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

IN RE NAFTA CHAPTER ELEVEN/UNCITRAL CATTLE CASES

THE CANADIAN CATTLEMEN FOR FAIR TRADE

Claimants/Investors

-and-

UNITED STATES OF AMERICA

Respondent/Party

REJOINDER MEMORIAL ON THE PRELIMINARY ISSUE OF THE CANADIAN CATTLEMEN FOR FAIR TRADE

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CLAIMANTS' REJOINDER ON THE PRELIMINARY ISSUE

In accordance with Procedural Order No. 1, the Claimants submit this Rejoinder on the Preliminary issue.

INTRODUCTION

1. The issue before this Tribunal is whether the Claimants can seek compensation under NAFTA Articles 1116 and 1102(1) for the Respondent's measures referred to in the Claimants' Notices of Arbitration, which offer more favourable treatment to United States-based cattlemen who – until the measures were imposed – were competing in like circumstances with the Claimants in the Free Trade Area established under NAFTA Article 101.

2. In its Reply document, the Respondent fails to properly reflect the Claimants' position. As a result, its line of argument, and authorities cited, fail to address the central point of this case: the proper interpretation of the applicable provisions of the NAFTA as set out in the Agreement in accordance with the principles of customary international law.

3. The Respondent appears to have chosen to avoid engaging and directly rebutting the logic of the Claimants' position with its Reply. It has failed to take into account the fact that the NAFTA was founded on, and driven by, the concept of a free, open and liberalized North American Free Trade Area. The NAFTA was a unique, continental policy initiative that was designed to establish and foster ever-growing continental integration by, and for the benefit of, individual economic actors.[1]

4. The Respondent has not addressed the elementary logic of the Claimants' position: that they invested their lives and resources in an integrated North American cattle industry under a NAFTA regime that guarantees fair treatment vis-à-vis their competitors operating in like circumstances in the North American Free Trade Area. The NAFTA encouraged the Claimants to join in creating a North American market in which they would compete fairly and for which they would be fairly treated by NAFTA governments. The United States' measures were imposed contrary to this promise, resulting in significant losses to the Claimants, as investors, and significant competitive advantage to U.S.-based competitors.

5. This principle of non-discrimination forms the bedrock of any governmental agreement designed to foster economic integration, which is why the antecedent and specific forms of non-discrimination, 'national treatment' and 'MFN treatment,' have been accorded the most prominent place in the NAFTA text: both as principles[2] and rules.[3]

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[1] Some political leaders, such as Congresswoman Bentley, would go further. Speaking on the legislative record, to the issue of whether to grant legislative approval for the NAFTA, she noted: "[The] NAFTA lays the foundation for a continental common market, as many of its architects privately acknowledge." U.S. *A New NAFTA Agreement*, 103rd Cong. (1993) at H9667 (Helen Delich Bentley R-MD-2), online: Library of Congress http://thomas.loc.gov, last viewed 4 July 2007.

[2] Under NAFTA Article 102(1).

[3] Under numerous NAFTA provisions, including Article 1102(1).

6. The Claimants' collective investment in an integrated North American market was the kind of economic activity that was precisely consistent with the vision of those who negotiated, drafted and promoted the NAFTA, as well as both sides of the aisle in the United States Senate:

> We must, and we will, respond to economic anxiety with creativity, innovation and initiative. The NAFTA encourages us to do that. This agreement will break down trade barriers that have reduced sales of our products and services to Mexico. It will encourage innovation by creating an integrated continental market. It will allow us to engage the world through a powerful and growing trading alliance.[4]

> There certainly would not be enough money available in our budget even if we decided to do it. The route to prosperity, Mr. President, in the Americas lies through trade and democracy, through mutual respect and real cooperation. The route to prosperity travels the road of integration and unification.
> That is the future I see for the Western Hemisphere, and that is the future we can begin to create passing the North American Free-Trade Agreement.[5]

7. The NAFTA text contains an explicit promise to NAFTA investors that they are entitled to receive "treatment no less favourable" from NAFTA governments than that which is accorded to other investors operating "in like circumstances" in the North American Free Trade Area. In the instant case, the relevant circumstances of treatment include: an integrated, continental market for the competing investors' products; along with the attendant harmonisation and rationalisation of business practices (including production; transportation; sales and marketing) and risk regulation that one would expect to find in such an integrated market. It is the existence of these circumstances of integration, wrought by individual actors encouraged to invest in the process by the NAFTA, which justify the claim.

8. In its Reply, the United States tries to portray the NAFTA as one of its many indistinguishable trade or bilateral investment treaties; that its provisions impose obligations that are static; and that they could not possibly promote the very dynamic goals of deep and transformative economic and commercial integration that the aim and intent at the time of its inception.

9. The Respondent also argues: "Claimants have failed to establish a link between the degree of economic integration the parties hoped to achieve with the Agreement and the scope of investor protection in the NAFTA's investment chapter or any rationale for why the NAFTA Parties would so dramatically depart from their habitual treaty practice."[6]

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[4] U.S. *North American Free-Trade Agreement* Implementation, 103d Cong. (1993) at S16377 (Richard G. Lugar R-IN), online: Library of Congress http://thomas.loc.gov, last viewed 4 July 2007.
[5] U.S. *North American Free-Trade Agreement* Implementation, 103d Cong. (1993) at S16374 (Christopher J. Dodd, D-CT), online: Library of Congress http://thomas.loc.gov, last viewed 4 July 2007.
[6] Respondent's Reply on the Preliminary Question (1 May 2007), at 4 [Respondent's Reply].

The 'missing link' is the NAFTA text itself, upon which investors may, and the Claimants did, rely in good faith – *pacta sunt servanda*:

> One of the basic obligations governing the creation and performance of legal obligation, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.[7]

10. Where an investment made in the North American Free Trade Area is premised upon a promise of protection from discrimination in favour of one's competitors operating in an integrated, continental market, the circumstances of such integration inform the scope of protection that NAFTA investors can expect under the Agreement. The rationale for providing such protection in the NAFTA, as opposed to a mere 'run-of-the-mill trade' or investment protection treaty, is obvious. The political leaders who envisaged and agreed upon the NAFTA were creating what was hailed at the time, and continues to be credited, as a 'revolutionary' or 'one-of-a-kind' political and economic agreement between three countries sharing one contiguous, continental land mass.

> As we approach [the] NAFTA's tenth anniversary, markets continue to open up for a freer flow of goods, services and investment; and our economies are integrating as never before. By expanding trade, investment and employment, the NAFTA is enhancing opportunities for the citizens of all three countries and has made our trilateral relationship more dynamic.[8]

> We remain committed to ensuring that the NAFTA continues to help us to strengthen the North American economy through a rules-based framework for doing business in an increasingly integrated market.[9]

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[7] *Nuclear Test Case (Australia v. France)* (1974) ICJ Rep. 253 at 268. See, also: section 711 of the *Third Restatement of the Foreign Relations Law of the United States*, which confirms how the principle of good faith provides that "a state is responsible under international law for injury to a national of another state caused by an official act or omission that violates… a personal right that, under international law, a state is obligated to respect for individuals of foreign nationality." Commentary (e) to Section 711 confirms that this understanding refers both to the interests of individuals and to "a juridical person of foreign nationality also enjoy some protection, for instance, against denials of procedural justice" and that "for a juridical person, such violations would normally result in economic injury and fall within clause (c)," that provides how responsibility attaches for acts that unreasonably interfere with "a right to property of other economic interest that, under international law, a state is obligated to respect for persons, natural or judicial, of foreign nationality, as provided in section 712."

[8] Joint Statement by the Honourable Pierre S. Pettigrew, Canada's Minister for International Trade; Fernando Canales, Mexico's Secretary of Economy; and Ambassador Robert B. Zoellick, United States Trade Representative, *NAFTA at Ten- NAFTA: A Decade of Strengthening a Dynamic Relationship*, (7 October 2003, in MontréalCanada). online: DFAIT http://www.dfait-maeci.gc.ca/nafta-alena/nafta10-en.asp, last viewed on 4 July 2007.

[9] Joint Statement by the Honourable Pierre S. Pettigrew, Canada's Minister for International Trade; Fernando Canales, Mexico's Secretary of Economy; and Ambassador Robert B. Zoellick, United States Trade Representative, *Celebrating NAFTA at Ten* (7 October 2003), online DFAIT: http://www.international.gc.ca/nafta-alena/statement-en.asp, last viewed on 4 July 2007.

11. Determined to promote freedom and prosperity for their citizens, to the fullest extent possible, the NAFTA Parties chose a unique path to economic integration. The Parties crafted a 'revolutionary' rule-of-law framework that relied on individuals and markets, not governments and officials, to bring about greater economic integration. This rule-of-law framework, described in the NAFTA's preamble and objectives and realised in provisions such as Articles 1101(1), 1102(1) and 1116, established international dispute resolution mechanisms to encourage compliance with its fundamental principles of non-discrimination and transparency.[10]

12. The rule-of-law model has been effective because it has created incentives for individual economic actors to engage in the kind of economic activity that has allowed the Parties to realize their economic goals for the NAFTA, both by providing substantive safeguards in favour of non-discrimination and through making recourse to individualized dispute settlement available to them under NAFTA Chapter 11. As Professor Hart has noted:

> True freedom requires structure. Without a framework to define the rules, there are no rules. Without rules, there is anarchy. In international relations, anarchy becomes a matter of might makes right. Large powers convince smaller powers that consent is in their interest. In such a system there is no accountability and no responsibility. In reaching agreement, therefore, delicate compromises have to be reached between the freedom to act and a sensible framework of rules within which to act.[11]

13. Unique among trade or investment protection treaties, the NAFTA provides – and was always intended to provide – a broadening of the depth and breadth of integration in the North American economy. The NAFTA was designed to eliminate domestic protectionism in the Free Trade Area, as it evolved toward ever-closer economic integration, by prohibiting measures that favoured domestic actors in the integrated, and integrating, markets that the Parties had always sought to create. The NAFTA accomplished this goal by creating a regime under which – subject to express limitations contained within NAFTA exemption provisions and in the Annexes – all government regulation in the Free Trade Area would be subjected to the principle of non-discrimination.

14. Non-discrimination, as enshrined in the national treatment provisions of the NAFTA, represents the bedrock values and protections for all individual economic actors

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[10] Commentators, such as those cited by the Respondent, noted how "light" the NAFTA framework was in terms of institution-building, as compared to the European Union. The NAFTA's dispute resolution mechanisms were seen as unique at the time. Its combination of investment and trade obligations, and the role it envisaged for independent economic actors in dispute settlement, was pioneering. Indeed, at the time of its negotiation, NAFTA Chapter 19's mixed-dispute settlement process (for the review of anti-dumping and countervailing duty measures of the Parties) was seen as the most problematic by commentators; not investor or investment protection and arbitration. This interim mechanism, found in the CUSFTA, had ultimately been made permanent under the NAFTA, along with the addition of investor-state arbitration.

[11] Michael Hart, Bill Dymond, and Colin Robertson, *Decision at Midnight: Free Trade-Trade Negotiations*, (Vancouver B.C.: UBC Press, 1994), at 369 [Hart *et al.*]. Michael Hart is a former trade advisor for the Government of Canada and currently the Simon Reisman Professor of Trade Policy at the Norman Paterson School of International Affairs and a Distinguished Fellow of the Centre for Trade Policy and Law in Ottawa,

participating in the North American Free Trade Area.[12] That is why the NAFTA text provides that a NAFTA government may not provide more favourable treatment to its own investors than it provides to similarly situated investors in the North American Free Trade Area.

15. Prior to the Respondent's imposition of the measures in question, the North American cattle and beef industry stood a significant example of the success of the NAFTA rule-of-law model. The novelty of the present case cannot be overestimated. Whereas all other NAFTA cases have addressed measures that relate to investments, and traditional forms of foreign investment protection, the distinguishing feature of this case is that the measures at issue relate equally to the investors and to their competitors operating in like circumstances in the North American cattle market. This high level of integration, fostered by the NAFTA, dictates the circumstances under which Canadian and US-based cattlemen must be compared for purposes of Article 1102(1).

ARGUMENT

Misstatements Found in the Respondent's "Preliminary Statement"

16. On page 2 of its Reply, the Respondent states: "At bottom, Claimants' interpretation is based on untenable premises." The first two of these so-called 'premises' articulated by the Respondent actually consist of an argument wrongly attributed to the Claimants and a conclusion that the Respondent draws from the 'straw man' it has created. The Respondent also inaccurately attributes to the Claimants a position that the Parties must have contemplated granting each other the right to regulate the formalities of establishing investment enterprises in each other's territory. This argument was repeated at pages 19-20 of the Respondent's Reply and will be addressed at paragraphs 78-85 below.

17. The first 'premise' wrongly attributed by the Respondent to the Claimants, is that: "the NAFTA Parties without so much as a single comment … created a revolutionary arbitral mechanism for private parties to resolve cross-border trade disputes…" To be clear, the Claimants have not taken this position. More importantly, both its supporters and its detractors have argued that the NAFTA is 'revolutionary.' The question before this Tribunal is whether the NAFTA text says what it says. The Claimants submit that the arbitration mechanisms the NAFTA provides (under Chapters 11, 19 and 20) individually and collectively demonstrate its unique character as an international instrument designed to promote economic integration through the participation by private actors within the contiguous, continental landmass identified in its very first provision, Article 101.

18. The second 'premise' asserted by the Respondent, on behalf of the Claimants, is essentially a restatement of the first: that it is allegedly nonsensical to argue that the

[12] See, e.g.:Michael Hart, *A Trading Nation: Canadian Trade Policy from Colonialism to Globalization* (UBC Press: Vancouver, 2002), at 7: "Years of negotiating and rule making have created a body of international rules that now limit the choices available to governments in deciding whether or not to favour one interest over another. The basic concept underlying these rules is the presumption that nondiscrimination is better than discrimination whether domestically or internationally."

NAFTA protects investors who have made "home-country investments" without going even further to protect those investments themselves. Implicitly, the Respondent's argument is that there can be no middle ground between a mere (run-of-the-mill) free trade agreement – which offers no protection for economic actors who have invested themselves in establishing a competitive business model throughout the Free Trade Area – and the 'E.U. model' of economic integration – which creates a complex institutional matrix of legislative, executive and judicial bodies to promote and enforce harmonisation.

19. The NAFTA, however is just such a unique agreement, built upon a non-discrimination-rule-of-law approach. It does not rely on the creation of confederating executive, legislative and bureaucratic institutions to rationalise and harmonise economic regulation within a shared market. Rather, the NAFTA establishes a rule-of-law framework that goes well beyond the models envisaged in a mere BIT or FTA entered into by the United States with a host of non-contiguous and in some instances remote trading partners. In contrast to these bilateral agreements, the NAFTA establishes a geographically contiguous Free Trade Area shared between the three countries that occupy the continent and promises, through a developed rule-of-law system, non-discrimination for those willing to invest in the establishment of an integrated industry within that Free Trade Area.

20. The Respondent appears to be operating on the flawed premise that NAFTA Chapter 11 is nothing more than a mere bilateral investment treaty autonomously attached to a free trade agreement, and that as such it makes no sense to offer any sort of protection to investors in a free trade area – unless an investor had invested in the territory of a "host country" within that free trade area. The premise is flawed, however, because it is not supported by the NAFTA text. The text provides no indication that NAFTA Chapter 11 is to be analysed in hermeneutic isolation from the remainder of the Agreement, or that it is to be interpreted through application of a limited selection of its governing principles and objectives.

21. The premise that should be applied in this case is that the NAFTA text says what it says. It makes sense that the Agreement would offer certain types of 'traditional' protections for investors in respect of investments made in the territory of a "host country" within the North American Free Trade Area, as well as one particular kind of additional protection for investors regardless of where they have made their investments in the Free Trade Area – i.e., non-discrimination.

22. On page 3 of its Reply, the Respondent incorrectly alleges:

> [The] Claimants' entire argument is that such measures are within Chapter Eleven's scope of application, which is contained in Article 1101(1), because Article 1102(1) … applies wherever those investments are located.

23. In doing so the Respondent appears to be seeking to re-shape the case against it. The Claimants' argument, however, is that the plain meaning of Articles 1101(1), 1102(1) and 1116, understood within the context of the remainder of the provisions of NAFTA Chapter 11, and in light of the object and purposes of the NAFTA set out in Article 102

and its preamble, permits them to claim for damages in respect of the instant measures because these U.S. measures accord more favourable treatment to domestic U.S. investors, in like circumstances, than that which has been provided to the Claimants.

24. Also on page 3 of its Reply, the Respondent makes another misleading statement, stating: "All of the Parties to the Agreement have expressly disavowed Claimants' erroneous interpretation." The Respondent has provided no evidence that the Government of Canada has taken any position on the Claimants' argumentation, much less an express disavowal. Moreover, the Government of Canada was certainly not supportive of the Respondent's decision to impose the measures at issue in this case. This is because, as the Right Honourable Mr. Stephen Harper, Prime Minister of Canada, has observed recently about the NAFTA:

> In North America we have an economy that is integrated; it is not necessary to differentiate our products.[13]

And about the measures at issue in this claim (in 2004, while he was Leader of Her Majesty's Loyal Opposition):

> Whatever the original causes or problems were, this is now simply a question of protectionism. I think we have to call it for what it is and do whatever we can to pressure to have it changed. ... This is the time where I expect the government to stand up for Canadians and make clear that we don't and can't justify these kinds of actions.[14]

25. In an apparent attempt to buttress its arguments that the Claimants are being unreasonable, the Respondent also misconstrues the Claimants' position on the role of statements attributable to treaty parties regarding the interpretation of specific treaty provisions. On page 3 of its Reply, it quotes an excerpt from paragraph 37 of the Claimants' Memorial out of context. The Respondent quotes the Claimants as saying "statements made by the NAFTA Parties, of their alleged intent behind a treaty provision, are neither relevant nor credible" – implying that the Claimants wish to ignore any and all statements by the NAFTA Parties about treaty interpretation.

26. In fact, at paragraph 37 of their Memorial, the Claimants simply restate the customary approach to treaty interpretation, noting that the best evidence of what the parties to a treaty intended are the actual terms that they used in their agreement. At paragraph 114, the Claimants also recognise that the three NAFTA Parties can agree upon binding statements of interpretation through the Free Trade Commission, under Article 1131(2). They can also contribute non-binding submissions on the interpretation of a NAFTA provision under Article 1128.

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[13] U.S., White House, Office of the Press Secretary, Transcript of Press Conference, Fiesta Americana Condesa Cancún Hotel Cancún, Mexico (31 March 2006) online White House: http://www.whitehouse.gov/news/releases/2006/03/20060331-4.html, last viewed on 4 July 2007.

[14] Tonda MacCharles, "Mad cow crisis is getting worse, Harper says" *Toronto Star* (8 September 2004) online: http://eslkid.com/msgboard.mv?parm_func=showmsg+parm_msgnum=1000961, last viewed on 4 July 2007.

27. The Governments of Canada and Mexico were offered an opportunity to submit observations under Article 1128 by 1 March 2007.[15] The Government of Canada did not submit any views on the issues in dispute to the Tribunal by that date. The three NAFTA Parties have also apparently elected not to issue a binding statement on the interpretation of Article 1102(1), as they are authorised – and have previously done – under Article 1131(2).

28. In addition, the Respondent alleges twice, on pages 3 and 4, that the Claimants have not provided any evidence that the NAFTA Parties intended, by agreeing to Article 1102(1), that the Claimants could be entitled to 'treatment no less favourable' than their U.S.-based competitors in the North American cattle industry.[16] The Respondent fails to take into account that the best possible evidence of their intent: the treaty terms themselves.

29. Finally, at page 4 of its Reply, the Respondent alleges that the "Claimants thus ask this Tribunal to presume that the mere absence of certain language – language that, in any event, is implicit when the relevant articles are interpreted in context – demonstrates that the NAFTA Parties intended to expand jurisdiction in a radical new fashion." The Respondents have inverted the situation. The Claimants are asking this Tribunal to find that the terms actually used in Articles 1101, 1102(1) and 1116, interpreted in context, mean what they say. It is the Respondent that asks this Tribunal to adopt an unconventional approach to treaty interpretation, by reading in a limitation that is not found in the text and does not comport with the context and objectives of the NAFTA.

Substituting A "Habitual Practice" Rule in Favour of the Plain Meaning of NAFTA Terms

30. Contrary to the Respondent's claim, found on page 6 of its Reply, there is no general rule of treaty interpretation whereby the plain meaning of treaty terms can or should be ignored in favour of the so-called "habitual practice" of one or more parties to that treaty, in drafting other treaties. The cases cited in support of this proposition simply do not support the Respondent's argumentation.[17]

31. The *SGS* v. *Pakistan* case is cited for the proposition that "clear and convincing evidence" must be provided in support of an interpretation of treaty text that is "far-reaching," "automatic, unqualified, sweeping in [its] operation," and "so burdensome in [its] political impact."[18] However, unlike the instant case, the subject of the *SGS* v. *Pakistan* award was a claim that any commercial contract entered into between an

[15] Procedural Order 1, on Preliminary Question (20 October 2006), at para. 5.4.
[16] The Respondent says that what the Claimant fails to prove is that "the protection of domestic investors of other parties with respect to their home country investments was among the Parties' objectives." Respondent's Reply, at 3. The Claimants need not prove such a broad proposition. The "enormous financial burden" alluded to by the Respondent is nothing more than unsubstantiated conjecture based upon its exaggerated view of the Claimants' position, *ibid.*
[6] See Respondent's Reply, at notes 7 and 8.
[18] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case Nº ARB/01/13, Jurisdiction (6 August 2003) [*SGS v. Pakistan*].

individual and a government could form the basis of a treaty claim before an international tribunal, simply by virtue of the 'umbrella clause' found in that treaty.[19]

32. First, the Respondent fails to demonstrate how the obligation invoked by the Claimants in the instant case actually is "automatic, unqualified, sweeping" or "so burdensome." Second, the Respondent was characteristically selective in its choice of the quoted text, omitting the *SGS v. Pakistan* Tribunal's observation, found immediately before the Respondent's caption, that "[a] treaty interpreter must of course seek to give effect to the object and purpose projected by that Article and by the [treaty] as a whole."[20] The Respondent also omits mention of the critical finding made by the Tribunal that the provision in question "textually… falls considerably short of saying what the Claimant asserts it means."[21]

33. Similarly, the *AAPL v. Sri Lanka*[22] case cannot be used for the proposition that collateral evidence is required to justify an interpretation achieved by applying the basic approach required under Article 31 of the *Vienna Convention*. In *AAPL*, the treaty terms at issue were capable of supporting different interpretations and, in contemplation of the context and object and purposes of that treaty, the Tribunal concluded that the absence of any *travaux préparatoires* supporting the claimant's position was determinative.

34. In contrast to the *AAPL* case, the parties in this case are not arguing over competing interpretations of a specific term of art, such as 'full' or 'most constant protection and security.' Rather, they are offering differing interpretations of the interplay between multiple treaty provisions, in context, where the Respondent seeks the Tribunal to 'read in' a territorial limitation that is not found in any of the relevant provisions. Also unlike the circumstances of the *AAPL* case, in the present case informal *travaux* do exist that support the Claimants' interpretation of the treaty text, refuting the interpretation proffered by the Respondent that would require the Tribunal to 'read in' a limitation that simply does not exist.

35. The Respondent accuses the Claimants of brushing aside "the entire history of investor-state arbitration" at page 6 of its Reply, but it fails to provide any valid reason as to why such 'history' should be used to read a territorial limitation into the text of NAFTA Articles 1101(1), 1102(1) and 1116 in the first place. The Respondent similarly claims that a "treaty principle" should never be overridden by the operation of a treaty provision, absent explicit language to such effect – but it fails to establish how or why the 'history' it cites can or should be construed as a sort of 'principle' applicable in this case.

36. In building its argument, the Respondent cites the *Loewen* Tribunal's observation, provided in *obiter*, that no NAFTA provision explicitly overturns the customary

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[19] It is also interesting to note that the 'umbrella clause' claim found so untenable by the Tribunal in *SGS* v. *Pakistan* was accepted under a similar treaty provision by the Tribunal in *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case N° ARB/02/6, Jurisdiction (29 January 2004).
[20] *SGS* v. *Pakistan*, *supra* note 18, at para. 164.
[21] *Ibid.* at para. 166.
[22] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case Nº ARB/87/3, Final AWARD (27 June 1990) [*AAPL*].

international law rule requiring exhaustion of local remedies.[23] The Respondent fails, however, to name a customary international law rule or principle imperilled in this case. Instead, it merely argues that the "common habitual pattern adopted in other investment treaties" is to prohibit private parties to seek damages against a Party without having made, or seeking to make, an investment in the territory of that Party. In the very next paragraph, the Respondent elevates this so-called 'pattern' to the status of 'a well-established treaty principle' without any explanation. In so doing, the Respondent attempts to equate its newly-minted 'common habitual pattern treaty principle' with the exhaustion of local remedies rule at issue before the *Loewen* Tribunal, which actually is well-established under customary international law.[24]

37. The Respondent also cites an article by Professor Salacuse to prove the existence of this so-called "treaty principle" but in his article Salacuse only describes how international investment law has been advancing through the growth of, and increasing recourse to, treaty arbitration mechanisms.[25] The Respondent similarly cites a passage from Professor Brownlie's treatise that actually only provides a descriptive observation by that author, rather than a normative statement about whether a principle of law against permitting private party claims in any given circumstance should not exist, absent specific treaty language.

38. The Respondent was selective in excerpting from Professor Brownlie's treatise. When the entire passage found at page 7 of its Reply is considered, it is apparent that Professor Brownlie's observations have not been fully and fairly reflected by the Respondent:

> **Although there is no rule that individuals cannot have procedural capacity before international jurisdictions**, the assumption of the classical law that only States have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of State responsibility, **in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations**.[26] [**Emphasis added to omissions from the Respondent's excerpt.**]

39. In attempting to manufacture its so-called "treaty principle" the Respondent also ignores the fact that the NAFTA is by no means just another investment treaty. The Respondent does not explain why a "habitual pattern" found in the negotiation of bilateral investment treaties or bilateral trade agreements with different parties should apply to the NAFTA – which was a unique and complex treaty negotiated in an entirely different political and economic context than any other bilateral trade or investment treaty. Further, the Respondent avoids explanation of why any "habitual pattern" should be used to override the plain meaning of treaty terms, even if contained to the exclusive realm of bilateral

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[23] Respondent's Reply, at 7-8.
[24] Similarly, at page 2 of its Reply, the Respondent cites the *Sambiaggo* case, which involved the question of whether a State should be held liable for the acts of revolutionaries who were not acting as its agents when they caused the alleged harm. Unsurprisingly, the customary international law of State Responsibility was found to govern absent express treaty language to the contrary.
[25] Respondent's Reply, at 1.
[26] Ian Brownlie, *Principles of Public International Law,* 5th ed. (Oxford University Press 1998) at p. 585.

investment treaties. The proposition that a "habitual pattern" could be used to override differences between and among treaty texts is itself at odds with a rule of customary international law that is actually undisputed: i.e., the customary rule of treaty interpretation memorialised in Article 31 of the *Vienna Convention*, and mandated by Articles 102(1) and 1131(1) of the NAFTA.

40. Paradoxically, on page 8 of its Reply the Respondent accuses the Claimants of attempting to engineer a "revolution in investor-state arbitration" – even though it is the Respondent who attempts to rely on unrelated investment treaty law in support of its arguments. The Claimants make no grand claims about the meaning of Article 1102(1) beyond the present case – whose circumstances are unique to other NAFTA cases, much less in an investment treaty case. Never before has an NAFTA investor made a specific and exclusive claim, on its own behalf as an investor under Article 1116, that it has been accorded less favourable treatment vis-à-vis other investors operating in like circumstances in the Free Trade Area, violating the non-discrimination obligation established under Article 1102(1).[27]

41. The Respondent's citation of the *Oil Platforms* case is similarly misplaced here, given that the ICJ's finding, as cited, was based upon the premise that a rejected formulation of a treaty provision could not be interpreted "in isolation from the object and purpose of the Treaty in which it is inserted." In this case, it is the Respondent's formulation – which requires the Tribunal to read a limitation into the treaty text – that requires isolation from the object and purposes of the NAFTA.

42. On page 9 of its Reply, the Respondent appears to assume that the obligation to compensate the Claimants for losses sustained vis-à-vis their competitors in the Free Trade Area are somehow extra-territorial[28] because its measures caused loss to Canadians. As the *S.D. Myers* Tribunal recognised, even where a NAFTA investor brings a claim in respect of an investment it has made in another NAFTA territory, losses sustained by the investor in its 'home country' are compensable under NAFTA Article 1116.[29] This is the only result that could accrue under a regime such as the NAFTA, within the territory of the free trade area it established.

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[27] All other NAFTA claims have involved allegations by investors that either just their investments (under Article 1117) or that both they and their investments (under Articles 1116 and 1117) have suffered loss or damage arising out of a breach of multiple NAFTA provisions, always including traditional foreign investment protection obligations such as the Article 1105 minimum standard of treatment and/or a claim of expropriation without compensation – including the *Bayview* case described below.

[28] It may also be recalled that this is the same Government that passed, and vigorously defends its right to maintain, *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, Pub.L. 104-114, 110 Stat. 785, 22 U.S.C. § 6021-6091 (aka the Helms-Burton Legislation) – a United States federal law that maintains and strengthens the longstanding United States economic embargo against Cuba. This measure extended the territorial application of the initial embargo to apply to foreign enterprises engaging in virtually any sort of economic activity with or in Cuba, by penalising them for allegedly "trafficking" in property expropriated by Cuba after the Cuban revolution that was formerly owned by persons who were (or in most cases became) U.S. citizens thereafter.

[29] *S.D. Myers, Inc. and Canada*, UNCITRAL/NAFTA, Partial Award at para's. 222-232 (13 November 2000) [Myers].

43. The proposition that a State is responsible for the effects of its actions without territorial restriction – even outside of the context of the *lex specialis* of a regime such as the NAFTA, is hardly novel. As long ago as the *Trail Smelter* case, international law has recognised State responsibility for the cross-border effects of domestic measures.[30] As Professor Eagleton, whose work was cited decades ago in the *Trail Smelter* award, noted:

> But while the responsibility of a state is fundamentally based upon the control which it exercises within its borders, it does not follow that the state may be held responsible for any injury occurring therein. The law of nations does not make the state a guarantor of life and property. It is answerable, under international law, only for those injuries which are internationally illegal in character, and which can be fastened upon the state itself. The duties, as well as the rights, attendant upon territorial jurisdiction are stated by international law. As a matter of practical operation, then, the responsibility of the state is to be ascertained from the duties of control within its territorial limits and over its agents laid down for it by positive international law.[31]

44. The NAFTA Parties' election, to permit NAFTA investors to seek damages for national treatment breaches in respect of their competitors operating in like circumstances in the Free Trade Area, is consonant with the principle of State Responsibility expressed in the *Trail Smelter* case. The obligation they imposed upon themselves under Article 1102(1) does not require them to legislate or regulate beyond their political borders. It merely obliges them to refrain from legislating or regulating in a manner that accords more favourable treatment to one's own investors vis-à-vis their competitors invested in the same continental market established under, and fostered by, the NAFTA.

45. The Respondent cites its own law, at pages 9 and 10 of its Reply, in support of its erroneous construction of 'extraterritoriality' applicable in this case. The governing law of this arbitration is international law, as indicated under Article 1131(1). Thus, even if the Respondent's extra-territoriality argument was well-founded, its citation to domestic law is not useful[32] in terms of guiding this Tribunal's interpretation of the applicable provisions of the Agreement.[33]

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[30] *Trail Smelter* (U.S. v. Can.), 3 R.I.A.A. 1938 (March 11, 1941), reprinted in 35 AM. J. INT'L L. 684 (1941) at 713.

[31] Clyde Eagleton, *The Responsibility of States in International Law* (New York University Press, Reprint of 1928 ed.) at 8-9.

[32] The legislation and regulation of the United States, including judicial reasoning in respect of same, can only serve as evidence of the existence of an alleged fact in a NAFTA case governed by international law (such as reliance upon a law, or proof of the means by which a measure breaches a NAFTA provision). The only exceptions to this basic rule would be where domestic measures are cited in support of an argument about the existence of a customary international law rule or as part of a much larger comparative analysis of the existence of a general principle of international law. Even in this context, domestic law is effectively being used as evidence to establish the proposed existence of an international norm – because Article 1131(1) is very clear that the governing law for a NAFTA Chapter 11 tribunal is the Agreement itself, and applicable rules of international law.

[33] The Respondent also cites, at 7, an article by Stephen Visciannie, which concerns interpretation of the fair and equitable treaty clause in bilateral investment treaties, in support of its proposition that "a treaty cannot impose uncontemplated extraterritorial obligations upon those who ratify it." This quotation is excerpted from *Sale* v. *Haitian Ctrs. Council Inc.*, a domestic judgment that the merely demonstrates how American courts may choose to show deference to both the Congress or the President when either authorises measures that are contrary to the United

The Respondent Embellishes and Exaggerates the Meaning of the Alleged "Subsequent Practice" of the Three NAFTA Parties

46. Contrary to the express provisions of NAFTA Article 1115 and Article 1131(1), at page 11 the Respondent reserves to itself and the other NAFTA Parties the 'exclusive' right to provide an 'authentic' interpretation of the NAFTA text. It does not do so in contemplation of Article 1131(2), which permits the three NAFTA Parties to issue binding interpretations of the NAFTA text – but rather, presumably as a matter of customary international law. None of the authorities cited by the Respondent for this proposition, however, supports it.[34] They merely establish that the subsequent practice of parties to a treaty may, in limited circumstances, be used to inform one's interpretation of such treaty.[35]

47. What the United States appears to be arguing is that it can dictate a binding interpretation of the NAFTA text to this Tribunal under the guise of nothing more than a mere assertion of so-called 'authenticity' – rather than by exercising the authority that the NAFTA Parties actually reserved to themselves under Article 1131(2). Such an approach violates the principle of effectiveness in treaty interpretation,[36] because it obviates the need for the Parties to carefully consider and issue binding interpretations through the auspices of the Free Trade Commission.

48. Rather than actually issuing a binding statement of interpretation under Article 1131(2), the Respondent claims, at page 11, that essentially any comment made by a NAFTA Party about a provision – no matter what the context – can be labelled by another Party as 'subsequent conduct' that demonstrates the 'authenticity' of its position in any given case. If the Respondent's position were correct, there would hardly be any need for the establishment of a tribunal under Chapter 11, except to decide damages for breaches of provisions whose 'authentic' interpretation would invariably be provided by at least one of the NAFTA Parties.

49. The logical conclusion of the Respondent's theory of 'authoritative interpretation' is that a Party need only inform a tribunal of what the terms of a NAFTA provision are 'supposed to mean' at any given time, and a tribunal will simply follow accordingly. As the Claimants argued in its Reply,[37] the best expression of the character of any obligation undertaken by the parties to any treaty is that which is reflected in the plain and ordinary

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States' international treaty obligations. The Visciannie article does not assist the Respondent because it concerns application of a traditional bilateral treaty obligation rather than NAFTA Article 1102(1); and because the author even acknowledges, at p. 123: "[w]hat is less clear is whether the absence of a clause limiting the protection standard to foreign investments or foreign property within the host State's territory could imply that the host State may be liable for breaches of the standard which take place outside its territory…"

[34] Respondent's Reply, at note 22 at p. 11.

[35] *Ibid.*

[36] See, e.g.: *Japan — Taxes on Alcoholic Beverages II* (1996), WTO Doc., WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at p. 11; *United States — Standards for Reformulated and Conventional Gasoline* (1996), WTO Doc., WT/DS2/9, at 23.

[37] Claimant's Reply, at 16.

meaning of the terms of that treaty, understood in context and in light of the object and purposes of that treaty.

50. While both past practice and the non-binding submissions of a Party on interpretation (as permitted under NAFTA Article 1128) may be instructive where the meaning of treaty terms are unclear or obscure,[38] the text itself always remains the best indicator of 'original intent.' The actual treaty text will always be the 'most authentic' expression of the Parties' intent because it is untainted by any revelation or revision by NAFTA Party officials subsequent to their learning that a NAFTA claim has been commenced.

The NAFTA Parties Have Not Agreed Upon an Interpretation of the NAFTA Provisions at Issue in this Case

51. In Section II of its Reply the Respondent repeats previous, unsubstantiated allegations that the three NAFTA Parties have actually already agreed to an interpretation of Articles 1101(1), 1102(1) and 1116, which proves the Claimants must be wrong.[39] The Respondent's claim that the subsequent practice of all three Parties demonstrates their shared and 'authentic' interpretation of NAFTA provisions at issue in this case. However, the Respondent cannot point to any statement made by the Government of Canada about this case. We note that the NAFTA Parties have not issued an 'authentic' interpretation of the provisions at bar, they would have issued a binding statement of interpretation ending the matter under Article 1131(2).

52. Indeed, at pages 12 and 16 of its Reply, the Respondent merely repeats the same references it already made in its Memorial to a pleading submitted by Canada in the *S.D. Myers* case[40] and Canada's *Statement on Implementation*.[41] An analysis of both of these cases reveals that neither supports the Respondent's arguments with respect to subsequent practice.

53. The *Myers* case, in which Canada made an argument upon which the Respondent now hopes to rely, concerned a claim by the investor that its investment in Canada was not accorded the best treatment available to domestic competitors, in violation of NAFTA Article 1102(2). The Notice of Arbitration did not raise a claim under Article 1102(1).[42] S.D. Myers (Canada) Inc. was established in Canada so that the investor could provide PCB waste destruction services to the Canadian market. Unlike the present case, the regulatory framework for PCB destruction in Canada was very different from the United States, where the industry was far more advanced due to the existence of a mandatory PCB destruction rule. In Canada, a waste holder was not obliged to destroy its PCB wastes by any deadline and therefore could 'store' them indefinitely. Again, unlike the circumstances of this case, Canada actually prohibited the transhipment of PCB wastes

[38] See *Methanex,* Final Award on Jurisdiction and Merits, Part II, Chapter B, at para. 22; and Part II, Chapter H, at para's. 19 and 24.
[39] Respondent's Reply, at 12 -14.
[40] See Respondent's Memorial, at 8.
[41] *Ibid*.
[42] *S.D. Myers Inc.* v. *Canada*, UNCITRAL/NAFTA, Statement of Claim, at para. 35 (30 October 1998); and *S.D. Myers*, *supra* note 29, at para. 130.

across its border, absent permission being granted by the United States Environmental Protection Agency ("EPA").

54. The measure that was found in breach of Article 1102(2) by the *S.D. Myers* Tribunal was an emergency order issued by Canada's Minister of the Environment, which changed the regulatory ground-rules for competition between U.S. and Canadian competitors. The emergency order closed the Canadian border to all shipments of PCB wastes to the United States, regardless of whether the U.S. EPA had approved of them. Canada's new border ban thus discriminated in favour of a domestic competitor who would have the Canadian market to itself. This is because Myers' plan had been for its investment enterprise, S.D. Myers (Canada) Inc., to remediate the local site and arrange for transportation of the PCB wastes to its Ohio plant for final destruction. The border closure provided better treatment to the Canadian competitor because its destruction facilities were located in Northern Alberta and were thereby unaffected by the new measure.[43]

55. Canada argued that Myers' classical claim for investment protection, founded upon Article 1102(2), should fail because of questions it raised about the ownership and operations of S.D. Myers (Canada) Inc. in its territory.[44] The Tribunal ruled against these factual arguments in its Partial Award, finding that breaches of Articles 1102(2) and 1105(1) had been sustained.[45]

56. The *Myers* Tribunal subsequently concluded, in its Second Partial Award, that damages were owed to S.D. Myers Inc. for the losses it suffered in respect of its entire business enterprise (both in Canada and in the United States). Canada had argued that Article 1116 did not allow an investor to claim for damages suffered outside of the territory in which it had made its investment,[46] but the Tribunal found that Article 1116 did not impose any territorial limitation on damages claimed by an investor in respect of a NAFTA breach.[47] It made this finding even though the breaches it found concerned NAFTA obligations relating to the protection of foreign investment in Canada, rather than protection against non-discrimination in the Free Trade Area (as in the present case).

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[43] In this case the same discriminatory result can be found. However, the crucial difference between the cases is that – prior to the imposition of the United States' border ban – there was only a single market for cattle production, rather than two distinct markets (as defined by the regulatory and commercial circumstances in which rival cattlemen competed). Both cases concern measures designed to advantage domestic companies vis-à-vis foreign competition in respect of a defined market for their goods or services. In *S.D. Myers*, the market was defined by regulatory and commercial practice as the territory of Canada; in this case, the market is defined by regulatory and commercial practice as the North American Free Trade Area.

[44] *S.D. Myers*, *supra* note 29 at para's. 145 & 227.

[45] *S.D. Myers*, *supra* note 29 at para's. 257 & 269. The Tribunal refers to the identical language of paragraphs (1) and (2) at paragraphs 238-239 and 243. It generally refers to Article 1102 generically, having noted, at para. 35, that the investor's claim was founded upon Article 1102(2).

[46] *S.D. Myers Inc v. Canada*, UNCITRAL/NAFTA, Counter-Memorial (Damages Phase), at pages 29-31 (7 June 2001).

[47] *S.D. Myers Inc v. Canada*, UNCITRAL/NAFTA, Second Partial Award, at para. 160 and note 56 (21 October 2002).

57. The *Myers* case thus demonstrates that the Canadian argument quoted by the Respondent, at page 8 of its Memorial and pages 12 and 16 of its Reply, actually concerned an investment protection claim brought under NAFTA Article 1102(2), unlike the present case. It also demonstrates that another NAFTA Tribunal has already had occasion to entertain a NAFTA Party's arguments that a territorial limitation should be read into NAFTA Article 1116, and that such arguments were rejected in favour of the plain and ordinary meaning of that treaty text.

58. Similarly, at page 12 of its Reply the Respondent provides an excerpt from a document published by the Government of Canada entitled: "Statement on Implementation."[48] Comparing the excerpt to the Government of Mexico's Article 1128 submission in this case, the Respondent says: "Canada has also stated that investment agreements such as the NAFTA aim to 'protect the interests of Canadian investors **abroad**' (emphasis added [by Respondent])." In fact, however, Canada's Statement on Implementation does not refer to the comprehensive NAFTA as being a mere 'investment treaty.' Indeed, in the same paragraph cited by the Respondent it is acknowledged:

> The NAFTA builds on [the Parties'] experience [with the Canada-United States Free Trade Agreement]. It includes a more integrated and extensive set of obligations which will ensure that Canadian interests will continue to be protected within a set of generic rules. It also includes important new provisions for dispute resolution and addresses a broader range of issues related to the conduct of business.[49]

59. This statement by Canada, that the interests of its investors would be protected abroad by the NAFTA, is consonant with the rights the Claimants seek to vindicate in this case. Indeed, the Claimants do have interests *abroad*: i.e., in the territory of the United States, which forms a part of the larger, integrated market for cattle and beef in which they had invested, encouraged by the establishment of the North American Free Trade Area.

Bayview Irrigation District et al* v. *Mexico

60. At page 12 of its Reply, the Respondent also repeats its reliance on the arguments that it and the Government of Mexico (but <u>not</u> the Government of Canada) made in the *Bayview* NAFTA case. The *Bayview* Tribunal recently issued an award in favour of Mexico. While the Respondent will undoubtedly claim that the *Bayview* Award vindicates its position in the instant case, there are two reasons why this is not so. First, both the facts alleged and the claims made by the investors in *Bayview* were categorically different from this case. Second, the *Bayview* case concerned measures that 'related to' investments (first in Mexico, and alternatively in the United States) rather than measures relating to investors, as in this case.

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[48] The Government of Canada had never before issued such a detailed statement on the implementation of an economic treaty. Its publication was not required under Canadian law, but it was seen as useful because of the large number of statutes and regulations that would need to be amended to implement the wide-ranging obligations that the NAFTA portended.

[49] Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, *in* CANADA GAZETTE 68, 147 (Jan. 1, 1994) at 147.

61. In *Bayview*,[50] the Claimants alleged that they had an investment in Mexico: i.e., rights to enjoy the use of water that they claimed to have been ceded by Mexico to the United States (and thereby to U.S. nationals) under a 1944 treaty between Mexico and the United States, in respect of the utilisation of the waters of the Colorado, Tijuana and Rio Grande River Systems.[51] The *Bayview* Claimants alleged that the Government of Mexico had failed to take the steps necessary to ensure that the Claimants would have access to these waters for the irrigation of their crops in Texas.[52] They argued that Mexico breached Articles 1102, 1105 and 1110 by allowing water to be used in Mexico that was therefore not made available to them to irrigate their farms in Texas.[53]

62. By withholding water from them, the *Bayview* Claimants argued that Mexico harmed their "investments" – characterised by them as a bundle of water rights; irrigation equipment and farming property[54] – to the point of expropriation. They argued that this interference with their water rights breached the minimum standard of treatment of investments under Article 1105, because it unfairly provided Mexican farmers with access to water that they claimed was theirs. The same theory appeared to ground the *Bayview* Claimants' national treatment case, even though the Mexican farmers using what they claimed to be 'their water' were not even necessarily engaged in commercial competition with the *Bayview* Claimants.

63. Despite the fact that their case was fundamentally based upon the allegation that the Government of Mexico had effectively taken 'their water' from them in Mexico, thereby depriving them of its productive use in Texas, the Claimants argued, in their post-hearing submission, that the absence of the words "in the territory of another NAFTA Party" from both Article 1102(1) and Article 1105(1) meant that it really did not matter whether they actually did enjoy any rights to that water in Mexico. They were entitled to both 'fair and equitable treatment' and some form of 'national treatment' (with no apparent commercial competitors identified) from Mexico in respect of their farms located in Texas.

64. As demonstrated above, the claimants in the *Bayview* case actually made precisely the kind of arguments that the Respondent has attempted to attribute to the Claimants in this case. As the *Bayview* Tribunal carefully observed, however, that case involved allegations of how the Government of Mexico imposed measures relating to claimed investments under Article 1101(1)(b);[55] not measures relating to the investors themselves, under Article 1101(1)(a), as in the instant case. This is why the Claimants argued in their Counter Memorial that the *Bayview* claim was unsound.[56] It was based on an untenable, alternative theory about measures and obligations that clearly related to the protection of

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[50] *Bayview Irrigation District et al* v. *Mexico*, NAFTA Award, ICSID Case No. ARB(AF)/05/01, 19 June 2007, at 24, note 105 [*Bayview*].
[51] *Ibid. at* 11.
[52] *Bayview Irrigation District et al* v. *Mexico*, Notice of Arbitration, 19 February 2005, at 32-37.
[53] *Ibid. at* pp. 37-38.
[54] *Bayview* Notice of Arbitration, *supra* note 52, at para. 53.
[55] *Bayview*, *supra* note 50 at 24, note 105.
[56] *Ibid.* at 34 note 58,.

their claimed investments, rather than to them only as investors, vis-à-vis other investors operating in like circumstances in the Free Trade Area.

65. The *Bayview* Claimants' case does not represent a serious expression of how Article 1102(1) protects the rights of certain investors, vis-à-vis their competitors operating in like circumstances in the North American Free Trade Area. Rather, their arguments – provided only after the jurisdictional hearing had taken place[57] – lack the detailed, careful analysis that the Claimants submit they have put forward in this case.

66. It is apparent that the *Bayview* Claimants were forced to respond when their Tribunal asked them what would happen if their primary argument about having an investment in Mexico was rejected, which it eventually was.[58] Because their claim was based upon Mexico's alleged deprivation of their so-called "investment" (i.e., water in Mexico) they made no attempt to explain how such deprivation related to them as investors under Article 1101(1)(a), instead of how the alleged conduct of Mexico related to their 'investments' under Article 1101(1)(b).

67. It was not plausible for the *Bayview* Claimants to argue that Mexican measures relating to their "investments" under NAFTA Article 1101(1)(b) entitled them to maintain their claims even if the Tribunal determined that they had no investments in Mexico. Unlike Article 1101(1)(a), Article 1101(1)(b) explicitly limits the scope of the Chapter to measures relating to investments in the territory of another Party. As the *Bayview* Tribunal observed:

> It is possible that the States Parties to the NAFTA might have given investors who are nationals of one NAFTA State and who had made an investment in that same State of which they are nationals, the right to bring a claim against another NAFTA Party in respect of a measure of that other Party which had adversely affected their investments in their national State. Such a right would, for example, entitle all Mexican business owners who had invested in Mexico by building up their own businesses there (and similarly all Canadian business owners who had invested in Canada) to bring actions against the United States in respect of any United States measure that affected their Mexican (or Canadian) businesses in violation of NAFTA provisions such as the 'fair and equitable treatment' provision in Article 1105. Such a right would likely give those Mexican and Canadian business owners much wider remedies in respect of injurious United States legislation than any United States investor would have against its own government; but such may sometimes be the effect of treaties that protect foreign investors and their investments.
>
> If, however, the NAFTA were intended to have such a significant effect one would expect to find very clear indications in the *travaux préparatoires*. There are no such clear indications, in the *travaux préparatoires* or elsewhere; and the Tribunal does not interpret Chapter Eleven of the NAFTA, and in particular Articles 1101 and 1139, in that way.[59]

[57] *Ibid.* at para. 74.
[58] *Ibid.* at paras. 111-17.
[59] *Ibid.* at paras. 94-95.

68. The present case is not about the treatment owed by NAFTA Parties to 'investments' under Article 1105. The *Bayview* Tribunal rightly concluded that the NAFTA *travaux* does not support such an interpretation for the customary international law minimum standard of treatment of aliens codified by Article 1105. Still, the *Bayview* Tribunal acknowledged the possibility of circumstances in which the NAFTA Parties could have agreed to provide some standard of protection to foreign investors whose investments were not made in the territory of a Host State. Such circumstances just could not include claims for protection of investments under Article 1105, or indeed any claim where the alleged measure is said to relate investments rather than to investors under either Article 1102(1) or 1103(1).

69. In respect of the typical claim by a "foreign investor," for the protection of its investment, the *Bayview* Tribunal observed:

> While this Tribunal does not purport to lay down a comprehensive and definitive test of what constitutes an investment covered by the protections of NAFTA Chapter Eleven, it is evident that a salient characteristic will be that the investment is primarily regulated by the law of a State other than the State of the investor's nationality, and that this law is created and applied by that State which is not the State of the investor's nationality.
>
> When an investment is made, such as the investments in farms and irrigation equipment, etc., in the present case, the investor makes its decision in light of its appraisal of the law and of the authorities who are making, creating and applying the law to that investment. When the investment is made in the investor's State, it is made in the light of the investor's understanding of laws, institutions and procedures that are familiar to the investor. When the investment is made in a different country which has concluded an investment protection treaty covering that investment, the investor is entitled to rely upon the fact the State Parties to the treaty have decided to commit themselves to give a minimum level of legal protection to such foreign investments.[60]
>
> …[61]
>
> The Tribunal considers that in order to be an "investor" within the meaning of NAFTA Article 1101 (a) [sic], an enterprise must make an investment in another NAFTA State, and not its own. Adopting the terminology of the *Methanex* v. *United States* Tribunal, it is necessary that the measures of which complaint is made should affect an investment that has a "legally significant connection" with the State creating and applying those measures. The simple fact that an enterprise in one NAFTA State is affected by measures taken in another NAFTA State is not sufficient to establish the right of that enterprise to protection under NAFTA Chapter Eleven: it is the relationship, the legally significant connection, with the State taking those measures that establishes the right to protection, not the bare fact that the enterprise is affected by the measures.[62]

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[60] *Ibid.* at paras. 98-99.
[61] *Ibid.* at para. 100 the tribunal quoted the United States' intervention in that case with approval.
[62] *Ibid.* at para. 101.

70. At paragraphs 102 to 103 of its Award, the *Bayview* Tribunal expresses an opinion that it was not the intent of the NAFTA Parties "to give every investment in any NAFTA State the protections set out in Chapter Eleven…" or "to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States." Considering the circumstances of the case before it,[63] in the context of the NAFTA text, the Tribunal thus concludes:

> In this case the Tribunal does not consider that the Claimants were 'foreign investors' in Mexico. Rather, they were domestic investors in Texas. The economic dependence of an enterprise upon supplies of goods – in this case, water – from another State is not sufficient to make the dependent enterprise an 'investor' in that other State.
>
> …
>
> Accordingly, in the context of the present case it is not enough that the United States' Claimants have made an investment in the United States. They must demonstrate that they were seeking to make, were making, or had made, an investment in Mexico. If they cannot demonstrate that, they will not qualify as "investors" for the purposes of these claims.[64]

71. Unlike the *Bayview* case, the Claimants in the instant case actually have established a "significant legal connection" between themselves and the United States that is greater than "the bare fact" their investments in the Free Trade Area have been affected by the United States' measures. That significant legal connection is the relationship of reliance that arose out of the United States' NAFTA promise of fair competition in the Free Trade Area for investors who were prepared to contribute significant resources to the establishment and growth of an integrated market within that Area.

72. The *Bayview* Tribunal observed that not every investment made in the Free Trade Area is entitled to the protections of NAFTA Chapter 11. The Claimants do not disagree with this broad observation. In fact, only one type of NAFTA Chapter 11 protection – that of non-discrimination vis-à-vis one's competitors operating in like circumstances in the Free Trade Area – is available to investors who have not made an investment in the territory of another NAFTA Party. To reiterate, the *Bayview* Claimants' position – that the customary international law minimum standard of treatment, owed by the NAFTA Parties under Article 1105, must be accorded to investments made outside of the territory of a host State – has not been made by the Claimants in this case.

73. The focus of the *Bayview* Claimants' case was their alleged right to water in Mexico that they claimed had been effectively expropriated by Mexico's measures under Article 1110. The *Bayview* Tribunal refused to recognise the factual basis for their alleged "investment" in Mexico. Unlike the *Bayview* Claimants, the Investors in this case are not seeking conventional protection from measures relating to investments made in the

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[63] *Ibid.* at para's. 105-107; the Tribunal notes how the interpretative Statement of the United States was in agreement with the position of Mexico and refer to the implementation statements of the NAFTA Parties supporting the primary purpose of NAFTA Chapter 11 as being devoted to the protection of foreign investors and investments.
[64] *Ibid.* at para's. 104 and 108.

territory of the United States. Unlike the *Bayview* Claimants, whose investments were "wholly confined" to Texas, the Investors in this case did not base their business decisions solely upon the application of Canadian laws and regulations to their investments.

74. Rather, the Investors in this case based their investment decisions on an over-arching, transnational, regulatory framework applicable exclusively to their highly-integrated and continentally-focused industry. Theirs was an industry that had already benefited from the significant regulatory harmonisation and co-operation that coincided with the coming into force of the NAFTA. Theirs was an industry in which similarly situated investors, on both sides of the border, expected fair treatment if they contributed their resources to establishing an integrated market for their goods within the Free Trade Area.

75. The Claimants relied upon the NAFTA promise of non-discrimination to protect them, as foreign investors participating in the North American Free Trade Area, from protectionist regulatory measures designed to alter the conditions of fair competition that the NAFTA was explicitly intended to promote. The *Bayview* Claimants could not make such an argument, as their case was – at root – about the alleged taking of water in Mexican territory that they claimed was theirs to use in Texas. *The Bayview* case was not about the promotion of conditions of fair competition between similarly situated investors engaged in a competitive commercial relationship within a single, continentally-integrated industry.

The Respondent Cannot Pick and Choose Amongst the Object and Purposes of the NAFTA

76. At pages 15-20 of its Reply, the Respondent attacks the Claimants' interpretation of the relevant NAFTA provisions on the basis that it leads to absurd results. At page 15, the Respondent argues that a person who qualifies as an "investor of another Party" must be construed as a "foreign investor" and that therefore the Claimants cannot be investors under Article 1116 because they are not "foreign investors" within the meaning of a traditional bilateral investment treaty. This reasoning is circular. Whether the Claimants would qualify as an "investor" or "foreign investor" under a bilateral investment treaty is not relevant in determining whether they qualify under the NAFTA definition of an "investor of another Party." The Claimants are all nationals of Canada. They do not bring their claims against Canada, but rather the United States, in respect of whom they are "investors of another Party" as defined in Article 1139.

77. The Respondent's reliance on the language found in its Statement of Administrative Action, and in Canada's Statement on Implementation, found at pages 15-16 of its Reply, is similarly misplaced. The language cited by both Parties acknowledges that they have undertaken obligations both in respect of their treatment of investors from other NAFTA Parties and in respect of their treatment of investments made in their territories. The Claimants acknowledge that the Parties have undertaken a larger array of obligations in respect of their treatment of investments made in their territories. This case, however, is about the national treatment obligation alone – and obligation that the Parties undertook

in respect of their treatment of investors in the Free Trade Area they established under Article 101.[65]

78. At page 2 of its Reply, the Respondent alleges that the Claimants believe: "the NAFTA Parties contemplated that each Party could actually regulate the formalities of establishing enterprises in the territories of other Parties." This allegation is based upon the hypothetical examples it provides at pages 16 to 19. However, in proposing these examples the Respondent has presumed a juxtaposition for interpretation of Article 1102(1) that is misleading and unnecessary. The Respondent postulates that if its presumption – that an investor must have made an investment in the territory of another NAFTA Party to be entitled to 'treatment no less favourable' vis-à-vis other investors in that same territory under Article 1102(1) – is not accepted, the alternative can only be that the investor is not entitled to submit any claim under Article 1102(1) with respect to investments it has made in the territory of another Party.

79. The Claimants have not made such an argument. Article 1102(2) explicitly requires a NAFTA Party to accord national treatment to investments – so long as the claimant investor "has made, is making or seeks to make" such investment in the territory of another NAFTA Party. Article 1116 permits that investor to bring a claim for all damages it has suffered (regardless of where they were sustained) for breaches of any the provisions of Section A of NAFTA Chapter 11 (not just Article 1102(1)). Accordingly, in all cases where the investor "seeks to make, is making or has made" an investment in the territory of another NAFTA Party, it may seek relief from a Chapter 11 tribunal when that Party's measure directly affects such investment, or intended investment, in breach of that Party's obligation to accord certain treatment to that investment (including the treatment promised under Article 1102(2)).

80. Unlike Articles 1105 or 1110 (which both require an investment to have already been made in the territory of a NAFTA Party in order for the provision to be engaged), Article 1102(2) clearly extends to cases of "pre-establishment" (where an investor need only to have sought to make an investment for the 'national treatment' obligation to be engaged). Accordingly, under NAFTA Article 1116 an investor may seek damages for breach of Article 1102(2) when a measure inhibits the establishment of its intended investment in the territory of another NAFTA Party. There is no need for Article 1102(1) to be invoked by the investor because of the breadth of protection provided to it under Article 1102(2).

81. This operation of Article 1102(2) is confirmed in the text of Article 1102(4), which the NAFTA Parties provided "for greater certainty" with respect to establishment requirements for investments made in their territories. The tortured and imprecise

[65] The Respondent's reliance on its own Statement of Administrative Action is also misplaced for the reason that its contents may be as much aspirational about what the United States hopes its obligations will be, if ever challenged, as much as what they actually are. Other international tribunals have clearly decided that while the Statement of Administrative Action may provide valuable interpretative guidance as to how the United States may choose to impose or enforce a measure, it is not illustrative of the actual content of the international obligations it bears. See, e.g.: *United States – Measures Treating Export Restraints as Subsidies* (2001), Panel Report, WTO Doc. WT/DS194/R at para. 8.98-100; and *United States – Section 129(c)(1) of the Uruguay Round Agreements Act* (2002), Panel Report, WTO Doc. WT/DS221/R at para. 6.38.

construction of the Claimants' arguments leads the Respondent to conclude that Article 1102(4) supports its point of view.[66] Article 1102(4) simply confirms that the NAFTA Parties are not permitted to impose measures that directly affect the establishment of investment enterprises within their territories, on the basis of nationality restrictions. If such measures cause actual, quantifiable damages to an investor (as opposed to speculative or theoretical losses of opportunity), the investor may seek recourse under Article 1116. However, such a case would likely be brought by one NAFTA Party against another under NAFTA Chapter 20 instead.

82. The Respondent's reliance on Article 1111 is also misplaced. Because the Respondent erroneously postulates that the Claimants' case is built solely upon the absence of the phrase "in the territory of another Party" from Article 1102(1), it believes the absence of that phrase from Article 1111(1) is determinative – even though it appears in paragraph (2) of that same provision. For the Respondent's argument to work, however, it would have to be correct about the Claimants' arguments. The Claimants' case is built on the terms found in Articles 1101(1), 1102(1) and 1116, rather than upon any words that may be absent from them.

83. The Respondent presumes that the only reason Article 1102(1) does not include the words "in the territory" is because it must be restricted to the treatment of investors who have made, or seek to make, an investment in another NAFTA Party's territory. Otherwise, the Respondent argues, Article 1111 would authorise a NAFTA Party to impose "special formalities" or information gathering requirements in connection with the establishment or operation of investments in the territory of another NAFTA Party.

84. Article 1111 is intended to provide greater certainty for the interpretation of Articles 1102 and 1103, in respect of measures that impose "special formalities" or information gathering requirements in connection with the establishment or operation of investments in the respective territories of each NAFTA Party. It does so by making reference to Article 1102, as well as to any of "the protections afforded by a Party to investors of another Party and investments of another Party pursuant to [Chapter 11]." The provision is effective because of the roadmap for application of the Chapter laid out in Article 1101(1).

85. Moreover, the United States has actually legislated measures that impose information gathering requirements upon investors whose investments are located outside of the territory of the United States, but within the Free Trade Area, just as Article 1111(2) contemplates. For example, Section 404 of the United States Federal *Sarbanes-Oxley Act of 2002*[67] imposes onerous information gathering and reporting requirements on 'foreign' (including Canadian and Mexican) investors whose only connection to the United States could be as little as the decision to list on a U.S.-based stock-exchange, even though the

[66] Respondent's Reply, at 17.
[67] *The Sarbanes-Oxley Act*, PL 107-204, 116 Stat 745 (2002).

entire business of its investment could be conducted outside of the territory of the United States.[68]

The Negotiating History of the NAFTA Refutes The Respondent's Interpretation

86. At pages 20 to 32 of its Reply, the Respondent attempts to answer the Claimants' argument that it has essentially ignored most of the NAFTA's objectives and principles in favour of its construction of the generic "object and purposes" of all the worlds' investment protection treaties.[69] First, the Respondent alleges that the Claimants have improperly attempted to use the NAFTA's objectives to re-write the text of Article 1102(1).[70] In fact, it is the Respondent which advocates using a generic set of investment treaty 'object and purposes' to re-write the language of the NAFTA text.[71] It basically claims that the only NAFTA objectives relevant to this case are those that conveniently comport with the generic object and purposes of bilateral investment treaties that it says must govern this Tribunal's interpretation.

87. The Respondent is asking this Tribunal to pick and choose amongst the NAFTA's objectives, as delineated in Article 102 and reinforced in its preamble. For example, its arguments at pages 25 to 27 imply that the promotion of "conditions of fair competition in the free trade area" cannot possibly be seen as an objective that informs this Tribunal's interpretation of Chapter 11 provisions, even though Article 101 expressly directs that the NAFTA's objectives are to be elaborated through specific principles and rules, including 'national treatment.' The only rationale put forward by the Respondent for this line of argument is a reference to its own insistence, contained within pages 6 to 10 of the Memorial, that "the object and purpose of Chapter Eleven is no different from that of bilateral investment treaties (BITs) and investment chapters in other FTAs."[72] In other words, the Respondent is forced to turn to its own arguments as the underlying authority for maintaining this untenable interpretative position.[73]

88. The Respondent accuses the Claimants of daring to expand the United States' national treatment obligation vis-à-vis the investors of other NAFTA Parties at page 22 of its Reply. In fact, the Claimants are merely seeking damages under the existing language of the NAFTA terms, whereas the Respondent is asking the Tribunal to narrow the United States' Chapter 11 obligations, by effectively re-writing sub-paragraphs (a) and (b) of Article 1101(1) to reflect the version of this provision proposed by the United States on 22 May 1992:

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[68] While it was certainly not necessary to establish that such an example existed, the *Sarbanes-Oxley* requirements imposed upon Canadian investors without the need to have any investments in the territory of the United States does prove just how hollow the United States' arguments about interpretation ring.
[69] Claimants' Reply, at para's. 89-94.
[70] Respondent's Reply, at 22.
[71] See Claimants' Reply, at para's. 90-91.
[72] Respondent's Reply, at 24.
[73] This approach reveals that the Respondent really does believe that any statement it makes about interpretation of the NAFTA must be respected as 'authoritative.' It simultaneously reveals the folly of such an argument.

> 1. U.S.A [Unless otherwise provided,] this Chapter shall apply to measures affecting:
> (a) investments (of investors of a Party) in the territory of another party existing at the time of entry into force as well as to investments made or acquired thereafter; MEX U.S.A [and
> (b) investors of a Party in the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in the territory of another Party.][74]

89. At pages 22 to 23 of its Reply, the United States also argues that a claim cannot be brought under NAFTA Chapter 11 for a SPS measure because Article 712 vests it with a "basic right" to impose it. It adds that permitting investors to seek damages for losses arising from the imposition of such measures would violate such "basic right," arguing that only Party-to-Party arbitration under Chapter 20 is suitable for SPS disputes. The serious flaw in the Respondent's argument is that there is nothing in the NAFTA that prevents an investor from seeking damages for the breach of a NAFTA Chapter 11 obligation arising from the imposition of an alleged sanitary or phytosanitary measure.

90. There is nothing in Article 712, or Chapter 7 of the NAFTA, that prevents the Claimants from seeking damages in relation to the damages suffered as a result of the Respondent's imposition of the measures at issue. Chapter 7B sets out the Parties' rights and obligations with respect to SPS measures in the state-to-state context. It includes an obligation that the Parties ensure that their SPS measures are not arbitrarily or unjustifiably discriminatory. It also provides that such measures are to be applied only to the extent necessary; they cannot constitute disguised restrictions on trade. A Party's sanitary or phytosanitary measure that conforms to relevant international standards is presumed to be consistent with Article 712.

91. NAFTA Article 2018 obliges a respondent government to respond to a Chapter 20 panel's finding of non-compliance through: "whenever possible… [the] non-implementation or removal of [the non-conforming] measure…" but it provides that the NAFTA Parties may also agree upon "compensation" to be paid as an alternative to compliance. A NAFTA Chapter 11 tribunal does not have the authority to issue an order or award that enjoins a measure. Its ability to award a remedy is strictly limited to ordering that monetary damages be paid or recommending the restitution of property (which can be converted to compensation at the respondent's election).[75] In either scenario, whether considered by a Chapter 11 tribunal or a Chapter 20 Panel, the Respondent's measure can stand, so long as it pays compensation.

92. Moreover, given that the Parties are entitled to enforce all Chapter 11 breaches before a Chapter 20 panel themselves, it cannot be reasoned that SPS measures are implicitly excluded from the ambit of NAFTA Article 1102(1) because the Parties enjoy the same "basic right" to impose them, subject to the Chapter 7B obligations noted above. In addition, no NAFTA Chapter 11 Tribunal has accepted the proposition that just because a

[74] See, Claimants' Reply, at 30.
[75] NAFTA Articles 1134 and 1135.

measure may be subject to a Party's obligations under another chapter, does not mean that it cannot be simultaneously subject to an obligation under NAFTA Chapter 11.[76]

93. At page 24 of its Reply, the Respondent also returns to its argument that the Article 102(1)(c) objective to "increase substantially investment opportunities in the territories of the Parties" proves the Claimants wrong, simply because it makes reference to the word "territories." The Respondent contrasts the difference in language between this objective and the Article 102(1)(b) objective to "promote conditions of fair competition in the free trade area," noting that the former mentions "territories" whereas the latter mentions the Free Trade Area, as further proof of its position. Within the very same paragraph, however, the Respondent also says that differences in language between subparagraphs (b) and (d) do not matter.

94. The appropriate approach to understanding the subparagraphs of Article 102(1) is not complicated. As the ICJ indicated in the *Admission* Case:

> […] the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter.[77]

95. There is no logical reason to juxtapose the promotion of conditions of fair competition in the free trade area established under Article 101 against the objective of substantially increasing investment opportunities in the territories of the Parties that collectively compose that free trade area. The plain and ordinary meaning of these terms demonstrate their complementarity, in that both contribute to the establishment and fostering of the necessary conditions for increased economic integration within the North American Free Trade Area.

96. In contrast, the objective outlined in subparagraph (d) speaks of providing protection for intellectual property rights "in each Party's territory" – rather than within the Parties' territories collectively. The Parties' choice of different terms for these objectives (i.e., "territory" versus "territories") demonstrates how the they had no intention of agreeing to the same kind, or degree, of integration for their respective intellectual property regimes as they intended for the broader economic regulation of covered investors, service-providers and goods. Under Article 1701 each Party agreed to maintain its own intellectual property regime, and under Article 1702, each Party also reserved the right to provide more comprehensive intellectual property protections within its own territory

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[76] See: *United States – Trucking*, NAFTA Chapter 20 Panel Report, 6 February 2001, at para. 293. See, also: *Pope & Talbot* v. *Canada*, NAFTA/UNCITRAL Tribunal, Decision on Motion re: Whether Measures "Relate to" the Investment, 26 January 2000 at para's. 27-34; and *S.D. Myers, supra* note 29, at paras. 294-300.

[77] *Competence of the General Assembly for the Admission of a State to the United Nations*, [1950] *ICJ Reports* 1, at 8. The Court continues: "If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the court by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.", *ibid.*.

than the three were willing to accept for the Free Trade Area as a whole.[78] In other words, for obligations in respect of their respective intellectual property regimes, the Parties used the singular expression "territory" because it was what they intended.

97. At pages 27 and 28 of its Reply, the Respondent resurrects its argument that the *Gruslin* Tribunal addressed the same issues as in the instant case, even though it involved a portfolio investor in a Luxemburg mutual fund who was trying to prove that he actually had made an investment in the territory of Malaysia, so that he could bring a claim under the terms of a bilateral investment treaty and the *ICSID Convention*.[79] The Respondent also alleges, at page 28, that the Claimants "ignore" the finding that Gruslin did not have standing under Article 25(1) of the *ICSID Convention* because he had not made an investment in Malaysia. It does so in spite of the fact that the Claimants clearly explained, at paragraph 108 of the Counter-Memorial, that ICSID cases such as *Gruslin* are inapplicable in the NAFTA context precisely because of the requirements imposed upon claimants under traditional BITs and Article 25(1) of the *ICSID Convention*.

98. The Respondent's argumentation with respect to *Gruslin* also suffers from the Respondent's continued aversion from the plain and ordinary meaning of treaty text. Unsurprisingly – because it was a run-of-the-mill investment protection treaty between distant countries rather than a comprehensive trade and investment agreement between three countries sharing a contiguous, continental land mass – Article 12 of the Belgium-Malaysia BIT was not like Article 1101 of the NAFTA. As the former specifically provided:

> This Agreement shall apply to investments made in the territory of either Contracting Party in accordance with its legislation or rules or regulations by nationals or companies of the other Contracting Party prior to as well as after the entry into force of this Agreement.[80]

99. As such, the *Gruslin* case simply does not assist the Respondent with its arguments. Rather, it assists the Claimants by demonstrating: (1) that because NAFTA is not just another BIT, neither ICSID jurisprudence nor common BIT practice, on the territoriality requirements of traditional protections for foreign investment, is relevant to the outcome of this case; and (2) that if the NAFTA Parties had truly intended to restrict Chapter 11 as the Respondent now claims they did, they would have chosen the requisite language for the job.

100. Indeed, at pages 29 to 31 of its Reply the Respondent demonstrates how it was certainly capable of using the kinds of treaty terms that would prevent this case from being brought under a large number of free trade treaties that the United States has entered with many of

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[78] While the Parties clearly protected their right to maintain their respective regimes, they did agree, in other Chapter 17 provisions, to establishing certain minimum standards: i.e., with respect to the administration of their respective regimes; the commitments they made under other intellectual property conventions; and basic principles such as non-discrimination.

[79] See Claimants' Reply, at 43-44.

[80] *Gruslin v. Malaysia,* ICSID Case No. ARB/99/3, Final Award (27 November 2000) at 489, citing Article 12 of the Intergovernmental Agreement (1979).

its much smaller trading partners. It claims that the Parties to these later treaties often selected many of the same objectives and preambular passages as the Parties used in the NAFTA.[81] It even admits that Articles 10.3(1) of the DR-CAFTA and 10.2(1) of the Chile-U.S. FTA include a territorial restriction on national treatment for investors that would "[foreclose upon] the argument Claimants made here."[82]

101. The Claimants, however, are not Chilean, nor are they Caribbean, cattlemen. They are Canadians, and thus the jurisdictional basis for their claims is not founded upon the understandably inhospitable provisions of the Chile-U.S. FTA or the DR-CAFTA, or of a typical United States BIT. Again, the Respondent's argumentation actually demonstrates the converse. That it had, and maintains, the ability to choose other language for other treaties only demonstrates how the United States could have restricted the extent of its national treatment obligation to investors with investments in the North American Free Trade Area, had it really intended to do so at the time. That it has also maintained the ability to agree with the other two NAFTA Parties on a binding interpretation of the relevant provisions, under Article 1131(2), but has not yet done so, similarly demonstrates that what the Respondent claims all three Parties clearly intended in 1992 cannot be the case.

102. Indeed, the Respondent omits to mention that every single other free trade agreement and BIT currently in force between the United States and another country includes a national treatment provision that explicitly limits the comparison of treatment received by investors to cases where the investor has made an investment in the territory of the other party. In addition, every single United States free trade agreement with an investment chapter, and every U.S. BIT, includes a definition of "investment" and/or "investor" or "claimant" that imposes a territorial limitation that would prevent a private actor under these treaties from seeking the relief that has been explicitly granted to "investors" in the NAFTA context.[83]

The Circumstances and Specific Objectives of the NAFTA

103. A closer examination of all of the United States' free trade agreements and BITs currently in force reveals, in fact, that none of them include an explicit objective "to promote conditions of fair competition in the free trade area" and none provide that their objective is "substantially increasing investment opportunities in the territories of the parties." As could be expected, a handful of these treaties[84] identify the elimination of barriers to trade in goods and services between the territories of parties as an explicit objective, but none of the other economic treaties ratified by the United States aims nearly as high the NAFTA. In other words, only the NAFTA was designed with an explicit objective of promoting fair competition in the Free Trade Area it established and

[81] Respondent's Reply, at notes 77-79.
[82] Respondent's Reply, at 31.
[83] See: Appendix B, containing copies of the United States' current bilateral trade and investment treaties, including those note in force, in addition to the DR-CAFTA, the NAFTA and the CUSFTA.
[84] See, e.g.: Article 1.2(d) of the DR-CAFTA and Article 1.2(d) of the US-Chile FTA.

only the NAFTA enshrines national treatment and MFN treatment as cornerstone principles of the treaty's interpretation.

104. The Chile-U.S. FTA and the DR-CAFTA, along with all of the other free trade treaties entered into by the United States, were each negotiated within a different political and economic context than the NAFTA. The same is true of the various BITs entered into by the United States, both before and after the NAFTA was negotiated and came into force. The United States' BIT program emerged from a particular history in which it was thought necessary to use an international instrument, and the promise of binding, de-localised arbitration, in order to reduce the risks of investing in a world wrought by ideological conflict, involving host states with significantly different legal and political regimes, as well as vastly different levels of economic development. The context of the NAFTA is just not the same as it was for these BITs.

105. Building upon the earlier CUSFTA, the NAFTA was motivated by a shared vision, on the part of the leaders of Canada, Mexico and the United States, of a North American Free Trade Area whose internal market would exceed the scope and collective size of the E.U. common market. As Professor Hart recalls, the CUSFTA was just the beginning for the Government of Canada:

> Reisman had come armed with a single vision of a comprehensive agreement that would establish the rules of the game for Canada-US trade relations for the next few generations. He wanted to establish national treatment as the norm for the movement of virtually all goods and services between the two countries. If the United States was prepared to accept his vision, he was authorized to extend this principle of nondiscrimination to the US priorities of investment and intellectual property.[85]
>
> With the conclusion of the FTA, Canadian trade policy finally achieved one of its longest standing and most enduring objectives. … The FTA achieved that objective by removing almost all barriers to trade in goods and many obstacles to trade in services, investment, and business travel, and providing a code of conduct for the two governments to follow in their regulation of private firm behaviour and their pursuit of their own economic policies.[86]
>
> "Canada's pursuit of trade agreements, of rules and dispute settlement mechanisms is not a matter of high-mindedness. It is a matter of survival. It is a reality that is brought home to us on a daily basis. As a small country living next door to a global power, we need these rules to reduce the disparity in power and thus allow us to reap the benefits of our proximity." The FTA raised the legal status enjoyed by Canadian interests to unprecedented heights.[87]

[85] Hart, *supra* note 12, at 380.
[86] Hart et al., *supra* note 11, at 390.
[87] Hart, *supra* note 12, at 388, citing Former Canadian Ambassador Derek Burney, Donald W. Campbell Lecture in International Trade, Wilfrid Laurier University Chancellor's Symposium (Toronto: 14 June 1995).

106. Within contiguous borders, NAFTA would go further than the CUSFTA[88] in reducing domestic protectionism. Canada would secure market access to a market of over 100 million people and it would rationalise Canada's uneconomic 'branch plant' industrial structure. The NAFTA would counter U.S. domestic protectionism and Mexico would gain access to direct foreign investment from its Northern partners. Through the NAFTA, the United States also addressed major economic irritants in energy, intellectual property and market access. The sustained political effort made by officials from the United States, Canada and Mexico, including their top political leaders, reflected the importance – even the 'revolutionary' character – of the NAFTA for North America.

107. The circumstances of its conclusion confirm the ordinary meaning of its terms: unlike any other FTA, and certainly different from a simple BIT, the object and purpose of the NAFTA go further than merely liberalising trade or protecting foreign investment. Rather, the NAFTA was intended to serve as a unique, rule-of-law-based instrument that would encourage private actors to join in a process of achieving deep economic integration, within the contiguous territory comprised by the Free Trade Area it established. As former United States President Clinton's Administration noted:

> In addition, as NAFTA increases North American integration in the agricultural sector, labor and capital will move from less productive to more efficient farms, firms, and industries. This dynamic process of market adjustment will continue throughout implementation of the Agreement. The strong export performance of U.S. agriculture thus far suggests that NAFTA is creating incentives for U.S. labor and capital to increase, and prosper, in the agricultural sector.[89]

108. The Respondent argues that the Claimants cannot "demonstrate why the fact of their participation in an integrated, continental market, or the consolidated nature of their claims, has any bearing on the Parties' intent regarding the scope of the Investment Chapter."[90] The Claimants relied upon the promises contained within the NAFTA that – if they participated in the process of integration intended by the NAFTA – they would

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[88] CUSFTA Article 1601 very clearly provided its investment chapter would only apply to "any measure of a Party affecting investment within or into its territory by an investor of the other Party." Article 1602 also very explicitly provided, in part:

1. Except as otherwise provided in this Chapter, each Party shall accord to investors of the other Party treatment no less favourable than that accorded in like circumstances to its investors with respect to its measures affecting:
    a. The establishment of new business enterprises located in its territory;
    b. The acquisition of business enterprises located in its territory;
    c. The conduct and operation of business enterprises located in its territory; and
    d. The sale of business enterprises located in its territory.
2. Neither Party shall impose on an investor of the other Party a requirement that a minimum level of equity (other than nominal qualifying shares for directors or incorporations of corporation) be held by its nationals in a business enterprise located in its territory controlled by such investor;
3. Neither Party shall require an investor of the other Party by reason of its nationality to sell or otherwise dispose of an investment (or any part thereof) made in its territory…
[emphasis added]

[89] USTR, *Study on the Operation and Effect of the North American Free Trade Agreement*, 11 July 11 1997, Chapter 2 (President William J. Clinton), at 92.

[90] Respondent's Reply, at note 55 and at 4 and 31.

benefit from establishment of the rule of law in the Free Trade Area, ensuring non-discrimination in respect of the measures imposed upon their coalescing industry by any NAFTA Party.

109. Proving reliance upon, and participation in, an integrated market within the Free Trade Area is important for the Claimants because the NAFTA promise of protection from discriminatory measures is contingent upon such reliance and participation. The Claimants' contribution to achieving the kind of integration envisaged for the NAFTA, demonstrates why they were entitled to receive 'treatment no less favourable' because of the likeness of circumstances found between the Claimants and their U.S.-based competitors. The non-discrimination obligation, as provided in Articles 101 and 1101(1), is the means by which deep integration within the Free Trade Area was going to be achieved:

> Trade liberalisation and market integration, however, are not clearly delineated stages in economic integration. Rather, they sit on a continuum and one seems to shade seamlessly into the other. There is, nonetheless supposed to be a gatekeeper on this misty bridge between trade liberalisation and market integration: this is the principle of nondiscrimination, canvassed in the National Treatment obligation.[91]

110. The Respondent even cites articles by Professors Abbot and Taylor to support its position that the NAFTA was actually not a unique, non-institutional instrument of economic integration, and that its investment chapter was effectively nothing more than a BIT that should be read in isolation from the remainder of its text.[92] It does so, for example, by contrasting the NAFTA with the E.U., citing Taylor as follows:

> Thus, "[a] country joining a customs union must literally surrender sovereignty over its tariff power," and the result of this surrender of sovereignty is that the members of a customs union begin to establish a common commercial policy. Id. at 59. In contrast, free trade areas do not require a similarly significant surrender of sovereignty or the coordination, or harmonization, of commercial or other policies among member countries.[93]

111. In fact, what Cherie O. Taylor actually wrote about FTA's, and the NAFTA in particular, was:

> Free Trade Areas, however, do not require the coordination of trade policies vis-à-vis the outside world. Instead, members are only subject to the GATT requirement that their tariff schedules not be more restrictive than the schedules used prior to the formation of the free trade area. Thus, free trade areas concentrate solely on the elimination of substantially all trade barriers among the members and do not require members to agree upon common tariff or

[91] Gaetan Verhoosel, *National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy*, (Oxford: Hart Publishing, 2002) at 7.
[92] Respondent's Reply, at 21.
[93] *Ibid.* at footnote 50.

> commercial policies. This type of elimination of trade barriers can be taken by a group of countries with a minimum of common rules or institutional structures.[94]

Professor Taylor also noted:

> […] [A]ll three countries envisioned the NAFTA as a true free trade area in which each member would eventually lower trade barriers to the same levels. The creation of a "true" free trade area between developed and developing countries, however, requires more than a simple elimination of trade barriers. Forming a free trade area constitutes the first and largest step toward economic integration. This is particularly true when a large component of the FTA is to lower investment barriers among members.[95]

112. Professor Taylor's position is unsurprising, and Professor Abbott appears to agree. Whereas the goal of a customs union, such as the E.U., is for a Party to "literally surrender sovereignty over its tariff policy," the goal of a FTA is economic integration. The NAFTA is distinguished among FTAs, however, because of the significant commitment its signatories showed to achieving deep integration, without going so far as to establish the institutional and governmental superstructure found in the E.U. model. That is why Professor Abbott entitled the article cited by the Respondent: "Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime."

113. Whereas the Respondent paraphrases Abbott to argue: "the NAFTA Parties chose to 'maintain their own regulatory schemes' to govern investments in their territories, and thus, Claimants' suggestion that the Parties intended to eliminate borders with respect to the investment promoting aspects of the Agreement is belied by the Agreement's very nature…"[96] what he actually wrote about NAFTA Chapter 11 was:

> In the major areas in which the establishment of harmonized rules might have been considered, for example, services and investment regulation, the NAFTA makes no concrete proposals. The country parties will each maintain their own regulatory schemes, subject to the broad *provisio* that they provide each other's enterprises with national and most favored nation treatment. This is a major trade-related accommodation, but cannot be mistaken for harmonization of law.[97]

114. The Claimants do not argue that the NAFTA Parties intended to completely harmonise the infinite number of regulatory regimes they maintained when the NAFTA came into force. To obtain this result at the outset of the North American Free Trade Area would have required the Parties to adopt the E.U.'s institutional and bureaucratic model. Instead, the NAFTA Parties chose to harness the resources of individual economic actors and market competition within a rule-of-law framework in order to facilitate ever-

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[94] Cherie O. Taylor, "Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into A Battle," 28 GEO. WASH. J. INT'L L. & ECON. 1, 59 (1994), at 60.
[95] *Ibid.* at 73.
[96] Respondent's Reply, at 21, note 90.
[97] Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 Am. J. Comp. L. 917 at 936.

increasing integration within the newly created North American Free Trade Area. This process was to be encouraged by enshrining non-discrimination as the basis for the rule-of-law governing the Parties' conduct under the NAFTA regime.

115. This 'rule-of-law' imperative was clearly intended by the NAFTA Parties to discourage political favouritism and parochialism inside the Free Trade Area, which might otherwise retard the growth of economic integration by impeding competition amongst the individual economic actors whose investments were intended to drive the process. Establishing the rule of law based upon non-discrimination created a legitimate expectation – held on the part of NAFTA investors such as the Claimants – that they would be treated fairly if they chose to participate in creating the kind of integrated markets that NAFTA authors and proponents intended.[98]

> The "rule of law" is above all, not politics. The "rule of law" is definitely not politics. As Professor Schacter has warned us, we cannot reduce law to politics "without eliminating it as law." Politics is arbitrary. Law is not. With the "rule of law" the law is certain, not arbitrary. With the "rule of law" the law is written beforehand, and the rules are defined in advance. With the "rule of law" the law is written to apply to all equally, and all – in practice – in reality – are equal before the law. With the "rule of law," no one – no one – is above the law. Only this can rightly be called the "rule of law.'[99]

116. The rule of law, and the expectations of non-discriminatory treatment it engendered amongst NAFTA investors willing to take up the cause of economic integration, was embedded in the NAFTA's preamble; objectives; principles; and rules – chief among them, Article 1102(1).

The Negotiating Texts Support the Claimants' Article 31 Interpretation

117. At page 32 of its Reply, the Respondent implies that the Claimants do not agree that preparatory texts may be used by a tribunal in confirming an interpretation resulting from the application of customary approach memorialised in Article 31 of the *Vienna Convention*. The Claimants actually acknowledged and relied upon this premise at paragraphs 73 and 82 of the Counter-Memorial.

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[98] International tribunals have recognised the fact that private parties enjoy legitimate expectations arising from obligations undertaken by treaty parties with respect to economic regulation and its impact upon their business activities and interests. See, e.g.: *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, at 323-328. See, also: *LG&E* v. *Argentina*, ICSID Case No ARB/02/1, Award, at para. 126, citing: *MTD* v. *Chile*, ICSID Case No. ARB/01/7, Award, at para. 113, for the axiomatic principle that investors are entitled to rely upon the terms of a treaty when making investment decisions:

> Although the Chile - Malaysia BIT does not include express reference in its Preamble with respect to fair and equitable treatment, the tribunal in *MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. *Republic of Chile* referred to the objectives of the Treaty set forth in the Preamble, and concluded that in light of these objectives, fair and equitable treatment meant treatment in an "even-handed and just manner, conducive to fostering the promotion of foreign investment."

[99] James Bacchus, *Trade and Freedom* (London: Cameron May, 2004) at 468.

118. The Respondent also persists in its unsubstantiated "legal scrub" argument on page 32, but still fails to acknowledge that, even after the relevant provisions of Chapter 11 crystallised in their present form, the Parties' 'scrubbers' had no less than 20 more opportunities to make changes to the text, over a period from 31 August 1992 to 23 April 1993.[100] That the Parties chose not to alter the language of Articles 1101(1), 1102(1) and 1116, in what would become their final form, over such a span of time can only confirm the Article 31 interpretation that permits the Claimants to bring exactly the kind of case that is before this Tribunal.[101]

Fear and Incredulity Cannot Substitute for Legal Analysis

119. In sum, the tactics employed by the United States in its Memorial, and in its Reply, speak to two concepts: fear and incredulity. The Respondent apparently hopes that this approach will obscure the fact that the plain text of NAFTA Articles 1101(1), 1102(1) and 1116, taken in context and in light of the object and purposes of the Agreement, support the Claimants' position.

120. The Respondent's incredulity, seemingly in respect of both the Claimants and their arguments, is repeatedly demonstrated in its Reply by its insertion of repeated and empty assertions about the Claimants' position, using epithets such as "revolutionary,"[102] "unreasonable,"[103] "farfetched,"[104] and "absurd."[105] The Respondent seems determined to argue that the Claimants' analysis cannot be taken at face value. Similarly, the Respondent appears to seek to instil fear in this Tribunal that allowing these claims to proceed to consideration of their merits will start off an avalanche of investment claims in respect of cross-border trade issues.[106]

121. The Respondent's proverbial 'floodgates' argument should not sway this Tribunal's resolve to apply the terms of the relevant NAFTA provisions in accordance with the applicable rules of interpretation. Not only does NAFTA Article 1136(1) specifically provide that this Tribunal's award shall have no binding force beyond the dispute submitted between the parties, the existing text provides more than sufficient protection

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[100] See Claimants' Reply, at para. 80.
[101] At page 33 of the Reply, the Respondent suggests that adding "in the territory" to Article 1102(4)(b) proves that Article 1102(1) was only ever intended to apply to investors with investments in, or intended for, the territory of another NAFTA Party. The provision in question deals with the disposition of investments – which is obviously a regulatory function affecting traditional forms of foreign investment to which the traditional form of national treatment obligation would apply. It only stands to reason that such a clarification would apply only to investments of investors in the territory of another NAFTA Party, and thus in no way undercuts the argument that the Parties intended to provide investors with a broader promise of non-discriminatory treatment within the Free Trade Area. As before, the fatal flaw in the Respondent's reasoning is its all-or-nothing approach to interpretation. That Chapter 11 could provide expanded protection against non-discrimination for investors in the Free Trade Area does not prevent it from simultaneously providing the traditional forms of protection expected from investors when they take the further step of actually investing in the territory of another NAFTA Party.
[102] Respondent's Reply, at 2, 3 and 8.
[103] *Ibid*. at 2 and 8.
[104] *Ibid*. at 2.
[105] *Ibid*. at 1, 2, 6, & 18-20.
[106] See, e.g., *Ibid*. at 9.

against any potential abuse of the national treatment obligation for investors under Article 1102(1).

122. Ignoring the impact of Article 1136(1) on any award issued by this Tribunal, the Respondent would have this Tribunal read a territorial restriction into any one of Articles 1101(1)(a), 1102(1), or 1116. It implies that taking this interpretative leap will prevent a "revolution" from taking place in "investor-state arbitration" generally,[107] and avoid creating an unspecified but nonetheless "enormous financial burden" from being imposed upon the NAFTA Parties.[108] The nature or reason for such a burden existing, or any details about its size or scope, remain undefined and unsubstantiated by the Respondent.

123. The Claimants merely advocate that the plain meaning of the terms of NAFTA Articles 1101(1), 1102(1) and 1116 provides them with a limited right to seek compensation for measures imposed by the United States that provide better treatment, in like circumstances, to their competitors in an integrated continental market. They are entitled to exercise this right because they relied upon the United States' NAFTA promise: to allow its measures to be governed by the rule of law to the extent that they impact upon the competitive balance intended by the Parties to exist amongst investors participating in integrated markets fostered by establishment of the Free Trade Area.

124. The obligation of the U.S. towards the Claimants is not – as the Respondent implies – one that could revolutionise the entire field of investor-state arbitration.[109] It would certainly not extend to all of the traditional forms of investment protection available under the NAFTA, or bilateral investment treaties, to foreign investors who have made investments in another territory. The obligation at issue is far more narrow; it requires: "treatment no less favourable" for investors operating in like circumstances with other investors in the same market encompassed within the Free Trade Area.

125. The fact is that the Claimants are Canadian investors who have made an investment in the Free Trade Area; they made their investment in reliance on the promise of non-discrimination vis-à-vis their competitors in the Free Trade Area; they are operating in like circumstances with their U.S.-based competitors; and their U.S.-based competitors have received more favourable treatment under the measures than the Claimants, without reasonable justification, resulting in damages suffered.

126. In this case, there is likeness of circumstances as between the Claimants and their U.S.-based competitors. Both groups of investors operate within essentially the same commercial environment and under effectively the same regulatory environment. These two competing groups of cattlemen are therefore entitled to be treated no less favourably than each other under measures introduced by either the United States or Canada. This is because they are effectively members of a single industry competing in the same market for the same goods or services in a contiguous geographic area protected by the rule of law in that area, on the basis of a non-discrimination imperative.

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[107] *Ibid*. at 8.
[108] *Ibid*. at 3.
[109] *Ibid*. at 8.

127. The Claimants bear the burden of demonstrating that they operate in like circumstances with U.S.-based cattlemen, and that their competitors are receiving better treatment from the United States under the impugned measures. It is a burden that the investors are uniquely qualified to meet. The evidence satisfying this burden will be submitted to this Tribunal if it permits the parties to proceed to a hearing on the merits.

128. As numerous academics have observed, before the measures at issue were imposed the North American market for beef and cattle there was characterised by "… extensive integration at every level…"[110] This is a view that is even shared by current United States President, Mr. George W. Bush:

> I believe that as quickly as possible young cows ought to be allowed to go across our border. I understand the integrated nature of the cattle business.[111]

As well as by noted industry experts:

> Once the toothpaste leaves the tube, as the saying goes, there's no amount of wishful thinking or heavy-handed coercion that's going to force it back in. This is also true for the evolutionary, and revolutionary, changes that have taken place over the last 20 years in trade harmonization and agricultural practices between the United States and Canada. [...] The beef industries in the U.S. and its northern neighbor have become so alike in recent years that it's nearly impossible to differentiate between the two, outside of political jurisdictions. In fact, the cattle not only come from the same gene pool, but are raised under nearly identical conditions, fed virtually the same feed and handled under the same regimens.[112]

129. As noted above, the cattle being raised and fed today, in both Canada and the United States, largely come from the same gene pool. To use the Province of Alberta as an example, its industry was launched in the 1880's with cattle drives from locations in Texas, Colorado and Montana. Indeed, mobility is an historic attribute of the cattle business in North America.

130. Moreover, the same breeds are generally popular throughout Canada and the United States and the same types of consumer are targeted by North American cattlemen. The same types of feed and the same methods of feeding are employed, along with the same kinds of animal husbandry and veterinary practices. The same social and business culture pervades the industry, from raising and feeding cattle to methods of sale and transportation. The same seasonal cycles are observed by cattlemen in the United States

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[110] *Risk Management in the Integrated NAFTA Market: Lessons From The Case of BSE*. Commissioned paper presented at the First Annual North American Agrifood Market Integration Workshop, Cancun, Mexico, May 2004, at 7. ("Risk Management"); http://www.farmfoundation.org/naamic/cancun/sparlingpres.pdf, last viewed on 4 July 2007.

[111] "Bush Tells U.S. Officials to Hasten Beef Resolution," *Financial Post*, 1 December 2004, at FP4.

[112] J. Patrick Boyle, President and CEO of the American Meat Institute, "North American meat industry already integrated" Billings Gazette, 6 November 2004, http://www.billingsgazette.com/index.php?id=l&display=rednews/2004/11/06/build/opinion/40-guest-op.inc, last viewed on 4 July 2004.

and Canada. Indeed, it is the very same grass that grows on either side of the vast, political border that stretches between the Canada and the United States; grass that feeds the very same cattle.[113]

> Once upon a time there were two calves in Flaxton, North Dakota – Bossie and Bessie. Then Farmer John sold Bessie to Farmer Jacques in Oxbow, Saskatchewan... Under the rule the USDA has just published, when Farmer Jacque seeks to sell Bessie, now 31 months old to a packer in North Dakota, he won't be allowed to do so. Instead, he'll send her to a packer in Moose Jaw, who can ship the beef back to the retail grocer in Flaxton, North Dakota... Instead of behaving like the Hatfields and the McCoys... we need to behave like the integrated North American meat industry that we have become.[114]

131. Under Article 1102(1), an investor can only prevail if it can prove that better treatment has been accorded by a NAFTA Party to its own investors, operating in like circumstances. As demonstrated in *US – Trucking* Panel Report, like circumstances can be found to exist across national borders.[115] It is also possible for a determination of likeness to be made on the basis of comparators operating within the territorial jurisdiction of the government whose measures are at issue, as demonstrated in the *S.D. Myers* and *Bayview* cases.[116] This is a case where the circumstances in which Canadian and United States investors engage in their chosen industry are not just "like" but rather virtually identical. Those circumstances crucially include the integration of their industry and its markets, which was significantly abetted by the promise of non-discrimination contained within the NAFTA.

132. In sum, rather than honour the plain words of this national treatment obligation, the United States has attempted to cultivate unsubstantiated fears that should the Claimants be permitted to make their case on the merits the floodgates will open. Allowing this case to proceed to the merits – to hear evidence on (1) whether the Claimants received less favourable treatment under measures relating to them and their participation in the Free Trade Area, vis-à-vis their U.S.-based competitors, and (2) whether they were operating in like circumstances with those competitors – is certainly not cause for alarm.

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[113] Attached, at Appendix A, are images of Del Bonita, a border area located in Uninc Glacier County, Montana, and Cardston County, Alberta, Canada.

[114] "Press Release," American Meat Institute, 30 December 2004.

[115] *United States – In the Matter of Cross-Border Trucking Services*, NAFTA Chapter 20 Panel Report, 6 February 2001, at paras. 285-94.

[116] In *S.D. Myers*, *supra* note 29, the Tribunal recognised Canada's right to maintain a different regime for the regulation and destruction of PCB wastes, from that which existed in the United States, and it was understood that investor's claim was founded upon its ability to prove the likeness of circumstances as between its Canadian business and that of other Canadian PCB destruction firms; not all such firms operating throughout North America.

Conclusion

133. NAFTA Articles 1101(1), 1102(1) and 1116 provide a straight-forward means whereby investors, such as the Claimants, can seek damages from a NAFTA Party whose measures break the promise of non-discrimination made by the NAFTA Parties to encourage private economic actors to participate in creating integrated economic markets within the North American Free Trade Area. The promise of such protection was essential in order to encourage the level of integration desired from the NAFTA.

134. With its Reply, the United States has failed to provide a valid reason as to why the plain and ordinary meaning of the terms found in these provisions should be overturned in favour of a more narrow interpretation that is not in accordance with the context and the object and purposes of the NAFTA.

135. It has been two years since the Claimants commenced this case. If the three NAFTA Parties truly intended something different than the mechanism they established with these provisions, they would have already issued an Article 1131(2) statement of binding interpretation to preclude the Claimants from making their claims.

136. For the forgoing reasons, the Claimant Investors hereby request the Tribunal to answer the agreed question in the affirmative and to proceed with the scheduling of a hearing of the merits of this consolidated case.

All of which is respectfully submitted,

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5 July 2007

Appendix A

Del Bonita Ranch Land (Montana/Alberta):
Looking West along the Canada-U.S. Border

Del Bonita Ranch Land (Montana/Alberta):
Looking Southwest along the Canada-U.S. Border