One week after the meeting.

PRESIDENT ORREGO: Yes, one week after the meeting of counsel.

Then there would be one further week to apply to the Tribunal for the settlement of any differences

that may still survive, and then the Tribunal would come up with a decision which we don't put yet today because we don't know what we are going to get--or if we don't get anything, still better--but within this period that we discussed this morning that we will do as much as needed to be prompt and effective on coming to terms.

And then 60 days after that decision, there would be a Reply, and 60 days after that a Rejoinder, and then a hearing on the merits, which we won't suggest any date at this point, but generally speaking, we would be looking into sort of this time of the year next year, approximately, very approximately. It could be earlier, it could be later, but say the 90 plus 90 plus all the rest would sort of mean eight months and so.

(Tribunal consulting.)

PRESIDENT ORREGO: Fine, we very much appreciate your cooperation, but I think we should leave Professor Dam leave right away.

(Tribunal conferring.)

PRESIDENT ORREGO: Well, at this point,

17:12:54 Howard is going to build in all these ideas, and then we have decided that it would be enough for the President to sign on behalf of the Tribunal and for each of you to sign as well, for each party to sign, and then we would be delighted to have you hang it on the wall afterwards. And we let Professor Dam leave with our gratitude for his help.

ARBITRATOR DAM: Thank you all very much.

MS. KINNEAR: May I address one issue on the timing here?

PRESIDENT ORREGO: Yes, of course.

MS. KINNEAR: The concern that we have is the document production. First of all, could I ask for clarification? I hope that I understand it correctly.

PRESIDENT ORREGO: Yes, please.

MS. KINNEAR: First of all, perhaps you could repeat what the schedule was in terms of document production.

PRESIDENT ORREGO: Yes. One week after the Counter-Memorial, requests, simultaneous requests, by both parties to each other. One week after that, counsel meet to discuss the overall situation. One

17:14:30 week after that, if there has been no agreement or so, the objections are submitted to the Tribunal. If they are agreed, they will let the Tribunal know. If they are not in agreement one week after, they will apply for the Tribunal, and then the Tribunal will take the decision.

(Comment off microphone.)

MR. APPLETON: My apologies.

So, one week after the Counter-Memorial is when the request can be made. Two weeks after that point is when you would like to have any refusals formally made.

PRESIDENT ORREGO: Exactly, correct.

MR. APPLETON: If counsel can work it out before that, that's great.

PRESIDENT ORREGO: Of course, any time within the two.

MR. APPLETON: But then you want another week after that to apply to the Tribunal?

PRESIDENT ORREGO: No, no. Once you signed it over, that's it.

MR. APPLETON: So, just to make sure, there

17:15:36 is a three-week process--I have it wrong, Mr. Rowley? Can you help me because I'm confused here.

SECRETARY DEAN: After receipt of the Counter-Memorial is the document-production phase. One week after we receive the Counter-Memorial, there is a simultaneous request--all right?--concerning document production. One week thereafter, counsel meet to discuss, they can come to terms on document production, et cetera. One week thereafter, the parties inform the Tribunal as to the outcome of their discussion and whether or not they're requesting the Tribunal to make a ruling on the request.

ARBITRATOR ROWLEY: No. I believe it works this way: One week after specific pointed rifle-not-shotgun requests for disclosure, you then have a two-week period in which to make production or refuse production or agree that production will be made. Within that week, the President has indicated that counsel should meet because this Tribunal feels it is essential for you to meet and come to grips.

One week following the two-week period, you will make an application to the Tribunal, if advised.

17:17:21 PRESIDENT ORREGO: Correct.

ARBITRATOR ROWLEY: After that, the Tribunal will decide as quickly as it is able. Following the Tribunal decision, the 60-day period begins to run for the Reply.

PRESIDENT ORREGO: Well, sorry, I should add one element. In that decision, the Tribunal should direct the parties to produce the documents by a certain date. As from that date, we count the 60 days. I had jumped it over because it was embodied in the context.

ARBITRATOR ROWLEY: The Tribunal would also, and intends to put in this Order that if there is to be an application to the Tribunal for documents that have been refused by the other side, that the party applying--and it may be that each will be applying--will do so supported by a Redfern schedule. And everybody probably knows what that is, but so there is no misunderstanding, a column on the left-hand side listing each document that is requested, the next column provides an articulated description of why the document is relevant and

17:19:11 material to your case. The next column is the opposing party's objection as to why the document is irrelevant, immaterial, unduly onerous, possibly even State secret, some such thing. And the next column is left blank for the Tribunal so it can go through.

So, assuming that both sides aren't able to agree on everything and there are counterapplications, there will be one or two documents from which the Tribunal can work without reference to any other document. So, if the parties decide to exchange 20 letters of indignation to each other as to why documents are--it's entirely inappropriate and fishing and overreaching, you know that's a State secret, the Tribunal never sees that and doesn't have to paw its way through it. It just has one document, and it can make its decisions based on an assessment of that one document.

PRESIDENT ORREGO: Okay.

MS. KINNEAR: 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 know Mr. Appleton--we have

17:20:37 litigated with him before--had large document 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 know now that does cause concern, and we wanted to raise it.

PRESIDENT ORREGO: That, I think, is reasonable.

Would you agree to have a slightly longer?

MR. APPLETON: I think three weeks would be fine.

We have done this with governments before with two weeks. They seem to do it.

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 to us we are going to do, if

17:21:35 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.

PRESIDENT ORREGO: One additional week for that. Would that be enough for you? Or not yet?

MS. KINNEAR: Or problem is we have to collect the documents to know what we could refuse, and that is difficult. If we could have two additional weeks, that would be more helpful.

PRESIDENT ORREGO: Two additional following the counsel's meeting?

MR. APPLETON: 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--that seems a little long to me.

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 sure

17:22:44 that there is enough time so that it doesn't get used to not give--everything else is tight, so I want to make sure that we just get everything moving and move from there, and we will comply with whatever you order, Mr. President.

PRESIDENT ORREGO: In fact, it's to extend by one week the--we have the counsel meeting at a date. One week we had for objections, and that would be kept, but the application for the Tribunal would not be made within one week but within--that's where we suggest two weeks, but really we would like to be effective from the point of view that they would be able to get what you all want.

So, if we enlarge that one to three weeks, it doesn't seem to exaggerate it, or does it? Three weeks to apply to the Tribunal.

ARBITRATOR ROWLEY: We understand that the government needs more time, and perhaps you would be able to fuss with it, with that in mind.

PRESIDENT ORREGO: But that we should include in the Order, in the Minutes.

I think that it's reasonable. One week after

17:24:38 the Counter-Memorials, simultaneous requests by the parties. One week thereafter, the counsel meet to consider the overall situation. Two weeks thereafter--that's the one to be extended--the parties react and said, "No, this I cannot submit;" and one week after that, the application to the Tribunal with the appropriate Redfern document so that it would be easier to decide.

All right? Does that look reasonable?

And after the Tribunal issues its decision, it will say documents to be produced by such a date, and following that the rest--and we will suggest to you shortly dates for a hearing. Not right now because it's good for all of you to be able to look at schedules.

ARBITRATOR ROWLEY: How many days for a hearing? Three days? Five days?

PRESIDENT ORREGO: Do you have any ideas?

MR. APPLETON: Generally, in the past, we looked at a five-day hearing. We could look at that. We had five days without the situation of--we often in NAFTA cases tend to separate liability as a quantum

17:26:17 from merits. This case we would have it altogether, so it's a possibility of adding a day at most, I think. My sense is five should be sufficient at this time. I think that--I don't think it gets better with having more days generally, but I'm in your hands.

PRESIDENT ORREGO: Would Monday to Friday be--

MS. KINNEAR: We would be glad to have that reserved--we think that's more than ample--and three days would be appropriate. So, out of caution, that would be fine.

PRESIDENT ORREGO: So, we would suggest to you dates, and then you react to those whether they are feasible for all of you.

MR. APPLETON: To the extent you can give us suggestions because we are going to have to block time for experts, block time with clients. You need to block time--your time is the most difficult to find, so I'm sure we could do that. We have a year, but let's see if we it block it now.

PRESIDENT ORREGO: We will get to it promptly, not right now because we have to discuss it,

17:27:18 but very quickly.

So, Howard, you're all set?

MR. APPLETON: Anything else from us right now?

PRESIDENT ORREGO: I think not, unless you have any other item that you would like to raise.

MR. APPLETON: I want to ask if the Tribunal had any other questions or anything else that would make things smoother or easier?

PRESIDENT ORREGO: No.

MR. APPLETON: We appreciate, it's been a complicated day, and this was the smallest procedural agenda we have ever had, and it's gone about as long as I ever had. I can only imagine if we had the usual ICSID 22- or 26-item agenda, we would have been here all night.

But if you're comfortable--I think we have anything to add, but I believe Ms. Kinnear does.

MS. KINNEAR: The only point is I don't believe that we have filled in the number for the Tribunal fee, and I don't know if you would like us to come back to that, or if that's a matter that has been

17:28:17 addressed sufficiently and the Tribunal will simply issue an order.

PRESIDENT ORREGO: If you have any views, you would be welcome to put it forth, but on that point, as we did in the morning, we would like to have that off the record for the time being, until it's submitted to fill in the dots. Would you like to discuss it now? I mean, as you wish.

MS. KINNEAR: We can stay here, and I don't know if we necessarily--

PRESIDENT ORREGO: Let's go off the record for a few minutes while Howard prepares the Minutes.

(Discussion off the record.)

PRESIDENT ORREGO: Thank you very much. We are closing out this record for now.

(Whereupon, at 6:47 p.m., the hearing was adjourned.)

CERTIFICATE OF REPORTER

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

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

DAVID A. KASDAN

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