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 2

HEARING ON THE PRELIMINARY ISSUE

Wednesday, October 10, 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 9:08 a.m. before:

PROF. DR. KARL-HEINZ BÖCKSTIEGEL, President

MR. JAMES BACCHUS, Arbitrator

MS. LUCINDA A. LOW, Arbitrator

Court Reporter:

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 Centre Avenue NW
Suite 239
Calgary, Alberta T2E 0P3
(202) 517-1597

PROF. 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 Embassy of Mexico:

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: Good morning, ladies and gentlemen. Welcome to this second day of our hearing.

We will continue, as you know, with the questions from the Arbitrators, and Mr. Bacchus still has not concluded his list of questions, so I would ask him to continue, please.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR BACCHUS: Thank you, Mr. President. Good morning, everyone.

I want, first of all, to thank both the Parties for their responsiveness--

PRESIDENT BÖCKSTIEGEL: I'm sorry, I forgot one very important thing. I think it's one of the Claimants, he asked could he take a picture of the group, and since this is being transmitted to Canada, basically I don't think there is any good reason to say no, but still I suppose if somebody really

objects, we shouldn't do it.

I see no objection. You go ahead, please.

(Pause.)

PRESIDENT BÖCKSTIEGEL: Could be added to the transcript.

Oh, yes. Yesterday morning, I announced that transmission was made to a law office in Canada, and now I understand it's being made to--Mr. Weiler, you said you'd tell us, is it the university?

09:12:40 PROFESSOR GRIERSON-WEILER: Yes, Mr. President. It's being transmitted to the University of Calgary, and I can't quite remember the name. It was the Hamlet Room, but I can't remember the name of the building, but I knew it was the Hamlet Room.

PRESIDENT BÖCKSTIEGEL: It's a nice room. I hope it doesn't refer to the Tribunal.

PROFESSOR GRIERSON-WEILER: For that they use the Urich Room when they're talking about it. But anyway, it's being transmitted to the University of Calgary and not to Heenan Blaikie's offices.

MR. WOODS: I apologize, Mr. President, for not mentioning that yesterday. It was to facilitate the television broadcast. It was easier to do it at the University of Calgary.

PRESIDENT BÖCKSTIEGEL: No problem. I just thought it should be on the record.

All right. Now we have a second try.

ARBITRATOR BACCHUS: We shall emerge from the

Hamlet-like indecisions, inspire the same kind of consensus just achieved on the success of the photo op.

I wanted, first of all, to thank everyone for your responses to this yesterday, and you concision and your replies. Very helpful to the Tribunal, a good example for today.

09:13:50 I have a few more questions, and I think Ms. Low and the President will have some follow-ups, and I think the President will have a few questions of his own after I have finished.

Most of our questions are questions that the three of us share, and so I think that's encouraging toward reaching the photo op-like consensus. We should go from here.

I want to begin by raising the issue with the United States that I think is a question all three of us on the Tribunal had, and it relates to the negotiating drafts. We had some discussion about this yesterday, and we don't have a lot to look at in terms of what the NAFTA Parties had in mind in the text and beyond the text, but we do have these negotiating drafts, and the Claimants have made emphasis on the fact that the specific wording in the text on the territorial limitation was removed early on, and then was kept out in 20 subsequent drafts.

And also, if I understood the facts correctly in one other provision, the text, the territorial limitation was restored along the way.

Now, it's hard to believe that this happened by accident, and I think all of us on the Tribunal, at least at

this point, are certainly willing to consider that there must be some significance to this. We have to assume that the negotiating Parties knew what they were doing when they did

09:15:41 what they did. And I would like to hear a little more in the way of an explanation from the United States as to what significance this has, in your view, beyond what you said yesterday.

As I recall, you drew a distinction--I will give Mr. Bettauer a second.

As I recall, you drew a distinction, and you said--if I understand you correctly, you're saying, well, in a sense that there is a territorial limit in some of the provisions and not in others, and it doesn't make any difference, and you can read it either way, and frankly I don't find that at all persuasive--at all persuasive.

Do you have another reason? Why should we not attach significance to the fact that they took this out and then left it out in 20 successive drafts, even when they had the presence of mind to restore it along the way in a separate provision, which leads me to believe that they were aware that it wasn't there.

MS. MENAKER: Well, let me offer a few responses. And this is something that we were going to elaborate on in our rebuttal or second arguments, as well.

ARBITRATOR BACCHUS: Good. It will save time later in the day. You can repeat it if you wish, but go on.

MS. MENAKER: Okay. Well, first of all, I know that Claimants repeatedly characterized our position as this having

been accidentally taken out or done as a matter of accident. We have never, ever said that. We have not said that it was intentional or accidental. All we have said is we have questioned whether it has the change that they attribute to it, and we said that it does not.

So, clearly it was an intentional act when someone scrubbed the text. We say that it doesn't have the significance they say attribute to it, but we're not saying that it was--that this was somehow accidental and that there's an error in the text because when we read the text in context, we think that there is no other way to read it, and that the language "in the territory" was unnecessary.

Now, the fact that it was taken out and then--

ARBITRATOR BACCHUS: Let me interject.

MS. MENAKER: Yes.

ARBITRATOR BACCHUS: Your view is that even in--that the language specifying the territorial limitation was not necessary. It was superfluous because--and that's why it was taken out, because they felt that it wasn't needed because it was clear without that language that there was a territorial limitation. But if that's so--and this is where I get puzzled--if that's so, then why do you need to specify the territorial limitation in the other provisions?

MS. MENAKER: And let me just also just clarify, because when we say it's superfluous, it's unnecessary, that's

09:18:26 1 our reading. I can't attribute the motivation to the people
2 who were actually scrubbing the text. I can tell you we have
3 tracked down everyone who we know who was involved in this
4 process, and no one has a recollection of this particular
5 change.
6 MR. WOODS: Excuse me, Mr. President. My friend is
7 going into territory where I don't think it's appropriate in
8 terms of discussing. She just said that we cannot go back in
9 time to discuss what the individual scrubbers were thinking or
10 not thinking. My friend, I think, just said that she has
11 no--has discovered no recollection. I would submit that any
12 such recollection, in any event, would not be appropriate at
13 today's hearing because that would be new evidence, for one
14 thing.
15 And secondly, the Vienna Convention makes it quite
16 clear that you look at the text, there may be secondary means
17 of interpretation, but you can't go back and get the
18 negotiators to come and explain to you what they did or what
19 they didn't do.
20 ARBITRATOR BACCHUS: Thank you, Mr. Woods.
21 Ms. Menaker, go on.
22 MS. MENAKER: And I understand what counsel is saying,
23 which is why we have--I mean, I'm not offering testimony here,
24 obviously, but when pressed by the Tribunal I want to be as
25 responsive as I can be.

09:19:48 1 ARBITRATOR BACCHUS: We appreciate that.
2 MS. MENAKER: So, there is nothing, and certainly

nothing in the record that indicates what particular individuals were thinking, and we have no way of discovering that information.

Now, the fact that this language was are removed and, as you say, remained out for 20 drafts, that, in our view, is completely irrelevant because when you look at how a Treaty is drafted both during the negotiations and then during the "legal scrub" process, once the Parties agree on a substance, once they visited a certain portion, then they moved forward. So, you will see that in the rolling drafts themselves during the negotiation, the negotiating process. You will see bracketed texts, you know, say, around 1102. Once that's put to rest and all the brackets are gone, in the subsequent sessions they don't start over from the first provision and go through everything.

ARBITRATOR BACCHUS: Let me interject here. Along the way in an increasingly lengthening life I have been involved in those processes, and you are describing it accurately, but isn't that tacit acceptance of the things that are not bracketed?

MS. MENAKER: Yes.

And so my only point is that--

ARBITRATOR BACCHUS: Isn't it irrelevant whether they

09:21:00 actually go back and discuss them again? I mean, they could, if they wish, if they still had problems.

MS. MENAKER: Right.

ARBITRATOR BACCHUS: But the fact that they don't I think has some significance.

MS. MENAKER: And that's my point, is that during the "legal scrub" process, you will look through--the lawyers will look through the particular provision. Once they scrub the text, so to speak, it's put to rest. It's not revisited at the beginning of every subsequent negotiating session, unless someone comes forward and says, oh, you know, I know we dealt with this two weeks ago, but I have a change. Can we consider it.

So, I think it's somewhat misleading to say this change was made on so-and-so date, and then 20 more sessions were had, and it wasn't changed back.

ARBITRATOR BACCHUS: I don't think the Claimants are suggesting that there had been 20 more lengthy discussions on this issue. I mean, the Canadians have negotiated agreements, too, often with the United States, and I think you're accurately describing the process. I think what they're saying is that there is no evidence on the record that anyone saw any need to revisit this particular language and that they had 20 opportunities to do so, but chose, for whatever reason, not to go back and revisit that text.

09:22:21 Would you agree with that characterization?

MS. MENAKER: Yes, yes, that there was nothing in the record that shows that anyone had any impetus to revisit it. If they had, there would have been a footnote, or brackets would have started to appear again.

But from what I draw from this is they thought the language was unnecessary; and, indeed, when you look at the text in context, there is no other way to interpret the text,

and I think we went through a number of other provisions--

ARBITRATOR BACCHUS: Now, this is my next question, Ms. Menaker. You've answered the first one.

The next one is, in looking at this text, of course, we have to interpret--in looking for the ordinary meaning of the text of this particular provision, we have to interpret it in the context of the other provisions. And, as you have rightly pointed out, and I think the Claimants readily acknowledge, there are other provisions that are adjacent in the same Chapter in which there is a territorial limitation, and they argue with some rationality that, well, when it's not there in this text but they're elsewhere, we can reasonably draw the conclusion that it is not supposed to be there. That seems to be their argument. I will let them tell me if I'm wrong.

Why are they wrong? I know you addressed this yesterday, but I am a little slow, and maybe the caffeine

09:23:50 hadn't kicked in, and I had been flying half the night before. Why--if it's needed in these other provisions, why isn't it needed here?

Why can you read--because to me, to me, you're reading--there is an argument you're reading words into the text.

In order for me to agree with you, I have to conclude that you are not reading words into the text because you are not supposed to do that.

Go on.

MS. MENAKER: And our argument is that we are not

reading--our position, excuse me, is that we are not reading words into the text because the assumption that I think you made in your question is that where the words "in the territory" do appear in other provisions of the NAFTA, that they were necessary, and with that we disagree because I pointed to several examples--

ARBITRATOR BACCHUS: Are you saying the Treaty negotiators put unnecessary words into the Treaty?

MS. MENAKER: Yes, and that they were not--

PRESIDENT BÖCKSTIEGEL: I would say that happens all time.

ARBITRATOR BACCHUS: It never happened in the WTO Treaty. That's scripture.

MS. MENAKER: The practice of using what people call

09:24:55 belts and suspenders is used all the time. Whenever you have a Treaty provision that starts off "or greater certainty," typically that provision is unnecessary. Those words are unnecessary because it's just providing greater certainty for what is already explained.

So, when you look at Article 1102(4), for instance, that you can say, I mean, I--typically I wouldn't characterize it as this, but you could say, no, that's unnecessary words because it's just for greater certainty. And when you look throughout Chapter Eleven, there are multiple times when it says things like that, so those words were not necessary.

In the same vein, when you look at where in the territory it appears, there are several--several--instances where it's simply not necessary, but it's put in there. And

it's maybe some inconsistency in Treaty drafting, but there is no right, you know, one single correct way to draft a provision. And the--

ARBITRATOR BACCHUS: Is it necessary in any of those provisions that are in the context?

MS. MENAKER: I have not looked through every single provision, but I can certainly point to yesterday I pointed to a few, and I had a few more additional examples. The expropriation provision in Article 1110 that a State may not directly or indirectly expropriate or nationalize--

ARBITRATOR BACCHUS: It's hard to expropriate

09:26:11 something if it's in another country.

MS. MENAKER: Precisely. And the same thing is--

ARBITRATOR BACCHUS: So, I take your point there, and maybe the Claimants will enlighten me.

MS. MENAKER: So, if that had been taken out in the "legal scrub" in the territory, and they were arguing, well, look, that means that we have an obligation not to expropriate something in Canada, we would say, "Well, no, look at it in context." Those words "in the territory" are not necessary there, just like they are not necessary here.

There are in--I believe Ms. Low asked specifically about Articles 1106 and 1109 yesterday, which I didn't address, but each of those offers further examples. 1106 deals with performance requirements and says, for example, that a Party cannot impose a requirement on an enterprise to export a given level of or percentage of the goods that it produces.

Now, there, it contains the "in the territory"

language. It says they may not impose or enforce a requirement on an investment of an investor in its territory. But now, again, the same question is posed. If that didn't have "in the territory" language, one wouldn't interpret it any differently because how could a State have the authority to impose a requirement on a company that is located or how could the United States have the authority to impose a requirement on a company that is located in Canada to export a given percentage

09:27:46 of its goods.

PRESIDENT BÖCKSTIEGEL: I would express some doubt--

ARBITRATOR BACCHUS: Me, too.

PRESIDENT BÖCKSTIEGEL: --because the United States have been alleged to do this quite a few times in certain fields.

ARBITRATOR BACCHUS: Government procurement.

PRESIDENT BÖCKSTIEGEL: I'm not saying I support that or I take a view on that, but.

ARBITRATOR LOW: Typically that's a condition of access to the U.S. market or U.S. financing for--

PRESIDENT BÖCKSTIEGEL: I'm not really playing with your argument. I'm just saying nevertheless, it has been alleged to happen.

ARBITRATOR BACCHUS: For example, if you buy--if the Canadian company might hypothetically want to invest in Florida and a condition of that investment might be some local governmental approval, it's not beyond the realm of possibility that the government in Florida might attach a condition to that investment by that company that it dispense of assets in Cuba.

MS. MENAKER: Isn't that a condition that is being imposed on the investment in the United States?

ARBITRATOR LOW: Yes.

MS. MENAKER: Right. That's not a condition that's being imposed on an investment that is entirely outside of the

09:28:53 country, so that was my point.

ARBITRATOR BACCHUS: I take your point. Okay, that's a good point.

All right. So, largely but not entirely, your view, then, is that the specific references to territorial limitations are superfluous, and you have given me a couple of examples, including the one on expropriation, and I think that's very helpful.

But the logic of that argument falls back, it seems to me, on the nature of your interpretation of the word investment, and another question I have, another problem I have, is that if you look at the definition of investment in 1139, I mean, it goes on for two pages, and unless I missed it, there is no territorial limitation there; am I correct? Did I read past that? Are there specific references to territorial limitations in the definition of investment?

MS. MENAKER: It's--there is nothing that I see in Article 1139, but again, you have in Article--in the scope provision, Article 1101(1)(b), that the scope of the Chapter is restricted to measures that apply to investments and which investments. It's only those investments of investors of another Party in the territory of the Party.

ARBITRATOR BACCHUS: Well, I think the Claimants would

pointed us to (a) as it relates to investors.

MS. MENAKER: But again, you can't read (a) divorced

09:30:35 from (b) because an investor is someone who is making or seeking to make an investment.

ARBITRATOR BACCHUS: Who makes an investment, yeah, and this is a--but your argument is circular because you're assuming that an investment is something that is a foreign investment.

This is the problem I have with the Bayview reasoning, frankly. And I'm going to go back and look at that and give it all the credence it deserves because of the considerations we discussed yesterday and the skills of those Arbitrators. But, to me, their argument seems to be circular. They reason from an assumption that the investment is, of course, a foreign investment, so therefore we have to interpret it in that fashion. And to me that's teleological in nature. I know you are making a textual argument or you're trying to make one. You have done a very good job of looking at the text and applying it from the text, but I'm not yet persuaded that you're not reading into the text the word form. And, yes, investor is the word in (a), but investor, as you just said, is related to investment, and if you look at the definition of investment, there is absolutely no reference whatsoever to any type of territorial limitation.

My intellectual challenge here is that when I look at the Vienna Convention approach, I generally think of it as a textual approach, and I incline my knee jerks toward a little

09:31:59 bit of literalness, and I worry if you get too far beyond the literal in terms of interpretation, then you have a tendency to stray from the intent of the negotiators, and I want to make certain that we don't do that.

I want to give the Claimants a chance to address these issues, but am I wondering in never-never land here?

MS. MENAKER: I think when you're talking about interpreting--we absolutely agree that you have to interpret the text, you know, the ordinary meaning of the text, in context, of course, but I think that's quite different than when you say a literal interpretation because I don't think--you can't--

ARBITRATOR BACCHUS: I'm being the devil's advocate here a little.

MS. MENAKER: And you can't take the words so literally completely out of context. There is no ordinary meaning that is divorced from context.

ARBITRATOR BACCHUS: Right.

MS. MENAKER: And when you pose the question of whether in doing so and so-called adding in words that we might be interpreting it, the Treaty not in accordance with the drafter's intent, I think that we have shown that quite the opposite is true. That when you look at the words in their context and in light of the object and purpose of the Treaty as expressed by the drafters, as expressed by all three of the

09:33:15 1 States contemporaneously with the adoption of the Treaty, it
2 was very clear that what they were intending to do--
3 ARBITRATOR BACCHUS: I'm going to come back to that.
4 MS. MENAKER: --was to promote and protect foreign
5 investment and the investors that make that investments, and
6 that is the clear, in our view, object and purpose of this
7 Treaty.
8 The--there was one other point that--
9 ARBITRATOR BACCHUS: Take your time.
10 MS. MENAKER: I'm trying to--
11 PRESIDENT BÖCKSTIEGEL: We could take it up later.
12 ARBITRATOR BACCHUS: I'll come back to you.
13 What about these questions I have been asking? I want
14 to give the Claimants a chance to weigh in. Do I understand
15 your arguments correctly? Do you have any response to what
16 Ms. Menaker has just said?
17 PROFESSOR GRIERSON-WEILER: We think that you
18 adequately portray our arguments in large extent. I suppose
19 one thing that we would want to add is to go back to the
20 discussion I had with you yesterday about symmetry, the fact
21 that Article 101(2) starts with noting the importance of
22 nondiscrimination both in national treatment and a
23 most-favored-nation treatment aspect. And then we see in
24 Article 1101(a) and (b) the (a) claim and the (b) claim, and
25 then we see in Article 1102 the (a) claim and the (b) claim

09:34:43 1 again, subsection (1) and subsection (2). You see it again in
2 Article 1103, the (a) claim and the (b) claim. And then you
3 see with Article 1116 the ability for the investor to bring a

claim regardless of nationality or territoriality issues.

So, we would submit that a plain and ordinary meaning of that text individually and taken as a whole and, therefore, which includes its context, imbued with the objectives of the NAFTA and the nondiscrimination provisions that are there, that the text makes sense. The symmetry we described makes sense.

And so, when we turn to the question of whether or not a particular provision using the word "territoriality" is surplusage--I hate that word--it's hard to say--I think that we lead ourselves down the road we don't necessarily need to go through. The key is, as you noted, Mr. Bacchus, that the question of the investment in that regard, that it's in the nature of the (b) claim.

I would note that with respect to Article 1106, it seems to us that the question of how a measure relates to an investment in the territory was very much on the minds of the drafters in that they first mentioned in Article 1101(1)(c) that it applies to all investments, so it's trying to say that the measures apply to all investments, was trying to broaden out and make clear all investments. And then, when you go to 1106, in the chapeau of (1), again, it says--it explains in detail the kind of measures that might impact upon an

09:36:34 investment of an investor of a Party or of a nonparty in its territory.

So, again, it seems to be very precise language. It seems very clear to spell out exactly the kind of performance requirements they are thinking of.

It's funny because they say spelling out exactly the

performance requirements, but, of course, by their very nature the performance requirements could be a wide range of things, but they're doing their best to sort of explain at least where they expect the measures to connect to the obligation.

I also looked to yesterday some discussion we had of Article 1111(1), where my friend says that--she uses this to propose her argument that obviously there is a territoriality provision there and that that has some significance. We would suggest that 1111 is simply there to clarify how (b) claims are supposed to be brought forward and no more, in the same way that Article 1105 works.

We think that's the same reason why 1102(4) works that way, but we would note that it's difficult for one to argue that the word "territory" doesn't matter or is surplusage in Article 1110, and yet it's very, very important for Articles 1102(4) and 1111. I would submit that she can't have it both ways, that either territory is important or it's not important, and in that regard we would propose that the simple, plain, and ordinary meaning of the text and the symmetry I've described to

09:38:23 you works. It makes sense within that context. There's no contradictions with regard to any of these provisions. If one understands that there are (a) claims and (b) claims, that it would make sense when they mention the territorial restriction and when they don't.

ARBITRATOR LOW: Could I interject here because I need to clarify something that counsel said, and I find these references to (a) and (b) claims confusing because I don't think Chapter Eleven has any such things or if it does.

PROFESSOR GRIERSON-WEILER: If we talk long enough, maybe I could convince you.

ARBITRATOR LOW: Maybe you can convince me, but I would just like to pause on what you said with regard to Article 1111 to make sure that I heard it correctly, and if I heard it correctly, what you were saying with regard to Article 1111 is that it only applies to claims with respect to investments under 1101(b), which cannot be the case if you look at the text of it.

PROFESSOR GRIERSON-WEILER: I will look at the text of it.

(Pause.)

PROFESSOR GRIERSON-WEILER: Now, this is largely meant to clarify (b) claims, though as we did point out in our Rejoinder, the Sarbanes-Oxley Act did seem to impose some requirements that one might call extraterritorial, but it makes

09:40:20 sense that in that context if one is going to have one's stocks, even if one doesn't have a business presence in the U.S., if one's going to have one's stocks listed in the U.S. and trade in the U.S., it would make sense why that extraterritoriality would apply and those kinds of special formalities might kick in--

ARBITRATOR LOW: Excuse me, I don't--I meant to ask you that yesterday. I don't think Sarbanes-Oxley, with all due respect, has anything to do with what we are talking about here. It's a listing condition for trading on a U.S. securities exchange, and I don't know that it's anything at all like what was intended with regard to 1111. You have tried to

argue that it's something quite different than what I think it is, Counsel.

PROFESSOR GRIERSON-WEILER: No, I don't think we--I think they are listing conditions, I think I agree, but I think that if you ask any Canadian businessperson, they would say that they very much are special formalities in business requirements that they have--

ARBITRATOR LOW: Not in connection with the establishment of investments within 1111(1) by investors of another Party, or with respect to--it's not routine information for informational or statistical purposes as well within 1111(2). So I'm--this is not the central point, but it troubles me that you are using something that I don't

understand to fit within this provision at all to support your argument.

PROFESSOR GRIERSON-WEILER: 1111(2) refers to territoriality, so it's very clear that this is a clarification or embellishment with regard to (b) claims.

With regard to 1111(1), we would submit that again, this is largely a clarification with regard to (b) claims, though we could see how this could be relevant in a broader context, and we gave you Sarbanes-Oxley in that regard. I would still submit that Sarbanes-Oxley and other--I mean, it's hard to conceive of the universe of measures, but there are measures that could impose special requirements, certainly not with regard to establishment in the (a) claim context. But as we would stand and say that, yes, 1111 is a provision that has to deal with clarification of (b) claims.

ARBITRATOR LOW: Well, let's go back to the main question with respect to 1111 because, for example, 1111(2)--I'm just going to read the language, and I want you to confirm that you're reading it the same way--1111(2), for example, talks about investors of another Party or its investment in the territory. That in the context of 1102 and 1103, both of which contain provisions, if memory serves, in (a) for investors and (b) for investments.

So, I don't understand the point that it applies to (b) claims because, as I read this very clearly, it's intended

09:43:13 to cover both. Can you just comment on that question.

PROFESSOR GRIERSON-WEILER: Sure.

It doesn't envisage (a) and (b) claims in that way. If we go back to Article 1102(2), it refers to investors--it refers to the investments of investors of another Party, and this provision here, Article 1111(2), refers again to investors of other Parties or their investments in the territory to provide routine information concerning, et cetera, et cetera.

So, they are simply talking about the cases where the--the typical (b) cases where an investor is trying to make--has made, seeks to make, or is making an investment in the territory of either Party.

ARBITRATOR LOW: With due respect, Counsel, I think that strains the reading. It says m"investors of another Party, or its investment in the territory," and it doesn't say notwithstanding Articles 1102(b) or 1103(b). I don't understand your reading.

PROFESSOR GRIERSON-WEILER: It simply covers the

circumstance--any circumstance of foreign investment and the protection of direct foreign investment, so it doesn't--there is no contradiction. That's--it's meant to protect foreign investors when they go into the territory of another Party, and so it's meant to clarify those provisions.

ARBITRATOR LOW: For example, the United States has an statute called the International Investment and Trade and

09:44:54 Services Survey Act, which I believe was one of the provisions that was contemplated by this section, which can apply with respect to the establishment of an investment by an investor, so it can apply at the pre-establishment or establishment phase.

And would you agree that that would be the kind of provision that would be covered by 1112?

PROFESSOR GRIERSON-WEILER: Yes, it could be the kind of provision, but I would use the word "could" rather than "would" because "would" implies that it's what the drafters had in mind, and I'm not in a position to say what the drafters had in mind. As a lawyer coming after the fact, the question I'm asked is could it, not would it. So could it? Yes, that sounds like something that could fit here.

ARBITRATOR LOW: Okay. But the core question we are dealing with is, do you--does it continue to be your position that 1112 is only dealing with what you call (b) claims?

PROFESSOR GRIERSON-WEILER: You mean 1111?

ARBITRATOR LOW: 1111, I'm sorry. I said 1112. Yes, 1111.

PROFESSOR GRIERSON-WEILER: Yes, 1111 is a (b) claim

clarification provision, by and large, a (b) claim clarification.

And that's why when we look at Article 1102(2), it even refers to one of the types of measures that can be

09:46:19 involved in a (b) claim. National treatment involves establishment. So, an investor who is either in the process of or desirous of establishing an investment is protected, if it makes a (b) claim and would make a (b) claim for protection under 1102(2).

ARBITRATOR LOW: I would like to hear Respondent's views on this.

MS. MENAKER: First, just so our position is clear, we disagree with this entire construct of (a) claims and (b) claims. I think we mentioned yesterday that it was an artificial construct. It's not something that--I know one of the Tribunal Members mentioned it was his first Chapter Eleven case, and so you may not be familiar with the terminology, but this is not terminology that we, as representative of the U.S. in these cases--

ARBITRATOR BACCHUS: I actually have read Chapter Eleven before.

MS. MENAKER: Right. It's not terminology that is--

ARBITRATOR BACCHUS: Indeed, I was one of the cosponsors of the implementing legislation for the NAFTA.

MS. MENAKER: Just referring to your comment yesterday, we are well aware of that.

But this is just not terminology that is used, and the reason is that the claims--the claims are brought pursuant to

Articles 1116 or 1117, so we have heard of Article 1116 and

09:47:37 Article 1117 claims whether they are brought on behalf of the investor or the investment. And, of course, you can have a national-treatment claim, you can have an expropriation claim, a minimum standard of treatment claim, et cetera. But there are no (a) claims and (b) claims. What Article 1101(1)(a) and (b) do is they define the scope of coverage of the Chapter. They explain which measures are covered.

So, it's not a type of a claim that they're describing. They're actually describing what types of measures are covered by the Chapter.

We disagree with Claimants' characterization of Article 1111 as being confined to so-called (b) claims. All 1101(1)(a) and (b) say is (a) says that it applies to measures that relate to investors, and (b) says it applies to measures that relate to investments. Here, when you look at 1111, it says in 1111(2), for example, a Party notwithstanding certain Articles, a Party may require an investor of another Party or an investment to provide routine information. If a Party--if a Claimant were challenging that, and it was an investor, the measure would have imposed on the investor an obligation to provide information. It would be bringing a claim saying that requirement violates Article 1111(2). The measure that that investor would be complaining about would be a measure that related to it as an investor. That is 1101(a). It's fairly simple.

If the measure imposes a requirement on the investment, by contrast, it would be 1101(b). And there is no sort of magic to this. I mean, most--many claims have challenged measures that relate to both the investors and the investment. And I mentioned the Methanex case yesterday. I mean, there the measure it was alleged related to the investor. Under Article 1101(a), they brought a national-treatment claim under Article 1102(1) because they allege that Methanex as an investor was treated less favorably.

If you look at the Loewen claim, they had claims under both Article 1102(1) and 1102(2). They claimed that the individual claimant, Mr. Loewen, claimed that he, himself had been denied national treatment by the measures at issue, and they also claim that the enterprise had been denied national treatment. Those claims were necessarily encompassed by Articles 1101(a) and (b). They are related to the investor and the investment. There is nothing unique about Claimants' claims being brought, as they say, under 1101(1)(a).

ARBITRATOR BACCHUS: Ms. Low, may I? You had a chance to ask everything you wanted right now?

ARBITRATOR LOW: Yes.

PRESIDENT BÖCKSTIEGEL: Before you go on to something else--

ARBITRATOR BACCHUS: I'm going to continue on this.

PRESIDENT BÖCKSTIEGEL: Okay. Let me just say, this

(a) and (b) claim issue has now been discussed in abstract and

concrete application for a while, and I feel a certain responsibility to avoid--there are misunderstandings between the Parties, one Party and the Tribunal, certain members.

Mr. Weiler, since you have been the one saying this makes the difference, could you point us to any source where a distinction between (a) and (b) claims has been described in detail in the way you now use it?

PROFESSOR GRIERSON-WEILER: In detail, no. This is the first (a) claim, and so in detail, no. I did note, of course, that the Bayview Tribunal took the time in note 105 to specify that it was dealing with a claim relating to--measures related to territorially situated investment.

PRESIDENT BÖCKSTIEGEL: Yeah, now I quote, but note has used the term (a) claim and (b) claim so far?

PROFESSOR GRIERSON-WEILER: Not to my knowledge.

PRESIDENT BÖCKSTIEGEL: Okay. This is what I wanted. Then you obviously cannot point us to a source on that.

PROFESSOR GRIERSON-WEILER: Correct.

PRESIDENT BÖCKSTIEGEL: Okay. But I think in the interest of us understanding you, I think it would be helpful if you not only use that terminology to explain things, but also use another way of describing it so that everybody in the room understands better what your argument is, okay?

PROFESSOR GRIERSON-WEILER: Certainly.

09:52:20 ARBITRATOR BACCHUS: Thank you, Mr. President.

Let me proceed to the next question, and I will start this time with the Claimant.

I want to examine the issue of subsequent practice

because as we've been discussing with respect to the negotiating drafts, we do have a limited amount of materials beyond the text itself in which to discern the meaning of these Treaty obligations. And we have also discussed subsequent practice under the Vienna Convention. Mr. Bettauer, I think, has a pretty good summary of where the Vienna Convention directs to us go there. I haven't heard Claimant disagree with the basic approach that needs to be taken here, but there does seem to be disagreement on whether there is any agreement among the Parties.

Now, as I understand it, the Parties are both of the view there has been no formal interpretation here by the Free Trade Commission, okay? And further, it's clear that Canada has made no 1128 submission in this particular proceeding. We have our friends from the Canadian Government in the back of the room, but they have not brought us a piece of paper that says here is our submission. I see only a smile but no piece of paper, so we can't find agreement from either of these two places.

So the question then becomes, well, where is there agreement? There are some contemporaneous declarations in the

09:54:22 Statement of Administrative Action presented by the U.S. Government, and then I think it was said by Canada and Mexico at the time, and then there are some arguments that have been made in the context of particular disputes, and that seems to be it. All of that is whether it's tantamount to agreement, and that's what I'd like to explore because if there is agreement among the Parties, then I think that's very important

to the Tribunal. In fact, it could be dispositive to the Tribunal.

I would ask the Claimant very briefly to tell us why you think there is no agreement, and then I would ask the United States to tell me why you think there is.

PROFESSOR GRIERSON-WEILER: My colleague, Dr. Alexandroff addressed some of this yesterday, so I will refer this to him.

ARBITRATOR BACCHUS: Dr. Alexandroff, good morning, sir.

PROFESSOR ALEXANDROFF: Good morning. Give my colleague a bit of a rest.

On the subsequent practice, I mean, the Respondent did raise it in their pleadings and suggested that there was an authentic interpretation, meaning directly expressed agreement by the Parties. Then, when you look at what they have identified, I think your characterization or description is right. There is certainly not, and we are not suggesting it is

09:55:45 required, but there's certainly not an Article 1131(2) interpretation which, at least arguably, is vying in the mind of the Tribunal. And then we come to then 1128, which you identified as well.

And I would point out that they have raised it in the context--in the Methanex there was some discussion of this, apparently, one, with respect it the July 2001 FTC, the Free Trade Commission interpretation, this with respect to 1110 on expropriation, and then an argument with respect to whether or not the 1128, in fact, constituted a 31(3)--a 31(3)(a) of the

Vienna Convention subsequent agreement. And what the panel says in the Methanex is we don't have to determine that.

So, they never make a determination with respect to whether or not 1128 interpretations, in fact, fall to the 31(3)(a). In any instance, we say, and I think you characterized it right, there isn't such agreement. Canada has not put in an 1128 interpretation as requested here by the Tribunal, which was supposed to be filed as of March 1st, 2007.

ARBITRATOR BACCHUS: Let me ask you a question. Someone was kind enough to leave four pages up here with us this morning in big print. Was this from the United States?

MR. BETTAUER: Those were going to be the slides during our rebuttal.

MS. MENAKER: I'm sorry, I didn't realized those were being passed out.

09:57:42 ARBITRATOR BACCHUS: That's okay. I'm happy to have them. They're relevant, and they are in big print.

MR. ALEXANDROFF: We haven't seen them.

ARBITRATOR BACCHUS: Well, I'm sure they'll make certain that you do. And there's nothing new here.

PRESIDENT BÖCKSTIEGEL: Pass the paper over so we could start talking about them.

Give him a copy of it.

PROFESSOR ALEXANDROFF: In any case, sorry, I interrupted you.

ARBITRATOR BACCHUS: No, I interrupted you, my apologies, but I don't see anything in here that the United States and the Claimants didn't mention yesterday.

MR. ALEXANDROFF: We haven't seen all that.

ARBITRATOR BACCHUS: There are various statements here from the three countries along the way both from the implementing acts and from and in particular disputes.

PROFESSOR ALEXANDROFF: Yes.

ARBITRATOR BACCHUS: This is my question. Mr. Bettauer was talking about the desire of the United States always wanting to be consistent in its pleadings in different disputes and different places, and I'm going to ask him a little bit more about that in a minute.

To what extent are arguments that are made in particular in the context of particular disputes in support of

09:58:49 the effort to try to prevail on those disputes necessarily going to be or should be persuasive along the way? Are the NAFTA Parties obliged to consistency, in your view, and should we--should we, even if something does support a position, is it necessarily going to be persuasive a little later on in another dispute?

PROFESSOR ALEXANDROFF: I mean, it is a possibility. It's clearly statements made in the litigation. There is no obligation. It may be true that my friends have always been consistent, I can't say, but I don't think that is somehow obliged by NAFTA or, indeed, by Vienna, but we are looking for authentic interpretation, and our position is that we do not have authentic interpretation here, meaning agreement, direct agreement, of the Parties. That's our kind of standing position.

ARBITRATOR BACCHUS: This is my problem. In terms of

the Vienna Convention, it says subsequent practice. It doesn't say there has to be--when you look at the NAFTA, and you have got an opportunity for a formal interpretation by the Parties through the Commission, you also have an opportunity for a formal submission, and we are all agreed that neither of those things has occurred. But does that necessarily mean, in your view, that there cannot be subsequent practice?

PROFESSOR ALEXANDROFF: No, I don't think that is the case.

246

10:00:30 ARBITRATOR BACCHUS: Then what would subsequent practice be that would persuade you that there has been agreement because what other opportunities are there other than to make submissions in particular cases?

PROFESSOR ALEXANDROFF: It would seem that what we are looking at, then, is 31(3)(b). First, our friends don't argue that. They argue (a) in terms of agreement, but if we are talking about (b), then they have argued an instrument which is 31(2)(b), and they have raised that with respect to the statement of interpretation.

Our position on the statement of interpretation--this is the Canadian position--is that it doesn't say what they suggest it says, which is that it's agreement with the interpretation that the U.S. Government and Mexican Government have said with respect to the question of the territoriality. In other words, the question of investment versus investor.

So, in--

ARBITRATOR BACCHUS: The statements made at the time of limitation raised are not really subsequent practice. They

are really statements that are contemporaneous--

PROFESSOR ALEXANDROFF: That's contemporaneous, that's right.

ARBITRATOR BACCHUS: Some idea of what the Parties had in mind. And we will have to look at those and judge whether we think that--

10:01:54 PROFESSOR ALEXANDROFF: Then it would fall to, as you correctly said, then it would fall to the--they have raised the S.D. Myers case in their pleadings as presumably representative of subsequent practice. This is the position that the Canadian Government took.

ARBITRATOR BACCHUS: Okay.

PROFESSOR ALEXANDROFF: And in particular, they raised the statements made at the time of the damages phase of S.D. Myers.

Now, I would point out, of course, that that was--that position that they raised was not accepted by the Tribunal because it was an issue around 1116 and 1117, and particularly around defining the ambit of damages with respect to the investor who sat in Ohio.

ARBITRATOR BACCHUS: To be candid, we talked about the extent to which we are bound by what previous tribunals have resolved. Just because another Tribunal reached a conclusion is not the reason why I will reach the same conclusion, but I want to look at the factors that went into in their thinking and the documentation that they considered in making their own decision because we will have to consider it as well in terms of whether we, too, find it persuasive.

I want to turn to the United States.

Mr. Bettauer, is this your issue or is this Ms. Menaker's issue?

10:03:12 MR. BETTAUER: Depends on how we tee up the issue, but I can comment on the extent to which we are bound by our assertions, but I think Ms. Menaker would want to do a little bit more on the agreement of the Parties.

PRESIDENT BÖCKSTIEGEL: We will just raise the questions to the Respondent and after that who wants to answer.

ARBITRATOR BACCHUS: I have two questions. One is, the Claimants told us why they think there is no agreement. I need a little bit better understanding of why you think there is.

And then second, I'm interested in this consistency. I may not have heard all you said yesterday, and I didn't know whether you were making a general statement that the United States of America is always consistent in all of its arguments at all international tribunals, or whether you were making a more pointed statement that's restricted to the NAFTA. If you were making a more limited statement with respect to the NAFTA, then I find that interesting. If you were making a general statement, well, I heard the United States make lots of statements in lots of fora, and I will just take your word.

But in terms of the agreement, in terms of the agreement, why do you think there is an agreement? Why--is there a particular NAFTA reason why statements made in the context of particular disputes in arguing on behalf of positions in those disputes should be given a general

10:04:44 1 application as subsequent practice?
2 MS. MENAKER: We think that, indeed, they should be
3 because it is a statement by the Government of its view on the
4 interpretation of a provision of a treaty; and, as you
5 recognized, that is the context in which these issues are most
6 likely to arise is in the context of a case.
7 ARBITRATOR BACCHUS: Is there something in the NAFTA
8 that supports what you just said?
9 MS. MENAKER: That...
10 ARBITRATOR BACCHUS: That we should see that--that we
11 should see such things as being tantamount to agreement.
12 MS. MENAKER: No, there is nothing specifically in the
13 NAFTA, but through the Vienna Convention. I think certainly
14 one can find agreement of the Parties based on statements that
15 the Parties have made, and one can certainly find State
16 practice in statements they've made on positions that they have
17 taken.
18 We have even heard in some cases that somehow the only
19 positions or statements that should be given any weight by
20 Tribunals are made when the United States is acting in an
21 offensive capacity. When we are acting on behalf of our own
22 investors, who are making claims either under the NAFTA or
23 under a BIT, and we intervene as a third Party or we espouse
24 their claim, but the statements that we make when we are
25 defending claims are somehow accorded less weight, and they are

10:06:04 1 less indicative of the United States Government's views, and
2 there is absolutely no basis on which to draw any such
3 distinction. The Vienna Convention certainly would not support
4 any such distinction.
5 ARBITRATOR BACCHUS: Let me interject here. As you
6 reminded me, I'm new to the NAFTA, but I have been involved in
7 several hundred disputes in the WTO where the United States
8 makes arguments every day that are oftentimes inconsistent with
9 one another, and that's perfectly okay. The United States will
10 argue that the sky is blue one day and the sky is red the next,
11 and so will Canada, by the way, and everyone accepts that.
12 And in my entire several decades of dealing with those
13 kinds of things, first in GATT and WTO, I never heard any
14 contracting Party to GATT or member of the WTO ever once argue
15 that any member should be held to have--to have taken
16 definitively a position for all time and for all purposes,
17 based on an argument that they have made and the position they
18 took in the context of any one particular dispute.
19 MS. MENAKER: I think this is quite--
20 ARBITRATOR BACCHUS: And what's telling to me is, I
21 thought there might be something I was missing in the NAFTA
22 that said, well, for purposes of the NAFTA, for purposes of the
23 NAFTA if you argue consistently in these cases, that has a
24 credence and a stature that it wouldn't otherwise have in the
25 context of, you know, a garden variety international commercial

10:07:38 1 dispute.
2 MS. MENAKER: No, I think it's quite different from

saying if we were to come in here today and argue something that was directly at odds with something we always before argued, I mean, we are free to do that, but I think we would have less--

ARBITRATOR BACCHUS: I think you are.

MS. MENAKER: Excuse me?

ARBITRATOR BACCHUS: I think you are.

MS. MENAKER: Arguing something that is different from anything--

ARBITRATOR BACCHUS: I think you can argue the sky is blue one day and the sky is red the next.

MS. MENAKER: Okay. I thought you said we were arguing something. No, if we were to do that, you know, we are free to do that, but I think that we would certainly hear, well, that's not what the United States really thinks this provision says. Look, it is argued in these other hundred cases it says this. In essence, the Tribunal may look at that as not being a very credible argument.

Of course, a party is always free to change its position, but our point is that when we take a position in one of these cases, we are taking a position on behalf of the Government. It is public, our transcripts are up on the Web, these are broadcast, they are very publicized. And we know

10:08:48 quite well that every country that is defending a claim brought by one of our investors looks at every defense we raise and will invoke that defense against the claim of one of our investors.

ARBITRATOR BACCHUS: This is all true--this is my

problem.

MS. MENAKER: Okay.

ARBITRATOR BACCHUS: When I asked you what your rationale for thinking this is tantamount to an agreement was, you reference was to the Vienna Convention. In the Vienna Convention customary rules apply generally, and they are applied in the WTO, and they're applied in other fora as well, where the conclusion you're reaching is not drawn, nor is it argued.

MS. MENAKER: But it's a statement. If the Party makes a statement as to its position, others are entitled to rely on that statement to say that is the position of the Party, unless and until that Party comes forward and revokes that position, which they are always free to do. Canada is free to come forward, whether it be in this proceeding, in the next proceeding and say, yes, we said this is how we interpret this, but--in S.D. Myers, but we no longer believe that.

ARBITRATOR BACCHUS: Have you made any statements--setting aside the Statement of Administrative Action, which is in a different category, and which is--and an

10:09:57 official character for the Government of the United States, have you made any statements outside of the context of particular disputes?

MS. MENAKER: We have cited in our written submissions a statement that is made by the USTR, which was also contemporaneously with the NAFTA's adoption, also by the, was it the GAO as well? And I can get you those citations where they also described the NAFTA's provisions in the same terms

that we are using to describe them now. And I could do it now or during a break.

ARBITRATOR BACCHUS: I seem to recall the references to them in the briefs. All right. That's helpful to me.

MR. BETTAUER: Could I make one further point about the consistency?

ARBITRATOR BACCHUS: Oh, yes. Certainly. Explain as much as you want, Mr. Bettauer.

MR. BETTAUER: Sometimes you need to change positions, and you explained why you changed positions. But as a general rule, our effort is to take consistent positions and to state when we are argue in litigation a position of the government.

Now, that can sometimes be difficult to achieve because, as you know, the government is messy, and the clearance process is messy, so we don't always get access to, for example, what the USTR may be arguing in the cases it does.

But at least in the Office of the Legal Adviser, when

10:11:26 we deal with international litigation, whether it be NAFTA, the International Court of Justice, and ad hoc arbitration, we are very much conscious of trying to maintain consistent positions across the board, whether we are in a Claimant or a Respondent position. We know those positions are made public. We publish them in the Digest of U.S. Practice, which comes out annually. We know others rely on them. We know that there is even jurisprudence which not terribly well-thought-of domestically of the International Court of Justice that says you can, in fact, be committing yourself to a position as a matter of law if you take it and others rely on it. And we know that other

rely on the positions that we take.

ARBITRATOR BACCHUS: Actually, I fault the Department of State for pointing out to the American people that there is such a thing as an International Court of Justice, but go on.

MR. BETTAUER: So, anyway, I mean, that essentially says what I'm going to say, is that perfection is hard to achieve in this area, but--and we sometimes have interagency struggles when we know about the defensive risk or offensive risk of taking one position or the other, but that's why there is so much care put into the positions that we take--

ARBITRATOR BACCHUS: So, the State Department may take one approach in one place and USTR will take another in another?

MR. BETTAUER: I will bite my tongue as to what I say

10:13:08 about the lot.

ARBITRATOR BACCHUS: All right. I understand. Do Claimants have a thought on this? I'm trying to find out to what extent we can look to statements that have been made by the NAFTA parties in the context of particular NAFTA disputes in a way that would give rise to subsequent practice as that term is intended in the Vienna Convention on the Law of Treaties.

MR. WOODS: I think it's dangerous to consider that what could be plead in one case, particularly on--

PRESIDENT BÖCKSTIEGEL: Could you speak up a little bit more.

MR. WOODS: Particularly on behalf of governments who change and whose directions you have to--whose instructions you

have to obtain before you make your pleadings.

It seems to me a very heavy and irrational burden and irrational thing to rely on in the context of thinking that the Government of the United States or Canada or Mexico go into every case having to consider past, present, and future precedent in everything that they plead.

I just think that the weight of that consideration falls.

And the other small thing I would like to add is that we've heard from the government, from the Respondent in the United States' position. But what we are talking about really

10:14:22 here, in part at least, is statements that put forward with respect to Canada's position, and that's entirely another story.

MR. BETTAUER: We appreciate that it's hard for private counsel representing private parties to appreciate the burdens of the government.

PROFESSOR ALEXANDROFF: Well, let's be clear. Mr. Woods spent 25 years in government, and so he's perfectly aware of the kinds of burdens that are placed on government when they argue these Chapter Eleven cases or WTO cases, so I don't think that is a relevant comment. We do understand that, but the issue here is agreement of all the Parties, and Canada's issue, not the United States's, as to whether they agree with the position that the United States has staked out, and we say they haven't.

ARBITRATOR BACCHUS: Thank you. I think we can all stipulate that there are both public and private burdens to all

aspects of--

PRESIDENT BÖCKSTIEGEL: May I just suggest, I mean, we are now getting into very interesting and also very general questions of the public international law and the Vienna Convention, on which we could, of course, spend a week easily and if we go back to whatever has been said by tribunals and distinguished experts, we could spend another week on that.

So, I think in for the benefit of our case here, we

10:15:53 should try to concentrate what is really relevant or different from things we have all knowing or at least supposed to know from public international law what is different in our specific NAFTA case.

ARBITRATOR BACCHUS: I agree.

The United States has answered my question.

Going on to my next question, and I would like to begin with Claimants here, and I think generally this question is one that all the Members of the Tribunal have, and the President and Ms. Low may have follow-up questions here for the Claimant and then response from the United States a little later. I refer to this in my own mind as the Pandora's Box issue, which is the thought expressed by the United States yesterday in its opening statements, that if there's jurisdiction here, then there is jurisdiction anywhere and everywhere. And we heard counsel for Claimants say that's not so, that's not what you're arguing, and that the particular circumstances of this case are such that give rise to jurisdiction, but that wouldn't necessarily be the case in every instance where there has been trade across the border and

investment back home.

So, if we are going to go forward and say that there is jurisdiction and if we conclude that Pandora's Box should not be opened entirely, then we are going to have to figure out some way to discern the line that has been drawn from the text

10:17:51 of the Treaty that allows jurisdiction here but not everywhere, and so we are thinking about that.

If I understand the Claimants' position correctly, you are saying that there is jurisdiction here though not everywhere because in this case there is an integrated regional market for cattle; and furthermore, that there are like circumstances between the situations of the Canadian Claimants here and the Americans who are in the same business and who are in competition with them in the United States. Do I understand your position correctly?

PROFESSOR GRIERSON-WEILER: Yes. And if you will allow me, I will elaborate. I also thought about this question last night, having been given a preview of yours today. I think I would like to try to put it first basics and see if that's consistent.

Article 1101 requires the measure to relate to investors under subsection (a) and under territorially situated of investors under subsection (b). Past tribunals have employed an effects-based approach to interpret what "relates to" means, and then as refined in that case for its purposes, the Methanex Tribunal took this approach and said whether the measure directly impacted upon the territorially situated investment that it was looking at.

But I think it's fair to say that the Methanex Tribunal stopped there. It was essentially trying to find a

10:19:37 proximate cause reason in its case, the horizon of investors, the horizon of Claimants that it sought, and it said a direct impact would satisfy what it referred to as a significant legal relationship and then later on a significant legal connection. So, I think what we saw then was basically that "relates to" became "significant legal relationship" and/or "significant legal connection" and what significant legal relationship or connection meant was direct impact.

Now, should the circumstances dictate, a different Tribunal may try to explore this idea of "significant legal relationship" a little further. For example, it could inquire into the character of the obligation allegedly breached in determining whether that sufficiently significant legal relationship exists between the measure and the investor, as in this case. If a tribunal was to adopt this kind of approach, on a prima facie basis, it would assess the claim on the basis of the following characteristics of nondiscrimination expressed in Articles 1101 or 1103 both paragraph (1). It would ask whether the investor alleged economic circumstances between it and investors of another Party demonstrative of significant economic condition between them with--competition between them within an integrated market. It would ask whether such alleged market by the investor was geographically based within the free trading area or within a portion thereof, and it would likely ask whether the alleged treatment accorded to the investor

10:21:26 appeared to be less favorable. It would ask all these questions on a prima facie basis whether or not the Claimant has pled--

ARBITRATOR BACCHUS: Let me interject here with questions. This is a question that the Americans raised yesterday, and I think it might be in line with my colleagues' and the flow of my own mind. I heard your answer yesterday, but isn't this a lot to ask as an inquiry to establish jurisdiction? Aren't you having basically delved into the merits of the case in order to establish the threshold question whether the Tribunal even has jurisdiction? I remember your point which was, well, for purposes of determining jurisdiction, you have got to assume that the facts are as stated by the Claimant, but that's sort of begs the question, I think. Am I off base here?

PROFESSOR GRIERSON-WEILER: I think that what the Tribunal--and I'm not necessarily advocating this for a tribunal, but I'm suggesting that this--maybe if one wants to explore, if one is worried about a box opening, if one is worried about floodgates, I'm trying to provide a--

ARBITRATOR BACCHUS: One is. Maybe three.

ARBITRATOR LOW: More than one.

PROFESSOR GRIERSON-WEILER: I'm trying to provide a legal theory through which one can do it tied into the existing case. And as we know, existing cases can be relevant in terms

of contributing legal theories and thoughts even if they are not on all fours, and even if you seriously doubt everything else they say, you might find something useful.

I have to admit that at first when I saw Methanex, I said why did they think proximate cause up in jurisdiction, but I saw that it made sense, that they essentially were saying that "relates to" in that particular case meant directly impacts upon rather than just impacts upon; and, for the circumstances of that case, I think that was necessary. And I understand that they got there by suggesting that they were looking for a significant legal relationship or connection.

So using that logic, but then going elsewhere with it saying, okay, yes, you need to have a direct impact, well, what else do we need to do if we want to keep the lid fairly tight?

Well, under--we submit that under Article 1101(1)(a), that the only two obligations available to an investor are the nondiscrimination obligations of MFN treatment and national treatment. And so, what we would suggest is that one adopt the same approach that tribunals, international tribunals, in all contexts approach when they look at a jurisdictional question. They say is there sufficient alleged meat on the bones to meet the prima facie allegations that have been made?

ARBITRATOR BACCHUS: That's beef; right?

PROFESSOR GRIERSON-WEILER: From Holsteins in particular. I'm from Ontario originally, and so there's more

Holsteins.

ARBITRATOR BACCHUS: I couldn't resist that.

PROFESSOR GRIERSON-WEILER: Is there sufficient meat

on the bones in the allegation to get there. And we would submit that in all the other NAFTA cases, either it wasn't pled or as suggested in Bayview, to the extent that at the very last minute they did amend their pleadings to try to get themselves within Article 1101(1)(a), that they didn't sufficiently--the old Wendy's commercial, "Where is the beef?" They didn't put that beef there.

So, I would say that you asked these three questions whether the investor alleged economic circumstances as between it and other investors of another Party that was demonstrative of the significant economic condition of competition between them within an integrated market, which we have done, and, in addition, one might inquire as to whether or not they have mentioned there that the reliance that they held on the regulatory conditions in play, in our case, we have spoken of the harmonization that had largely existed between the two. We have spoken of the NAFTA promises. You saw how after the NAFTA came into force, and, indeed, how after the Canadian-American Free Trade Agreement came into force this massive upswing in beef and cattle shipments, so you we see those things. You make sure that it is geographically based in the free trade area or a portion thereof because that's the nature of the

10:26:02 obligation. And then you ask whether or not the treatment did, indeed, appear to be less favorable, and if that meat looks good, you know if you go to--what's that restaurant we were at? Morton's. If you go to Morton's, you know, they give you this big thing of steaks, and they say, "This is the meat we offer you." Well, if you think that, you know, that cut looks good,

if you think that cut looks like it's fresh and strong enough, well, on a prima facie basis, you say, okay, let's go to the merits and see if you can actually prove what you claim to have alleged.

Of course, and the test is relating the measure to the investor, so--and they say it's not an easy threshold to meet, but I think it is the one that Parties probably need to meet if they want to establish that a measure relates to an investor vis-a-vis other investors, and that really only makes sense because under Article 1101--I'm sorry, under 1102(1) and 1103(1), there isn't that normal territorial restriction which would apply for treatment of investments--

ARBITRATOR BACCHUS: Cutting to the chase, Professor Weiler--this is helpful--you say that, if I'm understanding your argument correctly, that the distinction here is based on the nature of an integrated market for this particular product on a regional basis and the like circumstances between investors in Canada and investors in the United States.

Am I also hearing you in suggesting that, of course,

10:27:48 it's this Tribunal's job to judge this case and not others, but being mindful of the facts that other tribunals will look to what we do as we look to what others did before us, we want to be careful not to prejudge future cases. Are you of the view that this type of an inquiry can be done efficiently and effectively on a case-by-case basis?

PROFESSOR GRIERSON-WEILER: Very much so. Very much so.

ARBITRATOR BACCHUS: All right. So, we understand

your argument in terms of how we find particular jurisdiction here.

I want to give the United States a chance--

ARBITRATOR LOW: Could I have a one quick follow-up before you go on?

ARBITRATOR BACCHUS: Sure. Take several.

ARBITRATOR LOW: The series of tests you suggest that we import for jurisdictional purposes into 1101(a) implicates a number of factual issues, and I'm curious to hear your further thoughts as to what the, especially since we are talking about jurisdictional issue, what the burden of proof would be with respect to such factual matters and whether you're suggesting that a tribunal such as ours would simply rely on allegations of facts that are made in the pleadings and submissions to the Tribunal at the jurisdictional stage.

PROFESSOR GRIERSON-WEILER: The first thing I would

10:29:27 mention is just so that I'm clear, and I apologize if I wasn't, I don't suggest--I don't advocate a series of tests, but rather the simple concept that if we are talking about "relates to" under 1101, and we understand--let me borrow from Methanex that "relates to" means a significant legal relationship, then we at least, one, have established you need a direct economic impact. Fine.

The part that I'm adding, the two that I would be adding is the significant legal relationship. Okay. Well, then let's look at the alleged breach because if it's a legal relationship and we're alleging that a measure causes a breach when applied to an investor, well, then the obligation of a

breach could be considered a necessary element to look at in that significant legal relationship.

And so, the (b), the second part I'm adding or suggesting that you may want to consider would simply be to look at the breach alleged and see if it's made out and how well made out it is. Now, so just--I had to clarify that.

Now, then, to go into the meat of your question, we would submit that you would use the test that international tribunals have generally used, and I should probably mention that this is the test that we saw in the Bayindir versus Pakistan and in the Ethyl case, but we will get back to that later. If you use that test, essentially you are asking whether or not on a prima facie basis they have alleged

10:31:13 significant enough--significant--that significant relationship and they put enough meat on the bones to qualify that.

I would say, though, that UNCITRAL tribunals, and I speak not to ICSID Tribunals in this context because this is an UNCITRAL Tribunal, I would say that UNCITRAL tribunals actually have a significant amount of discretion as to how they want to establish their preliminary hearings, and if an UNCITRAL Tribunal decides it wants to take facts in evidence on a preliminary hearing, it can do so. I'm not suggesting that that's what you do here, by any means. I think that we are well down the road we are down, but I would be open to another Tribunal if it so chose to want to--if it felt that the meat on the bones on a prima facie basis in the store window wasn't enough for them, they could open up and go into the store because they can parse up the hearing however they would like.

In this case I'm not suggesting that because I would say it's very clear that we have established every conceivable reason to assume that we have--that you have jurisdiction, that we brought ourselves within the language of the text, and that you should move on to allow us to prove our case in merits.

ARBITRATOR LOW: Could I ask one further question? And that is on the point of reliance, Respondent said yesterday that there has been no promise on which you could rely and, as long as we are here, I would like you to specifically address that point, and they focused in particular on Article 710, I

10:33:01 think, in making that statement.

I would also like you to indicate to this Tribunal whether Claimants have--Claimants' investments in Canada, if it becomes critical for us to determine when those investments had been made or whether they were made prior to NAFTA or in advance of NAFTA, I take it that's information that we don't have on the record that you have. I haven't seen that pleaded in your--in your submissions. Two questions.

PROFESSOR GRIERSON-WEILER: Just to be clear--and what was the nature of the second question? I'm not sure.

ARBITRATOR LOW: The second question is just confirming that we don't have on the record any information as to whether Claimants' investments were made pre- or post-NAFTA.

PROFESSOR GRIERSON-WEILER: I will answer the first question first.

I think the best way to explain the nature of reliance in any given case is to go back to something that actually the Bayview Tribunal had pointed out, when it was trying to explain

why the claim before it on the circumstances of the facts before it, it believes, should fail. It suggested that these were Texans who were farming in Texas, and who were desirous of water, but basically knew that all the regulations and that all of the market conditions that applied to them were those of Texan farms, and we suggested in our Memorial, I believe it was our Rejoinder Memorial, that that's the difference between--or

10:34:47 that's one of the differences between their case and this case, whereas in that case, what the Tribunal was effectively saying was there was no expectation of the kind of circumstances that were alleged in that case. We are suggesting that here it was very reasonable for an investor to have an expectation that they would be in a position to reap the benefits of an integrated market, protections of fairness and fair deal and noncompetition that they would have based on what the NAFTA said and just a general character and flow of the regulatory cooperation between the two Parties.

Now, I'm reminded of the simple statement that I think that one could make, which is, if you look at these Alberta lands as you drive through them, you see how big they were. You can't help but think there is no reason for all of those--for all of that infrastructure unless it's to feed the American market. There is just too much of it. It just doesn't--there is so much they have invested there, there would be no point to have it all there if it was just to serve the Canadian market. There is only 33 million of them, and they eat a lot of beef, but there is only 33 million of them.

So, I think that it's the circumstances that go into

the expectations on a more general level that an investor would have that we are looking at, so it's not like you're necessarily looking for a specific promise. That is a type of reliance case, but that would be a minimum-standard case, I

10:36:27 would submit.

ARBITRATOR BACCHUS: Let me see if I understand. You're saying it was less reasonable for the Texan farmers to expect to continue to get access to the Mexican water?

PROFESSOR GRIERSON-WEILER: Or that they would get it.

ARBITRATOR BACCHUS: Or that they would get access to Mexican water, than it was for the Canadian cattle feedlot owners to expect that they would continue to get access to U.S. consumer marketplace for beef cattle.

PROFESSOR GRIERSON-WEILER: Very much so, and that's because--

ARBITRATOR BACCHUS: That's your distinction between the two in terms of like circumstances.

PROFESSOR GRIERSON-WEILER: Yes, and very much so because the cattlemen are looking at a market that has been promised them, so it's talking about competition between investors for a customer to provide a service, which is to feed them; whereas, in the Bayview case, it wasn't competition for any kind of customer. It was rather we want more of that water than we are getting. That's supply. That's about your inputs. That's not the nature of the promise that we see in the preamble and the objectives and the provisions. That promise is for the protection of a market on a competition basis.

ARBITRATOR LOW: Could I come back to that? Because

that was my original question.

10:37:50 What is the promise here?

PROFESSOR GRIERSON-WEILER: Fair--

ARBITRATOR LOW: Can you cite the provisions of the NAFTA and respond to the Article 710 point that Respondent made yesterday. This is very important to understand.

PROFESSOR GRIERSON-WEILER: Well, as I understand the Article 710 argument, that's really--that's just another example of what we would refer to as a watertight compartments theory. There is no--in Article 1112, there--you need an inconsistency, and there is no inconsistency with Chapter Seven or with Chapter Three or with any other Chapter. So, it doesn't matter what the Parties say they want to be governed by or what rules they want to submit to State-to-State practice. That's nice. It's the same thing with Chapter Nineteen.

ARBITRATOR LOW: Okay. So, we have the preamble. You mentioned the preamble.

PROFESSOR GRIERSON-WEILER: Yes. And the preamble--

ARBITRATOR LOW: We have the object and purpose, Article 1102. And what else do you have?

PROFESSOR GRIERSON-WEILER: We have Article 1102(1), and then, of course, which goes back to the question that Mr. Bacchus had yesterday, and then you have the term of trade "national treatment," and what that means--

ARBITRATOR BACCHUS: I'm going to come to that linked in a minute as soon as Mrs. Low has had a chance to ask all her

questions.

PROFESSOR GRIERSON-WEILER: So, yes, the preamble, established a predictable framework for business planning and investment. Expanded and secure market for goods and services.

The kinds of language here and the amount and consistency of it is very clear what kind of thing they're trying to create.

And then when they talk about the objectives of promoting fair competition within the free trade area and they say that that must be imbued with your understanding of national treatment and transparency and MFN treatment, we say that when you have that in your mind and you turn to plain language of 1102(1), it says that investors vis-a-vis other investors are going to receive treatment no less favorable.

ARBITRATOR BACCHUS: Thank you. Let me tell you where I'm going so you'll know that this is not endless. First of all, I want to give the United States a chance to expound on this Pandora's Box question that I have raised, which is what we have been answering for the past few minutes. Then I have only two questions remaining after that. One of to them is on the proper definition of the nondiscrimination provisions in the NAFTA, and the other, Ms. Menaker, I will be coming back to my question about relating to in my hypo that I raised yesterday where you said you wanted to give it some thought. That would be my last question, and I thought I would just let

you know that I'm going there so that it wouldn't surprise you

and you would have a chance to prepare for that. But that's all I have left.

And then the President and Ms. Low will have whatever additional questions they have, but that's where I'm going.

So I'm back to the Pandora's Box for the United States. We have heard the Claimants' explanation of where they see jurisdiction and how they think jurisdiction should be discerned in any particular case and why they see that this is not a Pandora's box, and they think that on a case-by-case basis Tribunals should be able to discern based on where there is an integrated regional market and whether there are like circumstances where jurisdiction exists, and that it won't always exist in every case where there is cross-border trade and an investor back home who has invested over here.

You obviously disagree with that. Can you tell me why.

MR. BETTAUER: Yes. I will start, and Ms. Menaker will have some comments, too.

The construct, in our view, that the Claimants have put forward is entirely artificial. In Methanex, they analyzed the jurisdiction question as looking at whether a measure related to, a certain measure, how that measure related to the investor or the investment. You mentioned what constituted the alleged breach.

10:42:21 What they proposed here is a far-reaching inquiry that goes way beyond the jurisdictional threshold, that gateway of 1101, but deep into the merits looking at whether there is significant competition, whether the market is integrated,

whether it's geographically based, whether the treatment is less favorable or not, whether there has been reliance. They're suggesting a merits inquiry.

Now, they have been very meticulous about challenging us for trying to read "in the territory" into (a). We think it's there, but we think it's--I mean, the concept is not necessary, but look at what they're doing. They're trying to read into this provision the jurisdictional threshold, requirements for a significant competition in an integrated market that is of geographically a certain type where one is less favorable than the other, treatment less favorable than the other and that there has been reliance. These are really not jurisdictional inquiries and they go far afield from the questions set out by this Tribunal in paragraph 3.6 of Procedural Order Number 1, which was the agreed question that we had.

If--and just looking at the agreed question, if you have a Claimant that has not made, does not seek to make an investment, is there jurisdiction. And what they have suggested is a far-reaching factual inquiry.

In fact, they are trying to have it both ways. At

10:44:08 some points in their argument, they argue that NAFTA is a unique agreement. It's not like an ordinary BIT, that it gives broad new special rights to investors. You find nothing in the actual text that will allow you to distinguish an investor that has an integrated market, an investor that has just a business in Canada and other competitors across the border. There is nothing there, but at the same time, they're worried that you

will find that a ruling that says they can come in will be too broad and have too severe a consequence, so they have Jerry built this concept, this what they called yesterday a rule of law based upon nondiscrimination creating a legitimate expectation. It's a new--

ARBITRATOR BACCHUS: What about the phrase "in like circumstances," because that is there? I want to come back to that in my nondiscrimination.

MR. BETTAUER: That's there when you get to the merits. 1102, when you make a merits determination, it's not at the threshold--first you have to find out whether there is jurisdiction in this case, and if there is jurisdiction in this case, certainly you have to look at the comparators and see whether there has been damage and all that. So we don't read that out--

ARBITRATOR BACCHUS: Your argument--and I realize your position, but your argument intellectually is that we either have to open Pandora's Box entirely or not at all?

10:45:45 MR. BETTAUER: That's right.

MS. MENAKER: If I could just elaborate on that, just to make four points on why it's our position that the test that Claimants proposed would not close Pandora's Box or keep it closed to some extent.

The first reason is that the inquiry that they proposed for 1101(1)(a) does implicate all of these factual issues, and yet they have repeatedly urged on this Tribunal that the proper approach for jurisdiction is to accept the facts that are alleged in the pleadings.

So, if a claimant comes forward and alleges that it is operating in a highly integrated market and that it has been directly affected, in what sense can a tribunal at the same time have to accept those facts and yet those are the very facts on which they say this will somehow narrow the jurisdictional scope? If those have to be accepted as true at the jurisdictional phase, then essentially all get through that window.

The second point is they have argued that this would not open the door to everyone who just trades in goods and is not an investor because they have said two things. One is that they're reading of "relating to" requires a direct impact, and the second is they said that claims would be limited to claims for national treatment and most-favored-nation treatments. And in our submission, that would not close the door at all because

10:47:17 if one thinks of, and I always hesitate to get into trade hypotheticals, given the panel, but one thinks of a measure imposing a tariff on a good, and suppose that someone is in the other State and wants to export that good into the United States, is not an investor in the United States, has no investment in the United States. That is, I think, a quintessential trade measure, and yet that person is certainly directly impacted by that tariff. It's going to have a direct impact. And if they wanted to bring a claim, what claim other than national treatment would they bring? I mean, that is a national treatment, albeit we would say national treatment for treatment of goods--

ARBITRATOR BACCHUS: Actually, a tariff is a border

measure, and national treatment refers to internal regulations. And it's an open question under WTO laws as to where that line was drawn, and no one wants to--no one has yet determined whether something could be both an internal regulation and a border measure under Article 3 and Article 11, respectively.

MS. MENAKER: And I'm sure that we would argue that were we--

ARBITRATOR BACCHUS: All that's completely irrelevant to our case. Go on.

MS. MENAKER: But I can see if this door is opened in this respect, what would prevent any Claimant from saying, regardless of how it is, you know, that this is an open

10:48:40 question in the WTO, they merely say here is a tariff. That has a direct impact on me, and it's not according my investment. My investment is the goods that I'm producing in Canada. They're being treated less favorably than similar goods in the United States.

Now, there are all sorts of defenses we could raise to that, but that is not so different. My point is that it would open the door in their jurisdictional test. Every entity or person that is basically trading in goods, they said they wouldn't all get through because they would have these two thresholds, only national treatment, most-favored-nation treatment, and only direct effects, and all we are saying is that would not limit the class of Claimants whatsoever. It's hard to imagine any class that could not get through that doorway.

The third point is they have put forward a test on

reliance on some integrated market. We have already said that factually they're wrong, we don't believe that there has been any such promise. They're relying on the objectives and preambular language, and in our closing arguments today we will go into that in a bit more detail.

But again, the promise, when you look at it, that they're are relying on is this broad promise of economic integration, so why wouldn't every person operating in any industry say, well, it's a broad promise of economic

10:50:08 integration. Why is that integration limited to the cattle industry? Why wouldn't everyone have the same argument and say that same promise of economic integration was made with respect to my industry? Why can't I get through the door?

As a matter of fact, they're wrong on Bayview as we see it, the so-called promise as they have characterized it in that case. They said they had no more reason to expect that they could get this delivery of water to the U.S. than Claimants here have had. I think an argument can be made quite strongly to the opposite. Here, they are relying on aspirational goal of the NAFTA as set forth, whereas Claimants in the Bayview case, they were relying on a 1944 Water Treaty between the United States and Mexico that obligated Mexico to release a certain quantity of water, and it was conceded that Mexico had breached the Treaty.

Now, that was a State-to-State claim that was later negotiated to the both parties' satisfaction, but there was a breach of a treaty. When you're talking about reliance, there was a specific treaty provision, so certainly they could get

through the door on this reliance test.

Finally, when they're also talking about this so-called promise, they mentioned that, you know, ever since the Canada-America--Canada-U.S. Free Trade Agreement, there has been this, you know, promise of further economic integration, and I think this further shows the weakness of their arguments

10:51:38 because as we have shown in that agreement, that agreement contains language that is more similar to the agreement, the language that is contained in our other treaties, where Claimants could not make the argument they are putting forth here because it clearly limits the scope to investors that have investments in the territory of the other Party. That language is contained in that agreement.

So, to the extent that they're talking about a reliance having made their investments on a reliance of this promise that was in their earlier agreement that was then carried over to the NAFTA, again, their claim falls on its own facts.

So, just to sum up, we don't think this can be done on a case-by-case basis, so to speak. There is no support in the text for the test that Claimants are suggesting that this Tribunal adopt, and there would be no cut-off point; and these things would require a merits inquiry, but all of this Pandora's Box, in our view, would remain wide open.

ARBITRATOR BACCHUS: Thank you, Ms. Menaker. I do want to move on to my question about national treatment; but, before doing so, I wanted to give Claimants a chance for just a brief reply. I don't want to get into a tit-for-tat here. I

think we have had a pretty good discussion of this. If the other Members of the Tribunal have follow-up, that's fine to do so.

280

10:53:04 PROFESSOR GRIERSON-WEILER: I will endeavor to be very brief.

First, only a fool alleges facts that are--especially complex and comprehensive facts, only a fool alleges facts it wouldn't be able to prove on the merits.

Second, we mention the McCallum approach in the study in the evidence there, and we had an economist apply the approach, shows that--

ARBITRATOR BACCHUS: This was the study that showed the cattle market was much more integrated?

PROFESSOR GRIERSON-WEILER: Incredibly more integrated.

National treatment, by its very nature, if I had a choice of a treaty, I have two treaties and I can choose between one that only offered me national treatment for whatever the protection was for my business or if I could have one that had national treatment, fair and equitable treatment, expropriation, transfer protection and performance requirements, I would choose the one that had all of those rather than the one that just had national treatment.

Reliance is not a test, we are suggesting to you. It's part of the explanation of the like circumstances applicable in this case. We didn't rely on the FTA, the Canada-U.S. Free Trade Agreement, as a carryover; rather, what we tried to say was that it showed the political and economic

281

10:54:15 1 context for the background of the negotiation of the NAFTA.
2 And, finally, fair treatment wasn't an aspirational
3 goal for these clients. It was a reality, day-to-day reality,
4 until the 20th of May 2003.
5 ARBITRATOR BACCHUS: I thank the Claimants.
6 Let me go on to the first of my two final questions.
7 MS. MENAKER: May I ask one, not in response to that.
8 I just wanted to see--
9 ARBITRATOR BACCHUS: You have a question?
10 MS. MENAKER: Yes. I'm just wondering when might be
11 an appropriate for a five-minute break.
12 PRESIDENT BÖCKSTIEGEL: Right now.
13 (Brief recess.)
14 PRESIDENT BÖCKSTIEGEL: All right. We continue.
15 We have come to the last question of Mr. Bacchus,
16 please.
17 ARBITRATOR BACCHUS: I want to do my part to move the
18 proceedings along now that we are properly refreshed and
19 fortified.
20 I said I would have two questions. I'm only going to
21 have one. I wanted to defer my first question to when and if
22 we ever get to the merits in this dispute, but I wanted to
23 signal my question to the parties so you might be able to think
24 about it.
25 One of my concerns is that, in terms of national

282

11:07:10 1 treatment, investment dispute tribunals generally in Chapter
2 Eleven and investment tribunals, to the extent that they had to
3 address the issues, thought they had to invent the notion of
4 national treatment in every given case, when, in fact, the
5 NAFTA Parties and lots of other countries have been dealing
6 with national-treatment issues, internationally in dispute
7 settlement and international treaties for decades now. And as
8 someone who spent more time on trade than on investment, I find
9 that facet strange, and it would be my thinking that, if and
10 when we got to the merits on national treatment, that we would
11 consider what had been done elsewhere on national treatment to
12 be relevant, taking into account, of course, any differences in
13 language in the NAFTA such as the phrase "in like
14 circumstances."
15 That said, let me go to my one remaining question. I
16 think it would be for Ms. Menaker. Yesterday, I presented a
17 hypothetical situation to you relating to the phrase "relating
18 to," and I wanted to ask if you could give some thought to
19 that. Again, we were talking about the nature of these
20 measures and that are at issue here, and the hypothetical
21 situation in which our Canadian friends who have brought this
22 particular claim had in that hypothetical world also made
23 investments in the United States. And the question I had for
24 you was--well, would there be sufficient legal connection, in
25 your mind, between these particular measures and their

11:08:58 1 investments as investors in the territory of the United States
2 that would be sufficient to give rise to jurisdiction?

MS. MENAKER: Actually, I defer to Mr. Bettauer.

ARBITRATOR BACCHUS: That is the choice of the United States.

MR. BETTAUER: Okay. Well, I need to tread carefully here. I want to bear in mind the caution that the President made yesterday that it is the Tribunal's intention to address this case and not a different case; and the hypothetical does, then, pose a different case and not the facts before us.

ARBITRATOR BACCHUS: I'm responding in offering this hypothetical only to the argument that was made by the United States.

MR. BETTAUER: Well, if there was an investment made, then obviously we would be in the position of making a different argument, and our argument would be geared to that case and not this case, and you would have to assess the measure through the lens of 1101 with respect to how the measure impacted on that investment and the investors making that investment.

So, you have a different line of inquiry, and we obviously couldn't be making the exact same arguments we are making in this case, and that is clearly a given. But that analysis would depend on much more information about the facts of the case in the hypothetical, and it would also require that

11:10:42 we go our interagency group and vet what we say about it.

ARBITRATOR BACCHUS: Assume the case is brought challenging these same measures; that's my hypothetical.

MR. BETTAUER: You would have to look at how the measure related to--

ARBITRATOR BACCHUS: As I understood Ms. Menaker's argument--maybe I misunderstood it, in which case we wouldn't need the hypothetical. As I understood your argument, one of the number of reasons you have identified why there is no jurisdiction here is because these particular--there is no sufficient connection between these particular investors and these measures that have been applied by the United States; am I correct?

MS. MENAKER: Well, not insofar as we were raising a jurisdictional objection. That is not the basis for our jurisdictional objection. In the hypothetical it may or may not have been, depending on the facts of that case. All I was doing when I was referring to the Methanex language in the context of that--and that was it came out in a Bayview, you will recall, they cited Methanex. They did not decide that jurisdictional objection on the basis that there was an insufficient legal connection between the measure and the investor. Rather, they decided that objection on the basis that, because the investor did not have an investment in Mexico, there was no jurisdiction.

11:12:16 And they looked to the language "relating to" simply as context--as further support to further buttress their conclusion that there could be no jurisdiction when there was no investment in the territory. So, it wasn't grounds for a separate jurisdictional objection; it was just further context. And it was in that respect that I was invoking that language.

ARBITRATOR BACCHUS: So, you'd just as soon we forgot about it for now?

MS. MENAKER: Well, we would just as soon that--I don't think that the record is such that the Tribunal could decide that, to decline the jurisdiction on the basis, that there is insufficient connection between the investor and the measure and separate and apart from the position that there is no investment.

ARBITRATOR BACCHUS: What if we decided that all the other elements of jurisdiction were there and we had to address the "relating to" issue? That's where my question becomes relevant because of the distinction between whether the investment was made in the United States or not.

MS. MENAKER: It would be unfortunate for our sake for many grounds, but I think the issue before you is constrained by the preliminary question that's set forth in the procedural order, which phrases it in such a way as--I think if you decide, unfortunately--like I said "unfortunately", if you decide that in the negative, I don't think that at this stage

11:13:50 you could decide--decline jurisdiction on other grounds, although we have reserved our rights to bring further objections that may be characterized as jurisdictional.

ARBITRATOR BACCHUS: I think you may have answered both of my questions. I don't want to beat a dead cow. I don't know that the Claimants have any thoughts on this.

PROFESSOR GRIERSON-WEILER: No.

ARBITRATOR BACCHUS: Mr. President, I have finished my inquisition.

PRESIDENT BÖCKSTIEGEL: Thank you very much.

Any further questions from you at this time?

ARBITRATOR LOW: Not at this time.

PRESIDENT BÖCKSTIEGEL: I feel enlightened by this discussion. I say "discussion" because it's sometimes much more than answers to questions, and the full scope of the discussion has really taken care of all the inquiries I still had at the beginning of all this, so there are no further questions from me. I take it that the two cases that I mentioned last night will be dealt with by the Parties in their second-round presentations anyway.

All right. It's quarter past 11:00, and obviously we have to make use of our time. We would in our agenda now come to the second-round presentation by Respondent. Can you give me any indication of how long you think that will be? You have up to two hours, obviously.

11:15:20 MR. BETTAUER: I think it will be up to an hour but less, probably.

PRESIDENT BÖCKSTIEGEL: Okay. So, we could easily do it.

MR. BETTAUER: Because many of our points have been answered in these discussions; and, to save the Tribunal's time and the patience of everybody, we won't repeat the answers that were already given.

PRESIDENT BÖCKSTIEGEL: That would be my suggestion, that you don't have to repeat things that were very extensively mentioned from the respective sides during the discussion, and so I expect that the Parties don't really need the two hours for which they would have as a maximum for this.

Why don't you start.

MR. BETTAUER: Ms. Menaker will start, and then I will conclude.

REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

MS. MENAKER: Thank you, Mr. President and Members of the Tribunal.

Mr. Bettauer noted I will try not to repeat all the points that were made this morning, but I would like to begin our closing by noting that in contrast to what the claimants have argued, the interpretive approach that we put forth before this Tribunal is not novel. We are not seeking to create any special rules, be it whether with respect to the "legal scrub"

11:16:33 or the practice of the Parties or any of those other things; nor have we put forward a so-called "sovereignty defense," as Claimants yesterday suggested. They said, and I quote, "The State which has consented to arbitration cannot invoke immunity to jurisdiction," but that begs the question. The question here is whether we have, indeed, consented to arbitration. And we have cited numerous authorities for the proposition that the consent of the State needs to be clear. Here, it's far from clear. I think that any reading of the text shows that the United States has not consented to arbitrate this claim.

And we have reached that conclusion by looking at the ordinary meaning of the text, in its context, in light of the object and purpose of the Treaty, taking into account the agreement of the Parties and subsequent practice that constitute such an agreement; and, on this point, I would just note that we made clear yesterday--or at least I hope we made clear--that we are making these arguments regarding the

parties' agreement under both Article 31(3)(a) and (b).

As we noted yesterday, the interpretive exercise under Article 31(3), it shows that that is a unitary process and that there is no hierarchy among the various tools of interpretation.

We have also resorted to supplementary means of interpretation, the draft rolling texts or the travaux that you have looked at, which we submit confirms the interpretation put

11:18:02 forth by the United States. Yesterday, Claimants, in our view, incorrectly argued that supplementary means like the travaux can only be resorted to when the interpretation that would otherwise result would lead to an absurd result, but that's not the case. When you look at the Vienna Convention, it clearly states that it can be used to confirm the meeting, which is how we used it. There is not much difference because, if one were to conclude that interpreting the agreement in light of its ordinary meaning and its context would lead to the results that Claimants propound, we would urge upon you that that would lead to an absurd result and then urge you to look to the supplementary means of travaux that you have, the draft rolling texts.

Now, Article 1101 must be read together as an integrated whole, and I have already responded this morning to the suggestion that there are so-called (a) and (b) claims. It's certainly not the way we see it, not the way it's ever been expressed before; but, rather, Article 1101 as a whole simply defines the scope of the Chapter and which measures are covered.

And Article 1101(1)(a) cannot be read apart from Article 1101(1)(b). The only measures that are covered or those that relate to investments are those that relate to investments that are in the territory of the Respondent State and all of the substantive protections of the Chapter that

11:19:38 relate to the investments. The only protections that are accorded to investments are those that are accorded to investments within the territory of the Respondent State. Investors, of course, are entities or persons that make investments, and the only investors that are granted protection must be those that had made or are seeking to make investments in the territory of the Respondent State. Again, the substantive provisions of the NAFTA confirm this. The national-treatment provisions, as you will see, as you have seen, grant national treatment to investors but only with respect to their investments. Again, the only investments that are accorded any treatment under the NAFTA are those that are in the territory of the Respondent State.

We submit that Claimants are reading out the term "with respect to investments" in Article 1102(1) and instead are seeking to import the words "in like circumstances" and other phrases that we discussed this morning into Article 1101(1)(a).

But, again, the "in like circumstances" inquiry is an inquiry for the merits for a national-treatment claim, but it does not and can't inform the Tribunal's jurisdiction. There is simply no support anywhere in the text for Claimants' theory that Chapter Eleven applies to investors that have not made an

investment in a Respondent State where those investors have invested in their home State in an integrated market.

11:21:05 Now, as an initial matter, the Tribunal will appreciate that the citations that Claimants put up yesterday during their arguments in support of their claim that the NAFTA created this integrated market were all very general and aspirational in nature, and those simply can't inform the jurisdictional reach of NAFTA Chapter Eleven.

Now, Claimants have created this carve-out, we suggest, to avoid the implications of their arguments that everyone who trades in goods would gain access to investor-State arbitration under the NAFTA; but, as I tried to explain this morning, there is not only no support in the text of reading that requirement into Article 1101, but it's also wrong to say that this would somehow limit the impact of a decision that the Tribunal can take jurisdiction over a claim made by a Claimant that does not make and does not seek to make an investment in another NAFTA Party's territory.

And we have shown that the Claimants in Bayview also alleged that they operated in an integrated market. The Claimants tried to debunk this allegation, but as I mentioned earlier again, they also argued that a tribunal needs to take the facts as alleged by Claimants as true at the jurisdictional phase. So, anyone who argues that they operated in an integrated market would gain access to the Chapter Eleven dispute resolution mechanism, and there again would be a lot of Claimants.

11:22:43 1 Claimants repeatedly assert that the NAFTA's goal is
2 economic integration; but, as I mentioned again earlier, why
3 would this integration be only with respect to this one
4 industry? Nothing in the NAFTA limits this aspirational goal
5 of economic integration to the cattle industry. And the fact
6 is that there is just no way to limit the reach of such a
7 decision and remain true to the text of NAFTA Chapter Eleven,
8 just like there is no way to read into Article 1101 an
9 exception for those investors that invest in an integrated
10 market.
11 Now, I won't repeat the arguments that I made earlier
12 when I was explaining that the distinction that Claimants tried
13 to draw between Articles 1101(1)(a) and (b) are artificial. I
14 referred to, unless the Tribunal has questions on both the
15 Methanex and the Loewen cases, where these claims certainly
16 concerned Article 1101(1)(a) and claims were certainly brought
17 under Article 1102(1). So, Claimants' claims are not as unique
18 as they would like you to believe that they are.
19 And I know the President indicated yesterday that he
20 didn't necessarily feel the need for us to discuss the Bayview
21 case anymore; but, with the Tribunal's indulgence, I would just
22 like to respond to a point made by Claimants.
23 PRESIDENT BÖCKSTIEGEL: You are absolutely free to do
24 that, obviously.
25 MS. MENAKER: Thank you.

11:24:26 1 Claimants today said that, at the very last minute,
2 the Bayview Claimants amended their claims to get into
3 Article--to make it into an Article 1101(1)(a) claim, and
4 that's simply not true. They have throughout these proceedings
5 tried to limit the import of that case by suggesting that that
6 was really an 1101(1)(b) case, as they say, and not under
7 1101(1)(a).
8 So, I just want to point the Tribunal to a few
9 citations so you can all see for yourselves why that isn't the
10 case.
11 First, in the hearing binders that we set out
12 yesterday, you will see in Claimants' Supplemental Memorial on
13 page 10 they clearly state that Mexico adopted measures
14 "relating to investors of another Party," and then they cite
15 Article 1101(1)(a). And this was not any new thing that was
16 brought up in their Supplemental Memorial. If you look their
17 Notice of Arbitration, one of the first submissions filed, you
18 will see just paragraphs 59 and 72, for example, they are
19 making a claim under Article 1102(1). They are claiming that
20 they are alleging that they, as investors, were accorded less
21 favorable treatment. They're not alleging in those paragraphs
22 that their investments were accorded less favorable treatment.
23 They are claiming that they were. So, it's necessarily they
24 are complaining about a measure that related to them as
25 investors.

294

11:25:51 1 So, the Claimants clearly made that clear.
2 Second, the Bayview Tribunal noted in its award that
3 Claimants were invoking Article 1101(1)(a) as well as Article

1101(1)(b), and this is in paragraph 43, and I will just cite that. They state: "The Claimants asserted that their claim concerns the measure taken by Mexico both to investors of another Party and to an investment located in Mexican territory."

Third, Claimants have, in fact, acknowledged this. If you look at footnote 58 from your Counter-Memorial, they say, "The investors in that case made some" what they characterize as "rudimentary arguments in respect of application of Article 1102(1) to them as investors."

Fourth, the Bayview Claimants were arguing the same things as Claimants are arguing here, and there really should be no mistake about this. If you look at paragraph 75 of the Award, it quotes the Claimants as arguing that "The omission from NAFTA Article 1101(1)(a) of an explicit territorial limitation such as that found in Article 1101(1)(b) and (c) has a similar effect." That's the same argument that Claimants are making here. Clearly, they are relying on 1101(1)(a) in the absence of the words "in the territory."

But the Tribunal clearly held that in order to be an investor within the meaning of NAFTA Article 1101(1)(a), "An enterprise must make an investment in another State and not in

11:27:25 its own," and that's at paragraph 101.

Now, I note that when Claimants quote this paragraph in their Rejoinder at paragraph 69, they have inserted a "sic," S-I-C, after the citation to Article 1101(1)(a), but the Bayview Tribunal did not make a typographical error in its award. It clearly held in more than one place that to be an

investor within the scope of Chapter Eleven, a Claimant needs to make an investment in the Respondent State. That's why, when you look at footnote 105 which Claimants have repeatedly relied on, the Tribunal states it's not necessary to settle the point whether the allegations that the measures relate to the investor or the investment because it doesn't matter, it says, "as it will become clear later in the Award." The reason why it doesn't matter is that the Claimants--the Tribunal held that a Claimant does not have jurisdiction to bring a claim if it is not an investor that seeks to make the investment in the territory of the Respondent State. That's the case for all claims. It's regardless of whether that Claimant is complaining about treatment of it or treatment of its investor. It's a threshold inquiry: Are you an investor that is entitled to bring a claim?

So, finally, in a last-ditch effort to minimize the impact of the decision, the Claimants yesterday repeated their decisions of the Bayview Claimants, saying they clumsily presented their case and they only made these arguments when

11:28:50 the Tribunal somehow indicated that they would lose.

Now, as you know, tribunals don't indicate to one Party or another--hopefully not, but there is nothing to indicate that the Tribunal told them they were going to lose. That is simply not the case. These arguments were briefed throughout the proceedings. They were not made during an amendment. But, if you look at particularly the posthearing submissions that we have concluded--that we have put in the binders, you will see that it contains all of the same argument

that Claimants are making here. They go through all of the draft rolling texts, the travauxes, they make the exact same arguments that Claimants here. Mexico made essentially the same argument that the United States is making here.

And, in effect, what Claimants are doing is essentially denigrating the Tribunal, saying that the Tribunal there mistakenly reached its conclusion because it didn't have the benefit of Claimants' allegedly superior arguments, but we urge the Tribunal to make a careful look at the decision, and we submit that it will find the reasoning of that Tribunal to be persuasive.

Now, the last point that I want to talk about with respect to the ordinary meaning in the context is the fact that Claimants still have not yet ever offered any explanation of why their interpretation does not lead to the absurd result that we have put forth. If the Parties had truly wanted to

11:30:17 extend the so-called "nondiscrimination principle" so broadly, so widely, and they are urging you to read into every provision a kind of super-gloss nondiscrimination principle, why is it that if the NAFTA Parties decided that it was in their interest to extend this principle so far that they wanted to extend it to investors in Canada that had made investments in their home territory, why would they have not accorded that same treatment to those investors' investments? It just simply does not make any sense. The NAFTA Parties clearly wanted to protect investors and their investments, and the national-treatment provision, as it works, as everyone agrees under Article 1102(2), if an investor makes an investment in another NAFTA

country, that investment is protected. That investor is also necessarily protected.

Now they want you to believe that the NAFTA Parties decided you don't have to make a foreign investment to be protected. If we are going to protect the individuals who made the investment, why would we withhold national treatment from the investment itself? It simply is an absurd result to extend the nondiscrimination principle in one direction and not in the other direction. And again, they throughout these proceedings have not come through with any type of explanation.

Now, the provisions, of course, of the Treaty must be read in light of the Treaty's object and purpose; but, again, the object and purpose of the Treaty cannot override the

11:31:50 Treaty's express provisions, and we cited ample authority for that basic proposition. Again, the Claimants argue about this--their argument rests on this supposedly broad nondiscrimination objective; but, quite apart even from the additional reasons I just offered, it doesn't mean that the Tribunal has to interpret every provision to provide for nondiscrimination because, clearly, there are exceptions to national treatment throughout the agreement. In giving the exception effect can't be said to advance the Treaty's object and purpose of providing for nondiscriminatory treatment, but that is not a reason to avoid the express provision of the Treaty.

And another example of how this sort of overarching objective can't be used to import an obligation where none exists is the example which also comes from Article 102(1) of

the objective of transparency.

The Tribunal may be aware that there is another NAFTA Chapter Eleven Tribunal, the Metalclad Tribunal in the case against Mexico, that interpreted Article 1105(1) as encompassing an obligation to provide a transparent framework for investment; and, in doing that, it relies specifically on the objectives set forth in Article 1102(1). But that part of the Decision was set aside, was vacated, by the British Columbia Supreme Court. That court determined that there was no showing made that the provision itself, Article 1105(1),

11:33:26 provided for an obligation of transparency, and that Claimant could not simply rely on the objectives of the Treaty alone to find that obligation. If you look through the Treaty, that obligation of transparency was contained, albeit in Chapter 18, but that obligation could not be read into every provision because it was an overarching objective of the Treaty. And the same is true for the nondiscrimination objective.

Now, again they relied on the general objective of creating a free trade area, but that doesn't tell us anything about how the agreement's provisions should be interpreted. As we showed yesterday, most, if not all, of the United States's Free Trade Agreements contain the same language--we pointed to our Free Trade Agreement with Jordan, for example--but you can't extrapolate from this objective that the NAFTA Parties intended to accord treatment under the investment chapter to Claimants that have not made and do not seek to make cross-border investments.

The Claimants focused on a few other objectives and

preambular language, but not every objective is achieved in every provision of the Treaty as I just explained with respect to the national treatment provision in particular. And we have shown that the objectives that are relevant when interpreting Chapter Eleven are those of increasing substantially the investment opportunities in the territories of the Parties and that of creating effective procedures for the resolution of

11:34:49 disputes, namely those objectives that really talk about investment.

Claimants's focus on the objectives of eliminating barriers to trade and facilitating the cross-border movement of goods and services are really not relevant to interpreting the provisions of the investment chapter, and Chapter Eleven Tribunals have recognized as much and have focused on particular objectives. If you look at the Myers Decision, for instance, they interpret the language in light of the objective and increasing substantially investment opportunities in the Parties. When you look at the Softwood Lumber Consolidation Tribunal's Decision on Consolidation, they are focusing namely on the objective of ensuring efficient resolution of disputes.

So, again, it's another example of showing that not every provision is interpreted in light of every objective and not every objective can be--the objectives can't be used to supersede the provisions themselves.

Now, interpreting the pertinent provisions of Chapter Eleven in light of the relevant objectives of the Treaty compels the conclusion that the Chapter applies only to investments in the territory of the Respondent State and to the

investors that seek to make or have made those investments. And it's in this respect that the Gruslin versus Malaysia award we believe is instructive, and I know that the President asked us, I think, to go into a little more detail on this.

301

11:36:11 Now, of course, that Tribunal in that case was interpreting a different Treaty, and the case was factually different, but it was faced with a similar jurisdictional issue as the one that is faced by this Tribunal, and that is whether the absence of the words "in the territory" in some provisions of the investment agreement at issue should be construed to allow investors to seek protection for investments that were made outside the territory of the Respondent State.

And the Gruslin Tribunal rejected that interpretation. It observed that the language didn't matter because the meaning was clear. The omission of that particular language didn't matter because that meaning of the provision was clear.

And the Tribunal observed that the meaning of the word "investment" had to be informed by the stated objectives of the investment agreement at issue in that case, which included a creation of favorable conditions for a greater economic cooperation for investments by nationals of one Party in the territory of the other.

The Tribunal also observed that the BIT's substantive provisions all predicated on the same subject matter of investments by nationals of one Party in the territory of the other Party, and, therefore, the Tribunal found that it was clear, and I quote, "that the concept of investment was to be read as being confined to the same defined subject matter of

25 investments by nationals of one contracting Party in the

11:37:44 1 territory of the other, and that the absence of qualifying
2 words of limitation to the word 'investment' itself did not
3 broaden the class of investments included in the BIT."
4 Claimants have sought to Gruslin on the grounds that
5 the scope and coverage of that BIT in question restricted the
6 Treat's application to, "investments made in the territory of
7 either contracting Party by nationals or companies of the other
8 contracting Party."
9 But the Claimant in Gruslin sought to bring its claim
10 because the Treaty allowed for, quote-unquote, any dispute
11 arising directly out of an investment, and it allowed for any
12 of those disputes to be brought to arbitration, and that clause
13 didn't contain any territorial limitation, but the Tribunal
14 said that that didn't matter. The absence of that language in
15 the territory in that provision didn't matter since the meaning
16 of the provision was clear.
17 And the scope and the coverage of NAFTA Chapter Eleven
18 and Article 1101 is similarly clear, we submit, and that the
19 absence of the words "in the territory" in Article 1101(1)(a)
20 do not matter because Article 1101 restricts the agreement's
21 application to investments made in the territory of another
22 NAFTA Party and to investors that have made or are seeking to
23 make such investments.
24 So, although Claimants are trying to isolate the term
25 "investor" from the related term "investment" in Article 1101,

11:39:13 1 that type of artful pleading is precisely what the Gruslin
2 Tribunal disallowed.
3 Now I would like to turn briefly to agreement of the
4 Parties.
5 Today, Claimants acknowledged that an FTC
6 interpretation by the Parties is not what is required to show
7 an agreement of the Parties. And they instead are seeking to
8 cast doubt on the probity of the views or positions that are
9 expressed by a Party in an arbitration or litigation. But as I
10 mentioned earlier, there is no basis on which to make such a
11 distinction or draw any distinction and discount some State
12 practice and not other State practice.
13 And as the Tribunal noted, Mr. Bacchus noted, when it
14 comes to interpreting the provisions of Chapter Eleven, much,
15 maybe all, but certainly much of the State practice will be in
16 the form of positions that the States themselves have taken in
17 arbitrations under Chapter Eleven, and that's just to be
18 expected. And there is no reason to say that that State
19 practice is somehow less probative or less relevant than other
20 State practice.
21 And again, I won't go through all of the arguments,
22 but we urge the Tribunal to keep in mind that these positions,
23 they are statements of the Government of what its positions are
24 in interpreting a provision of the NAFTA. We have indicated
25 why we believe our positions are taken with careful

11:40:52 1 consideration and that they are taken for both--with offensive

and defensive concerns in mind. But regardless, in either event, it is clearly a statement. It is clearly subsequent State practice by a Party on its views of the correct interpretation of Chapter Eleven.

Now, there is no dispute between the Parties that the United States and Mexico agree on this issue, and I have included a slide--I won't belabor the point by going over those, so I won't go over those because that is pretty clear, but you have that in your binders, if you should like to review that material.

But the question is really of Canada's agreement, and I do want to spend a few minutes on walking through these statements that Canada has made and explain why we believe that these statements indicate their agreement with the views that have been expressed by both Canada--excuse me, by both the United States and Mexico.

And the first thing that I want to make clear in this regard is the fact that Canada did not make a submission pursuant to Article 1128 in this arbitration. Cannot serve as any basis for concluding that it disagrees with the interpretation proposed by the United States.

In our view, the Tribunal should not draw any inference from a Party's failure to make a submission in a particular case. Certainly, it can't draw an inference that it

11:42:25 disagrees. As the United States, we certainly would not want tribunals to be drawing inferences as to our positions on the basis of nor intervening in a case.

There are many reasons why a State may choose not to

make a submission in a third-party case. I think everyone recognized that it may be politically sensitive to take positions in cases that are brought by your nationals, but that doesn't mean that Canada has changed its previously made legal position. If it had changed its view, it has had every opportunity to make that clear. The United States has argued throughout these proceedings for the past year that there is agreement among all three NAFTA Parties, and we have repeatedly relied on Canada's prior statements, and Mexico did the same in the Bayview case, and that Tribunal found an agreement of all three Parties relying on the statements of Canada that Mexico had introduced to the Tribunal. If Canada disagreed with the characterizations made by the United States or if it had changed its position, we submit that it would have had every opportunity and, indeed, every incentive to make a submission to tell the Tribunal that it disagreed with the United States's interpretation and that the United States had mischaracterized its views, but it hasn't done that, and, therefore, we and the Tribunal have every right to rely on Canada's past statements as expressing its views and its considered positions and to conclude that there is an agreement among the Parties.

306

11:43:58 So, what are those statements? So, let me put up the first slide, which is a statement from Canada's Statement on Implementation.

And that says, and I quote, "Canada has negotiated investment agreements both 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. The NAFTA builds on that experience." Their statement clearly indicates that the Chapter applies to Canadian investors who invest abroad; that is, not to those Canadian investors that invest at home and vice versa. And it was this statement that the Bayview Tribunal relied on when it found an agreement among the three NAFTA parties on this point.

And now I want to turn to the other statements that we relied upon, which are the statements made by Canada in the S.D. Myers case.

The Claimants have spent a lot of time discussing the facts of this case, but we submit it's not relevant for these purposes because Claimants have focused on arguments that Canada made during the damages phase of the case. And, in fact, Dr. Alexandroff repeated his statement today that the statements by Canada that we are relying on were made during the damages phase, and that's not the case. When you look at these submissions, these were made at the liability phase, and

11:45:32 that's important for the reasons which I will go into right now.

At the damages phase, the Tribunal had already made a determination that the Claimant was an investor that had an investment in Canada and that Canada had breached the Treaty. So, all of that had already been established, and the issue was damages, and in particular, the issue was whether the Claimant could recover for damages that was sustained by its U.S. company in addition to damages that were sustained by its enterprise that had been established in Canada.

Now, that's a different issue. That's not the issue here because, again, they had already established that you had an investor, a company in the United States. It had its investment, which was a company in Canada. So, that's the jurisdictional issue before us. They already had that, and they're only talking about damages, and can they recover for damages that are sustained by their--the U.S. investor in addition to the Canadian investment.

And in the Ethyl case, that was the same issue. There, there was a U.S. investor with an investment in Canada. Ethyl Canada was an enterprise in Canada. So, you had an investor that had an investment in the territory of the other NAFTA Party. Ethyl had made a claim for acts against it that were taken by the Government of Canada in the territory of Canada. So, again, it already had an investment in Canada and

11:47:00 was complaining about measures that were directed towards this investment.

Now, it claimed compensation for damage to its Canadian investment, Ethel Canada, as well as to damage sustained by it outside of Canada, and what the Tribunal held was that the issue of what damages the Claimant could claim was more appropriately determined at the merits issue. But again, that's not the issue here. In both the S.D. Myers case and the Ethyl case, the Ethyl case at the earlier phase, the Myers case at the damages phase, you had a claimant that already had an investment in the territory of the other respondent State, and they were only talking about what damages could be recoverable. Now, the statements that we are relying on were made by Canada

at the liability phase of the Myers case.

At this phase, Canada objected, made a defense on the grounds that the Claimant did not qualify as an investor, and the reason was it claimed that it did not own or control the alleged investment in Canada. You had the investor was S.D. Myers, I will call it S.D. Myers U.S., the investment was S.D. Myers Canada. S.D. Myers U.S. was owned by a number of shareholders. Those same shareholders owned S.D. Myers Canada. Canada objected and said the investor isn't the individual shareholders. It's the U.S. company. The U.S. company doesn't own or control the investment in Canada; therefore, you don't have an investor with an investment in Canada.

11:48:34 The Tribunal rejected that defense. They said as a matter of corporate structure, it's true that the U.S. company didn't directly own the investment in Canada, but because there was this commonality of shareholder ownership, they said it didn't matter. But that's a different issue.

The issue is, when Canada was raising this objection, they argued very clearly. They clearly took the position that in order to be an investor under NAFTA Chapter Eleven, you need to have an investment in the territory of the other NAFTA Party, and it was these statements made in the context of this argument that we are relying on.

And let me just point to these statements, which are all taken from Canada's Counter-Memorial on the merits.

The first thing that we put on the screen is the heading where it says: "The basic requirements of NAFTA Chapter Eleven have not been met."

Then it goes on to say, "Myers had no investment in Canada within the meaning of the NAFTA. SDMI, which is the U.S. investor, has not established that it was an investor of another Party that was seeking to make, was making, or had made an investment, as defined by Article 1139."

And, in this section, Canada is clearly objecting to the jurisdiction of the Tribunal on the grounds that because the U.S. investor had not established that it had made or was seeking to make an investment in Canada, it was not an investor

11:50:05 as defined by NAFTA Chapter Eleven.

Now, the next quote here you will see is from further on in that same Memorial. It says: "Defining the investment and the investor with respect to his investment."

"The terms of Article 1102 provide that the national treatment guarantee is extended to both the investment, Article 1102(2) and the investor with respect to the investment, Article 1102(1). The latter obligation does not mean that the national treatment obligation applies to the investor's activities in its home country. The obligation only applies to the investor with respect to its investment in the foreign country, in this case Canada."

Now, here Claimants have argued that Myers was a so-called (b) claim under Article 1101(1)(b). And that's a red herring. In this passage, Canada is clearly expressing its view as to the improper interpretation of Article 1102(1), and that's a so-called (a) claim in Claimants' parlance. That is, they are arguing here, expressing their view as to Article 1102(1) that provides for national treatment for investors with

respect to investments; if you're providing national treatment to investors because it's because it's measures that relates to investors under 1101(1)(a), and clearly Canada is expressing its view that that obligation only extends to investors, not with respect to any investment that they may have in their home country territory, but only with respect to those investments

11:51:46 that are made in the foreign country in another NAFTA State.

Again, I think Canada's view is set forth, and I think do we have--and just one other slide that I will just mention briefly from also that same Memorial, Canada also opines here in the object and purpose of the NAFTA when they say their interpretation is confirmed by the object and purpose of the NAFTA and its investment provision, which is to promote investment in the territory of the NAFTA Parties and therefore to provide some protections to investors and their activities in the territory of the other NAFTA Parties, again clearly indicating that the object and purpose of the NAFTA is to protect investments that are made in another NAFTA Party and to protect the investors that have made those investments. Not to protest investors that have not invested in the other NAFTA Party.

And Canada's position was also recognized by the Tribunal in its partial award, and in the partial award of November 13, 2000, and I'm afraid I don't have a slide for this, but it's paragraph 224, and I will just quote from there. It says: "Chapter Eleven covers claims by investors against a host Party. In the context of this case, SDMI, which is the Claimant, contends that it is an investor which is a national

of a Party that seeks to make, is making, or has made an investment. It is common ground that SDMI is a national of a Party, but Canada asserts that it did not have an investment in

11:53:30 Canada."

So, there again the Tribunal is clearly recognizing Canada's position that it is objecting to the jurisdiction of the Tribunal because the investor, the Claimant, allegedly did not have an investment in the territory of another NAFTA Party, and that, again, is at paragraph 224 of the partial award dated November 13, 2000.

So given all this, in our view it is clear that there is agreement among all three NAFTA Parties that in order to have jurisdiction, you need to be a Claimant, an investor that has made or is seeking to make an investment in another NAFTA Party.

And finally, I just want to turn to make a few more additional comments on the travaux, and I think we covered this this morning, but I will just see if there is maybe a few additional things to add.

Again, let me just begin by reiterating that the Claimants' suggestion that we have somehow indicated that the text from Article 1101 and 1102 was deleted by accident does not accurately portray our position. We have not argued that it was accidental, but rather we maintain the position that it was deleted. While we don't know for certain the reasoning, we can infer that it was deleted because it was deemed unnecessary. And we have shown in other provisions where the language that was retained seems to be superfluous.

313

11:55:22 1 We have also shown other provisions where the language
2 is not expressly there, and yet Claimants concede that the
3 provision has to be read with the language. And in particular,
4 I note Article 1105(1) they mentioned in that regard.
5 Now, Claimants today argued that we were somehow
6 seeking to have it both ways, that we were saying that the
7 language was necessary in some places and not necessary in
8 others, and that is not what we have said. We said it
9 certainly in the scope and provision Chapter provision--excuse
10 me, scope and coverage provision; there it makes sense to have
11 the language in 1101(1)(b), but insofar as the other provisions
12 that we were discussing, as far as they were concerned, our
13 position has been entirely consistent.
14 So, in Article 1102(4), for instance, we have never
15 contended that the language there was necessary. We have shown
16 that the language there has--at one point it was in the text,
17 then it was taken out, and then it was put in again. But could
18 anyone conclude from that that the lawyers, when they were
19 doing this over a matter of days or weeks, that they were
20 dramatically, drastically expanding and then restricting the
21 scope of Chapter Eleven and then expanding it again day by day
22 as they were making these changes? I think that's just
23 implausible.
24 Now, recall that Article 1102(4) is again one of those
25 Articles that is there for greater certainty. It doesn't add

314

11:57:08 1 any substantive obligations. It gives examples for when
2 national treatment should be accorded to investors. So, in
3 other words, it's under Article 1102(1). And we submit it
4 provides further evidence that the words in the territory are
5 sometimes superfluous because since it's not actually meant to
6 expand the substantive obligations, by taking the words in and
7 out, it is not making any substantive changes, and it shows
8 that it could be done either way, and you get a bunch of
9 lawyers in a room, and there will be lots of different ways
10 that one would choose to draft any particular provision.
11 Again, I don't want to repeat everything we already
12 said this morning, so I will just take one moment to see if
13 there were any other additional points I wanted to make with
14 respect to the travaux.
15 I think I can just sum up on this point by noting that
16 once the text went to the lawyers for the lawyers' revisions or
17 the lawyers' scrub, it indicated that at that point in time
18 there was agreement among the Parties as to the substance of
19 the provisions that were at issue, and what was left was again
20 for the lawyers to conform the text and to do the scrub. And
21 you can see that because the first text that is labeled
22 lawyers' revision on August 22nd, 1992, there are almost no
23 brackets that are remaining. Prior to this time you will see
24 bracketed texts. You will also see an indication in brackets
25 which says Mexico, Canada, or U.S., indicating that one of the

11:59:05 1 other Party was proposing certain changes to be made. But once
2 you get to the lawyers' revisions, the text, the bracketed

texts and the bracketed Parties are all gone from Articles 1101, 1102, and 1103, except for a notation in what would become Article 1101(3), which states that further coordination still needs to be made with the financial services Chapter.

So, there, it's a clear indication by the Parties that there is agreement on the substance, and they noted when they actually needed to check with something or further coordinate for financial services.

So, here, at this point in time, what we can infer is that the lawyers are making changes, that change is made, the word is taken out. We submit it was unnecessarily placed in there. You can see there is not consistency throughout the Chapter, and that in other places it's retained where it doesn't seem to serve a purpose and other places it's not there where, again, it wouldn't necessarily need to be there. But what we can conclude is that the change was not made as a result of a decision among the parties to drastically expand the scope of the Chapter beyond that which had ever been negotiated by any of the Parties to the investment agreement, and that simply is not plausible, even where there is something as minor as needing to coordinate something with another Chapter or needing to look at something a little closer.

There is a footnote during--in the lawyers' revision

12:00:43 of the texts. Here, you'll see when this change is made, it's is not accompanied by a footnote. There are no brackets. There are no indications that Mexico or Canada or the U.S. is proposing this change. It is simply a change that was made by the lawyers in order to polish up the text, and we submit that

to read into that change any kind of indication that the Parties intended to drastically expand the scope of coverage of Chapter Eleven would go far against any proper means of treaty interpretation.

So with that, I would ask the Tribunal to call upon Mr. Bettauer. He will conclude our closing remarks.

PRESIDENT BÖCKSTIEGEL: Mr. Bettauer, please.

MR. BETTAUER: Mr. President and Members of the Tribunal, I can be quite brief because much of what I was going on say has already been addressed in our extensive question-and-answer period. There are just a few points that I would come back to, and for the rest I would trust you to find our responses already in the record.

I start by noting that yesterday, you, Mr. President, indicated that the approach to treaty interpretation that might be favored by the Tribunal might be found in the Bayindir case, not Treaty interpretation, a precedent to the use of previous awards in this case, so obviously we took a look at that last night, and found that there the Tribunal said, and I quote, paragraph 76, "The Tribunal agrees that it is not bound by

12:02:34 earlier decisions, but will certainly carefully consider such decisions where appropriate."

That seems to us obvious, and we all seem to have agreed on that position yesterday as well during our discussions. This is what that Tribunal, the Bayindir Tribunal did, in fact, did. It reviewed prior cases carefully and reached decisions along the lines of prior cases where it considered that appropriate. But it's interesting that in

paragraph 109 of that award the Tribunal decided that it would not depart from a decision in a prior case because it said it, "cannot see any reason to depart from the decision."

So, it seemed to suggest that if there is no good reason to depart from a decision of a prior Tribunal, why, it would be prudent to continue to uphold the decision of a prior Tribunal, although not binding, but to follow it.

And we submit that if the Tribunal follows that practice and carefully reviews the Bayview case, which again I won't go into--we had enough discussion of it--we are confident that this Tribunal will follow the reasoning in that award.

We also think that other Claimants will then look to this award and follow the reasoning of this award that comes out of this case in future cases if they find it apposite, and that's why we were concerned about the Pandora's Box argument that we have had.

Now, I won't go into that again because we have

12:04:28 already discussed that at some length, but we've made clear our view that if one were to find jurisdiction in this case on the basis of the question put forth in Procedural Order No. 1, over a Claimant that had not made an investment in the Respondent State, then there would be no reasonable way to distinguish that from other situations in future cases. And again, there is no point in repeating it. We've explained our position. I just wanted to make clear that that follows from that.

I also wanted to note that in the discussion we've heard our adversaries have put forward many facts, and they have been facts not only pertaining to jurisdiction, but facts

we would consider as pertaining to the merits. They were facts about the market, assertions that the U.S. measures weren't based on adequate health or scientific analysis, assertions about the investments made in Canada, assertions about the expectations of Claimants. These assertions are obviously attempts to gain sympathy for the Claimants, and I want to be clear that the United States has no intention to attack Claimants in these proceedings. We do not intend to denigrate their plight. Indeed, we don't address here the merits of the case. We don't address whether these Claimants have other remedies that may be available.

What we do address is that these matters, these facts are not relevant for the purpose of determining whether the Tribunal has jurisdiction to consider their claim under Chapter

12:06:37 Eleven. We suggest that the question is exactly as put by this Tribunal in Procedural Order Number 1, and these facts, while interesting, are not relevant. These matters do not pertain to jurisdiction based on sympathy. One cannot give jurisdiction where no jurisdiction exists.

Now, as was already mentioned this morning, for the first time yesterday Claimants came up with this novel construct of analyzing Chapter Eleven claims into the (a) claims and the (b) claims. Ms. Menaker addressed that somewhat. You will understand that I'm familiar with (a) claims and (b) claims on the Iran Tribunal, but not here. No writer, as they admit, and no Tribunal has come up with that theory here, and we think it's an improper construct here. It is wrong to consider 1101(1)(a) and 1101(1)(b) as completely

independent bases of jurisdiction. They are interrelated. The Tribunal does not have jurisdiction if the challenged measure doesn't relate to an investor of another Party. An investor of another Party is defined to be someone that seeks to make, has made, or is making an investment. An investment of an investor of another Party must be in the territory of the Party. It's that simple. It seems to us clear. Really it is straightforward, and that's why we have focused on what we think are the central issues without feeling a need to argue excessively and just fill up our time.

The ordinary meaning in context and in light of the

12:08:53 investment protection objective and purpose of the Treaty compels a negative answer before this Tribunal. This--this is consistent with the agreement and practice of the three NAFTA Parties, as Ms. Menaker has just demonstrated, which also compels a negative answer to the question before the Tribunal. And in addressing the same, the exact same question, that's what the Bayview Tribunal correctly concluded. This is entirely on point and persuasive, and there is no good reason for this Tribunal to come to a different conclusion.

Therefore, I submit, Mr. President and Members of the Tribunal, that this Tribunal should dismiss the claim and should award the United States full costs and fees. And with that, I conclude our rebuttal. Thank you very much.

PRESIDENT BÖCKSTIEGEL: Thank you very much, Ms. Menaker, Mr. Bettauer. This concludes the second-round presentation on the Respondent's side. I would suggest that this is an appropriate time for a lunch break.

PROFESSOR GRIERSON-WEILER: Mr. President, we have likely no more than 20 to 25 minutes for our presentation, and so we would suggest that a 15-minute break would be more than enough to make sure that the electronics gets settled.

PRESIDENT BÖCKSTIEGEL: Okay. So, we will have a five-minute break--15-minute break--let's compromise on 10. And then we will basically finish, depending on whether we still have questions, obviously, but basically the presentation

12:10:44 will be finished by 1:00.

PROFESSOR GRIERSON-WEILER: Yes.

PRESIDENT BÖCKSTIEGEL: Very good.

(Brief recess.)

PRESIDENT BÖCKSTIEGEL: We invite Claimants to do the second-round presentation now.

REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANTS

PROFESSOR GRIERSON-WEILER: Thank you, Mr. President. We have three points on what I'm referring to as the President's homework because Mr. Bacchus said we would have no homework, but--

ARBITRATOR BACCHUS: He is the President.

PROFESSOR GRIERSON-WEILER: And I have seven quick points of rebuttal jotted down in response to my friends' presentation, and then Mr. Haigh will close our submissions. First, I will turn to the points of rebuttal.

We should mention that the concept of (a) claims and (b) claims was just my Professor's shorthand for the arguments that we have consistently made throughout the hearing and throughout the submissions about how measures relate to

investors or investments. There is not much more that needs to be said about that. It's shorthand.

With regard to Bayview, we would note that, if you read the procedural preamble in that award, you will see Professor Lowe, who chaired that Tribunal, provided directed

12:26:20 questions and said it's--I call it the "van den Berg model," and I see that President Lowe adopts it, too, of providing directed questions to the parties in advance of the--immediate in advance of the hearing; and thus, indeed, the relevant question for us was one of those questions in that case. The summation of the Bayview Claimants before and after that Tribunal in respect of this issue is before the Tribunal, and the Tribunal can read it itself. The Tribunal can also read our submissions about the case, Respondent's, as well as the Award itself, so we need say no more than that.

With regard to Ms. Menaker's reference to extending national treatment to investors but not to their investments and to why that would make no sense, we simply reiterate that Article 1101(1)(a) says that the Chapter applies to investors; and 1101(b) says that it applies to territorially situated investments of investors. So, it explains where the applies to investors alone and applies to investors with respect to their investments.

Metalclad. Just to be clear, in the Metalclad case, we were dealing with the fair-and-equitable-treatment provision in the Article of 1105, so the question of whether fair and equitable treatment includes the concept of transparency. That Tribunal was chaired by Sir Elihu Lauterpacht, and the judicial

review took place in the trial-level division. It sounds too impressive, the B.C. Supreme Court, but the Supreme Court is

12:27:54 the trial court, and it was a trial court judge named Judge Tysoe. I frankly would back one particular horse there. I think Lauterpacht versus Tysoe on what transparency means with regard to the minimum standard of treatment, I think I would probably go with Professor Lauterpacht.

With regard to the comment about Canada and Mexico in agreement, I would note that the U.S. is effectively saying that Mexico's Article 1128 submission proves that it's in agreement, and that Canada's lack of an 1128 submission proves its agreement, and I will just leave it at that.

With regard to Myers, at page 14, note 42, of our Rejoinder, we cite the Myers Statement of Claim and in particular paragraph 130 of the Myers Statement of Claim. I remember it because I helped draft it. The claim was made for Article 1102(2) to the protection of Myers and its investment as your typical foreign investment claim. We did not make an 1102 subpoint claim.

Finally, as regards the notes of rebuttal, I would note concepts or terms such as "drastic" and "revolutionary," that again, as I said yesterday, are the kind of thing that lie in the eye of the beholder. There are many persons such as the devotees of Bill Moyers who would say that traditional investment protection or, I should say, perhaps much less investment arbitration is both "drastic" and "revolutionary."

And then, finally, I will turn to my homework. We,

too, read Bayindir, Gruslin, and Ethyl again, and we have the results of our homework before you. Three slides, one of them at the top there.

We also noted paragraph 76 of the Bayindir Award. More importantly, we note the entire discussion, paragraphs 73 to 76, and I am mindful of Professor Kaufmann-Kohler's article that followed some months thereafter because I recently moderated a panel on investments and arbitration at the BIICL.

So, if you look to 73 to 76, those paragraphs, it's clear that the Tribunal noted how both Parties, one in the text and one in the footnote, how both Parties submitted the decisions of other tribunals may be carefully considered by a tribunal but that it would not be bound by them, mindful that account must be taken of whether the reasoning of the other tribunals was based on different factual contexts or different treaty provisions.

And the best examples where the Bayindir Tribunal consulted the decisions of past tribunals were on the comparatively well-trod question on what constitutes an investment under Article 1125 of the ICSID Convention, and when it considered the many awards that support the approach to jurisdiction, quote-unquote, that it used, and paragraph 197 shows that approach to jurisdiction. We would submit that that's the correct approach.

With respect to Gruslin versus Malaysia--

12:31:43 1 (Pause.)
2 PROFESSOR GRIERSON-WEILER: I'm sorry, it's a
3 Microsoft issue.
4 (Pause.)
5 PROFESSOR GRIERSON-WEILER: With regard to Gruslin
6 versus Malaysia, I want to alert you to a set of paragraphs of
7 note. We think in looking at it one more time, we think that
8 these paragraphs are the most relevant to the issues before
9 you.
10 One is paragraph 13.1, where it says that the
11 objection made by the Respondent is, "As a single contention
12 that the requirements laid down in Article 25(1) of the ICSID
13 Convention for the jurisdiction of the ICSID are not met." So,
14 clearly, it was an ICSID Convention case. It was about whether
15 or not this claim qualified under the provisions of the ICSID
16 Convention, which, of course, are not relevant in an UNCITRAL
17 Tribunal.
18 At paragraph 15.7, "The Parties were agreed that the
19 characterization of whether or not the Claimant had made an
20 investment in the territory of Malaysia under the terms of the
21 investment agreement was a matter to be determined by reference
22 to the laws of Luxembourg." Well, that's no surprise for ICSID
23 practice because it's very common to refer to the local laws in
24 addition to international law; terribly inappropriate in NAFTA
25 where Article 1131(1) says "international law shall govern in

12:33:20 1 addition to the Treaty."
2 At paragraph 13.3, the Tribunal notes the Respondent's
3 citation of a number, a large number, of provisions of the

investment agreement that imposed a territoriality requirement for claims that a government action breaches any obligation listed therein and stresses the same provisions that I mentioned yesterday.

And then at 13.8, the Tribunal notes that the object and purpose of that Treaty found in its preamble--and the language suggests that it was explicitly found in that preamble, not simply guess, but rather explicitly stated--was to create favorable conditions of competition for foreign investment.

And then, finally, at 13.11, the Tribunal found that consent of the investment agreement for purposes of establishing consent under the ICSID Convention required the investment to be made in the territory of Malaysia.

So, we are dealing with an ICSID Convention Article 25 jurisdiction question, domestic-law aspects come in, and a very, very different treaty text than we have here.

So, finally, I will turn to the Ethyl case.

On the question of interpretation, the Tribunal early on at paragraph 50 stated, "No Party has argued, and the Tribunal is not otherwise informed, that the NAFTA Commission has provided any interpretation here relevant. The Tribunal

12:34:51 therefore looks to the NAFTA itself and applicable rules of international law," which we submit would be the correct approach to follow again.

On the question of jurisdiction generally, at paragraph 58, the Tribunal distinguishes between jurisdictional provisions that are substantive, as it says, that would

limit--limits set to the authority of a tribunal to act at all on the merits of a dispute, and procedural rules.

With respect to procedural objections, it makes a finding that the procedural requirements in that case found in Article 1119-1120 should not be construed so as to deprive the Tribunal of jurisdiction; and, in its footnote, it says the following: "Specifically, the Tribunal concludes that this results from interpreting those Articles in good faith in accordance with the ordinary meaning to be given to the terms, therefore in their context so that the Vienna Convention approach, and it makes it clear that the object and purpose stated earlier by the Tribunal was upon its mind." Again, we see the correct and, I would submit, the correct interpretive approach to apply in this case.

And then, with respect to substantive provisions, at paragraph 64, it highlights that Canada says Chapter Three, "Goods Provisions," versus Chapter Eleven, "Investment Provisions," was not an objection that was absolutely critical and found that it could not presently exclude the claim on that

12:36:38 basis. At paragraph 63, it does, though, say, "Canada cites no authority and does not elaborate any argument as to why the two Chapters' obligations are incompatible." So, it does make some finding that suggests that Canada has perhaps not fully briefed that issue, and perhaps that's why Canada elected to let it go on to the merits, and the Tribunal agreed.

With respect to the other substantive jurisdictional question before it, paragraph 70, the Tribunal reports Canada's argument that an 1101(1)(b) claim must be made for an

investment made in the Respondent Party's territory and that the link to Canada made by Ethyl was for compensation for an expropriatory measure which Article 1110 specifies must be related in the territorially situated investment. So, basically, Canada said, "Hey, look, you're making a claim under 1101 for an investment that you say was taken." Canada says, "If you're going to do that, you have to have--your claim has to be restricted to the territory."

In response--I shouldn't say "in response," but having considered those arguments, the Ethyl Tribunal said the following--this is paragraphs 71 to 73: "A distinction must be made, however, between the locus of the Claimant's breach and that of the damages suffered." Then it says that obviously that measure relates to the situated investment claimed.

It goes on, "Ethyl has argued, however"--it says--I like this. Sorry. "Ethyl itself succinctly notes the investor

12:38:34 claims that an expropriation that occurred inside Canada but the investor's resulting losses were suffered both inside and outside." The Tribunal goes on to explain that, given the nature of the question, that this is an issue that was properly decided on the merits.

But it does footnote something which is interesting. It says in its footnote the Tribunal does not decide what significance, if any, is to be attributed to the fact that Article 1106, like Article 1110, includes the phrase "in its territory," whereas Article 1102 does not.

So, it seems the Tribunal was tweaked by the question but saved it for merits. And as we all know, in that

particular case it was settled, so it never came up.

So, that's my report on my homework; and, with that, unless there are any questions, I will allow my colleague to conclude.

PRESIDENT BÖCKSTIEGEL: Mr. Haigh, please.

MR. HAIGH: Thank you, Mr. President, Members of the Tribunal.

My remarks, like my colleague's, Mr. Bettauer's, before me will hopefully be very brief.

What the Parties seem to say in common is that each of them agrees that you should be guided by the text, the ordinary meaning of the words used and in light of the object and purpose of the text. We have been over this ground numerous

12:40:02 times in the last two days, but the difference between us is not the principle to be applied but how, in fact, to read these words.

We ask you to keep in mind that, in our submission, 1102 contains a very clear promise to investors. 1102(1) is a promise to investors. It's not directed at investors and their investments or investments of investors in the territory of the Party. It is simply to investors.

And the key phrase in 1102, the one that meets all of the arguments about how this is possibly going to be a Pandora's Box or, worse, a floodgate or that we are going to have, as I noted it in the course of Ms. Menaker's last submission, the possibility that anyone who claimed to operate in an integrated market could bring a claim. That's not the case.

The drafters of this Treaty themselves have provided the limitation. It has to be "in like circumstances." It's true we put information in front of you to show that this is a very fully integrated market, but we also are alleging--and these are allegations at this stage which we ask you to accept for the purpose of the jurisdictional phase--we are alleging that it's not just that we have made a unique allegation of the circumstances of integration, but we say they are "in like circumstances."

The conditions that we have pointed to that show "in

12:41:48 like circumstances" include pricing mechanisms, the quality-control mechanisms, the same slaughterhouses, the same suppliers, the same breeds of cattle, the same pasturage, the same conditions for businesses to be conducted. These are all like circumstances. These are all factors that the drafters of the Treaty themselves contemplated. They didn't open the Pandora's Box. They included something that is potentially quite limiting. There would rarely be an instance in which a Party such as the United States would be according treatment for investors of another Party like those of Canada, unless they were in like circumstances, and that would be the issue for you to address on the merits of this case.

So, with that limitation in mind and with those background facts in mind, we suggest that this is not a case of an "Open Sesame." This is not a case where the panel should be apprehensive, in our submission, that it's going to somehow or other create a whole new generation of claims. There are going to be only a very limited number of circumstances in which

"like circumstances" can justify the bringing of such a claim.

We began with the allegation that the text says what it says and that it should be relied on. We end with that same request, that you be guided by exactly what the drafters of the Treaty have said, by exactly what the Parties have agreed to. Nothing read in and nothing read out. Just what it says. That should be good enough.

12:44:10 And with that, I will close on behalf of the Claimant, and we thank you for your patience and for all the good questions. We know that you have a difficult task, and we wish you well with it.

PRESIDENT BÖCKSTIEGEL: Thank you very much, indeed.

I will just turn to my colleagues. Are there any further questions at this time?

ARBITRATOR LOW: No.

ARBITRATOR BACCHUS: No, sir. I just wanted to thank both the Claimants and Respondent for their excellent arguments and presentations.

ARBITRATOR LOW: Let me join in that, as well.

PRESIDENT BÖCKSTIEGEL: Well, let me then just before I conclude this, on behalf of my colleagues who have expressed themselves, my gratitude that you all have so much to have what I consider a rather good hearing. Everybody has been very professional and, in spite of some strong differences, rather friendly to the other side, which is the way it should be, and there were basically no procedural battles--remember what I said at the beginning, which is also nice, so I think you have made it easy for us, for the Tribunal, to go ahead with this

hearing.

I have a couple of housekeeping things. My first question would be, would it be possible for the Parties--the hearing binders have been very helpful, obviously, but would it

12:45:42 be possible for the parties to put the hearing binders on a CD so that we have them available electronically? We will take them home, don't worry, and I basically would like paper, but it would be helpful for traveling purposes and so on if you could provide us with CDs. How long do you think that will take?

MS. MENAKER: Maybe a week?

PRESIDENT BÖCKSTIEGEL: A week would be nice because we are going to meet pretty soon for the deliberations.

A week?

MS. MENAKER: We will give it to you as soon as we have it.

PRESIDENT BÖCKSTIEGEL: Sure, but the range of it that would be helpful because we want that to be available at the time we meet first.

And then the unusual question I have to ask you again: Are there any objections from the Party regarding the method and way the Tribunal conducted this case so far?

PROFESSOR GRIERSON-WEILER: No.

MR. BETTAUER: None.

MS. MENAKER: No.

PRESIDENT BÖCKSTIEGEL: That's also good to hear.

I had already indicated yesterday--just to warn you, so to speak--that we would feel, from this side of the

Tribunal, that there is no need for Posthearing Briefs.

12:47:08 PROFESSOR GRIERSON-WEILER: We agree.

MR. BETTAUER: We agree.

PRESIDENT BÖCKSTIEGEL: We already exhausted everything. All right. So, we have that on the record, as well.

And my last point is the following: The Respondent has put a claim for costs, a claim for costs before us both in their briefs and also orally. If I recall correctly, the Claimants have not yet done so.

Would you feel you want to place a similar claim for costs--in other words, that the other side would have the costs, would have to bear the costs? We are talking about costs of the arbitration and also, of course, the representation of these other two packages.

PROFESSOR GRIERSON-WEILER: I will caucus just to confirm that. I know what I'm supposed to say.

(Pause.)

MR. HAIGH: Thank you for the question, Mr. President, and the Claimants would take the position that, if it was successful on this application, it should receive its costs.

PRESIDENT BÖCKSTIEGEL: All right.

MR. HAIGH: Thank you.

PRESIDENT BÖCKSTIEGEL: So, we will have that on the record. There is no need to put it in writing. We have it in the record.

12:48:49 1 MR. HAIGH: Thank you.
2 PRESIDENT BÖCKSTIEGEL: That would mean we need cost
3 claims in some written form as soon as possible.
4 Let me say that I would not expect that you will send
5 us piles of invoices and all that. It should be rather
6 detailed, obviously, given the kind of costs you have had, for
7 which purposes, so it would be a small binder or whatever you
8 want to call it, but don't add any additional proof. If the
9 other Party complains, then you may still have to provide it.
10 What would be a decent time for that? Is two weeks
11 too short?
12 MS. MENAKER: We could do two weeks.
13 PRESIDENT BÖCKSTIEGEL: It might be more difficult for
14 you.
15 PROFESSOR GRIERSON-WEILER: We have multiple parties,
16 so three weeks.
17 MR. HAIGH: Could we say at least three weeks,
18 Mr. President?
19 PRESIDENT BÖCKSTIEGEL: When you say three weeks,
20 should be say four weeks?
21 MR. HAIGH: Thank you.
22 PRESIDENT BÖCKSTIEGEL: We will not decide the case
23 within a week. I don't think we could manage. So, four weeks
24 would be more realistic. Four weeks from now, if we count it
25 from now, we would expect cost claims from each side.

12:50:02 1 My experience shows that it is wise to then afford

each Party the opportunity to comment on the other side's cost claim within, say, a week. It doesn't have to be done, but it's better to provide for it. That's my experience.

MR. HAIGH: All right.

PRESIDENT BÖCKSTIEGEL: Okay. So, after receiving it, within another week you will make comment, but you don't have to comment.

MS. MENAKER: Mr. President, may I just confirm these submissions will be limited to the quantification of our costs but not contain any argument as to--

PRESIDENT BÖCKSTIEGEL: No, not at all. It's a very formal cost claim. The time for arguments is over.

So, just cross it with the details and identify what the costs are.

As far as the costs for this room and for the Court Reporter are concerned, you have supplied a trust account with sufficient funds, so we have already agreed that I will receive the invoice, and it will be sent in copy to you just so that you are informed; and within, let's say, a reasonable time, over a week, if there are no objections, then I will pay it. I'm sorry, I must say that since I'm often enough in the United States and still see so many checks are being sent back and forth, and I come from a part of the world where this is not done anymore, so all we need is a clear-cut bank account, for a

12:51:43 Swiss account, and transfer it electronically.

All right. Well, then, let me thank you all again, and we will try to start working as soon as possible. We already had agreed on a first day of deliberations; but, on the

other hand, it may take a little while. The case is complicated, and some of us have few other things to do as well, so we can't do it full time, but I'm sure you are aware of that. We will make an effort to make it fast.

Thank you very much, again, and have a good journey home.

(Whereupon, at 12:25 p.m., the hearing was adjourned.)

CERTIFICATE OF REPORTER

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

accurate record of the proceedings.

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

_____

DAVID A. KASDAN