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

- - - - - - - - - - - - - - - - - - - -x

In the Matter of Arbitration Between:

THE CANADIAN CATTLMEN FOR FAIR TRADE,

Claimants/Investors,

and

THE UNITED STATES OF AMERICA,

Respondent/Party.

- - - - - - - - - - - - - - - - - - - -x Volume 1

HEARING ON THE PRELIMINARY ISSUE

Tuesday, October 9, 2007

The Army and Navy Club
Farragut Square
901 17th Street, N.W.
Iwo Jima Room, Second Floor
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to notice, at 9:03 a.m. before:

PROF. DR. KARL-HEINZ BÖCKSTIEGEL, President

MR. JAMES BACCHUS, Arbitrator

MS. LUCINDA A. LOW, Arbitrator

MR. DAVID A. KASDAN, RDR-CRR
Worldwide Reporting, LLP
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

APPEARANCES:

On behalf of the Claimant:

MR. MICHAEL G. WOODS
MS. MARTHA L. HARRISON
MR. RAJEEV SHARMA

Heenan Blaikie, LLP
1250 René-Lévesque Blvd. West
Suite 2500
Montréal, Québec H3B 4Y1
(514) 846-3427

PROF. TODD GRIERSON-WEILER
950 Central Avenue N.E.
Suite 239
Calgary, Alberta T2E 0P3
(202) 517-1597

MR. ALAN S. ALEXANDROFF
125 Colin Avenue
Toronto, Ontario M5P 2C4
(416) 617-9627

MR. DAVID R. HAIGH, Q.C.
Burnet, Duckworth & Palmer, LLP
1400, 350 7th Avenue S.W.
Calgary, Alberta, T2P 3N9
(403) 260-0100

APPEARANCES: (Continued)

On behalf of the Respondent:

MR. RONALD J. BETTAUER
Deputy Legal Adviser
MS. ANDREA J. MENAKER
Chief, NAFTA Arbitration Division,
Office of International Claims and
Investment Disputes
MR. KENNETH BENES
MS. JENNIFER THORNTON
MS. HEATHER VAN SLOOTEN

MR. MARK FELDMAN
MR. JEREMY SHARPE
Attorney-Advisers, Office of
International Claims and Investment
Disputes
Office of the Legal Adviser
U.S. Department of State
Suite 203, South Building
2430 E Street, N.W.
Washington, D.C. 20037-2800
(202) 776-8443

APPEARANCES: (Continued)

On behalf of the U.S. Department of the Treasury:

MR. GARY SAMPLINER
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220
(202) 622-1946

On behalf of the U.S. Department of Justice:

MS. MAAME A. F. EWUSI-MENSAH
Commercial Litigation Branch
1100 L Street, N.W.
Room 12000
Washington, D.C. 20530
(202) 353-0503

On behalf of the Government of Canada:

MS. CAROLYN ELLIOTT-MAGWOOD
MS. CHRISTINA BEHARRY
Investment Trade Policy Division
125 Sussex Drive
Ottawa, Ontario K1A 0G2
(613) 944-8975

On behalf of the United Mexican States:

SR. SALVADOR BEHAR
Secretaria de Economia
Trade and NAFTA Office
1911 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 728-1707

C O N T E N T S

P R O C E E D I N G S

PRESIDENT BÖCKSTIEGEL: Well, good morning, ladies and gentlemen. I hereby open the hearing on jurisdiction in what has been identified as the NAFTA UNCITRAL Canadian cattle cases consolidated, which are, indeed, consolidating Canadian claims versus the United States of America.

Let me first introduce the Tribunal.

I'm Karl-Heinz Bockstiegel, as you may have guessed by now, and the Parties have agreed that I shall be the chairman of this Tribunal.

On my left, I have Lucinda A. Low, appointed by the Respondent, and on my right I have James Bacchus, appointed by Claimants.

On behalf of the Tribunal, may I welcome you here. We have distinguished parties, quite a few of them this time in this case, as well as distinguished lawyers representing them,

and I therefore have no doubt that it should be possible, in spite of the complicated matters before us and the large financial volume in this case, to conduct this hearing from the side of all concerned in a professional way.

As recorded in Section 3(6) of Procedural Order Number 1, the parties have agreed on a bifurcated procedure to the effect that in a first stage of the procedure, the Tribunal shall only deal with what has been identified as the Preliminary Issue, which the Parties have defined as follows,

09:05:37 and I quote: "Does this Tribunal have jurisdiction to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1), where all of the Claimants' Investments at issue are located in the Canadian portion of the North American Free Trade Area, and the Claimants do not seek to make, are not making, and have not made Investments in the territory of the United States of America. The Parties agree that a negative determination of this question will dispose of all of Claimants' claims in their entirety.

"The Parties also agree that any other objection of a potentially jurisdictional nature shall be reserved for a single merits phase, should the claims not be dismissed at this preliminary phase."

So, that is really what we are talking about today.

As agreed and recorded in Procedural Order Number 3, the agenda of this hearing shall be as follows: One, a short introduction by the Chairman of the Tribunal, which is obviously going on right now; two, opening statements, statement by Respondent of up to three hours; three, opening

statement by Claimants of up to three hours; four, questions by the Tribunal and suggestions regarding particular issues to be addressed in more detail in the Party's second round presentations at this hearing; five, second round presentation by Respondent of up to two hours; six, second round presentation by Claimants of up to two hours; seven, final

09:07:56 questions by the Tribunal, if any; and, eight, discussion on whether Posthearing Briefs are deemed necessary and any other issues of the further procedure.

So, this is the agenda we have to deal with.

I should add that the Members of the Tribunal may raise questions at any other considered time if they think it's appropriate, but I will make another remark on this in a minute.

It was also agreed that the timing for this agenda shall be as follows, unless otherwise agreed at the beginning or during the hearing.

On this first day, start at 9:00, which I think we achieved by two minutes; agenda items 3(1) and 3(2), so these are the first-round presentations of the parties--no, this is my introduction at the first round presentation by Respondent, then we will have a lunch break at an appropriate time. Then, after lunch, agenda items 3(3) and 3(4), which is the Claimants', their first round presentation, and possible questions from our side at that stage.

We should have a coffee break somewhere in the morning and afternoon sessions, and I would ask counsel in their presentations to give us some indication when that might fit in

best in order to not split up the presentations.

The second day tomorrow will also start at 9:00. We will continue with the agenda items 3(4), if found to be

09:09:50 necessary. That is our questions. Then we turn to agenda items 3(5) to 3(8). If they can complete it on that day, we do the second round of presentations and our final questions.

Presently, as we also had agreed, it is anticipated that it might be possible to finish the hearing by tomorrow evening. On the other hand, as a precaution, we have also reserved the third day, if that becomes necessary, and we will have to discuss that sometime tomorrow, obviously, so that people know where we are going.

Regarding the conduct of this hearing, let me recall some major details as they have been agreed and decided on the basis of the submissions filed by the Parties in accordance with procedural orders of this Tribunal. And I apologize if I repeat a few things that at least we have counsels involved quite well aware of, at least I hope they are, but in view of the larger participation, I think it would be good for everybody to understand what already has been settled.

By Claimants' letter of January 30 this year, the Tribunal was notified that the Parties had agreed to hold this hearing at the Army and Navy Club of Washington, where we are right now, and that board room facilities at the Calgary, Alberta, offices of Heenan Blaikie will serve as the place where Claimants can view the proceedings via one-way video transmission.

On behalf of both sides, by Claimants' letter of

11

09:11:42 1 August 29 of this year, the Tribunal was notified that the
2 parties have made the final arrangements regarding the
3 simultaneous transcription of the oral hearing by Court
4 Reporter, and let me add a personal note and say it's a quite a
5 pleasure to have the Court Reporter with whom I have done quite
6 a few hearings and other cases in Washington and whom I know
7 that he is excellent.
8 In order to facilitate references to exhibits, the
9 parties may rely on in their oral presentations; and in view of
10 the great many of exhibits which the parties have submitted
11 earlier, the parties were invited to bring to the hearing for
12 the other party and for each member of the Tribunal hearing
13 binders of those exhibits or parts thereof on which they intend
14 to rely in their oral presentations at the hearing, together
15 with a separate consolidated Table of Contents of the hearing
16 binders of each party, and for the use of the Tribunal, one
17 full set of all exhibits the parties have submitted in this
18 procedure, together with a separate consolidated Table of
19 Contents of these exhibits.
20 Let me also recall that it was agreed and recorded in
21 Section 10(5) of Procedural Order Number 1 that no new
22 documents may be presented at this hearing, but that
23 demonstrated exhibits may be shown using documents submitted
24 earlier in accordance with the timetable, if the party so
25 wishes.

12

09:13:27 For the benefit of the transcript, but also to ensure that everybody understands clearly what has been said, all oral communications in this hearing should be made--well, into the microphone is not what we need, but should be made loud and clearly and distinctly, and then I think it will be all right.

Since beginning of this hearing, many and voluminous written submissions have been filed, including arguments and many exhibits. After the meeting with the Parties in Washington on October 3 last year, procedural orders have provided further opportunities for the parties to submit more arguments and more exhibits. This was done to ensure that with regard to all issues, every party had a full opportunity to present all factual and legal aspects of its case, and answer fully to what the other party has presented.

This exchange was intended to lead to an oral hearing at which as much as possible, so to speak, all the facts and major arguments are already on the table. It is, therefore, not the intention of this hearing, nor is that time available during these days, to orally repeat all the material submitted in writing.

To assure equal opportunity for both parties, the Tribunal has agreed with the parties well before this hearing on how much time they will have available at this hearing, and I have repeated that earlier.

Let me also recall that the Government of Mexico

09:15:15 submitted a Memorial under NAFTA Article 1128 on certain aspects of this case, and I understand that we have two

representatives of the Government of Canada here as well. Are they present?

VOICES: Yes.

PRESIDENT BÖCKSTIEGEL: They are.

The long and detailed procedure and the relevant orders of the Tribunal follow the common intention that as much as possible the impression and evaluation of this hearing should not depend on any surprises to the other party, but on a prepared balanced exchange between the parties and for the Tribunal on the facts and the law of this case.

You must also recall that we are here not under the procedure as it is used before the courts of our home countries, but we are in an international arbitration procedure. As you know, the procedure shall be in accordance with the relevant provisions of the NAFTA and of the UNCITRAL Rules and that lacking provisions therein in respect of a given procedural order, the procedure shall be freely determined by this arbitral Tribunal.

In order to have a productive hearing, the Tribunal would be grateful if we would not use major parts of the limited time available in this hearing on procedural battles between the parties, but to concentrate on the factual and legal issues in this case. In the same spirit, I suggest that

09:16:58 we give each party time to finish their respective presentations, as provided for in the agenda and in our timing, and within the time given for that presentation, and that only thereafter the other party takes up procedural or substantive objections which it may have.

In the same spirit, finally, we, as Members of the Tribunal, though we may raise a question at any time, if we feel that it is easier to fit in at that given moment, intend to normally wait with our questions until the respective presentations by the parties are finished. Experience of arbitration hearings of this kind shows that often there is a spontaneous question one may have at a given point of a party's presentation may be answered at a later stage within the same presentation or may pose itself differently after one's having heard the comments of the other party. Therefore, often the question does not even have to be put anymore once the presentations are finished.

Another very trivial matter is that if anybody still has a mobile phone on, we would be most grateful if it is turned off.

This concludes my short introduction, but before I now turn to the parties, may I just ask my colleagues, have I forgotten anything? Not yet? Okay. We will wait for another occasion.

ARBITRATOR BACCHUS: We are in good hands.

15

09:18:38 PRESIDENT BÖCKSTIEGEL: By their letters of September 14 of this year, and in addition by later communications, the parties have notified the Tribunal who is attending this hearing from their respective sides. Nevertheless, before we now turn to the next point on the agenda, which will be the first round presentation by Respondent, we would be grateful if each party could shortly identify the persons in this room, again some of them know so

that we all can connect names with faces from the very beginning. And at that occasion, when the parties finished, perhaps also the Bureau in Ottawa, which, as I mentioned, has informed us that two representatives will attend for the Canadian Government, could also shortly identify themselves in this room.

So, this is all I have to say, and since this is a hearing on jurisdiction, Respondent can start. Normally Claimants would start, but this is, I think, what we all have agreed on. In jurisdictional matters this is quite normal. So, may I ask Respondent to shortly introduce the persons on that side.

MR. BETTAUER: Thank you, Mr. President. I'm Ron Bettauer. I'm with the State Department Legal Office representing the United States.

We will just go down and let each of our people introduce themselves.

09:20:16 MS. MENAKER: I'm Andrea Menaker, also with the State Department, representing the United States.

MR. SHARPE: Jeremy Sharpe, State Department.

MR. BETTAUER: Keith Benes, also with the State Department.

MS. THORNTON: Jennifer Thornton, also with the Office of Legal Adviser.

MS. GREENBERG: Sara Greenberg, Law Clerk, with the Office of Legal Adviser.

MR. PATERNO: Good morning, I'm Lide Paterno, Paralegal, with the Office of Legal Adviser.

MS. VAN SLOOTEN: I'm Heather Van Slooten with the State Department.

PRESIDENT BÖCKSTIEGEL: Perhaps you could be kind enough to stand up in the back of the room.

MS. VAN SLOOTEN: Heather van Slooten, State Department.

PRESIDENT BÖCKSTIEGEL: Thank you.

MR. FELDMAN: Mark Feldman, with the State Department.

MS. EQUSI-MENSAH: I'm Maame Ewusi-Mensah with the United States Department Justice. I'm just here to observe.

PRESIDENT BÖCKSTIEGEL: Thank you.

Yes?

MR. SAMPLINER: Gary Sampliner from the U.S. Department of Treasury, also here to observe.

09:21:24 PRESIDENT BÖCKSTIEGEL: That concludes that side?

MR. BETTAUER: That concludes our side, yes.

SR. BEHAR: Mr. President, just to introduce myself, I'm Salvador Behar from the Embassy of Mexico, and I'm representing the Government of Mexico.

PRESIDENT BÖCKSTIEGEL: Oh, I see. I was not aware that we had somebody present from Mexico, but you are most welcome.

SR. BEHAR: Thank you.

PRESIDENT BÖCKSTIEGEL: All right, now we turn to the Claimants' side, please.

MR. WOODS: Yes, Mr. President and Members of the Tribunal, I'm going to stand because I have a number of people to introduce, and it's a little bit like herding cattle.

First of all, I would like to start with my legal team. I'm privileged and proud to have Mr. Grierson Weiler as my co-counsel, right here. And with me as well is Dr. Alan Alexandroff. And from Heenan Blaikie I have Ms. Martha Harrison, Ms. Veronique Bastien, Mr. Rajeev Sharma, and we are delighted today to have with us as counsel Mr. David Haigh, which you see as counsel for Alberta.

I have from the Claimants' group, and if I ask you to stand up, Mr. Rick Paskal of Paskal Holdings, Rick Paskal Livestock, and Butte Grain Merchants. Mr. Cor Van Raay, Cor Van Raay Holdings, Cor Van Raay Farms, and Butte Grain

09:22:57 Merchants, Limited.

Mr. and Mrs. Jack and Cindy de Boer, de Boer Farms.

Mr. Glenn Thompson of NFL Holdings, Limited, G. Thompson Livestock, and M&T Feedlot, Limited, Saskatchewan.

Mr. D. Butch Martin of D.V. Butch Martin Farming, Inc.

And Mr. G. Scott of G. Scott Feeders and Gateway Livestock.

And Larry Nolan of Nolan Cattle, Limited, and Transmark, Limited.

And I think that covers my cattle herding.

Oh, and me. Michael Woods from the Ottawa office of Heenan Blaikie.

PRESIDENT BÖCKSTIEGEL: I thought that might be the case. Have I missed the representatives of the Government of Canada?

MS. ELLIOT-MAGWOOD: Carolyn Elliott-Magwood from the Law Bureau of Canada.

MS. BEHARRY: Christina Beharry from the Bureau of Trade Law.

PRESIDENT BÖCKSTIEGEL: Thank you very much. All right. That definitely concludes our list, then.

Thank you very much, indeed. Is their anything further we have to discuss procedurally before we get started?

MS. MENAKER: Not from our part.

MR. BETTAUER: No.

09:24:18 PRESIDENT BÖCKSTIEGEL: Seems not to be the case. Very good.

Then, without further ado, we come to the first round of presentation from the Respondent's side. And, as I say, at an appropriate time, when you feel it fits in, we may have a coffee break.

OPENING STATEMENT BY COUNSEL FOR RESPONDENTS

MR. BETTAUER: Mr. President, Members of the Tribunal, I am pleased to appear before you today. I will begin the United States' presentation by reviewing why it is so clear that this Tribunal does not have jurisdiction to consider the claims at issue in the case before you today. After making a number of general points, I will outline some of our legal points. Then I will ask the Tribunal to call on Ms. Menaker, who will spell out further how our legal reasoning and present the remainder of our arguments.

We, of course, continue to rely on all the arguments and authorities set out in the United States' Memorial and the United States' Reply. In addition, since those filings, the Bayview Irrigation Case against Mexico has been decided, where

the Tribunal rejected the exact same argument that is being made by the Claimants here. Ms. Menaker will review in depth what that case teaches, and I will touch on the case more briefly in my presentation, as well.

Now, Claimants have laid a smokescreen of irrelevant

09:25:52 arguments in their filings, and they may continue that course of action today. We trust the Tribunal to see through the haze clearly and recognize the issues that are pertinent. We intend to save the Tribunal's time. We believe this matter is not complicated. It is so clear that we expect to use--we do not expect to use a substantial amount of the time allocated to us today, so in that connection, we will have to see how our presentation goes, but we may, indeed, be able to complete our first round presentation before it would otherwise be time for a coffee break.

So now, let me turn to the issue before us today. As you know, the Parties have agreed, and the Tribunal has ordered in Procedure Order Number 1 that at this stage there is only one issue before us. Mr. President, you have read that issue out just a moment ago, so I will not repeat it, but that the question you read has a simple answer. That answer is straightforward. The Tribunal does not have jurisdiction in this case.

The jurisdiction of an arbitral tribunal rests upon the common consent of the disputing Parties. In a NAFTA Chapter Eleven case, jurisdiction stems from the initial consent of the State, as expressed in the NAFTA, and the subsequent conduct of the Claimant, which accepts the

Tribunal's jurisdiction by commencing arbitration. We have shown in our written pleadings and will show today that the

09:27:47 NAFTA Parties have not consented to investor-State arbitration where the Claimant does not seek to make and has not made, any investment in the territory of the Respondent State.

Claimants here are Canadian nationals who made investments in cattle-related businesses exclusively in Canada. None of the Claimants has made, or has sought to make, any investment in the United States. Claimants nonetheless seek to invoke the NAFTA investment chapter to claim money damages against the United States for actions they claim solely injured their investments in Canada.

But the NAFTA investment chapter does not provide a right for a private Party in one NAFTA State to claim money damages from another NAFTA State for what essentially are cross-border trade disputes. Claimants' arguments to the contrary are not only novel and far-reaching, but revolutionary. Although Claimants have expressed surprise at our characterization of their argument, I note that their own pleadings acknowledge that the revolutionary expansion of the NAFTA Chapter Eleven scope and coverage that they seek. At page five of their rejoinder, Claimants note, and I quote, "The novelty of the present case cannot be overestimated." And that is certainly true.

Claimants would have you believe that the NAFTA's investment chapter is fundamentally different from the thousands of bilateral investment treaties and investment

22

09:29:46 1 chapters contained in Free Trade Agreements in force around the
2 world. The NAFTA, the Claimants contend, is a revolutionary
3 agreement containing so-called hybrid provisions that go well
4 beyond traditional forms of protection for cross-border
5 investment, so they say.
6 But Claimants have produced no evidence that the three
7 NAFTA Parties intended the revolution in investment protections
8 that the Claimants imagine, and it is clear that the Parties
9 did not. Claimants have failed to show that even one of the
10 thousands of persons in the three NAFTA Parties who negotiated,
11 drafted, vetted, signed, ratified, or implemented the NAFTA
12 ever discussed, let alone adopted, Claimants' extraordinary
13 interpretation of Chapter Eleven. The interpretation put
14 forward by Claimants was never even proposed during the
15 negotiations. Indeed, seven years ago, Mr. Weiler discussed
16 the necessary elements for a Chapter Eleven claim in an article
17 in the Columbia Law Review. He said then, and I quote, "The
18 existence of (1) a qualifying NAFTA investment with, (2) an
19 investment in another NAFTA Party," are both necessary
20 elements.
21 All the Claimants can point to to support their theory
22 is changes in the text of a few provisions of Chapter Eleven
23 that were made during the "lawyers' scrub" to the Treaty. As
24 with most multinational treaties, following the agreement on
25 the substantive provisions, lawyers are called upon to clean up

23

the text, make stylistic improvements, eliminate inconsistencies, and harmonize linguistic differences. This is traditionally referred to as the toilette finale. This process does not provide a mandate to make any substantive changes. No one can plausibly suggest that while cleaning up the NAFTA's texts, the lawyers could have established a radical new regime for the settlement of cross-border trade disputes.

The consequences of adopting such a view of the NAFTA would be enormous. If a Claimant in one NAFTA Party could bring claims against another NAFTA Party for alleged actions that only affected its domestic investments, this would risk imposing financial and litigation burdens on the NAFTA Parties of a scope and magnitude that they never agreed to. It is inconceivable that in the absence of consideration, negotiation, and deliberation the NAFTA Parties simply discarded decades of conventional treaty practice and adopted the novel regime proposed by Claimants.

As we pointed out in our written submissions, every enterprise that engages in the export of goods or services is an investor in its own territory. Each of those domestic investors could suffer losses with respect to its domestic investment as a result of border control measures imposed by another state. The international community has established elaborate and carefully designed State-to-State dispute resolution mechanisms for resolving trade disputes.

There is simply no evidence, and it is incredible to suggest that NAFTA Parties intended to bypass or supplement these mechanisms and create in addition to the investor-state

mechanism that Chapter Eleven establishes, a trader-state mechanism in NAFTA's Chapter Eleven.

Now, we ask you to take this on faith. The NAFTA Parties did not intend to establish--did not intend such radical result, no, and they have all made this clear and explicit. Each of the NAFTA Parties has specifically disclaimed any such intention. Each of the NAFTA Parties has rejected the proposition that a Chapter Eleven Tribunal has jurisdiction over a claim by a Claimant challenging measures taken by another NAFTA Party that may affect them where the Claimant has not made and has not sought to make an investment in the Respondent State.

Mexico, in its Article 1128 submission in this arbitration, stated that it, and I put the clause on the slide, "Agrees that none of the NAFTA Parties undertook any obligation with respect to investors who are not seeking to make, are not making, and have not made an investment in its territory."

Canada has also stated that investment agreements such as NAFTA aimed to, and I quote, "Protect the interests of Canadian investors," abroad, and likewise has objected to jurisdiction of Chapter Eleven tribunals where the Claimant allegedly has not made any investment in the territory of

another NAFTA Party.

And I put a relevant quote from the S.D. Myers case on the screen.

And, as Ms. Menaker will further explain, the United States has made its view clear in a Statement of Administrative Action in the Bayview case and in this case. And I have put a

United States' statement to that effect on the screen.

You see the three NAFTA Parties agree. The three NAFTA parties' concordant interpretation of their own agreement forecloses Claimants' novel interpretation of this agreement.

PRESIDENT BÖCKSTIEGEL: Mr. Bettauer, I'm sorry to interrupt you. Just for our logistics, we will have the transcript of what you say. Is there any chance that we get copies of whatever you put on the screen?

MR. BETTAUER: You should have them in the books we handed out. You should have them already.

PRESIDENT BÖCKSTIEGEL: Good.

MR. BETTAUER: As you know, under customary international law rules set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in context and in light of the treaty's object and purpose. Article 31(3) of the Vienna Convention provides that any subsequent agreement and subsequent practice among the Parties to the Treaty regarding

09:37:58 the interpretation of the Treaty shall, and I quote, "be taken into account together with the context." That means these elements form the primary part of the interpretive inquiry.

The International Law Commission commentary on the Vienna Convention makes clear that there's no hierarchy among the elements of interpretation enumerated in Article 31, and that the elements included in paragraph 31(3), "by their very nature, could not be considered to be norms of interpretation in any way inferior to," the other elements of interpretation

listed in the Article.

In other words, when determining the ordinary meaning of the terms of a treaty in their context and in light of the Treaty's object and purpose, the subsequent agreement and subsequent practice of the Parties to the Treaty is a critical element to be considered, along with the Treaty's text, context, and object and purpose. There is no question that the NAFTA Parties agree that a claim, such as the one before you today, may not be brought.

Now, Claimants latch on to a technical argument focused on a few words to come up with a sweeping new interpretation that would bring their claims within Chapter Eleven. Not only does the interpretation fail on its own terms, it is also directly contradicted by the subsequent practice and subsequent agreement of the Parties. On this basis alone, the Tribunal should reject the Claimants'

09:39:56 proffered interpretation.

I have been discussing the agreement and practice of the Parties. Now I turn briefly to the text of the NAFTA.

The jurisdiction of this Tribunal is limited in scope by Article 1101, the Chapter's Scope and Coverage provision. That provision states in relevant part--it's very simple--the slide is on the screen--"This Chapter applies to measures adopted or maintained by a Party relating to, (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party.

The Methanex Tribunal, a Chapter Eleven Tribunal, identified Article 1101(1) as, "the gateway" leading to the

dispute resolution provision of Chapter Eleven. In its recent award, the Bayview NAFTA Tribunal likewise said, "The role of Article 1101"--and it's on the screen--"in determining the scope of the jurisdiction of tribunals established to hear Chapter Eleven claims is clear from the title of the Article."

"It defines the scope and coverage of the entirety of Chapter Eleven, including both the scope and coverage of the substantive protections accorded to Investors and investments by Chapter Eleven Section A and the scope of the rights to submit disputes to arbitration under Chapter Eleven Section B."

So, Article 1101 has the important function of circumscribing the scope of all the substantive provisions contained in Chapter Eleven, including Article 1102, which the

09:42:09 Claimants invoke in this arbitration. Article 1102 states in relevant part--and I put it on the screen, but I won't read it to you. The first paragraph deals with protections accorded to investors with respect to their investments. And the second paragraph deals with protections accorded to the investments of investors, again, with respect to investments.

This is the provision that deals with ensuring no less favorable treatment than accorded to investors of its own nationality in its territory, but it's important to realize that it's no less favorable treatment for investors or investments with respect to their--with respect to the investment.

Claimants argue that the distinction drawn in both Articles 1101 and 1102 between investors of another Party, on the one hand, and investments of investors of another Party on

the other suggests that investors may claim protections separate and apart from their investments. But, as Ms. Menaker will explain further, this reading actually takes words out of their context and doesn't make sense. Rather, Article 1139 defines "investors of a Party" to mean someone that, and I quote, "seeks to make, is making, or has made an investment."

One can see from paragraph 1(b) of Article 1101 that Chapter Eleven only applies to measures relating to investments of investors of another Party in the territory of the Party.

To be clear, let me say it another way. Article

09:44:40 1102(1) provides national treatment protection for investors only with respect to investments. Article 1101(1)(b) makes clear that the only investments protected by the NAFTA are, and I quote, "investments of investors of another Party in the territory of the Party." It's quite clear. As Ms. Menaker will explain, and as the Bayview tribunal held, restricting Chapter Eleven's coverage to those investors that have made or seek to make investments in the territory of another Party is the only reading that makes sense.

In this proceeding, as I said, Claimants have not made, are not making, and do not seek to make investments in the United States. They are not investors within the meaning of Article 1101(1), and they cannot claim the protections accorded in Chapter Eleven, including in Article 1102. The object and purpose of NAFTA's Chapter Eleven is to substantially increase investment opportunities in the Parties' territories. Now, of course, most Chapters of the NAFTA were designed to eliminate tariffs and nontariff barriers to trade

at the parties' respective borders, but there can be no doubt that the substantive protections and system of dispute settlement established by Chapter Eleven specifically were intended to promote investment by nationals of one NAFTA country in the territory of another NAFTA country. This is the same objective of bilateral investment treaties.

Claimants' interpretation of Article 1102(1) would

09:47:01 eliminate important distinctions and differences in the treatment between international investment disputes and international trade disputes. Under Claimants' interpretation, every affected investor in the Free Trade Area could challenge any allegedly discriminatory border measure adopted by one of the NAFTA Parties under Chapter Eleven. But the NAFTA Parties specifically negotiated a detailed State-to-State consultation and dispute resolution mechanism to address such external barriers to trade. These are set forth in various other Chapters of the agreement and in Chapter Twenty. Allowing such measures to be challenged under Chapter Eleven by investors not seeking to make an investment in the territory of the Respondent State would frustrate the Parties' express agreement in the NAFTA that such measures be resolved through an entirely different dispute resolution mechanism.

The NAFTA Parties were simply not willing to give everyone trading in goods the right to seek money damages when challenging border control measures. In contrast, Chapter Eleven specifically affords investors the right to arbitration to protection their substantive right and to claim money damages for their losses, but only with respect to their

foreign investments, their investments in a NAFTA state different from the state of their nationality. That's the price NAFTA Parties were willing to pay for the benefit of attracting foreign investment.

09:48:54 Domestic investors, by contrast, are protected by domestic law. When investors in their own economies, their domestic legal systems generally provide protection against discrimination and expropriatory measures by their own governments. When those investors and their domestic investments are impacted by allegedly discriminatory measures taken by another NAFTA Party, they have the option of presenting such complaints to their own government, which, in its discretion, can decide the appropriate recourse to be taken, including the options of consultation, State-to-State arbitration under the NAFTA, or recourse to the GATT dispute settlement mechanism.

Now, let me turn, finally, to the only two investor-state arbitral awards that directly address the issue before us. Both those tribunals declined jurisdiction where the so-called "investors" had not made an investment in the territory of the Respondent State.

The first case was Gruslin versus Malaysia, decided in 2000 by Gavin Griffith. In that case, the Tribunal denied jurisdiction under a BIT where the Claimants had not made an investment in the Respondent State. In doing so, the Tribunal rejected the argument that the absence of the words, "in the territory" from some provisions of the BIT in question evidenced the Parties' interpret to provide protections for

"all investments, even those that were not in its territory."

09:51:01 Relying on the object and purpose of BITs as instruments that promote investment by nationals of one Party in the territory of the other Party, the Tribunal held that, "The absence of qualifying words of limitation on the word investment in Article 10, [the consent article], itself does not broaden the class of investments included by the agreement." That's the quote.

Now, the second case is the recent NAFTA Chapter Eleven case, Bayview versus Mexico, and it is even more telling for us. That Tribunal decided unanimously this June. The Tribunal was composed of Vaughan Lowe, Ignacio Gomez Palacio, and Edwin Messe. While the Claimants have addressed this decision in their last brief, it was issued after the final U.S. brief. I will therefore summarize it briefly, and Ms. Menaker will go into it in somewhat more detail.

The Tribunal in Bayview interpreted the specific treaty provisions at issue here, and also squarely addressed and rejected the same arguments advanced by Claimant in this arbitration. The Bayview case was submitted by 46 Claimants, including 17 irrigation districts, and several individual farmers and various business entities. They complained that Mexico had wrongfully refused to release a certain portion of water in the Rio Grande to the United States for a period of several years. As a result, the Claimants allege that they had suffered losses and sought recompense under NAFTA Chapter

Eleven.

Mexico raised jurisdictional, a jurisdictional objection to the claim on the basis that Claimants were not investors with investments within the meaning of NAFTA under Chapter Eleven and, therefore, lacked standing.

The American Claimants made two alternative arguments in response. First, they claimed that their investments were their farms and irrigation facilities located in Texas, and that they, therefore, were investors with investments within the scope of NAFTA's Chapter Eleven. Just like Claimants here, the Bayview Claimants argued that it was unnecessary for them to have investments in the territory of another NAFTA Party and that their investments within their home state were sufficient to confer jurisdiction on the NAFTA Chapter Eleven Tribunal.

Alternatively, the Claimants argued that where were the Tribunal to reject their interpretation of Chapter Eleven's coverage, they still fell within its scope because they said they had made investments in Mexico. They claimed that they owned the water flowing through Mexico in the river and that the water was their investment.

Now, the distinguished Tribunal in that case unanimously rejected both arguments and dismissed the claim for lack of jurisdiction. The Bayview Tribunal found, and I quote, that it was, "quite plain that NAFTA Chapter Eleven was not intended to provide substantive protections or rights of action

to investors whose investments are wholly confined to their own

national States in circumstances where those investments may be affected by measures taken by another NAFTA State Party."

Ms. Menaker will show the Bayview Tribunal's conclusions were absolutely correct.

In sum, Mr. President, Members of the Tribunal, the Claimants' interpretation of the NAFTA is wrong. It is inconsistent with the interpretation the three NAFTA Parties have given to their agreement, and it is inconsistent with the carefully reasoned review of the exact same issue by the Bayview Tribunal in its recent award. This Tribunal should reject Claimants' interpretation of the NAFTA and dismiss its claim for lack of jurisdiction.

Indeed, Claimants' interpretation is so at odds with any reasonable interpretation of the NAFTA that we urge the Tribunal to award full costs and fees to the United States.

Mr. President, Members of the Tribunal, I'm coming to the end of my part of the U.S. presentation. Ms. Menaker will review in more detail why the Claimants' radical interpretation cannot be sustained when the relevant NAFTA provisions are scrutinized through the lenses of Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

I would now ask that the Tribunal call on Ms. Menaker to further address our jurisdictional objection.

Thank you, Mr. President.

09:57:03 PRESIDENT BÖCKSTIEGEL: Thank you, Mr. Bettauer.

Ms. Menaker, please.

MS. MENAKER: Thank you. And I anticipate that this will take approximately 45 minutes. Would you like me to go

ahead?

PRESIDENT BÖCKSTIEGEL: I think you can go ahead, please.

MS. MENAKER: Thank you.

Mr. President, Members of the Tribunal, as the Tribunal noted and Mr. Bettauer himself just noted, the question before you today is whether or not Chapter Eleven applies where a Claimant does not seek to make, has not made, and is not making an investment in the territory of another Party. And the United States submits that clearly it does not.

This morning, I will demonstrate that this conclusion is compelled by an interpretation of the relevant NAFTA provisions in accordance with the customary international law principles reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

I will show that, seen in this light, Chapter Eleven cannot be read to give a Claimant that has not made, and does not seek to make, any investment in the territory of another NAFTA Party a right to bring a case against that Party.

In addressing this, I will delve into the Bayview award which Mr. Bettauer just mentioned in some more detail. I

09:58:14 will also expand on the points that Mr. Bettauer made which demonstrate the agreement of the NAFTA Parties on this point and show that each of the three NAFTA Parties has taken the position that a Chapter Eleven Tribunal has no jurisdiction where a purported investor had not made and does not seek to make an investment in the territory of another NAFTA Party. And, indeed, as I will demonstrate, a contrary interpretation

would lead to absurd results.

The interpretation that is supported by all three NAFTA Parties is also confirmed by the supplementary means of interpretation such as the NAFTA's travaux, and I will also go into that in some detail.

Now, the starting point for the interpretation of a treaty provision is the ordinary meaning to be given its terms in their context and in light of the Treaty's object and purpose. And we demonstrated it in our written submissions, and the Bayview Tribunal found that the United States's interpretation, as well as that of Mexico and Canada, is consistent with the ordinary meaning of the NAFTA's text, read in context, and in light of the Treaty's object and purpose.

Claimants' interpretation, on the other hand, would lead to absurd results.

Now, Article 1101, which I will also put on the screen, provides in relevant part, as you know, that the Chapter applies to measures that relate to investors of another

09:59:43 Party as well as to investments of investors of another Party in the territory of the Party. As defined in Article 1139, an investor of a Party is someone that seeks to make, is making, or has made an investment.

An investor of another Party must be a foreign investor. It makes no sense to refer to an investor that invests in its own country as a foreign investor, but the NAFTA did not use the term foreign investor, but, instead, used the term investor of another Party, is explained by the fact that the NAFTA does not provide protection for all foreign investors

but merely for that subset of foreign investors that have the nationality of one of the NAFTA Parties.

But, just as the phrase "foreign investor" can only describe an investor that makes an investment in a jurisdiction other than in its home state, the term investors of another Party, as used in Article 1101(1)(a) must likewise be interpreted as an investor that is foreign and that it has invested in a State other than in its own.

The term "investor" cannot be read divorced from the term investment. And I have put on the screen a slide from a quote from the Bayview Tribunal. That Tribunal noted, and I quote, "While NAFTA Article 1139 defines the term 'investment,' it does not define foreign investment. Similarly, NAFTA Chapter Eleven is named 'Investment,' not 'Foreign Investment.' However, this Tribunal considers that NAFTA Chapter Eleven, in

fact, refers to foreign investment and that it regulates foreign investors and investments of foreign investors of another Party."

Thus, the Bayview Tribunal concluded that, and I quote again, "When an investor of one NAFTA Party makes an investment that falls under the laws and jurisdiction of the authorities of another NAFTA Party, it will be treated as a foreign investor under Chapter Eleven."

And that Tribunal continued, and I've also put this quote on the screen, "It is true that the text of the definition of an investor in Article 1139 does not explicitly require that the person or enterprise seeks to make, is making, or has made an investment in the territory of another NAFTA

Party. But the text of the definition does require that the person make an investment, and although investments can, of course, be made in the Investor's home State, such domestic investments are, as was explained above, not within the scope of Chapter Eleven. In short, in order to be an investor under Article 1139, one must make the investment in the territory of another NAFTA State, not in one's own."

This is exactly the issue before this Tribunal, and we submit that the Bayview Tribunal was correct in determining that in order to be an investor covered by NAFTA Chapter Eleven, one must make an investment in the territory of another NAFTA State and not in one's own. This interpretation is

10:03:33 confirmed by the provisions of the NAFTA that provide substantive protections for investors and their investments. Each of those provisions provides protections either for investments which, by the NAFTA's express terms, must be in the territory of another NAFTA Party, or to the investors that have made such investments. The very nature of the commitments contained in Chapter Eleven support the conclusion that the NAFTA Parties did not intend to accept obligations for investments that are outside of their territory or to the investors that have made such investments.

As we explained in our Reply and as Mexico highlighted in its Article 1128 submission in this proceeding, with Chapter Eleven, the NAFTA Parties intended to promote investment in their respective territories by providing foreign investors with certain international law guarantees and a mechanism for the settlement of investment disputes. By adopting the

provisions of Chapter Eleven, the Parties agreed to eliminate barriers to foreign investment in their respective domestic laws so that a commercial actor seeking to take advantage of the agreement could more easily in the words of Mexico, "produce goods or services in the territory of another Party by means of an investment."

As the Bayview Tribunal correctly noted, the Chapter was designed in effect to level the playing field between foreign and domestic investors by providing assurances that the

10:05:07 regulation of investments by a State which is not the State of the investor's nationality would not violate certain standards of treatment. The Bayview Tribunal thus concluded that, and I quote, "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."

In other words, by extending certain international law guarantees to foreign investors, investment agreements like NAFTA Chapter Eleven facilitate foreign investment by giving comfort to foreign investors when investing in countries governed by legally regimes with which they are unfamiliar. No such guarantees or protections are extended under the investment chapter to those commercial actors that choose not to make a foreign investment.

Indeed, Articles 1102(4)(a) and (b) provide further context in support of this point, and I've also placed those Articles on the screen. In those subsections to the national treatment provision, the NAFTA Parties provided for greater certainty that no Party may impose on an investor of another

Party a refinement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals and that no Party may require investors from another Party to dispose of their investments in its territory simply on the grounds of nationality. These provisions illustrate that through the NAFTA's national treatment provision, the

10:06:49 NAFTA Parties sought to prohibit legislation that restricts or burdens foreign investment, and were not concerned with legislation that may adversely affect purported investors that make investments solely within the confines of their home State.

Claimants, therefore, are wrong when they state in paragraph 66 of their Counter-Memorial, "To be clear, Article 1102(1) and 1103(1) are both worded in a manner that specifically protects investors separate and apart from their investments." As you can see, and as Mr. Bettauer noted, those Articles protect investors, but only with respect to their investments. Thus investors that have not made or do not seek to make investments that are covered by the protections of the NAFTA cannot seek any protections for themselves.

And Claimants also err when they allege that the United States's interpretation renders Articles 1102(1) and 1103(1) ineffective.

As we explained in our written submissions, Articles 1102(1) and 1102(2), and likewise Articles 1103(1) and 1103(2), serve different purposes. And I have placed on the screen the Articles 1102(1) and 1102(2). And I will just give one example.

The NAFTA, as you know, provides what is called pre-establishment protection for investors that seek to make, but have not yet made, investments in another NAFTA Party's

10:08:29 territory. If a measure interfered with an investor's ability to establish an investment in violation of the national treatment provision, that could give rise to a claim under Article 1102(1) but not under Article 1102(2), and this is because it would be the investor and not the investor's investment which has not yet been established that would have been denied national treatment.

Yet, it's clear that the treatment owed to the investor is with respect to its investment and not as Claimant suggests separate and apart from their investments. And in every case under Article 1102(1), the treatment being afforded is to investors, but only with respect to their investments which must be in the territory of another NAFTA Party.

The United States's interpretation is consistent with the NAFTA's object and purpose, while Claimants' interpretation is at odds with the object and purpose of the agreement. We have shown in our written submissions that the purpose of the NAFTA Chapter Eleven is like that of other bilateral investment treaties and investment chapters in Free Trade Agreements, and that is that Chapter Eleven is intended to protect foreign investments and the investors who have made or who seek to make those investments, and not investors that have only invested in their home State.

The United States cited numerous authorities in support of this incontrovertible proposition in our written

10:10:06 1 submissions.
2 And we have also demonstrated that the United States
3 has consistently maintained this view of the object and purpose
4 of Chapter Eleven. At the time that the agreement was
5 ratified, the Congressional Budget Office, for instance, noted
6 that Chapter Eleven's national treatment and most favored
7 nation provisions provide that, "Investors from one NAFTA
8 country with an investment in another should be treated no less
9 favorably by Federal, state or provisional governments than are
10 investments or investors of a domestic country or those of any
11 other country."
12 So, in other words, the object and purpose of Chapter
13 Eleven was to ensure that foreign investors were treated no
14 worse than domestic investors by host governments.
15 And, similarly, the Office of the U.S. Trade
16 Representative extolled the virtues of the agreement in
17 ensuring, "Nondiscrimination against U.S. companies
18 establishing, acquiring, or operating businesses in Canada or
19 Mexico."
20 It is clear, therefore, that at the time it ratified
21 the NAFTA, the United States held the firm view that the object
22 and purpose of Chapter Eleven was no different than the object
23 and purpose of other bilateral investment treaties. That is,
24 to promote investment by providing protection for investments
25 of investors of one Party in the territory of another Party and

10:11:35 for investors that make those investments. And as we noted in our Memorial, the Metalclad Chapter Eleven Tribunal subsequently recognized that it was not just the intent of the United States, but of all three of the NAFTA Parties to "promote and increase cross-border investment opportunities through the investment chapter's provisions.

Claimants' argument that the NAFTA Chapter Eleven is sui generis and that it imposes obligations on the Parties beyond those imposed by any other BIT or FTA Chapter is meritless. Claimants' reject commentary on other investment agreements arguing that those are irrelevant for the Tribunal's purposes, and they likewise reject arbitral awards interpreting BITs or FTAs, but Claimants are wrong on this point. There is nothing in the NAFTA's text, its negotiating history, or the official contemporaneous documents of the NAFTA Parties that suggests that the Parties intended NAFTA's investment chapter to serve as a vehicle to protect and promote domestic in addition to foreign investment. And indeed, the Bayview Tribunal expressly rejected the argument that Claimants advance here.

The United States in that arbitration made a submission pursuant to Article 1128. In its award, the Bayview Tribunal quoted that submission in relevant part as follows, and I placed this on the screen: The aim of international investment agreements is the protection of foreign investments

10:13:12 and the investors who make them. This is as true with respect to the investment provisions of Free Trade Agreements, FTAs, as

it is for agreements devoted exclusively to investment protection, such as bilateral investment treaties, or BITs. NAFTA Chapter Eleven is no different in this regard. One of the objectives of the NAFTA expressly set forth in Article 102(1)(c) is to, "increase substantially investment opportunities in the territories of the Parties, which refers to and can only sensibly be considered as referring to, opportunities for foreign investment in the territory of each Party made by investors of another Party."

After citing this portion of the United States's submission, the Tribunal went on to say, and I quote, "In the view of the Tribunal, this is the clear and ordinary meaning that is borne by the text of NAFTA Chapter Eleven."

This Tribunal should likewise find that the object and purpose of the NAFTA's investment chapter is to promote and protect foreign investments and the investors that make those investments, and reject Claimants' argument that the NAFTA's purpose is unique among investment agreements in seeking to protect so-called investors who invest solely in their home state. Claimants can point to no authority to support their conjecture, and the only NAFTA Tribunal to squarely address this issue has flatly rejected NAFTA's--excuse me, Claimants' argument.

10:14:49 I've been discussing the interpretation of the relevant NAFTA provisions in light of the first paragraph of Article 31 of the Vienna Convention, but that, however, as Mr. Bettauer noted, is not the end of the interpretive inquiry. As Mr. Bettauer explained, there is no hierarchy of importance

amongst the elements of interpretation listed in Article 31, and thus examining any subsequent agreement of the Parties and any subsequent practice of the Parties regarding the proper interpretation of a treaty, is part of the core interpretive process of considering the ordinary meaning of the Treaty terms in their context and in light of the object and purpose of the Treaty under Article 31.

Under Article 31(3)(a) of the Vienna Convention, any subsequent agreement of the Parties regarding the interpretation must be taken account, and I submit should be dispositive in this case. All three NAFTA Parties agree to the interpretation that the United States has put forward in this case, and that agreement, we contend, should end the discussion. In its commentary, the International Law Commission observed that, and I quote, "In agreement as to the interpretation of a provision reached after the conclusion of the Treaty represents an authentic interpretation by the Parties which must be read into the Treaty for purposes of its interpretation." And this comment has been cited with the approval by the International Court of Justice.

10:16:17 In addition to reflecting the agreement of the Parties under paragraph 31(3)(a), the NAFTA Parties' concordant interpretations also constitute consistent State practice under Article 31(3)(b). As Judge Fitzmaurice noted, "A consistent, subsequent State practice must come very near to being conclusive as to how the Treaty shall be interpreted."

Thus, whether the Tribunal considers the interpretations the NAFTA Parties have presented in Chapter

Eleven cases as an agreement under Article 31(3)(a) or as consistent State practice under 31(3)(b) or both, the outcome is the same, and that Claimants' interpretation must be rejected.

Other NAFTA Chapter Eleven tribunals have recognized the significance of agreement among the Parties on an interpretation of a NAFTA provision. And I will point to one example which is the ADF NAFTA Chapter Eleven Tribunal, which stated that when a Tribunal had before it the views of all three of the NAFTA Parties, as it does here, "No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA is possible."

All three NAFTA Parties concur that Chapter Eleven extends to protect only those investors that have made or are seeking to make investments in the territory of another Party, and the NAFTA Parties have demonstrated this concurrence

10:17:54 through their consistent State practice under Chapter Eleven.

The United States's position is not in doubt. We made it clear in the Bayview case, and we, of course, are also making clear our position in this case. And we previously made our position clear in a Statement of Administrative Action which was adopted when the NAFTA was adopted.

Mexico has similarly made its position clear in both this proceeding, in the Bayview proceeding, and in its report on the NAFTA prepared prior to the approval of the NAFTA by the Mexican Senate. And as we noted in our submission, Canada has made its position clear in the S.D. Myers case and in its

statement on implementation of the NAFTA. Thus, this Tribunal, having before it the subsequent agreement of all three NAFTA Parties should find that interpretation dispositive and interpret the Treaty in accordance with those views.

Claimants' response to this point is unavailing. While acknowledging agreement between the United States and Mexico, Claimants seek to cast doubt on whether Canada has expressed its agreement on this issue in dispute; and, in fact, Claimants go so far as to suggest that the United States, "Misleads the Tribunal in arguing that all three NAFTA Parties have agreed upon the issue."

But the record reveals that Canada has expressed its agreement on this point by advocating an interpretation consistent with that offered by the United States and Mexico to

10:19:27 another NAFTA Chapter Eleven Tribunal. As we cited in our Reply, and I put the pertinent excerpts in your binder, in the S.D. Myers case, Canada stated, "The Article 1102(1) obligation does not mean that the national treatment obligation applies to the investors' activities in its home country. The obligation only applies to the investor with respect to its investment in a foreign country."

Canada also argued in that case that the claim was outside the scope of NAFTA Chapter Eleven because the Claimant, it argued, had not made an investment in Canada, and that is the precise issue before this Tribunal.

Indeed, the Bayview NAFTA Chapter Eleven Tribunal found that there was agreement among all three NAFTA Parties on this very point. Although Canada did not make a submission

pursuant to Article 1128 of the Bayview case, the Tribunal found that Canada, in its Statement on Implementation, had expressed its view that NAFTA Chapter Eleven applies, "to protect the interests of Canadian investors abroad and to provide a rules-based approach to the resolution of disputes involving foreign investors in Canada or Canadian investors abroad."

It thus concluded that the interpretation that Mexico advanced in the Bayview case, which is the same interpretation that the United States advances here was, "the interpretation publicly adopted by the NAFTA Parties themselves prior to that

arbitration."

So, Claimants are simply wrong to contend that Canada has not stated the same interpretation as the United States and Mexico on this point, and, indeed, another Tribunal has found agreement among the NAFTA Parties on this very issue.

Claimants' other argument is similarly devoid of any merit. They attempt to minimize the legal impact of this agreement among the Parties by arguing that any agreement other than in the form of an interpretation of the NAFTA Free Trade Commission is ineffective. As we showed in our written submissions, however, there is no legal basis for drawing any such distinction. While an interpretation of the Free Trade Commission is expressly binding on NAFTA Chapter Eleven Tribunals, an agreement among the Parties in any form shall be taken into account by Tribunals and is the best evidence of the proper interpretation of the Treaty. Indeed, the Methanex NAFTA Chapter Eleven Tribunal rejected a similar argument made

by the Claimants in that case, finding that Article 31(3)(a) of the Vienna Convention does not envisage that any subsequent agreement among the Parties be concluded with the same formal requirements of a treaty.

So, even if Claimants were correct on this point, which they are not, the interpretation offered by all three NAFTA Parties would still be dispositive as consistent, subsequent State practice under Article 31(3)(b). Because the

10:22:38 NAFTA Parties all agree that the investment chapter does not imply in circumstances such as these, and because the parties' agreement is the best evidence of the proper interpretation of the NAFTA, the Tribunal, we submit, ought to decline jurisdiction over Claimants' claims.

Claimants' contrary interpretation would lead to absurd results. Claimants concede that the only investments that are protected by Chapter Eleven are those that are located in another state, but they have offered no explanation whatsoever for why the NAFTA Parties would have chosen to afford protection to Investors that make domestic investments but not to those investments themselves. In its award, the Bayview Tribunal noted the United States's argument in this regard. And they quoted the United States's Article 1128 submission, and I placed that quote on the screen.

In its award, it quotes the United States as writing, "While the scope of Article 1102 in protecting investors is not expressly limited to the protection of investors with respect to investments in the territory of the State adopting the measure of which complaint is made, the United States submitted

that it is clear that Article 1102 is so limited and that any other conclusion would be absurd."

The Tribunal also acknowledged the United States's position that a contrary conclusion would, "result in situations where there was an obligation to accord national

10:24:14 treatment to an investor, even though there was no obligation to accord national treatment to the investment itself."

The Bayview Tribunal then concluded that its view of Chapter Eleven scope and coverage was consistent with that advanced by the United States in its Article 1128 submission and with that advanced by Mexico in the proceeding.

Adopting Claimants' interpretation of Article 1102(1) would also lead to absurd results when interpreting other provisions in the Chapter. The implication of Claimants' argument is that any provision specifically affording protections to investors that does not have an express territorial limitation imposes obligations with respect to investors operating anymore in the Free Trade Area. Article 1111(1) provides that nothing in Chapter Eleven's national treatment obligation should be construed to prevent a Party from adopting or prescribing measures that impose special formalities with respect to the establishment of investments by investors of another Party, and that provision contains no express the territorial restriction.

If the consequence of this omission is that the provision must be construed to authorize the imposition of special formalities by Parties on investors operating anywhere in the Free Trade Area, purely domestic, Canadian, U.S., and

Mexican investors could be subject to regulatory formalities imposed by each of the NAFTA Parties, even when they had no

10:25:55 intention to invest in another party's territory. Claimants' argument, we submit, would lead to a construction of Article 1111(1) that would be plainly absurd.

Now I will move on to supplementary means of interpretation which are also mentioned in Article 32 of the Vienna Convention. These supplementary means of interpretation confirm that the interpretation given by the United States to the NAFTA scope is correct. As we have shown in our written submissions, the negotiating history of the NAFTA confirms the meaning of Article 1101(1) proffered by the United States. We have further demonstrated that this position is taken contemporaneously by the United States in its Statement of Administrative Action, which was submitted to the Congress in connection with the NAFTA's conclusion. It was also taken contemporaneously by Canada in its Statement on Implementation and by Mexico in its statement to its Senate which documents were also both prepared contemporaneously with the NAFTA's adoption.

Moreover, there are no clear indications in the travaux that NAFTA Chapter Eleven was meant to have the unprecedented reach that Claimants advocate. Claimants have not produced any evidence, absolutely none, of anything in the negotiating history or contemporaneous official documents that indicates a contrary position.

As we have noted, there is no international agreement

10:27:25 of which the United States is aware, and the Claimants have identified none, that empowers an investor from one State to bring an investment arbitration against another State when that investor's only investment is in its home State. The Bayview Tribunal observed that it is not inconceivable that two States must enter into such an agreement, but it noted, and I quote, "If, however, the NAFTA were intended to have such a significant effect, one would expect to find very clear indications of it in the travaux preparatoires, but there are no such clear indications, in the travaux preparatoires or elsewhere."

And, in fact, Claimants' arguments to the contrary are self-defeating. They seek to distinguish the NAFTA from every other Free Trade Agreement or Bilateral Investment Treaty. They urge the Tribunal to find that the NAFTA affords much greater protection than the investment chapters in subsequent Free Trade Agreements entered into by the United States, like the DR-CAFTA and U.S.-Chile Free Trade Agreements, which Claimants characterize as containing, quote-unquote, understandably inhospitable provisions. But, as we explained in our written submission, the DR-CAFTA and U.S.-Chile FTA contain objectives that are identical to or equivalent to those contained in the NAFTA, and Claimants cannot identify anything in the travaux of those other agreements or in any other contemporaneous documents interpreting those agreements which

10:28:54 1 indicates that the United States intended the scope of coverage
2 of the investment chapters in those agreements to be
3 drastically narrowed from that in the NAFTA.
4 At bottom, Claimants' argument appears to rest
5 primarily on their allegation that they have made their
6 investments in reliance on the alleged promise of the NAFTA of
7 access to an allegedly integrated North American market. But,
8 as a matter of fact, no such promise was made anywhere in the
9 NAFTA. Indeed, the NAFTA Parties did not make any promise of
10 market access with respect to sanitary or phytosanitary
11 measures. In Article 710, the Parties expressly provided that
12 the general national treatment provisions with respect to goods
13 and the provisions dealing with import and export restrictions
14 which are commonly referred to as the market access provision,
15 that those provisions do not apply to any sanitary or
16 phytosanitary measures as the measures at issue in this case
17 are under the definition in Article 724. The nature of the
18 market in which Claimants are operating simply has no bearing
19 on the jurisdictional scope of Chapter Eleven, so they are
20 wrong as a matter of fact that any such promise was made, but
21 legally it is irrelevant.
22 And on this point, the Bayview Tribunal is again
23 instructive. That Tribunal rejected the argument that, because
24 the Claimants in that case depended upon Mexico's actions in
25 releasing a certain quantity of water, perhaps even made their

10:30:26 1 investments in the United States in reliance on Mexico's
2 adhering to its Treaty obligations to release such water, that
3 this affected the jurisdictional scope of NAFTA Chapter Eleven.

In fact, despite Claimants' attempts in this arbitration to characterize their claims in this case as unique because they participate in an allegedly integrated market, the Claimants in the Bayview case also claimed that they participated in a similarly integrated market. In their posthearing submissions, the Bayview Claimants argued, and I put this on the slide, "Agricultural production along the United States/Mexico border is a fully integrated economic activity, with goods and services freely traversing the border between the two countries. The same kinds of crops are grown and sold on both sides of the border and use the same water supply. In fact, crops move back and forth across the border, depending upon the availability of water. The Claimants here own and operate farms in Texas, which annually generate millions of dollars of agricultural products that are sold across the border in Mexico, again depending on the availability of water."

If one were to substitute the words "crops" for "cattle," the Bayview claims would appear virtually identical to the present case.

The Bayview Claimants' arguments that they were participating in a quote-unquote fully integrated market and

10:31:56 that they had relied on Mexico's Treaty commitment to release water not surprisingly did not affect the jurisdictional scope of NAFTA Chapter Eleven. In that regard, the Bayview Tribunal stated, and I quote, "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

dispense 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 State."

And this case is no different. Claimants have argued that they have made their investments in their cattle and feedlots in Canada in reliance on the alleged promise of access to a supply of customers in the United States. But, as the Bayview Tribunal held, Claimants' economic dependence on access to another market has no bearing on the jurisdictional scope of NAFTA Chapter Eleven.

In sum, the ordinary meaning of the NAFTA's text, read in context and in light of the agreement's object and purpose and taking into account the agreement of the Parties on this point compels the conclusion that this Tribunal lacks jurisdiction over Claimants' claims. This result is confirmed by the NAFTA's travaux and contemporaneous as well as subsequent authorities interpreting the agreement.

When confronted with the obvious obstacles to their claims, Claimants argued that the investment chapter was unlike

10:33:30 any other Bilateral Investment Treaty or investment chapter of a free trade agreement, and therefore the United States's reliance interpretations of those treaties should be disregarded. As the United States demonstrated in its written submissions, this argument is without foundation.

But now that a tribunal has interpreted this very issue in the context of the NAFTA itself and has concluded that the object and purpose of Chapter Eleven is not distinct, Claimants have resorted to arguing that that Tribunal's

interpretation cannot apply to their claims because their claims are factually unique, but there is no distinction between the Bayview case and this case that would affect jurisdiction. As Mr. Bettauer and I have explained, the Bayview panel clearly held that, quote, and I put these on the screen, "The object and purpose of NAFTA Chapter Eleven is no different from that of BITs and TAFs; i.e., the protection of foreign investments and the Investors who make them."

It also held that, in order to be an investor within meaning of NAFTA Article 1101(1)(a) and Article 1139, one must make an investment in the territory of another NAFTA State, not in one's own.

It also held that the scope of Article 1102(1) is limited to the protection of investors with respect to investments in the territory of the Respondent State, and thus it is quite plain that NAFTA Chapter Eleven was not intended to

provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States.

And finally, the three NAFTA Parties are in agreement on this point.

Claimants contend that their case is distinct because they base their investment decisions on a nonexistent guarantee of access to a market in a highly integrated industry. Claimants, in essence, are asking this Tribunal to take jurisdiction in this case in a way that would cover only the claims of investors operating in similarly integrated markets, but the NAFTA Parties never agreed to that. There would be no

grounds to conclude that NAFTA Chapter Eleven applied only to investors that have made or are seeking to make cross-border investments except where the so-called investors have made investments in their home State and in an allegedly integrated market. Such a rule finds no support in the NAFTA's text, its object and purpose, its travaux, its official documents of the NAFTA Parties, in arbitral awards, and it is disavowed by the NAFTA Parties themselves.

So, in conclusion, Mr. President and Members of the Tribunal, there is no basis on which Claimants can go forward in this proceeding. The question that the Tribunal set out in paragraph 3.6 of Procedural Order Number 1 must be answered in the negative. The United States thus respectfully requests

10:36:26 that the Tribunal dismiss Claimants' claims for lack of jurisdiction and award the United States full costs and fees.

Thank you.

PRESIDENT BÖCKSTIEGEL: Thank you very much, Ms. Menaker.

Now, we are approaching 11:00. Obviously, we would have a coffee break, but the question is I suppose the Claimants would like to digest a little bit what they have heard before they start their own first round presentations, so the other option would, of course, be that we break early for lunch and start early in the afternoon for the second round presentations, for your first round presentation.

MR. HAIGH: Mr. President, perhaps the legal team could discuss this during the break, and we will try to give you a little more precise response. As you will hear when I

begin after the break, there are going to be a number of presenters. We are going to break this up, and there will be several different persons speaking, so it may be appropriate to begin after the break and then have the lunch and resume our argument at that time.

PRESIDENT BÖCKSTIEGEL: Could be done. But you will then not take more than your three hours?

MR. HAIGH: Oh, no. Oh, no, that's understood.

PRESIDENT BÖCKSTIEGEL: Okay, that could also be done. Let's have a break. Would 11:00 be sufficient to

10:38:09 restart? Good.

(Brief recess.)

PRESIDENT BÖCKSTIEGEL: Thank you very much. Then we will start with the Claimants' presentation, first of all.

OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

MR. HAIGH: Thank you very much, Mr. President and Members of the Tribunal. My name is David Haigh, and I'm been very pleased to have be asked by the legal team for the Claimants to begin their response to this motion. It is going to be my job to present very briefly some legal and factual context in which we are going to ask you to consider the question that has been put.

And I may say, Mr. President, just before I go on, that with respect to the anticipated timing, I will be followed by Dr. Alexandroff. He, in turn, will be followed by a short presentation from Michael Woods, and we think that will likely take us through to approximately the lunch break.

PRESIDENT BÖCKSTIEGEL: Okay.

MR. HAIGH: We will see how it unfolds.

If I may, I would like to begin on a personal note by saying that in my own early years I was raised on I cattle ranch in southern Alberta and also in southern Saskatchewan where my parents were engaged in cow-calf operations and in feeding cattle. And I can tell you that from that early experience until now, I have always appreciated and understood

11:06:03 the hard work, the efficiency, the commitment, the risk taking that families who engage in such enterprises must undertake if they are about to succeed.

The cattle business is not for the fainthearted, and it is the same courage and commitment that's necessary in this business for these family enterprises, intergenerational enterprises, I might note. In some the pleadings have disclosed father and son operations, in other cases husband and wife operations, but that courage and commitment is what leads the Claimants to bring this claim before this Tribunal.

That 107 Claimants who appear before you in these actions say that the promise that was made to them under the NAFTA has been broken, so let's look at the legal context in which we say there is such a promise.

First of all, we refer to the preamble of the NAFTA itself. This is not something that, after the fact, an advocate might say. This is not something that a bureaucrat might draft as a surrounding document. This is something the NAFTA Parties themselves have said, and this will be a theme of what the Claimants are going to say to you today.

Let's remember what the Parties themselves have said

in their agreement. In the preamble, the NAFTA Parties resolved to create an expanded and secure market for the goods and services produced in their territories, and to ensure a predictable commercial framework for business planning and

11:07:47 investment. Canada, Mexico, and the United States agreed to establish an Article 1101(a) Free Trade Area and, among other things, to promote conditions of fair competition in the Free Trade Area.

In particular, the NAFTA Parties in Article 1102(1) made a promise to investors such as the Claimants. In 1102(1), each Party, in this case the United States, promised that they would accord to the investors of another Party--in this case Canadian investors--treatment no less favorable than that Party--that is, the United States--would accord in like circumstances to its own investors.

There is no phrase, "in the territory of the Party," in 1102(1). We will deal with that history. We will deal with how deliberately and clearly that omission must be understood.

These 107 Claimants say the United States broke the promise of 1102(1).

I would like to say a few words about the factual context in which we ask you to hear and understand the arguments that are to be made. In particular, bear in mind the phrase "in like circumstances." If we step back and consider the implementation of the NAFTA agreement after 1994, it becomes evident--and Dr. Alexandroff will be addressing you on this more fully and carefully--that the cattle herd in Canada and the cattle herd in the United States increasingly became an

integrated cattle herd. You will see this in the movement of

cattle not only for slaughter, but in the shipment of cattle for breeding purposes, and that shipment and that movement of cattle went both ways. There were cattle, live cattle, going from the United States to Canada and live cattle going from Canada to the United States.

It's unsurprising in many ways that this integration of the Free Trade Area cattle herd should have occurred. First, let's remember that we share the same continental landmass, supposedly the longest undefended border in the world. When the United States and Great Britain negotiated a boundary between then-British territory, now Canada and the United States in the mid-19th century, for the bulk of that negotiation they were not dealing with natural boundaries. What they had to settle on, from Lake of the Woods in Manitoba through to the Pacific Ocean, a distance of more than 3,000 miles, was the 49th parallel. And when one considers the 49th parallel, it's obvious the grazing and the terrain and the vegetation on either side of the 49th parallel are virtually indistinguishable.

By the late 1990s, the beef grading system between Canada and the United States had become virtually identical so that, for example, USDA prime was Canada prime, USDA choice was Canada AAA. USDA select was Canada AA. These were virtually identical forms of grading beef.

The beef breeds and the manner of raising and

finishing cattle on either side of the border are identical. Whether we talk about the beginning of the process of raising cattle through the cow-calf operation to the backgrounders who take the calfs and take them up to approximately an 800-pound weight and yearling age, to the feedlot operators who purchase feeder cattle or weaned calves from cow-calf operators and backgrounders, these cattle are finished and fed to their slaughter weight in identical fashion in their two countries.

By the time they're ready for slaughter plants, I could give you the example in Western Canada, that before May 20, 2003, cattle feeders in either Alberta or in western United States had access to nine slaughter plants, four of them in Canada and five in the United States. After the closing of the border, following May 20, 2003, five of those slaughter plants were no longer accessible to the Claimants.

As Dr.Al Alan Alexandroff will show you, the beef industry in the North American Free Trade Area gradually became fully and completely integrated. Live cattle were freely shipped from Canada to the United States and just as freely from the U.s. to Canada. The market price became referable to Chicago prices, and that was true in both countries. This single integrated cattle market for live cattle became interdependent. There was now, quite correctly, a North American cattle herd.

It was in this context the investors such as the

Claimants expanded and modernized their facilities. Millions

and millions of dollars were committed to creating more efficient and more competitive operations. Their competition was that not only in other parts of Canada, but in the United States. They were all doing the same thing. These capital expenditures by the Claimants were made in good faith and in the belief that the promises made in the NAFTA would be kept. The Claimants said they relied on those promises, to their detriment.

On May 20, 2003--let's talk about something that we are all aware of in the background to this case--there is the discovery of a single BSE-infected cow in Alberta; and, with that, the lives of the investors who appear before you now were changed dramatically. If there had, for example, been a brief period of border closure while the scientific facts were checked and then upon confirming that there was minimal scientific risk, the flow of cattle could have continued, we wouldn't be here today. As the argument of the Claimant shows, later in the story, when BSE was discovered in a cow in the United States, that's exactly what Canada did. Briefly, they investigated the scientific facts surrounding that discovery in the U.S., and within weeks correctly concluded that the U.S., like Canada, was a low-risk country, and the free flow of cattle resumed. That did not happen in this case.

But I want to bring one other set of facts to your

11:15:17 attention. When this one cow was discovered in May 2003 in Canada, almost immediately 18 farms surrounding the farm where this one this animal was raised, were closed down and their herds were all seized and destroyed. In addition, the

genealogical background to this one animal was investigated, both backwards and all possibly related animals. In total, 2,800 head of cattle were slaughtered and tested and in every single case there was no BSE.

This is a dramatic demonstration, we say, of the care and the concern that Canada was bringing to bear on the problem.

In addition, an independent scientific body of experts in this field were brought in to oversee and comment on how Canada was conducting its own investigations. They issued a report that confirmed that Canada was complying with OIE standards and was conducting itself properly, in fact, in an exemplary way.

On the other hand, we have to look at something that occurred on the other side of the border. The Claimants have told you in their briefing that there were at least 200,000 head of Canadian-born cattle inside the United States in May of 2003. There may have been more. There is a belief that there was more, but certainly at least 200,000 head were alive and inside the United States. If this was a matter for grave concern about either animal or human health, you might have

11:17:10 expected there would have been an enormous undertaking to find and slaughter those 200,000 head and ensure that they didn't go into the human food chain or infect other animals.

In fact, nothing happened. Not one step was taken to do anything about that 200,000 head. That is an eloquent fact. It is a fact we ask you to keep in mind in the background as you listen to the argument on this case. This is not a case

about scientifically based actions. This is not a case about health concerns. This is a case simply about breach of a promise made to Investors under 1102(1).

At all times the Claimants will ask you to look at the words used by the NAFTA Parties themselves in the NAFTA agreement. Whether we refer to the Vienna Convention or to simply common sense, the fact is that treaties such as the NAFTA should be read and understood and followed based on the plain, ordinary meaning of the words that the Parties to those treaties have used. The text of Article 1102(1) means, we say, just what it says, and no amount of innovative advocacy should change that.

The task of making presentations on behalf of the Claimants in the context of this motion will be divided up. Dr. Alexandroff will be dealing with the single integrated cattle market in the North American Free Trade Area, and he will be showing the reliance which the Claimants came to place on the promise of the NAFTA undertakings.

11:19:03 He will also be speaking in reply concerning the so-called agreement of the Parties.

Professor Todd Weiler will be providing his analysis of the NAFTA text, and he will also be examining other NAFTA cases, including specifically the Bayview case.

Finally, Mr. Michael Woods will be examining the measures in issue to show why they were discriminatory, why, in other words, the measures of the Respondent did not accord agreement to the claimants which was no less favorable than that it accorded in like circumstances to its own investors.

We will continue to emphasize the phrase "in like circumstances." It cannot be overlooked, and it is a significant part of 1102(1).

Mr. Woods will also be examining the drafting history of Article 1102 and the so-called scrub theory. He will tell you about at least 20 drafts in which the phrase "in the territory of a Party" that had clearly and deliberately been removed was not reintroduced. This isn't an accidental oversight. This isn't something that was simply omitted because a bunch of lawyers in a back room happened to be undertaking a task. This is part of the drafting history. There are no travaux preparatoires here. There are no commentaries, but there is this set of actions, and 20 drafts did not include the phrase "in the territory of the Parties." And Mr. Woods will be telling you about that.

11:20:45 He will also be addressing the common habitual past practice argument made by the Respondent. He will ask you to follow the text to uphold the right of the Claimants to go forward to the merits of this case and to answer the question that has been put on jurisdiction before you in the affirmative.

Thank you.

PRESIDENT BÖCKSTIEGEL: Thank you, Mr. Haigh.

Mr. Alexandroff, go right ahead.

MR. ALEXANDROFF: Good morning, again, Mr. President and Members of the Tribunal. Due to a slight technological glitch, I hope to present to you with the slides in front of you. If not, you do have in your materials this slide

presentation and all the slide presentations that we have now and this afternoon.

I may call on my colleague to assist me here. Hopefully I will not have to.

MR. HAIGH: When he says his colleague, I hope the panel is clear that won't be me. I'm happy to relinquish my chair to Mr. Weiler, if he needs to help.

MR. ALEXANDROFF: So, this morning, as indicated by Mr. Haigh, I will be looking at the integrated market in North America for live cattle, and one might raise the question: Why examine the character of the market? And indeed, why examine the character of the Treaty? And I submit that if one examines

11:22:21 Articles 1101, 1102, and 1116, these elements of the Treaty--indeed, all the elements--have to be construed within the context of the NAFTA regime. That was built in our submission, with the objective of market integration, a single competitive market for cattlemen in Canada and the United States.

In addition, a key element of the Chapter 1102 section of the Treaty of the investment chapter talks of in like circumstances, and in like circumstances is an examination within the principles that emerge from the agreement and whether investors are in the same economic sector.

We submit that prior to May 20th, 2003, when the measures that we speak of in this matter in this dispute occur, the political border between Canada and the United States had a minimal impact upon the export flow of cattle, live cattle. The North American market for live cattle and beef was

interdependent, particularly as between Canada and the American segments, over a number of years. Canada and the United States promoted and protected the development of this continental market with the establishment of the Canada-United States Free Trade Agreement in 1989, and then furthered it with the agreement in 1994, the North American Free Trade Agreement.

As my colleague, Mr. Haigh, has indicated, an assessment calculated that on May 20th, 2003, there were over 200,000 live feeder and breeding cattle in U.S. herds and in

11:24:30 feedlots that had been born in Canada but were at that point reside residing in the United States. It is, therefore, in my submission, not possible to speak of a Canadian or an American herd prior to the imposition of the Respondent's ban and then, of course, the subsequent modifications.

As you see, we are presenting from, in fact, a Notice of Arbitration--one of the notices of arbitration--the flow of beef shipments from the period 1970 to 2004, and we can see how they raise particularly with respect to Canada, to the United States with shipments, but also with the U.S., and, of course, they significantly drop off.

In the decade of the 1970s and '80s, looking at this graph, Canadian production was largely consumed in Canada. Indeed, 90 percent of it was consumed in Canada. Between the 1980s and '90s, shipments to the U.S. doubled. Twenty-five percent of Canadian production was thereby going to the United States. If measured by tonnage, it was 60 percent. A rapidly declining proportion of production remained in Canada.

As the investors in the integrated market, the Claimants have actively engaged in growing their respective shares of the market by participating in the integration process. Canadian investments by the Claimants has helped to create this integrated market for cattle in the North American Free Trade Area. Their investment decisions relied on the

11:26:30 promise that the Free Trade Area provided the opportunity for considerable growth on a competitive basis with their competitors in the United States and in Canada throughout the territories of each of the NAFTA Parties.

Let me take a quick look at the characteristics of the live cattle market, and it is worth making mention that my friend, Mr. Bettauer, of course, suggested that we were suggesting that the protections would extend to everyone trading in the kin goods. But the reality is the Claimants have never suggested that. That is why we are looking at the characteristics of the cattle market, to show the deep integration of this market in the Free Trade Area of North America. If you take a look at the pricing, you can see just by eyeballing it, of course, that, in fact, the pricing co-varies, varies the price very closely between the significant markets in Canada and in the United States.

Taking a slightly different view, this is the variation of pricing that is noted in the Sen Report that examines integration and has been provided to the Tribunal and to our friends. And it slightly differs in that it identifies specifically the Provincial and State pricing and variations on a semi-annual basis.

When Dr. Sen performed the simple price correlation--that is, the variation of prices in Canada and prices in the United States when he had this for slaughter

11:28:20 steer prices--he found an impressive correlation, .96, obviously perfect correlation being 1.0, an impressive correlation of .96 between Canada and the United States for prices through 2003.

He also notes quite clearly that there is an evident and immediate divergence and wide divergence of price following the measures that are at issue here in the dispute, and that is, of course, the measures that commence on May 20, 2003.

And, indeed, he takes a quantificated measure of that difference, and what he finds is that the variation in pricing of prices in Canada for steer, slaughtered live steer, and in the United States goes from a .96 to a .12, so that the pricing correlation widely diverges.

It is, of course, the fact that co-variation of pricing, as in many other instances, can be affected by the third variable that we may not be aware of, the obvious example of pricing of feed and so forth.

So Dr. Sen, as you note in his report, looks at shipments of cattle and constructs what he calls an export index on the presumption that large flows of exports from one of the NAFTA parties to the other would be indicative of deep integration. And what he finds is that there, indeed, is a significant and large magnitude of flows that go from provinces to states in an increasing amount. What he says is that by 2002, obviously before the measures complained of here, just

11:30:20 1 less than 50 percent, on average, of provinces' exports of
2 cattle were going across the border.
3 He performed finally one final analysis--and this is
4 in the so-called statistical world what's called a gravity
5 analysis, but what it does, the analysis, is that it attempts
6 to control for a variety of factors, obviously distance and
7 other intervening variables that might have occurred in a
8 determination. He does this because Professor John McCallum,
9 in a quite famous 1995 study, tried to assess how important the
10 political border was in the flow of goods between Canada and
11 the United States. And his examination, of course, does all
12 commodities. And what he found was that trade between the
13 provinces was 22 times greater than trade between Canada and
14 the United States. And he trumpeted the fact that what we had
15 here then is clearly was two countries in which the border
16 still matters significantly on the flow of all goods and
17 commodities.
18 What Professor Sen then did was in largely replicating
19 the methodology of Professor McCallum, soon to then become a
20 Minister in the Federal Government, what he found was that
21 the--looking at cattle, live cattle alone, rather than all
22 commodities, he found that the shipment of live cattle between
23 provinces is, in fact, only 1.6 times greater between provinces
24 as between provinces and states, controlling for the various
25 factors. In fact, then, the comparison is 22 times greater

versus the live cattle market, which was 1.6 times greater.

My conclusion of my submissions is relatively simple, but I think powerful, that what we have here in the live cattle market is a highly integrated market in the live cattle industry that had been underpinned by both the FTA in 1989 and 1994. The Claimants and others relied on that in their development of a deeply integrated market, particularly in the North American Free Trade Area of Canada and the United States.

Those are my submissions.

PRESIDENT BÖCKSTIEGEL: Thank you very much.

Mr. Todd Weiler is the next one? Mr. Woods.

MR. HAIGH: Mr. Woods will be next, Mr. President.

PRESIDENT BÖCKSTIEGEL: Okay. Mr. Woods, please.

MR. WOODS: Thank you, Mr. President and Members of the Tribunal. I will be--I will attempt to be brief.

My friend, Dr. Alexandroff, has described a fully integrated market. In May 2003, the United States imposed measures which effectively struck a blow at that integrated market, and actually one could say disintegrated the integrated market.

In May 20, 2003, four-and-a-half, a full four-and-a-half years ago--a full four-and-a-half years ago, the United States closed off our Claimants' access to the United States portion of the North American integrated market. This was done under the Animal Health Protection Act.

And as my friend, Mr. Haigh, has indicated, at the time of this single isolated case in Alberta, officials of both

the Department of Agriculture, the U.S. Department of Agriculture and the Canadian Food Inspection Agency, part of Agriculture of Canada, took immediate effective steps to address this one incident of BSE.

The World Animal Health Organization, known by its French acronym the OIE, is looked upon as the group, the international group--Canada and United States are both members--which sets out the standards, the internationally accepted approach to OIE and to BSE and to other animal diseases. And we have a quote in our submission that tells that you that their position is quite clear. At the time of an isolated case, the OIE indicates that a short trade suspension during an investigation period following a new epidemiological event is what is the step that should be taken, and the OIE warns against countries closing their borders to trade in such circumstances. And in our submission, we quote such situations penalize countries with a good transparent surveillance system for animal disease, which have demonstrated their ability to control the risks and identify them.

The OIE goes on to warn what the United States Government did as an example of, "what may result in a reluctance to report future cases, an increased likelihood of disease surprising internationally."

11:37:24 While this quote may not be directly on point, it's important to note in the context of the integrated market and in the context that my friend Mr. Haigh has introduced our case, that the disintegration of the market which began on May 20, 2003, was prolonged for four-and-a-half years. And how

did that happen?

In August 2003, the United States Secretary of Agriculture, Ann Veneman, was prepared, having found negligible risk to the United States market, to accept boneless bought boxed beef from animals under 30 months. However, the border remained close to livestock.

While in our understanding of the Animal Health Protection Act the Secretary had discretion at that time to maintain or to open the border to livestock, to live cattle, instead, the United States Government embarked on a process called the rule-making process, and that was started in November 2003.

In November 2003, remember the context is that Canada under OIE guidelines is a minimal risk country, a minimal risk country under which OIE guidelines say that a short, temporary suspension is permissible, but that is all. Instead what happened was our Claimants, as investors who held herds of cattle, hold actually over 25 percent at any given time of a Canadian herder, were not allowed to ship their cattle or trade their cattle or embark in any business with their cattle in the

11:39:19 United States. At the same time U.S. cattle investors, with the same herd, in the same context, under the same sets of rules and regulations were able to trade fully and freely in the integrated market.

What happened under the rule-making process, which is an administrative system that the Secretary of Agriculture embarked upon, was that a Proposed Rule, a proposed Final Rule, was announced in November 4, 2003. And, in this rule, in this

Proposed Rule, the Government of the United States, or the U.S. Department of Agriculture, proposed to reopen the border to trade in livestock, but the question was when. Now, six months had passed. In their own rule-making process, the United States Department of Agriculture recognized that there was minimal risk, and Canada followed the international guidelines and the international standards, and there was negligible risk to human health or plant life--animal or human health, but the border remained closed.

The border remained closed because the rule-making process required the United States Government to obtain comments--there is a comment period. The comment period was supposed to end in January 2004, but the period was extended.

And it's ironic, I think, in the context of what my friend Dr. Alexandroff has told you what the market is, it's ironic that the reason that the rule-making period was extended was because there was a finding of BSE in the United States.

11:41:16 So that by December 2003, neither Canada nor the United States could be considered, or factually were considered to be free of BSE. They were quite clearly not only under OIE guidelines, but in point of fact, were in the same boat in the same integrated market. But still the Claimants that are here in this room today and over a hundred others were left to try to survive having been cut off from their ability to conduct their business in the integrated market. Some did not survive, some did, but they lost a large amount of money.

And you know, in passing, with respect to comments about the kind of case this is, this case is not about asking

the United States Government to change its regulations. This case is about the fact that our Claimants as investors were not only not receiving national treatment in terms of their competitors, the American investors in their cattle operations, not only that, but this is so far from national treatment that it's incredible. Four-and-a-half years, today we are meeting today, this case started in August of 2004, with the Notices of Intent, and the border is not open.

It is true that in January 4th, 2004, pursuant to the rule-making process, that the border was finally opened, but let me go back. At the end of the year 2003, there was a finding of a case in Washington State.

Again, there is another irony because the animal was born in Canada, but raised in the United States. So, who has

11:43:22 the BSE? Subsequently, there were indigenous cases of BSE found in the United States, and there were further cases in Canada, but that did not stop the OIE from considering both countries under the same standards and saying that there was minimal risk to animal or human health.

So, in January of 2005, Rule (1) was published, but, because of legal actions from groups that sought to oppose the opening the border, the actual opening of the border was not put into effect until July 25th, 2005. So again, we're in an integrated market in the context of our Claimants as investors in a fully integrated cattle market, and their competitors have enjoyed 20 months of full access to that market, 20 months where our Claimants were cut off from the market.

Even then, in January 2005, restrictions remain in

place, onerous restrictions. My friend David Haigh and I have been to see what these restrictions are and how they're translated, but cattle over 30 months, live cattle over 30 months, from our Claimants' feedlots were not allowed into trade and commerce in the United States, and those restrictions were wholly unjustified.

Even more, even outside the rule-making process, the United States, through administrative guidelines, imposed other onerous restrictions, one of which was that heifers, pregnant heifers, were not allowed into the commerce of the United States. So our investors were stuck with not only

11:45:10 restrictions, but they were stuck with an onerous system whereby they had to demonstrate that the cattle going into the U.S. market--and my friend David Haigh has told you what that meant in terms of access to processing--they had to show through a licensing system, through a very expensive and tedious system which caused wear and tear on their operations and to their pocketbooks. They had to prove the animal was over 30 months, and they had under 30 months, and they had to prove that the animal was not pregnant.

Finally, in August 9, 2006, there was a Final Rule (2) which again recognized quite clearly that there was a minimal risk and that Canada was a minimal risk country, and that OIE Guidelines and their U.S.'s own Risk Assessment did not justify maintaining these restrictions. The Final Rule was announced less than a month ago, and it's not due to go into effect until a full four-and-a-half years after the incident in Alberta.

I guess to summarize, the U.S. legislation and U.S.

actions under the rule-making process created a barrier, created a circumstance in which our clients, our Claimants, could not do business. It could not do business in spite of what my friend this afternoon will tell you is the promise of NAFTA. It could not do business in spite of the fact that there was--that the rules on both sides of the border were quite clear and designed to address and were designed to survey and were designed to eliminate any risk whatsoever.

11:47:13 So, integrated market, same risk, should be the same rules anymore.

Thank you, Mr. President and Members of the Tribunal.

PRESIDENT BÖCKSTIEGEL: Thank you, Mr. Woods.

Who is the next one?

MR. WOODS: I think what we were going to suggest was a natural break here because for one thing, from a logistical point of view, we have to change what's on the computer, but if you prefer to proceed, we can do that.

PRESIDENT BÖCKSTIEGEL: Well, natural breaks are really mandatory, of course.

MR. WOODS: I wasn't talking about that kind of natural break, but come to think of it...

PRESIDENT BÖCKSTIEGEL: No, the question is, it's still before 12, so I think it would make sense to continue and move a bit further.

Can we do that?

PROFESSOR GRIERSON-WEILER: It would be much easier. The flow would be quite broken. We are at the part we are 35 minutes long, so it would be easier to--

PRESIDENT BÖCKSTIEGEL: To what?

PROFESSOR GRIERSON-WEILER: To break now and come back.

PRESIDENT BÖCKSTIEGEL: For the lunch?

PROFESSOR GRIERSON-WEILER: Yes.

11:48:26 PRESIDENT BÖCKSTIEGEL: All right. We will have a early lunch. We prefer to have early lunches. In Paris this wouldn't be unheard of.

MR. WOODS: Actually, I think the folks at the Army Navy Club will provide some kind of a lunch.

PRESIDENT BÖCKSTIEGEL: I see. And that would be ready now, you think?

MR. WOODS: I'm not sure.

PRESIDENT BÖCKSTIEGEL: We'll see. But we can eat in this place; right?

MR. WOODS: Yes.

PRESIDENT BÖCKSTIEGEL: Okay. So, how long will we need for lunch? An hour-and-a-half?

MR. WOODS: An hour is okay.

PRESIDENT BÖCKSTIEGEL: An hour for lunch. I think we all agree on that.

So, we meet again at 1:00.

(Whereupon, at 11:50 a.m., the hearing was adjourned until 1:00 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT BÖCKSTIEGEL: Mr. Weiler, I understand you will continue from here?

MR. ALEXANDROFF: I will, actually, and will be followed by my colleague.

PRESIDENT BÖCKSTIEGEL: I'm absolutely in your hands as far as that is concerned.

MR. ALEXANDROFF: Members of the Tribunal, you will note that the slide presentation that I'm referring to is the same one that you began with. I'm on slide 17 right now, and the wording on that slide is, "No Ordinary BIT-Scope and Structure." So it's slide 17. I have just one set of presentation slides.

So, Mr. President and Members of the Tribunal, it is our submission that this is not an ordinary BIT, and NAFTA is not like--does not function like other bilateral investment treaties, and NAFTA text supports that unique character. So, both with respect to this slide and the following slide, I will give--I would just set out the standard. My colleague, Mr. Weiler, will go into some depth on filling in what the meaning of that is.

Also, this is at least a BIT with explicit investment objectives, and they are set out in Article 102. They are not like other U.S. BITs, and again, my colleague will go into some depth on what we mean by this.

13:00:45 Article 1102(1) has to be construed within the context of the NAFTA regime. The NAFTA was built with the objective of North American market integration in mind. Whatever the government or in particular whatever the government lawyers, our friends, say today, particularly in the context of a litigation, the officials and politicians at the time of the FTA, 1989, and of the NAFTA recognized the goal of market integration, and in the unique effort that was being undertaken at the time. So, if we look on one side of the aisle, Senator Christopher Dodd, in 1993, in other words, at the time of the NAFTA, he says: "Hemispheric trade negotiation will not be easy and it may take many years to complete, but we must begin with that process. We must commit ourselves to achieving the goal because the success of such an effort, in my view, will be critical to our future economic well-being."

At the same time across the aisle, Peter Domenici says--this is 1993--"In 1979, I introduced a legislation calling for a North American integrated market. Now I see a tremendous momentum building in the direction of integrated markets in this hemisphere. In fact, practically the entire economic profession is in favor of NAFTA because it makes good economic sense for our country, period."

Further, the U.S. administration, in its Statement of Administrative Action, again at the time of entering into the NAFTA said, "The North American Free Trade Agreement is the

most comprehensive trade agreement ever negotiated and creates the world's largest integrated market for goods and services. With NAFTA, the United States, Canada, and Mexico will create the biggest integrated market in the world, a combined of economy of 6.5 trillion and 370 million people. NAFTA is the U.S. opportunity to respond to and compete with burgeoning trade alliances in Europe and Asia. By creating export opportunities, NAFTA will enable the United States to take advantage of U.S. economic strengths and remain the world's biggest and best exporter."

And then finally, even 10 years later, at the time of the anniversary of NAFTA, in other words, in 2003, the Ministers of the day, from all three of the Parties, said, collectively, "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. 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."

Indeed, this is a revolutionary agreement, and calls for and is built on a rule-of-law framework, rule-of-law

framework based on individuals and markets and motivating economic integration. That's what this is about. Uniquely, of course, it is a contiguous free trade area--Canada, the United

States, and Mexico. It is not based on governments, not based on officials or bureaucrats, but it is--and it is not built on secretariats and commissions. It is built on a rule-of-law framework, individuals, and markets."

All government regulation subject to some exceptions in the Free Trade Area would be subject to the principle of nondiscrimination, and my colleague, Mr. Weiler, will again go into some detail on the relation--on the meaning of that.

What the Free Trade Agreement did was to encourage private actors to join in a process of achieving deep economic integration within the contiguous territory comprised by the Free Trade Area that it established through the--first the FTA and then the NAFTA in 1994. The rule-of-law framework, based upon nondiscrimination, creating a legitimate expectation that investors like our Claimants in the room and elsewhere in Canada, would be treated fairly if they chose to participate in creating an integrated market. And, as I have shown earlier, that is exactly what they did.

I will now turn over the presentation to my colleague, Mr. Weiler.

PRESIDENT BÖCKSTIEGEL: All right. Mr. Weiler, please.

13:06:37 PROFESSOR GRIERSON-WEILER: Good afternoon. I have placed a slide above there, so you can see a summary of my presentation today. We are going to begin with discussing briefly approaches to interpretation, and then we are going to turn to our submissions on the object and purpose of the NAFTA, stress the crux of the dispute between the Parties, then look

in detail at the provisions in context, and finish with what we believe to be the true most important aspect of this case, the like circumstances between the clients here in the room and then elsewhere in Canada and the counterparts in the North American Free Trade Area. After that, I will turn over to Mr. Woods, who will discuss negotiating drafts with you.

In a nutshell, the Respondent's approach in this case--

PRESIDENT BÖCKSTIEGEL: Let me just ask--is that somewhere here?

PROFESSOR GRIERSON-WEILER: You, indeed, do have these slides. Which tab is it?

PRESIDENT BÖCKSTIEGEL: It's nice to be able to note them.

ARBITRATOR LOW: It's nine.

PRESIDENT BÖCKSTIEGEL: Nine, thank you.

PROFESSOR GRIERSON-WEILER: Essentially, we have two approaches to interpretation here. Either we have the authoritative statement of the Treaty parties' intent being

13:07:56 found in the text of the relevant Treaty, or we have a different position, that of Respondent. In a nutshell, the Respondent's approach to first categorically state, categorically and unabashedly state that NAFTA Chapter Eleven is a bilateral investment treaty and nothing more.

Second, they submit that the object and purpose of the NAFTA is really that of a garden-variety bilateral investment treaty. In contrast, the Claimants' approach is to first accept that the text of the Treaty says what it says; second,

submit that the object and purpose of the NAFTA can be found in its preamble and in Article 102 rather than anywhere else; and, finally, that the plain and ordinary meaning of the text is reflected in the context of the Treaty of the Chapter as a whole.

In other words, we have two starkly different approaches to interpretation, both of which claim to be based on the customary international law rules of Treaty interpretation. Whereas the Claimants rely on the actual terms used in the context and in light of the object and purpose of the NAFTA, my friends have chosen to conjure up a series of novel concepts which they hope will obviate the plain and ordinary meaning of the text, and these include a "legal scrub" theory found in the Respondent's Memorial, an authenticity argument found in its Reply, and a habitual practice argument, also found in its Reply. My colleagues will be speaking to

13:09:25 these particular concepts in a moment, but first we turn to the anchor of our case: The Vienna Convention.

As so many international tribunals have confirmed, good faith interpretation is based on ascertaining the ordinary meaning of the terms in context and in light of the object and purpose of the Treaty. Our case is founded on the ordinary meaning of the terms in their context, and our case is founded and consonant with the explicit objective and purpose of the NAFTA. The Respondent say that we have no proof of the law that we argue today. They say, for example, we failed to take evidence from anybody who actually was involved in the drafting of the provisions at issue, but they missed the obvious. We

rely on the text of the Treaty.

Now, the object and purpose of the NAFTA. Whereas some treaties contained no explicit indication of the object and purpose, the NAFTA actually walks an opposite path. It provides us with a statement of those objects and purposes. For example, the NAFTA preamble.

I highlighted the most important passages. The Parties sought to ensure predictable framework for business planning and investment, to create an expanded secure market for goods and services produced in their territories. How else to interpret, then, Article 101 which states that this Treaty was intended by the Parties to establish a free trade area, a contiguous one?

13:10:58 We also note the explicitly stated objective of the NAFTA found in Article 102, promoting conditions of fair competition in the Free Trade Area, increasing substantially investment opportunities in the territories of the Parties, and creating effective procedures for the implementation of the NAFTA and resolution of the disputes. We have seen these goals mentioned in other NAFTA Tribunal proceedings.

Indeed, NAFTA goes far to provide that nondiscrimination in the rules of national treatment and most-favored-nation treatment, in addition to transparency, are rules and principles that must be used in interpreting these goals and, in turn, interpreting the NAFTA text.

In this light, we can therefore distill a cardinal element in the object and purpose of the NAFTA. It is about establishing a geographically contiguous free trade area within

which the rule of law governed by a principle of nondiscrimination is intended to reign.

Now, we submit that this case is one where the plain and ordinary meaning of the text is clear. There's a level of treatment promised for investments made in the territory of another NAFTA Party, and there is a level of treatment promised for investors operating in like circumstances anywhere in the Free Trade Area. As we will see in a moment, the twin-pronged approach I just described to you can be found, is reflected, is cemented in Articles 1101, 1102, and 1103, as well as the

13:12:33 architecture found in Article 1116. But, first, let's just be clear about the crux of the Treaty between the Parties.

My friends effectively said that the controversy between us is no less than the dispute over the very character of NAFTA Chapter Eleven and not just a disagreement over the terms and what they actually say. My friends say that Chapter Eleven is no more than a bilateral investment treaty transplanted into a Free Trade Agreement. No stop, no debate. Full stop. From that premise, they note how the object and purpose of your average bilateral investment treaty is not, of course, to promise fair competition throughout a contiguous free trade area, but only to protect foreign direct investment on the basis of a group of established norms, such as compensation for expropriation or the minimum standard of treatment.

Now, while that latter part about objectives of bilateral investment treaties may be true, we are not here to talk about the object and purpose of your average bilateral

investment treaty. We are here to talk about what Articles 1101, 1102, and 1116 actually say in context about protecting investors who have invested in the Free Trade Area that the three Parties established in 1994.

We are here to talk about how Chapter Eleven provides more than just the usual protections found in most bilateral investment treaties because the plain meaning of the text

13:14:07 indicates that Chapter Eleven is more than just your typical run-of-the-mill bilateral investment treaty. What you have in NAFTA Chapter Eleven, and understandably so given the political and negotiating history explained by my colleague, Dr. Alexandroff, is all of the normal Bilateral Investment Treaty protections that you would have for any investment made, "in the territory of the other NAFTA Party," plus one special principle designed to ensure fair competition throughout the Free Trade Area, and that principle obviously is nondiscrimination for all investors operating in like circumstances with other investors in that Free Trade Area.

Prohibiting this kind of discrimination is at the very heart of ensuring fair competition within a geographically contiguous area. The fair competition mentioned in the object and purpose of the NAFTA. It's what the leaders of the three governments spoke of when they concluded the agreement, and again, it's what's found in the preamble.

Turning now to the Treaty terms in their context, we submit that there is an elementary--an elemental asymmetry in the provisions we are about to talk about, whose meaning is plain and ordinary in the reading of that text.

First, we look at Article 1116. Article 1116 provides investors with the right to damages for any harm suffered as a result of measures imposed by a Party, regardless of whether those measures are related to investments in the territory of

13:15:41 another NAFTA Party or, as in this case, they are related to the investors of one Party seeking fair treatment vis-a-vis competing investors from other NAFTA Parties.

Again, you see nowhere in that text where the word "relates to an investment or investment in the territory" exists. It's a very broad provision that gives investors a right to claim money damages with regard to any breach in those provisions set out in (a) and (b).

Now, we turn to Article 1101 to explain those measures--I'm sorry, those obligations in question, and again, we see that the structure of Article 1101 reinforces the approach I have described effectively acting as a gateway for these two kinds of protection.

Now, like all international economic instruments, the scope provision focuses on and differentiates between types of government activity regulated by the Chapter, just like the goods provisions of the GATT regulate regulations affecting trade in goods, just like the GATT regulates regulations affecting services, this Chapter is about--sets out how measures are to be related to two classes of object, but it's the measures that are the subject of this scope provision.

The scope provision says, measures relating to investors are subject to the provisions of the Chapter, and it says that measures relating to investments in the territory of

25 another NAFTA Party are subject to the provisions of the

13:17:40 1 Chapter as well. In other words, the scope of the Chapter
2 applies to different types of measures. It doesn't, as so many
3 casual observers might say, apply to different types or modes
4 of investment. That's not just semantics. All international
5 agreements are about governments agreeing to abide by external
6 norms. Those norms are applied to government action, what
7 economic treaties would normally refer to as measures.
8 Now, Article 1101 specifies that there are two types
9 of measures that are covered by the Chapter: Those that relate
10 to investors and those that relate are to territorially
11 situated investments.
12 Alluding to the common law theory of tort, of
13 proximate cause, and the common law theory of contract privity,
14 the Methanex Tribunal explained its view of Article 1101's
15 text, and you can find that view at pages--I'm sorry, at
16 paragraphs 127 to 147 of its First Interim Award. And I should
17 mention that all of the--both the exhibits cited and the cases
18 cited in our oral presentation are in that binder for you.
19 The Tribunal in Methanex found that a measure relates
20 to a territorially situated investment when there exists a
21 "legally significant relationship or connection between the
22 measure and that investment." We submit the same is obviously
23 true for measures relating to investors under paragraph 1(a).
24 The legally significant connection exists under either portion
25 of this scope, whether it be (a) or (b), only when the measure

13:19:27 1 has a direct rather than merely incidental impact upon the
2 investor or the territorially situated investment, having
3 regarded the nature of the alleged breach.
4 Regardless of whether the measure relates to investors
5 or to the territorially situated investments, the remedy is the
6 same under Article 1116. Again, it is the investor who brings
7 the claim when measures breach a listed NAFTA obligation,
8 whether that be with relation to, a measure in relation to
9 investment, territorially situated or a measure related to
10 investors.
11 Now, NAFTA provisions, where a territorially situated
12 investment is the exclusive target of the obligation can be
13 found on the screen and in the pages before you. One example
14 is Article 1106. You see the highlighted text. So, the
15 relation of--if you think of the scope provision where it talks
16 to or relates to, we are talking about that direct impact. The
17 direct impact has to be on--of a measure--has to be on an
18 investment of an investor in the territory.
19 1109, same highlighted text: "The measure must
20 directly impact upon, must relate to, an investment in the
21 territory."
22 And 1110: "The alleged expropriatory government
23 action must relate to an investment of an investor in that
24 territory." All three very exclusive, the target is the
25 investment of an investor in the other territory.

13:21:34 1 I turn to Article 1105. You see that before you now

on the screen. Article 1105 provides another example of a NAFTA provision that governs measures that relate to territorially situated investments and only territorially situated investments. Now, unlike the other three provisions I just mentioned, Article 1105 does not include a territorial requirement itself, but it doesn't need to. As the three NAFTA Parties confirmed with their official interpretation on July 31, 2001, we submit that Article 1105 embodies no more and no less than the customary international law minimum standard of treatment for aliens. That's why there is no need to clarify in the text where the investment is to be located. It's the minimum standard. It must have to do with the treatment of investment in the territory of another NAFTA Party. The minimum standard is about foreign direct investment.

That's why it suffice to say that the obligation referred to investments because under Article 1101--and we will go back there for a second so you can see it--under 1101, the Chapter applies to measures relating to investments; i.e., in a significant legal relationship with investments when those investments are located in the territory of the other NAFTA Party. That's why 1105 has to be what I would refer to as a (b) claim, one that refers to the territorially situated investment.

13:23:17 Now, while under Article 1116, it is still the investor who brings a claim for breach of 1105, the type of claim it brings is what the Bayview Tribunal referred to in its, I think it was, actually footnote 105 of its award as an

1101(1)(b) claim because it was brought in relation to, in respect of, how a measure related to a territorially situated investment; in that case, an alleged investment--as opposed to an Article 1101(a) claim, which is made in respect of how a measure relates to, directly impacts upon an investor vis-a-vis other investors operating in like circumstances in the Free Trade Area.

So, to be clear, every claim under these provisions such as Article 1105 or 1110 must, by definition, be a (b) claim because the allegation is that there exists a significant legal relationship between a measure and one's territorially situated investment that has resulted in a breach and caused harm thereby.

The same approach applies equally to Article 1102(2) and Article 1103(2), which you see in front of you now.

Neither of these provisions mentioned where the investment must be located because if the measure relates to an existing or planned investment, Article 1101(1)(b) says it must be located in the territory of the other NAFTA Party, just like Article 1105. No need to say territorial because it's clear. Article 1101(1)(b) says that it's only measures that relate to

13:25:17 investments in the territory of the other NAFTA Party. So, when you have a provision regarding treatment of investments as opposed to investors, that's why it says that.

Now, in contrast, there is only one principle for which the NAFTA Parties are in agreement that they were willing to go further than your typical bilateral investment treaty. And that's national treatment and most-favored-nation

treatment; i.e., nondiscrimination for investors in like circumstances.

I now have you before you Articles 1102(1) and 1103(1). Shall accord to investors. We know that because of Article 1101, we are talking about measures that relate to investors. So, that must mean that have a direct--either a direct impact on or significant legal relationship with, whichever word you prefer, the investor. It's essentially a results-based allegation. One makes the claim that there has been a measure, and the measure has either done harm to my foreign direct investment or has done harm to me in the Free Trade Area. When I claim that it has done harm to me in thea free trade area, the NAFTA only gives me nondiscrimination as my breach. When I claim the harm is done to me because of something that's done to my foreign investment, NAFTA Chapter Eleven gives a range of breaches.

As you can see, these provisions work hand in glove with Article 1101 and 1116.

13:26:58 When you have made or you're intending to make an investment in another NAFTA Party's territory, we were promised all of the protections the Chapter has to offer, compensation for expropriation, freedom from performance requirements, customary international law minimum standard of treatment, nondiscrimination in a comparison of your investment and the competitors of another Party in the territory of the other Party.

When you have made or you're intending to make an investment in the Free Trade Area, you were promised only

nondiscrimination vis-a-vis investors operating in like circumstances in that Free Trade Area. In other words, as you see up here, we have (a) claims and we have (b) claims. Your (b) claims work just like any other bilateral investment treaty breach. Your (a) claim is unique to the NAFTA, which now leads me to obviously what I hope the Tribunal now sees is the crux of the case, the true meat of the case, which is can the investors prove that they are, indeed, in like circumstances with and, thereby, entitled to, the treatment they seek under the Article 1101(1)(a) and Article 1102(1)(a). I'm sorry, 1102(1).

Faced with the starkness of this language in context, my friends say that we are out to revolutionize the whole world of investor-State arbitration with this one case. In truth, my friends are delicately attempting to smuggle what I call the

13:28:47 "floodgates elephant" into the room. They say that years of bilateral investment treaty practice show how the language found in NAFTA Chapter Eleven can't be what it appears to be on the plain meaning, and they imply that if this Tribunal allows this case to proceed, the revolution will have begun. In fact, the Claimants do not make any claims about foreign direct investment or bilateral investment treaties, save and except for explaining how the NAFTA includes both (b) claims and (a) claims, thereby providing all the usual Bilateral Investment Treaty protections for foreign direct investment within the Free Trade Agreement and the universal prohibition against nondiscrimination amongst investors competing in like circumstances in the Free Trade Area.

So, therefore, the answer to my friends' implicit floodgates argument, apart from reminding them that there is no stare decisis in this case, is to remind them that it is for the Claimants to prove at the merits stage that they were sufficiently in like circumstances to be entitled to treatment no less favorable vis-a-vis the other investors in this cattle business in the Free Trade Area.

Now, as we noted at pages 126 to 132 of the Rejoinder, this is a case where the incredible likeness of circumstances calls for treatment no less favorable. Let's review some of them. They have the same retail customers. They have the same availability of slaughterhouses. They have the same supplies

13:30:29 of livestock and the same livestock, same basic inputs, same price mechanism, largely the same regulatory framework, the same auctions served by continental satellite feeds so that an investor in this market in London, Ontario, and one in Des Moines, Iowa, and one in North Battleford, Saskatchewan, are all able to bid on the same animal.

The same long-standing commitment from regulators to continue to move towards harmonization, and even the same contiguous geographic area.

Now, these scenes that I put before you, which can be found in the Rejoinder as well as in today's binder, could be either of Canada or the U.S. In fact, they're both. This is a shot looking Southwest from Alberta into Montana over the dividing line which you can see the slight fence posts. That's the 49th parallel, and this is a shot looking immediately on the 49th parallel looking west directly on the fence line, and

you see cattle grazing on both side of the fence. I submit to you that the animals have no idea what side of the fence they are on and what significance that may or may not hold.

Indeed, until May 20, 2003, the investors on both sides of the border had the same promise of fair treatment by the NAFTA governments for their participation in this integrated regional market; and, therefore, the same opportunity to grow and, more importantly, all Canadian and American cattlemen continue to enjoy then, as is now, the same

13:32:24 risk designation from the OIE, whose scientists, when they came over to investigate these instances of BSE, never spoke of a Canadian herd and an American herd, but, even back in 2003, they only saw and spoke of a single North American herd.

Now, just to finish up, earlier today, my friend, Mr. Bettauer, stressed that not everybody who trades in goods across the Parties' border should be entitled to make a claim for money damages, and we agree. Only Claimants who invested in building an integrated regional market within the Free Trade Area and who can prove that they are in like circumstances with other participants in that same integrated market could bring a claim, what we refer to as an (a) claim, under Article 1102(1). We are prepared to prove in a merits hearing that how these circumstances just described to you formed the foundation of the Claimants' expectations that they were competing in a regionally integrated market with their U.S. counterparts and, thereby, entitled to nondiscrimination within it.

In other words, the present case is that of a very rare breed. Indeed, the first of its kind, where deep regional

integration desired by the original NAFTA leaders was achieved in a particular industry, thanks in large part to the certainty and the fair dealing promised by the NAFTA Parties for investors willing to take them up on it, to invest themselves so heavily in the Free Trade Area created by Presidents and Prime Ministers of each Party.

13:34:12 And again, finally, I also need to thank Mr. Bettauer for his reference to my work published in the Columbia Law Review. However, while I'm gratified that my friends apparently read so much of my work, I must admit that the Columbia article written in 2004 didn't say anything about territorial requirements. Indeed, it was about substantive principles of interpretation in international economic law as between the WTO and investment treaties. I think what my friend meant to cite was a short case comment that I wrote in 1999 that appeared in the American Journal of International Arbitration about an award that I believe the Chairman might be familiar with. It was called Ethyl. And I would suggest that obviously a case comment that I wrote at the end of the last century about how the first ever (b) claim decided under the NAFTA really doesn't have anything to teach us about the very first (a) claim, which is now about to be decided under the NAFTA.

And unless there are any questions, I will turn back to Mr. Woods.

PRESIDENT BÖCKSTIEGEL: All right. Mr. Woods.

MR. WOODS: Thank you.

PRESIDENT BÖCKSTIEGEL: Don't run away.

MR. WOODS: He's still here, Mr. President. As you can see, my learned friend Grierson-Weiler does not sit on offenses.

106

13:36:03 I'm going to briefly address drafting history. One thing that should be clear at the outset is that we are talking about a drafting history. As you know, NAFTA Chapter Eleven has no travaux preparatoires in the true sense. Instead, there are 42 versions of the NAFTA Chapter Eleven negotiating text publicly available. Really poor second cousins to the actual travaux. From each text we can observe how the negotiating text changed as far as the goals, so again, it's the drafting history. There is no official travaux preparatoires.

My friend, Mr. Grierson-Weiler has put forward our case based on a simple premise that the text means what it says. Article 31(1) of the Vienna Convention sets up the general rule of treaty interpretation.

Under the Vienna Convention, it is clear that the drafting history comes into play when the application of the general rule fails. Under this approach, the drafting history of NAFTA and contemporaneous statements by the Parties can be used as aids to interpretation. This approach can only be used when the ordinary meaning leads to an absurd result.

As Mr. Grierson-Weiler has submitted, the plain reading of NAFTA Articles 1101 and 1102 do not result in an absurd--they do not lead us to an absurd result. Absurd, by the way, does not mean an interpretive result that is unpalatable to one of the disputing parties. It is our submission that recourse to Article 32 is not required in this

13:37:55 1 case, is not necessary. What we submit in any event, whether
2 it is interpreted using the ordinary meaning approach or a
3 secondary approach, Articles 1101 and 1102 mean the same.
4 While we say that recourse to the drafting history is
5 not called for, we have, in fact, shown in our submissions that
6 a review of the changes to the text actually support our
7 arguments. The changes happened during a detailed and, indeed,
8 exhaustive process of negotiation. As the agreement was
9 drafted, refined, and finally signed by the three Parties.
10 These complex negotiations ended with the result that
11 wholly supports our position. It points to a process or an
12 evolution that comes right back to the text that ends in the
13 form that Mr. Grierson-Weiler spoke to a minute ago.
14 The Respondent takes the contrary view. It invites
15 the Tribunal to read in the territory into Articles 1101(1) and
16 1102(1). We submit that that would be an absurd result.
17 The "legal scrub" theory. We don't plan to spend too
18 much time on the "legal scrub" theory. It has no basis in
19 international law. In the end, the text reflects the agreement
20 of the three contracted Parties, not what their lawyers said or
21 thought at the time. And in the end, the Respondent is faced
22 with a rolling text which fails to reflect its position. The
23 language of the so-called--the language of the so-called
24 scrubbers to whom the Respondent refers have no less than 20
25 opportunities, as you will see, to change the text of 1102(1)

13:39:44 1 from August 31 to April 23rd, 1993. That's August 31, 1992 to
2 April 23rd, 1993.
3 Let us look at the text of Articles 1101 or the
4 evolution of the text of Article 1101 and 1102, starting with
5 Article 1101.
6 The earliest version as you can see up on the screen
7 of Article 1101 appears as Article 2101 in the December 1991
8 text. As you can see, this Article sets out the scope and
9 coverage, and it focuses squarely on investments.
10 Article 2101 is qualified by Article 401 which
11 situates the obligations as a measure affecting investors with
12 respect to business enterprises in or into its territory.
13 At the May 1 drafting session, the language of Article
14 2101 was changed to include the concept of investments of the
15 investors in the territory of another Party. And then, as you
16 can see, by May 22, the language of the text is changed. There
17 are two separate components in the scope of this provision:
18 Investments and investors. The paragraph on investor
19 protection and a paragraph on investment protection.
20 In the lawyers' revision of August 22, the investors
21 of a Party is qualified by investments in the territory of
22 another Party. However, in the August 26th version, we are
23 simply left with investors of another Party. So, therefore,
24 the individual economic actors that my friend
25 Mr. Grierson-Weiler referred to are simply defined as investors

13:41:43 1 of another Party. The changes in the August 26th draft are of
2 great significance. We note that the draft departs from the

August 22 text, but the language of paragraph (b) pared down to simply investors of another Party. The territorial qualifier has been removed, and this is how Article 1101 will define the investors of a Party. Again, as individual economic actors and as they were intended to be by the drafters, receiving protection under the national treatment provision of Article 1101, 1102 in their own right as investors.

The final text confirms the parties' intent, and, therefore, we submit that Article 1101 should be read without the "in the territory" qualifier that our friends insist upon. The new language as of August 26 was not only agreed upon by all negotiating Parties, but in our submission was the actual language that reflected the intention of the Parties with respect to the scope and coverage of the Chapter on investment.

Now we should turn to--now let us turn to Article 1102. Again, the drafting history of Article 1102, the national treatment provision, turned in its territory, was present in some proposals of the earlier drafts. However, as we will show you, the term was removed from the language of the draft in the August 26 version and was never reintroduced. In the January 16th draft, the national treatment was set out as appears on the screen.

Compare this to the version put forward in the

13:43:40 February 21 draft. In this version we clearly see the proposal for territorial qualification, as it's underlined.

May 13th draft that Canada offered shows that Canada offered alternative language to the treatment of investment. "Each Party shall accord to investments--investments of

investors of another Party treatment no less favorable than that which it accords, in like circumstances, to investments of its own investors." We note the absence of the territorial qualification.

Now, May 22, the U.S. and Mexico adopted Canada's proposal.

I'm sorry, on August 22, the U.S. and Canada adopted this proposal. Other adjustments were made to the proposed text of the national treatment Article during the drafting sessions before the draft of August 26, where a major change was introduced. The territorial requirement for the investors was removed. The draft language of August 26 appears on the screen. Please note that words in the territory are absent.

Also note that changes occurred--also note the changes that occurred in paragraph 4(b), until August 22, the subparagraph contained the language indicating a territorial limitation, "required an investor of another Party by reason of its nationality, to sell or otherwise dispose of an investment in its territory."

Compare this draft to the draft of August 26, where

13:45:40 the language disappears.

Compare again the draft of August 30, the lawyers' revision, in which the lawyers and drafters put back in the territory of the Party, put back in the territory of the Party in language of subparagraph 4(b), but subparagraph (1) remained without the territorial qualification.

There were another 20 versions of the negotiating text generated from August 31, 1992, to April 23, 1993, but no more

changes were made to Article 1102(1), as it came to be. The rolling text of the Chapter thus demonstrates the removal of a territorial restriction from subparagraph (1) was deliberate. We reviewed the modifications and the language of the national treatment provision, and this emphasizes and demonstrates that the negotiators certainly entertained different options for the structure and content of the national treatment provision as well as the scope and application of the Chapter. Yet, they decided upon the relevant provisions in their present form. The August 26 change was obviously significant and no mere oversight.

In conclusion, we submit that the drafting history we have shown actually reinforces the arguments we have made about the plain meaning of the text.

PRESIDENT BÖCKSTIEGEL: All right.

MR. WOODS: I believe it's now the turn of Mr. Grierson-Weiler.

13:47:30 PRESIDENT BÖCKSTIEGEL: Mr. Grierson-Weiler.

It's nice in the afternoon session to have faces changing, which makes it more lively.

PROFESSOR GRIERSON-WEILER: More constitutional.

I'm going to spend about 10 minutes now on three cases relied upon most by my friends. I've put that up there for you, a little table that you may also to want jot down, but you also--I believe you have it in front of you. Tab 13, I'm told. I thought that might have been useful. Those are be the three cases I will be talking about this afternoon, and they're the three, of course, that we're have spoken the most about.

And it's clear that these cases answer the ques--sorry. It's clear none of these cases answer the question that the Parties have put before this Tribunal. That would be true even if there again was a rule of stare decisis that could somehow bind this Tribunal to previous decisions.

Gruslin is about somebody who invested in a mutual fund in Luxembourg and didn't do so well. That's because the fund's investment in Malaysia were devalued during the Asian currency crisis.

Now, unlike many bilateral investment treaties, including one in which I was involved as a Party-appointed arbitrator, the applicable Treaty does not in the Malaysia-Luxembourg case contemplate protection for indirect investments. It only covered direct investments. So, Gruslin,

13:49:20 who apparently didn't have any recourse to his mutual fund manager, tried to turn himself into a direct investor in Malaysia in order to fit himself into the protection offered by that particular Treaty. The Respondent in that case said that he had to have a direct investment in the territory of Malaysia, and it said that the investment had to have been approved under the language of that Treaty.

Now, as it turned out, the sole Arbitrator made no finding on the territoriality issue because the Respondent in that case asked him only it address the approval issue. And only then if necessary to move on. He found nonapproval issue, and you can find that at pages 496 to 497 of the Gruslin award.

Nonetheless, even if he had made a finding on the territoriality issue, the bottom line was that he was asked to

consider very different provisions in a very different Treaty. I draw your attention to the image on the screen there. "This agreement shall apply to investments made in the territory of either contracting Party in accordance with its legislation," et cetera, et cetera.

Well, there is a scope provision that very clearly specifies what is and isn't covered. It doesn't say anything about A, investors, that the relation of the measure be to their investors; and, B, that the measure be related to investments in the territory of the Party. It says what it says: Territoriality.

13:50:58 And again, the provision that Gruslin was going under, a combination, fairness, minimum standard provision, says within its territory.

This isn't surprising. This is a bilateral investment treaty. It protects foreign direct investment.

So, fact, though, is that the question of whether the Belgium-Luxembourg-Malaysia Bilateral Investment Treaty covers indirect cross-border investments is just not relevant to what we are here to talk about today.

My friends have also devoted much of their energies to the Myers and Bayview cases. There is also, however a--

PRESIDENT BÖCKSTIEGEL: The Myers case is not in your binder; right?

PROFESSOR GRIERSON-WEILER: It's not?

ARBITRATOR BACCHUS: We can't find it.

PRESIDENT BÖCKSTIEGEL: It has been submitted earlier, I'm quite aware.

MR. ALEXANDROFF: We understand it's Tab 11.

ARBITRATOR LOW: It's not in the index.

ARBITRATOR BACCHUS: Tab 11 in Bayview is 15; correct?

PRESIDENT BÖCKSTIEGEL: Yes, indeed, Tab 11.

Sorry. Go ahead.

PROFESSOR GRIERSON-WEILER: No problem.

There is a fundamental difference between those two cases and this one not mentioned by my friends. Both the Myers

13:52:10 and the Bayview cases concern (b) claims rather than (a) claims. In other words, in both of those cases investors were looking for damages arising from measures that related to the investments they claimed to have made in the territory of another NAFTA Party. Neither was styled as a claim for how the measures related to the investors themselves vis-a-vis comparable investors operating in like circumstances in the Free Trade Area. Indeed, as I mentioned earlier at note 105, the Bayview Tribunal took the time to mention that it was dealing only with a (b) claim. That's really simple. The Myers and Bayview cases were not (a) claims. Indeed, all of the other NAFTA cases brought thus far have been (b) claims, not even (a) claims. And to be clear, to our knowledge there is no such thing as an (a) claim mechanism in a bilateral investment treaty. That's why Gruslin could not possibly be relevant to the case at hand.

Now, a quick look at the facts of the Myers and the Bayview cases will demonstrate the point. Myers is a case in which I was counsel. Myers was about accessing a closed market for PCB waste destruction in Canada and in Canada alone.

Bayview was about water rights allegedly derived from a couple of old treaties between Mexico and the United States that would have obliged under the Claimants' theory the Government of Mexico to take steps in Mexico to ensure sufficient water flowed back into Texas for the Claimants' benefit. The Bayview

13:54:01 Claimants were very clear about it. They claimed that their investment in Mexico was the right to that water usage in Mexico.

It was only when the Bayview Tribunal indicated that it was not going to find in favor of them on this point that those Claimants clumsily pointed to both the language of Article 1102(1) and Article 1105 to allege they didn't need to have their so-called investment in Mexico after all.

In other words, I think the Respondent's only wish that it was the Bayview Claimants before them and not us because the Bayview Claimants simply said, oh, look, the word territory is not there. They didn't do this analysis. They just saw that the word territory wasn't in two provisions that they were claiming. They dropped the one that did have the word territory, and they said, oh, we can go ahead. There was no theory. There was no explanation. It just--they just said, oh, no territory words. We can go. That's not what we have here.

The difference between these cases and our case is that neither of those investors alleged that they were operating in like circumstances with competing investors throughout an integrated regional portion of the Free Trade Area, and that by virtue of these circumstances, they were

entitled to treatment no less favorable. The circumstances and the treatment completely interlinked as is the relationship

13:55:40 between that measure and that treatment. There was no integrated regional industry based upon an expectation of open borders and nondiscrimination in those two cases, as there is in this one. Indeed, the measure in Myers was designed to prevent access to a closed Canadian market involving an industry that was being regulated very differently by Canadians than it was by Americans. That was the whole nature of the Canadian defense.

And the Tribunal in Bayview made a point of stressing the differences in national regulatory treatment, and, therefore, the reasonable expectations of investors impacting on the investments that those Claimants claimed to have, but in Bayview, the Claimants did not point to other investors who were in a similarly like circumstance.

And, in Myers, the measure effectively nullified the benefits of Myers's investment in servicing that distinct Canadian market through an investment enterprise operating in Canada.

The measures alleged in Bayview did nothing to disturb--even if alleged to be true, did nothing to disturb an integrated regional market shared as between comparable investors. In Bayview, the Claimants made no serious attempt to explain how they as investors were competing in like circumstances with persons allegedly receiving better treatment in Mexico from Mexico.

13:57:20 Bayview, in a nutshell, was a failed expropriation case because the Claimants couldn't prove that they had rights to water in Mexico that they claimed existed, that the Bayview Tribunal would reject the Claimants' last-ditch effort to convert a (b) claim into an (a) claim was hardly a surprise, and it proves why the claim before you should proceed to the merits. We are not trying to convert a (b) claim into an (a) claim. We are not alleging expropriation or a failure to observe minimum standard. We are only asking for treatment no less favorable than our competitors have been receiving in an integrated North American market.

I have two final points about the Myers case. First, the Myers case is actually in one way very similar to this case, and it says a lot about the national treatment obligation both for (a) claims and for (b) claims. The Tribunal awarded damages to the Claimant in Myers because Canada had deprived its investment of fair access to the distinct Canadian market, typified by unique regulatory industry characteristics. Whereas Canada tried to argue that Myers's investment in its territory was actually not in like circumstances with other enterprises because final destruction of the PCBs in that case would take place in the U.S., the Tribunal saw this not on the supply side, but on the demand side of the market in finding liability.

Who were the customers and what was the business?

That's what the Tribunal did. The customers were the Canadian PCB waste holders, and the business was taking a problem away from them. It was competition and characteristics of market in question that to find a likeness of the circumstances between Myers's investment in Canada and the other territorially situated investments competing for the exact same customers. In this case, we similarly have a defined market with obvious customers with obvious business. Because it is an (a) claim, however, the comparison is between investors operating in like circumstances in an integrated regional market that crosses national borders within the Free Trade Area for which fair competition was promised by the NAFTA Parties as opposed to for an investment made in the other territory as compared to those territorially situated investments.

I would also mention, thinking about the Bayview case and a comment made earlier about their--their halfhearted attempts to make comparisons, what did they refer to? They referred to inputs for their farming operations, the water. Well, that's akin to what the Canadians did in the Myers case unsuccessfully, claiming that it was what you did with the PCBs. Oh, well you had to bring them back to the U.S. for final destruction? You're not in like circumstances. No, the Tribunal focused on who were the customers, what's the business. That's how you define the market. And that's what the Bayview people didn't do. And that's what we submit we

have tried to do.

The second point about Myers and the last point, as we noted at paragraph 57 of our Rejoinder, the Myers award

actually provides the only previous example of what happened when a government asked a Tribunal to read a territoriality requirement into NAFTA text where none existed. The circumstances were such that Myers succeeded in a (b) claim on the merits chaired by Professor Martin Hunter.

Now, the damages phase, Canada tried to restrict the Claimants' losses to those suffered specifically in respect of the investment in Canada to the exclusion of any losses that can be connected to the U.S., where the investor resided.

But let's look at Article 1116, and it's pretty easy to see why the Tribunal disagreed with Canada and would not read a territoriality requirement into the text. Had the territoriality requirement been there, the struck out portion, that's what it would have said. It didn't say that, and that's why Canada's argument to put territoriality where it didn't belong didn't work.

And again, unless there's questions immediately, I will turn it back over to Mr. Woods--to Mr. Dr. Alexandroff.

MR. ALEXANDROFF: I would ask you to refer again, then, to my slides, and it's the last portion of my slides starting at slide 27, which has on it--I will give you a moment to relocate yourselves--it has on the slide agreement of the

14:02:33 NAFTA Parties.

As you heard this morning by my friends and, of course, in their written materials, they have argued and made submissions that, in fact, all the NAFTA Parties agree with and have interpreted the Treaty provisions that are at issue in this dispute the same way, particularly with respect to the

territoriality argument that my colleague has been so fully examining in his presentations and submissions.

Let me begin with where that agreement might have resided. It could have resided for all the three NAFTA Parties, as we know, by way of the Free Trade Commission, which was established under Article 20. And further, and particularly, not only could they resolve disputes regarding interpretation set out in Article 20, but further they could impose under Article 1131(2) a statement of interpretation that would be binding on tribunals.

In the alternative, and not carrying any of the binding character that 1131(2) carries, they could have--all the Parties could have provided submissions to this Tribunal on interpretation under Article 1128. And, indeed, as you well know, the Tribunal did, in fact, ask for submissions with respect to the pleadings to the other NAFTA Parties.

But all the three NAFTA Parties have not agreed as to the meaning here. The Canadians have declined to provide an interpretation, as you know, asked by you with respect to a

14:05:06 submission by March 1st, 2007, as to the meaning, among other matters, of Article 1102(1), nor, might I add, did they provide a submission under 1128 with respect to the Bayview case.

So, the Canadian Government, at least with respect to an 1128 interpretation, has put in no provision which would argue for agreement of the Parties. Moreover, they have not provided an Article 1131(2) binding interpretation.

Now, as our friends point out, that's not mandatory, not obligatory. We simply point out that that instrument is

available to them, and that has not occurred in this case. So, neither has Canada provided an 1128 submission with respect to interpreting territoriality, nor has there been a Free Trade Commission interpretation with respect to the question of territoriality.

In fact, my friends' end up referencing for the notion of Canada's agreement with the Parties concerning the issue of territoriality related to two matters and, in fact, we have heard them before. If you look at slide 30, of course, they have raised Canada's agreement, presumably within the context of the S.D. Myers case, and as we have pointed out in particular in some detail, my colleague has pointed out, it is not the same kind of case. It is not an (a) claim, it is a (b) claim, and it regards investments.

So, there is no agreement.

The final comment is that our friends point to the

14:07:03 Statement of Implementation by Canada with respect to Canada's statement at the time and point particularly to a sentence by Canada which says Canada has also stated that investment agreements such as the NAFTA aim to protect the interests of Canadians abroad.

They have taken that and suggested that that shows what Canada's view on territoriality is and, further, that it is an agreement with the other NAFTA Parties. I will submit to you that, of course, that is not the case. We, in fact, agree that there is a protection, wide protection, of Canadian investors abroad. Where we differ is in suggesting that it does go to the protection here under this (a) claim with

respect to the North American Free Trade Area. There is no contradiction in that statement to the views we have set forth before you in our submissions to this point.

Finally, let me just make a brief reference to the so-called authentic interpretation. I would simply suggest that it does not relate to conduct at all. It appears to relate, in my friends' view, an expression by Parties of what a term is supposed to mean, and that rather than conduct the statements, and I might point out statements made in the context of litigation that somehow should be accepted as authentic interpretation and demanding adherence by the Tribunal, if that were the case, as we pointed out in our pleading, it would hardly be necessary for us to have this

14:09:00 hearing because the authoritative statements of the government position should govern with respect to the interpretation of the Treaty and of the particular dispute in front of you, and that clearly is not the case.

So, in conclusion, the so-called agreement of the Parties that had been expressed by my friends does not exist.

Unless there are further questions, I will hand off my submission to the next, to Mr. Woods.

PRESIDENT BÖCKSTIEGEL: Mr. Woods, please.

MR. WOODS: Mr. President, Members of the Tribunal, I'm going to briefly address the sovereignty issue and habitual practice, and then my friend Mr. Haigh will conclude our submissions.

The Respondent attempts indirectly, we submit, to invoke sovereignty as a defense to this claim in this

arbitration, and contends in its first submission the Claimants are seeking, "the benefit of the doubt with respect to the validity of this claim." The Claimants respectfully submit that the Respondent submission is untenable.

The Respondent appears to submit that it is immune by virtue of State sovereignty from the jurisdiction of this Tribunal in the present case because it has never consented to be sued for damages sustained by an investor whose investment is not in the territory of the United States. First, let me say that the Respondent has misinterpreted the Claimants'

14:11:04 position insofar as we are not seeking the benefit of the doubt from the Tribunal.

Secondly, the Respondent's reliance on sovereignty has been dismissed in prior Chapter Eleven arbitrations, such as the Ethyl Tribunal, where it was stated: "The erstwhile notion that in case of a doubt--in case of doubt on limitation of sovereignty must be construed restrictively," has long since been displaced by Article 31 and Article 32 of the Vienna Convention.

Commentators and tribunals have noted in similar contexts that the general rule of interpretation found in the Vienna Convention Article 31 constitutes a distinct move away from the doctrine of strict interpretation of Treaty provisions in deference to State sovereignty. In this regard, tribunals prefer to refer to the object and purpose of the specific treaties in concluding a more opposite approach to treaty interpretation, which is to resolve uncertainties as to favor protection of the covered investments and investors.

As Claimants assert, and as we assert in our written pleadings, the terms of NAFTA Articles 1101(a) and 1102(1) are clear. They entitle the Claimants to receive treatment no less favorable than that which the United States effectively provides to its own investors operating in like circumstances with the investors in what was once a thriving integrated cattle market within the North American Free Trade Area. It is

14:12:44 important to note that both theory and practice of international arbitrations has accepted that a State which has consented to arbitration and the arbitration agreement may not bend, revoke immunity from jurisdiction before an arbitral tribunal. The NAFTA and Chapter Eleven (b) in particular is a type of arbitration agreement in which the NAFTA parties have explicitly consented to the jurisdiction of the NAFTA Tribunal in question and in arbitrations between States and investors. Therefore, the NAFTA does not require the claims to demonstrate the Respondent's special consent to a NAFTA Chapter Eleven arbitration.

In other words, it is our submission that NAFTA incorporates the necessary consent for which the Respondent searches when it argues that the jurisdiction of the international courts and tribunals rests on the common consent of the disputing Parties. The NAFTA is a free trade and investment agreement in which Canada and the United States and Mexico expressed a common consent in question.

I would like to briefly address the issue of habitual practice.

The Respondent argues that it is well accepted that

when States intend to depart from habitual past practice, they express their intentions clearly. Common habitual past practice, there is no general rule of interpretation under which the Treaty terms can be ignored. The Vienna Convention

14:14:22 does not provide for optional rules of interpretation, and the Respondent should not then be able to rewrite treaty interpretations to suit its objectives. Respondent is not able to point to jurisprudence which actually supports this theory of common habitual past practice. As the Claimants have indicated in our Rejoinder, starting paragraph 31 of the Rejoinder, the jurisprudence presented by the Respondent simply does not support its position.

Respondent takes the position that the Claimants have brushed aside the entire history of investor-State arbitration, but what we remind you is that the Respondent is looking in the rearview mirror. They are trying to create a theory of common habitual past practice. And what we have demonstrated this morning and this afternoon is that there is nothing common or habitual about the NAFTA. There simply was and is no precedent in the body of investor-State arbitration that addresses the complex economic framework that is set out in the NAFTA. And that is why we say the past practice principles do not apply. There is no principle of past practice that can reasonably be used to read a territorial limitation into the text of Articles 1101(1) and 1102(1). The Respondent claims that the common habitual past practice requires the Claimants to demonstrate some explicit language in favor of construction also fails, and there are two points in that regard. First, as my friend

25 Grierson-Weiler has demonstrated, we've already pointed to the

14:16:05 1 ordinary meaning of the language of Articles 1101 and 1102 in
2 the context we have spoken to today. And secondly, we reject
3 entirely the assumption that the Claimants are put under any
4 special or specific burden to prove anything more than the
5 plain meaning and object and purpose of the NAFTA.
6 And the Respondent, as my friend, Mr. Grierson-Weiler,
7 the Respondent is wrong in claiming that we are proposing to
8 revolutionize investor-State arbitration. We are making no
9 grand claims about the relevant Articles of the NAFTA beyond
10 the present case. As we explained in the circumstances, this
11 case is unique. There is no revolution here. This is an
12 agreement. The NAFTA is an agreement that goes well beyond
13 simple bilateral investment treaty, and that is for certain.
14 And as we have already stated, the NAFTA is just not another
15 investment treaty. The Respondent's theory is simply not
16 applicable.
17 That's--those are my submissions.
18 PRESIDENT BÖCKSTIEGEL: Okay. Mr. Woods.
19 Mr. Haigh.
20 MR. HAIGH: Thank you, Mr. Chairman.
21 I wanted to say very quickly three simple things
22 distilled from the presentations that my colleagues have given
23 you. First of all, to paraphrase a child's book that's popular
24 among people in North America, in this case, the NAFTA Parties
25 said what they meant, and they meant what they said. What they

said is set out in Articles 1101 and 1102, and the language is clear. They didn't mean what they didn't say, and my friends for the Respondent Party want to have you read in in the territory of the Party where it doesn't appear.

Let's be very clear about certain facts that I suggest speak eloquently to how you should stay with the text and read it in its plain meaning. Under Article 1128, as was pointed out just shortly ago by Dr. Alexandroff, there is an opportunity for participation by a Party. Mexico has participated. Canada has not. Let there be no doubt about that. Canada has not made a submission under 1128.

Article 1131 provides for an interpretation by the Commission of a provision of this agreement which shall be binding on the Tribunal. There is no interpretation of the Commission with respect to this issue. Whatever anyone ever wants to attribute to any of the Parties in whatever fashion, however creatively, there is no Commission interpretation. It is up to the Tribunal to decide. So, those are things that haven't happened.

One other fact. When Mr. Woods was describing their drafting history, keeping in mind there were no travaux as such, there were 42 drafts. From August of '92 onwards, Article 1102 stood as it had been redrafted. There was no longer any territorial reference. 20 drafts is not an accident. 20 drafts is not an oversight. 20 drafts means what

it means. There is no territorial limitation under 1102(1).

If that was in any way in question, we have the additional fact that under 1102(4), they did come back and add in a territorial reference. It's not as if people were completely unmindful of the potential to add back in a territorial reference. It had happened previously in the drafting process, as Mr. Woods pointed out, and it happened under Article 1102(4). It did not happen in Article 1102(1). That is a very eloquent fact.

The second point that I would simply state, and I know you have heard this a number of times now, so I will try to say it as quickly and as simply as I can. The phrase "in like circumstances" in Article 1102 is a significant phrase. It goes to the very issue. As Professor Weiler pointed out in his submissions a short time ago, it goes to the very issue which is at the crux of this dispute, which is that the Parties to the NAFTA, having agreed to create a free trade area and having promised that they would allow competition to occur in a nondiscriminatory fashion, extended it specifically to those who are competing in like circumstances. They didn't say within the territory of the Party. They said in like circumstances. And that's the significance of the information that Dr. Alexandroff has been placing before you. What he has demonstrated through the statistical information and the drafts that he has placed before you is this was an integrated market.

14:22:19 These Claimants were competing in like circumstances to those others who were growing cattle in Canada and the United States.

And it is the opportunity for these Claimants to go to the merits hearing to show that what they say about these facts

is so that we ask at this time. They have been harmed by the measures that were taken, and it's shown by Mr. Woods in his description of those measures. Those measures did not affect competitors on each side of the international boundary in the same way. American beef producers were not affected adversely. They were helped. Canadian beef producers were adversely affected, and they ask for the opportunity to go to a merits hearing. They ask you to find affirmatively on the question that has been put to you.

Thank you.

PRESIDENT BÖCKSTIEGEL: Thank you. I understand that this completes the presentation by Respondent?

MR. HAIGH: Yes, it does.

PRESIDENT BÖCKSTIEGEL: Thank you very much. It is well within the three hours given to both Parties. I would suggest that we now have our usual break anyway, but we will use it as far as the Tribunal is concerned to sit together, compare the questions that we have, and then come back to you with the questions.

Depending on the question, we will leave an option to the Parties whether they want to answer right away, especially

14:24:00 if the questions are short and would be preferable probably to have answers right away, but if you think it's a question that you want to digest overnight and then include it in your second round presentation tomorrow, that's all right as well.

But it would be nice to make use of the afternoon as much as possible, I think, and this is a common concern.

ARBITRATOR BACCHUS: I would prefer answers right

away. You have been working on this for months and months and months, and I think you know the answers. I'm willing to let you write something. But don't be surprised if I expect to you answer my question.

PRESIDENT BÖCKSTIEGEL: Let me also at least, subject to what we hear from the Parties tomorrow, that we say so far we feel there is definitely no need for Posthearing Briefs. The case has been fully briefed in writing and extensively, I think, would be treated here orally, so, for the time being, we think there is no need for Posthearing Briefs. But I say we can rediscuss this matter. But I just thought I should mention it because it may have an impact on what you want to say.

All right? So, how long do we need? Half an hour?

ARBITRATOR LOW: I think half an hour would be good.

PRESIDENT BÖCKSTIEGEL: So, we will restart at 3:00. Okay. And if we don't come, don't run away. It just will take us a slightly bit longer.

(Off the record from 2:25 to 3:00 p.m.)

14:54:55 PRESIDENT BÖCKSTIEGEL: All right. We will resume the hearing.

We had a little deliberation and compared questions that we have--and, indeed, we do have a few questions--and we have decided that Ms. Low first will ask a number of questions, and then Mr. Bacchus and probably there will still be a few left, even though we noticed that somehow the questions are basically very similar. So, there will be some overlap, and it may help us later on.

The idea is, as we said before, that since everybody

is very well acquainted with the case by now that if somehow it's possible that you answer right away--now, sometimes the question is addressed to one of the Parties, but we are quite aware that, as soon as they have finished, the other Party may want to comment. So, basically all questions go to both Parties. On the other hand, in view of our efficiency here, we would be grateful if you try to be short and then not start a lecture, especially because there is no need to repeat things that we have read or heard today. I'm quite aware that you may want to refer to something and say, "Well, we read what we said there and that's it," and people do so because we will find it in the transcript. So, this is as it is to be where we go from here.

The idea is to finish around 5:00, if that's agreeable, no matter where we are at that stage. All right?

15:16:26 Ms. Low, please.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR LOW: Thank you, Mr. President.

As our President indicated, I will have some questions that I'm going to direct to both Parties. I have some questions that I will direct to one particular Party, based on their presentations today or their written submissions, but I would also welcome the comments of the other Party on those questions.

I'm going to start with the question for both Parties, and the question is this: Both Parties have talked about Article 1101, the scope and coverage provision of Chapter Eleven, and discussed in some detail subparagraphs (a) and (b)

of Article 1101. What I would like the Parties to comment on is that there is also a paragraph (c) of Article 1101, and between paragraphs (b) and (c) there is use of the conjunctive term "and." And so my question to the Parties is if you could comment particularly on the implications that you see, if any, of the use of the conjunctive "and" in Article 1101 with respect to your arguments about the meaning of Article 1101(1)(a) in particular.

And if you would like to think about this, that's fine; but, if you are prepared to address it now, that would be our preference.

PROFESSOR GRIERSON-WEILER: Do you have a preference

15:18:22 of who goes first?

ARBITRATOR LOW: Whoever is ready to go first.

PROFESSOR GRIERSON-WEILER: The use of the word "and" in 1101(1)(b), which is at the end of (b) and refers to (c), demonstrates that what the Parties were doing was basically establishing the scope of the Chapter in a way that says you have, as you heard me say many times, you have (a) claims and (b) claims; and, by the way, with regard to these particular breaches, it's even broader. It includes with respect to 1106 and 1104 all investments in the territory of the Party.

So, what it's basically doing is it's basically saying--and we have--it essentially is a question of what conjunctive--what the conjunctive nature of the "and" is, and I think what they're saying here is you can have this type of claim, this type of claim, and keep in mind this twist on the claim. So, that's why they use the "and" there.

PRESIDENT BÖCKSTIEGEL: All right.

MS. MENAKER: I think the use of the conjunctive in 1101 is important and is consistent with our interpretation because it is essentially defining the scope and coverage of the entirety of the Chapter; and, as we have explained, when the provision says that it applies to investors of a Party, it's saying it applies to investors and those investors that have investments in the territory of another Party. And for other reasons which I won't repeat, that's how we think that

15:20:01 the terms and context must be interpreted.

And the use of the conjunctive and between (b) and (c) adds further support to that in that these are not disjunctive elements, so to speak, but that they must be read altogether.

PRESIDENT BÖCKSTIEGEL: All right. Thank you.

ARBITRATOR LOW: Thank you.

I would like to ask the Claimants is if you could identify for this Tribunal any other treaties of any sort that specifically explicitly accomplish what you maintain Article 1101(a) accomplishes here namely gives the right to an investor that has not made, is not making, and does not seek to make an investment in the territory of another Treaty Party a right to claim for discriminatory measures that are imposed by another Party.

PROFESSOR GRIERSON-WEILER: There are essentially three types of treaties in this regard, three types of economic treaties. The first type would be the bilateral investment treaty or your average free trade agreements, whether that be multilateral or bilateral. And, on the other--you could

situate this on the spectrum. That's on the one side. On the other side, you have the European Union and everything that it has.

Now, what the NAFTA Parties essentially did is, they looked at the European Union which at that time was forming. They looked at the WTO, which was not yet together but was

15:21:53 again forming; and they said, "Well, we don't to want go as far as the European Union with these institutions that reinforce a deep level of integration, but we don't want to go to these bilateral and multilateral treaties alone as we did with the FTA and as we do with other bilateral investment treaties. We need to do something different." And what they decided to do was use rule of law and the self-help mechanism for the Claimants to essentially police a deeper level of integration.

So, I would say--and we would submit the answer to your question is--there is no other economic Treaty quite like the NAFTA. It is essentially a hybrid of or perhaps a halfway house between a common union set of agreements and your typical bilateral or multilateral trade or investment agreement.

The only instrument that I could think of that actually is now similar is recently the Canadian Provinces of British Columbia and Alberta have agreed to something that's loosely termed the "tilda," which is actually a trade and investment agreement between the two Provinces which allows investors in either Province to make claims to their own governments or to the Government of the other Party.

So, that is one model, but technically that is not a treaty. Canada is a very loose confederation, but we are still

one country.

MS. MENAKER: I would just respond that the short answer to your question, we submit, is no, that the Claimants

15:23:30 have not identified any other international treaty, whether it be a BIT or an FTA, that provides the type of coverage that they are urging that Article 1101(1)(a) provides. They have said clearly no BIT provides that type of coverage, nor have they identified any free trade agreement; and, in our written submissions, we pointed to the free trade agreements that the United States has entered into subsequently, after the NAFTA, and we have shown that none of those agreements could be interpreted in the manner that Claimants suggest. And they haven't argued that they do provide such coverage; in fact, they have called those free trade agreements "inhospitable."

ARBITRATOR LOW: Let me follow up on that question or those answers with the question that's directed initially at the Respondent, and I would like to hear the Respondent's views of what, if any, the legal import is of the inclusion of an investment chapter in a trade agreement. That is to say, what is--is it the position of the United States first that Chapter Eleven is no different than a BIT? And if it is--that is a stand-alone instrument, and if the position of the United States is that it is different, can you explain what additive elements Chapter Eleven acquires by virtue of being part of a free trade agreement.

MS. MENAKER: Now, in our submission, Chapter Eleven performs the same function as a bilateral investment treaty, although it is contained within a larger free trade agreement,

15:25:14 1 but that does not change the essential structure or content of
2 the obligations that are contained within the Chapter.
3 And, indeed, if you look at some of the free trade
4 agreements that the United States has entered into--and I need
5 to doublecheck this, but I believe it's with Jordan, for
6 instance, we have a free trade agreement, there is no
7 investment chapter in there because we had a prior BIT with
8 Jordan. So, there was no need, unless for some reason we
9 wanted to update it in some sense and have it superseded by a
10 free trade agreement with the investment chapter, but our BIT
11 was fine, so we did not do that.
12 Here, we did not have a prior BIT with either Mexico
13 or Canada; and, when you are negotiating a comprehensive free
14 trade agreement, it made sense to put the investment
15 protections in the NAFTA itself. The prior Free Trade
16 Agreement that we had with Canada, you might know, has an
17 investment chapter but did not provide for investor-State
18 arbitration. So, in that respect, NAFTA Chapter Eleven went
19 further and was different in this regard, and we had no prior
20 BIT with Mexico.
21 PRESIDENT BÖCKSTIEGEL: Any comments from the other
22 side?
23 PROFESSOR GRIERSON-WEILER: Yes.
24 I have heard mention of the Jordan FTA. I think of
25 the CAFTA that comes to mind. I think of the U.S.-Australia

15:26:42 1 trade agreement. CAFTA has an investment chapter, Jordan
2 doesn't, U.S.-Australia doesn't, and there is no bilateral
3 investment treaty between the U.S. and Australia. The NAFTA
4 has a special investment chapter. All that tells us, we
5 believe, is different courses for different horses. The fact
6 that there is different practice in different treaties doesn't
7 mean anything. The text says what it says.
8 I would also correct, with the greatest of respect to
9 my friend, the Canada-U.S. Free Trade Agreement did have an
10 investment chapter. It did not have the typical mechanisms of
11 a bilateral investment treaty with regard to arbitration, but
12 it did have an investment chapter--
13 ARBITRATOR LOW: I think that's what counsel said.
14 PROFESSOR GRIERSON-WEILER: I wanted to make sure.
15 They obviously just went a bit further with NAFTA than they
16 were prepared to go with the U.S.-Canada Free Trade Agreement.
17 So, again, different time, different place, different economic
18 integration goals.
19 MS. MENAKER: If I may just note, I believe counsel
20 said that the U.S.-Australia FTA doesn't have an investment
21 chapter. That agreement does, indeed, have an investment
22 chapter. It just doesn't contain investor-State arbitration
23 mechanism within the investment chapter.
24 PROFESSOR GRIERSON-WEILER: I sit corrected.
25 PRESIDENT BÖCKSTIEGEL: Okay.

15:27:57 1 ARBITRATOR LOW: Let me follow up with a question
2 directed initially at the claimants, and this is in the same

vein as my previous question to you.

Can you point this Tribunal to any contemporaneous evidence apart from the Treaty text, any statement of a publicist, any statement of a NAFTA government, any evidence that's contemporaneous with the adoption and entry into force of the NAFTA that would support the Treaty interpretation that you are urging on this Tribunal?

PROFESSOR GRIERSON-WEILER: I think those submissions fell under Dr. Alexandroff's purview; so, if you would, he could answer that.

MR. ALEXANDROFF: We did point, and it wasn't exactly contemporaneous, but it was certainly there in some form at the time, which was Michael Hart. We did in our Rejoinder identify his statements and, in fact, included statements by Simon Reisman, who was, in fact, the head of what was called the TNO, the Trade Negotiator's Office, back in the period of the negotiations with the FTA. And they were certainly talking about certainly Simon Reisman as interpreted by Hart, who was involved in the agreement, certainly did make reference to the fact that they were willing to make certain concessions in order to achieve deep integration with the United States because, obviously, the FTA includes the decision at midnight that he wrote. Again, it was not contemporaneous, and he

15:29:44 writes it later and back on the negotiation.

ARBITRATOR LOW: Could you give us those specific references, Counsel.

MR. ALEXANDROFF: Certainly.

PRESIDENT BÖCKSTIEGEL: You don't have to do it now.

You could do it tomorrow.

MS. MENAKER: In fact, we found that reference; and, with all due respect, we don't think that says any such thing. It's on page 29 of Claimants' Rejoinder, paragraph 105.

It says--well, I won't read the entire thing--it's a block quote of three paragraphs--but, in our submission, there is nothing in that language that suggests that this person held the view that the NAFTA somehow accorded treatment to investors that had not established, and do not seek to establish, an investment in the territory of another NAFTA Party. And, as counsel indicated, this was not even written contemporaneously with the NAFTA. But we have pointed to multiple authorities, whether they be government authorities submissions that were made to the respective parliaments and congresses about the agreement itself as well as government agency documents that they issued contemporaneously with the NAFTA such as that issued by the USTR, as well as a multitude of secondary sources by academics and practitioners, none of whom have expressed the view that the NAFTA somehow created this new revolutionary agreement that granted these expansive rights to purported

15:31:28 investors that were not making any foreign investments.

And, indeed, it is our submission that it would be truly extraordinarily had the NAFTA have done such a thing or for no one to have noticed and no one to have commented on it.

MR. ALEXANDROFF: Might I just add--I will go back to the quote as well because it's on page 29 and it does reflects, I think, the thinking of Simon Reisman, who was the chief trade negotiator, at the time and it says there in the first

paragraph, he wanted to establish national treatment as a norm for removal of 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 U.S. priorities of investment and intellectual property.

That is exactly what I think Mr. Weiler or Dr. Weiler has argued with respect to the extensive view of what nondiscrimination meant in the agreement; and, of course, that relates to 1101(a), and it relates to 1102(1) or 1102.

PROFESSOR GRIERSON-WEILER: I would also state quickly in response to my friend that is what is expansive or revolutionary is probably something which is best in the eye of the beholder. None of the contemporary or secondary sources cited by the Respondent actually addressed themselves negatively to the submissions here. Really, they're not on point.

15:32:54 I would finally note that, unlike in Gruslin where the Respondent did trot out witness statements from negotiators, we don't have any here. Neither Party has those here. What we have here is the text, the Treaty text, and we have the political context set out and argued between the Parties.

MS. MENAKER: Just very briefly on that point, it is quite the norm that government officials state what the Treaty does and what it says. It would be somewhat unusual for them to then trot out all of the things that it does not do. I mean, unless someone was coming forward with an interpretation that suggested that the Treaty did something quite out of the

ordinary and they were actually rebutting that, the fact that all of the contemporaneous sources say this treaty's investment chapter protects investments that are made in another NAFTA Party and the investors who make those investments, that, in our view, is dispositive of what those drafters and those government officials thought the entirety of what the entire chapter did.

And with respect to this quote from Mr. Hart in the Rejoinder, I would just say that first it is somewhat aspirational--in fact, he is saying what he is authorized to negotiate--but, in the end, he is just saying that if we are able to achieve a national treatment for virtually all goods and services, he's authorized to extend the principle of nondiscrimination to investment and intellectual property.

15:34:28 And, indeed, that's what the Parties did: They have an investment chapter that contains a nondiscrimination, a national-treatment provision. That says nothing about extending that to investors who don't make investments in another NAFTA Party.

PRESIDENT BÖCKSTIEGEL: I think the positions are quite clear now, okay?

Ms. Low, please.

ARBITRATOR LOW: Thank you.

I would like to follow up and direct this question initially to the Respondent.

The claimants have taken us through a fairly detailed textual analysis of a number of provisions of Chapter Eleven, arguing that one territorial requirements were indicated, they

were explicitly included, that particularly focusing on not only the structure of 1101 and 1102, but also on 1106, 1109, and 1110, and I would like to hear the Respondent's views on that argument specifically with regard to 1106 and 1109 and 1110.

MS. MENAKER: As an initial matter, I would just note that there is no single one correct way to draft a treaty or draft a treaty provision; and, of course, Treaty provisions may be drafted in any number of ways that would still lead to the same interpretation.

Now, in this case here, if you take Article 1110, for

15:36:01 instance, that Article provides "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory," et cetera. So, that does have the words "in its territory." If those words were not there, I don't think that anyone would suggest--and Claimants certainly have not argued--that that Article could be read to suggest that a NAFTA Party is--has an obligation not to expropriate investments in another Party's territory. And, in fact, they have said that those words, in essence, are surplusage because, when you look at Article 1101(1)(b), it only--the Chapter only relates to measures that are adopted by a Party that relate to investments of investors of another Party in its territory.

So, indeed, it would be unnecessary to include that word there, that phrase, but they have done it anyway. Why they chose to include it some places and not others, you know, we can't know for certain, but there it would have no different

effect if the term was there or not; and, we submit, in Article 1102(1), similarly it has no different effect if the term is there or if it is not.

Another example is Article 1105 which quite curiously counsel today argued that the reason why you didn't need the "in the territory" language was somehow because of the FTC's interpretation, if I understood them correctly. Now, there again, they said the FTC interpretation made it clear that

15:37:40 Article 1105's obligation was an obligation to accord minimum standard of treatment in accordance with customary international law. Now, that's the interpretation that we, along with the other two NAFTA Parties, have always submitted is clear from the context of the Article, even without the FTC's interpretation.

So, there, the context, the obligation is clear, and yet we also never had the words "in the territory;" and yet no one is suggesting there that the treatment that had to be accorded to investments had to be accorded to investments outside the territory.

We think another example that we have given both in our written submissions--I can't remember if I heard it referred to today--is Article 1102(4), where it says "for greater certainty," and it has examples of the national-treatment obligation, and there it does have the phrase "in the territory."

And when counsel today was going through these different rolling drafts, he showed you that at one stage the "in the territory" language was there in Article 1102(4). A

little while later it was taken out. A few days after that it was put back in.

Now, we submit the provision would and should be interpreted no differently whether the phrase is in or is out, and that is just an example provided for greater certainty.

15:39:03 And to accept Claimants' submission would be to reach the conclusion that the NAFTA Parties were actually made a conscious decision to, when they took that phrase out, to actually drastically expand the scope of the national-treatment provision; and then, a couple of days later, when they put it back in that they somehow decided, "Oh, no, we want to narrow the scope of the national-treatment provision," but there is simply no evidence on which to base such a conclusion. In our view, it just further supports the contention that in many of these places the addition of the language is unnecessary; and, when it is there, it's extra; it's surplusage.

PROFESSOR GRIERSON-WEILER: You have most of our arguments both orally and in writing on this point. We will only add that with respect to Article 1102(4), yes, indeed, counsel did mention it because I have it in my notes. It's a clarification provision. Obviously, the point of a clarification provision is to focus on the (b) kind of claim, and the fact that it's meant to deal with foreign direct investment (b) claims.

So, given that it's a clarification provision, it makes perfect sense that they would have taken out the territoriality requirement, thought better of it and thought, "No, what we're trying to do here is clarify a (b) claim, so we

better just put that back in," and they did. It makes perfect sense. And, unfortunately for the Tribunal, we also think

15:40:36 Article 1102(4) supports our argument.

MS. MENAKER: May I just add very shortly on that, Claimants are suggesting that Article 1102(4) is what they call a so-called (b) claim. But, if you look at it there, it says no Party may impose on an investor. So, it's treatment of an investor, just like 1102(1) is treatment of an investor. That would be a so-called (a) claim because it deals with a measure that relates to an investor, not to a measure that relates to an investment of an investor.

So, I think that the argument that you just heard doesn't hold water.

PROFESSOR GRIERSON-WEILER: (b) claims have to do with investors making a foreign direct investment, so it makes perfect sense that they would refer to investors in the process of making their (b) claim investment, the foreign direct investment.

Again, there is no problem with that.

PRESIDENT BÖCKSTIEGEL: May I just ask, Ms. Low, as you may recall, also mentioned 1106 and 1109. I understand the general comment you make, and that refers to those two as well, but do you have anything specific regarding those two Articles?

MS. MENAKER: I don't have anything to add from what I already said, but I will think about it overnight and look at those two.

PRESIDENT BÖCKSTIEGEL: That's fine. Thank you very

much.

ARBITRATOR LOW: I will direct the next question to Claimant, and perhaps as we have been talking about your so-called (a) and (b) claims, this is the right time to raise this question, but the Article 31 of the Vienna Convention on the Law of Treaties says we should look at the context of the Treaty, and you focused on certain aspects of the context. I would like to focus on some additional aspects of the context in some of the questions I'm going to ask.

One of them is to ask you to discuss a provision which you haven't mentioned in Chapter Eleven itself, and that is Article 1117; because, as I have understood it, Article 1116 deals with one type of claims; Article 1117 deals with another type of claims. And I would like to hear comments of the Claimants on Article 1117 and the contextual light that it sheds, if any, on your position.

PROFESSOR GRIERSON-WEILER: Article 1117 authorizes a particular type of (b) claim that some would argue in customary international law could not otherwise be brought because the mode of informed direct investment in that case would be an enterprise of the other Party, and some argued in customary international law that an enterprise of a Party cannot bring a claim against that same Party; therefore, 1117 has been added, and it refers to (b) claims.

PRESIDENT BÖCKSTIEGEL: Any additional comment from

15:44:05 1 Respondent's side on that?
2 MS. MENAKER: Only that when Claimant here is again
3 saying this refers to so-called (b) claims, it is accepting the
4 fact that when an investor brings a claim on behalf of an
5 enterprise, that the enterprise itself must be located in the
6 territory of the other Party because the measure must have
7 related to an investment of an investor of another Party under
8 Article 1101(1)(b).
9 And yet, that language or that so-called "restriction"
10 is not contained in the language in 1117. They are drawing
11 that from the context, recognizing that the only investments
12 that are covered or are accorded any protection under the
13 Chapter are those in the territory of the other Party. So,
14 therefore, there is no valid reason for the doing the same
15 thing if you are looking at 1116, which similarly, when they
16 showed it on the screen, they said, "There was nothing in
17 there, there is no territorial restriction in the language."
18 But, similarly, when you look at the fact that an investor is
19 bringing its claim on its own behalf and you look at that in
20 light of both the rest of 1101 which contains 1101(1)(b) and
21 the substantive protections. If you look at the substantive
22 protections, the only protections that are accorded to
23 investors are those that are afforded to investors with respect
24 to their investments, and that must be read in light of the
25 remainder of Article 1101, which includes 1101(1)(b).

15:45:40 1 PROFESSOR GRIERSON-WEILER: Article 1117 refers to
2 investments, a particular type of investment and enterprise,
3 such defined at the end of the Chapter at Article 1138.

Again, it's a foreign direct investment protection. Article 1116, by contrast, has to handle (b) claims and (a) claims; therefore, it doesn't have a territorial restriction.

PRESIDENT BÖCKSTIEGEL: Very well.

Ms. Low?

ARBITRATOR LOW: Thank you.

I would like to ask both Parties to comment on the relevance of Article 1112 applied to the issues in this case, and I have in mind not only in asking this question the provisions of paragraph one of Article 1112, which subordinates the provisions of Chapter Eleven to other Chapters of the NAFTA in the event of inconsistency, but also the provisions of paragraph two of Article 1112, which address aspects of scope and coverage in the context of the cross-border provision of services.

So, whoever wants to--

PROFESSOR GRIERSON-WEILER: I keep going first, but I should let Andrea go first.

PRESIDENT BÖCKSTIEGEL: Ms. Menaker.

MS. MENAKER: I think both portions of that Article are relevant for this issue. And I will start in the reverse order.

15:47:16 When you look at subparagraph two, it states that, if a Party imposes on a service provider of another Party a requirement to post a bond or financial security as a condition of providing the service into the other territory, that does not in and of itself make this Chapter applicable. So, that shows that the investment chapter wasn't meant to cover service

providers; and, if it's not covering a service provider, it certainly isn't going to cover a provider of a good from another territory, from another Party; that those who simply are trading in goods or services are not necessarily investors, I mean, unless they have had established or seek to establish the investment in another territory. And simply providing a cross-border service and having a financial security obligation imposed on you doesn't even necessarily make you subject to the investment chapter.

I think that's further evidence of the fact that the parties--

PRESIDENT BÖCKSTIEGEL: Have you finished what you wanted to say?

ARBITRATOR BACCHUS: You lost me. I am a little slow.

How did you make the leap from services to goods there?

MS. MENAKER: In an--I don't want to go too far afield, but in many respects when you have a service provider, one can argue that it comes closer to the line of actually

15:48:52 becoming or achieving an investment or an actual presence in the territory of another Party as opposed to when you have a cross-border sale of goods. And if you look in Article 1139, for example, under the definition of investment, it explicitly under (h), says that an investment does not mean claims to money that arise solely from commercial contracts for the sale of goods or services by a national of an enterprise in the territory of a Party--to an enterprise in the territory of another Party.

So I think it's quite clear that if you were simply having a cross-border sale of goods, that that is not what the Parties--within the scope of the definition of an investment, and within the scope of the Chapter, but I think for the purposes of the point that I was making with 1112(1), I don't really need to differentiate between service providers and good providers.

ARBITRATOR BACCHUS: Thank you. That's very helpful.

MS. MENAKER: But the point being there just that that--even an obligation to post financial security would not necessarily make that provider subject to Chapter Eleven.

The first paragraph of Article 1112, we submit, is also relevant to this inquiry, and that is because we have referred to earlier Chapter Seven in this proceeding. And Chapter Seven, as you will see, calls agriculture and sanitary and phytosanitary measures. And in this case the measure at

15:50:33 issue is a sanitary or phytosanitary measure.

And if you look at Article 710--oh, excuse me, it's Article 710, relation to other Chapters. It says Article 301, National Treatment and Article 309, Import and Export Restrictions and the provisions of Article 20(b) of the GATT as incorporated into Article 2101(1), General Exceptions, do not apply to any sanitary or phytosanitary measure.

So, here, what the Parties were saying is that although under Chapter 20 a State can bring a claim, a State-to-State claim against any other Party regarding the interpretation of any Article of the NAFTA itself, they were even saying when it came to phytosanitary and sanitary measures

that the national treatment provision for goods does not apply.

And what Claimants are doing here is they are seeking to bring a claim under Chapter Eleven for national treatment as it relates to a sanitary or phytosanitary measure. And, in this respect, I think that Article 1112(1) is important because it says in the event of any inconsistency between the Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency. And this forms a further part of the context in which the Tribunal should interpret the provisions of the agreement in that accepting jurisdiction over Claimants' claims could result in an inconsistency where the Tribunal would be applying a national treatment provision to certain measures when the State Parties themselves explicitly

15:52:28 provided that the national treatment provision would not apply.

And there is a mirror provision in Chapter Seven that mirrors the provision of Article 1112(1), and that's the first provision in Chapter Seven, Article 701, Scope and Coverage, subparagraph (2), which states, "In the event of inconsistency between this section and another provision of this agreement, this section shall prevail to the extent of the inconsistency."

So that's a mirror provision of Article 1112 again saying that Chapter Seven trumps, so to speak, Chapter Eleven.

And the final thing that I would just note on this point is I would direct the Tribunal's attention to the UPS decision against Canada in its preliminary decision on jurisdiction, and there, at paragraph 61, the--what was at issue there was the Claimants were trying to bring an investor-State claim for something that was specifically carved

out of State-toState arbitration, and the Tribunal stated that, "The NAFTA authorizes a broader scope for State-toState arbitration than for investor-State and nowhere confers express authorization to bring claims respecting Article 1501, which was the article at issue in that case under investor-State proceedings. The natural inference, then, would be that there is no such jurisdiction, and that was submitted as the case hereto; that when you look at these provisions in context, the very fact that the NAFTA Parties said quite explicitly in Chapter Seven that they were not going to accord national

15:54:06 treatment when sanitary or phytosanitary measures were concerned, and then you have both an underride and an override provision in Chapter Seven and Eleven, respectively, is further context and further support that this Tribunal should not take jurisdiction over a national treatment claim made under Chapter Eleven.

ARBITRATOR LOW: I would like to hear from Claimant on this, but I would just like to clarify something that counsel for Respondent has just discussed with regard to Article 710.

Is it the United States' position--I don't see any reference in Article 710 to the national treatment provision of Chapter Eleven. Is it your contention that Article 710 applies, nonetheless, to Chapter Eleven, that there can be no national treatment violations under Chapter Eleven with respect to sanitary and phytosanitary measures?

MS. MENAKER: We are saying in this context where you are talking about a sanitary or phytosanitary measure that is applied in the context of agricultural trade and the NAFTA

Parties had explicitly provided that the NAFTA--that the national treatment provision for goods does not apply. In that case, then, when you read the provisions of Chapter Eleven in context, it would not make sense to allow that claim to go forward under Chapter Eleven. It's somewhat--you know, I'm not making a broad statement that if you had a true investment claim in a sanitary or phytosanitary measure, you could reach a

15:55:58 different result. But here, because this pertains precisely to--their claim pertains precisely to trade in agricultural goods, it does fall under Chapter Seven, as Claimants themselves concede in their written submissions.

I don't know if that answers your question.

ARBITRATOR BACCHUS: No.

MR. BETTAUER: Andrea is saying that there's a--I mean, there is a separate national treatment provision in Article 301.

ARBITRATOR LOW: Right.

MR. BETTAUER: We are not saying that the 710 explicitly deals with Chapter Eleven provisions. We are saying that it would make little sense to say that the NAFTA Parties agreed that the 301 national treatment didn't measure--didn't apply, and then to bring in by the back door the Chapter 11 national treatment provision where there is no investment because what we have here is a measure that's the kind of measure defined as a sanitary or phytosanitary measure, and it fits squarely in the definition of Article 724. That's what we are saying. It helps form the context.

ARBITRATOR LOW: Okay.

PRESIDENT BÖCKSTIEGEL: Did you have an additional question on this?

ARBITRATOR BACCHUS: I will refrain.

PRESIDENT BÖCKSTIEGEL: Okay.

15:57:31 ARBITRATOR BACCHUS: I will ask you tomorrow.

PROFESSOR GRIERSON-WEILER: There are a number of points there. I'll see if I can--this may sound more free flow than directed in response to your question, but I'm going to try to play off of my friend's comments in response.

First would be that UPS is about conduct of State enterprises where the right to establish a monopoly is guaranteed in Chapter XV, so we would submit it's just not relevant in this case.

Further significant what State Parties may say about their own disputes says very little about what they may have provided for investment disputes. For example, my colleagues in another case involving Softwood Lumber were very vehement that they believed that their antidumping measures, what they construed as antidumping measures could in no way give rise to a Chapter Eleven case, and yet the Tribunal found that the Byrd Amendment--I will leave it to the two party Claimants to explain as necessary to the President--the Byrd Amendment, indeed, could be the subject--

ARBITRATOR BACCHUS: I'm not free to comment on the Byrd Amendment.

PRESIDENT BÖCKSTIEGEL: Neither am I.

ARBITRATOR BACCHUS: Lucinda will explain it.

PROFESSOR GRIERSON-WEILER: The Byrd Amendment was

25 indeed--would have been, indeed, subject to a Chapter Eleven

15:58:44 1 claim, even though the parties obviously had decided otherwise.
2 With regard to Article 1112(1), we would certainly
3 agree that it subordinates the Chapter to other provisions in
4 the event of inconsistency, the key word there being
5 inconsistency. And in international law, proving an
6 inconsistency is very difficult to do. It means that one
7 Treaty provision says go west and the other says go east, and
8 that may be a bad example because even then it meets. A better
9 example might be better black or white. Inconsistency is very
10 difficult.
11 This was the subject of the earliest NAFTA cases. It
12 was actually, if I recall correctly, the form of it was framed
13 as a jurisdictional objection in the Ethyl case. You would
14 have perhaps, Mr. Chairman, heard more of that had the case not
15 settled, but instead that played out in the Pope and Myers
16 cases in both of which I had the privilege to have a play in.
17 And in both of those cases the sum result was that the
18 Tribunals agreed that measures aimed at goods can still
19 directly impact upon investments in the territory of another
20 NAFTA Party, and I say that because both are dealing with (b)
21 claims. In that way these two tribunals very much follow the
22 lead of the Appellate Body in its decisions in cases such as
23 Canada Autos, where in the Autopack case where the Appellate
24 Body was given similar arguments about watertight compartment,
25 and the conclusion was no.

16:00:15 1 It's really got to do again with what I said earlier
2 about whether you say that the Treaty applies to a good, a
3 service, or investment or rather does the Treaty apply to a
4 measure affecting goods, a measure affecting service or
5 affecting investment. The reason that the Appellate Body, I
6 would submit, in that case and the Myers and Pope tribunals in
7 their cases did what they did is because they recognized it was
8 about how the measure was impacting upon a certain object. As
9 Chapter Eleven Tribunals, they could only look at how it
10 impacted upon the investment in terms of a (b) claim. With
11 regard to the Appellate Body and the WTO panels, they don't
12 have quite the same restriction. If they decide that something
13 affects more than one type of measure like more than one type
14 of measure is affected by an obligation, well, then they can
15 choose which one they want to do first. If I recall correctly,
16 they have some rules about how they do that.
17 So, 1112(1) doesn't come into play here simply because
18 there is no inconsistency, so it's that simple.
19 With regard to 1139, I heard it mentioned, actually, I
20 thought--I think it was 1138. I guess I'm wrong. The
21 investment chapter's definitions.
22 ARBITRATOR BACCHUS: 39.
23 PROFESSOR GRIERSON-WEILER: For some reason I want to
24 think about 38.
25 ARBITRATOR BACCHUS: You were right about Canada

16:01:42 1 Autos.

PROFESSOR GRIERSON-WEILER: With respect to 1139, one-off claims to money or even multiple claims to money, we would agree that if someone has a very, very large contract to sell widgets from Mexico into the United States and somehow that's frustrated, that large contract is frustrated, that in and of itself would not give rise to, as my colleagues refer to it, a money claim for damages simply because it shouldn't fit into the nature of an (a) claim under either Article 1102(1) or 1103(1). There wouldn't be any proof of like circumstances in an integrated market. That's why that kind of claim would fail.

Finally, with regard to 1112(2), again, it's the difference between, if I heard my friend correctly saying, this proves that the investment--if the investment chapter says this but it doesn't apply to service providers, well, then, it certainly doesn't apply to investors, if I'm paraphrasing correctly.

Well, once again, the Chapter isn't about applying to investors or service providers. It applies to measures. And that particular provision refers to a particular type of measure, a bond requirement, and it's saying that specifically with regard to that kind of measure, this is the way the Parties want to go. It says nothing about any broader context than that.

16:03:13 I think those were all the submissions, unless we have more.

No.

PRESIDENT BÖCKSTIEGEL: All right.

MS. MENAKER: Just very, very briefly because I just wanted to make sure the record is clear, that we are not taking the position that the NAFTA, you have to figure Claimant in so-called watertight compartment, and that if it falls under one Chapter, it can't fall into another. And of course we recognize that a measure that has some relation to a good might also concern an investment, and a claim can be brought under, you know, one Chapter and a State Party could also have a complaint, you know, under Chapter 20 under another Chapter.

To I just wanted to be clear that that was not what we were arguing when I was talking about Chapter Seven. I was merely showing that in our view, this provides a further context and shows that Claimants' interpretation in our submission would frustrate the object and purpose of the agreement and the manner in which the Parties had determined to resolve these types of specific disputes. When you had a dispute that concerned an agricultural--an agricultural trade issue concerning a sanitary and phytosanitary measure, that the Parties were quite specific, that those types of disputes would be settled by State-toState consultations and then arbitration, if necessary, and the national treatment provisions, as they

16:04:36 relate to trade in goods, would not even apply in such circumstances, but rather they have very specific requirements later on in Chapter Seven as to how the panel should judge the sanitary or phytosanitary measures.

So, I just upon wanted to clarify our submission in that regard.

ARBITRATOR BACCHUS: I will go ahead. I refrained

earlier, and that's helpful, but you would acknowledge, then, that that trade dispute could also, from the same circumstances in Chapter Eleven, as you characterize it, give rise to investment dispute?

MS. MENAKER: It could give rise to an investment dispute if there was actually an investor that had an investment--

ARBITRATOR BACCHUS: As said in Chapter Eleven as you characterize it?

MS. MENAKER: Yes.

ARBITRATOR BACCHUS: That's one less question for tomorrow. Thank you. That's very helpful.

ARBITRATOR LOW: Just A couple more questions at least for today.

Let me ask counsel for Claimants, I would like to make sure that I understood your oral submissions of today correctly, and therefore if you could clarify for me whether it's your position that the Article 1101(a) should have read

16:05:56 into it a like circumstances condition, which is what I thought I heard you suggest earlier.

PROFESSOR GRIERSON-WEILER: No, no.

MS. MENAKER: May I briefly, if that's the end of your response...

PROFESSOR GRIERSON-WEILER: Go ahead.

PRESIDENT BÖCKSTIEGEL: It's nice to have short answers.

MS. MENAKER: In our view, that is the exact outcome that would have to be made if Claimants' submissions were

accepted.

Essentially, what they have argued is that the crux of the matter, as they put it, is whether they are in like circumstances with U.S. domestic investors, and, in our view, that's a merits argument. That is when once the Tribunal has established that it has jurisdiction and is then assessing a national treatment claim, then it must determine whether there has been treatment that has been less favorable that has been accorded to someone that is in like circumstances, but that's not a threshold inquiry. Actually, what they are doing is importing the like circumstances requirement up into Article 1101 in the scope and coverage, and it's quite backwards because the Tribunal would, in essence, have to determine that they succeed on the merits and only then determine that they then had jurisdiction because the manner in which they have

16:07:24 confined the jurisdictional scope of the Chapter is not to any investor that invests in its home country. It's to any investor that invests in an integrated market that--which market is so integrated it makes them in like circumstances with investors of the other country.

And so then once you are doing that, you are essentially deciding merits first and then deciding that you have jurisdiction only after they succeed on the merits, but, in essence, it's importing a like circumstances requirement into Article 1101 itself, which is not there.

PROFESSOR GRIERSON-WEILER: In a jurisdictional undertaking, our understanding is that the Tribunal accepts as facts as proven, and what we are suggesting is that under

Article 1101(1)(a), the Parties have allowed for one type of claim, as a measure affects an investor in one type of claim only, a nondiscrimination claim. That's embodied in two types of rules, national treatment rule and most-favored-nation treatment rule, and there is a duality throughout the NAFTA that matches this. You see the duality in paragraphs (1) and (2) of the national treatment provision, paragraphs (1) and (2) of the MFN provision. You see it in (a) and (b) of Article 1101(1).

And you see it, indeed, in Article 102(1) where, as we mentioned earlier today, it refers to two types of principles, transparency and nondiscrimination, and the way it describes

16:09:08 the principle of nondiscrimination, yes, I know it didn't doesn't say principle nondiscrimination, it mentions two types of rules, national treatment and most-favored-nation treatment, which are, we all know embodying the two rules embodying the principle of nondiscrimination.

So, again, we see the duality in the interpretive exhortation, we see the duality in the scope provisions, and we see the duality in the national treatment and MFN treatment provisions, and that's why, we submit, Article 1116 is not more restrictive as the Canadians and Myers once argued it should be because if the Canadians had been right in Myers, and you should read in the territory as part of the Article 16 claiming mechanism, well, then we would be wrong about the scope provision, but it doesn't say that. It allows Claimants to bring, investors to bring a claim in respect of how a measure breaches one of the operative sections.

And so, to circle back to your question, no, we don't import like circumstances into the scope provision. It's just that the scope provision allows for measures that affect investors, and when we look through the rest of the Chapter, there is only two that have a provision affecting investors in particular, and they include the merits question of like circumstances. But not to tell you your job, but obviously, as a tribunal hearing a jurisdictional matter, the Tribunal is normally to assume the facts as proven. It will be up to us in

16:10:46 the merits phase, if we should go forward, to be able to establish what we claim to be necessary to prove our case, but that's not the exercise we are asking you to do today.

PRESIDENT BÖCKSTIEGEL: Okay.

ARBITRATOR LOW: One last question for today, which is actually segues very well into the discussion we have just been having, and I will direct this to Respondent initially, although I would like to hear Claimants' further views on this because especially in light of your last comments, this question I think becomes more significant in my mind.

Claimants' counsel said earlier in referring to the Methanex decision that there had been a Chapter 11 Tribunal decision requiring that it be shown that measures relate to investments, and if I heard you correctly, I thought you indicated that you believe there should be a similar requirement with respect to investors, the textual language of Article 1101(1), in fact, uses the relating to argument as a chapeau for both A and B, so perhaps that's not a farfetched statement.

But I would like to hear the views of Respondent as to what relating to means in this context, and Claimant as well, particularly focusing on how the measure at issue relates to investors qua investors.

MS. MENAKER: In the Methanex case, the Tribunal held that in order to be covered by Chapter Eleven when Article 1101

16:12:37 states that the measure must relate to the investor or the investment, and that Tribunal held that that meant that the measure had to have a legally significant connection with the investor or the investment.

And more specifically, that it was insufficient that the measure just affected the investor or the investment so that the Tribunal recognized that countries, States take a number of different measures, all the regulations are measures, and that they will have in effect on a multitude of persons, and all the way down the line. And that it simply was insufficient to say that because you were somehow affected by a State's measure that you had jurisdiction to bring a claim under NAFTA Chapter Eleven. Rather, there needed to be this legally significant connection.

Now, there, the facts were different than here, of course, but here we submit that where an investor or where a Claimant, rather, has not entered into the territory of the Respondent State, has not made an investment, and has not sought to make an investment, that legally significant connection between the State, between the measure, and between the Claimant is lacking; that just in the same way as in the Methanex case, where the Tribunal held that at issue there was

a ban of a certain substance, and the Claimant didn't produce--manufacture that substance. It manufactured an input into that substance, and the Tribunal held that that was

16:14:19 inadequate for standing, and they that did not fall within the scope and coverage in Chapter Eleven because an endless stream of individuals could be affected by that measure, and it wasn't enough that they had an economic effect.

Here, too, when the United States passes any type of regulation or takes any measure, that may affect people around the world. It can have an inordinate impact. But the only persons to whom the United States owes an obligation are those with whom it has a legally significant connection, and here that connection is lacking if the individual has not made an investment in the territory.

As far as, you know, if the investment is actually in the territory, of course, there is that connection between the United States and the investment, and the same is true with the investor.

And I would point the Tribunal to the Bayview decision in paragraph 101. And there that Tribunal said that the--the Tribunal considers that in order to be an investor within the meaning of NAFTA Article 1101(1)(a), an enterprise must make an investment in another NAFTA State, not in its own. In adopting the terminology of the Methanex versus the United States Tribunal, it's 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.

16:15:52 So, 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 and not the mere fact that the enterprise is affected by those measures.

And I believe that Mexico in its Article 1128 submission--I would have to find the citation, and if not certainly in their submissions to the Bayview Tribunal, took that same position.

PRESIDENT BÖCKSTIEGEL: Okay.

PROFESSOR GRIERSON-WEILER: As I mentioned earlier, the question relates to--had been interpreted previously by the Myers and the Pope tribunals and was relied upon by the Claimant in Methanex. It didn't carry the day, though, because in those two cases, it was fairly obvious there was a direct impact, and the question of the day was can a goods measure affect an investment. And so as far as they got in those first two cases "relates to" essentially meant effects.

And when the Methanex Tribunal came with its set of facts, while it respected and understood those two cases, it needed to look at "relates to" within the context of that fact pattern, and it concluded that it was looking for a direct impact rather than at some sort of ephemeral indirect impact.

16:17:25 It had to be direct impact. And then they alternatively used the expression legally significant connection. In a sense, this is not that different from when someone asks you, you know, your student asks you what's an expropriation, and you say, well, it's a taking. Well, what's a taking? Well, it's a substantial interference.

Well, what's that?

Well, it's like an expropriation.

You're basically--the Tribunal in Methanex was using these terms, "legally significant connection" or "direct impact" to mean by proxy "relates to."

So, what they actually said, they referred both, of course, to privity, and I think more accurately to the tort law concept in common law of proximate cause.

It's just what they essentially did--I taught torts for a few years, and in tort law you don't use proximate causes as a jurisdictional bar, but they did here. They decided that proximate cause was a legitimate jurisdictional bar given the wording of Article 1101.

So they were seeking proximate cause between the claimed measure and the harm.

Methanex involved a (b) claim, and again, the argument was that the measures harmed the investments fuel additive business, and the fuel additive that they made actually was an agreement in the fuel additive that was actually banned. So,

16:18:44 they didn't make the stuff that was banned. They made the stuff that went into the stuff that was banned. And that's why

the Tribunal basically referred to or invoked the concept of proximate cause. They just said that's too far down the chain. They actually referred, if I recall correctly, to a horizon, they used the concept of horizon. There is some line on the horizon when the cause is no longer proximate.

So, in other words, their test of what relates to means was effects based. They were asking whether or not the measure--well, actually I would say, did the measure directly impact upon the investors or, in that case, did the measure directly impact upon the investment of the investors in the territory of the other party, and in their case they said no. We submit in our case the answer is yes. Did the measure directly impact upon these investors? Certainly did. It directly impacted upon them. They suffered grave income losses as well as equity losses. And, of course, given that the equity is what allows them to run the business, the livestock itself is part of the equity that allows them to carry on the operations. If that instantly drops like a stone because all of a sudden your cattle are so common it's a buyer's market, well, that's going to affect your ability to run your business. It's going to gravely affect your ability because the bank is going to say sorry, but your equity is a lot less than it used to be. So, yes, it directly affects their investment.

16:20:18 And is it legally significant, is another way of asking the question. Well, yes, in light of the obligation, the claim in this case, national treatment, and the circumstances that had been alleged and will be proved if there is a merits hearing, it did affect directly or have a legally

significant connection to the measures and the breach.

MS. MENAKER: If I may very briefly, first, the Methanex Tribunal did not equate, nor did the United States argue, that directly affecting was equivalent to a legally significant connection. And if you see the briefing in that case and the Tribunal's decision, they were very careful to use the term "legally significant connection," and we never urged upon the Tribunal a test that would be direct effect because in our minds, that does not encompass what "relating to" means. It's not enough or sometimes it can be more than enough, sometimes not enough that you are directly affected. Some would not make that threshold, but just saying that you were directly affected or greatly affected is not enough. There needs to be that legally significant connection. And this goes back to the issue which we also discussed in our written submissions about the very purpose of the investment chapter is to provide the protections for those who come into your country because then they are going to be--their investments are going to be governed by a legal regime other than their own. That makes a legally significant connection between the State and

16:21:43 those investments and those investors.

So, it's quite distinct from the magnitude of the impact.

But I would also note that this distinction that counsel is trying to make between the so-called (a) claims and (b) claims is somewhat artificial because if you look at Methanex, they made a claim under Article 1102(1). They were claiming that they, as investors, were accorded less favorable

treatment than investors, domestic investors that they claimed were in like circumstances. They were claiming that they as investors were producers of a certain product, methanol, and the investors who they claimed to be in like circumstances with them was a U.S. ethanol producer. They had Methanex, the Claimant, had investments in the United States. They had a shuttered factory in Louisiana and they had a very small company in Texas, a marketing company. They did not claim that either that--they did not find a comparator to that shuttered factory or to that Texas marketing company. They were not making an 1102(2) claim. They were not claiming that their investments were treated less favorably than other investments in like circumstances. They were claiming that they themselves, as foreign investors who had made investments in the United States, were being treated less favorably. That was an 1101(1) claim, not different from the claim that's being made here.

16:23:14 ARBITRATOR BACCHUS: Follow-up question.

PRESIDENT BÖCKSTIEGEL: Yes.

ARBITRATOR BACCHUS: Let's assume for the moment that our Canadian friends in the back of the room had made investments by purchasing feedlots in Kansas and Nebraska and South Dakota. We know that's not the case, but let's assume for the moment that that's the case.

Are you contending that even had they done so, there would be no jurisdiction here under Chapter Eleven because these types of measures that are at issue are being challenged here and identified here by the Claimants are not measures that

would be relating to these investors of those investments? Are you making that claim as a jurisdictional claim? And if you are, what type of political connection would they need?

MS. MENAKER: We certainly would not be making the same jurisdictional objection we are making here.

ARBITRATOR BACCHUS: I'm sorry. I meant to say legal connection.

MS. MENAKER: So, we certainly would not be making the same jurisdictional objection that we're making here. Whether we would make any other jurisdictional objection under Article 1101--

ARBITRATOR BACCHUS: Your argument seems to apply, if, in fact, your argument is correct, it would seem--it would make sense there would be no jurisdiction, even if they had made

16:24:22 investments in the United States.

MS. MENAKER: Well, not--and that's why on that question what you would be asking me is in a hypothetical situation, if we would have another jurisdictional argument under Article 1101, but that's something that I would have to defer until tomorrow because I would have to consult with our colleagues on that.

ARBITRATOR BACCHUS: I think that's reasonable, and I appreciate an answer tomorrow.

MS. MENAKER: We'll do our best, but I would just hope that the Tribunal recognize that in that circumstance, the objection that we're raising under Article 1101, we would not raise that particular objection in that circumstance. But whether we have--

ARBITRATOR BACCHUS: While you haven't highlighted this issue, I don't think you have mentioned it in your opening statement this morning. For example, you mentioned it along the way. It's not that you ignored it, but while you haven't highlighted it, it's possible for three of us to conclude that Claimants are right in every respect except this one and that you're right, and that these particular measures don't relate to these investments. At which point, if we reach that point, it would be very, very important to me to know whether you would think that the case would be the same, even if these friends from north of the border made investments in the

16:25:35 midwestern United States because it seems like the same logic should apply. It shouldn't matter. The measures either relate to investment or they don't. Assuming there is investment, do you agree with that?

MS. MENAKER: Yes.

ARBITRATOR BACCHUS: Okay.

PRESIDENT BÖCKSTIEGEL: Mr. Weiler?

ARBITRATOR BACCHUS: That was a hypothetical.

PROFESSOR GRIERSON-WEILER: With respect to the concept of legal significance and expectation, we would stress that it's the nature of the regulatory environment that confronts the investor, whether that be an investor with the (a) claim or foreign direct investor in the traditional sense under "B," and is that regulatory environment with which they are faced that dictates the circumstances and dictates the significance of the legal relationship that one needs, the proximate cause that one must establish. We submit, and we

have submitted, in no other case has any investor made the argument that there is a legally significant connection because of the great degree to which they took the NAFTA Parties up on their promise to have fair treatment for competition in an integrated market that crossed national borders. We submit that that is the legally significant connection in this case.

And the legally significant question issue which comes up in the scope provision is naturally in every case going to

16:27:18 be refined in and defined by the alleged breach. In this case, we are alleging a national treatment breach. In some other case, let's say we were alleging an expropriation breach, in which case what is legally significant as a connection is very much connected to the breach alleged and the circumstances therein.

ARBITRATOR LOW: Mr. President, I may have additional questions tomorrow, but I think for today I will rest.

PRESIDENT BÖCKSTIEGEL: Very good.

Without further ado, I think we will start with yours.

ARBITRATOR BACCHUS: Thank you, Mr. President, and I want to thank Lucinda for her excellent questions. I thought they were pertinent and very much to the point.

I want to ask some fundamental questions late in the day and probably some more pointed ones in the morning because I want to have a good understanding of exactly what Claimant and Respondent think we should be using as the interpretive approach and what the particular tools the two of you believe we should rightly rely on in reaching our decision on this Preliminary Issue. I also have some fundamental questions

about terminology that's being used by the two Parties that in some instances is not defined in the NAFTA. I will start with that.

My first question relates to the concept of a free trade area. The Claimants have made much of the notion of a

16:28:45 free trade area and refer from time to time to the North American Free Trade Area. And, of course, in the very first Article of the NAFTA that you reference to a free trade area, Article 101, that the Parties of NAFTA established one, whatever it is, there must be some significance to that. It's up front, and it's right there. And then there is a reference to it, as the Claimants pointed out, in Article 102(1)(b). The Claimants made much of this. The United States has not said much about it along the way today.

I did note something, if I could find it, that I think Mr. Weiler said he was asked earlier about it, and I think--well, he wasn't asked about it, but he made a statement in his opening remarks earlier today, and I apologize if I didn't write it down correctly, but I think he said the NAFTA's purpose was to create a "geographically contiguous free trade area in which there is nondiscrimination and the rule of law is to obtain." Well, that might be a good idea, but that's not the question before us. The question before us is whether that's what this particular Treaty did as a legal matter.

I would like to ask the United States what it thinks a free trade area is and what significance it may attach to the phrase "Free Trade Area" and the fact that in the very first section of this Treaty the Parties said they had established

such a thing.

MS. MENAKER: I don't know beyond the fact that the

16:30:48 NAFTA uses the term the "Free Trade Area." It's still clear that obviously throughout the agreement there is not complete so-called "free trade," or the agreement would be very, very short.

ARBITRATOR BACCHUS: Well, be careful now. The entire agreement is an exception to the Article XIV of the GATT, so you don't want to be hoisted on your own petard, Ms. Menaker. USTR is somewhere listening.

Go on.

MS. MENAKER: All I can say about that is it establishes an area--

ARBITRATOR BACCHUS: It covers substantially all of the trade between the NAFTA Parties, does it not?

MS. MENAKER: Yes.

ARBITRATOR BACCHUS: I'm sure it does.

MS. MENAKER: With many, many exceptions and annexes, and carve-outs for things such as procurement that only covers certain types of procurement and not State procurement, for instance.

So, it is, I think, a reference to the area that is covered, but one cannot read it literally, so to speak. It has to be read, obviously, in context of the entire agreement.

With respect to the comment that counsel made that you repeated about creating this contiguous free trade area and that that somehow had legal relevance as opposed to another

16:32:06 1 free trade agreement between two Parties that are not
2 contiguous neighbors, we don't believe there is anything in
3 here to show that the Parties accepted any obligations or that
4 term should be read to heighten the obligations--
5 ARBITRATOR BACCHUS: Well, enlighten me, if I may
6 interject. Are there other free trade agreements that have
7 been concluded by the United States, I know, and there are
8 several pending before the Congress, please tell them back in
9 the Department that I support them all.
10 Do these other agreements--no one has paid me to read
11 them yet--do they refer to free trade areas? Is there a free
12 trade area between Jordan and the United States or between
13 Australia and the United States or between Chile and the United
14 States, or Panama or Peru or Columbia or Korea and the United
15 States? Or is the NAFTA alone in establishing a free trade
16 area?
17 MS. MENAKER: No. The other free agreements do state
18 that actually, and let me find the precisely--
19 ARBITRATOR BACCHUS: If you don't know the answer off
20 the top of your head, I will certainly understand if you want
21 to take some time. I would not know the answer off the top of
22 my head.
23 MS. MENAKER: I believe in the DR-CAFTA, Article
24 1.21(c) says to "promote conditions of fair competition in the
25 Free Trade Area."

16:33:45 1 And this is--yes, and that is from the DR-CAFTA.
2 ARBITRATOR BACCHUS: I'm impressed you have this. You
3 need to buy him a cup of coffee.
4 MS. MENAKER: And also in the U.S.-Chile Free Trade
5 Agreement, which is even more relevant in that we are not
6 contiguous with Chile, obviously, the objective is also in
7 paragraph Article 1.2(c), which also says "to promote
8 conditions of fair competition in the Free Trade Area."
9 ARBITRATOR BACCHUS: All right. Do, you would say
10 generally--I think that makes a good point. You would say that
11 generally not too much significance should be attached to that
12 particular phrase; is that what you would say?
13 MS. MENAKER: Yes.
14 ARBITRATOR BACCHUS: Other than it being a reference
15 to what generally is in the Treaty.
16 MS. MENAKER: Yes.
17 I would even note within the NAFTA--I mean, the NAFTA
18 is not entirely contiguous, so to speak, because when you look
19 at Annex 201.1, which contains the country-specific
20 definitions--and it defines the territory with respect to each
21 of the three Parties. And, for instance, with respect to the
22 United States, it includes Puerto Rico, and it also includes
23 some areas beyond the territorial seas. With respect to
24 Mexico, it includes the islands of Guadalupe and another
25 island.

16:35:10 1 So, it's even with respect to the NAFTA itself. It's
2 not entirely contiguous.
3 ARBITRATOR BACCHUS: Okay. Professor Weiler, how

would you respond? First of all, am I hearing the Claimants correctly that you see a significance in the notion of the creation of a free trade area; and, if so, how would you respond to what she's just said, that it is just a term that's used fairly widely in a variety of agreements?

PROFESSOR GRIERSON-WEILER: We think in the context, political and economic context, of the Canada-U.S. Free Trade Agreement and how important elections were and how hot the debate of those questions were, and this particular agreement is a very significant expression. What does it mean?

Well, without trying to beat the drum too often, we think it means what it says. It's an area which is why we say it must be, to a certain extent, geographically contiguous. We say that--and, obviously, for the most part without quibbling about a Caribbean island somewhere, generally the cattlemen--we know what we are talking about. The picture showed the area. In this case, the area is reasonably defined geographically to be North America.

It refers to economic activity, uses the word "trade." We know that the NAFTA is an international economic instrument and that the purpose of all such instruments--indeed, all treaties--is to regulate regulators. And we know that "free"

16:36:44 means "unrestrained."

Now, "free," of course, will be conditioned and subject to exceptions and reservations contained within, but it's obvious that the object is free, is liberalization.

So, what does free trade area mean? It means that the Parties, with the exception of reservations and exceptions, are

basically establishing a geographic area within which they agree to regulate themselves based on established norms with the goal of free commerce.

ARBITRATOR BACCHUS: Thank you. Thank you both.

Let me ask another question. This goes to the practical issue of the appropriate approach we should take to treaty interpretation.

Now, I have heard you both say--and I'm going to describe what I heard both of you say, and you tell me if I misunderstand you. I believe I heard you both say that the appropriate interpretive approach is that it is found in the customary international law that's reflected in the Vienna Convention on the Law of Treaties, and that specifically you point us to Articles 31 and 32 in the Vienna Convention on the Law of Treaties, and you have both stated the interpretive approach in Article 31, looking at the ordinary meaning of the words in their context and in the light of the object and purpose of the Treaty itself. And you have also both pointed to the possibility of subsequent practice and being an

16:38:35 additional interpretive tool. I am deferring that question for another time.

I think you also both said that in terms of what I have just described, that there is no hierarchy of approach, that you would look at the text as I have suggested in a holistic way.

Am I right thus far?

PROFESSOR GRIERSON-WEILER: Yes.

MS. MENAKER: Yes.

ARBITRATOR BACCHUS: This is boilerplate black letter to both of you?

MS. MENAKER: Yes.

PROFESSOR GRIERSON-WEILER: Yes.

ARBITRATOR BACCHUS: Which implies that the interpretive approach we are not to use would be purpose of teleological approach in which the three of us would decide what the purpose of the NAFTA is based on what we think it ought to be, and then interpret the text accordingly.

Do you agree with that?

MS. MENAKER: Yes.

ARBITRATOR BACCHUS: I thought you would.

Now, going forward, I want to ask you a little bit more about what you think some of the other interpretive tools we might have at our disposal might be. When I look at Article 102(2) of the Treaty--let me read from it--it says the parties

16:40:01 should interpret and apply the provisions of this agreement in the light of its objectives set out in paragraph one," which we have been talking about all day, "and in accordance with applicable rules of international law."

And also, if you look at 1131(1), the more directly relevant one because it's in the investment chapter, it says pretty much the same thing. The Tribunal established under this section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law.

All right. What I wanted to ask you here is what you think the relevant applicable rules of international law might be that might be helpful to us. For example, in listing the

United States, it seems to me that you have been arguing that we need to take into account all of the cumulative experience in trying to deal with investment on an international basis through bilateral investment and other investment treaties, and that's relevant. And these are certainly applicable in international law, whether they give rise to particular rulings or not. For the Claimants there might be other relevant international law that you thought we might or ought to consider. I will address my question first to the United States.

What do you see would be the most applicable rules of international law that might be relevant to this particular dispute, in addition to the Treaty itself?

16:41:42 MS. MENAKER: I think in addition to the text, obviously, read in the context of its light and purpose and the customary international law rules in the Vienna Convention that instruct treaty interpreters to interpret the treaties in a manner that does not lead to absurd results and that does not render certain provisions ineffective.

ARBITRATOR BACCHUS: Inutile?

MS. MENAKER: Inutile, yes.

And I think those are principles certainly that are appropriately used here, and, as you mentioned, also to interpret the principle of the cumulative experience and in light of the principle that when States intend--

ARBITRATOR BACCHUS: Was that a principle? "Principle" is a term of art.

MS. MENAKER: It's a common practice in light of the

United States's past practice, and what--

ARBITRATOR BACCHUS: Now, here is where I--being as slow as I am, I have to pause. We are supposed to look at applicable rules in international law. How do you import past practice in that if it's not risen to the level of customary rules? That's my problem.

MS. MENAKER: Well, I think in one instance in our Reply we refer to the Oil Platforms case before the ICJ where in their decision on the preliminary objections, when they were--when the ICJ was interpreting the objective section of

16:43:22 the Treaty at issue there between the United States and Iran, it did look to other treaties, other similar treaties, that had been executed by the United States during the same time period, and it believed that that was an appropriate means of interpretation, and that is what we have also urged the Tribunal to do here.

ARBITRATOR BACCHUS: Okay. I pose the same question to the Claimants. What are the relevant applicable rules of international law on which we should rely in addition to the text of the Treaty?

PROFESSOR GRIERSON-WEILER: With your indulgence, I will make one point before answering that question, and that would be with regard--

ARBITRATOR BACCHUS: You are hereby indulged.

PROFESSOR GRIERSON-WEILER: Thank you.

PRESIDENT BÖCKSTIEGEL: Would you speak up a little bit more, please.

PROFESSOR GRIERSON-WEILER: I would say that the

Tribunal's analysis is teleological in one way, in the sense that an appropriate interpretation of the Treaty text would be one that gives support to the stated object and purpose of the NAFTA; and, therefore, that that is purpose in a sense that you are intended to apply that object and purpose.

ARBITRATOR BACCHUS: That's not teleological. That's the Vienna Convention, if you do it right.

16:44:34 PROFESSOR GRIERSON-WEILER: Indeed.

I would say, of course, that those object and purposes because the NAFTA tells me it must, must be imbued by the principles of nondiscrimination and transparency, and so--and in addition to the question of applicable law--

ARBITRATOR BACCHUS: Let me interject here, Professor Weiler, because this is an important point. Object and purpose--and I want to make sure our Parties are agree--our task is not to determine for ourselves what we think the object and purpose ought to be of the Treaty, but to look at the text of the Treaty to discern the object and purpose of the Treaty from the text of the Treaty.

PROFESSOR GRIERSON-WEILER: Yes. For our part, yes.

ARBITRATOR BACCHUS: Does the Claimant agree with that?

PROFESSOR GRIERSON-WEILER: Yes.

ARBITRATOR BACCHUS: Does the United States agree with that?

MR. BETTAUER: There is one point. Object and purpose isn't defined in Article 31. You have to look at the customary international law for how you define "object and purpose" of a

treaty. And it may be looking at the preamble and other provisions of the Treaty, but may also be bringing in other treaties at the time what the Parties were intending to do with the Treaty when they put it into--put it into place--

16:45:42 ARBITRATOR BACCHUS: You think that's more important than looking at the text itself?

MR. BETTAUER: It's part of the inquiry that comes with looking at the text. It's looking at the text, the ordinary meaning of the text--

ARBITRATOR BACCHUS: That's a slippery slope you're advocating.

MR. BETTAUER: It has to be in light of the object and purpose, the object and purpose informs the inquiry into the text but doesn't override the text.

MS. MENAKER: In this regard, we would also just point the Tribunal to the ADF NAFTA Chapter Eleven Decision which we quoted in our written submissions where they said the object and purpose may frequently cast light on a specific interpretive issue but is not to be regarded as overriding and superseding the latter.

ARBITRATOR BACCHUS: I hear that. Let me be certain I understand.

Are you telling me that we should look beyond the Treaty itself to other international agreements to determine the object and purpose of this Treaty?

MR. BETTAUER: I'm saying that you can and that Ms. Menaker has just given you an example of where the International Court of Justice did that kind of inquiry in

terms of the assessment of an Article in a different Treaty.

16:46:54 ARBITRATOR BACCHUS: Thank you very much.

I go back to Professor Weiler.

PROFESSOR GRIERSON-WEILER: Following up on that point, we would say you cannot, and that the NAFTA in this regard is a lex specialis that sets out very clearly what its object and purpose are.

I would suggest--and far be it for me, but nonetheless I would do it--I would suggest that, if I were the Respondent, that recourse to other treaties would potentially provide context for the interpretation of provisions, so I would bring other treaties in as a context question.

ARBITRATOR BACCHUS: You're anticipating my next question. Why don't I go ahead and ask it.

PROFESSOR GRIERSON-WEILER: I'm still answering your previous one.

ARBITRATOR BACCHUS: Article 31 talks about the ordinary meaning of the words in their context and in light of the object and purpose of its obligations to the Treaty. In their context, you just suggested that in looking at context we should go beyond the language of the text?

PROFESSOR GRIERSON-WEILER: I said if I were them, that's where I would try to bring it in.

ARBITRATOR BACCHUS: If you were them?

PROFESSOR GRIERSON-WEILER: If I were them.

ARBITRATOR BACCHUS: What do you think? They will

16:48:00 1 speak for themselves.
2 PROFESSOR GRIERSON-WEILER: Far be it I should think
3 for them.
4 ARBITRATOR BACCHUS: You think we should look at--what
5 is the context in which we should look?
6 PROFESSOR GRIERSON-WEILER: I think--and this also
7 comes into (c) principles as well, that in other cases where
8 you have a (b) claim, it would make sense to look possibly to
9 other treaties but more like to jurisprudence to try to inform
10 yourself as to what the alleged breach was and how it should be
11 interpreted. But, in our case, since it's an (a) claim, I
12 would submit, no, you don't go beyond that. The context could
13 be very well found in the wording of your remainder of the
14 Chapter.
15 And I would also add that--I will not also add. I
16 will answer your question, which was with regard to the
17 principle of nondiscrimination that must imbue your
18 interpretation of the object and purpose, the specific objects.
19 Now, I don't say that lightly. It's just that Article 102 says
20 that nondiscrimination and transparency by naming the rules of
21 national treatment and most-favored-nation treatment, that
22 those principles must imbue your reading of those objectives;
23 and, in turn, those objectives inform your interpretation of
24 the provisions.
25 So, in that regard, there is some other applicable law

16:49:21 1 that I suggest might be relevant with regard to understanding

nondiscrimination and how important it is, and I would say that you could draw guidance from the breadth of decisions that are available, including in mostly international jurisprudence, so including some GATT cases such as U.S. 337, WTO cases such as U.S. 301 or Shrimp/Turtle, even EC cases such as Danish Bottles, cases which give you a full and complete understanding of the concept of nondiscrimination within the context of a free trade area.

ARBITRATOR BACCHUS: Thank you.

I turn to the United States to ask the question about context.

MR. BETTAUER: Context is defined in paragraph two of Article 31, and it's defined quite narrowly. So, our view of what "context" means is set out in paragraph two of Article 31, and that has been held by many to be customary law on this point, and we said what we said about object and purpose--I won't repeat it--and we have also said, as you referred during our presentation, that in addition to context we have to take into account those factors in paragraph three of Article 31.

ARBITRATOR BACCHUS: Thank you.

One more question, and I continue with these fundamental questions for what remains of our time together today so I can better understand what you're expecting of us, and that is this: To what extent are we bound by the rulings

16:50:55 of other arbitration panels, including those in Chapter Eleven? I look at Article 1136(1) here, and it says, "An award made by a tribunal shall have no binding force except between the disputing Parties in respect of the particular case," and yet

there is much citation of previous rulings by arbitration panels. This is not unfamiliar to me from another context. We all know there is no stare decisis in public international law; but, in my experience, when someone has the case law on their side, they put in the case law. When they don't, they remind you there is no stare decisis, and this doesn't surprise me.

But this is my first Chapter Eleven arbitration, and I want to make certain that I fulfill the expectations of the NAFTA Parties, and so I'm wondering to what extent are we bound by what the Tribunal did in Bayview? You know, sometimes I agree with Ed Meese and sometimes I don't.

MR. BETTAUER: You are not bound. You are bound only to the extent that you find the reasoning persuasive, and we put it forward because we think the reasoning in that case is persuasive. I think the importance is to look at the cases to see how well they were reasoned and how persuasively they were--the argumentation is put out and is certainly persuasive--

PRESIDENT BÖCKSTIEGEL: Similar to the facts?

MR. BETTAUER: How similar the facts and if the legal issue is identical or not. Those are all issues for you to

16:52:42 consider.

But, obviously, we as the United States wouldn't want to find ourselves bound by a case that was between Mexico and some investor of Canada and some investor that we didn't agree with.

ARBITRATOR BACCHUS: Well, you are not required to be consistent in these cases.

MR. BETTAUER: Yes, we are. We cite the argumentation made by the other countries as indicating their view on issues, and we are consistent, and that's why it's difficult for us to be--and why we take care in what we say. We are consistent in what we say across the cases and in this case and in our arguments in other tribunals.

So, hopefully Professor Böckstiegel will remember that we said the restrictive interpretation doctrine had no merit before him in the Iran Tribunal. We still maintain that.

ARBITRATOR BACCHUS: Well, I will think about that.

What do the Claimants have to say about how much we should be persuaded by previous tribunals?

PROFESSOR GRIERSON-WEILER: We are largely in agreement with Respondent, though we come to dramatically different conclusions about the case law cited. And I say "case law" in the common-law sense and I probably shouldn't because I really mean the international decisions that we mentioned that may or may not be a guidance to you.

16:54:08 I will recall my colleague Dr. Alexandroff's remark which I wholeheartedly endorse, that argumentation made by a Party within the context of one case is not normally going to be relevant within the context of another case. That hearkens back to the fact that our government, the Government of Canada, has not made any submissions in this case; and, therefore, I would not want to construe what they said pending in other cases being particularly relevant to this case, unless the fact were on all fours, and they're not.

That being said, we have looked to, and we have

suggested that there is much persuasive reasoning in various decisions before you, in Myers--indeed, even in Bayview--we see--we see note 105 denoting a difference between--denoting a (b) claim as being reasonably prescient on the part of that Tribunal. They didn't go beyond what they said--indeed, in Bayview, if I recall correctly early on in the decision, the Tribunal said, "We are dealing with the case before us. We are not dealing with other cases." And I think that was the right approach.

ARBITRATOR BACCHUS: Thank you.

We have about five minutes. I wanted to ask a straight question that occurred to me that I think could be disposed of in five minutes. Mr. Bettauer made an interesting observation this morning, and I wanted to ask him about it because it deals with the different notions of relief from

16:55:37 trade restrictions and investment restrictions under the NAFTA, and we are all very much aware of what the trade and investment agreement, whatever that means or implies.

If I heard you correctly this morning, Mr. Bettauer, you suggested that if we adopted the Claimants' view of jurisdiction in this case, then it would--I think your word was "frustrated," the trade remedy, trade relief procedures of the NAFTA, could you elaborate on that observation just a little bit for me. Could you explain why you think that is so.

MR. BETTAUER: Ms. Menaker did a second ago. She mentioned that for the kind of measures at issue in this case there is a procedure set out for consultation between the Parties and then potential arbitration. And it's a different

procedure which doesn't accord Chapter Eleven-type relief and money damages than the procedure we have in Chapter Eleven.

ARBITRATOR BACCHUS: That's true, and I did hear that. My question was: Why would seeking different kinds of relief simultaneously, especially when the investment relief is for private Parties in a private State action and frustrate the trade positions? I don't understand why one would frustrate the operation of another. Why couldn't they both work?

MR. BETTAUER: In a case where you had it--I mean, this goes back to our fundamental case. In the case where you had an investment as a possible, you could have them both work; and we haven't said that there may not be such a case, and we

16:57:22 would have to look at the gateway provisions and so on. But in the case where you don't have an investment, then you have the application of a measure which is a measure which is a boundary of a cross-border measure which is at issue in this case of exactly the same type or a different kind of mechanism was intended, and it wasn't in a kind of measure that was intended to give relief to individual investors.

ARBITRATOR BACCHUS: All right. So, what you're saying is we have a way of handling this type of problem where, in your view, there is no investment. You're not really saying that if we found an investment here that it would frustrate the operation of another remedy because, where there is a clear investment, they both proceed simultaneously.

MR. BETTAUER: Where there is a clear investment, there would be--you could proceed with both of them as if you had a measure subject to both the Chapters.

ARBITRATOR BACCHUS: So, maybe "frustrate" wasn't the best possible word. I think I understand your point now.

I don't think Claimants need to respond to that, unless they really want to.

PROFESSOR GRIERSON-WEILER: We really do.

In our Rejoinder, we state our then Opposition Leader and currently Prime Minister Harper, he certainly didn't like the measures. Indeed, he and a number of members of Parliament went so far as to intervene in one of the local judicial

16:58:47 proceedings. I dare say that, if Prime Minister Harper had been Prime Minister at the time, it may well have been that he could have acted differently than the current Prime Minister did. What is very clear, though, is that Prime Minister Harper hasn't directed anybody to stop us in what we are doing, so he apparently it doesn't see that there is any frustration of Canada's ability to execute this Treaty taking place.

ARBITRATOR BACCHUS: He really couldn't stop you anyway.

PROFESSOR GRIERSON-WEILER: He could--

PRESIDENT BÖCKSTIEGEL: We are getting into political speculations now.

MS. MENAKER: Just to put on the record, we disagree with that and the conclusions drawn from that.

ARBITRATOR BACCHUS: Mr. Bettauer answered my question, which I appreciate it, and I think that's all I have for this afternoon. I can return--

PRESIDENT BÖCKSTIEGEL: Well, we have 5:00.

The only suggestion would be that if you have a

question where you feel the Parties need some preparation, then you should mention them and we would not expect an answer.

ARBITRATOR BACCHUS: I have two particular things I'm going to focus on first thing in the morning.

PRESIDENT BÖCKSTIEGEL: Well, the idea hopefully will be that we give the Parties the chance--we could continue with

17:00:04 our questioning, obviously; but, on the other hand, we have to give some meat for the Parties for their second rounds. And, therefore, it may also be that you answer questions during your second round presentation, depending on the question. We have this option tomorrow morning.

Go ahead.

ARBITRATOR BACCHUS: I don't want anyone writing tonight. Take the evening off. All I want to do is tell you what we would be thinking about first thing in the morning. I have a lot of questions about the whole notion of subsequent practice and whether there is or is not an agreement among the NAFTA Parties on the issue before us. I think all three of us share that question, and I think the President and Ms. Low will be following up with questions as well.

Also, I had a lot of questions about what seems to be the view of the United States, that if this particular claim were allowed to go forward, if jurisdiction were found that this would open up a Pandora's Box by allowing claims on virtually everything. I think I heard that, and I think I heard the Claimants try to say that's not what we intend and distinguish it, and I think all three of us have some questions in our mind about that, and I want to address that issue as

well.

Finally, I think all of us would like to hear a little bit more about how we can or cannot distinguish, especially the

17:01:57 Bayview case, but a couple of the cases that have been mentioned, taking into account that we are not bound by them; nevertheless, they are there, and we need to make certain that we give them full credence in our deliberations.

Those are the principle things that I would be talking about in the morning, Mr. President.

PRESIDENT BÖCKSTIEGEL: Well, I have just been looking at my list which has become less and less because, after our deliberations, my colleagues really mentioned most of them. And I don't want answers now, but I just wanted to tell you.

One thing I would still be very grateful for is for a further effort for you to look into how the territorial reference disappeared when it disappeared, for which reason. I'm quite aware that there is no official travaux, and I'm quite aware that we don't have any real evidence, and I think both of you have said we can only speculate; but, nevertheless, let's face it, that's a highly important question before us. Of course, this is the provision that we have to deal with. And, then I actually heard some of that this afternoon, so just think about it again whatever you have.

And then, secondly, that relates to matters which have just been raised by my colleague panelists already.

Basically, I think I have heard enough comments about the Bayview case from both sides, so I wouldn't need any further views on that. I'm quite aware of your positions, and

17:04:00 1 we can all re-read it and make up our mind.
2 I would be grateful if you could elaborate slightly
3 more on the Gruslin Award, always the question being what makes
4 it similar or different to our case, either factually or
5 legally, and what relevance may it have or may not have for our
6 case here.
7 And the same, to a lesser amount, also is true for the
8 Ethyl Award. One of the subjective reasons for me, of course,
9 having chaired that very first NAFTA arbitration, I wanted to
10 make sure I'm not inconsistent, knowingly inconsistent, with
11 what we have said before. We did accept some jurisdiction
12 there, as you know, but only some; and, if you do it, it
13 becomes why. But perhaps it would be helpful again, even
14 though there is some reference in the file, if you look at that
15 again.
16 Having said that, let me also refer you to something.
17 First of all, without having discussed that with my colleagues,
18 but I'm sure they agree, we intend to decide this case before
19 us, nothing else, no more. And even though I used to be a
20 Professor, I have no intention on writing a treatise on the
21 development of certain abstract relationships between NAFTA
22 Chapters or NAFTA and others. Your comments can really focus
23 on this aspect. The second thing is--
24 ARBITRATOR BACCHUS: Amen to that, by the way.
25 PRESIDENT BÖCKSTIEGEL: Yes.

17:05:57 1 The second thing is with regard to the relevance of
2 other awards, it's obvious we are not bound, but it's also
3 obvious that for serious work if an award of our case comes
4 close, whatever that means, the Tribunal is expected to look at
5 it and see whether others have been wiser or wise and can give
6 you additional ideas which persuade us.
7 In that context, let me just say that--and I have not
8 discussed this with my colleagues, but as far as I'm concerned
9 personally, you will find some guidance on my approach to that
10 issue in the ICSID Bayindir versus Pakistan case. We have a
11 Chapter there on the relevance of other decisions; and, for the
12 time being, I would still feel that it comes close to what I
13 still think about, even though it was a year or two ago. For
14 fairness I should point you to that. It's available. I'm sure
15 you can get hold of it easily.
16 All right. That's all I would like to say for the
17 evening. Anything else from this side for this evening?
18 ARBITRATOR LOW: No, that's all.
19 ARBITRATOR BACCHUS: No.
20 9:00 tomorrow morning?
21 PRESIDENT BÖCKSTIEGEL: 9:00 in the morning is when we
22 start.
23 We will discuss it then, and then the Parties will
24 give some thought what we gave you on the way today. The
25 probable approach would be, I think, that we continue with the

17:07:43 1 questioning and still leave you with the option right away of,
2 say, we already plan to pick that up in our second round

presentation. Would that be okay?

Have a good evening.

(Whereupon, at 5:08 p.m., the hearing was adjourned until 9:00 a.m. the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by

computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

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

_____

DAVID A. KASDAN