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CHIEF JUSTICE: Good morning, everyone. Did anyone have any housekeeping or other preliminary matters they wanted to raise before we start back up?

MR. UNDERHILL: Not from our end. I have one case to hand up, but I think I'll do that when I get to that point in my submissions, Chief Justice.

CHIEF JUSTICE: Okay. All right. So, you're going to just pick up where you left off.

MR. UNDERHILL: All right. All right.

SUBMISSIONS BY MR. UNDERHILL (Continued):

So, Chief Justice, what I thought I would do with the time I have left this morning is try to structure what I have left to say in my submissions to you under the general framework of the questions and issues that you flagged for me in our initial discussion in the morning, to try to really sort of be as responsive as I can to, I know, what is in your mind in terms of the key issues, and so I'll try to, as I say, structure my submissions this morning that way.

And I want to begin first with an issue that you raised about the implications of a potential opportunity to consult later. You know, when a particular measure comes along after this CCFIPPA has

been ratified and that sort of scenario. And what are the implications of that, what does it mean for a duty to consult now?

And to address that issue, I think it would be quite helpful to go through the most recent *Dene Tha'* case that was handed down this week. So that was handed up loose yesterday, if you can find that. I referred to it a couple of times during the course of my submissions yesterday.

CHIEF JUSTICE: Mm-hmm. I have it.

MR. UNDERHILL: And so you may recall from our discussions, we never -- I don't think we dove into it yesterday, but as I say I referred to it a few times, and you may recall that the basic fact pattern is the issue about adequate consultation around the issuance of what I'll just loosely call "fracking tenures". And the bottom line for the decision was that the process of consultation at that -- if I can call it the tenure issuance stage was found to be adequate. There was no actual debate in that case, and we'll go to this in a moment, but there existed a duty to consult and he -- Mr. Justice Grauer made the point of noting that, that no one was arguing that there wasn't some sort of duty to consult. The question was whether or not essentially the content was adequate at that particular stage, recognizing that there was more to come. And so I think there's a few useful principles that can help inform this issue of, you know, if there

are opportunities later, what does that mean.

Again, if I could ask you first just a couple of other points that I think are useful to hit while we're in the case, and the first one is at paragraph 5, and you'll recall I alluded to this in my introduction yesterday. It's about policy versus process.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so if you'll see at the bottom of page 3 of the decision, paragraph 5, for your notes, and I won't repeat it again, but essentially the idea that when you're dealing with these duty to consult cases what you're concerned about is process as opposed to passing judgment on the wisdom of the policy choices that has been made with respect to that particular decision.

Factually I wanted to draw you into paragraphs 13 and 14 on page 7.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: Just to remind you, and again I've touched on this yesterday during my submissions, that the -- essentially what these two paragraphs are saying, with these tenures that are being issued here, this does not, and it's sort of said both in paragraphs 13 and 14 -- re-emphasized, I'm sorry, in 14, that these tenures, as it said in the beginning of paragraph 14, do not authorize the conduct of any exploration or extraction activities. So the point

being -- and he goes on. You'll see, the judge goes on in paragraph 15 and 16 to talk about what's still to come in terms of the specific permits that will be needed to give that authority down the road.

And so the point is, again, there was no contest that despite the fact that these -- the issuance of these tenures weren't actually authorizing anything to happen, it was still conceded there was an obligation to consult.

Just as we're passing through the next reference I want to take you to is the paragraph 108, which begins at the very bottom of page 39.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: And just to remind the Court of the first sentence, that the existence of the duty, which while not an issue in that case, of course is very much an issue here, is a question of law to which no deference is owed.

CHIEF JUSTICE: It’s because it’s a question of constitution, a question of law with a constitutional dimension.

MR. UNDERHILL: Yes. I mean that’s exactly right.

CHIEF JUSTICE: Because not all questions of law are --

MR. UNDERHILL: That’s right. In fact, well, yeah. I mean, as we now know from the new standard of review, in fact the presumption is quite the

opposite. Some questions, most questions of law now from administrative decision makers, assuming they have the requisite expertise, are in fact subject to a reasonableness standard.

CHIEF JUSTICE: Yes, I think the way one of my colleagues -- at least one of the members of the Federal Court of Appeal has characterized it as being four shrinking islands.

MR. UNDERHILL: Yeah. No, that's very apt.

So then I wanted to take you to paragraph 114 on page 41 to really make the point to sort of get at the issue of when there's later consultation -- later opportunities, I'm sorry, for consultation. What does that mean?

CHIEF JUSTICE: Right, and I think so we're clear.

MR. UNDERHILL: Yeah.

CHIEF JUSTICE: I raise the point because that was -- my understanding is that it's a point being made in the respondent's arguments, is that this doesn't change anything. If and when there are activities, then they'll be operating.

MR. UNDERHILL: Right, right, and I think what I'd like to do is take you to paragraph 114 and then particularly 112 to sort of answer that suggestion, because it's important to remind ourselves of why we have consultation at the so-called high level.

I think it's very important to keep this in mind.

So at paragraph 114 Mr. Justice Grauer says:

> "The question before me then is different from that considered in cases such as *Rio Tinto, Haida Nation, and Klahoose First Nation.*"

And of course we're different than this decision in the sense of it's very much in issue whether there is of course a duty to consult prior to the ratification of the CCFIPPA.

> "Those cases make it clear that a duty to consult will arise in relation to strategic higher-level decisions, notwithstanding the existence of later opportunities for consultation in the contemplated process. Thus, in both *Haida Nation* and *Klahoose First Nation,* the Crown could not avoid consultation at the strategic higher-level decision stage by pointing to the existence of subsequent opportunities at the operational stage."

And so just backing up then to paragraph 112 is the reminder of why that is so. And in particular what I wanted to refer to was the passage from *Halalt* that's referenced in paragraph 112 if you see it there, which is also in turn referring to a passage from the *Rio Tinto* decision from the Supreme

Court of Canada. And so at paragraph 132 of the *Halalt* decision from the B.C. Court of Appeal it says as follows:

> "The reason for the concern was articulated by the court in paragraph 47. In such cases, current Crown conduct may constrain the ability of the Crown to respond appropriately in the future. It 'may remove or reduce the Crown's power to ensure that the resources developed in a way that respects aboriginal interests in accordance with the owner…'"

it should be honour, I think,

> "'…of the Crown.' The aboriginal people would thus effectively lose or find diminished their constitutional right to have their interest considered in development decisions."

And so the point which I think you've heard me on with the CCFIPPA is it, you know, sets the stage and introduces these constraints irrevocably for that period of 30 years, and we say very much in the same sense as discussed in *Rio Tinto* at least reduces or alters the Crown's ability or power to ensure that resources are developed in a way that respects aboriginal interest.

CHIEF JUSTICE: Were you reading from a particular paragraph there?

MR. UNDERHILL: I was just

paraphrasing what was -- the quote from *Halalt* at paragraph 132.

CHIEF JUSTICE: Mm-hmm, okay.

MR. UNDERHILL: Briefly I just wanted to address the *Adams Lake* case which is also referred to in Canada because it's another one of these so-called high-level decisions, and Canada refers to it in the course of its argument. And the facts of that case very briefly was whether or not a duty to consult arose from the incorporation of the new municipality. And the simple point I wanted to make about that case was, is that ultimately that case was dismissed. In other words, the First Nation who brought the case lost. But the reason for that – and this is the point I wanted to emphasize – not because no duty to consult was found to exist, but rather the duty had been met.

I'd next like to go to a question we did discuss off and on through the course of the day yesterday, and that is, you know, what could have been different had there been consultation? Or what could be different, going forward, if there is consultation? I know that's a question that's on your mind, and I think to provide the fullest answer I can to that, I'd like to go back to the provisions of the CCFIPPA and look at the way in which the government of Canada has carved out various exceptions to – is I think the way they put it – to give themselves policy space to regulate in those areas. And I think that will be an informative for the

points then that I want to make to you about what could have been done or what could still be done if there is an opportunity for consultation. And so, I think you had it loose, if I recall.

CHIEF JUSTICE: Yes, I have it right here. Mm-hmm.

MR. UNDERHILL: And you have it now.

So the first -- there are a few exceptions in various forms through the course of this treaty, and the first you will find on, I think, your page 54 under -- the first one I wanted to take you to, anyway, is under Article -- sorry. Let me just back up one moment.

Article 10, which we of course looked at yesterday, the expropriation article.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: And it's sub-paragraph (2), the article does not apply -- this article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so again that's one of the carve-outs that is made, is Article 10(2).

And then over the page, at Article 11, they've got some specific language about losses suffered owing to war or other sort of national emergencies or the like and essentially saying that in those sort of cases the foreign investor essentially is -- the only

thing they can really be entitled to under the CCFIPPA is treatment no less favourable than how domestic investors, or any other third -- what they call "third state" investors are treated. So they have again turned their minds to -- well, what happens if these foreign investors suffer these kinds of losses? How are we going to deal with that?

Next is Article 14, on page 58. And you'll see there essentially this is, as you see in paragraph 1:

> "Except as provided in this Article, nothing in this agreement shall apply to taxation measures."

That's page 58, Article 14.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: And you'll see it carries on the page and there is some additional language, but essentially my point for present purposes is again minds have been turned to that they want to deal with taxation measures in a very different way. And I'll say more about that in a moment.

Then next I'd like to take you to Article 33 on page 77. These are the general exceptions to the treaty. Do you have that? And so you'll see there and in the pages that follow there are a number of general exceptions, and I just thought we could highlight a few. The first is an exception for cultural industries, and a number of, you know -- as you'll see, there's a number

of subparagraphs, including, you know, books, magazines, radio communications and so forth.

Article 2 is -- and just for your notes, because it's a complicated topic in itself, Article 2 there, the general exception number 2, if I can call it that, as modeled on Article 20 of GATT. We addressed this just for your notes in paragraph 42 of our reply argument, because it has a very -- it has a very nuanced meaning that would take you too long to take you through. But Article 42 of our reply addresses this quite briefly, and then footnotes the extract which we had neglected to hand up earlier, which we handed up yesterday from the Newcombe and Paradell text. That's a loose we handed up, and so that's footnoted and that addresses that issue of how Articles 33(2) is interpreted, just for your notes. And I should highlight there again, you'll note from the language there's no inclusion of aboriginal rights in that language.

Then if we go over the page you'll see there's again, if I can just say an exception around financial institutions in Article sub (3). Do you see that?

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And to the same effect, there's a monetary and related credit policies, or exchange rate policies are addressed in Article sub (4).

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And then Article sub (5) addresses the security interests. That carries over the page onto page 79.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And then Article 6, you'll see sub (a), for example, addresses cabinet confidences.

The next point I wanted to make is something that I meant -- I didn't give you a reference for and said that I would, in respect of the aboriginal preferences reservation, and again, as with all these things, it's a bit of a web to go through it, but if I can just try to summarize it for you by starting with Annex B-8 on page 83.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so you'll see what that says, in essence there, reserving their right to adopt or maintain any measures that do not conform to the obligations in various articles of the free trade agreement between Canada and the Republic of Peru. And it's, for reasons that I'm sure someone can elucidate, it's in the free trade agreement between Canada and Peru where there is provisions about being able to extend certain preferences to aboriginal people that, of course, then couldn't give rise to claims.

But importantly, just for your notes, Article 8 of the CCFIPPA then says essentially, if I can

say: But that doesn't apply to minimum standard treatment and expropriation. So that's how it works in a nutshell, the aboriginal reservation, if I can call it that. If that's as clear as mud.

CHIEF JUSTICE: Funny wording, isn't it?

MR. UNDERHILL: Yeah, it is.

CHIEF JUSTICE: You know, it doesn't really explicitly say that it's adopting these reservations. It's just referring to them.

MR. UNDERHILL: Yeah.

CHIEF JUSTICE: At least that appears to be --

MR. UNDERHILL: Yeah, and I guess -- sorry?

The next point I want to take you to just again to finish off the various carve outs that have been done in the CCFIPPA, is something we've already covered. I'll just reference it again. It's Annex B-10, of course, and the limiting language that's applied there and we talked about yesterday how, again, aboriginal rights and title are not included in that language. That's Annex B-10 on page 84.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: Yeah. And then lastly, there's Annex D-34 on page 90. And there again you'll see what's said is that decisions taken by Canada under the *Investment Canada Act* about approving

investments are clearly not to be subject, you'll see, to dispute settlement provisions under Article 15 in Part C of this agreement. So again, turning their mind to, well, making sure that those sorts of decisions are essentially protected.

And then China, and this was the subject of -- in subparagraph (2). This is the subject of some there's discussion in the cross-examination transcripts that you may have seen. China is given a similar exception but on a much broader scale. You'll see that a decision by China following a review under the laws, regulations and rules relating to the regulation of foreign investment are not subject to the dispute settlement provisions, and we confirmed under cross-examination laws, regulations and rules are not defined. And so it's, in our respectful submission, at least a much broader carve out for China than Canada.

So again, the reason I took you through those carve outs was to make this point. Canada has turned its mind to that it wants to preserve some kind of space, I think they call it policy space or policy flexibility, to be able to regulate in those areas that we went through. You know, they have provided themselves some limited policy space when it comes to aboriginal peoples. For example, they seemingly could, without facing the specter of claims under the CCFIPPA, give special grants to aboriginal development, for example, without having to give the same sort of grants

to Chinese investors.

But our point to you, Chief Justice, is that this treaty does not create sufficient policy space to protect the lands and resources which are subject to asserted but unproven aboriginal rights and title. You know, in large part because that conflict between the needs and interests of aboriginal people and those interested in developing resources plays out then -- as we've seen from the claims that have been brought, you know, when a foreign investor under NAFTA or one of the other by-lateral investment treaties is frustrated by the inability for some reason or another to be able to -- and is unable to proceed with its development. It generally brings its claim under either, you know, indirect expropriation or fair and equitable treatment. And so the point is, you know, that we've been trying to urge on you over the last day and a bit is, we have in Canada right now the very real tension between the aboriginal interests, of course, and the development interests of third parties. And so, our fundamental submission to you is that this treaty does not give Canada the necessary policy space to be able to regulate in a way that we say it ought to be, to properly protect and accommodate aboriginal rights and title.

And so, we say, therefore, there ought to be consultation to address that issue. And so, what could happen, was really what your question -- or what could have happened had there been a process. And so

I've set the table to have, you know, some discussion about that. How could we create more policy space in this treaty? For example, to do exactly that.

Obviously the starting point is, there could be a much more general reservation or exception for aboriginal peoples. And importantly the protection or accommodation of their aboriginal rights and title.

And we've seen parenthetically, that's why I took you through the general exceptions, you know, let's remember that those carve-outs in Article 33 are general exceptions to everything in the treaty. So it's not an answer to say, "Well, we can't…." Canada may say, "Well, we can't do -- you know, we can't do certain exceptions to fair and equitable treatment in expropriation." Well, you've done that in Article 33 already. So why can't there be an additional article in Article 33 dealing with aboriginal peoples and their rights and interests?

You know, one can also envision, you know, a broader section on First Nations that talks about, importantly, the duty to consult, right? And references the fact that foreign investors have to address this issue when doing business in Canada. You know, one of the interesting things we know from the case law is that even traditional decisions around various issues can give rise to claims. That was the *Eli Lily* claim that's recently come up in the intellectual property field. There is a recent claim

that's been filed that's in the materials. You may have seen that in going through them.

And my point is, the duty to consult is not the most transparent legal principle there is out there. It's -- you know, as you know, it's evolving and the principles are very flexible, in order to meet the unique facts of the cases that come up. And it is not inconceivable that even a court decision around the duty to consult may give rise to a claim. But more importantly, what we say, in our respectful submission, is that Canada should make clear its constitutional obligations to aboriginal peoples in this investment treaty. So that the Chinese investors who, as I'll talk about a little bit later, are principally state-owned, have notice of the unique constitutional relationship between the Crown and aboriginal peoples in this country.

Could there be a provision that -- could there be a carve out for the laws of First Nations? Of First Nations governments? That their laws and measures are not covered by the CCFIPPA or indeed other future BITs down the road, or other FIPPAs down the road.

The other interesting question to think about, and we say it might be the subject of consultation, is there anything that can be done with the modern land claims agreements? And we talked about this at some length yesterday in the context of what I call our treaty argument. You know, at first glance it

wouldn't seem so, because of course as we talked about yesterday, and this is the nub of our argument, Canada has to require its sub-national governments to abide by international law. But is there some space to deal with these land claims agreements? As I say, at first glance it would seem difficult given international law, but it properly might be the subject of consultation if there's something that can be done there. Because, you know, as the submission to you yesterday is Canada, in our submission, has to say to First Nations, "Unless you're prepared to agree to these provisions, we can't negotiate a treaty with you and give you self-government powers because you have to be constrained by our international legal obligations, not just in the context of CCFIPPA but otherwise." And that's why we saw it so consistently present in the final agreements and of course the introductory language in the agreements in principle.

There is a provision in the CCFIPPA about the ability of foreign investors to realize on Canadian assets abroad to satisfy, you know, a successful claim. Could there be a carve out, for example, for First Nations assets that are abroad such that they couldn't be realized as part of that?

And so the point is, in a nutshell, to answer your question about what could be done -- and again, some of this could be done perhaps outside of the treaty by way of diplomatic letter prior to ratification

if it is said to be impossible to now reopen the treaty. But the nub of my point is this. Canada has in the CCFIPPA very clearly carved out space for itself in a variety of areas. And so in principle there would seem to be nothing to suggest that a similar carve out could not be done for aboriginal rights and title.

The next issue or question that I wanted to address that came up yesterday was dealing with the honour of the Crown and the fact that here, Canada very clearly has taken the position and does not believe it has any sort of obligation to consult First Nations, any First Nations, is clear from the evidence with respect to the ratification of the CCFIPPA. And I said to you yesterday, of course, it's the court's task to objectively determine whether or not the honour of the Crown does in fact require a consultation.

But I wanted to make two points about that. In so finding, in other words if the court were to find in the applicant's favour here and determine that there was an obligation to consult and that it had obviously been unfulfilled, that is not passing judgment in a sense of saying that the Crown has acted in bad faith, you know, dishonorably in that sense of the word. It is simply saying, no, I think, you know, this is what the constitution requires, in other words, what the constitutional principle of the honour of the Crown requires. And so in so doing, in our respectful submission at least, it in no way impugns in that sort

of sense the behaviour of Canada to date. The honour of the Crown is not about bad faith in that sense, at least in the context of this case.

And what I wanted to make clear to you that came out in the cross-examination of Mr. MacKay was this, and I'll give you the reference for it. Mr. MacKay confirmed in cross that Canada made no assessment of the following matters:

(a) the potential adverse impacts of the CCFIPPA on aboriginal rights and title;

(b) the implications of Chinese investment in land and resources, which might be subject to aboriginal rights and title; and then

(c) how First Nations governance might be affected by the CCFIPPA.

CHIEF JUSTICE: Sorry, what was that last one?

MR. UNDERHILL: How First Nations governance might be affected by the CCFIPPA. And the citations for that for your notes is the cross-examination of Mr. MacKay, Volume 2, pages 472 to 476 of the record.

And so the point, and you'll see when you look at it, that Mr. MacKay said, "Well, you know, our position was it doesn't have any effect, we don't think it does." But in our respectful submission the detailed analysis of what was required was not done, and that's an important point to bear in mind when you do your own

assessment of this issue.

I next wanted to try to squarely again re-visit the rubber hitting the road, if I might. And to do that I wanted to hand up, as I said, a new case, which I have promptly managed to put away. Which I've handed up to my friends this morning. And you'll see this is a 2011 decision out of the Supreme Court of Northwest Territories involving the *Tlicho Government and the Mackenzie Valley Environmental Impact Review Board and Fortune Minerals Limited*. The name "Tlicho" may be familiar to you from your review of the materials. Their land claims agreement, which you'll see referenced in this case and I'll go to in a moment, is one of the -- or an extract from it is one of the attachments to Ms. Sayers' affidavit, and we're going to go there in a moment and I'll give you the cite when we get there obviously.

Now, the facts of this case and its outcome is not the reason I'm taking you to this case. Let me be clear. But it struck us that this might be a useful example of how the rubber might hit the road in terms of what Tlicho was doing here, and I'd like to talk to you about how things might play out under the CCFIPPA with this kind of example in mind.

So, if you could turn into the case, just at page 1, paragraph 1, under the heading "Reasons for Judgment", the case in essence involved this. The company Fortune Minerals was looking to develop a mine

and mill on a claimed block on lands owned by the Tlicho government, who had signed, of course, the final agreement and that's why they have lands. And the location of the mine was also surrounded by Tlicho lands and there was a necessity to put a road through those surrounding lands to be able to, of course, properly extract -- you know, have an access to the mineral extraction.

The Tlicho, and you'll see this at paragraph -- well, first of all at paragraph 5 you'll see just a reference to the Tlicho government having been established and getting its jurisdiction from the Tlicho lands protection law. And I should have referenced paragraph 4 as well, just that the -- again, they take their lands from Chapter 18 of the agreement there, you'll see at paragraph 4.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: Importantly, in paragraph 6 you'll see that subsection 7(4) of the Tlicho Lands Protection Law, which is referenced in paragraph 5, declares a moratorium on development on Tlicho lands until regulations governing their land use plan have been enacted. And so again, the facts of this case and the issue was whether or not the company was applying for some various licences and permits, the board wanted to undertake an EA process with respect to those applications, and the Tlicho were saying, "No, you can't do that because we've got this moratorium and they

can't have their road and so it's all premature to be doing an EA."

And the court ultimately said, "Well, on a reasonableness standard we think maybe it's okay to go ahead with an EA." But that's neither here nor there for our present purposes.

What I wanted to focus in on is the fact that this is a First Nations' government who has issued the type of moratorium that we talked about yesterday. Of course, we were talking about the fracking moratorium by Quebec and the Ontario's offshore wind power developed moratorium, but here is

A First Nation's government exercising self-government powers under a final agreement to issue a moratorium on development.

And so it is not, in our respectful submission, at all difficult to envision a scenario where that moratorium could give rise, in the right circumstances, if it had, you know, the requisite effect to constitute essentially indirect expropriation, or it may be claimed to be a violation of fair and equitable treatment. And again, you know, I think what we can take away from the various cases, including *Glamis Gold*, you know, if that moratorium had ultimately affected -- essentially making the mine untenable, that it couldn't proceed, it's not difficult at all, with respect, to envision a claim proceeding.

But then what, is the question, to finish

this thought. And the "Then what?" comes from the Tlicho land final agreement. So I'd like to take you there and it is found as Exhibit L to Ms. Sayers's affidavit, which is in Volume 1 of the applicant's motion record.

CHIEF JUSTICE: What page?

MR. UNDERHILL: That's page 275 of the record, number at the top.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: So you'll see there is a number of -- table of contents is quite lengthy, and when we get into the international legal obligations section on page 283.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: So I just -- I wanted to point out, and this applies, frankly, generally to all the agreements we look at. The definition of "international treaty" is not particularly helpful in terms of obviously answering the question you're trying to deal with, which is, you know, are the obligations under the CCFIPPA an international legal obligation, as that language is often used. But nonetheless, there it is. So, what I want to take you to first is 7.13.2. First of all:

> "Prior to consenting to be bound by international treaty that may affect a right of the Tlicho government, the Tlicho First Nation or a Tlicho citizen, flowing from the

agreement, the government of Canada shall provide an opportunity for the Tlicho government to make its views known with respect to international treaty either separately or through a forum."

So that's a slight variation, you will recall, from the language we saw in some other agreements that talked about consultation. Here, it's making its views known.

But importantly again note that is either separately or through a forum. In other words, as we talked about at some length yesterday, a broader process is clearly contemplated here.

Then, carrying on into 7.13.3. "Where the government…" Oh, sorry.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: "Where the government of Canada informs the Tlicho government that it considers that a law or other exercise of power of the Tlicho government causes Canada to be unable to perform an international legal obligation, the Tlicho government and the government of Canada shall discuss remedial measures to enable Canada to perform the international legal obligation.

Subject to 7.13.4, the Tlicho government shall remedy the law or other exercise of power to the extent necessary to enable Canada to perform the international legal

obligation."

And so at 7.13.4, you'll see, is essentially this dispute resolution mechanism, where they submit themselves to arbitration. And the arbitrator has to decide essentially between Canada, who is right and who is wrong. And then so if we just carry down to the bottom half of the paragraph, about -- let's see, one, two, three, four, five, six lines up. "If the arbitrator, having taken into account…" Do you see that?

CHIEF JUSTICE: Yes.

MR. UNDERHILL: "…all relevant considerations including any reservations and exceptions available to Canada…"

Hard to think they weren't talking about the CCFIPPA here, isn't it?

"…determined that the Tlicho government law or other exercise of power causes Canada to be unable to perform the international legal obligation. The Tlicho government shall remedy the law or other exercise of power to enable Canada to perform the international legal obligation."

And so the point then, Chief Justice, is this: The moratorium, Canada may come to the Tlicho and say, "Well look, this moratorium is putting us offside," or if the arbitrator has to decide the issue there'll be a finding of the moratorium, puts Canada offside, and

Canada is entitled to come to the Tlicho and say, "You have to deal with this problem." That may mean a number of things. You know, the moratorium has go to go because, you know, you know, how they remedy the issue, you know, seems to me it's open to a variety of options. They might say, well, you know, one of the options is if you want to keep your moratorium you're going to have to pay any claim that comes. That's the remedial measure.

And so in our respectful submission -- oh, sorry, sorry, sorry. My colleague pointed out that I wanted to make one more point over the page before finishing, 7.13.5:

> "The government of Canada shall consult the Tlicho government and the development of positions taken by Canada before an international tribunal where a law or other exercise of power of the Tlicho government has given rise to an issue concerning the perfromance of an international legal obligation of Canada. Canada's positions before the international tribunal shall take into account the commitment of the parties to the integrity of this agreement."

So that's an interesting provision that Canada will actually talk to the Tlicho government about the positions it might take, for example, before an investor state arbitration panel.

And carrying on at 7.13.6, you'll see

there:

> "What can the tribunal do? If there is a finding of an international tribunal of non-performance of international legal obligation of Canada attributable to a law or other exercise of power of the Tlicho government, the Tlicho government shall, at the request of the government of Canada, remedy the law or action to enable Canada to perform the international legal obligation consistent with the compliance of Canada."

And so that leads me to a second point that can be made here. What we see here, and we talked about this yesterday, this idea of these different decision makers -- remember, that arose out of the duty to consult jurisprudence. What this provides you, Chief Justice, in our submission at least, is concrete example of a different decision maker, that is in the scenario that I'm painting for you the international investor state arbitration panel, actually passing judgment on, if you would, the Tlicho law and determining whether or not it gives rise to a claim of compensation. And would the result being that the Tlicho government then has to take certain actions, is required to under this agreement, under this final agreement to take actions to remedy that result?

And so we say that is a very concrete and real potential example of the change that is coming

about that triggers the duty to consult as a result of the ratification of the CCFIPPA.

And so when I talked about -- you remember I talked at some length about this idea of these different decision makers, these new set of rules. This, in our respectful submission, is a clear illustration of how it could play out in a very real way.

Now, that segues into another point I wanted to make about the different decision makers. You recall -- you heard from me yesterday, at least in passing, talked about the fact that we do have these new investor state arbitration panels making decisions, in this case specifically about, you know, a measure being passed by a First Nations' government, but more generally trying to wrestle with the difficult fact specific questions about when we cross the line between legitimate regulation into indirect expropriation, you'll recall, from that sphere. And similarly, wrestling with the broad questions of when we have, you know -- when we violate fair and equitable treatment, legitimate expectations. Those very, very difficult questions are being decided by this new tribunal, and I mention, of course, Professor Van Harten's point that these are *ad hoc* tribunals without the trappings of judicial independence.

CHIEF JUSTICE: What's he getting at there? Is he getting at the fact that they may be

influenced by the desire to get a future retainer to ruling a certain way or what exactly is it?

MR. UNDERHILL: Well, let's -- what I thought I would do, actually, is take you to I think the very article that I hope you will find very helpful, that addresses this issue as well, because this is not a concern that is unique in any way, shape or form to Professor Van Harten. And so in Volume -- so I'll ask you to turn up, and I can address your question I think more fully, Volume 5, tab 35. And you'll see it's an article from the Alberta Law Review, 2008-2009 by a professor from McGill University.

You'll see from the title, this is actually an interesting take because it's addressing, instead of, you know, the environment or aboriginal rights here, we're talking about the intersection between international investment arbitration and human rights. And so he's discussing the potential implications and the impacts of these investment treaties on human rights' protection. And concludes ultimately, his thesis I think is that the investment arbitration system, if you would, lacks sufficient transparency and protection to -- essentially to protect minority rights, importantly human rights.

And this point about *ad hoc* arbitrations is addressed at page 988 of the article.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: He says in the second

full paragraph, beginning "Investment arbitration", do you have that?

CHIEF JUSTICE: Yes.

MR. UNDERHILL: "Investment arbitration also borrows from the judiciary model found in international commercial arbitration. Because international commercial arbitration is designed to resolve disputes arising from a contractual relationship in which either party can initiate a claim against the other, arbitrators to these disputes are appointed on a case-by-case basis. Therefore, arbitrators in international commercial arbitration and consequently also in investment arbitration do not have tenure or financial security. Instead they must rely on arbitrary institutions and the parties themselves for re-appointment. They are also not prohibited from acting as both arbitrator and advocate in different cases. Arbitrators thus have a strong interest in ensuring the continued viability of investment arbitration, which is supported by their often broad interpretation of investment treaty obligations."

And so the point that I think Professor Choudhury and Professor Van Harten and there are

certainly a number of other commentators. Mr. Thomas in an article that I'll touch on a little bit later also noted the *ad hoc* nature of these arbitration panels. The -- you need to -- to understand the problem, it has to be coupled with the fat that there is very limited judicial review of these decisions. And you'll recall I took you through the -- I took you through the *Metalclad* case yesterday and also you'll see the *S. D. Myers* judicial review decision referenced in our materials. And the point is that when there is this limited availability of judicial review, decisions taken by panels without the trappings of judicial independence which may therefore be subject to other influences, and have interests at play, can have profound consequences. And this is a matter that's addressed, as I say, in a number of articles. And I say including Mr. Thomas's article which I'd like to go to in a moment. But before I do that, I wanted to just carry on to the next paragraph of Professor Choudhury's article, because I think you might find this sort of again informative in terms of your own analysis of what Canada is committing to. Because we're here, I thought it might be interesting to go to.

So at the top of 989.

> Interesting, the parallels between international commercial arbitration and investment arbitration end when it comes to consenting to the process. International

commercial arbitration requires both parties' consent prior to its use, while the investment arbitration process can be initiated solely at the investor's request. This is because investment treaties contain states' general consent for the use of arbitration to all future investment disputes. As the consent is provided *ex ante*, the opportunity to arbitrate is extended to a wide variety of potential claimants whose identity is unknown at the time consent is given, and for a broad range of potential disputes, the nature of which is also unknown at the time of consent. Thus, whereas a state party to an international commercial arbitration contractually consents with a known individual or business, to submit their dispute to arbitration, state parties to investment arbitration are notified with whom they will be resolving the dispute only after the investor has initiated his or her claim."

So that's another interesting way, I think, of looking at what states like Canada do when they commit themselves to these international investment arbitration provisions. And what I'm honing in on is this notion of *ex ante* consent, that you are consenting to be bound by these *ad hoc* panels to a group of -- at the time you

consent, an unknown group of potential claimants. Which is very different than a commitment to consent, as the professor points out, to commercial arbitration.

And remember that they are consenting on behalf of all Canadians, including of course importantly for this case, First Nations.

And so that brings me to the follow-on point, and it's to your question. Well, you know, what is it about this concern with the *ad hoc* tribunals and why does -- you know, why does that matter? In a sense. And what are the -- you know, what are the practical implications of that? And I want to try to illustrate to you that they're very real practical implications about that. And you've heard me refer to the so-called "chilling" effect from time to time yesterday, and this is another issue that Professor Choudhury visits. And I wanted to take you through that to explain -- and again, I'll take you to Mr. Thomas's comments on this too, that there are actually -- you know, Thomas himself concedes in his academic writing very real public policy ramifications to this. And so let me start by taking you to what Professor Choudhury has to say and that's carrying on the article at page 995, and it's the second full paragraph, or sorry, second full paragraph just above the heading, the sub-heading "(1) Expropriation" and it reads as follows:

> "The strength of expropriation and fair and equitable treatment obligations…"

which we of course talked about at some length yesterday afternoon,

> "…is also reflected in their ability to create a 'chilling effect' on government regulatory capacity…"

citing, you'll see at footnote 86, a United Nations Conference on Trade and Development Report from 2003. It states:

> "Fearing that a regulation could be challenged by a foreign investor and then subject to a multi-million-dollar damage award under these obligations may be discouraged from enacting regulations that enforce human rights obligations against foreign investors. In addition, because these obligations are drafted in broad terms, and the lack of a precedent system in investment arbitration prevents a harmonious interpretation of these obligations, the uncertainty associated with the scope of the obligations may also negatively impact on state initiatives to regulate human rights."

CHIEF JUSTICE: So you were reading that last paragraph on page 995 that goes over to 996?

MR. UNDERHILL: No, sir, I was reading the paragraph above the heading.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: I'm sorry, we weren't

with each other.

CHIEF JUSTICE: Yeah, no, that's okay, I've got it. Okay.

MR. UNDERHILL: And then that thought again is picked up on page 998.

CHIEF JUSTICE: Okay. Okay.

MR. UNDERHILL: And again I'm just above the heading "The Failure of Investment Arbitration".

CHIEF JUSTICE: Okay.

MR. UNDERHILL: And this is referencing to *Tecmed* which I think you've probably heard some references to decision, and their approach to fair and equitable treatment, and he says in that last paragraph before the heading:

> "However, if fair and equitable treatment is interpreted in accordancde with the reasoning in *Tecmed* and the cases that have followed it, states' regulatory powers will be strictly constrained. Democratic states will likely not be able to provide an investor with 'any and all rules and regulations' that will govern its investments. As the…tribunal acknowledged, laws will evolve over time and states have to be able to react to govern new developments, particularly in the area of human rights. A broad interpretation of the fair and equitable treatment may consequently

constrain this governmental function."

And so the same point is made in the context of then talking about indigenous peoples in the context of these investment trade arbitrations in the article that immediately follows at tab 36 from the *Wisconsin International Law Journal.* And the thesis of this article is essentially that -- and you'll see, you can take it from me, the typed, the capitalized, some of the capitalized type in the Lexus Nexus summary you'll see at the beginning there. Essentially that, you know, the thesis is these investment treaties do have impacts on indigenous peoples' rights of sovereignty and self-determination, and the punch line is that they should participate in the debate and the development of these international treaties, that they are affected and they should be participating because they have impacts on their rights, particularly their rights of self-determination.

And the so-called chilling effect or the effect on the abilities of governments to regulate is picked up on page 9 of this article and it's under the heading "Investment Rights and Indigenous Peoples' Sovereignty".

CHIEF JUSTICE: Yes.

MR. UNDERHILL: The author says this, and this is again talking about Chapter 11, I'm sorry, of NAFTA, of course:

"The implications of Chapter 11's effect on

national sovereignty raised concerns for North American indigenous peoples and other local governments. Investment provisions change the structure of power both internationally and nationally. By agreeing to recognize investors' protections, national governments inherently restrict their ability to set public policy. Although the arbitral awards cannot mandate a change in the regulatory system, the damages awarded or the threat of damages affect government decisions. Furthermore under the NAFTA model, national governments agree to take all necessary measures to give effect to the treaty including the supervising observance by sub-national governments."

And carrying on the next paragraph:

"The extension of investment agreement obligations to local governments restricts local ability to set policy. Although the national government is the party held liable, national governments have many carrots and sticks with which to preempt local laws or bend local governments to their will. The question has been raised whether national governments would be compelled to sue states when states' actions are inconsistent with NAFTA. Investors' rights may affect

indigenous peoples to a greater degree than other sub-national groups because the boundaries of their sovereignty remain disputed."

And of course that applies equally in the Canadian context where we're just trying to now deal with those boundaries.

"Nation-states may avoid confrontations with investors by refusing to recognize indigenous peoples' rights, or by establishing the global rules as a backdrop to any establishment of indigenous peoples' rights."

Now, I want to make clear at this point, that this is not just the subject of academic musings, which may go through your mind when you read these various articles. And we know this is a very real, you know, practical concern from the conduct of other countries and what they have done. And what I'm referring to is the public policy decision by various countries, and I'm going to focus on Australia for purposes of this submission, who have decided to move away from investor state arbitration, and we'll look at the reasons why Australia has done that to illustrate that this is not simply the musings of closeted academics. This is very real public policy concern.

And so the easiest way to do that, I think, is I'll ask you to go to another academic article, but that describes what Australia has done.

And that's to be found at tab 44, again staying in Volume 5.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so you'll see the title, "Choosing Domestic Courts Over Investor State Arbitration, Australia's Repudiation of the Status Quo". This author is in fact quite critical of Australia's decision to move away from investor state arbitration, but it's useful -- it's probably the best place where we can sort of get a better understanding of why Australia did what it did, which I think should properly inform your analysis here.

So just the introduction I think is helpful, just to cover off the first paragraph.

> "Many countries have lately sought to reassess the efficacy of international investment agreements and investment arbitration in particular. Nicaragua and Venezula have both signaled their intention to terminate existing bi-lateral investment treaties, including provisions for investment arbitration. Ecuador has denounced the international centre for Settlement of investment disputes, the primary source of investment arbitrations. Romania attempted to withdraw from the Swedish/Romanian bi-lateral investment treaty only to then be subject to investment arbitration award that

purported to bind it irrevocably to that agreement. China traditionally restricted investor state provisions in bi-lateral investment treaties until its more recent emergence as a leading capital exporter, while the Phillipines negotiated to exclude investment arbitration in its free trade treaty with Japan in 2006. One result is that bi-lateral investment agreements themselves are under attack, although countries like China have conluded a significant number in the last decade. Another result is that investment arbitration is not assured as the persuasive median through which investor state disputes will be resolved in the future."

And then over the page at 981, there is the discussion of what Australia has done with their new policy. And so at the top of the page, begins with "As a result".

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: "As a result, while the Australian government's position towards the effects of ISA decisions is more moderate than the stance taken by South American states, Australia is the first developed state to openly indicate that it will no longer agree to the adoption of

arbitration within its bi-lateral and regional trade agreements. The effect of this policy shift is that, henceforth, the Australian government may negotiate that investment disputes with foreign investors be heard by domestic courts of law rather than being resolved by international investment arbitration. In a trade policy statement released on 12 April 2011, (hereinafter referred to as the "Policy") the Australian government confirmed it would no longer negotiate treaty protections that would confer greater legal rights on foreign businesses than those available to domestic businesses or that would 'constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. This policy shift by Australia against ISA is not entirely unexpected. There is no provision for international state arbitration in the Australian/United States free trade agreement. In addition, some of Australia's free trade treaties preceding its 2011 policy statement against ISA defined protected investments narrowly. As a result, the change in Australia's policy was not a

bolt from the blue. What is distinctive about the policy, however, is the fact that it is not Australia's official policy as distinct from its preferred practice. The policy also enshrines Australia's view that domestic courts, not investment tribunals, are the appropriate bodies to resolve investment disputes between domestic states and foreign investors, in the same manner as domestic courts decide 'other' domestic disputes. The inference arising from this policy is that a domestic court can protect the rights of foreign investors while preventing them from receiving investment benefits beyond those provided to domestic investors."

And just to carry on:

"It is also presumed that if investment arbitration privileges foreign investors, it undermines the national interest and if it detracts from the national interest, local courts ought to replace it."

And so the question is why did this happen and that is addressed under -- over at page 1750 of the record, 984 of the article.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: Under the heading, “Background, The APC Report”.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And you'll see there, "A primary consideration…" Do you have that?

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: "…impelling the Australian government's policy stance is domestic public policy. Its central concern is that foreign investors, notably foreign drug companies, will invoke investment arbitration to challenge Australia's sovereignty and public interest in regulating industrial relations, public health, safety, and the environment. These concerns are understandable. Foreign drug companies are increasingly likely to challenge the Australian government's restrictions on access to, and the price of, foreign manufactured drugs such as under the pharmaceutical benefits scheme. A related concern is a challenge to the Australian law requiring the plain packaging of tobacco products. Philip Morris has already initiated investment arbitration against the Republic of Uruguay under the Switzerland/Uruguay BIT and has since launched a challenge against Australia."

And he goes on to say, well, you know, there may also be more doubts about in fact the merits of this more

generally.

But the point, Chief Justice, is this: Australia has made the policy decision to move away from investor/state arbitration. Because of concerns about the -- essentially in a nutshell its ability -- potential impact on its ability to regulate in the public interest as it sees fit.

And so this is, in our respectful submission, a very real issue insofar as you have a significant developed country making its own determination that these investor/state arbitration provisions restrain it in its ability to regulate. And so, as I say, it's not just the views of some academics, it is a view held by at least Australians, and as we saw from the introduction other countries.

CHIEF JUSTICE: But is the point more that there is uncertainty in that regard? Because of the nature of this investor/state arbitration? Because obviously any time you enter into an agreement, it binds you, and it limits your ability to regulate in the public interest. But is the concern more that there is uncertainty in what the outcomes are going to be? So you can agree on one thing and find yourself on the receiving end of decisions that imply much more liberal interpretations. Is that what the point is?

MR. UNDERHILL: And it's that uncertainty, if you would, that has led a country like Australia to say, "You know, we don't like that

uncertainty. We don't like that risk that we're taking when we sign up for investor/state arbitration." Right? That we're going to have these uncertain outcomes that may well affect practically what we can do to regulate in the public interest. Right? We don't like that risk.

And again, to be crystal-clear about this, this is not to suggest that Canada can't make the public policy choice that it wants to take on that risk.

CHIEF JUSTICE: Right.

MR. UNDERHILL: And take on that uncertainty. It's free to do that. But, to the extent that it does so, we say it has to consult with First Nations, because that risk is essentially -- and the uncertainty which in turn impacts on its ability to regulate in the public interest, and importantly here to regulate, to protect or accommodate aboriginal rights and title, triggers the duty to consult.

And I referred to this a couple times yesterday. Again, to try to bring this home, to make it real, sort of an answer to this whole thing, it's speculative, I just -- to appreciate what Canada does when considering the national legal options. And I referred to the cross-examination of Mr. MacKay on a couple of occasions. I'd like to go there to have a look at what Mr. MacKay had to say.

And so his cross-examination is found in Volume 2, although I see I've managed to lose my page

reference that I wanted to take you to. Just give me one moment. I'm sorry, Chief Justice. Yes, okay, I have it.

So, I'll take you first to pages 42 to 43. That's the number of the record. And so beginning at line 26, there's a little dispute between counsel about making sure we're getting the personal knowledge of the affiant. But at line 26 I asked this question.

> "Well, I'm just asking about the personal knowledge, and I, of course, don't expect him to give me evidence beyond his personal knowledge.
>
> Q Sir, I'm just asking to your personal knowledge, are risk analyses done when implementing the particular policy measure or indeed a new regulator measure domestically that looks at the international obligations that are entered into in the various FIPPAs that you've described?
>
> A Yes, there is. When a regulatory department undertakes the development of a new regulation, they are strongly advised to consult with our trade law bureau to ensure that the obligation is consistent with the international obligations of -- or the international trade investment obligations. And I do know from my participation in such exercises that the review very quickly goes

to the specific obligations of the FIPPA. So the regulation, if it does not reserve with respect to discriminatory policy flexibility than it has to be -- they have to ensure it's designed in such a way so as not to discriminate against foreign investors. So there is a due diligence assessment done.

Q And to your knowledge, again, appreciating you can't speak to everything that goes on, but to your knowledge, is Canada involved in, similarly, sort of due dilliguence, if you would, or risk analysis, with decisions being taken by sub-national governments? And we'll start with the province, for example. Is there any sort of consultation that goes on, any due diligence that Canada is involved in, when a province might be taking a new measure?

A The provinces, in areas where they have jurisdiction, would be advised to do so. I can't say, though. I don't have knowledge whether -- how frequently that is done. I have not been contacted by the province myself, but that's not to say that the provinces don't contact our trade law bureau."

And he goes on to say that he doesn't know exactly about contact between the trade law bureau and the provinces.

And then we came back to this in the specific context of aboriginal rights and title. At page 537 of the record. And so beginning at line 4, the question at line 4.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: "Q Well, let me ask you the question more generally, then. We touched on this and talked about it, and I think your answer to my question was, Canada does do some due diligence when enacting new measures in terms of looking at its international legal obligations. And I take it that from time to time Canada's legal obligations may be a factor in terms of whether the measure is enacted, or what that measure looks like. Is that fair?

A Yes. When regulatory departments enact a new measure, when they do their due diligence by reviewing their international obligations. Yes.

Q And so therefore it wouldn't be unreasonable to me to suggest, would it, that when we talk about the specifics of the measure taken to accommodate aboriginal peoples, for example, to a similar extent that Canada's international legal obligations under the Canada/China FIPPA, or indeed under NAFTA, might be a factor that's taken into

account, correct? When looking at that accommodation measure?

A If they're taking measures they should be looking at Canada's international legal obligations."

And then of course:

"I don't see anything in the FIPPA that would cause a problem for them, but if they were doing their due diligence, yes, they should."

And so the point of that exercise, Chief Justice -- I'm sorry, I stepped away from the mike -- the point of that exercise is to illustrate the point that, in a very real way, Canada has to look at its international legal obligations – and we know this must be so – when enacting domestic measures, including of course, as I took Mr. MacKay to, measures involving the accommodation of aboriginal rights and title. And if they are doing that, which they must do, in our submission, then there must in turn be a requirement to consult aboriginal peoples about those international legal obligations before they're committed to.

CHIEF JUSTICE: Even if he thinks, as he says here, that he doesn't see anything in the FIPPA that would cause --

MR. UNDERHILL: Yeah, and we talked about this before. That is their position, as you say, is that they don't believe that the provisions of the CCFIPPA, or NAFTA, or presumably any other future

bilateral investment treaty have any potential impact on aboriginal rights and title. And that's your task to decide whether that's right or wrong.

CHIEF JUSTICE: Is there like any kind of a -- this might be the wrong term, but is there any kind of a *mens rea* component to this honour of the Crown concept? Like you know, if they're sitting here thinking genuinely to themselves there's nothing here that's going to adversely impact on them, is there nevertheless this honour of the Crown that kicks in and says, well, you know, even though you thought you were being honourable, you weren't, and so you --

MR. UNDERHILL: Well, and then, and let me say this. Again, let's go back to the Crown, again. We're not suggesting that Canada, you know, that it's bad faith to take that position and that's what they thought, because they --

CHIEF JUSTICE: No, I understand that.

MR. UNDERHILL: They generally believed that. But let's remember what the honour of the Crown is about, right? It's aimed at, of course, reconciliation and making sure aboriginal interests are taken into account when government is taking any sort of decision. And the fact that -- and I would just remind you again that, you know, Canada didn't do any analysis of potential impacts. It's just taken the very strict position that, you know, these international trade agreements don't affect aboriginal peoples. And of

course my job is try to convince you that's not so. But there is no *mens rea* component. The question is, does reconciliation require taking into account aboriginal concerns and interests when you're entering into these international legal obligations? And for all the reasons I have tried to explain, we say that is so. And simply because Canada didn't think so isn't really an answer and isn't a factor in your own analysis that you have to come to, based on the law.

Now, another factor that I think needs to go into the analysis of risk and the nature of the potential impact of Canada ratifying this particular investment treaty is the nature of the investor here that we're dealing with. You know, NAFTA of course, which we acknowledge involves a much larger amount of foreign investment on the part of the U.S., is nonetheless -- you know, what we're talking about with the U.S. investors are a variety of companies, private companies who may bring claims on essentially a one-off basis when a particular measure may impact on their own business.

In our submission, it is a factor to be taken into account that here, with the Canada/China FIPPA, you are dealing with, in the main, state-owned foreign investment. And so there is a centralized national interest behind that investment and we talked about this yesterday, of course, with the well-known interest by China in the resource sector in this

country.

That centralized national interest may well affect how Canada -- or, sorry, how China -- and its state-owned enterprises behaves under the CCFIPPA, and the nature of claims it may bring, and the strategies it may employ to enforce its national interest. And in saying that, I don't suggest there is anything nefarious about that. I say that's what one would expect from China, who has -- as we just saw from the Trackman article, is busy -- has been busy over the last ten years because it's now in this aggressive capital exporter exposition, signing these bilateral investment treaties, because it has a really strong national interest in finding, among other things, resources for its growing population.

And so the point is simple. I guess it's not determinative, but it's a factor that has to be taken into account in the risk analysis that you have the state-owned enterprises and they may behave in a very different way than the U.S. investors under NAFTA. That's simply the point.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: Now, what I would like to do is make one more point on this general topic, and then with your leave take the break. I have a few more points to deal with, sort of more in the nature of clean-up, after the break. And then I'll see -- talk to my colleague about whether I have any other points that

I also wish to make. But I certainly expect to finish not very long after the morning break, if that's acceptable to you.

CHIEF JUSTICE: Well, assuming it's consistent with your agreement. If I recall correctly, you were going to go until around now.

MR. UNDERHILL: Mm-hmm.

CHIEF JUSTICE: So, I guess obviously any time over and above that that you take would have to maybe come off at the back end, so that any time they need comes off at the front end of your reply.

MR. UNDERHILL: Fair enough.

CHIEF JUSTICE: All right? Is that --

MR. TIMBERG: That's agreeable.

MR. UNDERHILL: So the last point I wanted to make before the break is to refer to this theme of -- you know, what I think you had aptly termed the risk analysis of ratifying FIPPA. And just to visit, I've alluded to Mr. Thomas's comments on this in some of his writing. And to do that, again, if you've still got Volume 5 at hand, we're going to just try and go to tab 43.

And so this is an article, as you'll see from its very title, responding to another article all to do with the *Metalclad* judicial review application that we talked about yesterday, and the standard of review, and so forth. And the passage that I wanted to take you to, because I think it's informative on this

issue, is found at paragraph -- sorry, paragraph -- page 446. That's 1726 of the record.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: So again, in the context of this article, what we're talking about here is the appropriate standard of review for these investor/state arbitration panels. And of course in the context of the *Metalclad* decision itself, and so that's the context just to help you through the paragraph I'm going to take you to. And it's the -- I guess the second full paragraph beginning, "One of the reasons for…".

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: "…a narrow interpretation of the grounds for review of private commercial arbitration awards is that they rarely have public policy ramifications. Since they are simply resolving private disputes where often even the existence of the dispute is not public, and the awards are not published, they do not create a body of law that could affect others. In the context of the interpretation of international treaties such as NAFTA, incorrect or unreasonable decisions will have significant public policy ramifications in the jurisdictions of all the parties. Such decisions can increase the exposure of all

three NAFTA parties to investor/state challenges of their measures."

And remembering that, of course, incorrect decisions we know from the *Metalclad* judicial review, and the *S. D. Myers* judicial review, are not touchable by domestic courts on judicial review.

And so the point simply is, this is an acknowledgement, in our respectful submission, of the point I've been making over the last few minutes about the fact that there are, in a very different way than a private, as Mr. Thomas is making in these private commercial arbitrations, there are public policy implications to what these tribunals are deciding. And again we say that is the reason why, you know, it is important that Canada is committing itself to these investors' trade arbitrations, because what those tribunals do will have public policy ramifications for those countries, and of course in the context of what you're trying to decide, there are, in our respectful submission as you've heard, ramifications for the protection and accommodation of aboriginal rights and title.

Just for your notes I just wanted to flag that the -- on page 444 of that same article, the last paragraph on page 444 there's a reference there as well to the *ad hoc* nature of the tribunals in the context of an argument about why there should not be a high degree of deference given to the tribunals. Their argument

that wasn't terribly successful at the end of the day.

So I'd like, as I say, to pause there, take the morning break and then come back, I hope just for a very few minutes after the break to wrap up.

CHIEF JUSTICE: That's fine. All right, so we're at 11:10. Why don't we get back together again at 11:25? Is that acceptable to everyone?

MR. UNDERHILL: Thank you.

(PROCEEDINGS ADJOURNED AT 11:10 A.M.)

(PROCEEDINGS RESUMED AT 11:27 A.M.)

MR. UNDERHILL: Thank you, Chief Justice. So I have essentially three points to make before sitting down. The first is in thinking about the *mens rea* discussion we had before the break. I had this thought. The position Canada is taking essentially is that there is a very bright line between trade law and aboriginal law, and that, in my respectful submission, informs the position they take that, well, these -- you know, what we do in these international trade agreements doesn't have any impact on aboriginal rights and title. And you know, we're asking you to find that there is an intersection between the two, you know, and it's no accident that that's the language used in some of those articles. You remember that Professor Choudhury's article talked about the intersection.

And my point is, you know, this is a case of first instance in the same way that *Haida* was a case

of first instance, because there, you know, the Crown had been taking the very firm position that there could never be a duty to consult First Nations before they proved their rights in court, or concluded a treaty. There's a very bright line and the same sort of bright line, Chief Justice, that's being drawn here by Canada that was drawn in the years leading up to *Haida Nation.* And we're simply asking you in a nutshell, just like the Supreme Court of Canada did in *Haida,* to say there just isn't that bright line, that reconciliation means the two need to be married together, that is, trade law and aboriginal law. That's really the essence of our submission here today.

The second point I wanted to make was to clarify the evidence for you around the MFN issue, because I was speaking about it without taking you to references and I just want to make sure I didn't in any way mislead the court about what the evidence is from the various parties about the application of the MFN provision. Let me begin by saying and reiterating the point that when we talk about expropriation in Annex B-10, our main point of course is, leaving aside this whole issue, Annex B-10 doesn't talk about aboriginal people and aboriginal rights and title. So that's sort of a threshold point.

But what I wanted to make clear is, and just try to summarize what I understand the evidence to be for you just for your notes and so that there's no

confusion about it, Professor Van Harten's views are expressed in his opinion, of course, on this issue, and in essence what he says at page 10 of his opinion which is Volume 1, page 85, in essence – and you'll see there's a couple of paragraphs addressing this issue – he says there's a strong argument to be made that the MFN provision essentially will apply to both expropriation and fair and equitable treatment. And I would just leave those two paragraphs with you and make the additional point that Professor Van Harten was not cross-examined on that issue.

And then Mr. MacKay agreed that Chinese investors under the CCFIPPA would be able to reach back under the MFN provision to the older treaties for both expropriation and fair and equitable treatment, and that reference is Volume 2, tab 10, page 509, line 36 to page 510.

Mr. Thomas, for his part, did not address this issue in his expert opinion, and so did not express any disagreement with Professor Van Harten on this point in his opinion.

On his cross-examination his evidence, I think, can be fairly summarized to say he wouldn't be surprised if such an argument was made with respect to MFN, but did not seem to share the views of Professor Van Harten and Mr. MacKay that it would necessarily be successful.

And that reference is Volume 3, tab 11,

pages 769 to 772 of the record.

My colleague is pointing out that he thought that a tribunal would give some meaning to Annex B-10 on this point. And of course you have heard me just a moment ago say that Annex B-10, of course, whatever it may -- however it may be interpreted, whatever meaning may be given to it, does not address aboriginal rights and title.

There are two other references from Mr. Thomas's cross-examination that I had committed to give you yesterday that I thought I'd just clean up. The first is the reference to the explosion of claims in recent years.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: That reference is Volume 3 – again, that's tab 11 is the cross of Mr. Thomas – page of the record, 728, lines 15 to 27.

With respect to the fair and equitable treatment being a frequently invoked obligation in investor/state claims, that's for the Thomas cross-examination, again Volume 3, tab 11, page 775, lines 45 to 47. And then from Mr. MacKay's cross-examination, Volume 2, tab 10, page 534 of the record, lines 15 --

CHIEF JUSTICE: Sorry, do you want to give me that again, please?

MR. UNDERHILL: Sorry. Volume 2, tab 10, page 534, lines 15 to 26.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And that, then, brings me to my final point. And to make it, I would ask you to turn up the *Taseko Mines* case, which is found at tab 32 in Volume 4. And this is, as you'll see, a 2011 decision by Mr. Justice Grauer, the same judge who decided the most recent *Dene Tha'* case, concerning what is out here at least the relatively notorious Prosperity Mine, which was the subject of considerable public -- still is the subject of considerable public attention. And the specific -- this specific case dealt with an injunction application by the First Nation trying to stop the exploration program from proceeding. You may recall this is the case involving the famous Fish Lake, which was a body of water of considerable cultural significance to the First Nation that was proposed to be essentially become a tailings pond.

And the injunction was granted by Mr. Justice Grauer, and the passage that I wanted to end with in my submissions today is found beginning at paragraph 60, which is 1444 of the record. Paragraph 60.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so, the context for this quote is wrestling with the balance of convenience on the injunction application, and what is or is not in the public interest. And at paragraph 60, Mr. Justice Grauer says this:

"On the other hand, it is also very much in

the public interest to ensure that in circumstances such as these, reconciliation of the competing interests is achieved through the only process available, being appropriate consultation and accommodation. Those duties, of course, attach to the Crown. Nevertheless, from the perspective of Taseko, that process is a cost and condition of doing business mandated by the historical and constitutional imperatives that are at once the glory and the burden of our nation. Only by upholding the process can reconciliation be promoted; without reconciliation, nothing is accomplished. This interest, in my view, is at risk should the injunction be denied, and weighs heavily in the balance of convenience.

[61] I observe that the importance of that interest in this case is magnified by the reality that the petitioners and Taseko will be involved for the foreseeable future in an ongoing relationship with the Crown in the middle. In these circumstances, it seems to me that the public interest in ensuring that the process of consultation and accommodation is set on a proper footing is particularly high."

And so, Chief Justice, really the point that we are

making in this case, fundamentally, is that in this country we have a unique constitutional relationship between the Crown and aboriginal peoples which is monitored, if you would, by the courts of this land including this court. It is a unique process that has of course, as we've talked about, various nuances and balancing that has to go on to achieve the fundamental goal of reconciliation.

Our perhaps simple point at the end of the day is that that balancing act is changed in a very real way by the introduction of the CCFIPPA insofar as a Chinese investor plays a very different role in the cost and condition of doing business when there is the prospect of being able to bring a claim under the CCFIPPA. And you know, looking back at paragraph 60, it is today the domestic courts, including this court, who had to decide how the costs, if you would, of reconciliation are to be distributed in this country. And what you have with the introduction of this particular investment treaty is another body being able to address that issue of distribution, which in turn changes the mix of this relationship we have in Canada. And that, we say at the end of the day, is what triggers a duty to consult.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: Subject to your questions those are my submissions.

CHIEF JUSTICE: I may have some more

for you when you come back on tomorrow.

MR. UNDERHILL: Yes. I figured that might be the case.

CHIEF JUSTICE: All right, thank you very much. So I guess what we will do now is turn to the Crown's case.

SUBMISSIONS BY MR. TIMBERG:

Chief Justice, I have a few things to hand up.

Yes, Chief Justice. It's T. Timberg for the Attorney General of Canada. I'll be providing submissions with respect to part of the case, and my colleague Ms. Hoffman will be doing the other parts, so we've split our submissions. And I'll explain that division in a moment.

I have provided to you, to assist with my oral submissions, a binder which is extracts from the record, and what you'll find there is at tab 1, I have the CCFIPPA agreement and then basically it's the affidavit and the cross-examination of Mr. MacKay and Mr. Thomas. So they're easily to be found in one place.

And then we have a copy of the Canada/Peru Free Trade Agreement that has the aboriginal reservation, which I'll be taking you to. So I'll be utilizing this during my submissions.

We've also provided yourself with an electronic copy of the entire record of both parties, so that CD-ROM contains both the applicant's and the

respondent's record, so you can find cases and everything electronically.

CHIEF JUSTICE: That's helpful.

MR. TIMBERG: Finally, when I get to the part of my submissions with respect to Canada's record, as it were, with respect to NAFTA decisions, I've provided you wish a chart of the decisions which have -- these are the decisions that actually there is a decision on, as opposed to ones that are ongoing. And so I'll be explaining that to you, because this has become, as we have heard from my applicant, we say that this is the best evidence with respect to how obviously NAFTA is operated, and how the CCFIPPA will be operating, because of the fact that the articles with respect to the CCFIPPA are basically identical to that of NAFTA. So we'll be turning to that in due course.

CHIEF JUSTICE: Okay.

MR. TIMBERG: So I'd like to start by setting out what this application is and is not about. The applicant requests relief from this court on the premise that the government has a duty to consult with the Hupacasath First Nation, prior to exercising the Crown prerogative to bring the CCFIPPA into force.

The applicant yesterday admitted that what this case is not about is, it's not about the government policy in entering into international agreements. The basis upon which Canada chooses to enter into international agreements, and the specific

international obligations which it agrees to be bound by, are matters of policy.

So this morning, whether the decision, the policy decision of Australia to not continue with international and trade agreements using the tribunals is not before the court. And it's not whether or not the policy choice to proceed with *ad hoc* arbitral tribunals is before the court, and it's not the merits of the CCFIPPA whether it's a lopsided agreement. Those policy decisions aren't before us.

Nor is this application about whether a duty to consult is owed to all First Nations in Canada. The only named applicant is the Hupacasath First Nation. Claims for aboriginal rights are both band-specific and pact-specific. Moreover, the court can only provide a remedy to a named party. So we will be focusing our submissions with respect to the Hupacasath First Nation.

Now, I note in our written submissions at paragraphs 156 to 161, we seek to strike the affidavits of the non-Hupacasath First Nations as this evidence is not relevant to whether the assertive rights of the HFN have been adversely impacted.

There are a few other issues that this case is not about. There was some discussion by Mr. Underhill about the application of other international treaties and the behaviour of other states around the world who violate their treaties. Those states and those treaties are not at issue. The applicant has said

that some of those treaties have similar language, which is true, but the treaty is only one aspect. The question is what has the state done? Has it adhered to its obligations? And so it's Canada's treaties and Canada's conduct in adhering to its legal obligations as to what are before us here today.

The applicant has also mentioned ILO clauses, international legal obligation clauses and certain modern treaties with aboriginal peoples. These modern treaties and these ILO clauses are also not at issue here. The HFN does not have such a treaty, and while it was certainly possible for other First Nations who do have treaties to join this application, they did not.

With that, Canada has three main points to make in response to the applicant's request that this court find that they are owed a duty to consult. The first point I will be covering, and my point is that by its very character and operation, the CCFIPPA is an international agreement, does not change or alter Canadian laws, and as a result does not require domestic legislation to be enacted. It's well established that, absent domestic implementating legislation, international treaty obligations are not incorporated into Canadian law, and I'll be taking you to the *Baker* case, the Supreme Court of Canada, for that proposition.

Further, the international character and operation of the CCFIPPA does not have sufficient links

with the domestic law of Canada to attract the application of Section 35 of the *Constitution.* This is the second part of the test that *Council of Canadians* discusses, when the court has to determine does an international agreement operate in the international realm, or does it have sufficient links with the domestic law of Canada to attract the application of the *Constitution?* Now, I recognize in *Council of Canadians* there is a Section 96 right with respect to access to the superior courts, but the same principle applies here that clearly there are international treaties that operate at the international realm that are ratified by the federal government, and they exist solely there and they do not enter the domestic sphere.

The applicant Section 35 rights are domestic rights, and if the CCFIPPA, as we say, is an international agreement that operates within the international realm, then there can be no adverse impact with respect to the operation of the CCFIPPA due to its character and the fact that it is an international agreement that remains there. So that is the point I'll be taking you through today, with respect to what is the CCFIPPA, what are its articles, how does it operate and at the end I'll be suggesting that it is an international agreement, it remains in the international realm, and does not, therefore, attract the application of Section 35.

CHIEF JUSTICE: Right. So I've read

your submissions, you can take that as a given. So, I'm kind of hoping that you'll go beyond them and actually address some of the points that we've been talking about over the course of the last day and almost a half now, because, as you know, those are the real live issues at play. And so to the extent that you could go beyond your written submissions then and address those issues that were amplified, teased out, over the course of the last day or so, I would find that very helpful.

MR. TIMBERG: Yes, and so we have your questions and I incorporate them into my submissions. So as I go through my explanation, I'll be answering those questions. So that's --

CHIEF JUSTICE: Yes, it's not just my questions, but what Mr. Underhill had to say in response, so that I've got you exactly joining issue and I can make a proper assessment of your response and his response, and figure out where I want to come out on some of these issues.

MR. TIMBERG: Okay. So I will be taking you through those points and I'll be answering those questions as I go through.

CHIEF JUSTICE: Right. I only say that because I'm very familiar with everything you've already said, which comes right from your submissions. And so I think we're beyond them now, to amplify them here and there.

MR. TIMBERG: Thank you. The second

point -- so I'll just describe to you what Ms. Hoffman, my colleague, will be covering. She'll be covering that if the court goes further and considers whether a duty to consult has been triggered under Section 35, that it's clear that the CCFIPPA does not trigger the duty to consult because it does not fetter the discretion of the Crown to ensure that resources are developed in a way that respects aboriginal interests in accordance with the honour of the Crown. The CCFIPPA does not act as a restraint on the ability of the Crown to manage land and resources and regulate in the public interest, and thus does not represent any alteration to the way in which land and resources are managed in Canada.

Moreover, the adverse impacts alleged by the applicant to arise from the ratification of CCFIPPA, which includes concerns regarding the potential impact of future arbitral claims of awards, this is a risk analysis that amounts to speculation, and it's founded on serious misunderstandings of the scope and operation of the CCFIPPA. And then finally my colleague Ms. Hoffman will be addressing the issue of Crown prerogative to enter into an international treaty.

Now, yesterday -- I would like to address a question you asked yesterday about whether the ratification of the treaty would actually put the HFN in a worse off position.

CHIEF JUSTICE: Or has a risk. Is the potential to put it in a worse off position beyond that

threshold agree potential that they've identified and acknowledged. It's not any potential. I think they've acknowledged that there's a threshold. So it's not the merest possibility, there's some threshold, and I'm still trying to get my head around where that threshold is, but there's something.

MR. TIMBERG: Well, we'll suggest that really their argument is setting up a false conflict. They're basically saying that there could arise a situation where the Crown might say it can't go any further in accommodation because of the CCFIPPA. But what are the principles within the CCFIPPA? They're basic international law principles. They're just core principles which are already consistent with Canadian domestic law. Basic minimum standard of treatment, that you won't act in an egregious manner without due/fair process. That you won't expropriate without compensation.

CHIEF JUSTICE: Right. That's part of the reason why I asked the other question yesterday, about whether there's anything in the agreement that would have changed in any event, in part because a lot of these things are just motherhood. But in part because as to the other things, well, we've already got several precedents of what the government decided to do and given that experience, have gone ahead and done those things anyway regardless of consultation.

And so, you know, you heard what they had

to say about that. You may take the position that that whole line of discussion is neither here nor there, but I'd like to hear what you have to say about that discussion that we had yesterday because, I mean, it goes to their second line of argument as they discussed it.

MR. TIMBERG: Well, if I could just -- I hear you with respect to the second line of argument, but really it's a false conflict because what they're saying is that -- they're saying that Canada cannot accommodate aboriginal peoples in a way that -- they're basically saying that the principles in the CCFIPPA prohibit them, prohibits Canada from accommodating them. And it's our position that, no, Canada has a choice, has multiple choices, has many ways in which it can choose to accommodate First Nations peoples where it's required. And so the duty to consult and to accommodate, Canada can choose to do that in a way that respects these basic international legal principles. And so to say that Canada can be constrained because Canada is going to have to pass a measure or -- sorry, can I just -- I just need to step back for a second.

CHIEF JUSTICE: Sure.

MR. TIMBERG: So I believe the point is this, that with respect to expropriation, the applicant seems to be saying there might be a situation where the only reasonable form of accommodation would be for the Crown to expropriate a Chinese investor, that

this would be a bar, the principles of the CCFIPPA would be a bar to that. But the Crown as a matter of policy does not forcefully expropriate private interests in order to meet its duty to accommodate.

And second, expropriation is not prohibited by the CCFIPPA. Expropriation under the CCFIPPA simply must meet certain basic minimums including the payment of compensation. So even if the only reasonable form of accommodation would be the expropriation of a private Chinese investment, that's not prevented by the CCFIPPA.

So there's no conflict here. The ability of Canada to act honourably under Section 35 and the ability of Canada to honour its international obligations, they're not in conflict. The reason for that is that the government has multiple ways in which it can achieve reconciliation in a way without violating the CCFIPPA. And even if there was a violation of the CCFIPPA, at the end of the day it's the government of Canada that pays. It's not the applicant. The HFN will never find themselves named as a respondent under a claim. So this sense that the CCFIPPA is a bar or prohibits Canada from reconciling and accommodating is just -- it's just a -- it's a false conflict to say that it's fettering the government's powers.

CHIEF JUSTICE: So when you flesh that out, again it would be helpful to address your mind to the very specific things that we've discussed over the

last day and a half or almost day and a half in that regard, because I mean we really delved down. Mr. Underhill delved down, delved into it in significant detail and kind of teased out a bunch of different things that I think it would be helpful for you to address. Although I leave it obviously to your complete discretion to determine how you want to use your available time. But, you know, he did tease out a more nuanced position that what we just described.

MR. TIMBERG: Yes, and perhaps the way in which I should be proceeding is I can allow -- if you can just allow me to get into my argument.

CHIEF JUSTICE: Absolutely.

MR. TIMBERG: So if you could just -- I haven't started off with my strongest foot forward, so I'd like to just, if I can, just get into the argument here.

So the purpose of the -- just start out at basic principles and then I'll get to your question.

So the purpose of the CCFIPPA is to promote and protect the investment. It's a reciprocal international agreement, and -- so, I think I'm going to ask for a break, if I could, Chief Justice.

CHIEF JUSTICE: Absolutely.

MR. TIMBERG: That, I think, would be appreciated.

CHIEF JUSTICE: Sure.

MR. TIMBERG: If we could just take a

ten minute break, that would be appreciated.

CHIEF JUSTICE: Absolutely.

MR. TIMBERG: Thank you.

CHIEF JUSTICE: We could also have lunch early today. It's up to you, whatever you'd prefer.

MR. TIMBERG: I think a ten minute break would be appreciated.

CHIEF JUSTICE: Okay.

(PROCEEDINGS ADJOURNED AT 12:04 P.M.)

(PROCEEDINGS RESUMED AT 12:13 P.M.)

MR. TIMBERG: Chief Justice, I'd like to take us through a conversation of what the obligations are in the CCFIPPA, so that we can understand how they work and what they do. With that background we can then get onto the more nuanced questions that you've raised, and I'll be dealing with that and my colleague Ms. Hoffman will be dealing with the duty to consult part of that. So we'll -- but I'd like to start with sort of the underlying articles. Put that before us, and then we are aware of your questions. If I could just do this.

So I'm at -- I thought to start with a discussion of what the CCFIPPA does and does not do. I would just highlight the evidence of Mr. Thomas, which is at tab 5 of the consolidated binder that I provided to you, and it's at page 5 at the bottom, page 0841 at the top.

CHIEF JUSTICE: This is tab 5?
MR. TIMBERG: Tab 5, yes, page 5.
CHIEF JUSTICE: Oh, this is his decision -- his opinion?
MR. TIMBERG: That's correct, yes.
CHIEF JUSTICE: Yes, I've got a marked up version somewhere else. All right. So what page?
MR. TIMBERG: Page 5. So paragraph 21 Mr. Thomas says that:

> "When analyzing the treaty it's important to note not only what it does but also what it does not do, and two key points immediately come to mind. First and foremost and most importantly, the treaty does not purport to change the allocation or distribution of governmental powers in either party."

And then paragraph 23:

> "In particular, in relation to the matters raised in the current application, the relationships between the federal Crown and First Nations remain unchanged. Nothing requires that any changes to such relationships be made, and conversely, nothing in the treaty precludes Canadian governments from making further changes in such relationships as they see fit.
>
> Secondly, the treaty does not supplant Canadian law, which remains fully in effect.

> Thus, to the extent that Professor Van Harten contemplates behavioural differences between Chinese and, for example, American investors, this treaty would permit a different group of major investors who may or may not conduct themselves in a similar way to U.S. investors in Canada to bring claims. Chinese investors who invest in Canada, like investors from any other country, are subject to the full force of Canadian law and would continue to do so under the treaty after its entry into force. If their investments do not conduct themselves in accordance with Canadian law, they are subject to the consequences."

He says the case now would continue. Then paragraph 25, the second sentence:

> "I would begin by noting that in procedural matters an international tribunal has the power to call upon a party to produce witnesses or evidence, but it lacks a kind of compulsory enforcement power held by a Canadian court."

And so he goes on that the tribunal does not have the power to enjoin a government measure. It can recommend an interim measure of protection to preserve the rights. So the point there is the tribunal has no power to enjoin a measure passed by the Hupacasath First Nation, nor with respect to the

government of Canada. The only power they have is to make a financial award against the disputing contracting powers. Its powers are limited and over the page to page 6, at paragraph 26.

> "All of the foregoing is consistent with the powers of NAFTA tribunals. Under this treaty, a tribunal has no jurisdiction to grant injunctive or other extraordinary relief of the type commonly granted by Canadian courts. Its powers are thus restricted."

And at the bottom here of page 6, Mr. Thomas summarizes at paragraph 30.

> "To my knowledge in almost 20 years of experience with investors in the country which is the largest foreign investor in Canada…"

that's the United States,

> "…there have been no other claims, let alone a tribunal finding of state responsibility against Canada for any federal, provincial or territorial measures taken in relation to aboriginal rights or interests, or for allegedly unlawful measures taken by First Nations themselves."

So obviously one cannot categorically rule out the possibility of a claim in the future, but the NAFTA experience does not suggest a substantial

probability of a spate of claims based on measures. And so I'll come to that. But this is Mr. Thomas's opinion with respect to how the CCFIPPA will likely operate, and he suggests that we look to NAFTA for that.

Now, the applicant attempts to distinguish the CCFIPPA from the other 24 FIPPAs that Canada has already entered into simply by focusing on the statement that China conducted more foreign draft investment in Canada than Canada does in China in 2007 and 2011. And there was some discussion about that yesterday. And it oversimplifies the facts. The evidence is that the United States conducts more foreign direct investment in Canada than Canada does in the United States. That's at Vernon MacKay's affidavit, paragraph 94.

The U.S. had, in 2011, through 326 billion FDI in Canada while Canada had 276 billion in the United States. Contrast, in 2011 China had 10.9 billion foreign direct investment in Canada, and Canada had 4.1 billion invested in China. So to compare the two, Chinese investment in Canada in 2011 amounts to about 3 percent of the U.S. investment in Canada. And while growing Chinese investment in Canada still represents less than 2 percent of total foreign direct investment in Canada, which in 2011 amounted to 607 billion.

In 2011, Canada was also host to over 160 billion foreign direct investment from the European

Union, and as commented on by Mr. MacKay in his affidavit, at paragraph 34, Canada is presently engaged in trade discussions with the EU to enter into a free trade agreement.

So, the parties are in agreement that the CCFIPPA is based upon the NAFTA language, the model feedback is related to that. Mr. MacKay's evidence clarified that Canada monitors the operation of NAFTA and how it's working. And in 2001, the three parties got together. They were dissatisfied with some of the early decisions with respect to a minimum standard of treatment and how they are being interpreted. And so they modified the agreement. They brought in a binding note of interpretation. Canada can do the same thing with China in the CCFIPPA.

Then in 2004 Canada updated its model FIPPA to add Annex B-10, which I'll get to, which is the indirect expropriation, the specific language. What's important about that is that MacKay's evidence is that Canada monitors how these agreements are working. They need to be adjusted, with their -- they need to be fine-tuned. And MacKay's evidence is, as with Mr. Thomas, is that there has not been a problem. There hasn't even been a claim filed with respect to an aboriginal measure or a measure taken to accommodate an aboriginal interest in Canada throughout the NAFTA experience.

Now, about the NAFTA experience, the NAFTA experience covers the entire geography of Canada,

it covers 19-year history and it covers hundreds of billions of dollars a year. So that is the experience that Canada monitors and looks to, and because of that Canada is satisfied that there have not been problems with respect to protecting aboriginal interests and accommodating them where required.

So when earlier you were talking about Mr. MacKay's evidence where he says, "Well, yes, we do our due diligence and we look at our international obligations and we see if they are consistent with measures that are been passed to accommodate aboriginals," and he says, "Yeah, we do that, we do --" the section that my friend took you to just before the break, and MacKay's answer was yes, they would look at the CCFIPPA but that that wouldn't cause any problem. And so part of that answer of his as to why it causes no problem, because there is this track record that is monitored and that's updated. And the CCFIPPA is arguably a better agreement than the NAFTA agreement because of these adjustments that have been made.

So when the applicant says that this is -- that the CCFIPPA is something -- in their opening statement they say that -- I'll just read that to you. In their opening to their memorandum they state that this is a new significant change that CCFIPPA brings, but instead it's Canada's position that the CCFIPPA is one of a family of investment treaties. It is based upon the model FIPPA that then developed from 1989 to

the present. It's almost identical to the NAFTA. And so this isn't a significant change. This is just part of a family of investment agreements.

And if I could ask that you turn to tab 2 of the consolidated binder that I have provided, we have attached here a document that's attached to Mr. MacKay's affidavit at Exhibit F and it's titled "Seizing Global Advantage", and if we could turn to page 4 of that document -- page 5 of that document, 0194 in the top right, this page is titled "Expanding Canadian Access to Global Markets", and here it explains that:

> "The government is also pursuing an ambitious bilateral agenda to secure competitive terms of access for Canadian…"

this is a 2009 document,

> "…for Canadian businesses, investors and innovators making strategic use of the entire suite of international trade policy instruments. The government is pursuing efforts in those markets where the opportunities are greatest."

And then it lists examples, "(1), the North American Free Trade Agreement," without a doubt Canada's most important platform of economic opportunity; and then over to page 6,

> "(2) free trade agreements. Canada is currently engaged in negotiations with key countries in the Caribbean and Central

America;

(3) foreign investment promotion and protection agreements;"

which we have before us today. (5) air service agreements, more than 70 bilateral air service agreements and then innovation and science and technology. So this is part of a family of international agreements that -- part of.

Now, turning to the actual CCFIPPA, I'll now take you through the different sections. It's divided by Part A is the definitions, Part B is -- has the various obligations, and then C is the investor -- is the tribunal for dispute resolutions, and then D are the general exceptions, and then there are a series of annexes. And I'll start with the minimum standard statement at Article 4, and perhaps we'll just have that before us.

So what does this provision do? MST is a customary international law standard which sets out the minimum or baseline standard for treatment of foreign nationals. In essence it requires that foreign nationals be treated with due process, and states are engaged in behaviour like manifest disregard of rights or gross miscarriage of justice would breach this standard. And so we say that these are standards that Canadian society itself already covers, and that most developed countries cover this minimum standard of treatment. And the text of the 2001 binding note has

been incorporated into this standard.

And so what does it not do? It does not act as a guarantee to investors against regulatory change. And it does not prevent states from engaging in bona fide regulation. And Mr. Thomas, and I'll take you to this, cautioned that early NAFTA cases, prior to the binding note of interpretation, should be disregarded for any reliance on how minimum standard of treatment was interpreted at that time. And so he cautions against the conclusions in *Metalclad, S.D. Myers* and *Pope & Talbot* as being not reflective of the present language.

CHIEF JUSTICE: What's your position on the fact that this article is not -- sorry, is subject to the MFN?

MR. TIMBERG: The MFN clause is the exemption under 8(1)(b).

CHIEF JUSTICE: But they'd be able to look at prior agreements going back to -- what? 1994?

MR. TIMBERG: Yes. So, I'm just clarifying with my colleague.

CHIEF JUSTICE: It was just the point that Mr. Underhill spent a significant amount of time on, and if I could get your thoughts on that. You can deal with that later.

MR. TIMBERG: No, I'm going to ask my colleague to answer this question with respect to key terms, because -- so I introduce to you Mr. Spelliscy.

SUBMISSIONS BY MR. SPELLISCY:

MR. SPELLISCY: Thank you, Chief Justice. Yes, I think, with respect, some of the questions raised yesterday with respect to the application of the MFN standard and what that means with respect to specific language that's been brought into this treaty, I think that was an apt discussion yesterday. Generally the MFN standard is a provision that allows reference back to 1994. But that doesn't mean that tribunals, in thinking about what these provisions mean, can ignore the specific language of these treaties in interpreting what is here.

Canada's position on this is that the language in the treaty since 1994 is in fact consistent. It comes to require the minimum standard of treatment. And when we talk about the FTC note of interpretation in 2001, I think it's important to remember it is a note of interpretation. It clarifies what the parties meant when they included language such as the minimum standard of treatment. It clarifies that what the parties meant is you have to look at customary international law. And that's what the parties meant when they signed NAFTA in 1994. And that's why, when we talk about going back to the minimum standard of treatment obligations all the way through, back to 1994, that the Government of Canada is comfortable that the same standards are being incorporated. We're not talking about different standards. We're talking about the minimum standard of

treatment that's been in place since NAFTA, which is what was referred to in NAFTA, which is what the Free Trade Commission clarified. And if you look here in the actual CCFIPPA, what you see is that the same standard is clarified. The intent of what the parties mean by the provisions, minimum standard of treatment including fair and equitable treatment and full production and security, there's an explanation. In NAFTA context it came in the form of a note of interpretation after, because as my colleague Mr. Timberg was saying, there was some concern that tribunals were getting at wrong, and so the parties acted.

In this context it comes in the text of the CCFIPPA itself, but it is an interpretation. And so our position is that it is in fact the same standard back to 1994. It is not a different standard.

CHIEF JUSTICE: Okay. That's helpful.

MR. TIMBERG: I note it's 12:30 so perhaps we should take the lunch break and we can continue this afternoon.

CHIEF JUSTICE: All right, that's fine, so we'll resume at 2:00.

(PROCEEDINGS ADJOURNED AT 12:30 P.M.)

(PROCEEDINGS RESUMED AT 2:00 P.M.)

SUBMISSIONS BY MR. SPELLISCY, Continued:

Good afternoon, Mr. Chief Justice.

CHIEF JUSTICE: Good afternoon.

MR. SPELLISCY: Just to sort of

introduce myself again, I'm Shane Spelliscy, I'm counsel of the Department of Justice, and counsel with the Trade Law Bureau. And my colleague, Mr. Timberg, has asked me to stand up and to walk through some of the obligations that are in the Canada/China FIPPA, to try and give you a little bit of a sense of understanding.

And we realize that you're interested in getting quickly to sort of the core issues in this case, which is the duty to consult, and is it triggered? And we will get there.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: We do think, though, that to understand why we have the position we have, the court has to understand what these obligations are, the way they operate, and the effects that they have that are at the international level. So I'm not going to take all the time to go through every single treaty provision. There are a lot of them. But there aren't that many that are actually at issue here, so I propose that I'm going to focus mostly on the ones that are at issue here, and what I'd like to do is come back to the minimum standard of treatment.

CHIEF JUSTICE: Sure. What you were talking about before lunch.

MR. SPELLISCY: That's right.

CHIEF JUSTICE: And I have read obviously Mr. Thomas's article-by-article treatment as well.

MR. SPELLISCY: Well, that's good. And it allows you to situate sort of where that provision comes. And I think, though, there's been a couple of questions about what the minimum standard of treatment is, and what it does, there has been discussion about the fair and equitable treatment, and what that means, and I think it's useful to come back and clarify what the provisions are in Canada's treatment. And I say that because yesterday my friend went through some of Mr. Thomas's testimony, where they were asking about concepts about legitimate expectations, stable regulatory environment, and Mr. Thomas was careful in his answers there to say that it depends on the language of the treaty.

And that's why we want to come back to specifically what's in Canada's treaty here. And what that means.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: So as my colleague Mr. Timberg was saying before the break, the minimum standard of treatment sets out a baseline of treatment. There are a number of cases, and since the Free Trade Commission's note of interpretation in 2001, there has been a consistency in the interpretation of the agreement. And so I'm going to take you to one, and then we'll discuss *Merrill & Ring*, which was discussed yesterday. But I'm going to take you to one, and that's the *Glamis Gold* case, which is at the respondent's --

well, it's attached to the Thomas affidavit, it's Exhibit D to the respondent's record, Volume 3. And I'm going to take you specifically to one that's at paragraph 894, I guess.

CHIEF JUSTICE: Okay, volume which again? Is this in the compendium that you gave me?

MR. SPELLISCY: I don't think it's in the core bundle that we handed up this morning.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: But is this --

MR. TIMBERG: We were going to hand this up with Ms. Hoffman. This is the *Glamis* decision.

CHIEF JUSTICE: All right. And is this -- is this -- it seems probably too big to be in there, but just to confirm, is this decision in the volumes?

MR. TIMBERG: It's in the DVD --

CHIEF JUSTICE: Oh, okay.

MR. TIMBERG: -- that is attached to the expert opinion of Mr. Thomas.

CHIEF JUSTICE: Okay.

MR. TIMBERG: And we advised our friend that we'd be handing this up for Ms. Hoffman's submissions, but we've jumped ahead.

MR. SPELLISCY: But I don't want to -- and I knew that there is sort of an issue with some of the copies. I don't want to spend a lot of time on this. I'm just going to read from one part talking

about what the minimum standard of treatment is, because I think it's a useful summary of what the tribunal found in that case.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: And so I'm at 894. Sorry, at paragraph 627. And at paragraph 627, starting with the second line in that paragraph, it says:

> "The tribunal therefore holds that a violation of the customary international law minimum standard of treatment as codified in Article 1105 of the NAFTA…"

and you find the same provision in the CCFIPPA. And it requires an act that is sufficiently egregious and shocking, a gross denial of justice, manifest arbitrariness, blatant unfairness, complete lack of due process, evident discrimination, or manifest lack of reasons, so as to fall below the accepted international standards and constitute a breach of Article 1105.

I come to this to highlight -- try and highlight, essentially, what we're talking about here with the minimum standard of treatment. And I think that Your Honour referred to it as "motherhood" a little bit this morning. These are the -- this is the core basic provisions that are sort of motherhood and apple pie provisions as to what the government is expected to do. And I think that's a good way of thinking about it. This is a basic obligation. We're not talking about ways that can -- or obligation that affects the right of

the government of Canada, federal government, sub-national government, First Nations government, to regulate in the public interest.

CHIEF JUSTICE: And what was the note that you said applied to Article 4?

MR. SPELLISCY: The free trade commission published a note in NAFTA in respect of Article 1105 of NAFTA, the content of which has been incorporated into Article 4 of the CCFIPPA, which is simply to tie the standard back to the customary international law minimum standard of treatment. And so we're not talking about a provision in the FIPPA that provides for what, in the jurisprudence of international arbitral tribunals, is called for free standing fair and equitable treatment provision.

And there's an important distinction to make and it's complicated and I don't want to spend a lot of time on it because the provision is relatively clear, but there is a divergence in the jurisprudence depending on what language a treaty has. And the NAFTA tribunals interpreting 1105, Article 1105, which is the same language as in Article 4 of the CCFIPPA, have found that this is the standard to be applied. And the application of the adjectives used here in the *Glamis* case manifest arbitrariness, a gross denial of justice. This is intentional.

CHIEF JUSTICE: And so where is this -- so you said the note was somehow incorporated into

the CCFIPPA? I've got it here. I'm keeping in mind the discussion we had about B-10, right, and the interface with MFN and so --.

MR. SPELLISCY: Well, let's just go to what is Article 4 then.

CHIEF JUSTICE: I have Article 4 in front of me.

MR. SPELLISCY: Right. So if you look at paragraph 1 of Article 4 it says:

> "Each contracting party shall accord to covered investments, fair and equitable treatment and full protection and security in accordance with international law."

We then go to paragraph 2. What you have is a definition of what that means, and this is where what was decided in the note of interpretation in the Free Trade Commission for NAFTA, this is where it's incorporated here. The concept --

CHIEF JUSTICE: Oh, so it's -- okay, so it's actually -- it's not a note, it's in the actual article.

MR. SPELLISCY: Right, and this is something we were discussing earlier. In the context of NAFTA, NAFTA included the language that the parties thought was clear that they were referring to the customary international law and minimum standard treatment. In early cases the concern was tribunals were getting that wrong. They weren't understanding

that this was tied to customary international law, and so a note of interpretation. Again, not a revision. This wasn't an amendment to the treaty. It was a note of interpretation as to what the parties meant when they wrote in Article 1105. That was done through a note.

Experience led -- that experience led the parties in Canada and the parties it concludes these treaties with to, instead of doing a later note, to include the specific provision in the actual treaties which clarifies the definition of what is meant by fair and equitable treatment and full protection and security.

CHIEF JUSTICE: Got it. So that whole discussion we were having about B-10 and the expropriation article doesn't apply to this.

MR. SPELLISCY: The note in Article -- indirect expropriation, the note of interpretation, MST, that's different than expropriation, yes.

CHIEF JUSTICE: Well, on the interface with MFN, you remember that whole discussion.

MR. SPELLISCY: Yes.

CHIEF JUSTICE: So that doesn't apply here is what you're saying.

MR. SPELLISCY: Well, there's a question there, and that's because some of, again, Canada's treaties between 1994 and 2001 -- and you'll remember the MFN reaches back to 1994.

CHIEF JUSTICE: That's right, yes.

MR. SPELLISCY: Between those years Canada didn't have the note of interpretation, and so it didn't include this language in its treaties.

CHIEF JUSTICE: Right.

MR. SPELLISCY: And so there are references in those treaties to NAFTA language, which doesn't include the note of interpretation. There's never been a note of interpretation with respect to those other treaties. Of course, there's never been a claim under those other treaties either.

CHIEF JUSTICE: Right, but the MFN article wouldn't override the clear language in Article 4. It's not like the situation that we were discussing with B-10 and whether -- I think Professor Van Harten seemed to think that that note may not give them anything. Remember we were talking about this and how it might render it completely nugatory. That whole issue isn't at play here because you've got the specific language of Article 4, and we're not talking about a note, and so this MFN issue if I understand correctly, if I understand your position correctly, doesn't apply here. Is that right?

MR. SPELLISCY: Well, our position would be that it doesn't apply to Annex B-10 either.

CHIEF JUSTICE: Yeah, right.

MR. SPELLISCY: And for the same reason, and for the same reason that it doesn't apply here. And that's because what's being done in Article

4, paragraph 2, and what's being done in Annex B-10 is to clarify the meaning of what is being said in the treaty. So in our treaties, even when they don't include this language, the intent is not to have a broader provision. The provision was always intended to be restricted in the case of minimum standard of treatment to customary international law. With respect to expropriation, when the language indirect expropriation is used, the intent of the parties was never to capture, with that language, the idea that bona fide regulation in the public interest, except in rare circumstances, would be an indirect expropriation. That was not what the parties intended.

When we think about the MFN obligation, what that does is if there are broader obligations or more trade favourable obligations in other treaties, those obligations can be brought in. But what that doesn't mean is that the definitions of the interpretations of the understanding of the parties is to be ignored. I think yesterday --

CHIEF JUSTICE: All right, okay.

MR. SPELLISCY: -- yourself and my friend were talking about the B-10, Annex B-10 as sort of a carve back in. But with respect, I think that's the wrong way of thinking about it. Indirect expropriation never carved in bona fide regulation in the public interest. That was never part of indirect expropriation. And what the parties under Annex B-10

have done is now clarifying, confirmed their understanding of what that word "indirect expropriation" or "measures tantamount to expropriation". They've clarified what that means but they haven't changed what the obligation is, and I think that that's an important way to think about it.

CHIEF JUSTICE: Right, but I think the history of it, if I understood correctly, was that there were arbitral tribunals that actually interpreted it indirect expropriation more broadly than what the parties intended, and so you had this article.

MR. SPELLISCY: That is correct, but the point there is it's not that by interpreting broadly that they were getting it right. The concern of the parties was by interpreting in the way they were interpreting it, they were getting it wrong.

CHIEF JUSTICE: Right.

MR. SPELLISCY: They weren't understanding what was meant. And so it's not that the language in those earlier treaties is broader. It doesn't give more favourable treatment for expropriation. It doesn't allow bona fide regulatory measures to be considered in direct expropriations.

CHIEF JUSTICE: Okay, and so then the interplay with Professor Van Harten's point on MFN is, you say, non-existent.

MR. SPELLISCY: With respect to Professor Van Harten, we think he's got it wrong here,

that in fact the MFN clause wouldn't render it nugatory, as you, yourself, have said. That would be a provision, that would be a result that would do essentially violence to the treaty language. Yesterday you were talking about the fact that there's a rule of statutory interpretation.

CHIEF JUSTICE: Right.

MR. SPELLISCY: The same rules exist at international law. You have to give effect to the provisions in a treaty.

CHIEF JUSTICE: Is there anything you can give me in support of that position? I mean you don't have to do it now and I take your point about how you want to -- do you want to cover some basic things before we start questioning? You could do it later if you prefer.

MR. SPELLISCY: We'll come back. I think Mr. Thomas addresses this in a relatively good way in his opinion --

CHIEF JUSTICE: Okay.

MR. SPELLISCY: -- in explaining why tribunals would have to interpret it.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: But again I would come back to just simple basic principles of legal interpretation, is just like a statute you don't ignore what was drafted.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: Coming back now to the question of what is in this minimum standard of treatment obligation, and in particular what it doesn't do. And I want to here come back to some things that were raised about concerns about particularly a stable regulatory environment or legitimate expectations, and that this somehow restrains the ability of the government to legislate in the public interest, that this provision does that. And I think that the best way to potentially do this is to come to a recent decision, and it is the *Mobil Investments* decision *v. Canada* which has been referred to, and this is at the respondent's book of authorities and it's in Volume 3 and it's at tab 75. Paragraph 152, one five two.

CHIEF JUSTICE: Yes, I have it.

MR. SPELLISCY: And we've talked about *Mobil* this morning already and there's been -- and yesterday as well there's been discussion that this is a decision where Canada was found to be in breach of its obligations. It was found to be in breach of its obligations because of in fact the performance requirements obligation. But this is on the minimum standard of treatment and the claim under the minimum standard of treatment, where Canada was found to have acted consistently with it. And it's a long quote, so I apologize, but I'm going to read through it because I think it offers a much useful insight. It says:

"The applicable standard does not require a

state to maintain a stable, legal and business environment for investments. This is intended to suggest that the rules of governing an investment are not permitted to change, whether to a significant or to a modest extent. The standard…"

again, we're talking about, in this context, Article 1105, but it's the same standard in the Canada/China FIPPA.

"…may protect an investor from changes that give rise to an unstable legal and business environment but only if those changes may be characterized as artitrary or grossly unfair or disriminatory or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in the standard to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor."

I'll say that, again, the standard -- it's talking about 1105, but it's the same here.

"The standard is not, and was never intended to amount to a guarantee against regulatory

change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, polcies change and rules change. These are facts of life with which investors and all legal and natural persons have to live with. What the foreign investor is entitled to…"

and I'll skip a little bit,

"…is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. Those standards are set, as we have noted above, at a level which protects against egregious behaviour."

and the next little part gets to what the NAFTA tribunal is to do.

"It is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in existing rules of customary international law. The tribunal has not been provided with any material to support the conclusion that the rules of customary international law require a legal and business environment to be maintained or set in concrete."

And I offer this long quote from a

tribunal that is very recent on this issue, and again it's using language that you see similar to *Glamis*. "Egregious behaviour". And I offer this to show that in accepting the customary international law on minimum standard of treatment, Canada has policy flexibilities to regulate in the public interest, it's in the interest of all Canadians.

I think, to come back to where we are with respect to our only experience under the minimum standard of treatment and what has been found, since the NAFTA parties clarified what they meant, the same clarification that's included here, Canada has not been found to be in breach of the minimum standard of treatment, not once.

CHIEF JUSTICE: You say the only case -- this is the only case they lost? Is that the one you mean?

MR. SPELLISCY: They lost but not on minimum standard of treatment.

CHIEF JUSTICE: So the only case they lost was what?

MR. SPELLISCY: There were cases of *Pope* and *S.D. Myers* prior to the note of interpretation.

CHIEF JUSTICE: I see.

MR. SPELLISCY: And those were the cases that lead to the note of interpretation, where there was concern that tribunals were in fact getting it wrong. And so that's why the interpretation comes out.

Since that time tribunals have been relatively consistent.

Now, there was discussion yesterday of a decision in *Merrill & Ring* and what that decision said, and I think there was even reference to an article published with respect to what that particular author would prefer the standard to be. But I think if you look at Mr. Thomas's opinion, and it's at page 65 -- sorry, I think it's actually his cross-examination. Looking at a few "I" numbers noted here, so I'm guessing it's his cross.

CHIEF JUSTICE: And that's where again?

MR. SPELLISCY: Mr. Thomas's -- for ease of reference, if you want to look at the core bundle that we handed up, it's at tab 6.

CHIEF JUSTICE: Okay. I have it.

MR. SPELLISCY: There's a discussion of the *Merrill & Ring* case and it starts at line 15, with a question that says --

CHIEF JUSTICE: That’s page -- which page is it?

MR. SPELLISCY: Sorry. We’re at 783 of the record, or 65 of the actual transcript.

CHIEF JUSTICE: So, 783. Got it.

MR. SPELLISCY: And it explains -- again, this is a question.

"Q Okay, now you referred to the *Merrill &*

Ring case as an outlier. But it is a case that was decided under NAFTA, after the memo of interpretation.

A Yes."

The answer is yes, and then they go through some questioning on that as to what the dates are. And certainly *Merrill & Ring* does come after *Glamis Gold*.

And then you get down to line 27, where Mr. Thomas answers a question.

"A The reason I called it -- why I called it an outlier is just that it seems evident form the face of the award that there were different views amongst the arbitrators. So what the tribunal ended up doing was not to come down on one side or the other of these different views of the meaning of the standard. But basically it looked at the claim on both standards and ended up dismissing the alleged violation of their inequitable treatment."

And I think that the *Merrill* decision is a complicated decision, but it does what Mr. Thomas says that it does. It considers both possibilities, both interpretations, and it does not resolve the issue. It doesn't come down one way or the other, and it doesn't do that because it finds it doesn't have to, because the behaviour of Canada wouldn't meet even a lower standard

if that was what was required under these international treaties.

So it didn't meet the higher standard. It didn't meet the lower standard. And again, since the note of interpretation, no behaviour of Canada has ever been found to violate the minimum standard of treatment.

CHIEF JUSTICE: So this goes to both points. This goes -- I guess, in an indirect way, this goes to the risk which your client says was very low, that aboriginal interests would be adversely impacted. But I think it might indirectly also go to the point that, well, even if there had been consultation, you've got an extremely favourable clause here and the language wouldn't have been more favourable than that, which basically requires "egregious".

MR. SPELLISCY: That is certainly the government's position on this, that -- and in fact when we look at -- and I don't propose to go through them all, but we've talked about specific exceptions. We talked about general exceptions. But there is policy flexibility built into these provisions, and the obligations as well. The obligations are not strict obligations, and as my colleague, Mr. Timberg, was saying, they are not obligations that Canada accepts and thinks that it won't be able to comply with its other obligations under domestic law.

CHIEF JUSTICE: Did I hear you say that MST is really a procedural measure in any event?

Is it just guaranteeing due process?

MR. SPELLISCY: It's one of the things that it guarantees. So, for example, a denial of justice is your typical standard, as that would violate minimum standard of treatment. If there was a measure that denied foreign investors access to courts --

CHIEF JUSTICE: Right.

MR. SPELLISCY: -- this would be, you know, the typical concern. The other language, manifestly arbitrary decisions, could be clarified, I guess, as process. Evident sectoral or racial discrimination. I don't know that I'd classify that as process, really, but you know, we've got discrimination provisions based on nationality in the national treatment and minimum standard of treatment. The MST provision comes in and says, "Well, other forms of discrimination, racial discrimination, religious discrimination, should also be prohibited."

CHIEF JUSTICE: So procedural fairness, due process, discrimination.

MR. SPELLISCY: And I think a lot of -- and the idea is to capture the sort of things that would shock the judicial conscience, if you looked at it. The sort of behaviour that is egregious in the words of the tribunal. That's what trying to be captured here.

CHIEF JUSTICE: Okay. Mm-hmm.

MR. SPELLISCY: I just wanted to step

back to the question that had come up earlier, which is where to understand sort of the need to give effect to the provisions of the treaty, and you had asked first sort of where that was, and where you could look at some information on that. And I'll refer to the cross-examination of Mr. Thomas again. And this is at the record at page 771. And he goes into -- the question is on the MFN clause. The question says, "The purpose of an MFN clause…"

CHIEF JUSTICE: Just let me catch up with you here.

MR. SPELLISCY: Sure.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: So it says -- and I'm at line 8 on this page.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: "Q The purpose of an MFN clause, just if I can be clear, is to say that if there is a substantive protection afford- -- provided in a different treaty, that's of the same sort that's in my treaty, I get that broader, more substantive protection. Correct?"

And Mr. Thomas's answer is:

"In general, but it is -- you have to analyze. The MFN clause is actually quite complex -- quite a complex operation sometimes. You have to look at the genus of

the measure, which is sought to be captured by the MFN clause. You have to look at the subject matter and analyze that. My point is simply this. There are limits, and *Maffezini*…"

which is a case, an International Investment Tribunal case which explored the MFN clause,

"…explored some of those limits and said there would be reasons not to employ the MFN clause. In that context, it was dealing with the dislodgement of the treaty's dispute settlement mechanisms. But they were talking about this issue, and they said there would be limitations on the MFN clause…"

and this is the important part,

"…if you had precise treaty text which shows the extent to which the state parties have turned their minds to the precise issue."

CHIEF JUSTICE: Okay. Mm-hmm.

MR. SPELLISCY: Articles 5 and 6 in the Canada/China FIPPA are what are referred to essentially as the non-discrimination provisions in the FIPPA. These are most favoured nation treatment, national treatment. Now, we've talked about most favoured nation treatment and what it means in the context of specific provisions, and I think, you know, we'll come back to it a little when we get to Annex B-10 and how it might impact there and we can explore further

some of your questions on that. But in the general sense, I don't think that these have been really the subject of the claim here. The applicant has focused primarily on minimum standard of treatment, has focused on expropriation and so I don't want to spend a lot of time on these specific provisions in this context.

I do note that when you look at these provisions what they don't do is limit the ability of the government to adopt regulatory policies. What they do is limit how those policies can be adopted. They say they can't be adopted in a way that discriminates against Chinese investors based on their nationality. And it's not any policy. If you look at the provision, what they have is the investors have to -- the treatment has to be accorded in what's called "in like circumstances". And so there's a factual analysis, are these two people, these two investors, the Canadian investor and the Chinese investor, or the third party investor and the Chinese, really in the same situation and is the treatment really discriminatory based on their nationality.

CHIEF JUSTICE: But my understanding is that the aboriginal reservation applies to these clauses, and so --

MR. SPELLISCY: It does, and that's an important point. That the government of Canada has reserved total policy flexibility with respect to providing rights and preferences to aboriginal people.

CHIEF JUSTICE: So arguably we don't really need to spend much time on these.

MR. SPELLISCY: We don't, and I agree with that. And I think that -- thinking about these more generally, even if you were to adopt a measure generally to protect the environment, that these provisions don't prevent you from doing that, and I think that there's some times a misconception or that these provisions somehow give rights of access to Chinese investors or rights that they can't be -- that certain policies can't be adopted to protect the environment. That's not these policies and that's the only point I wanted to highlight on these, that these aren't substantive as to what can and cannot be adopted. It's simply the way in which they are adopted to make sure they're non-discriminatory.

CHIEF JUSTICE: Right.

MR. SPELLISCY: Now, I want to actually jump ahead a couple articles here. Article 8 is the specific exceptions article and we'll come to that, but I think it's useful to do Article 10, which is expropriation, first because there's been a lot of discussion about what Article 8 excepts and what it doesn't except. And so let's talk again about expropriation.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: My colleague, Mr. Timberg, as he said this morning, the Canada/China FIPPA

doesn't not prohibit expropriation. Recognizes, actually, in Article 10 that expropriation is permitted. It couldn't really do otherwise. Expropriation is a fundamental sovereign right of a state.

What it does is it imposes conditions on how expropriations are to be conducted. So what it does, it says an expropriation has to be for public purpose. Expropriations, obviously, for -- government expropriations for private purposes, for corrupt purposes, you wouldn't want to protect.

Expropriation has to be under domestic due procedures of law. I don't think that should be extraordinarily shocking to anybody.

It has to be adopted in non-discriminatory manner. Now again, just to pause, the non-discrimination here, obviously any expropriation is going to be targeted potentially at a specific piece of property and so an individual investor may be identified, but that's not what's captured here. What can't be done is to expropriate Chinese investors, only Chinese investors.

The final requirement is that it has to be against the payment of compensation. Now, there's been a lot of talk about that. So, I think the first point is that, of course, expropriation against compensation is basic tenant of Canadian law generally as well. Certainly for direct expropriation.

CHIEF JUSTICE: When it says "against

compensation", that means "with compensation"?

MR. SPELLISCY: Against -- with a payment of compensation.

CHIEF JUSTICE: Right.

MR. SPELLISCY: So if you expropriate somebody you have to pay compensation.

CHIEF JUSTICE: Right.

MR. SPELLISCY: And there are provisions on fair market value.

CHIEF JUSTICE: Right.

MR. SPELLISCY: And what that means and how it's calculated. And we can again talk about this a little bit as well, but to point out with respect to expropriation there's been no finding that Canada has ever engaged in an expropriation violation of its obligations under NAFTA.

Now, we heard, and we can get to this in more detail a little bit later, but we heard some discussion of the *Abitibi* case, in which there was a settlement paid, and obviously the *Abitibi* case involved an expropriation. The measure at issue was called the *Abitibi Expropriation Act*. The question in *Abitibi* ultimately would have come down to what was the fair market value of compensation.

And I think in the context of *Abitibi* we talk about the settlement and we heard about the settlement, it's $130 million. That's a significant amount of money. $130 million in land was expropriated.

Power plants, revenue-producing power plants were expropriated. I think that's part of the context here when you talk about expropriation. It's that in an expropriation, particularly in a taking, in a direct expropriation, something is taken. And we heard reference yesterday again to an award against Ecuador for the expropriation of certain oil fields in Ecuador. We heard a reference to the amount of dollars. And again, the behaviour of Ecuador is not at issue before this court. The behaviour of Canada is. But even in that case, one has to recall that there's a finding of expropriation. Something was taken, something of value. And I don't think that it should be shocking at all that in a treaty, in an international treaty, Canada would require, and its treaty partners would require compensation to be paid when something of value is taken.

I think the other thing that was alluded to earlier today is just on Canada's practice a little bit and I don't intend to delve into this because I believe my colleague Ms. Hoffman might do it in more detail, but the other thing to understand about expropriation and expropriation on compensation is that Canada's practice is not to expropriate privately held land or interest in order to settle land claims, that the concerns about what this provision might and might not do, or what it might or might not restrict, it's not Canada's practice. Canada's practice is willing buyer,

willing seller. And there are ways, when that can't be achieved, then there's the question of what else can be done. But certainly nothing in the Canada/China FIPPA prevents us from exploring those other ways of potentially accommodating aboriginal interests when they truly arise.

In looking at this article, Article 10 in the Canada/China FIPPA, we've just sort of been talking mostly about direct expropriation there. If you read through the first line of that article which again is at -- for reference is at page 54 of the record, it says:

> "Covered investments or returns of investors of either contracting party shall not be expropriated, nationalized, or subjected to measures having an effect equivalent to expropriation or nationalization."

That, I think, is where a lot of the focus has been on because that is a reference to the concept of indirect expropriation.

And that of course brings us to Annex B-10. And I should say with respect to Annex B-10 the idea of indirect expropriation is a principle of customary international law. There's nothing new necessarily being created here. And I want to sort of pause on what this does, and I think it's important again to pause on what it does and what this annex is, and it's the same in that extent why we talked about the note of interpretation or why we talk about paragraph 2

of Article 4 of the Canada/China FIPPA. Because what this article leads into at the very top and it's on page 84 of the record:

> "The contracting parties confirmed their shared understanding that…"

and then it goes on to talk about what is and is not an indirect expropriation, or what is and is not a measure tantamount to an expropriation, to use the language from Article 10. And we touched on this earlier but I want to come back to it because I think it's important.

Indirect expropriation here, and what this annex does, it's not carving back the effect of Article 10. It's not Article 10 is a broad scope of measures tantamount to expropriation, and Annex B-10 is used to carve it back. Annex B-10 tells tribunals what the parties mean when they use words like "measures tantamount to expropriation". In that sense it's interpretive. Whether or not there is an annex in existing treaties going back to 1994 is therefore not relevant on the MFN clause because we're not talking about importing a different obligation. This isn't a restriction on an obligation, it's an interpretation of an obligation.

And when you come back and understand how then that fits in with the MFN clause, the language has been put in here for a reason – to assist tribunals in what the parties means. In this sense we would agree with Mr. Thomas that what this is about is interpreting

very specific language that was carefully considered by the parties as to help tribunals understand. But it is not you. Our position, under Article 1110 of NAFTA, where there isn't this language, that "indirect expropriation" means exactly the same thing. We're doing nothing more -- Canada is doing nothing more in this Annex than confirming a shared understanding, and I think that's important to remember.

And I think if we go to the testimony of Mr. MacKay, which is at tab 3 of the -- sorry, it's actually at tab 4 of the bundle that we handed up. This is Mr. MacKay's cross-examination, and it's right near the end. It's at page 541e.

CHIEF JUSTICE: Sorry, so where is the tab again?

MR. SPELLISCY: It's at tab 4.

CHIEF JUSTICE: Mm-hmm, 531?

MR. SPELLISCY: 5-4-1.

CHIEF JUSTICE: 5-4-1.

MR. SPELLISCY: 5-4-1 "E" as in Edward.

CHIEF JUSTICE: Oh, okay. Got it.

MR. SPELLISCY: And there's a question here. The question -- I'm at line 12, which says:

> "How would you characterize what Canada was attempting to do with respect to that Annex vis-à-vis its interpretation of indirect expropriation prior to the time that it

developed that Annex B-10."

And Mr. MacKay answers:

"Well, our intent was to provide interpretive guidance to tribunals with regard to hearings or claims being brought with regard to indirect expropriation."

He goes on to say:

"There was some concern with earlier NAFTA cases, as we discussed, that lead to the need, in our view, to offer this clarification. So it was seen by our regulatory department as a positive development, to give them greater assurance that their ability to regulate in the public interest would not be at risk by treaty."

What Mr. MacKay is saying there is essentially what I've explained. This is -- it's not a difference in obligation. It's a clarification of what the parties meant. The obligations are the same. And so we can have academic disputes about how far the MFN clause reaches and how it operates, but from our perspective they really don't remain more than that. And in fact the obligations have been the same and they are the same as in NAFTA.

I do want to spend just a little bit of time talking about Annex B-10 and paragraph 3 of it.

CHIEF JUSTICE: Sure. Just a quick question, though.

MR. SPELLISCY: Sure.
CHIEF JUSTICE: So you've said that this note simply clarifies the meaning of the NAFTA provision. What's that, Article 11? I can't remember.
MR. SPELLISCY: NAFTA's Article 1110.
CHIEF JUSTICE: Yes.
MR. SPELLISCY: And it's Article 10 in the Canada/China FIPPA.
CHIEF JUSTICE: Right. What about other international agreements, other FIPPAs? Is there any other FIPPA that might have a more favourable, substantive provision? Substantive MST provision.
MR. SPELLISCY: Again, we're talking about an expropriation, not minimum standard of treatment here.
CHIEF JUSTICE: Oh yes, sorry.
MR. SPELLISCY: We can talk about minimum standard, we can talk about it or we can talk about this, and I think the answer from Canada's perspective is with respect to its treaties since 1994 the answer is no. They have the same provisions. There may not be the clarifications that we've since developed to make clear the to the tribunals what we need, but the substantive obligations that the parties always intended, they are the same.
CHIEF JUSTICE: Sorry, so on all the FTAs and FIPPAs the expropriation revision language is basically the same? Since '94.

MR. SPELLISCY: Right. You get small variations in the language and we have to remember, of course, treaties are negotiated agreements. And so in some treaties you'll see language that references "direct", "indirect" or "measures tantamount to" expropriation. Here you've just got "direct" and "measures tantamount to" expropriation.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: You have variations of that, there's no question on that. But from Canada's perspective, all of the obligations that we have entered into since 1994 with respect to expropriation, minimum standard treatment, indeed all of the obligations, they are consistent. And that's why – and it's in the testimony of Mr. MacKay – Canada was comfortable going back to 1994.

So let's turn to the language that's in Annex B-10, sub-paragraph 3.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: And again, the point of this language here, the point of this entire provision, is to clarify -- to confirm what the parties' shared understanding of expropriation is.

And so it starts, paragraph 3:

> "Except in rare circumstances, such as if a measure or a series of measures is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and

applied in good faith…"

I just want to stop there and focus on that language. It's rare circumstances, and the question is, is it so severe that a third party looking at it reasonably says this must have been adopted in bad faith for a purpose other than what it is said to be.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: There is a lot of policy flexibility in that right there.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: And it continues:

> "A non-discriminatory measure or series of measures of a contracting party that is designed and applied to protect legitimate public objectives for the well-being of citizens, such as health, safety, and environment, does not constitute indirect appropriation."

Now, the first point: "Such as health, safety, and environment." "Such as" is not limiting language. "Such as" means "including". But there could be other things. The question is: Is it designed to apply and applied to protect legitimate public objectives for the well-being of citizens?

There was discussion this morning and, I guess, yesterday about whether or not aboriginal interests and aboriginal rights could have been added to this provision.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: And I don't want to get into a debate as to what the appropriate provisions are in a Canadian treaty, because that is a matter of high policy for the executive to decide. It's not the question for this court whether this court could draft better provisions or different provisions, or whether there might be different ways to achieve the same objectives. The question for this court really is what the government contemplated doing. Does it actually have an appreciable potential of a non-speculative adverse impact on aboriginal rights?

But I think to come to the explanation of Mr. MacKay, and we read through some of it with the applicant yesterday -- and just give us a second. I want to read to you sort of what continues.

And it's about -- the cross-examination here is about the need to insert the words "aboriginal rights or title" after "environment" in that paragraph.

CHIEF JUSTICE: So where exactly are we?

MR. SPELLISCY: And I'm at record page 535.

CHIEF JUSTICE: So was this in the book --

MR. SPELLISCY: Sorry, yes. If you go to book, tab 4 again, it's in Vern MacKay's cross-examination.

CHIEF JUSTICE: Yes.

MR. SPELLISCY: That's tab 4, record page 535 and we can start at line 40. And the reason I want to start at line 40 -- my friend took the court through some of the testimony yesterday, but stopped actually at line 32, and I want to just go through as to why the words "aboriginal rights" aren't here.

And it says:

> "The question is, well, what would be the concern about it if we inserted the words 'aboriginal rights and title' after 'environment' in paragraph 3?"

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: Mr. MacKay makes a couple of points.

> "Well, we are -- a couple of points. The moment you start adding elements to this list, then it invites other elements. So from a negotiating point of view, you don't like to enter into that trading game. But again, we do not see that the principles that we're promoting here in the treaty are doing -- are adversely affecting the rights of aboriginal people."

So I think -- and again, I don't want to -- and I don't think we should -- get into a discussion about the policy of what Canada includes in its treaties. Again, these are matters of high policy for

the executive to determine what the language is. But I think that it's important to understand that the view and the belief is that there is protection for aboriginal rights, and that's because, as we've been walking through, there is enough policy flexibility in these treaties, as they stand, to ensure that the government can do two things: can meet its obligations under the FIPPA, and can meet its obligations under the *Constitution* to consult and accommodate with aboriginal peoples where appropriate. There is no conflict between those two things. The government is in the position to do both.

CHIEF JUSTICE: And I guess what you're implying, I guess, is that this evidence is also suggesting that, at least in Mr. MacKay's opinion, this aspect of the treaty did not have the potential to impact adversely on aboriginal interests.

MR. SPELLISCY: Well, I certainly think that with respect to Annex B-10 in the sense that it clarifies that bona fide regulations in the public interest cannot be considered, even in indirect expropriation. Not that there's no compensation due, but that they're not even an expropriation, that you don't even get into that analysis, that certainly that gives policy flexibility to the government in order to determine what's in the best interests of all Canadians including aboriginal peoples.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: I said earlier I wanted to skip over and move to Article 10, and I think now we come back to Article 8 which is the specific exceptions in the Canada/China FIPPA. And so for the record, this is at record page 52.

CHIEF JUSTICE: I have it.

MR. SPELLISCY: Now, the first paragraph here again is Article 5, it's the most favoured nation, et cetera, and we've talked at length about that. Unless you've got further questions on that I don't plan to delve into that.

CHIEF JUSTICE: No.

MR. SPELLISCY: Paragraph 2 of these exceptions says that the most favoured nation treatment, the national obligation, the national treatment obligation and Article 7, which is senior management, board of directions – it's a version we don't talk about, I don't propose to delve into it – but that existing non-conforming measures are grandfathered. What does that mean? That means if you have a measure, if Canada has a measure that already doesn't comply, that's grandfathered. The FIPPA obligations doesn't apply. And moreover, there are rules on how they are to be amended and what amendments are, and if you're going to amend them or change them, they have to be in a trade liberalizing directive. This is a policy of the government of Canada.

And I want to specifically focus and now

go to Article 8, paragraph 3, which says,

"Articles 5, 6 and 7…"

so again most favoured nation treatment, national treatment, and senior management, board of directors,

"…do not apply to any measure that a contracting party has to reserve the right to adopt or maintain pursuant to Annex B-8."

And I want to go to Annex B-8 because there was some question about it, and why it is the way it is, and how it is effective. And I think that it's just useful to go there and explain how this provision actually works.

So there are two paragraphs in this provision. One applies to Canada and one applies to China. The provision says, the first line in the record, page 83:

"Canada reserves the right to adopt or maintain…"

so what this is, this is a reservation of policy flexibility for the government of Canada. That's what those first words do.

"…reserves the right to adopt or maintain…"

to continue. So Canada has reserved the right to do something. The next question is what?

"…any measure that does not conform to the obligations in Article 5, 6 or 7…"

so we are allowed to adopt measures that don't conform to those obligations,

"…provided that in the schedule of Canada, including its headnote, in Annex 2 of the Free Trade Agreement between Canada and the Republic of Peru, Canada reserved the right to adopt or maintain that measure in respect of investors or investments of investors of Peru."

So what this does is take what Canada reserved the right to do in Peru and incorporate it into the FIPPA here.

CHIEF JUSTICE: Right. So can you just help me understand exactly how it did that? Because the language to me is a little bit awkward.

MR. SPELLISCY: Right, so I think the first thing is Canada reserves the right to do something.

CHIEF JUSTICE: Right.

MR. SPELLISCY: It reserves the right to adopt non-conforming measures. What are those non-conforming measures? The question that a tribunal has to then ask itself is: Did Canada reserve the right to adopt a similar measure with respect to investors of Peru in that other free trade agreement?

So what it tells a tribunal is, if you want to know what Canada has reserved the right to do here, go look to see if Canada reserved a similar right with respect to investors of Peru in that free trade agreement. And so it incorporates everything, all the reservations that Canada took in that free trade

agreement, which are extensive, and incorporates them here.

And China, in the next paragraph, has done the same thing.

CHIEF JUSTICE: So just again on my last question, how exactly does it incorporate by reference all the reservations in that Canada-Peru FTA?

MR. SPELLISCY: Well, I think that the operative language there is "reserves the right" in the first line. So we reserve the right to do something.

CHIEF JUSTICE: Right.

MR. SPELLISCY: And for the tribunal to inform itself of what that something is, the language says, "Provided that…" So if Canada in reference to a particular document, and then I'm on the fourth line about middle:

> "…if Canada reserved the right to adopt or maintain that measure…"

so the question is there is a measure in question here, has Canada reserved the right to adopt or maintain that measure,

> "…in respect of investments or investors of Peru?

So a tribunal says: We now have to determine, in order to determine what Canada has reserved, we have to ask ourselves one question. Did Canada reserve the right in the Peru FTA?

CHIEF JUSTICE: Yeah, and that's the

language that I'm wrestling with. So, you know, the first line and a half says Canada reserves the right to do X. Then it says "provided that".

MR. SPELLISCY: Provided that Canada did Y. So if you take provided that, and then it just refers to where you would look.

CHIEF JUSTICE: Oh, provided that it already did it.

MR. SPELLISCY: Yeah.

CHIEF JUSTICE: I see, okay.

MR. SPELLISCY: So provided that Canada did Y, which is "did it in Peru free trade agreement".

CHIEF JUSTICE: So reserves X provided that Canada did Y.

MR. SPELLISCY: Yeah.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: And if we look to, and I don't think this is really an issue of dispute, but if we look to -- it's tab 7 in the core bundle that we handed up, the Canada-Peru Free Trade Agreement is there, or Annex II to it is anyways, and that's at record page 648.

CHIEF JUSTICE: 648?

MR. SPELLISCY: 648 in the record, if you want to just look in the bundle we handed up it's at tab 7. 648 is the first page. This is the Annex II of the Canada-Peru Free Trade Agreement.

CHIEF JUSTICE: Just one second. It was in the materials you handed up this morning?

MR. SPELLISCY: Yes, tab 7 in the binder.

CHIEF JUSTICE: Okay. Right.

MR. SPELLISCY: The first page in this tab at 648 is the headnote that was referred to, which provides definitions and the like, to explain how this works. And then if you flip to page 649, what you see is Sector, Aboriginal Affairs, Type of Reservation, and it's got National Treatment and the article there, I believe 9.03 refers to the investment chapter, so chapter 9 was the investment chapter here. National treatment, most favoured nation treatment, performance requirements, and senior management and board of directors. So the same ones except for performance requirements, and we think that that's been explained in the brief as to why performance requirements is not reserved. I can certainly answer questions on that if you have any. But for the Canada/China FIPPA it's the three, the national treatment, most favoured nation, and senior management board of directors, because performance requirements is only the minimum WTO obligations we already had. And it says in the description:

> "Canada reserves the right to adopt or maintain any measure denying investors of Peru and their investment or service

providers of Peru any rights or preferences provided to aboriginal peoples."

And it tells you what the existing measures are, even though this was a reservation for future policy flexibility. It also tells you the existing measures doing this are the *Constitution Act 1982.*

CHIEF JUSTICE: Okay.

MR. SPELLISCY: So that's how, and it's the reason I take you through this, because it can be a bit tricky to understand it.

CHIEF JUSTICE: Right.

MR. SPELLISCY: And that's why I want to take you to it and show you how it works, and show you how that aboriginal reservation is brought into the Canada/China FIPPA in order to preserve the government's flexibility to ensure that it can accord rights and preferences to aboriginal people in accordance with its constitutional obligations.

CHIEF JUSTICE: Yes. That's helpful.

MR. SPELLISCY: Now, there has been discussion about how this reservation does not reserve two provisions in particular, minimum standard of treatment and expropriation.

CHIEF JUSTICE: Right.

MR. SPELLISCY: So let's turn to that. I think the best explanation as to why that is the case is in the affidavit of Mr. MacKay, and so this is at tab 3 of the core bundle that we handed up to you earlier.

And I'm at page 22, which is also record page 22. And here Mr. MacKay testifies in paragraph 58, really, as to why, not just the Canada/China FIPPA, but none of Canada's trader investment agreements provide a reservation for measures which might violate the minimum standard of treatment or expropriation.

He says at paragraph 58:

> "FIPPAs do not allow for such reservation because such reservations would defeat the purpose of the treaty, which is to create reciprocal legal stability for foreign investors in the host state. These are basic protections against the lack of due process, denial of justice and comfiscatory conduct. Independently of the existence of any investment treaty, states must respect such obligations at international law, and the state may seek diplomatic protection on behalf of its national where such guarantees have been breached. Reservations are meant to provide governments with policy flexibility in certain areas, such as rights and preferences to aboriginals, not allow the state to expropriate without compensating or to forego due process."

And I think it's even just worth to pause again here on paragraph 59 of Mr. MacKay, because as he testifies,

> "I am unaware of any decision of a Canadian

court finding that either the minimum standard of treatment or expropriation provisions interferes with, or are incompatible with aboriginal claims or rights."

I think it's probably worthwhile just to flag something here, and this gets back, I think, more to what my colleague, Ms. Hoffman, will discuss probably tomorrow, but perhaps this afternoon, and to focus a little bit on what the conduct is that's prevented. And we've gone through the obligations. And so the question is, is a reservation needed to protect aboriginal rights and entrust in this -- on expropriation, minimum standard of treatment. And I think that Ms. Hoffman will discuss this further, but just to pause for a second to think about what the implication of that would mean.

That would mean that in order to accommodate an aboriginal right or interest the only -- the assumption would be the only reasonable solution would be for the government to act in violation of a provision simply to provide compensation for expropriation or to do it fairly, or the only way it could accommodate would be to simply act in a way that denied a Chinese investor due process. Denied them justice.

Ms. Hoffman will get into this further, but we cannot see how that could be the case, as to why

accommodation or the Crown's duty to aboriginal peoples would ever require it to act in such a manner. And that's why there's no need for a reservation here, and that's why we said before that there's no conflict between the treaty's provisions -- between both -- between the FIPPA's position and between the obligations that Canada owes to aboriginal peoples.

Now, as I look through, there are a few more provisions that I do want to talk about, and as I said, I won't talk about them all, but I do think that it's likely worthwhile -- and I should say, if you have any questions on any other provisions that I don't mention, please feel free and we can turn to whatever would assist the court. But I do think it's worthwhile to talk a little bit about dispute resolution provisions and the arbitration provisions in this treaty.

Just looking at the clock, it's five after three or seven after three. I'm wondering if now is a good time to take a break. It seems a natural spot for it. We can continue, but as I'm about to embark on a new subject I think it's a natural spot.

CHIEF JUSTICE: No, that's fine. It's up to you. If that's your preference, sure. So come back at twenty-five after.

(PROCEEDINGS ADJOURNED AT 3:08 P.M.)

(PROCEEDINGS RESUMED AT ??)

SUBMISSIONS BY MR. SPELLICSY, Continued:

MR. SPELLISCY: Right before the break,

we were going to start talking about what a lot of time has been spent on, and that's the investor/state dispute resolution provisions in the Canada/China FIPPA.

And I guess I want to pause here again to note one other point. There was some discussion from my friend this morning about whether or not Canada should be -- or whether or not it's a good idea to agree to *ex ante* tribunals, whether or not the policy adopted by Australia with respect to investor/state dispute settlement is appropriate. But I think he clarified at the end and I'm glad he did, because I agree, that that's not the question before this court.

CHIEF JUSTICE: Right.

MR. SPELLISCY: And so I think in looking at some of these provisions, and how they work, that has to be kept in mind, that this court does not pass judgment on the wisdom of Canada entering into those provisions. The question is, do these provisions have an adverse -- or can they have an adverse effect?

CHIEF JUSTICE: Yes. It goes to the potential, given the uncertainty about how these tribunals are going to -- yes.

MR. SPELLISCY: Well, I do want to talk about that.

The investor/state dispute resolution provisions are found in part C of the Canada/China FIPPA, and that starts at record page 64. And it starts Article 19. Primarily most of these articles are

procedural articles, how claims are to be filed, conditions precedent for filing claims, how arbitrators are to be selected. And I don't intend to primarily take the court through any of that.

CHIEF JUSTICE: Sorry, what page of the record?

MR. SPELLISCY: It's at page 64 -- Article 19. 64 of the record or Article 19 of the Canada/China FIPPA. Where Part C starts.

CHIEF JUSTICE: Yes, I've got it.

MR. SPELLISCY: There are provisions in this agreement, as I say, all the way up through including on the right of the government of Canada to decide to make the hearings transparent, to make their proceedings transparent. You find that in Articles 27 and 28. There are provisions on *amicus*. I don't think that we need to talk about any of that. Where I would like to get to, to start off, is Article 30. Which is on record page 74. Which is about governing law.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: What this provision provides is -- and I'll read from it in our paragraph 1.

> "A tribunal established under this Part, shall decide the issues in dispute in accordance with this agreement and applicable rules of international law."

What the tribunal isn't doing is implementing domestic law, is making rulings on Canadian law. It does not

overturn Canadian law, it does not invalidate it. But what it can do is, where relevant and as appropriate, take it into consideration in rendering its decision. And that's in the last part of paragraph 1 there.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: Article 31 is on the same page of the record. We talk about --

CHIEF JUSTICE: Just before you go there, I'm sorry to interrupt, but I see this next sentence,

> "An interpretation by the contracting parties of a provision in this agreement shall be binding on a tribunal."

MR. SPELLISCY: Correct. This is the similar provision as to what was found in the NAFTA, which lead to the binding note of interpretation. What this provision does is if the parties issue a note of interpretation under this agreement, that's binding on tribunals. So the parties have the ultimate control on how this agreement is to be interpreted.

CHIEF JUSTICE: So is B-10 in your view such a note? An interpretation -- is B-10 covered by that second paragraph -- the second sentence in paragraph 1?

MR. SPELLISCY: Let me think about that. I think that typically the indication here is interpretation subsequent to the agreement. Provisions in the agreement, and I guess let me take you to, I

think -- B-10 is an Annex to the agreement, and if you go to the final clauses here, of the treaty --

CHIEF JUSTICE: You're characterizing it as an interpretive note, I think.

MR. SPELLISCY: It is an interpretation. It's an interpretation of a clause, but it comes in an annex, and if you look at Article 35(4), on record page 82 it says:

> "The annexes in footnotes to this agreement constsitute integral parts of this agreement."

As a part of the agreement, Annex B-10 is, in essence, binding as it is in that it confirms a shared understanding. When we talk in the governing law about interpretations, this is interpretation issued not, I think, technically in the agreement, but interpretations that come subsequent to. And I think perhaps the easiest way to understand this is turning probably back to Article 18 of the Canada/China FIPPA. To Article 18, which is on record page 63.

CHIEF JUSTICE: I have it.

MR. SPELLISCY: And it talks about consultations. It's an article expressly on consultations. This gets back to something my colleague Mr. Timberg was saying earlier, that the parties can review these agreements and they can consider how they're applying. And so if you see here paragraph 1 says:

"The representatives may hold meetings for the purposes of…"

you've got:

"(a) reviewing the implementation of this agreement;

(b) reviewing the interpretation application of this agreement."

You get down to paragraph 2, it says:

"Further to consultations under this article, the contracting parties may take any action as they may jointly decide, including making and adopting rules supplementing the applicable artibtral rules under Part C and issuing binding interpretations of this agreement."

So I think that the reference in the governing law section, there's no need to clarify that the provisions of the agreement are binding. It's in a signed agreement. It's an international treaty. But what it's trying to pull in, is say, "If we subsequently issue a note of interpretation, even though it's not technically part of the treaty, investor state tribunals, you are bound by it. You don't get to consider whether or not to accept that interpretation or not."

CHIEF JUSTICE: Right. And are there any such interpretive notes that are of relevance to this case?

MR. SPELLISCY: The NAFTA note of

interpretation in 2001 is that exact provision applied. So we've talked about the Free Trade Commission's note of interpretation in 2001, in which they clarified what was meant, they interpreted what was meant by the minimum standard of treatment.

CHIEF JUSTICE: The MST.

MR. SPELLISCY: That is a note of interpretation pursuant to a similar provision that is found in NAFTA.

CHIEF JUSTICE: But is it an interpretive note to this agreement?

MR. SPELLISCY: No, it is not. So there has not -- this agreement is yet to be enforced, and so the parties have not issued any interpretations of this agreement because those are in the provisions of the agreement.

CHIEF JUSTICE: Okay, so it doesn't fall into the second sentence in 30(1), and it doesn't fall into 18(2).

MR. SPELLISCY: No, and that's because it is a provision of the agreement. The Annex is an integral part of the agreement. So, just like in any contract, you don't need to provide that the contract terms specified in the contract are binding. That's the --

CHIEF JUSTICE: I hear you.

MR. SPELLISCY: -- point of the contract.

CHIEF JUSTICE: Right, and so --
MR. SPELLISCY: So by including the Annex in there, it's a binding provision of the agreement. Tribunals have to deal with it.
CHIEF JUSTICE: So when you just answered my question about whether there were any binding interpretations that were relevant for this agreement, how are they relevant again? Just remind me about that, this one under NAFTA and MST.
MR. SPELLISCY: Well, it's not relevant really for the Canada/China FIPPA, because the binding note of interpretation is already incorporated into Article 4, paragraph 2.
CHIEF JUSTICE: I see, okay.
MR. SPELLISCY: Right?
CHIEF JUSTICE: Yes, okay.
MR. SPELLISCY: But this comes down to if the parties, in implementing -- if this agreement comes into force and the parties in reviewing the implementation have consultations and they don't like the way the agreement is going, the parties have the complete discretion to bind arbitral tribunals to interpret provisions in certain ways.
CHIEF JUSTICE: Mm-hmm. So it's just further flexibility, really.
MR. SPELLISCY: Further flexibility granted to the parties.
CHIEF JUSTICE: Is it your point that

basically what this provision does is further reduces the probability that there could be any adverse impacts on aboriginal interests as result of this agreement? Is that the point?

MR. SPELLISCY: That's correct, because the tribunal, again, is interpreting international law. It's interpreting -- it's acting at the international realm, and I think my colleague, Mr. Timberg, will come back to that. But what they are doing is interpreting international law. Canadian law may be considered if relevant, but they don't interpret it.

CHIEF JUSTICE: But is this your answer to the principal thrust of what Mr. Underhill was saying about the uncertain -- the uncertainty regarding how this agreement might be interpreted and the variety of potential interpretations that different *ad hoc* tribunals might take? So are you saying, yeah, but this is the answer to that because they can issue binding interpretations?

MR. SPELLISCY: I don't think it's the entire answer, because it is -- but it is an answer when people start to get concerned about essentially arbitral tribunals going off course. When they start to get concerned about tribunals interpreting the provisions in a way that cannot be acceptable to the disputing parties, as that isn't the -- what they intended. And the point with this article, that sentence and the

consultation is, there is a method for the contracting parties to stop that from happening.

And so in essence when we -- now, of course it requires the consent of China as well. This is a joint note of interpretation. We're not talking about a unilateral interpretation of the government of Canada. It requires the consent of China. But when the concern is established that we're locked in for -- and it's actually 15 years, but we'll get to that. But for a long period of time, that the provisions are set in stone, I think that -- as I've tried to walk through and show in these obligations, the provisions are flexible in and of themselves. There is policy flexibility further reserved to protect aboriginal interests, and there are mechanisms and means pursuant to which the parties can act to further secure their right to regulate in the public interest.

And I think that as we sort of come through some of the dispute resolution provisions, we can see some of -- where if things go wrong, what does that mean.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: So I want to come to Article 31, which is on the sort of awards that tribunals can render. Article 31(2) -- I guess we'll even back up. Article 31(1):

> "A tribunal may recommend interim measures of protection to preserve the rights of

disputing parties."

Recommend, not order. A tribunal does not have the right to enjoin action, does not have the right to attach assets. It may recommend that, but notably it may not recommend attachment or enjoin the application of the measure alleged to constitute. So it may not even recommend that. Not only would the government not have to pay attention, it may not even recommend that, preserving the space of the government to continue its regulations and its policies even in light of a challenge.

CHIEF JUSTICE: Sorry, Article 20 was?

MR. SPELLISCY: Article 20 is the submission of the claims arbitration, I believe. Article 20 is a claim by an investor of a contracting party. So it's your basic, the investor -- if you look at Article 20, paragraph 1 on record page 64:

"An investor of a contracting party may submit a claim to arbitration under this part if there is a breach of certain obligations."

CHIEF JUSTICE: So when it says, "it shall not recommend attachment". What does that mean?

MR. SPELLISCY: Shall not recommend the attachment of assets to satisfy the judgment.

CHIEF JUSTICE: Oh, like seizure.

MR. SPELLISCY: Seizure.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: You know, essentially

shall not recommend that its assets be attached in order to secure judgment in the future.

CHIEF JUSTICE: Oh, like a lien.

MR. SPELLISCY: Liens, or even seizing it, both things. But again, this is about interim measures to preserve the protection of the rights of a disputing party. So, the common thing would be enjoined the application.

This is what domestic courts, of course, have the right to do. They have this authority. Tribunals do not.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: Again, it stems from what they are. They are international tribunals.

CHIEF JUSTICE: All right.

MR. SPELLISCY: When we move to Article 31-2, it talks about what sort of awards tribunals can issue. That the issue -- final awards against the disputing contracting party, which is Canada or China. Now, I think it is important to pause here. Just to emphasize again, the Hupacasath First Nation, and no First Nation, will ever find itself as a respondent in an arbitration under the Canada/China FIPPA.

CHIEF JUSTICE: Right. Mm-hmm.

MR. SPELLISCY: So, what may they order? They may order under paragraph 2(a) monetary damages and interest, and under subparagraph (b),

restitution of property. But the second sentence there says:

> "In which case, the disputing contracting party may choose to pay monetary damages instead."

So, if you took a hypothetical example of an expropriation, and they expropriated a tractor, the tribunal could order the restitution of that tractor but the disputing contracting party could say, "We'll pay you monetary damages instead."

CHIEF JUSTICE: Mm-hmm. Mm-hmm.

MR. SPELLISCY: What can a tribunal not do? It cannot change Canadian law. It cannot stop the government from carrying on with a measure. It cannot stop -- cannot force the government to choose a different sort of measure. And I think when we think about sort of the impacts that this may have on aboriginal rights, this is the point that, when we make that, this operates in the international realm, that that has to be considered. And we've heard, and I know we want to address, the idea that in fact the concern is not that there will be a direct impact, but that there will somehow be an effect on government decision-making from what's been referred to as either claims or the spectre of claims.

CHIEF JUSTICE: The chilling effect.

MR. SPELLISCY: The chilling effect. And I want to get to that in a second. But I think that

to understand specifically that an arbitral tribunal can never require the government of Canada to adopt any particular measure or to change any measure in response to an award, that's an important thing to recall.

CHIEF JUSTICE: Right.

MR. SPELLISCY: I think the other part of an aspect of this is on Article 32, which is on record page 75. In paragraph 1, it says:

> "An award made by a tribunal shall have no binding force except between disputing parties and in respect of that particular case."

Essentially this means there is no *stare decisis*. And so the fact that one arbitral tribunal has found that a measure of Canada breaches an obligation under the Canada/China FIPPA has no effect other than in that particular case. Now that's not to say, and I don't want to leave the impression at all, that arbitral tribunals ignore each other. They don't. They do look at what each other say. They look at the reasoning. Sometimes they disagree. And that's actually been the source of some discomfort among some academics, that there isn't a way to create -- or that there hasn't been created any sort of ultimate resolution. There is no Supreme Court of investment arbitration.

Now, whether there might be eventually, that's a question of policy again. But the fact is that these tribunals decide particular cases. And so going

forward in terms of looking at what measures Canada can adopt, even after an award, that has to be kept in mind, the fact that a tribunal has determined that something is in fact a breach -- damages are paid, but there is no effect beyond that particular case.

CHIEF JUSTICE: Mm-hmm. Mm-hmm.

MR. SPELLISCY: Now, I want to get to talking about some of the experience under NAFTA and the chill question. And what the evidence actually shows on that, and what the experience is. But before I do that, I did want to come to one other point in the actual agreement, which has been mentioned a lot, which is Article 35. Which is the term of the agreement.

And that's on record page 81.

CHIEF JUSTICE: I have it.

MR. SPELLISCY: And this is what it provides in paragraph 1:

"That the agreement…"

in the second line,

> "…shall enter into force from the first day of the following month after the second notification is received…"

That refers to the mechanism for bringing the treaty into force. And then says:

> "…and shall remain in force for a period of at least 15 years."

Now, there is some question about is it 30 years, is it 15. The actual term of the agreement is 15 years.

There is a sunset protection for investments already existing in the country made at the time that -- and the agreement is canceled, that lasts another 15 years. But I think the more important point that I would make here is, Canada doesn't enter into these treaties with the intent of terminating them. Canada has never terminated a trade treaty.

The NAFTA has been in force for 20 years next year. And it is an integral part of the Canadian regulatory, the U.S. regulatory, the Mexican regulatory environment. It is about how those countries function, and there is no intent. And we can talk about whether it's 30 years, 15 years, but the reality is that Canada certainly intends its treaties to last for longer. We don't enter into these looking to cancel them merely at the extent of the first term. And so the fact that there is one year, 15 years, it doesn't really matter. This is not an abnormal clause. We have other treaties that have clauses such as these.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: But at the same time, the court should be cognizant that we're not looking to get out of the treaty.

Having walked through some of the obligations that we have in the treaty, and I don't -- unless there are particular questions on other obligations I haven't touched on, I don't intend to spend more time really on it. But I want to come and

talk about the idea of both what the risk really is, and potentially chill.

And this will be -- I'll talk a little bit about it. It will be covered again tomorrow, I know. We understand it's sort of the key crux of the dispute here, so my colleague, Ms. Hoffman, will also be discussing it in a way.

Yesterday my friend made the statement that it was dangerous to rely on NAFTA experience in thinking about what might happen under the Canada/China FIPPA. The reality is -- and we've heard that the provisions in this are similar to the NAFTA, and if we can't rely on 20 years of NAFTA experience of a treaty with similar provisions with an investor, with foreign direct investment that dwarfs what the Chinese investment is in Canada now, then what are we left to rely on? In making that analysis, we have evidence of practice before us. We have experience. It cannot be ignored. Could that experience be different? Could it change? Sure. But if we don't rely on this experience, all we are doing is engaging in utter speculation. It is before us and I think that we should turn to it.

And I want to go back to NAFTA, and I think just to pause for a little bit to note the environment in which NAFTA has been operating for the past 19 years, almost 20, next year 20. Because as my colleague Mr. Timberg mentioned at the outset, it's applied to the entirety of Canada. And in that

application, when it's been applicable, there have been aboriginal peoples exercising self-government through treaties, through modern treaties. These exist. They go back -- the First Nations have had expanded law-making powers pursuant to modern treaties and agreements beginning in 1984. And I think we've included some of those treaties in the record for the court to review.

And that, I think, is in the *Cree Naskapi Act*, which the court could find at the record, Volume 3 at pages 1055 to '57. And I don't intend to take you to it, because I think this falls more into sort of the realm of my colleague, but I think that the key is to recognize that these powers have been in existence for the entirety of NAFTA. It's not the only treaty. There are other treaties.

CHIEF JUSTICE: Which exhibit are you looking at?

MR. SPELLISCY: It's respondent's record, Volume 3.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: So it's Volume 3, and it's at tab 59 in Volume 3.

CHIEF JUSTICE: Okay, I have it.

MR. SPELLISCY: Right. And as I said, in this exhibit, what we have is a modern treaty that sets out the lawmaking powers of the Cree Naskapi. And you'll find that -- and I believe it starts on page 1055 of the record. I think my colleague, Ms. Hoffman, is in

a better position to discuss it in detail. But what I want to note for the court at this point is, here is a treaty granting governing -- self-governing powers, 1984. Ten years prior to NAFTA, still in force. There are other treaties, similar treaties, that grant law-making powers. And of course then there is the self-governance powers under the sections of the *Indian Act*, which include bylaw making powers, including zoning, land use planning. All of these have been in existence for the length of period of the NAFTA. And so when we talk about what Canada's experience is under the NAFTA, and what the real risks are that measures of this sort could lead to claims, which might lead to some sort of adverse effect, I think that that's important to recall, that that's the environment that NAFTA has been operating in.

CHIEF JUSTICE: Mm-hmm. Are there many similar such agreements that predate NAFTA? I'm just trying to get a feel for whether --

MR. SPELLISCY: Well, I think there are 19 First Nations that possess treaties. We'll try and find how many of those were signed prior to NAFTA. There are more than one. But I think to recall as well that it's not just the modern treaties that provide that have self-governing powers. Those are also under the *Indian Act* which have been in force for a while as well, and certainly zoning and bylaw provisions are the sort of acts that might be challenged.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: So now let's talk about NAFTA. And again I come back to something that I said earlier. We talk about NAFTA instead of some other FIPPA because there's never been a claim against Canada under any of these other FIPPAs or another of those other FTAs. NAFTA is the experience. So, and considering the similarity, as I said, this is the best evidence that there is of practice. Now --

CHIEF JUSTICE: Just before you move on, do you have anything you want to say about the additional point that Mr. Underhill made to the effect that, well, we just can't look at the experience under NAFTA, we need to look at the international experience?

MR. SPELLISCY: Yeah, I think, with respect to my friend, I think that that would be looking at the wrong set of variables. The question is not what other states do with respect to their other international treaties, the question here is the conduct of the government of Canada and what the government of Canada does and how the government of Canada manages its relationships with aboriginal peoples, and more generally, how the government of Canada regulates in what it believes is the public interest. This is not to say that of course other states may not violate their international treaties. But we have to focus here on the actions of the government of Canada.

Before getting into some of the --

identifying some of the claims, it's not disputed between the parties that there has never been an aboriginal measure of any of Canada's First Nations challenged in an investment arbitration under NAFTA. There has never been a claim against Canada relating to any right or preference accorded to an aboriginal group, or any measure taken to accommodate aboriginal interests against Canada.

So let's talk about the claims that have been filed against the government of Canada, and I particularly want to do so in the context again of what the real risks are, but also in the context of the concern about regulatory chill. And so I think earlier today we handed up a chart, an aid to the court.

CHIEF JUSTICE: I have it.

MR. SPELLISCY: This reflects the evidence in the record. We've tried to provide in a summary fashion so that the court doesn't have to leaf through hundreds of pages of decisions to find it.

CHIEF JUSTICE: No, that's helpful.

MR. SPELLISCY: And so the chart divides cases that have actually been finally resolved, and there have been twelve, I guess, that have been finally resolved in some fashion or another according to the chart here.

You've got a couple claims that were settled with compensation. Those are right at the very beginning of the chart. That's the *AbitibiBowater* case,

which we talked about earlier. And here what I would point out, because again you look at damages claimed in the notice of arbitration, what the initial claim was, $500 million. What the initial settlement was -- or what the settlement finally was, $130 million. Again, a lot of money, but one has to keep in mind that there was an actual expropriation of assets, revenue producing assets.

CHIEF JUSTICE: So what you're saying is they didn't actually lose $130 million, they got something back.

MR. SPELLISCY: In an expropriation of assets, that's what occurs. Now, the difficulty here again is, it was the government of Newfoundland that expropriated the assets of Abitibi, and it was the federal government that paid the NAFTA settlement.

Ethyl Corporation is the other one that was settled. Settled a number of years ago. *Ethyl* was one of the -- if not the -- one of the first claims. I believe it was actually the first claim against Canada. *Ethyl Corporation* has been referred to as an instance where a NAFTA claim resulted in a government changing its regulation. It's not really an accurate description of what happened in *Ethyl*.

So if you look to Canada's book of authorities, and it's in Volume 4. It's at tab 97. This is a page that provides information as of the time that it was, on NAFTA disputes that have been filed. It

talks about *Ethyl*, and I think this is an important part to realize what happened in *Ethyl*. And so I am looking at -- this is tab 97 in Volume -- and it's page 2 of 3 under Chapter 11, and the second paragraph down.

CHIEF JUSTICE: I have it.

MR. SPELLISCY: It says:

> "The first investor state complaint to be submitted to arbitration pursuant to NAFTA Chapter 11 with the government of Canada was launched by the U.S. company Ethyl Inc. on April 14th, 1988."

And yes, proceeding:

> "The Ethyl Corporation Inc. alleged that the federal *Manganese-based Fuel Additives Act* relating to the fuel additive…"

I'm not even going to try, MMT is what I'll say,

> "…breached Canada's obligations under NAFTA Chapter 11 and that these breaches harmed its investment in Canada."

Then the next sentence describes what happened.

> "Following the government's response to the recommendations of a separate dispute settlement panel established under the agreement on internal trade…"

which is a domestic agreement about trade between the provinces,

> "…which found the *Act* to be inconsistent with

the objectives to the EAIT, on July 20th, 1988 the government moved to resolve other challenges to the legislation and agree to a payment of $13 million to Ethyl, representing its reasonable costs and lost profit in Canada."

What happened in *Ethyl* was a measure was enacted. There was international challenges, yes. There were also domestic challenges. The domestic challenges resolved, finding the measure to be in breach of Canada's domestic agreement on internal trade, and so the government of Canada settled the case. Settled all the cases, the relating cases, $13 million. Again, not insignificant. We don't say that it is. But again, to get a perspective as to -- because there had been the idea of the specter of claims.

If you look on the chart, back on the chart, Ethyl, damages claimed with a notice of arbitration, $250 million. Settlement amount, $13 million. Again, we're not saying it's insignificant, but when thinking about sort of the effects of what the specter of claims is, you can't just look at what claimants claim. Claimants can claim exorbitant amounts of money. The question is, what is the effect of NAFTA under these agreements, and that's what we're trying to point to here.

If we continue down the chart there's been several cases, three of them, which have

been formally withdrawn after the tribunal has been constituted. So formally withdrawn so there's an order terminating the proceedings with no compensation. Some of them are in consent settlement awards. But no compensation. You look at that, you've got claims relating to *Dow AgroSciences* which was on a chemical, *St. Mary's* which was about permits for a quarry and a land use planning decision. Those claims are withdrawn or settled with no compensation.

You've got claims where judgment was rendered, and this is where it actually went to dispute resolution and what happened was there was either a decision on jurisdiction, there was a decision on the merits, there was some sort of judgment so that a tribunal actually exercised. In the previous there, there's *Greiner, Dow AgroSciences* and *St. Mary's,* the tribunal was constituted but not called upon to do anything except record the withdrawal of the settlement.

Actually I'd clarify one point there actually. I believe in both *Greiner* and *Dow AgroSciences*, the claim was filed but there was actually no tribunal constituted, so we never even got to that stage. There was actually a notice of arbitration.

And I don't intend to spend a significant amount of time on each one of these cases. The cases are there, they're listed, you see what amounts were claimed and what the awards were rendered. So far you've got a total of about 6.41 million claimed. Now,

I want to pause here because there's some dispute about the actual numbers. You've got a settlement, you've got an amount where we say that in the chart here it adds up to roughly 150 million settlement in damages awarded. I think in his testimony Mr. Van Harten clarified it as 160 million, or in his opinion. I believe in Mr. MacKay's affidavit he says it's around 158. Some of this is explained simply through variances and exchange rates, interest on damages awarded. It's between 150 and 160 million. I don't think for our purposes here, in terms of total amount, even amount awarded, these are millions of dollars but we're not going to quibble about whether it's 160 million. We can accept a total of 160 million awarded. 158 million is what Mr. MacKay says. That's not really the point.

CHIEF JUSTICE: Versus 149.

MR. SPELLISCY: Right, 149 if you look through the actual awards and what is awarded, and you simply add it up not taking into account interest that might be awarded on a judgment and not taking into account exchange rates that might have been prevailing at the time. And of course over the course of NAFTA those have varied widely. You know, an award back in 1998 in U.S. dollars was worth a lot more than one in U.S. dollars today. And so there have been some settlements in Canadian dollars. We haven't really tried to account for that in this particular aide, but the evidence is what it is in the record. Mr. MacKay

says it's 158 million. Mr. Van Harten opined, I think without really citing any, about 160. He's not far off. But that's settlements and --

Now, what can we say about these particular awards? And I guess actually, you know, before I go there, let me just talk a little bit about *Mobil,* because *Mobil* again was raised, I talked about it briefly already. *Mobil* is an award where -- an arbitration where the government of Canada and Newfoundland enacted what was determined to be, by a tribunal, a performance requirement in breach of the NAFTA.

CHIEF JUSTICE: So that's not on this list.

MR. SPELLISCY: It's not on this list. The case in terms of damages is still ongoing. Nothing has been decided on terms of damages. My friend yesterday indicated that there was significant damages claimed and therefore, I think he said, can assume that will be significant damages awarded. I think what this chart shows is that claims made and actual damages awarded are not correlated together. We don't know what the tribunal will award, if it will award anything in terms of damages. We don't know. There's questions of burden of proof.

The other reason *Mobil* isn't on this chart, of course, is it's not official really until the period for set-aside of the arbitral award is done. So

Mobil remains in an unresolved state. Yes, there has been a decision as to breach, but we can't really say anything more about it. We can't even say whether that decision will be upheld by a court that reviews it if it should be reviewed. We're just not there yet. Now, of course there are --

CHIEF JUSTICE: Are there any other unresolved ones?

MR. SPELLISCY: There are numerous unresolved cases in various stages. Some that are close to hearing, but there are no other ones where there has been a decision finding liability and only damages remains unresolved. Canada is still contesting, on the merits, every one of those cases.

CHIEF JUSTICE: It would be helpful to have, if it's not too much trouble, have a chart of these unresolved ones, just to get a more complete picture. But again, if it's going to take more than a short amount of time, then don't worry about it.

MR. SPELLISCY: I'm sure that we could produce something. I could reel some of them off, I'm sure, as well, but I'm sure we can produce something that may be graphically is a little bit easier. Again, the difficulty with some of it will be that there's been not even a finding that the tribunal has jurisdiction in some of them. There's certainly not been a finding on the merits of any of them. So there would be a question of the amount claimed.

And I do want to get to that, because -- and I want to go here to paragraph 69 of Mr. MacKay's affidavit, which is at tab 3 of the core bundle that we handed up.

CHIEF JUSTICE: Did you say 69?

MR. SPELLISCY: Paragraph 69 at tab 3, yes. It's on record page 0026, 26.

CHIEF JUSTICE: I have it.

MR. SPELLISCY: Mr. MacKay, in the previous paragraph, talked about the losses and settlements we mentioned, as I said the 158 million. And in paragraph 69 he says:

> "Importantly, I'm not aware of any evidence suggesting that any of the losses or monetary settlements have implicated or impaired Canada's ability to regulate in the public interest in a non-discriminatory manner."

He clarifies again, we talked about earlier:

> "None of the claims submitted to arbitration against Canada have involved aboriginal rights."

But I think that's important testimony and evidence to focus on there. They have not impaired Canada's ability to regulate in the public interest or to regulate in a way which protects aboriginal rights.

I want to pause here also to come back, because there's been a lot of talk about the specter of claims and how the specter of claims themselves --

forget the amounts awarded. Even the specter of claims can have a chilling effect, and I think we've seen that in some of the academic writings. But I think it's important again to look at the evidence that is actually a practice that we have and what do we have? We have, just in terms of the specter of claims, you'll see from the chart over $2 billion of damages claimed against the government of Canada. Claimed, not awarded. Claimed against the government of Canada since NAFTA came into force.

What is the evidence we have of how that effects the government's willingness to regulate in the public interest, or willingness to regulate in a way that is necessary to adhere to its obligations at domestic law? We have Mr. MacKay's evidence. We also have what the practice is. There's been a lot of talk about the *Lone Pine* issue and about the moratorium on fracking in Quebec.

Small clarification. There's actually been no claim submitted to arbitration yet. What there is has been a notice of an intent to submit a claim, but there's been actual no formal notice of claim to arbitration. There's been no complaint. The tribunal is not in the process of being constituted. There's been nothing in that respect.

CHIEF JUSTICE: That's in *Lone Pine*?

MR. SPELLISCY: This is *Lone Pine*. There is nothing. It is not a claim to arbitration

under the NAFTA yet. And may never be.

We've introduced evidence in the record that there have, I think, been about 35 notices of intent to submit a claim to NAFTA -- to arbitration under NAFTA, but fewer of those, 20 around, 21 maybe, have actually resulted in an actual claim being submitted. So the mere fact that a notice of intent has been filed does not mean a claim will be submitted.

But even, I think, to take that in context and to think about what is really at issue there, which is a moratorium on fracking, and I think to think back to the NAFTA experience, almost $2.4 billion of claims. Again, not adjusted for inflation, so that number -- not adjusted for inflation or for exchange rates. That number would be different, but hard to pin down. But over $2 billion of claims. And yet the government of Quebec, does it feel the regulatory chill? No. It enacts a moratorium on fracking because it believes it to be in the public interest. Now, there might be a claim about that. Canada will defend that claim.

But for the question of regulatory chill, it's one thing to speculate, but you've got the evidence of Mr. MacKay. And you've got what the practice of governments actually are. We heard about another claim, *Windstream*, about a moratorium on offshore wind development, enacted by Ontario. Again, that was in 2011. All of these claims in this chart, billions of

dollars of claims, filed before then, what does it say about the ability or the chill that governments feel? They still have the flexibility, despite the fact claims are filed, to regulate in what they believe to be the public interest. There is no reason, no evidence for this court which would lead it to be otherwise, to believe otherwise with respect to the Canada/China FIPPA.

CHIEF JUSTICE: You're saying there is no evidence at all anywhere in the record that this past experience that involved claims totaling over $2.4 billion has never exercised a chill or in any way modified Canada's behaviour.

MR. SPELLISCY: Well, I think you have to be careful with "modified" because again, it gets back to the evidence of Mr. MacKay. Do we consider our international legal obligations? Of course we do.

CHIEF JUSTICE: Right. He said that.

MR. SPELLISCY: But in and of itself, that cannot be enough to trigger a duty to consult. The mere fact that we worry about making sure we don't violate our international obligations does not mean that we can't act in a way still that regulates in the public interest, that protects -- preserves aboriginal rights. There is no conflict between those two things. And we've seen that by going through the obligations in the treaty, where the flexibility and the policy flexibility are built in. And then we see that with respect to what

the practice is.

And we see that with respect to the practice not just of the federal government, where you have Mr. MacKay's testimony, but of sub-national governments. There is nothing to say of course these agreements are important considerations in government decision-making. But that doesn't fetter our ability to act in a way that can accommodate domestic law, can accommodate our constitutional obligations, and our international legal obligations at the same time.

Here, I just want to come back to something that was briefly discussed earlier, about Article 33 of the Canada/China FIPPA and the general exceptions, and what might be done with respect to an aboriginal reservation, one of those general exceptions. And again, I don't want to get into a discussion as to what appropriate treaty policy is, because that's not for this court. But what I do want to come back to, which is something we talked about when we referenced Mr. MacKay's testimony, particularly Annex B-10, and it's the same point here, that when the government looks at what is necessary to preserve its flexibility, to protect aboriginal rights, to regulate in the interests of Canadians, a general exception of this regard isn't necessary. It's not in NAFTA, I would point out, that there is no article on general exceptions of the sort you see in the Canada FIPPA in NAFTA. And yet that has not impeded the government interest to regulate in the

public interest, as we've seen. It has not impeded -- it has not resulted in claims against aboriginal measures. It has not regulated in claims regarding measures adopted to provide rights and preferences to aboriginal people.

So I think, you know, as I say, I don't want to get into that discussion. But in thinking about where there is policy flexibility in the treaty and what the record of experience shows with respect to treaties, even when they don't include general exceptions of the sort found in Article 33, the experience is there are -- there is not a regulatory chill and there is no adverse effect directly on it.

CHIEF JUSTICE: In 32, again -- let me just have a look at that.

MR. SPELLISCY: Article 33 is the general exceptions article in the Canada/China FIPPA. And it was brought up this morning in the context of where they might think about changes.

CHIEF JUSTICE: Right, and how it could have been -- how aboriginal interests could have been included in that, but wasn't.

MR. SPELLISCY: That's the context it was brought up in.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: And of course the same context it was brought up in with respect to Annex B-10 about how you could have included a clause. But again,

the record here, and the experience of Canada, is that such provisions are not necessary to preserve the government's right to regulate in the public interest. They are not necessary to preserve the government's ability to respect its constitutional duties to accommodate aboriginal people. They are not necessary. It can be done. And the government does it.

If there is nothing else, sort of on the obligations of the treaty Canada's NAFTA experience, then what I would propose is, I pass the floor back to my colleague, Mr. Timberg.

CHIEF JUSTICE: Sure. That's great. Thank you.

SUBMISSIONS BY MR. TIMBERG, Continued:

MR. TIMBERG: Chief Justice. I'll just take you briefly through the *Council of Canadians* case and provide our conclusion with respect to our position that the CCFIPPA operates at the international realm and does not have sufficient impact in the domestic sphere to trigger Section 35 of the Constitution, and then tomorrow morning my colleague, Ms. Hoffman, will pick the brunt of the issue with respect to duty to consult.

So with that I'll perhaps take you through this. So I'm at Canada's book of authorities, Volume 2 of 4. And the trial decision is at tab 39 and the Ontario Court of Appeal at tab 40.

So, *Council of Canadians* is a challenge

that is similar to the one now before this court, in that a Constitutional challenge was brought against the investor state dispute provisions contained in Chapter 11 of NAFTA, and the court's determination of the scope and operation of NAFTA is directly applicable to this case, as we've seen the similarity, the strong similarities between NAFTA and the CCFIPPA.

The court in *Council of Canadians* found that NAFTA as an international treaty did not alter domestic law and therefore does not attract the application of Section 96 of the *Constitution*. And the court held that the conferral of authority on NAFTA tribunals could not be the foundation of a *Charter* breach because nothing in the NAFTA compels Canada to amend its law and practices, and the arbitration of international law claims could not affect or determine the rights of Canadians.

And I'll suggest there's a two-step analysis undertaken by the Ontario trial court and the Ontario Court of Appeal, and leave to the Supreme Court of Canada was denied. The first step is it's clear that without domestic legislation an international treaty operates within the international realm and does not form part of Canada's domestic law. I'll take you -- the basis for that is found in *Baker,* Supreme Court of Canada, and also in *Council of Canadians.*

So the first step is, is there any domestic legislation that's required for it to be

implemented? The second step under *Council of Canadians* is you look at the character of the international agreement. Is its character exclusively international or does that international agreement have "sufficient links with the domestic law of Canada to warrant the application of the *Constitution*"?

And so the second part of the test is that there will be some international treaties that operate in the international realm and they just don't have sufficient links to the domestic realm to form part of that. Others, however, by their character and their operation and what they do, although they don't have domestic legislation, will have sufficient links to a domestic realm. And so that's this analysis that was done in *Council of Canadians,* and there they determined that it remained in the international realm and Section 96, which is the right of access to superior courts, was not applicable.

So we suggest that this court is required to take a similar analysis to look at this international treaty. The first step is, is there domestic legislation? And the second step is to characterize it as to does it operate fully within the international realm, or does it have sufficient links with the domestic law of Canada?

So with that introduction I'll turn to the case. Now, I note that the trial case has more details with respect to this portion of our argument,

and so I'll be referring to it first and then I'll take you to the Court of Appeal decision. And it's at page 13 of the decision, paragraph 33 that sets out a heading titled "Treaty-Making Power and Performance" and it states the obvious at paragraph 33:

> "A treaty is an agreement entered into between or among states that is binding in international law."

And halfway down the page it talks about Lord Atkin's commentary in the *Labour Conventions* case:

> "Within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing law, requires legislative action."

Then Peter Hogg addresses this concept:

> "The Canadian Parliament plays no necessary role in the making of treaties. The negotiation and conclusion of a treaty is part and parcel of the conduct of international relations, and the conduct of international relations has always been one of the prerogatives of the Crown. In other words, the executive branch of government has the power to make treaties without the necessity of parliamentary authority. There's no legal requirement that the

parliament give its approval to either the signing or the ratification of a treaty."

Now, I'll note in this instance the CCFIPPA was -- there's a policy -- subsequent to this case, there's a policy on tabling treaties in Parliament and the CCFIPPA was tabled in Parliament for 21 days from September 26th to November 1st, 2012. So that did take place with respect to this FIPPA. And the explanatory memorandum that accompanied that, we've provided that to you at tab 8 of the binder that we handed up earlier.

CHIEF JUSTICE: Yes, I think I saw that. Yes, I've got it.

MR. TIMBERG: And it simply states, under "Implementation", that therefore, no -- it explains that no new legislation provisions are required to implement the CCFIPPA agreement. That's at page 0097 of the record. It says:

"Considering the nature of the obligations contained in the agreement, as well as their possible enforcement, which have already been met…"

So, the first part of the test: Is there any legislation required to implement the CCFIPPA? There is not.

And going back to *Council of Canadians* at paragraph 34, it states:

"The executive, by agreeing to the terms of

the treaty may not alter the domestic law of Canada."

So, at *Council of Canadians*, the trial court confirms at paragraph 37 that since NAFTA did not -- there was an *Implementation Act* there, unlike here, but the court reviewed that and confirmed that it did not incorporate the NAFTA into Canada's internal law, nor did it have that effect. The NAFTA, therefore, is not part of Canada's domestic law and does not attract the application of Section 96 jurisprudence by that route.

So we would say the first step, similarly the CCFIPPA is not part of Canada's domestic law, and the question then is for the courts to look at the second part of the test of what they undertook here. And what the court did is a characterization of the investor state provisions, and at paragraph 38 the court -- I can jump to paragraph 41, over the page at page 16. It says, the third paragraph starts:

"I consider this to be an accurate characterization of the provisions in issue. NAFTA tribunals address treaty obligations and international commitments made by the three parties to the agreement. I fail to see how Section 96, which governs the domestic arena, is applicable."

So we would suggest that Section 35 of the *Constitution* equally governs the domestic arena, and

so international law and domestic law are distinct legal systems that operate in different spheres. This issue of distinction between the two arenas was addressed in the *Loewen Group*, and so then there's a description there. But we do have an international sphere happening, and then we have a domestic sphere.

Moving on, at paragraph 42, the court in *Council of Canadians* states that a detailed analysis of Chapter 11 establishes that the obligations protected are international in nature. And there's a summary in the right-hand side. But they have no -- and is similar obviously to the articles that my colleague Mr. Spelliscy just went through. NAFTA tribunals have no power to strike down or invalidate internal laws, or decisions. NAFTA tribunals are to decide the issues in dispute in accordance with the NAFTA and applicable rules of international law. They do not apply domestic law or make determinations as to rights under domestic law.

Over the page, 18, the end of paragraph 43, and at the top of the page it says:

> "Although stated in a different context, Professor Hogg's following comments are apt. Treaties on taxation, extradition, or trade, for example, will bind each party's state to treat the nationals of the other state in particular ways. Each state undertakes its obligations in return for promises that its

nationals will receive comparable treatment in the other state. With treaties of this kind, the international character of the obligations cannot be doubted and the inability of the federal government to ensure the fulfillment of Canada's part of the bargain to be very seriously disabled."

And so a trial judge concludes,

"I am of the view that NAFTA is an international treaty that is unaffected by Section 96 of the *Constitution*."

Now, the Court of Appeal, it's over the page at -- over at tab 40. So it's paragraph 26 of the Court of Appeal, page 9. So paragraph 25, the court states that:

"In my view, the application judge correctly determined that the tribunal set up under Chapter 11 have not been incorporated into the domestic law of Canada, which negates one possible basis for applying Section 96 to them. There is a clear and well-known distinction between Parliamentary approval of a treaty on the one hand, and incorporation of that treaty into Canadian domestic law on the other."

And the court then goes on under paragraph 26:

"Beyond whether NAFTA tribunals have been incorporated into domestic law, the broader

question is whether tribunals set up by an international treaty signed by Canada, but not incorporated into domestic law, are *per se* immunized from scrutiny under Section 96. However, these tribunals otherwise have sufficient links with the domestic law of Canada to warrant the application of Section 96 to them."

So, I'm suggesting that's the second part of the test, is that you have to go beyond an initial analysis of whether or not there's legislation. But what is the character of it? Does it have sufficient links with the domestic law of Canada? And so some international treaties will remain there and others will have sufficient links with the domestic law.

Now, I note the time. I'm five minutes over. Shall I just finish this section?

CHIEF JUSTICE: Sure, don't worry about it. I'm okay with you going for a bit.

MR. TIMBERG: Okay.

CHIEF JUSTICE: I just -- I'll wait until after you're finished but I do have a question.

MR. TIMBERG: So, I'll provide a summary as to why the CCFIPPA exists at international law.

In *Council of Canadians* the trial court and the Court of Appeal characterized the NAFTA as an international agreement, unaffected by Section 96 of the

Constitution. The parties are in agreement that the main obligations of the CCFIPPA are based on NAFTA, and with the exception of Article 3 – there's a small point there – this court can, accordingly, rely on the characterization in *Council of Canadians* that NAFTA is properly characterized as an international agreement and characterizes CCFIPPA likewise as an international agreement.

Two, a detailed analysis of the CCFIPPA establishes that the publications protected are international in nature. Part A of the agreement provides definitions. Part B defines the reciprocal obligations, which are the same as NAFTA. Part C establishes a mechanism for the settlement of investment disputes. Again, similar to that of NAFTA. Part D establishes general exceptions, and the Annexes.

The CCFIPPA -- the third point is the CCFIPPA is part of a family of investment treaties, of which it is a part. And it's an agreement that binds each parties' state to treat the nationals of the other state in particular ways, and these are reciprocal international agreements that are part of the -- that are of an international nature and do not enter the domestic sphere.

The CCFIPPA does not change Canada's domestic legal framework. Canadian Constitution remains the same. Canadian laws with respect to resource management, resource development remain the same. The

duty to consult remains the same within the Canada's domestic sphere.

CCFIPPA is not about the way in which land and resources are managed domestically within Canada. It doesn't say anything directly about that. CCFIPPA allows an investor to be the claimant in the proceeding, but in substance the investor is asserting the right of his party to obtain compliance by the other party, and that is that pursuant -- as my colleague Mr. Spelliscy discussed, Canada consents to this process, but it's still operating within the international realm. Any cause of action under the CCFIPPA is international in nature and is independent from any cause of action under domestic law. And the CCFIPPA tribunals are to decide the dispute in accordance with applicable rules of international law. They do not apply domestic law or make determinations as to rights under domestic law.

While measures have been interpreted to encompass judicial determinations that may have resulted in a breach, the tribunal is not a court of appellate jurisdiction.

And finally, they have no -- CCFIPPA tribunals have no power to strike down or invalidate domestic law or decisions. If their measures are determined to be inconsistent with Canada's international obligations, and the only power the tribunal has is to order Canada to pay monetary damages.

And as we've discussed, decisions of *ad*

hoc CCFIPPA tribunals have no binding force except as between the disputing parties.

So for all of the above reasons, we suggest that a characterization of the CCFIPPA is that it does not have sufficient links with the domestic sphere to warrant the application of Section 35 of the *Constitution.*

Now, my colleague Ms. Hoffman tomorrow will proceed with addressing the applicant's argument with respect to the duty to consult.

CHIEF JUSTICE: Okay.

MR. TIMBERG: And those are our --

CHIEF JUSTICE: Sure. So this whole issue of whether there's sufficient links with Canadian domestic law to trigger Section 35 of the *Constitution,* that's going to be -- are you done now with that, or is that going to be addressed some more tomorrow?

MR. TIMBERG: Well, we're done, I'm done my part for now, but it's this concept that there's the international sphere and there's the domestic sphere.

CHIEF JUSTICE: Right.

MR. TIMBERG: And I think that has to animate the conversation with respect to how you characterize the operation of the CCFIPPA. So that characterization and that decision -- because there -- you know, that will continue tomorrow, because how can you avoid that?

CHIEF JUSTICE: So maybe -- I'm just wondering, because obviously there was some fairly broad language in some of the passages that you took me to, about the different spheres and treaties being in one, and domestic law being in the other. But I guess I have a question. Surely this couldn't mean that no treaties could ever trigger the potential duty to consult. Like, for example, what if there is a treaty whereby Canada gave, you know, a huge, a very large amount of fish stocks to another government, to another country, that were located in aboriginal territory.

MR. TIMBERG: Yes, and so that --

CHIEF JUSTICE: Surely that would trigger the duty to consult.

MR. TIMBERG: You would need to look at the characterization of what the treaty actually does.

CHIEF JUSTICE: Okay. So you're not saying that international treaties can never trigger --

MR. TIMBERG: No, we're not.

CHIEF JUSTICE: Okay.

MR. TIMBERG: No, we're just asking -- the court needs to be alive to the possibility that some are, and some do have sufficient linkages.

CHIEF JUSTICE: So your point really is that because the CCFIPPA is so similar to the NAFTA, that the rationale of the Ontario Superior Court and the Ontario Court of Appeal applies equally here, even

though the nature of the case was different as was pointed out in your colleague's *factum*.

MR. TIMBERG: Yes.

CHIEF JUSTICE: And you don't have anything further to add about the point they make in their factum, distinguishing.

MR. TIMBERG: Well, I'll leave that to my colleague, because it -- I'm trying to keep the separation.

CHIEF JUSTICE: No, that's fine. Okay, I just -- it would be helpful to hear what, if anything, your side has to say about the point they make in their *factum*. Okay.

All right. Well, thanks to everyone. So we'll see you all tomorrow morning at 9:30, and I guess we're still on track to finishing up before the end of the day, then. Is that everybody's expectation and hope? Yes.

All right. Perfect.

(PROCEEDINGS ADJOURNED AT 4:42 P.M.)