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C O N T E N T S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
FERNANDO BORJA	269	321	380,406	411

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E X H I B I T S

None.

16:15:32 1

P R O C E E D I N G S

2 PRESIDENT van den BERG: The hearing in
3 the arbitration Fireman's Fund Insurance Company
4 versus United Mexican States, and I think the first
5 to do this morning is the examination of
6 Mr. Fernando Borja Mujica called by the claimants.

7 MR. PRICE: That's correct, Mr. President.
8 For purposes of scheduling, we undertook yesterday
9 to inform the Tribunal this morning whether we
10 intended to recall any particular witnesses. At
11 this point we do not intend to recall
12 Mr. Fernandez; and if the Tribunal has further
13 questions for him, he would be pleased to answer
14 them, but if not, we would let him go.

15 PRESIDENT van den BERG: Mr. Fernandez, is
16 it not a problem if you stay until the break,
17 because then the Tribunal would like to see amongst
18 themselves whether we would like to ask further
19 questions of Mr. Fernandez? We don't envisage as
20 yet, but I still would like to consult my
21 colleagues.

09:35:31 1 MR. PRICE: He is certainly prepared to
2 stay.

3 PRESIDENT van den BERG: Thank you.

4 MR. PRICE: And at this point we have no
5 plans to recall Mr. Mancera.

6 PRESIDENT van den BERG: Okay.

7 MR. PRICE: And finally, just to confirm
8 what we discussed yesterday, we do not plan to call
9 Dr. Reuss.

10 PRESIDENT van den BERG: That's
11 understood.

12 Mr. Perezcano, is there also something
13 else on the procedural level you would like to
14 share with the Tribunal?

15 MR. PEREZCANO: No, Mr. President, we
16 don't have the intention of calling Mr. Fernandez
17 or Mr. Mancera. We also don't intend to
18 cross-examine Dr. Reuss.

19 PRESIDENT van den BERG: I think we could
20 then start with the examination of Mr. Borja.

21 MR. PRICE: Thank you very much.

09:37:03 1 PRESIDENT van den BERG: Mr. Price, the 15
2 plus 45 minutes rule still applies?

3 MR. PRICE: Yes, it does, Mr. President.

4 PRESIDENT van den BERG: Mr. Borja,
5 welcome. I understand you have already been here
6 yesterday, and you have seen introduction of the
7 other witnesses?

8 THE WITNESS: Yes.

9 PRESIDENT van den BERG: Okay. Could you
10 state your full name and domicile for the record.

11 THE WITNESS: My name is Fernando Borja
12 Mujica, and I live in Mexico City.

13 PRESIDENT van den BERG: Thank you. You
14 appear as an expert called by the claimants,
15 Fireman's Fund Insurance Company, and you testify
16 in a language other than your mother tongue, which
17 I understand to be Spanish.

18 THE WITNESS: That's right.

19 PRESIDENT van den BERG: Do you feel
20 capable and comfortable in testifying in the
21 English language?

09:37:50 1 THE WITNESS: Yes, sir.

2 PRESIDENT van den BERG: But nevertheless,
3 if a question isn't clear because of language or
4 for some other reason, please do seek a
5 clarification.

6 THE WITNESS: All right.

7 PRESIDENT van den BERG: If you do not do
8 so, the Tribunal assumes that you have fully
9 understood the question.

10 THE WITNESS: Okay.

11 PRESIDENT van den BERG: You're also now
12 familiar, I assume, with the manner in which the
13 examination of witnesses is being conducted, so I
14 don't need to explain it to you?

15 THE WITNESS: Yes, I'm aware.

16 PRESIDENT van den BERG: Thank you.

17 Finally, you have also heard that
18 appearing as an expert is also a very serious
19 business before a court or the Tribunal, and for
20 that matter we would like you to give a statement,
21 and you will find it in front of you, and I will

09:38:29 1 first read it out, and would you please repeat it.

2 THE WITNESS: Okay.

3 PRESIDENT van den BERG: I solemnly
4 declare upon my honor and conscience that my
5 statement will be in accordance with my sincere
6 belief.

7 THE WITNESS: I solemnly declare upon my
8 honor and conscience that my statement will be in
9 accordance with my sincere belief.

10 FERNANDO BORJA MUJICA, RESPONDENT'S WITNESS, SWORN

11 PRESIDENT van den BERG: Thank you,
12 Mr. Price. Please proceed.

13 DIRECT EXAMINATION

14 BY MR. PRICE:

15 Q. Good morning, Mr. Borja.

16 A. Good morning.

17 Q. Before we get started with the
18 questioning, I would like to place your opinion and
19 supplemental opinion into the record.

20 I would like to ask you to confirm that
21 the opinion prepared and executed by you on 17

09:39:11 1 December, 2002, is, in fact, your opinion, and that
2 is your signature.

3 A. Yes, it is.

4 Q. And I refer also to the supplemental
5 opinion dated--

6 A. February 4?

7 Q. --February, 2003. Is that your opinion,
8 and is that your signature?

9 A. That's right.

10 Q. Thank you.

11 MR. PRICE: Mr. President, Mr. Alexandrov
12 will be conducting the direct examination of
13 Mr. Borja.

14 MR. ALEXANDROV: Thank you, Mr. President.

15 BY MR. ALEXANDROV:

16 Q. Mr. Borja, could you please describe,
17 summarize your experience and expertise in the
18 field of Mexican banking and financial law, and, in
19 particular, in relation to the financial services
20 chapter of NAFTA.

21 A. Okay. Well, in my professional

09:40:23 1 experience, I have been exposed to financial law
2 matters and particularly to NAFTA, NAFTA's
3 financial services chapter. I served as a public
4 officer within the Ministry of Finance first in the
5 general directorate of public credit, and after,
6 from '93 to '98, in the general directorate of
7 commercial banks.

8 In '93, I was appointed as Director of
9 International Affairs within the Ministry of
10 Finance, and my responsibilities were to implement
11 NAFTA's financial services chapter.

12 In 1995, I was appointed as General
13 Director of Commercial Banks, and my
14 responsibilities, in addition to NAFTA's
15 implementation, also included the regulation of
16 financial holding companies that include banks and
17 other financial institutions.

18 Also, I participated in the boards of the
19 National Banking and Securities Commission, and the
20 Bonding and Insurance Commission, and in FOBAPROA.

21 And also, in connection with NAFTA, I was

09:41:27 1 a member of the Financial Services Committee that
2 was established in Chapter 14. I was the
3 representative of Mexico.

4 I was the Technical Secretariat of the
5 Financial Services Opening Committee, which was an
6 internal body in charge of the authorization of
7 foreign affiliates. We received in '94 around 120
8 applications that--and we solved them then.

9 And finally, when I left the government in
10 1998, and I joined Mijares, Angoitia, Cortes y
11 Fuentes, S.C., a firm specialized in banking and
12 corporate law, I was appointed by the government to
13 integrate the panel roster of financial experts for
14 the dispute resolution mechanism under Chapter 14.

15 On the academic side, I have a law degree
16 from Escuela Libre de Derecho in Mexico, and LL.M.
17 from Georgetown University Law Center, and I have
18 been a professor of banking and financial law for
19 the past eight years.

20 Q. Thank you, Senor Borja.

21 Senor Borja, you have stated in your

09:42:33 1 opinion, and supplemental opinion, that
2 controladoras are not financial institutions under
3 Mexican law.

4 A. That's right.

5 Q. Senor Mancera, in his letter of
6 January 29th and during his testimony yesterday,
7 asserted the opposite, that controladoras are
8 financial institutions under Mexican law. I want
9 to ask you a few questions about that, drawing
10 primarily on your NAFTA experience and your
11 experience as a regulator.

12 Can you summarize briefly the role of the
13 controladoras prior to NAFTA coming into effect.

14 A. Yes. Can you allow me to draw some
15 charts?

16 PRESIDENT van den BERG: Those who know
17 me, arbitrations without a chart is not possible
18 for me.

19 THE WITNESS: Well, I think it is very
20 important to understand the nature of financial
21 holding companies--I think it's very important to

09:44:17 1 understand the nature of holding companies versus
2 financial institutions because I think this is a
3 core matter of these hearings. The Holding Company
4 Act was enacted in 1990, after the privatization of
5 the banking system. As you know, before the banks
6 were owned by the state, and the features of that
7 law as they had been expressed were that there was
8 a possibility of having a control--a controlling
9 vehicle through which investors could
10 participate--could invest in that vehicle, and
11 therefore that vehicle, that controladora, invests
12 in financial institutions.

13 But the idea, legally speaking, each
14 corporation has its own personality and legal
15 status. You cannot say that they are all part of a
16 unit or that, legally speaking, we are talking
17 about one company. That is not true. Each company
18 has its own authority and its own authorization as
19 well, and it is authorized to do different things.

20 In the case of the controladora as its
21 name stands, rather than being authorized to engage

09:45:38 1 in business, it is restricted to do business. What
2 it does it says you cannot do anything except for
3 these three things. Whereas, financial
4 institutions are authorized to engage in those
5 financial activities which are mentioned in their
6 specific laws. For example, in the case of
7 banking, it's mentioned you can engage in the
8 deposit taking, which is an activity which is not
9 permitted to another person.

10 So, I think that this is a very important
11 difference. These [financial institutions,
12 pointing to chart] are allowed to operate and enter
13 into transactions restricted to other people,
14 whereas this [holding company, pointing to chart]
15 is prohibited for entering in any kind of
16 operation.

17 So, with this in mind is that two blocks
18 are here: One, which are the financial
19 institutions that engage in financial services with
20 the public, and the other one are controladoras,
21 which are really shell corporations, which they

09:46:39 1 cannot do anything. The idea is that they don't do
2 anything except for controlling the shares, owning
3 the shares.

4 And also enter into a responsibility
5 agreement and issue debentures and short-term
6 financing; in those both cases, all of the
7 indebtedness shall go to the subsidiaries.

8 So, I think this is a very relevant
9 starting point to see how in 1990 there was a
10 difference between financial entities and holding
11 company. At this point, they are mentioned--I
12 already mentioned they are financial entities, but
13 there was not reason--there was not a reason to
14 call them financial institutions. This term was
15 not--didn't exist at NAFTA. It was not even
16 negotiated.

17 But besides from the definition test,
18 which I think is important, we must also follow a
19 functional test of what are the differences. So,
20 under the definition, we have sociedad controladora
21 and we have entidades financieras. On the function

09:47:41 1 we have a company which is a shell corporation on
2 one hand, and on the other hand we have
3 corporations that are allowed to enter into
4 transactions that other people cannot engage in.

5 So, that is the essence. That is the
6 nature of controladoras which again were created in
7 1990.

8 BY MR. ALEXANDROV:

9 Q. Thank you, Senor Borja.

10 Senor Borja, when the financial services
11 chapter of NAFTA was negotiated, how was this
12 structure reflected in Chapter 14?

13 A. Of course, then we move to 1994. And in
14 1994, as you know, it is important for us, NAFTA,
15 because before NAFTA there was not a possibility of
16 foreign financial institutions to control domestic
17 ones. Foreign investment was restricted to
18 minority participation. So, financial services was
19 a very important part of NAFTA, and NAFTA, as you
20 all know, is also state of the art because it deals
21 with services, not only investments and other

09:48:50 1 regulations that were included in other agreements.
2 So, it was a very important element of NAFTA. And
3 that's why the government was very careful about
4 the financial services opening. And I think that
5 more attention should be drawn to what NAFTA says
6 because if we are trying to--the question is what
7 does NAFTA understand by "financial institution"?
8 I think we should take a closer look at NAFTA.

9 And in my opinion, what NAFTA says is the
10 following: First, in the case of Mexico, again,
11 the right of establishment of a majority
12 participation in a financial institution in Mexico
13 was reserved to financial institutions that were
14 engaged in the same general type of financial
15 services. This is Annex VII(B)(14). This is the
16 principal rule. We have here the United States,
17 and we have here Mexico.

18 So, the idea was the following: If I am
19 John Smith, and I want to buy in Mexico, I can only
20 get a minority participation, okay? Or if I'm John
21 Smith, and--But if I'm Citibank, I am allowed to

09:50:18 1 have a majority participation, and I must be
2 engaged in the same general type of activity, okay?

3 So, that's the rule. There must be
4 equals. But there is an exception to that rule,
5 which is Annex VII(C)(5), which says if you are a
6 bank in the U.S. or Canada or a broker-dealer, only
7 then you are authorized to establish a bank in
8 Mexico, form a financial holding company, and we
9 must take a close look that it differentiates the
10 word "financial institution" from financial holding
11 company.

12 It is not that negotiators forget about
13 that terminology. It is that Annex B, for example,
14 which talks about market share because another
15 element of the financial services opening of Mexico
16 is that it was gradual, that we have market shares.
17 Those market shares that apply to financial
18 institutions. They are the ones that operate.
19 They are not applicable to controladoras because
20 they don't have market share because they don't
21 operate. Why should we care about a company that

09:51:36 1 does not operate? It doesn't pose any risk at all.

2 So, here, the exception was that if you
3 establish a bank in Mexico, you could have sociedad
4 controladora, a financial holding company, and then
5 operate other types of financial business, like the
6 insurance or the securities. Okay? So, this is
7 NAFTA, and NAFTA also has very important
8 definitions.

9 ARBITRATOR LOWENFELD: Why did you
10 draw--why did you draw that below the line? Why
11 isn't that up there where the first big circle is?

12 THE WITNESS: Which one? Sorry.

13 ARBITRATOR LOWENFELD: You have a big
14 circle--

15 THE WITNESS: This is a bank in the United
16 States, this is U.S., and this is Mexico. This is
17 the border. So, if you have a bank in the U.S.,
18 you can incorporate a bank in Mexico.

19 ARBITRATOR LOWENFELD: Okay. You drew
20 that below the line, I see. Okay.

21 THE WITNESS: If you're a bank in the U.S.

09:52:32 1 and incorporate a bank in Mexico, then you could go
2 for the whole package and have an insurance company
3 or a broker-dealer with a controladora, but in the
4 term--the terms are different.

5 PRESIDENT van den BERG: I see the
6 question also of Professor Lowenfeld. I understand
7 you erased the borderline, the real physical
8 borderline you're drawing, but I see also the
9 controladora, the little circle just below the
10 borderline you have there, and now is John Doe
11 above the borderline, in U.S?

12 Can he or she own directly the sociedad
13 controladora, even though--there you have a bank,
14 and I have John Doe who has no bank but a lot of
15 money. Can he or she then have then the--

16 THE WITNESS: John Smith? No, no. It is
17 reserved.

18 PRESIDENT van den BERG: It is only banks?

19 THE WITNESS: It is only financial
20 services providers.

21 PRESIDENT van den BERG: But then you

09:53:31 1 should have a line direct from the B in the United
2 States to the sociedad controladora?

3 THE WITNESS: That's correct. You can
4 have two options of investment.

5 PRESIDENT van den BERG: Okay.

6 THE WITNESS: This is one or you can go
7 the other way, which is two.

8 BY MR. ALEXANDROV:

9 Q. Thank you, Senor Borja.

10 Now, you mentioned that Annex C actually
11 has the--mentions the terms "financial institution"
12 and separately the terms "holding company." How
13 was that reflected in the implementing legislation?

14 A. Yes, so, with this in mind is that we
15 instrumented implementing legislation. If we are
16 trying to get a definition of "financial
17 institution" under NAFTA, I think that the law that
18 should prevail is the legislation, that implements
19 NAFTA. This regulation was not only addressed to
20 the Financial Holding Company Act, it was also
21 addressed to all of the financial laws that

09:54:30 1 permitted NAFTA's investments to the securities
2 law, to the banking law.

3 So, what happened was the following. This
4 is also in implementing legislation in 1994. We
5 have three cornerstone definitions in the affiliate
6 chapter, which I think are very relevant, and I
7 would like you to turn to Tab E, which is Article
8 27(a) of Financial Holding Company Act.

9 MR. ALEXANDROV: Mr. President, this
10 is--what Senor Borja is referring to is claimant's
11 hearing binder.

12 THE WITNESS: Yes, Tab E, Article 27(a).
13 I have here the Spanish version. I will make my
14 own translation, but I understand that maybe you
15 have other translation.

16 PRESIDENT van den BERG: Tab B is Annex 7.

17 ARBITRATOR LOWENFELD: I have H.

18 PRESIDENT van den BERG: 27-A?

19 THE WITNESS: 27-A, Section 2.

20 MR. ALEXANDROV: Article 27-A is Tab H.

21 THE WITNESS: It says: "For purposes of

09:56:03 1 this law," and this is again included in all
2 financial laws not only in the Holding Company Act,
3 "foreign financial institution or Institucion
4 Financiera del Exterior, which is the term used in
5 NAFTA, means the financial entity. So, again,
6 that's why financial institution and financial
7 entity are the same, "incorporated in a country in
8 which Mexico has executed an international
9 agreement or treaty under which it is permitted the
10 establishment of an affiliate in Mexican
11 territory," and we go to the definition of
12 "affiliates." Affiliates are, indeed, entidades
13 financieras under Article 7. So it's the second
14 segment, the ones that provide financial services.
15 Okay? And we have to complement with Mexico's
16 annexes, of course, because we didn't take this out
17 of our own imagination. It was implementing
18 legislation.

19 BY MR. ALEXANDROV:

20 Q. Senor Borja, just to clarify, when you
21 referred to Article 7, it's Article 7 of what?

09:57:13 1 A. Annex VII, sorry, Annex VII(C) of Mexico.
2 It says investor of another party, VII(C). It's at
3 the end.

4 PRESIDENT van den BERG: I think what you
5 are referring to is Annex VII(C), and then
6 subsection five; is that correct?

7 THE WITNESS: No, my page here is
8 VII-M-22.

9 ARBITRATOR LOWENFELD: It's Article 7 of
10 LRAF.

11 THE WITNESS: It's the last page of Annex
12 VII(C).

13 PRESIDENT van den BERG: You're talking
14 about Annex, you're talking Annex to the NAFTA?

15 THE WITNESS: Yes, to the NAFTA.

16 PRESIDENT van den BERG: So, I have it
17 here, Annex VII, and then under C?

18 BY MR. ALEXANDROV:

19 Q. Are we talking about Annex VII, chapter
20 14?

21 A. Yes.

09:58:19 1 Q. Okay. And which paragraph, Senor Borja?

2 A. It's the last section where you have
3 definitions. In my edition it's page M-22.

4 Q. We are looking at claimant's hearing
5 binder, and it's Tab B.

6 A. It's the definition of "investor of
7 another party."

8 PRESIDENT van den BERG: That's subsection
9 five, 14 and 5, at least. B--C is fine.

10 THE WITNESS: It's the definition of
11 "investor of another party."

12 PRESIDENT van den BERG: We are already on
13 Annex VII and C, and then you have referred to that
14 under Tab B. What exactly are you referring to now
15 within that Annex VII(C)?

16 THE WITNESS: The definition section of
17 that section. VII(C), Mexico. I don't know if I
18 can show you.

19 PRESIDENT van den BERG: So, in the Blue
20 Book, for the record, it's page 735, for those who
21 have--

09:59:37 1 ARBITRATOR LOWENFELD: Which definition
2 are we looking at?

3 THE WITNESS: Investor of another party
4 finding 1403(5). It means investor of another
5 party as found at 1403(5). And If we take a look
6 at 1403(5), it says, "For purposes of this Article,
7 investor of another party means investor of another
8 party engaged in the business of providing
9 financial services in the territory of that party."
10 1403(5) It's paragraph 5.

11 So, this means that only financial
12 institutions are allowed to participate, and only
13 in financial institutions, and this definition of
14 foreign investor of another party equals
15 Institucion Financiera del Exterior that equals
16 entidades financieras which is what has been
17 sustained, in my opinion.

18 So, in accordance with NAFTA's regulation,
19 again, it's not only a definitional aspect. On the
20 definitional aspect, I think it's covered. We
21 cannot mean that an Institucion Financiera del

10:00:47 1 Exterior or a foreign financial institution is
2 different than a domestic financial institution.
3 On the other hand, on the functional test, also
4 there are very important elements that again
5 holding companies are shell companies. They cannot
6 provide financial services, whereas financial--

7 ARBITRATOR LOWENFELD: Excuse me. You
8 keep saying "shell company."

9 THE WITNESS: Yes.

10 ARBITRATOR LOWENFELD: But the
11 controladora holds real assets. It's not a shell
12 company, is it?

13 THE WITNESS: Well, it's a company that
14 only holds shares.

15 ARBITRATOR LOWENFELD: It holds shares and
16 it issues bonds. I understand it has some
17 restrictions. It doesn't seem to me right to call
18 it a shell company.

19 PRESIDENT van den BERG: What I think that
20 you're saying is it's a special purposes company.

21 THE WITNESS: It doesn't engage in

10:01:38 1 business on its own.

2 PRESIDENT van den BERG: Shell company
3 has--

4 THE WITNESS: Only a single purpose, which
5 is control financial institutions. That is its
6 only purpose. Of course it can issue debentures,
7 but for purpose of capitalizing, of acquiring more
8 capital in the subsidiaries, or it can engage in
9 short-term financing for the same purposes, limited
10 to the acquisition of a foreign entity or a merger.

11 ARBITRATOR LOWENFELD: And in fact, if I
12 understood you when you were talking about your
13 curriculum vitae, you said you were regulating
14 controladoras.

15 THE WITNESS: Yes, I did.

16 ARBITRATOR LOWENFELD: So they are, in
17 some sense, authorized and regulated?

18 THE WITNESS: Yes, they are authorized and
19 regulated, we cannot deny that, but they are not
20 authorized to operate as financial institutions as
21 the NAFTA's 1416 definition stands.

10:02:21 1 ARBITRATOR LOWENFELD: That's for us to
2 decide.

3 THE WITNESS: Well, in my opinion, yes.

4 PRESIDENT van den BERG: It went somewhat
5 quickly for me. Can you please help me again.
6 Because you wanted to show the interaction between
7 Annex VII(C), and the definitions?

8 THE WITNESS: Yes.

9 PRESIDENT van den BERG: Then
10 Article 1403, paragraph 5.

11 THE WITNESS: It's definition of investor
12 of another party.

13 PRESIDENT van den BERG: Would you explain
14 to me again what it means. I apologize for not
15 having understood it fully.

16 THE WITNESS: When implementing
17 legislation, we introduced again the definition of
18 Institucion Financiera del Exterior, which is a
19 foreign financial institution. And we took that as
20 the instrumentation of investor of another party,
21 which were the only ones that were permitted to

10:03:17 1 establish financial subsidiaries in Mexico because
2 they must be engaged in the same general type of
3 activity.

4 So, that definition which is under
5 1403(5), means that only--foreign financial
6 institution must be something as it is described in
7 1403(5), which is an investor of another party
8 engaged in the business of providing financial
9 services in the territory of third party.

10 ARBITRATOR LOWENFELD: Excuse me. Which
11 came first? The statute or the NAFTA--

12 THE WITNESS: NAFTA, of course.

13 ARBITRATOR LOWENFELD: You say 1994 held,
14 but the law was 1990--NAFTA is really finished
15 negotiating in October 1992. It met ratification.

16 THE WITNESS: We had these bilateral
17 agreements afterwards, and actually it was approved
18 in Mexico by the Senate in '93.

19 ARBITRATOR LOWENFELD: I know. But, I
20 mean, the drafting was in line with your 1990
21 statute, was it not?

10:04:13 1 THE WITNESS: No. We began negotiating, I
2 understand, in 1990. It finished the negotiations
3 in 1992, and the controladoras law was issued in
4 1990.

5 ARBITRATOR LOWENFELD: Before?

6 THE WITNESS: No, no, no. These
7 definitions I'm talking about are NAFTA's
8 implementing legislation issued and prepared to
9 instrument NAFTA, they were entered into force in
10 January of 1994 as well.

11 ARBITRATOR LOWENFELD: I'm not sure
12 anything turns on it, but if I understood it
13 correctly, Mexico makes the reservations in Annex
14 VII to comply with your preexisting law; isn't that
15 right?

16 THE WITNESS: No. No. They exist--did
17 not permit majority foreign participation in the
18 financial sector.

19 ARBITRATOR LOWENFELD: That's why Annex A
20 reserves?

21 THE WITNESS: Yes, it reserves. And to

10:05:11 1 implement those reservations, all of the financial
2 laws of Mexico were amended to implement NAFTA, and
3 these definitions were included, which I think are
4 relevant.

5 ARBITRATOR LOWENFELD: So, would the LRAF
6 is amended afterwards?

7 THE WITNESS: Yes.

8 ARBITRATOR LOWENFELD: It's there before
9 at least with some of the reservations in Annex A,
10 for instance?

11 THE WITNESS: Yes.

12 ARBITRATOR LOWENFELD: And then in NAFTA
13 you have other carve-outs, and those are
14 implemented in the revised statute?

15 THE WITNESS: In internal legislation,
16 yes. So, this is really NAFTA's implementation
17 legislation, and this Exposition de Motivos or the
18 letters sent by the President also confirms that
19 the nature of financial institutions is to provide
20 financial services, which is in line with this
21 description.

10:05:58 1

ARBITRATOR LOWENFELD: Was this a
2 negotiated deal with the United States and Canada,
3 or did Mexico say, well, that's what we're going to
4 reserve?

5 THE WITNESS: No, it was negotiated.

6 ARBITRATOR LOWENFELD: Because the United
7 States companies wanted access to financial
8 services. It's the same time the Uruguay Round is
9 being negotiated? The whole financial services
10 sector was very lively both in Geneva, and in the
11 NAFTA negotiations.

12 THE WITNESS: That's correct, yes.

13 BY MR. ALEXANDROV:

14 Q. Senor Borja, just to clarify a point,
15 before NAFTA, a foreign financial institution could
16 not be majority shareholder in a Mexican financial
17 institution. Is that what you said?

18 A. No, foreign investment was not permitted
19 in a majority manner in Mexican financial
20 institutions.

21 Q. And if I understand correctly, what you

10:06:50 1 said is that Annex VII(B) permitted a foreign
2 financial institution to be a majority shareholder
3 in a Mexican financial institution of the same
4 general type of--that provides the same general
5 type of services?

6 A. The opening was through NAFTA, and NAFTA's
7 implementation of legislation is the one that
8 contains these definitions.

9 Q. Thank you for the clarification.

10 A. So, I think these are really my bases that
11 on the definitional aspect are covered that
12 financial institutions are--entidades financieras
13 are the ones that are engaged in the provision of
14 financial services as well as the functional tests
15 that they are the ones that provide financial
16 services.

17 Q. Thank you, Senor Borja.

18 You mentioned that the controladoras are
19 not authorized to do business as financial
20 institutions. Obviously Senor Mancera yesterday
21 disagreed. Could you state again what is it they

10:07:56 1 are authorized to do, and why they are not
2 authorized to do business as financial
3 institutions.

4 A. Yes. I think with this question and with
5 the other elements also, we should not only take a
6 formal approach, not only because there are
7 financial authorities that authorize or have some
8 supervision authority over these institutions is
9 that they are financial institutions. The
10 definition says as financial institutions. And in
11 this regard, if you are authorized as a
12 controladora, you are authorized to control shares,
13 and that's it, and those limited borrowing
14 activities, which they must be extraordinary
15 because it's better that they get the
16 capital--through capital infusions and not through
17 that granting.

18 So, that's the controladora authorization.
19 And if you take a look again at financial
20 institution authorization, what it says is that it
21 allows you to engage in financial services that are

10:08:55 1 restricted to other people. So, I think they are
2 completely different. They are not authorized as
3 financial institutions.

4 PRESIDENT van den BERG: It's conceivable
5 that you have a financial institution that does not
6 render financial services?

7 THE WITNESS: No. I think that all
8 financial institutions provide financial services.
9 I think that this is a very broad category. You
10 have intermediation on one side. You have--on the
11 other side you can act also as an agent, for
12 example, a broker-dealer that buys bonds or shares
13 for its customers, so you must provide either
14 intermediation or provide some other financial
15 necessities.

16 ARBITRATOR CARRILLO: Just one question,
17 Mr. Borja. How do you distinguish between
18 financial service and financial intermediary?

19 THE WITNESS: Financial service?

20 ARBITRATOR CARRILLO: And financial
21 intermediary. Is financial intermediary a

10:10:06 1 financial service?

2 THE WITNESS: Well, I think that financial
3 intermediary, in my opinion, is the one that
4 intermediates.

5 ARBITRATOR CARRILLO: And do you have
6 financial services other than the engagement in
7 financial intermediation?

8 THE WITNESS: Yes.

9 ARBITRATOR CARRILLO: Can you give us an
10 example.

11 THE WITNESS: For example, if I am a trust
12 which is reserved for financial institutions, for
13 banks mainly, and providing financial service;
14 however, I'm not intermediating because I'm not
15 acting on my own. I'm rendering a service.

16 ARBITRATOR CARRILLO: So could we say that
17 a financial services is a general term, and
18 financial intermediation is a more concrete aspect
19 of a financial service, but it's not the same to
20 say financial service equals financial
21 intermediation.

10:11:01 1 THE WITNESS: Yes. That's right, yes.

2 ARBITRATOR CARRILLO: You can have an
3 intermediary that does not make financial
4 intermediation, but it's the financial service
5 provider; is this correct statement?

6 THE WITNESS: Yes, that is correct.

7 ARBITRATOR CARRILLO: Okay. Thank you.

8 BY MR. ALEXANDROV:

9 Q. Senor Borja, you mentioned that as a
10 regulator, you did regulate controladoras, and in
11 fact, Senor Mancera yesterday argued that because
12 controladoras are regulated by the same regulators
13 who also regulate financial institutions, therefore
14 they are regulated and supervised as financial
15 institutions.

16 Now, if they are not financial
17 institutions, why are they regulated and supervised
18 by the same authorities that regulate and supervise
19 financial institutions?

20 A. Well, they form part of the financial
21 system that we cannot discuss. However, they are

10:11:56 1 not financial institutions because they do not
2 provide financial services.

3 Again, its purpose is only to hold the
4 shares of financial institutions, and the way they
5 are supervised is very different because the whole
6 purpose of regulation in the financial system is to
7 cover risks, and those risks are incurred when you
8 enter into intermediation processes or render
9 financial services.

10 So, in that regard, Mr. Mancera is right
11 in saying that there are different levels of
12 regulation, depending on the intermediary. You
13 have a bank that incurs great losses with the
14 public at large, you have large intermediation.
15 But if you have zero financial services or zero
16 intermediation, you are not regulated as a
17 financial or supervised as a financial institution,
18 no?

19 So, it's very different, again, the
20 supervision and the regulation, as well as the
21 authorization.

10:13:03 1 Q. You are the regulator, so you see a
2 controladora and you say this is not a financial
3 institution. What in the regulatory practice and
4 in the supervision is it that is so important and
5 essential for financial institutions that does not
6 apply to controladoras?

7 A. Well, there are a couple of examples, like
8 we've discussed capital adequacy, also minimal
9 capital requirements. We must say that all
10 financial institutions in Mexico have minimum
11 capital requirements. Mr. Mancera referred
12 yesterday to sofoles (phonetic) or limited scope
13 financial institutions. They do have a minimal
14 capital requirement, which is 15 percent of the
15 capital required for the banking system. He also
16 referred to cajas de ahorro popular, and they are
17 also subject to capital adequacy and other
18 requirements.

19 So, capital is the main aspect because
20 capital is a cushion for the losses of investors or
21 debtors. And capital adequacy is the second one,

10:14:02 1 lending limits to diversify its risk, credit
2 controls, foreign exchange positions that are
3 issued by the Central Bank, money laundering
4 because they take funds from the public. All those
5 are the essence of the regulation for the provision
6 of financial institutions which do not appear in
7 holding companies.

8 Q. Senor Borja, Senor Mancera yesterday
9 stated, and he states that in his January 29th
10 letter, that even though the controladora may not
11 engage directly in the provision of financial
12 services, and in fact he admitted that the
13 controladora is prohibited by law from engaging in
14 financial services, but he claims in his letter and
15 stated yesterday that the group as a whole, the
16 controladora and the subsidiary financial
17 institutions as a whole engage in the provision of
18 financial services, and therefore the controladora
19 indirectly provides financial services.

20 Do you agree or disagree with that?

21 A. I disagree completely. Again, when these

10:15:11 1 companies were created, they have their own legal
2 capacity. If a bank enters into a deposit
3 transaction, the obligation is with the bank. It
4 is not--the bank is acting as principal, not as
5 agent of the holding company. All companies are
6 different. One is a controladora, other is a bank,
7 and they have their own legal capacity and cannot
8 be mixed or unified with the other members of the
9 group.

10 In addition to that, they don't all--they
11 don't manage--controladoras don't manage really
12 financial subsidiaries. What they do is they
13 control them. They attend to their shareholders'
14 meeting as majority shareholder to elect the
15 majority of the board members, and the fiduciary
16 duty of a board member in Mexico is to watch the
17 company it represents. It is not towards the
18 shareholder it is appointed by. As a matter of
19 fact, the financial authorities are worried about
20 corporate governance and want to establish
21 independent board members that are unrelated to the

10:16:19 1 shareholders to have a better working of the
2 financial institutions.

3 ARBITRATOR LOWENFELD: But, sir, you say
4 they are completely separate. But don't they have
5 the same name? I mean, the public doesn't know the
6 difference. It's the same brand, isn't it, and the
7 same people?

8 THE WITNESS: The legal opinion is that
9 they are different. Of course, they use same
10 names, and that is one of the benefits, but for the
11 legal standpoint of view, it's strictly different
12 companies, and they are owned by the same
13 shareholder, and that's it. And controladoras do
14 not have any additional powers as any other
15 majority shareholder can have in another
16 corporation.

17 ARBITRATOR CARRILLO: One question,
18 Mr. Borja: What is the difference between sociedad
19 controladora and the concept grupo financiero?

20 THE WITNESS: Well, I think those terms
21 are mixed within the regulation, and that's a

10:17:26 1 problem. The legal entity is sociedad
2 controladora. The thing is that usually those
3 sociedad controladoras, their denomination is grupo
4 financiero. So, the denomination is grupo
5 financiero, but the legal entity is the sociedad
6 controladora. And that's why we make--it's a
7 little bit sometimes difficult to--you think there
8 are two entities, no. Legally, there is only one
9 corporation, which is the sociedad controladora.
10 However, its denomination is grupo financiero.

11 BY MR. ALEXANDROV:

12 Q. Senor Borja, yesterday Senor Mancera, I
13 think, asserted that the group must be authorized
14 to exist as a group and provide services to the
15 public. Would you explain who receives the
16 authorization, and authorization to do what.

17 A. Well, again, based on this separation,
18 each entity has its own authorization. If you want
19 a bank with broker-dealer, I define a controladora
20 with a broker-dealer and a bank, then have you to
21 get one authorization for the controladora and the

10:18:42 1 authorization will say you cannot do anything
2 except this, or that is the purpose of the company,
3 and you may hold a majority participation in this
4 bank and this broker-dealer. Then we have another
5 separate authorization for the bank that says you
6 are authorized to be a bank, and then another one
7 and so on.

8 So, they're not together. There is no
9 unity in the authorization process.

10 Q. And, Senor Borja, does the public do any
11 business with the controladora?

12 A. Well, it does not--does not--controladora
13 does not provide financial services. We were
14 discussing that it may issue--and this is not
15 ordinary business again. It may issue mandatory
16 commercial debentures that are located within the
17 group.

18 And also, yesterday, I think it's
19 important to remark that Mr. Mancera mentioned that
20 if you're going into the markets and borrow, and
21 then lend, then you are in intermediation, and if

10:19:41 1 you don't have authorization for that, it is even a
2 criminal offense. I agree with that. But there is
3 nothing bad in going--it's not as bad, it's not
4 financial intermediation in going into the markets
5 and using that for its own purposes. That's what
6 all issuers do. You may be regulated as an issuer,
7 but not as a financial institution, which is
8 different.

9 PRESIDENT van den BERG: All three members
10 have at the same time questions, if you allow it.

11 ARBITRATOR LOWENFELD: Well, I think we
12 all had the same question. If the controladora
13 issues bonds, as it did in the case that gives rise
14 to the present arbitration, and then uses the
15 proceeds to invest in the bank or the broker-dealer
16 or whatever the subsidiaries, why isn't that
17 intermediation?

18 THE WITNESS: Why is it not? Because it's
19 for its own purpose, which is to support the
20 capital of its subsidiaries. If those bonds were
21 issued for a different company that was not

10:20:48 1 related, I agree that that is intermediation, but
2 this is within the same group.

3 ARBITRATOR LOWENFELD: That's a rather
4 limited definition, isn't it, of intermediation?
5 It takes it from here to there and from there to
6 here, if you had your chart.

7 THE WITNESS: Well, here again, the
8 purpose of the company is to foster the
9 capitalization and to have control over the
10 financial institutions. There are different ways
11 to do this. The best one, and the first one, is to
12 have a capital infusion at the holding company
13 level, and then have an increase in capital in the
14 subsidiaries, and having all as capital.

15 A second option is to go to the
16 debentures, but at the end of the road it
17 translates into the capital of the subsidiaries,
18 which is the sole purpose of the holding company.

19 ARBITRATOR LOWENFELD: I will pass the
20 baton.

21 ARBITRATOR CARRILLO: Just for purposes of

10:21:48 1 the clarity of the Tribunal, Mr. Borja, can you
2 tell us under NAFTA where can we find a definition
3 of "financial intermediary"?

4 THE WITNESS: Financial intermediary?

5 ARBITRATOR CARRILLO: You say the
6 definition of "financial institution." It says any
7 financial intermediary. What is a financial
8 intermediary for purposes of NAFTA?

9 THE WITNESS: I don't know of any
10 definition of "financial intermediary," but again,
11 it is the one that provides intermediation.

12 ARBITRATOR CARRILLO: But then if we don't
13 have a definition under NAFTA, how can we construe
14 the definition? How does Mexican law or U.S. law
15 or Canadian law construe the definition of
16 "financial intermediary"? What was--the experts
17 when they negotiated NAFTA, how did they pretend to
18 define "financial intermediary," or this question
19 was never raised?

20 THE WITNESS: Well, the thing is that the
21 definition, which I think was considered by Mexico

10:22:54 1 in its local legislation, was financial
2 institution, and was equivalent to the one--the
3 foreign financial institution, which is equal to
4 investor of another party, which is equal to a
5 financial services provider. Really, that's what
6 the Mexican law says. I don't recall at this point
7 any definition of "financial intermediary" within
8 NAFTA.

9 ARBITRATOR CARRILLO: Another question.

10 Oh, I'm sorry.

11 THE WITNESS: At this point I don't recall
12 because I was focusing on the financial institution
13 definition, which was the one that we were
14 analyzing.

15 So, I didn't really look at any financial
16 intermediation within NAFTA.

17 ARBITRATOR CARRILLO: And under Mexican
18 law, what does the statute define as financial
19 intermediary for the guidance of the Tribunal?

20 THE WITNESS: No, I don't think so. We
21 have seen here some definition financial entity,

10:23:47 1 financial institution, financial--but I'm not aware
2 of any.

3 ARBITRATOR CARRILLO: To your knowledge,
4 is there a definition under Mexican statutory law
5 of financial intermediation, financial
6 intermediary?

7 THE WITNESS: Not as that, no.

8 ARBITRATOR CARRILLO: Thank you.

9 PRESIDENT van den BERG: I also have a
10 question. You explained to the Tribunal on a
11 question of Mr. Alexandrov, that each of the
12 subsidiaries need their own authorization for
13 banking intermediation and insurance companies,
14 et cetera.

15 THE WITNESS: Um-hmm.

16 PRESIDENT van den BERG: You have followed
17 that reasoning. Why is that authorization at all
18 necessary for this sociedad controladora?

19 THE WITNESS: To have an authorization?

20 PRESIDENT van den BERG: Why is it
21 necessary? As a holding company, if they are all

10:24:33 1 regulated and supervised the subsidiaries according
2 to the old regulations--

3 THE WITNESS: Because one of the concerns
4 also in the financial sector is who is behind
5 financial institutions, and if you want to be
6 shareholder also--if I wanted to buy a bank, I will
7 have to get an authorization of the Ministry of
8 Finance, if I wanted to control a bank. So, that's
9 why I need authorization, to control financial
10 institutions. But again is the same case as
11 anybody, because we don't want--we want to know who
12 is behind the bank, the financial institution, and
13 that he has the proper credentials for engaging in
14 that business.

15 PRESIDENT van den BERG: Why is it, then,
16 that the legislation limits the activities of a
17 sociedad controladora to a number of specific
18 areas? Why can it not be any holding company or
19 any company holding the shares? But that company
20 would also be engaging in other kind of business?

21 THE WITNESS: Well, other companies can

10:25:31 1 also have a Mexican company, you can have a
2 majority ownership of bank or broker-dealer if it's
3 authorized by Ministry of Finance or the
4 corresponding authority.

5 PRESIDENT van den BERG: But you see the
6 Mexican legislation requires majority ownership by
7 the sociedad controladora.

8 THE WITNESS: That's correct.

9 PRESIDENT van den BERG: Why is that? Why
10 can't you have three companies?

11 THE WITNESS: The idea here is that the
12 benefit of the controladora, of sociedad
13 controladora according with this financial holding
14 company, is that you can use the same brand name.
15 So if you are going to say this is a Banamex, an
16 insurance Banamex, et cetera, then you must have a
17 common ownership. That is why it is required.
18 That is a benefit of being a controladora,
19 operating under the same brand name, which you
20 cannot do if you are not a controladora.

21 BY MR. ALEXANDROV:

10:26:41 1 Q. Senor Borja, if I could follow up on two
2 of the questions you were just asked, and I will do
3 that, obviously, in order.

4 The first is you mentioned that the
5 controladora is, in fact, prohibited from doing the
6 business that the financial institutions it owns
7 do, and that they cannot use the financial
8 institutions--financial institutions cannot use the
9 controladora's offices to provide any financial
10 services.

11 Now, can you tell us if that is--you also
12 mentioned that they all do business under the same
13 name. Well, if the law allows them to do business
14 under the same name, the whole grupo, why is it
15 that the controladora is prohibited from engaging
16 in the business of the financial institutions?

17 A. Well, the controladora, and this is the
18 name of the company and the function and the
19 nature, is that it only buys shares, that it does
20 not engage in any activity, and that's why it's not
21 regulated as financial institution because what you

10:27:43 1 want is only a common ownership vehicle. You don't
2 want a financial services provider at the top
3 because you don't want to jeopardize--if they enter
4 into other transactions, then there may be other
5 risks there.

6 Q. Thank you.

7 I want to follow up on another question.
8 You discussed the definition of a financial
9 intermediary under NAFTA, and you mentioned that
10 there is no such definition, but can you say in
11 your understanding you were involved in Chapter 14
12 negotiations, you're the regulator of the financial
13 sector in Mexico, in your understanding, what is a
14 financial intermediary, and what is financial
15 intermediation?

16 A. Well, that financial intermediary is the
17 one that has--does one operation on one side of the
18 balance, and the opposite of the other one, or
19 renders also a financial service. That's what the
20 term "intermediation" is, to be in between two
21 persons, a borrower and a creditor or whatever.

10:28:53 1 Q. Senor Borja, when you gave your opinion
2 and then your supplemental opinion, obviously it's
3 an opinion of Mexican law, but you are looking at a
4 specific case. In that case the purchaser of the
5 bonds was Fireman's Fund. Those bonds were issued
6 by the controladora.

7 A. Yes.

8 Q. They were not issued by the bank; correct?

9 A. No.

10 Q. Is that--is the issuance of bonds by the
11 controladora, is that financial intermediation in
12 your understanding?

13 A. No. The issuance of the bonds? No. It's
14 not, again, if I'm General Motors Company, if I'm a
15 shoe manufacturing company and I go into the
16 markets to borrow and rather than go into the bank
17 I go to the markets because it's cheapest and I'm a
18 big company, and I use those funds for my own
19 purpose, I'm not making any intermediation.
20 Otherwise, all companies which issue debt
21 securities would be financial intermediaries or

10:29:52 1 financial institutions because usually corporations
2 are also integrated into groups, and the public
3 company is the group, not the subsidiaries.

4 So usually Mexico, for example, we have a
5 lot of commercial groups, not financial groups;
6 that the public company is the one who is the
7 controlling company, and then it makes
8 capitalization loans, or whatever, to the members
9 of the group, and that's not financial
10 intermediation, and that happens every day.
11 Otherwise, we would be saying that all issuers are
12 financial intermediaries.

13 Q. Senor Borja, if I may follow up on that
14 question, assume the Ley para Regular las
15 Agrupaciones Financieras did not exist, and in a
16 hypothetical way, the controladora could engage in
17 any type of financial activities. If the
18 controladora issues those bonds and Fireman's Fund
19 purchases the bonds, what else would the
20 controladora have to do to make this whole
21 transaction a financial intermediation in your

10:30:58 1 opinion?

2 A. Well, lend that money to a different
3 party, grant a credit to a different entity which
4 is not part of the group. That's intermediation.

5 MR. ALEXANDROV: Thank you.

6 Mr. President, we have no further
7 questions for Senor Borja at this time.

8 PRESIDENT van den BERG: Thank you.

9 Mr. Perezcano, how many minutes do you
10 foresee for cross-examination?

11 MR. PEREZCANO: For cross-examination,
12 well, I would like to reserve the full hour that we
13 have. I may not use it all.

14 PRESIDENT van den BERG: I suggest we have
15 a 15-minute break so you could reorganize your
16 notes. Perhaps it would be best.

17 MR. PEREZCANO: I would appreciate that.

18 PRESIDENT van den BERG: Mr. Borja, you
19 are under testimony. You are not to talk to
20 anybody.

21 (Brief recess.)

10:54:52 1 PRESIDENT van den BERG: Before we begin
2 cross-examination, one small thing. ICSID is kind
3 enough to distribute new copies of the ICSID
4 Additional Facility Rules. It's nice publicity,
5 but the thing is, as I understand it, that this
6 revised version, which is applicable as of the 1st
7 of January of 2003, does not apply to our case.
8 Now, it's not shocking news because I understand
9 that the major amendments, as you may call it
10 major, is that the award should be more detailed.
11 That's not on deaf ears for this Tribunal. Don't
12 worry.

13 We could continue, and, Mr. Perezcano,
14 please proceed with cross-examination of Mr. Borja.

15 I understand you have handed out and
16 revised--not revised. Strike that. Also a binder
17 with materials you are going to use for
18 cross-examination of Mr. Borja?

19 MR. PEREZCANO: Yes, sir. I have, and I
20 will explain what the binder contains. It
21 contains, similar to yesterday, the provisions of

11:01:18 1 the NAFTA, Mr. Borja's statements, and I will
2 indicate as agreed yesterday, that the Ley de la
3 Comision Nacional Bancaria y de Valores, this is
4 the updated version, we have actually gone ahead
5 and stamped it at the bottom which was suggested
6 yesterday by the Tribunal, but this is the updated
7 version. So, it was not previously before or
8 previously on the record. That is Tab 8.

9 Tab 9 contains the Ley de Proteccion y
10 Defensa al Usuario de Servicios Financieros, and we
11 have not included this before at all.

12 PRESIDENT van den BERG: Mr. Price, you
13 may have time to familiarize yourself and
14 Mr. Alexandrov with this law.

15 MR. PRICE: We may need a break before
16 redirect, thank you.

17 MR. PEREZCANO: Now, at Tab 11, we have
18 included the provisions of the LRAF that were in
19 force in 1990. And at Tab 12 it begins at the very
20 bottom, but those are the amendments to the LRAF of
21 December 1993.

11:03:11 1 ARBITRATOR LOWENFELD: After the NAFTA
2 negotiation?

3 MR. PEREZCANO: Exactly. So, these are
4 the amendments after the NAFTA was negotiated,
5 before it went into force, and those are not--we
6 have not submitted them before. That's the new
7 material.

8 PRESIDENT van den BERG: The same applies
9 to Mr. Price, that you would like to have time
10 before redirect to look at the materials?

11 MR. PRICE: Yes, Mr. President.

12 MR. PEREZCANO: Thank you very much,
13 Mr. President.

14 CROSS-EXAMINATION

15 BY MR. PEREZCANO:

16 Q. Mr. Borja, we have discussed--I take it
17 that there is no disagreement that financial
18 holding companies are regulated and supervised by
19 Mexico's financial authorities; is that correct?

20 A. That is correct.

21 Q. And these authorities are the Secretaria

11:04:22 1 de Hacienda; is that correct?

2 One of them is Hacienda.

3 A. Yes.

4 Q. Another one is Banco de Mexico?

5 A. Yes, although I have some remarks in this
6 regard.

7 Q. Is it a financial authority that regulates
8 and supervises financial--

9 A. Yes, but I would like to make a comment
10 about the way it regulates holding companies.

11 Q. And another authority is the Comision
12 Nacional Bancaria y de Valores, the National
13 Banking and Securities Commission?

14 A. Yes, but I would also like to make another
15 remark on the second point.

16 MR. ALEXANDROV: Mr. President, the
17 witness indicated--I'm sorry I'm interrupting,
18 Mr. Perezcano--the witness indicated he would like
19 to make a clarification to his answer. May he make
20 that to qualify his yes and no answer now?

21 PRESIDENT van den BERG: I was waiting for

11:05:19 1 the follow-up question, and I was seeing to it at a
2 certain point in time the expert could, indeed,
3 clarify it, but depending on the follow-up question
4 because I didn't want to interrupt the question.

5 MR. ALEXANDROV: Thank you.

6 MR. PEREZCANO: I wanted to go on in this
7 line of argument, and perhaps Mr. Alexandrov would
8 want to redirect him on these issues.

9 PRESIDENT van den BERG: It may be useful
10 for clarifying at this point.

11 MR. PEREZCANO: That's very well.

12 PRESIDENT van den BERG: So, I described
13 you as an expert witness. To be clear, you are an
14 expert witness in the sense you called by party as
15 an expert. We have also experts appointed by the
16 Tribunal. So we do not have confusion for the
17 record. So, just labeling you.

18 So, please go ahead, and briefly explain
19 the comments you wanted to make.

20 THE WITNESS: The remarks?

21 PRESIDENT van den BERG: You said that

11:06:14 1 because you had a question of whether they
2 were--the laws regulated and supervised by--

3 THE WITNESS: The question is the
4 financial holding companies are regulated by the
5 CNBV, and the answer is not all because as the
6 Holding Company Act establishes the supervision
7 corresponds to the Commission charge of the
8 prevailing entity, so not all financial holding
9 companies are supervised by the CNBV. The National
10 Banking Securities Commission supervises those
11 holding companies with principal financial
12 institution is mainly a bank, broker-dealer, or
13 other financial entities over which it has
14 supervisory power; whereas, we have other two
15 different national commissions which are the
16 National Bonding and Insurance Commission that is
17 in charge of insurance and bonding, and on the
18 other hand, we have another commission which is the
19 Comision Nacional del Sistema de Ahorro para el
20 Retiro, which is the Pension Fund Commission, which
21 is in charge of supervising the pension funds and

11:07:33 1 the operating companies of pension funds.

2 So here, for example, it is mentioned that
3 they are supervised by CNBV. Not only by the CNBV.
4 It may be also supervised by other institutions,
5 and in the information they provided to say that
6 they are supervised by these entities. They only
7 provided the information regarding the CNBV which
8 are these regulations issued by the CNBV.

9 PRESIDENT van den BERG: But then the
10 question is, depending on which are you
11 subsidiaries, the sociedad controladora has a
12 different financial authority that controls,
13 supervises it.

14 THE WITNESS: Supervisory Commission.

15 ARBITRATOR LOWENFELD: Which is the
16 dominant, I think.

17 THE WITNESS: For example, the regulations
18 issued by the CNBV which are mentioned in the
19 opinion, they say to the financial entities
20 supervise--to the sociedad controladora supervised
21 by the CNBV, so that's not all the universe.

11:08:35 1 That's only a part of it.

2 PRESIDENT van den BERG: Depends on which
3 are your subsidiaries.

4 THE WITNESS: That's correct.

5 PRESIDENT van den BERG: One way or the
6 other, you are supervised by one or more financial
7 authorities.

8 THE WITNESS: Yes, that is correct, but
9 not all by CNBV.

10 PRESIDENT van den BERG: A difference.

11 THE WITNESS: Under the Commissions,
12 which, as you know, we have different services and
13 different ways to supervise financial institutions.

14 My comment on the Central Bank was the
15 other one is that the Central Bank really, as
16 Mr. Mancera well characterized, the difference
17 between financial authorities. On the one hand, we
18 have the Ministry of Finance, which is the one that
19 provides for the structure and the organizations of
20 the holding companies and the financial
21 institutions. On the other hand, we have the

11:09:31 1 Central Bank. The Central Bank, as you know, is an
2 entity which is autonomous, and its main purpose of
3 the Central Bank is the monetary policy. Of
4 course, it is also a financial authority, but
5 really the focus of the Central Bank is to regulate
6 operations, you know? Because the idea of having
7 different financial authorities is that each one
8 plays its own role.

9 So, the role of the Ministry of Finance is
10 to authorize the role of the--the role of the
11 Central Bank is to regulate operations, and they
12 regulate, for example, banking operations. They
13 have a very extensive relation, and they regulate
14 also credit operations engaged by other financial
15 institutions or foreign exchange operations.

16 So, in this regard, the only authorization
17 of the Central Bank regarding holding companies are
18 those authorizations required to short-term
19 financing and debentures, which are the only
20 operations it engages in. The Central Bank, for
21 example, has issued also other regulations to other

11:10:40 1 financial institutions as general rules, but there
2 are no general rules applicable to holding
3 companies.

4 So, again, formally, yes, of course, they
5 are part of the financial system of controladoras.
6 Of course, they are authorized by the Ministry of
7 Finance, of course, they are supervised and
8 regulated, but again in a different fashion, with
9 different extensions. So I think those remarks are
10 important to go into not only in the formal aspect,
11 but into the substance of the matter.

12 PRESIDENT van den BERG: Thank you.

13 Mr. Perezcano, please proceed.

14 MR. PEREZCANO: Thank you, sir.

15 BY MR. PEREZCANO:

16 Q. In talking about the CNBV in particular,
17 the Commission, the National Banking Securities
18 Commission, their rules require controladoras to
19 prepare consolidated financial statements; is that
20 correct?

21 A. Yes. Again for the controladoras, which

11:11:44 1 are being supervised by the CNBV, yes.

2 Q. I'm referring to those only.

3 A. All right.

4 Q. And those consolidated financial
5 statements are then submitted to the Commission?

6 A. Yeah.

7 Q. And they are reviewed by the Commission?

8 A. Yes.

9 Q. And the Commission has the authority to
10 intervene in controladoras, for instance, in cases
11 of insolvency, independently of its subsidiaries?

12 A. Yes, although I would like to make a
13 remark because that's a very awkward case.

14 Q. But they do have that authority?

15 A. Yeah, but I think that they do have the
16 authority, but it's also important to understand
17 why is that authority granted and what is the
18 purpose also of those financial statements. Again,
19 the holding companies are mirrors of the financial
20 institutions. If a balance sheet of the financial
21 holding company is not in good shape, it's because

11:12:58 1 the financial institutions are not in good shape.
2 It's not because only so there is a problem dealing
3 with the holding company because it did cannot do
4 almost anything besides from the operations we have
5 described.

6 On the intervention side, it is important
7 to note that this intervention feature was not
8 present--and it's good that you submitted the
9 original version of the law--in the original law,
10 but when the banking crisis came about, which was
11 '94, shortly after NAFTA's instrumentation, then
12 there was an amendment because what happened was
13 the following: Maybe we couldn't--well, there was
14 a possibility of intervening the bank, but maybe it
15 would be more successful if we do it through the
16 holding company level, and of course the ability of
17 authorities is to intervene only at the holding
18 company level but it is because there were problems
19 downstairs. And the special feature that denies
20 the identity, the autonomy or maybe you could
21 regard this of the holding company is they could do

11:14:11 1 the opposite. You can--the reason why can you
2 intervene the holding company is because the
3 subsidiary is in bad shape; whereas if you go to
4 the subsidiaries' intervention authority, it's only
5 because that entity has a problem.

6 So there is, again the linkage, the
7 mirror, the common ownership vehicle, the way to
8 get into the subsidiaries.

9 PRESIDENT van den BERG: But possibly a
10 follow-up question, if you allow me, Mr. Perezcano.

11 MR. PEREZCANO: Please.

12 PRESIDENT van den BERG: You just said the
13 holding company mirrors the financials of the
14 financial institutions, the subsidiaries, because
15 they are in bad shape as an example.

16 THE WITNESS: Yeah.

17 PRESIDENT van den BERG: Could you also
18 have the reverse that because the holding company
19 is in bad shape, that they're a problem, then, for
20 the financial institutions which are their
21 subsidiaries?

11:15:03 1 THE WITNESS: Well, I don't think so,
2 because what a controladora is to the subsidiaries
3 is a shareholder, and the thing is that in the
4 Convenio unico de responsabilidades, the
5 liabilities of the controladoras are backed. The
6 obligations are backed on this agreement by--the
7 obligations of the subsidiary are backed by the
8 controladora, so it is only one way. I really
9 don't see how can the limited powers that have
10 controladoras can have an effect on their
11 subsidiaries, because again it is a majority
12 shareholder.

13 ARBITRATOR CARRILLO: One question just
14 for clarification of the Tribunal. Is there a
15 distinction between regulation and supervision?
16 Because you mentioned that in some cases the CNBV,
17 the bancaria, supervises. In another, other
18 financial authorities. What is the distinction
19 between regulation and supervision for purposes of
20 controladora, if you can answer it?

21 THE WITNESS: Well, the difference, which

11:16:17 1 is not only for this intermediary, but as a whole,
2 those are the fine terms. The regulatory authority
3 is the powers to issue these positions that are
4 applicable to different entities, like to issue
5 laws, regulations, to restrict, to allow. That's
6 regulation.

7 Supervision has two aspects. It is the
8 way how authorities verify fulfillment with those
9 regulations that they go and check that they are
10 complying with the applicable laws and regulations,
11 and it has two different manners to engage in
12 supervision. We have extra situ supervision, which
13 is where you only look at--the officers at the CNBV
14 are in their own offices and they are looking at
15 the financial statements and in their premises with
16 the information that has been provided by the
17 institutions. And then we have in situ inspection,
18 which is that an auditor of the CNBV goes to the
19 premises of the financial institution and see how
20 is it operating. That is the word "supervision."

21 Now, again, regulation and supervision are

11:17:39 1 in different entities regarding the nature of the
2 financial intermediary. In a bank, for example,
3 the regulation is in the Ministry of Finance; the
4 supervision is in the CNBV.

5 If we are talking of a broker-dealer, most
6 of the regulation is issued by CNBV, and the
7 Ministry of Finance has limited powers. For
8 example, we are talking about capital adequacy.
9 Capital adequacy is issued by the Ministry of
10 Finance in the case of banks and by the National
11 Banking and Securities Commission for the case of
12 securities firms.

13 Minimum capital standards that are
14 applicable to all financial institutions are issued
15 generally by the Ministry of Finance, but rather
16 than the authorities is the nature, again, the
17 nature of the disposition. It is a general
18 disposition, that's regulation. If I want to
19 double-check that you are complying with law,
20 that's supervision with these two aspects.

21 PRESIDENT van den BERG: Mr. Perezcano,

1 please proceed.

2 BY MR. PEREZCANO:

3 Q. Mr. Borja, you said that you did not
4 imagine a case where the controladora could be
5 intervened if there were no problems below.

6 A. No, no. No, maybe I would like to
7 rephrase that. If that's what I said, that's not
8 what I understand.

9 The thing is that I cannot imagine a case
10 in which there is an intervention of the
11 controladora level that does not have to do with
12 the health of the financial institutions.

13 Q. But legally speaking, that is the--there
14 is that authority?

15 A. Legally speaking, yes.

16 But legally speaking also, there is a
17 possibility of being intervened without being in
18 any fault at all, which is also important to
19 stress. If, for example, we are talking about a
20 financial institution, they can only intervene if
21 they have done something wrong or if the financials

11:19:44 1 are not good. If that is not happening, then there
2 is no right for the authority to intervene;
3 whereas, at the holding company level, even though
4 they meet all of their regulatory requirements
5 which are very reduced, they can be intervened
6 because something is happening downstairs, and I
7 think, legally speaking, that is also an important
8 difference.

9 Q. And, Mr. Borja, in this supervisory
10 capacity, the Commission has the power to inspect
11 the controladora's records?

12 A. Which Commission? Sorry.

13 Q. The Supervisory Commission.

14 A. The banking, the insurance, or the--

15 Q. Whichever.

16 A. Whatever?

17 Q. Whichever. The Supervisory Commission,
18 which it may be, they have the authority to inspect
19 the records?

20 A. What records, sir?

21 Q. The accounting records?

11:20:44 1 A. Financial statements?

2 Q. Financial statements.

3 A. Well, what happens is that they must
4 provide financial information.

5 Q. And in the intervention they can go deeper
6 into their corporate records, financial records,
7 accounting records?

8 A. Well, the only records--I don't know.
9 Maybe we have a confusion here with the words.
10 What is provided is that you can--you have to
11 provide financial statements, and financial
12 statements, well, they are different forms of
13 presentation of those financial statements, and
14 they are a reflect of the company's assets and
15 liabilities, and--but I don't know what are the
16 records can a controladora have. Maybe--I don't
17 know, if it can verify if it owns the--well, the
18 shares of the controladora or the shares are not
19 even with the holding company. They are in the
20 bank. I don't know what you are--

21 Q. For instance, their accounting books.

11:21:47 1 A. Accounting books? The financial
2 statements?

3 Q. The financial statements are sort of the
4 summary of their accounting?

5 A. Yeah.

6 Q. And they can go--

7 A. Financial information, yes, of course.

8 Q. Financial information?

9 A. Yes, yes, besides from that, they don't
10 have any other information regarding operations, so
11 the controladora only has its financial statements.

12 If you are going to go--if you going to
13 make supervision in a controladora, it would be
14 very fast because what are you going to do? Take a
15 look at the financial statements? They don't
16 operate. Maybe if they engage in this exceptional
17 operation. They will review them, and that's it;
18 whereas, it's a much more difficult task if you are
19 going to the bank, which is not only going to the
20 financial and evaluating the risks that you have
21 incurred, any of the reserves are fine or not, so

11:22:40 1 it's a much burdensome process.

2 Q. And the--

3 PRESIDENT van den BERG: Perhaps, could
4 you also detail the question. If you ask for the
5 financial statements, the financial bookkeeping,
6 but financial statements you have at the holding
7 company level is one thing. The other thing is the
8 consolidated financial statements. But I think
9 you're asking your question only for the financial
10 statements of the holding company; is that correct?
11 Because otherwise the answer may not correspond to
12 your question.

13 MR. PEREZCANO: I asked him before whether
14 controladoras have to provide consolidated
15 financial statements. I believe his answer was
16 yes.

17 THE WITNESS: Yes.

18 MR. PEREZCANO: So, it is on the
19 individual basis.

20 BY MR. PEREZCANO:

21 Q. Is that correct?

11:23:23 1 A. Yes, consolidation which are based on the
2 financial statements of the subsidiaries, yes.

3 Q. So, they can be on the individual basis as
4 well as on the consolidated basis?

5 A. Well, I don't remember exactly, maybe yes,
6 okay. But again, there are individual financial
7 statements. They don't engage in operations.

8 Q. In this case, the National Banking and
9 Securities Commission, it can also intervene if it
10 detects irregularities that may affect the
11 stability or solvency of the interests of the
12 public, in the controladora?

13 A. Well, let me see the exact wording because
14 it must be very precise on this.

15 Q. If you want to turn, Mr. Borja, to Tab 10,
16 you have a copy of Ley para Regular las
17 Agrupaciones Financieras, and it's Article 30-B.
18 It's the first paragraph of Article 30-B.

19 A. It has two elements. This says in the
20 opinion judgment, the corresponding
21 Commission--sorry. In the opinion of the

11:24:54 1 corresponding Commission's judgment, the
2 irregularities of any kind detected in the holding
3 company affect their stability and solvency and put
4 or jeopardize the public interest or its creators,
5 the President may decree intervention.

6 Okay. The first part--

7 Q. Let me--hold on for a second. It says
8 declared the intervention of company?

9 A. Of the holding company, yes.

10 Q. Thank you.

11 A. If you want me to read the whole
12 paragraph, without being required of the board, the
13 individual that would take care of the company.

14 PRESIDENT van den BERG: You wish to
15 clarify your answer?

16 THE WITNESS: Yes, here, what are the
17 limits contained in this paragraph in order to
18 proceed on the intervention. First, irregularities
19 of any kind. What sort of irregularities may a
20 controladora engage in? If it engages in other
21 transactions other than the limited ones of rights?

11:26:00 1 I don't know. I think that is the only
2 irregularity that could lead us to a problem in the
3 controladora.

4 BY MR. PEREZCANO:

5 Q. It does say any kind of irregularity?

6 A. Yes, I define "irregularity" as something
7 which is not regular. That is something which is
8 against the regulation, and what the regulation
9 says is that it cannot do anything but the
10 operations I've referred to. Therefore,
11 irregularity would be that the controladora goes
12 crazy and begins to grant credit or something like
13 that.

14 First, you have to have an irregularity in
15 order to intervene on its own.

16 Second, that irregularity, which I think
17 is hard--while the irregularity will be to do other
18 things, jeopardizes the interest of the public or
19 its creditors, in case only--and this is all only
20 applicable if the controladora has issued debt or
21 has outstanding loans because again, that is not an

11:27:10 1 ordinary way. We have this case here, but that is
2 not usually how they operate.

3 The credits, for example, must be
4 short-term credits for the purpose of acquiring a
5 new subsidiary or merging another subsidiary, which
6 does not happen every year. And the debentures,
7 they are instruments which are medium and long
8 term, which also don't happen very frequently.

9 So, yes, there is a possibility of having
10 the situation. However, taking into account that
11 there must be an irregularity, which is a violation
12 of the law, and that it must affect creditors,
13 supposing that it has creditors, that is true.
14 Therefore, if a holding company behaves well and
15 does not commit any irregularity, does not engage
16 in any transaction, only controls the shares, there
17 is no legal basis for the authority to intervene.

18 BY MR. PEREZCANO:

19 Q. Well, what about, Mr. Borja, what about if
20 persons with a criminal record are appointed to the
21 board?

11:28:24 1 A. Well, that is an important question.
2 First of all, in order to be appointed as board
3 member of a controladora, this has changed because
4 before you need to have an authorization of the
5 CNBV and of course you have to submit your
6 curriculum and everything, and they double-check
7 that situation; however, now, you must declare
8 before being appointed a board member that you are
9 a person with moral solvency to be in that charge.

10 If there is a problem with a board member,
11 then I think the one who is responsible is the
12 board member and it can be removed. But the fact
13 that a board member has a criminal record shouldn't
14 have any effect on the company because that's a
15 different situation. Legally speaking, if they
16 contradict that prohibition, who are they going to
17 fine? The person, not the company. You cannot
18 intervene controladora because suddenly it shows
19 that the person in charge of the management of the
20 board members have some problems with the justice.
21 What you can do is you can remove them from their

11:29:47 1 position, but that's all.

2 Q. The controladora can remove them from
3 their positions?

4 A. Not the controladora. The National
5 Banking Commission.

6 Q. Exactly. Thank you for the clarification.

7 So--and this is if you see paragraphs one
8 and two of that Article, this is independent of
9 intervening in the subsidiaries; is that correct?

10 A. That is correct, again, but again, what is
11 different--

12 Q. But it is, Mr. Borja, it is independent?

13 A. Yes, it is independent. However, the
14 other two paragraphs are not present in the other's
15 intervention provision; however, in order to commit
16 any irregularity that leads you to a problem at the
17 holding company level alone, it's because you have
18 broken the rules.

19 Q. Okay. Now, Mr. Borja, earlier on you
20 suggested--I just want to clarify a point. It
21 seemed to me that you suggested that issuing

11:30:50 1 debentures was not doing business by a
2 controladora?

3 A. No, no. It was not financial
4 intermediation.

5 Q. But it is doing business by a
6 controladora?

7 A. It's not doing business as a financial
8 institution.

9 Q. That's okay. But it is doing business?

10 A. Well, everything, there are corporations--

11 Q. And they do business?

12 A. Yes. Can you wait a little bit?

13 We have corporations and every corporation
14 does business. What is business defined as under
15 Mexican regulation, and you also define this also
16 in your submission of Article 75 of the Commerce
17 Code, which are acts of commerce, and everybody
18 that engages in acts of commerce is doing business,
19 is a merchant. So, in that case we have everybody,
20 including myself, if I sign a promissory note, and
21 I give it to somebody, I'm doing business because

11:31:43 1 I'm entering into a commercial transaction. That
2 is correct.

3 Q. Okay. Now, in your statement, Senor
4 Borja, you referred to Article 7 of the Ley para
5 Regular las Agrupaciones Financieras?

6 A. Yes.

7 Q. And this is the Financial Holding Company
8 Act; right?

9 A. Sorry--

10 Q. This is the financial holding company--

11 A. --you are reading from my opinion?

12 Q. Well, that's how you call it. When you
13 referred to it as the Financial Holding Company
14 Act, is referred to as the Ley para Regular las
15 Agrupaciones Financieras?

16 A. That is right, that is right. Yes.

17 Q. And you referred to Article 7; is that
18 correct?

19 A. Yes.

20 Q. Now, this Article says how financial
21 groups are formed; correct?

11:32:38 1 A. How they are integrated, yes.

2 Q. How they are integrated, okay. And it
3 provides that they shall be comprised of a holding
4 company?

5 A. Yes.

6 Q. And it also provides that they shall be
7 comprised of several financial intermediaries; is
8 that right?

9 A. Yes, that's right.

10 Q. But this is not a definition. It does not
11 contain a definition of "financial institution"
12 now, does it?

13 A. Well, again, as I explained earlier on--

14 Q. Before you explain, is it a definition, or
15 is it not a definition?

16 A. Of financial institutions?

17 Q. Of financial institutions.

18 A. No, it is not a definition of "financial
19 institutions" because it doesn't say so. But,
20 however, I think that we must bear in mind that the
21 definition of "financial institution" that we are

11:33:23 1 looking for is the one that refers to NAFTA's
2 financial services chapter, that this law was
3 enacted in 1990; and, therefore, while there was no
4 reason to include such a definition, but that when
5 NAFTA's implementing legislation that you also
6 include here, which I think it's good to see how it
7 was amended for this implementing legislation,
8 establishes these principal definitions not only
9 with this law, but also in the banking law and the
10 securities law, and other financial laws that says
11 foreign financial institution refers to that
12 institution, that foreign institution that is
13 authorized an investor for another party which in
14 turn is a financial institution. And therefore, if
15 you say that a foreign financial institution is the
16 one that is engaged in the provision of financial
17 services--

18 Q. I don't say that, Mr. Borja.

19 A. You are asking me why do I infer.

20 Q. I didn't ask you why you inferred. I
21 asked you whether this contains--

11:34:28 1 A. No, it does not.

2 Q. --and your answer is that it does not
3 contain.

4 A. In my opinion I say financial institution
5 because of that--

6 PRESIDENT van den BERG: Could you there
7 in that respect simply limit your answer to the
8 question. If anything is unclear thereafter, that
9 may also be explored in redirect, unless you feel
10 your answer is incomplete. Some people are short
11 in answers. Others are more professorial. I'm a
12 professor myself, so it takes some time to explain.

13 THE WITNESS: Okay, sorry.

14 BY MR. PEREZCANO:

15 Q. Now, other laws that were interacted after
16 the NAFTA, they do contain actual definitions, do
17 they not, of other financial--

18 A. Yeah. Actually, you know, so...

19 Q. Can we turn, please, to Tab 8, Senor
20 Borja, if you will. This is the law of the
21 National Banking and Securities Commission; is that

11:35:23 1 correct?

2 A. That is correct.

3 Q. Can you turn to Article 3.

4 A. Yes.

5 Q. This law was enacted after the NAFTA came
6 into force; is that right?

7 A. That is right.

8 Q. And it does contain, if you see there, an
9 actual definition of "entities of the financial
10 sector" or "financial entities"; right?

11 A. Yes.

12 Q. And the first of those entities of the
13 financial sector or financial entities are holding
14 companies?

15 A. Yes, that's correct.

16 ARBITRATOR LOWENFELD: Where are you?

17 MR. PEREZCANO: Tab 8, Professor

18 Lowenfeld. Page two, Article 3.

19 PRESIDENT van den BERG: Subsection 4, you
20 are referring to?

21 MR. PEREZCANO: Yes, subsection 4.

1 BY MR. PEREZCANO:

2 Q. If you turn to Tab 9, Senor Borja, that is
3 the law for the protection and defense of the user
4 of financial services.

5 A. Um-hmm.

6 Q. And if you look at Article 2, it contains
7 a set of definitions; is that right?

8 A. Yeah.

9 Q. And if you look there at Section 4 again,
10 it contains a definition of "financial
11 institution"?

12 A. That's right.

13 Q. You see that? And it says in singular and
14 plural, and it refers in first place to sociedades
15 controladoras; is that correct?

16 A. That is right.

17 Q. And this law was also enacted after the
18 NAFTA came into force; is that correct?

19 A. It was '99, yes.

20 Q. Now--so, actually, the Financial Holding
21 Company Act, Ley para Regular las Agrupaciones

11:36:53 1 Financieras, it does not contain a definition of
2 "financial institutions"; is that correct?

3 A. Which law?

4 Q. The Ley para Regular las Agrupaciones
5 Financieras, does not contain.

6 A. It contains a definition of "foreign
7 financial institution," that is part of
8 implementing legislation, that refers to financial
9 entities.

10 Q. But does it contain a definition of
11 "financial institution"?

12 A. No, not like that. As a domestic
13 financial institution, no. It contains a foreign
14 financial institution, yes.

15 Q. Okay. If we may go back to the--

16 A. I would like also--

17 PRESIDENT van den BERG: Let the witness
18 finish.

19 THE WITNESS: Here we are talking about
20 again about the definition test.

21 I would like to make some remarks. I

11:37:36 1 think that, in my opinion, the law that should
2 prevail is the law that implemented NAFTA.

3 Also, I think it's important to note that
4 there is a new law, new investment company law that
5 was just recently issued last year, that it
6 maintains these three definitions of foreign
7 financial institution. That was a law that was
8 enacted in 2000, I don't remember exactly, I think
9 2001--but maintains these three important
10 definitions.

11 It's also important if you are
12 interpreting Mexican law, the purpose of the law.
13 What is the purpose of this law? For example,
14 let's take the National Banking Securities
15 Commission? Again, the purpose of having all of
16 these intermediaries into a single definition or
17 term is that when you referred to regulate
18 supervised entities, you only use a word, and you
19 have to include all of them. If we say this is a
20 definition of "financial institution," well, then,
21 we don't have insurance companies, we don't have

11:38:37 1 bonding companies, we don't have pension funds. On
2 the opposite, we have others that aren't like
3 financial institutions, such as financial bureaus
4 et cetera.

5 What is the purpose of the other law? The
6 purpose of the other law, really this was not
7 something that was originally prepared by the
8 executive nor by the people that were in charge of
9 NAFTA as implementation or that we are aware of
10 NAFTA. This law was created again in 1999 together
11 with IPAB. IPAB was the institution that was the
12 predecessor to FOBAPROA. At that point in time
13 there was a great pressure of creditors against
14 authorities, and the problem was that consumer
15 protection agency that existed in Mexico didn't
16 have any jurisdiction over financial institutions.
17 The only jurisdiction on consumer protection
18 matters were the commissions. So, the intention
19 was to create this body in order to have this.

20 However, it is included only for this
21 purpose. What is the purpose of the law? That if

11:39:46 1 you have a problem with a financial institution,
2 then you could go into mediation with the
3 Commission, which is nonbinding. You have to
4 assist to try to conciliate. If you don't
5 conciliate, you go to court. That's really the
6 means and also to have some transparency measures.
7 But again, it relates to the operations with the
8 public, which are very, very limited or restricted
9 and not of financial nature, the ones issued by
10 controladoras. That's why I didn't consider this a
11 prevailing definition. I considered the prevailing
12 definition the one in the affiliate financial laws.

13 PRESIDENT van den BERG: Mr. Borja, the
14 simple question is: Does Mexican law (A) in 1990,
15 (B) after enactment of NAFTA, (C) currently contain
16 a definition of what is a financial institution?

17 THE WITNESS: It contains a definition--

18 PRESIDENT van den BERG: Can you go by
19 time. 1990, did Mexican law contain a definition
20 of what is a "financial institution" under Mexican
21 law?

11:40:44 1 THE WITNESS: No.

2 PRESIDENT van den BERG: After the
3 implementation of NAFTA to the various provisions
4 you had--

5 THE WITNESS: Foreign financial
6 institution? Yes.

7 PRESIDENT van den BERG: No. I asked for
8 financial institution under Mexican law. That's
9 the question.

10 THE WITNESS: Financial entity, yes.
11 Financial institution, no.

12 PRESIDENT van den BERG: Financial
13 institution, no. And at present?

14 THE WITNESS: At present, I may say no.

15 Well, it's financial entity or financial
16 institution, but also in the Dictionary of Free
17 Trade, which I agree that is not law. That is
18 something that is useful to interpret trade
19 agreements. It says financial entity equals
20 financial institution.

21 PRESIDENT van den BERG: Thank you.

1 BY MR. PEREZCANO:

2 Q. So, the Ley para Regular las Agrupaciones
3 Financieras, Article 7 also doesn't say that these
4 financial--it doesn't say that financial
5 institutions are those that provide financial
6 services, does it?

7 A. No. But what it does, it enumerates
8 different types of companies. What they have in
9 common is under their laws the provision of
10 financial services.

11 Q. But it doesn't contain the words "provide
12 services to the public," does it? Article 7?

13 A. No, Article 7 does not, but the laws
14 governing these regulations, if you see the
15 operations they can engage in, that's operation
16 with the public. Yet you cannot have everything in
17 one law. You have to make interpretations.

18 ARBITRATOR LOWENFELD: In Article 7, would
19 you mind helping me. I have Tab 10, which is the
20 original law. Tab 12 which is the amendment.

21 THE WITNESS: Yes.

11:42:54 1 ARBITRATOR LOWENFELD: I can't find any
2 difference in Article 7 except that (speaking in
3 Spanish) is eliminated.

4 THE WITNESS: No, the change is in Article
5 27, actually.

6 ARBITRATOR LOWENFELD: Pardon?

7 THE WITNESS: The thing is, it was amended
8 for that purpose because every time there is a new
9 financial institution is created that can be owned
10 or controlled by a holding company it is amended to
11 include them--include it in the list, so it's been
12 updated, but this is implementing--let me see if
13 it's the right one, but 27-A is the one that has
14 foreign financial institution, and that's the NAFTA
15 implementation.

16 ARBITRATOR LOWENFELD: But 7 is not--maybe
17 I missed something. It seems except for the
18 retirement funds, it looks just the same.

19 THE WITNESS: Yeah, that's right.

20 ARBITRATOR LOWENFELD: That's all I wanted
21 to know, whether I missed something. I understand

11:43:51 1 27 is all new, A and B.

2 BY MR. PEREZCANO:

3 Q. Now, Mr. Borja, actually the definition of
4 "financial institution" in Article 1416, that does
5 not refer in any way to providing services to the
6 public now, does it?

7 A. Well, the definition again says that.

8 PRESIDENT van den BERG: The question as
9 such is simple. Does it contain a reference to
10 rendering financial services or not?

11 THE WITNESS: It says it's a financial
12 intermediary or a company authorized to do
13 business, and authorizes financial
14 institution--financial services, no.

15 PRESIDENT van den BERG: Then we could
16 move on to the next question. Perhaps you should
17 take the text in front of you.

18 THE WITNESS: Yes.

19 BY MR. PEREZCANO:

20 Q. Earlier today I think I understood
21 Mr. Alexandrov to have suggested that you were a

11:45:18 1 NAFTA negotiator. You were not a NAFTA negotiator;
2 is that right?

3 A. That's right. I did not participate in
4 the negotiation. Only in instrumentation.

5 Q. Okay. In 1992 you were doing--you were
6 studying up here in the U.S.; is that correct?

7 A. No, let me tell you dates so they match.
8 In 19--

9 Q. Well, 1992?

10 A. In '91, '92 I was here in Georgetown. In
11 '92, '93, I was in New York. In March '93, I was
12 appointed as Director of International Affairs.

13 Q. So, did you not participate in the NAFTA
14 negotiations?

15 A. No, I participated in the implementation
16 and in the administration of the license.

17 Q. I just wanted to clarify that for the
18 record, Mr. Borja. Thank you.

19 A. Yes.

20 Q. Now, in your statement you also referred
21 to the subject of minimum capital requirements; is

11:46:13 1 that correct?

2 A. Um-hmm.

3 Q. Is that yes?

4 A. Yes, yes, minimum capital.

5 MR. PRICE: Could we know what paragraph?

6 MR. PEREZCANO: Yes, paragraph 32 of his
7 statement, Mr. Price.

8 MR. PRICE: Thank you.

9 THE WITNESS: 32, minimum capital
10 requirements, yes.

11 BY MR. PEREZCANO:

12 Q. And you suggest there that they
13 thereby--they have financial holding companies
14 because they have no minimum capital requirements,
15 have no regulatory capital. That is what you say;
16 is that correct?

17 A. Well, why I say that is the following.

18 Q. Well, do you say, Mr. Borja, financial
19 holding companies themselves are not required to
20 hold any minimum capital requirement--any minimum
21 levels of capital and hence they have no regulatory

11:47:25 1 capital as such. Is that what you said?

2 A. You are in 30?

3 Q. Paragraph 32, second and third lines. Is
4 that what you said?

5 A. Regulatory capital? Yeah.

6 Q. Okay. Now, the NAFTA, nowhere does it
7 talk about regulatory capital in relation to
8 minimum capital requirement now, does it?

9 A. No. The term "regulatory capital," let me
10 tell you what I think about it.

11 Q. I just want an answer to my question.
12 Does the NAFTA refer to regulatory capital in
13 relation to minimum capital requirement, the NAFTA?

14 A. I don't think that the NAFTA deals with
15 minimum capital requirements.

16 Q. Okay.

17 A. So that's why--

18 Q. Do you know where the term "regulatory
19 capital" comes up in the NAFTA?

20 A. Well, I think it's in the definition of
21 "investment."

11:48:17 1 Q. Can you turn to that definition of
2 "investment," please. This is Article 1416 in the
3 definition. It depends on the edition.

4 What is the definition of "investment"?

5 A. Investment means investment as defined in
6 Article 1139, except that with respect to loans and
7 debt securities referred in this Article alone or
8 security issued by a financial institution is an
9 investment only where it is treated as regulatory
10 capital by the party in whose territory the
11 financial institution is located.

12 Q. So, it comes up in the context of loans or
13 debt securities issued by a financial institution;
14 is that correct?

15 A. Yeah.

16 Q. And is there any other reference in the
17 NAFTA to the term "regulatory capital"?

18 A. Not that I'm aware of.

19 Q. Now, prior to the NAFTA, you said earlier
20 on today that foreigners could only invest in
21 minority interests in financial institutions; is

11:49:39 1 that correct?

2 A. That is correct.

3 Q. So, would it be--so, would it be fair to
4 say that there were no major investments prior to
5 the NAFTA in financial institutions by foreigners?

6 A. Foreign investment, investors? No, there
7 were none.

8 Q. So, would it also be fair to say that
9 after the NAFTA, significant investments were made
10 by that foreign institution?

11 A. That is correct.

12 Q. And were those investments made through
13 financial holding companies?

14 A. Yes. Well, there's another concept, which
15 if you want me to explain I will do for sure, which
16 is sociedades nacionales. Here the thing is you
17 must be a foreign financial institution in order to
18 be enabled to invest in Mexico.

19 However, what happened is that we
20 recognized when we have a bank that wanted to
21 invest in Mexico that maybe another vehicle

11:50:48 1 was--will be used, and therefore we develop the
2 definition of sociedades nacionales in the
3 regulations that apply for the application of
4 foreign financial institutions. But those two
5 terms are distinguished.

6 Q. I understand. Would you say that the
7 major investments by foreign institutions in the
8 Mexican national institutions are in holding
9 groups--in holding companies?

10 A. The major investments are through?

11 Q. Through.

12 A. Holding companies?

13 Q. Holding companies.

14 A. Yes, yes, I think that's why--and also I
15 think that NAFTA, as you pointed out, it was a very
16 important instrument to foster, to encourage, for
17 investment because of the certainty it provides
18 because of the guarantees that are included in this
19 sector, and, therefore, yes, I recognize that that
20 is an element that really triggered investment
21 especially in the private vector through sociedad

11:52:14 1 controladora.

2 Q. You are referring in your statement also
3 to Annex VII, Section C, paragraph 5; is that
4 correct?

5 A. Yes, that's correct.

6 Q. Now, if you please turn to that section?

7 A. Yes.

8 Q. These are Mexico's specific commitments,
9 are they not?

10 A. In B-5 or C?

11 Q. Yes, B-5, these are Mexico's specific
12 commitments?

13 A. That's right.

14 Q. These are specific commitments under
15 Chapter 14?

16 A. Yes.

17 Q. And would you--now, paragraph 5 says, if
18 an investor of another party that in accordance
19 with Section B is authorized to establish or
20 acquire a commercial bank or securities firm in
21 Mexico, may also establish a financial holding

11:53:08 1 company in Mexico, and thereby establish or acquire
2 other types of financial institutions in Mexico
3 under the terms of Mexican measures.

4 Is that what it says?

5 A. Yes, that's what it says.

6 Q. So, investment by an investor of another
7 party--or the establishment, rather, by an investor
8 of another party of a financial holding company is
9 only possible through this paragraph 5; is that
10 correct?

11 A. Sociedad controladora filial you are
12 talking about?

13 Q. Well, I'm talking about paragraph 5, and
14 my question is whether this is how an investor of
15 another party may establish a financial holding
16 company in Mexico.

17 A. Yes, a holding company and other financial
18 services, yes.

19 Q. Correct. And this is a commitment under
20 Chapter 14; is that right?

21 A. Yes. However, it is important to note

11:54:10 1 that Chapter 14 deals with holding companies
2 because they are, I guess, part of the financial
3 system.

4 (Simultaneous conversation.)

5 PRESIDENT van den BERG: Excuse me,
6 Mr. Perezcano, let the witness finish.

7 THE WITNESS: But, of course, they have to
8 be included. Otherwise, for example, if we
9 included restriction that only says foreigners are
10 not allowed to invest in banks up to 30 percent of
11 minority investment and we didn't include that
12 mirror provision at the holding company level, then
13 those investors could circumvent that restriction.

14 So, really in my opinion, why they are
15 related here is because they are common ownership
16 vehicles of which you could invest.

17 BY MR. PEREZCANO:

18 Q. But, if you turn to Article 1401,
19 Mr. Borja--

20 A. Yes.

21 Q. --Article 1401 is entitled Scope and

11:55:13 1 Coverage of Chapter 14.

2 A. Yeah.

3 Q. And it says, "This chapter applies to
4 measures adopted or maintained by a party relating
5 to, (A) financial institutions of another party"?

6 A. Yes.

7 Q. "And (B) investors of another party and
8 investments of such investors in financial
9 institutions in the party's territory"?

10 A. Uh-huh.

11 Q. "And (C) cross-border trade and financial
12 services"?

13 A. Yeah.

14 Q. So, this defines scope and coverage of
15 Chapter 14, does it not?

16 A. Yeah, yeah, scope of coverage, that's what
17 it says, yes.

18 Q. Okay. And if we turn to the implementing
19 legislation, and you will find that at Tab 12, now,
20 these are the provisions that you drafted?

21 A. Yeah.

11:56:03 1 Q. And you clarified for Professor Lowenfeld
2 just a few minutes ago that the main changes were
3 in Articles 27-A, B, and in fact that whole
4 chapter; is that correct?

5 A. Yeah.

6 Q. Now, you have referred to the definition
7 of Institucion Financiera del Exterior; is that
8 right?

9 A. That's correct.

10 Q. I want to clarify something. It seemed to
11 me that you earlier on suggested that this
12 definition was the same as the definition contained
13 in Article 1403. But that is not correct, is it?

14 A. No, Let me--because I think we should be
15 very clear in this matter.

16 Q. Can we refer to Article 1403?

17 A. No, but you are asking me what my opinion
18 is regarding this.

19 Q. No, I'm asking you whether--I'm asking you
20 to clarify--

21 A. Yes, that's what I'm going to do.

11:57:04 1 Q. Well, before you clarify, then, you did
2 not say that those two definitions are the same or
3 equal?

4 (Simultaneous conversation.)

5 A. Should I clarify it?

6 PRESIDENT van den BERG: Yes, but let me
7 be clear first about the question. Which
8 definition are you now asking, Mr. Perezcano?

9 MR. PEREZCANO: Mr. Borja, earlier on
10 referred to the term "investor of another party" as
11 referred to in paragraph 5 of Section C of Annex
12 VII. That refers back to Article 1403 in paragraph
13 5 it seems to me that he said that the definition
14 of paragraph 5 in 1403 was the same as a definition
15 in the law--in the implementing legislation. My
16 question is that is not the same.

17 THE WITNESS: Is that a question or a
18 statement?

19 PRESIDENT van den BERG: That's the
20 question.

21 THE WITNESS: What is my opinion?

11:58:05 1 PRESIDENT van den BERG: Could you please
2 answer yes or no and then expound on it.

3 BY MR. PEREZCANO:

4 Q. That is a no?

5 A. That is a statement.

6 PRESIDENT van den BERG: Then you could
7 clarify.

8 BY MR. PEREZCANO:

9 Q. That's why I wanted to clarify so that
10 there was no misstatement. These definitions are
11 not the same?

12 A. In my opinion?

13 Q. Are they or are they not the same? Not in
14 your opinion. Are they--

15 PRESIDENT van den BERG: He may state his
16 opinion.

17 MR. PEREZCANO: Right now before he states
18 his opinion, I just want for the record to know
19 whether the definition in 27-A is the same as the
20 definition in 1403, paragraph 5.

21 THE WITNESS: Well, what I can tell you is

11:58:42 1 that--

2 BY MR. PEREZCANO:

3 Q. I want a yes-or-no answer.

4 A. Yes, that would be, but first let me--

5 Q. Yes, they're the same?

6 PRESIDENT van den BERG: Would you please
7 answer yes or no.

8 THE WITNESS: I just want to be precise.
9 The definition of foreign financial institution is
10 the same as the one in 1403(5). That's the
11 question?

12 BY MR. PEREZCANO:

13 Q. That's the question.

14 A. Yes, that's the foreign financial
15 institution.

16 Q. Are these definitions the same? Yes or
17 no?

18 A. They are not the same--

19 Q. Yes or no.

20 A. Well, I think I need to clarify because
21 they are in different--

11:59:19 1 Q. Would you answer yes or no before you
2 clarify.

3 A. The definitions are the same. I don't
4 understand the question.

5 Q. Is the definition of investor of another
6 party contained in Article 1403, paragraph 5, the
7 same--

8 A. Do they have the same--

9 Q. Would you let me finish, Mr. Borja,
10 please, so you could understand my question.

11 Is the definition contained in
12 Article 1403, paragraph 5 the same as the
13 definition of "foreign financial institution"
14 contained in Article 27(a)?

15 A. The same being the same--

16 Q. Are they the same?

17 A. The same wording?

18 Q. Are they the same wording?

19 A. No, they are different.

20 Q. They are different. Thank you.

21 A. What I mentioned is that when we

12:00:07 1 implemented NAFTA, we took the definitions that
2 were in Mexico's financial charter and we had
3 to--in order to implement, you have to make your
4 own wording in accordance with your own law to make
5 it consistent. So, therefore, we said, how are we
6 going to define investor of another party? We are
7 going to define investor of another party as a
8 foreign financial institution, both not only in
9 dissolving the other laws including the new
10 investing company law that has been issued
11 recently, that maintains the same position. So,
12 that is the relationship. Of course, you only have
13 to take a look at them, and, well, they are not the
14 same.

15 Q. Thank you, sir.

16 Now, the definition of "foreign financial
17 institution" in 27-A does not contain the language,
18 an investor engaged in the business of providing
19 financial services, does it?

20 A. No.

21 Q. It does not contain that language?

12:01:10 1 A. No, but again, not because it doesn't
2 contain the same language. It doesn't mean that
3 that's not the instrumenting legislation for that
4 definition. That definition was instrumental to
5 that means because in addition to establishing the
6 financial services of NAFTA, the intention of the
7 implementing legislation was to create a general
8 framework for future openings such as we did with
9 the OECD, such as we did with the European Union.
10 So, therefore, we cannot only refer to NAFTA terms.

11 What we have to do is to take this period
12 of NAFTA's negotiation and incorporate it, and, of
13 course, that spirit and that commitment will be
14 more or less the same in other agreements.
15 Therefore, we include the definition of a "foreign
16 financial institution" as such as being able to
17 establish an entity which is the one described in
18 paragraph 7, first paragraph of Article 7 of the
19 Holding Company Act, and it would take a look at
20 NAFTA, who is the one which is entitled to that
21 only a financial institution.

12:02:19 1 So, that's the way we define "foreign
2 financial institution."

3 Again, this is not only NAFTA, but it has
4 a broader term, and that's why we didn't copy the
5 definitions.

6 Q. Now, would you agree, Senor Borja, that a
7 financial service provider is a person engaged in
8 the business of providing a financial service?

9 A. Yes.

10 Q. And is that the definition of "financial
11 service provider" of a party under Chapter 14?

12 A. Sorry?

13 Q. Is that the definition of "financial
14 service provider" of a party under Chapter 14 in
15 Article 1416?

16 A. 1416? Financial service provider means a
17 person of a party that is engaged in the business
18 of providing financial services within the
19 territory of that party.

20 Q. That is what it says; correct?

21 A. Yeah.

12:03:17 1 Q. Now, the definition of "financial
2 institution" does not say financial institution
3 means a financial service provider of a party now,
4 does it?

5 A. No, no, it didn't.

6 Q. It doesn't say that?

7 A. You could read it if you want, but it
8 doesn't say so.

9 Q. It doesn't say so.

10 Thank you, Mr. Borja.

11 MR. PEREZCANO: Mr. President, I'm
12 finished with my questions. Thank you.

13 PRESIDENT van den BERG: Mr. Price, you
14 need 15 minutes, or ready for redirect?

15 MR. PRICE: Thank you, Mr. President.
16 That would be sufficient.

17 PRESIDENT van den BERG: 15 minutes
18 recess. You are still under testimony.

19 (Brief recess.)

20 PRESIDENT van den BERG: Okay. There is a
21 person missing in action.

12:23:56 1 I think we could start the redirect.

2 Mr. Price, please proceed.

3 MR. PRICE: Thank you, Mr. President. I
4 invite my colleague, Mr. Stanimir Alexandrov, to
5 continue.

6 REDIRECT EXAMINATION

7 BY MR. ALEXANDROV:

8 Q. Thank you, Mr. President.

9 Senor Borja, Senor Perezcano asked you
10 questions about the Article 30-B about the Ley para
11 Regular las Agrupaciones Financieras. That appears
12 as Tab 10 of the notebook that Senor Perezcano
13 gave. If you open, please, and take a look at
14 Article 30-B.

15 A. 30-B?

16 Q. Yes.

17 A. Okay.

18 Q. What you testified, Senor Borja, in
19 response to the question of Senor Perezcano was
20 that the competent commission, which may be a
21 different commission, depending on the structure of

12:25:01 1 the whole group and the subsidiaries, the competent
2 commission can take measures in case there are
3 irregularities committed by the controladora.

4 A. Um-hmm.

5 Q. And if I recall correctly, what you said
6 was that irregularities, in your view, is something
7 that the controladora does, that it is prohibited
8 from doing under the law.

9 A. Yeah.

10 Q. What would be the actions that it would
11 take that would be prohibited under the law?

12 A. Well, maybe to engage in business other
13 than holding the shares and operations it can
14 engage in, which are the debentures and the
15 short-term financing and Convenio. That's it.

16 Q. Would you recall what is a controladora
17 prohibited from doing under the Ley para Regular
18 las Agrupaciones Financieras?

19 A. Well, actually, it's Article 16--it says
20 the controladora, the purpose of the controladora
21 is to acquire and manage shares issued by the

12:26:27 1 financial institutions that form part of the group.
2 In any event, the controladora can enter into
3 operations that are not permitted, operations of
4 the financial entities that form part of a group.

5 So, they cannot engage in any operation.
6 The scope is limited to these transactions.

7 Q. Okay. Thank you, Senor Borja.

8 And just one follow-up question on this
9 before I move on. As a regulator, what would be of
10 greater concern to you between, one, an officer of
11 the controladora has a criminal record which you
12 discover, or the controladora breaches that
13 prohibition of Article 16 and begins, for example,
14 accepting deposits from the public?

15 A. Well, obviously the second. The first one
16 does not affect the financial healthiness of the
17 company.

18 Q. Thank you, Senor Borja.

19 Now, I wanted to ask you another question
20 that relates to what you testified in response to
21 Senor Perezcano's question. If you open the law

12:27:55 1 labeled Comision Nacional Bancaria y de Valores,
2 Article 3, Roman four, which appears under Tab 8 in
3 the notebook Senor Perezcano gave you?

4 A. Yes.

5 Q. Article 3, Roman four.

6 A. Roman four, yeah.

7 Q. I want to remind you of the question that
8 Senor Perezcano asked and then follow up with my
9 own question.

10 So, when he was asking you whether this
11 was a definition of a financial
12 constitution--sorry, financial institution, what
13 you said was that this was enumeration of the
14 entities that were--that are regulated by the
15 National Banking Commission.

16 Now, what I want to ask you is look at the
17 very first line, which says, entidades del sector
18 financiero or entidades financieras.

19 A. Yes.

20 Q. Entities of the financial sector or
21 financial entities.

12:29:05 1 When you read this language, Mr. Borja,
2 does it suggest to you that there may be two
3 categories of entities that are not necessarily
4 co-extensive?

5 A. Yes. Yes, because otherwise, why do we
6 have to put synonyms in that definition.

7 Q. And if that is the case, would you say
8 that all the entities that are enumerated in this
9 Article are necessarily both entities of the
10 financial sector and financial institutions?

11 A. Either/or.

12 Q. Thank you.

13 MR. ALEXANDROV: Mr. President, we have no
14 further questions at this point.

15 PRESIDENT van den BERG: Thank you.

16 Professor Lowenfeld will ask a few
17 questions.

18 ARBITRATOR LOWENFELD: I have three
19 questions that are not really related to each other
20 but they are related to your testimony. The first
21 one is, if you go back to the Annex, Annex VII,

12:30:24 1 paragraph 5, which you talked about, (C)(5) that
2 you talked about.

3 THE WITNESS: Uh-huh.

4 ARBITRATOR LOWENFELD: It refers to a
5 financial holding company in Mexico or other types
6 of financial institutions.

7 THE WITNESS: Um-hmm.

8 ARBITRATOR LOWENFELD: Doesn't that
9 suggest that the financial holding company is a
10 financial institution?

11 THE WITNESS: No, because if you read it
12 that way, it would say that a financial company was
13 thereby established by other financial holding
14 companies, and that is not possible.

15 ARBITRATOR LOWENFELD: If there are other
16 types, there must be one type.

17 THE WITNESS: This is in relation with the
18 restriction, and the restriction is you can only
19 have a bank in Mexico if you're a bank in the U.S.
20 So, that bank is a financial institution. In case
21 you have a bank in the U.S. and establish a bank in

12:31:15 1 Mexico, then you can acquire other types of
2 financial institutions--

3 ARBITRATOR LOWENFELD: I understand the
4 meaning of the whole thing. The question is just
5 this wording here.

6 THE WITNESS: In my opinion, that other
7 types refers to other types that you are entitled
8 to under (C)(14), which is the one which
9 is--engages in the same activities as you are.

10 ARBITRATOR LOWENFELD: All right. I'm not
11 quite satisfied, but I understand your point.

12 THE WITNESS: But in implementing the
13 legislation, this is also to clarify, because also
14 the President says the financial institution, the
15 legal nature is to provide financial services.

16 ARBITRATOR LOWENFELD: My second question
17 is, you spoke about intervention. You thought it
18 was unlikely you would have the holding company
19 intervened, except for irregularities, doing
20 something prohibited.

21 Perhaps I'm wrong, but my recollection is

12:32:27 1 that BanCreceer, the controladora, was, in fact,
2 intervened; isn't that so? And the reason that it
3 was intervened, if I understood the statements,
4 because of instability, not because of acting in
5 prohibited way. Am I wrong on that? If you don't
6 know, tell us you don't know.

7 THE WITNESS: I don't know all the fact,
8 but what I can tell you from my limited knowledge
9 of the facts is that what I said is that to
10 intervene only financial holding company because
11 the only problem is the financial holding company,
12 it's really very awkward. It cannot happen. In
13 order to happen, you have to have irregularities
14 that as a consequence generate problems with the
15 financial situation of the holding company.

16 What happens is that usually, and this is
17 the other part that is not included in the other
18 financial institutions, you can intervene a holding
19 company if there are problems at the subsidiary
20 level, which is the case, and that situation is not
21 present in the other intermediaries.

12:33:39 1 And that's what usually happens if you
2 have problems in various financial institutions,
3 then you go directly to the controladora.

4 ARBITRATOR LOWENFELD: So, the whole group
5 was unstable, and there was an intervention?

6 THE WITNESS: Yeah, but the interest being
7 protected to the public are the interests--are the
8 ones of institutions that operate with the public,
9 which are the bank, the securities firm, not really
10 the holding company because its operations again
11 are very limited.

12 ARBITRATOR LOWENFELD: One more question,
13 or did you want to follow up?

14 PRESIDENT van den BERG: No, please.

15 ARBITRATOR LOWENFELD: I have one more
16 question, sir. If you go back to NAFTA now and
17 Article 1403.

18 THE WITNESS: Yeah.

19 ARBITRATOR LOWENFELD: In the way tells
20 the object of the special provision. The parties
21 of 1403(1), the parties recognize the principle

12:34:37 1 that investor of another party should be permitted
2 to establish financial institution, and then the
3 rest really spells that out.

4 THE WITNESS: Uh-huh.

5 ARBITRATOR LOWENFELD: And we know that
6 this was carved out of the general investment
7 provision--

8 THE WITNESS: Uh-huh.

9 ARBITRATOR LOWENFELD: --for, I think, two
10 reasons. One was that the regulatory agencies in
11 the three countries did not want each regulation
12 that they might have issued for prudential reasons
13 to be met with a claim of expropriation or unfair
14 treatment, the same kind of thing that perhaps was
15 not foreseen in the environmental area, but has
16 happened since then, as Mr. Perezcano well knows.
17 So, that's one reason.

18 And the other reason is that national
19 treatment wasn't quite--given there are these
20 various special rules and percentages and so on.

21 Now, if that's true, why would the

12:35:56 1 controladoras be excluded from Chapter 14? It's
2 hard for us to understand why you say, well,
3 Chapter 14 applies to everything except this one
4 little animal.

5 THE WITNESS: Well, because, again,
6 controladoras don't pose a risk to the public. It
7 is--I'm thinking, maybe other examples, if you have
8 media company, TV company, is not the same case
9 because here we are not talking about concessions.
10 We are talking about authorizations, which, in the
11 legal, in Mexico's legal regime has very poor
12 delivery, but what you are concerned of is who
13 operates the banking business, the business that
14 has an effect with the public at large, who
15 operates the television channel, and not who is the
16 owner of those companies. So, that is my
17 interpretation about why they didn't consider this,
18 and also because the financial holding companies,
19 as described with the features that the Mexican
20 system has, are very unique.

21 ARBITRATOR LOWENFELD: It's not just

12:37:18 1 Mexican, of course. But if you think about it,
2 1403 says we want to encourage investment,
3 transport our investment.

4 THE WITNESS: Uh-huh, investment.

5 ARBITRATOR LOWENFELD: And then it says,
6 but Chapter 11 only applies to those parts that are
7 incorporated.

8 THE WITNESS: Yeah.

9 ARBITRATOR LOWENFELD: Otherwise, we have
10 a special regime which calls for essentially the
11 Commission and for state-to-state negotiation.

12 Wouldn't you then say, if your position is
13 right, wouldn't you then make an express
14 reservation and say everything except investment in
15 controladoras is covered by Chapter 14? It doesn't
16 say that. I kept looking.

17 THE WITNESS: I think it's implied in the
18 definition of "financial institutions."

19 ARBITRATOR LOWENFELD: You just told my
20 colleague there is no definition.

21 THE WITNESS: I said definition of

12:38:13 1 "foreign financial institution" in the NAFTA
2 implementing legislation.

3 ARBITRATOR LOWENFELD: Foreign, yes, but
4 financial institution as such.

5 THE WITNESS: And also--

6 ARBITRATOR LOWENFELD: We kept looking and
7 didn't find one.

8 THE WITNESS: But the nature of a
9 financial institution, again, in addition to the
10 definitional test is to provide financial services,
11 which is something expressed in the President's
12 letter. And also, for example, here 1403(2)(a) it
13 says provided the party/territory a range of
14 financial services through financial institutions.

15 So, therefore, what do financial
16 institutions do, provide financial services? And
17 that was a concern.

18 Of course, it will have been better if
19 they had made an express exclusion of holding
20 company, but I think that within the people that
21 participated, they're really--the sense was to have

12:39:04 1 control over the companies that were engaged in
2 taking other people's money, managing other
3 people's money, not really in companies that owned
4 those institutions. Because again, if you take a
5 broad definition of "financial institutions" such
6 as one proposed in the CNBV, you will end up with
7 great bureaus--

8 ARBITRATOR LOWENFELD: Do you think the
9 United States, for example, in the negotiation--and
10 I understand you were not in the negotiation, but
11 you read the travaux preparatoires. Suppose the
12 United States had said we want an exclusion for
13 financial holding companies from Chapter 14, we
14 want those covered by Chapter 11 which gives
15 greater protection, would Mexico have agreed to
16 that?

17 THE WITNESS: Well, I don't think so. I
18 think from my recollection of what Eduardo
19 Fernandez mentioned yesterday who was an active
20 negotiator is that that was not--the intention was
21 to cover--govern financial institutions solely, and

12:40:15 1 and that is my point of view. If you are also
2 going to regulate other sorts of people that
3 control financial institutions, I think that that
4 is not included in the scope of this chapter. That
5 is my personal opinion, of course.

6 ARBITRATOR LOWENFELD: Thank you.

7 PRESIDENT van den BERG: Mr. Carrillo will
8 ask you questions.

9 ARBITRATOR CARRILLO: I just have one
10 question.

11 THE WITNESS: Uh-huh.

12 ARBITRATOR CARRILLO: Under current law,
13 under NAFTA in current law, do you think it would
14 be possible to establish in Mexico in a company
15 which provided financial advisory service--in the
16 U.S. it is called an investment advisor, in Mexico
17 it's called source finance.

18 Do you think that would qualify under
19 NAFTA an investment advisor which is a person that
20 renders financial services which are basically
21 advisory services?

12:41:31 1 THE WITNESS: Yes. (Speaking in Spanish.)

2 ARBITRATOR CARRILLO: Do you think it's
3 possible, how would you qualify the financial
4 service, qualify it under NAFTA? Under Mexican law
5 or under U.S. law?

6 THE WITNESS: Well, under Mexican law, the
7 advisory, I think, is more professional service
8 than a financial service. So, somebody that, what
9 it does is it makes research, and then it decides
10 you should buy these bonds or economy is going in
11 this way, so you should invest in it. I don't
12 think that that is a financial service. What is a
13 financial service may be if in addition to the
14 advisory then you tell him, well, why don't you buy
15 this on my behalf.

16 ARBITRATOR CARRILLO: But to my
17 understanding, the financial advisor in Mexico is
18 supervised by the Mexican Banking Commission.

19 THE WITNESS: That is a good example, and
20 it is only considered--it's only regulated as far
21 as you--as you engage in taking decisions from

12:42:43 1 another party, and maybe we should clarify this
2 with the proper Article, which is Article 12-B of
3 the securities market law, and I will read the
4 Spanish version. (Speaking in Spanish).

5 ARBITRATOR LOWENFELD: Would you read more
6 slowly, sir?

7 THE WITNESS: Sorry. The securities
8 market law because Mr. Carrillo asked whether
9 financial advisory is regulated activity or not.
10 In Mexico, we have it regulated only if you take
11 decisions on behalf of your customer. Otherwise,
12 it is a service. And this Article precisely
13 describes that distinction.

14 ARBITRATOR CARRILLO: But financial
15 advisor who advises his client on how to compose
16 his securities portfolio, he would qualify under
17 Mexican law as a financial advisor.

18 THE WITNESS: Sorry?

19 ARBITRATOR CARRILLO: He would qualify
20 under Mexican law as a financial advisor.

21 THE WITNESS: Yeah.

12:43:53 1 ARBITRATOR CARRILLO: He would be
2 supervised by the Banking and Securities
3 Commission.

4 THE WITNESS: Not if he doesn't take
5 decisions on behalf of the customer.

6 ARBITRATOR CARRILLO: Let's go to the
7 extreme case. He's a financial advisor. He
8 advises portfolio. He is supervised by the Mexican
9 Securities Commission because he falls under the
10 wording of the statute. The question would be, is
11 he a financial institution for purpose of NAFTA?

12 THE WITNESS: But which--(speaking in
13 Spanish.)

14 ARBITRATOR CARRILLO: Could he qualify as
15 a financial institution under NAFTA?

16 THE WITNESS: Well, if he engages in
17 intermediation of securities--

18 ARBITRATOR CARRILLO: No, he's just
19 rendering financial advice.

20 THE WITNESS: As agent, as agent, yeah,
21 because if he takes orders from his clients and

12:44:43 1 then invests in securities at its own discretion.
2 But I would like to read the Article because I
3 think the Article is self-explanatory as to what
4 are the boundaries.

5 PRESIDENT van den BERG: Give me the
6 number of the Article.

7 THE WITNESS: It's 12-B of the Securities
8 Market Law.

9 (Witness reviews document.)

10 THE WITNESS: I don't think so, because it
11 does not require an authorization. What the
12 Article says is that the portfolio management that
13 include the offering and ordinary rendering of
14 service of advisory services, supervision, and
15 maybe taking decisions, investment decisions, on
16 the name and for the account of third parties, that
17 are not written by securities firms, or other
18 financial entities to operate with securities, may
19 be granted by individuals or companies that comply
20 with the following, and no authorization is
21 included.

12:46:33 1 ARBITRATOR CARRILLO: So, first off, NAFTA
2 as financial institution, the prerequisites set
3 forth in NAFTA have to be supplemented by domestic
4 law, by U.S. law, Canadian law, or Mexican law.

5 THE WITNESS: That they provide financial
6 services, yes.

7 ARBITRATOR CARRILLO: You would apply the
8 corresponding law of the party.

9 THE WITNESS: Yeah. It is, as financial
10 institutions, and that goes back to local law.

11 ARBITRATOR CARRILLO: And the example I
12 put you, a financial advisor was subject to an
13 approval from the Mexican authorities.

14 THE WITNESS: No, it is not.

15 ARBITRATOR CARRILLO: Assuming there was.
16 It could qualify for purpose of NAFTA as a
17 financial institution.

18 THE WITNESS: No, I don't think so because
19 in addition to the authorization, you must admit
20 the other elements: Supervision and regulation,
21 and they are not supervised or regulated in neither

12:47:32 1 of these cases. I think should be--

2 ARBITRATOR CARRILLO: But you would apply
3 domestic law, supervision and regulation?

4 THE WITNESS: Yes, because it says 1416,
5 and that's why we have to go--even though NAFTA is
6 domestic law, it is implementing legislation, and
7 it says that definition, as financial institution
8 under the law of the party, in this case the
9 Mexican laws, so that's why we have to take into
10 consideration for this purpose what is a financial
11 institution under Mexican law, and also for
12 financial service.

13 ARBITRATOR CARRILLO: Thank you very much.

14 PRESIDENT van den BERG: Well, Mr. Borja,
15 you edited an Article 1416. Can you help the
16 Tribunal in how, in your opinion, we should read
17 the text, and before that you testified earlier two
18 things, but two things which may be relevant. One
19 is that you were instrumental in adapting Mexican
20 legislation to NAFTA, particularly Article 27-A.
21 And another thing that you testified is that as

12:48:48 1 such, there is not a definition under Mexican law
2 of a financial institution. You said there is a
3 definition of a foreign financial institution, but
4 not as a financial institution as such under
5 Mexican law; is that correct?

6 THE WITNESS: That's correct.

7 PRESIDENT van den BERG: So, if you can
8 help the Tribunal, can you have a look at
9 definition of--Article 1416 of "financial
10 institution."

11 THE WITNESS: Yes.

12 PRESIDENT van den BERG: How do you read
13 it now? Because it says, "financial institution"
14 means any financial intermediary. You could define
15 under Mexican law what it means, or enterprise. If
16 we stopped there for the time being simply for the
17 sake of exploring what it may mean, because at the
18 end it says, under the law of the party in whose
19 territory it is located, which is in this case the
20 Mexican law.

21 THE WITNESS: Uh-huh.

12:50:06 1

PRESIDENT van den BERG: Now, we have
2 found out that the words just preceding that under
3 law of the party "in whose territory" as a
4 financial institution is not defined under Mexican
5 law.

6 THE WITNESS: Well, what I think about
7 this definition is the following: There are, for
8 example, in the U.S. some companies that engage in
9 the provision of financial services that are not
10 regulated, as in Mexico, for example, nonbanks.
11 Those are intermediaries because they intermediate,
12 they receive loans and take--grant credits.

13 And the other is other company that is
14 supervised as a financial institution under the law
15 of the party. What does the law of the party says?
16 It has a definition of "foreign financial
17 institution?" In the Exposition de Motivos it says
18 that the nature, legal nature of financial
19 institutions is to render financial services, and
20 also the dictionary makes the terms equal. That is
21 my interpretation. But you cannot say that there

12:51:16 1 is a definition of "domestic financial institution"
2 means that and no, only the foreign financial
3 institution that can--the foreign financial
4 institution's different than domestic financial
5 institution may be a little bit awkward.

6 PRESIDENT van den BERG: How do I know for
7 certain--let's call it an animal is a financial
8 institution in the figurative sense, of course,
9 animal is a financial institution under Mexican law
10 when there is no definition what is a "financial
11 institution" in Mexican law? How do we know?

12 THE WITNESS: How I do know?

13 PRESIDENT van den BERG: Yes.

14 THE WITNESS: Because I think that again,
15 that financial entities, this is based on NAFTA's
16 implementing legislation, try to accommodate this
17 situation, and it permitted investment in financial
18 institutions and the amendments were made to the
19 corresponding laws. I think that that's why those
20 are the financial institutions referred in NAFTA,
21 the ones that provide financial services.

12:52:23 1 Of course, if we had a clear definition of
2 foreign financial institutions for purpose of NAFTA
3 means and was updated and included, I think we will
4 be very comfortable, but unfortunately we don't
5 have that. So, we have--in addition to the
6 definition test--have to go into the nature and the
7 functional test.

8 PRESIDENT van den BERG: The functional
9 test, but just one step back here. Is it your
10 interpretation of this provision that--actually
11 it's in two parts. One is--means any financial
12 intermediary under the law of the party, in this
13 case Mexican law, and the other part would be or
14 other enterprises, et cetera.

15 Is that the way you are reading?

16 THE WITNESS: Financial intermediary, yes.

17 PRESIDENT van den BERG: Intermediary
18 under Mexican law as applied to Mexico.

19 THE WITNESS: Yeah.

20 PRESIDENT van den BERG: And then the
21 other one would or other enterprise that also has

12:53:25 1 to do business and regulatory supervisor as
2 financial institution under Mexican law?

3 THE WITNESS: Financial intermediary.

4 PRESIDENT van den BERG: Because any
5 financial intermediary as a financial institution
6 that is the possibility, too.

7 THE WITNESS: Yes, I think that's--

8 PRESIDENT van den BERG: So we have to
9 read it in this way, in your opinion, that means
10 any financial intermediary under Mexican law?

11 THE WITNESS: No, I think that maybe other
12 ones only qualifies--only qualifies the second
13 part.

14 ARBITRATOR LOWENFELD: Could you speak
15 into the microphone.

16 THE WITNESS: I'm thinking into the
17 microphone.

18 PRESIDENT van den BERG: Think first and
19 then say it if I may suggest. I know it's not a
20 process of think out loud and then come to a
21 conclusion.

12:54:21 1 THE WITNESS: I think it is not qualified
2 by the local law, the financial intermediary part
3 because again, there may be some companies that do
4 intermediation that are not supervised or
5 regulated, I guess.

6 PRESIDENT van den BERG: But financial
7 intermediary is a term of its own, which does not
8 need to be applied under local law.

9 THE WITNESS: Well, yes, yes.

10 PRESIDENT van den BERG: So the whole rest
11 of the sentence applies to the other enterprise; is
12 that correct?

13 THE WITNESS: Yeah.

14 PRESIDENT van den BERG: "Financial
15 institution" means, between brackets, (A) any
16 financial intermediary or to (B)? Is that your
17 understanding of it.

18 THE WITNESS: Uh-huh. The way I'm reading
19 or other enterprise that is authorized to do
20 business, and regulation or supervised the three
21 qualified as financial institutions, financial

12:55:18 1 institution under the law of the party.

2 PRESIDENT van den BERG: Mr. Price, do you
3 have follow-up questions?

4 MR. PRICE: I do, Mr. President.

5 FURTHER REDIRECT EXAMINATION

6 BY MR. PRICE:

7 Q. Mr. Borja, I just want to clarify some
8 questions posed by Professor Lowenfeld.

9 MR. PRICE: And on one of them, Members of
10 the Tribunal, I would like some guidance.

11 BY MR. PRICE:

12 Q. Professor, one of your questions
13 presupposed that in this particular case that the
14 controladora itself was intervened, and it wasn't.

15 ARBITRATOR LOWENFELD: I asked that. It
16 was not?

17 MR. PRICE: It was not intervened, and
18 Dr. Reuss is prepared to provide testimony to the
19 effect that it wasn't.

20 PRESIDENT van den BERG: We could easily
21 resolve that. Mr. Perezcano, is that stipulated

12:56:29 1 that there was no intervention on the level of GF
2 Bank?

3 MR. PEREZCANO: My understanding is that
4 there was no intervention by the Commission.

5 PRESIDENT van den BERG: Not of the
6 holding company?

7 MR. PEREZCANO: Right.

8 PRESIDENT van den BERG: That is clear, so
9 we don't need testimony on it.

10 MR. PRICE: Thank you.

11 MR. PEREZCANO: Or at the level of the
12 bank.

13 PRESIDENT van den BERG: Or at the level
14 of the bank. But then there was no intervention at
15 all?

16 MR. PEREZCANO: There was no intervention
17 at all.

18 PRESIDENT van den BERG: Then we have--I
19 thought we had a stipulation, but I don't have a
20 stipulation because one side says there was
21 intervention, and the other said there was no

12:57:06 1 intervention.

2 MR. PRICE: I said there was no
3 intervention at the controladora--

4 PRESIDENT van den BERG: That's what I
5 mean, that's why I sought stipulation, yes, because
6 then I assumed that it would only be there was an
7 intervention, but on the banco level, if you may
8 call it that way. But is it also your case that
9 there is--there was no intervention at all even
10 though the banco level?

11 MR. PRICE: I think that's correct.

12 PRESIDENT van den BERG: So, there was no
13 intervention at all?

14 MR. PRICE: I think that's correct.

15 PRESIDENT van den BERG: Those are then
16 the parties again on the same level? You agree?

17 MR. PEREZCANO: Yes.

18 PRESIDENT van den BERG: There was no
19 intervention at all. That's stipulated.

20 MR. PRICE: The second question.

21 BY MR. PRICE:

12:57:44 1 Q. Mr. Borja, I think Professor Lowenfeld
2 asked one question and you answered a different
3 question. Professor Lowenfeld asked if the U.S.
4 had said to Mexico, we want to exclude
5 controladoras from Chapter 14, would Mexico have
6 agreed? And you said no. And I thought you meant
7 yes. Because you said no, Mexico did not intend to
8 include controladoras within Chapter 14.

9 A. Yes. The question is that, as has been
10 expressed here, my intention is to have certainty
11 over foreign investment. The intention was only to
12 limit these rights of action to the occasions that
13 were--that they were required because of the
14 working of the financial system because there was
15 public interest at risk, and that that, my opinion,
16 was not the case. In a company that was only the
17 majority shareholder of another one which provided
18 that service.

19 ARBITRATOR LOWENFELD: Well, did you mean
20 yes? I heard the same thing Mr. Price said. You
21 said no. Did you mean yes?

12:59:07 1 THE WITNESS: Can you rephrase the
2 question again? I'm a little bit--

3 MR. PRICE: I think he said yes this time.

4 ARBITRATOR LOWENFELD: I thought so now,
5 and I asked him to confirm it, and repeat the
6 question.

7 THE WITNESS: Repeat the question because
8 yes to what? First one? Second one?

9 BY MR. PRICE:

10 Q. Okay. If the United States had asked
11 Mexico to exclude from Chapter 14 controladoras,
12 would Mexico have said yes?

13 A. Yes, yes.

14 MR. PRICE: Thank you. I have no more
15 questions, Mr. President.

16 PRESIDENT van den BERG: Mr. Perezcano?
17 Do you have further questions?

18 MR. PEREZCANO: One question,
19 Mr. President.

20 PRESIDENT van den BERG: Please.

21 RECROSS-EXAMINATION

1 BY MR. PEREZCANO:

2 Q. It's a follow-up to the question to
3 Professor Lowenfeld and put again by Mr. Price.

4 In that case if Mexico would have agreed
5 to exclude controladoras, would Mexico have
6 maintained Annex, its reservations on controladoras
7 in Annex VII which is Annex to Chapter 14?

8 A. Well, here it's important to know that, in
9 my opinion, they are not included because they are
10 not financial institutions--okay?--to start with.
11 Maybe, of course, if this situation was not clear,
12 and I think that that was maybe the intent of the
13 question, that's what I perceive, that's why they
14 didn't make clear that situation, that's why didn't
15 they make clear they didn't belong to this chapter.

16 Then the question as well, if they wanted
17 to make it explicit because in my opinion it is
18 clear because of the working of the financial
19 system, if they want to make it explicit, well,
20 they should have said this is governed--these
21 companies expressly are.

13:01:15 1 But I think it is the understanding and
2 interpretation that can be given also gets you to
3 that point. Again, the reason why, for example,
4 they are mentioned in the Annexes is that if they
5 only restricted in banks, then if they go one step
6 above, they could circumvent that restriction.

7 But again, what they have in their minds
8 as well, thinking, of course, everybody would be
9 much happier in that situation.

10 MR. PEREZCANO: I don't have more
11 questions.

12 PRESIDENT van den BERG: Thank you,
13 Mr. Borja. You are excused as a witness. Thank
14 you for testifying.

15 (Witness steps down.)

16 PRESIDENT van den BERG: Before we break
17 for lunch, we have question 10 from the Tribunal if
18 you would like to submit for both sides, and again
19 it will be formulated by Professor Lowenfeld.

20 Professor Lowenfeld, please.

21 ARBITRATOR LOWENFELD: I was looking back

13:02:32 1 over the motions, and one of the objections made on
2 behalf of Mexico is that Article 1405 does not
3 apply.

4 Now, is the argument that because you have
5 to go to the Commission established under 1412 of
6 the committee, therefore the Tribunal doesn't have
7 jurisdiction right now? Or is the argument that
8 the commitment there, that is to say the national
9 treatment commitments which are spelled out in some
10 detail, seven paragraphs, are inapplicable?

11 The Chairman wants me to rephrase the
12 question.

13 Is the objection to Article 1405, the
14 national treatment provision of Chapter 14 a
15 procedural objection, or is there a contention that
16 as a matter of substance, national treatment
17 obligation does not apply to this controversy?

18 PRESIDENT van den BERG: Mr. Price, you
19 seek clarification of the question?

20 MR. PRICE: I seek clarification.

21 Professor Lowenfeld, are you asking

13:04:10 1 whether or not this Tribunal, as presently
2 constituted, has authority to rule on a claim under
3 1405? At least in part?

4 ARBITRATOR LOWENFELD: Well, I wanted
5 essentially here that the nature of the
6 objection--there are two aspects. 1405 has
7 substantive obligations. I mean, you ask yourself
8 where is the difference between 1405 and 1102, and
9 you can make some detailed arguments, and, of
10 course, the whole issue is, to some extent, up in
11 the air.

12 Now, is this merely a procedural objection
13 so that, for example, if the contention is that
14 assuming we say 14--Chapter 14 is applicable, then
15 there is a--I guess you have to go to the
16 committee, as I understand it, under 1412. The
17 committee might say either 60 days pass and it does
18 nothing, or it might say, Tribunal, go back and
19 hear it, especially since you also have the 1110
20 claims still there.

21 So, then it becomes really just a sort of

13:05:45 1 temporal or procedural matter.

2 Alternatively, the committee might say,
3 well, we will go to state-to-state dispute
4 settlement.

5 In a way, this is sort of a detailed
6 question of my question nine yesterday, but I would
7 like really to hear clarification, particularly
8 from Mr. Perezcano in his closing, and then have
9 you, Mr. Price, respond.

10 I'm not sure I clarified, but I've
11 amplified.

12 MR. PRICE: Thank you very much. You
13 certainly clarified it at least for me.

14 PRESIDENT van den BERG: Mr. Perezcano,
15 it's also clear in your mind what the question is?

16 MR. PEREZCANO: Yes, it's clear.

17 PRESIDENT van den BERG: I think, then, we
18 can adjourn for lunch, and we will resume at 2:00
19 for the closing arguments, Mr. Perezcano for the
20 respondent first and then Mr. Price thereafter.

21 I understand from conversations with the

13:06:44 1 two of you you may not use up the full one and a
2 half hours allotted to you. Of course you are free
3 to use the one and a half hours, if necessary,
4 that's also fine. One of the things that the
5 Tribunal is particularly interested in is are the
6 answers, in a more or less logical order, to the 10
7 questions now.

8 ARBITRATOR LOWENFELD: You mean the 10
9 Commandments?

10 PRESIDENT van den BERG: Not the Ten
11 Commandments. I would not characterize them that
12 way. That the Tribunal has submitted to both
13 parties.

14 MR. PRICE: Thank you.

15 PRESIDENT van den BERG: Thank you.
16 Adjourned.

17 (Whereupon, at 1:07 p.m., the hearing was
18 adjourned until 2:00 p.m., the same day.)

19

20

21

13:08:29 1

AFTERNOON SESSION

2 PRESIDENT van den BERG: Mr. Price, are
3 you ready?

4 (Off the record for technical
5 difficulties.)

6 PRESIDENT van den BERG: Mr. Perezcano,
7 the technical problem has been cleared. Please
8 proceed with your closing statement.

9 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

10 MR. PEREZCANO: Thank you, Mr. President,
11 Members of the Tribunal. I will be referring to
12 the fundamental issue of my presentation before you
13 this afternoon, but I would like to ask two of my
14 colleagues, Mr. Thomas and Mr. Becker, to touch on
15 certain topics, and in due time I will give them
16 the floor. I wanted to notify you of this, that I
17 will be asking them to speak.

18 The North American Free Trade Agreement,
19 NAFTA, is clearly a complex and detailed
20 instrument. It was very carefully negotiated and
21 establishes commitments for trade liberalization

14:22:14 1 among the different sectors of economic activity of
2 Mexico, Canada, and the United States. And the
3 fact that it was carefully negotiated among all
4 these sectors means that it's especially true in
5 regard to certain sectors that have been dealt with
6 in general terms in reference to the trading of
7 goods, services, investment, and there has been
8 special and differentiated treatment for these.
9 Chapter 14, which regulates financial services, is
10 one of these examples.

11 Yesterday and today, we heard that the
12 treaty was scrupulously negotiated in reference to
13 Chapter 14, and by the financial authorities of the
14 three parties. In the case of Mexico, the same
15 financial authorities who regulate and supervise
16 financial institutions and are in charge of
17 applying financial legislation in its totality.

18 From paragraphs 19 through 26, of the
19 writings submitted on preliminary issues, Mexico
20 indicates the legal relationship between Chapters
21 11 and 14, and we there provide a chart which you

14:23:45 1 will recall in which we compare the provisions of
2 Chapters 14 and 11 in regard to investment.

3 Thus, we can graphically note the levels
4 of protection under Chapters 11 and 14. And for
5 all intents and purposes, we can conclude that, in
6 regard to the level of protection to investment,
7 they are extremely similar. Perhaps Chapter 14,
8 given its specificity and specialization, may have
9 some additional provisions. For example, the
10 safeguards that the parties may reserve to
11 themselves in regard to prudential measures. But
12 in terms of protecting investors, they are similar.

13 Perhaps this is the chart that needs to be
14 completed by defining the situation regarding
15 services. We did not include this because it is
16 not a matter in this dispute. However, a
17 comparison of the equivalent provisions under
18 services would lead us to the same conclusion: The
19 level of protection to private individuals in terms
20 of the agreed-to liberalization is similar.

21 Nonetheless, as already indicated, Chapter

14:25:29 1 14 has some specific provisions, and this includes
2 the safeguards that the parties may take on in
3 terms of prudential regulation, but also other
4 types of safeguards and provisions regarding the
5 state investment mechanism, the terms under which
6 these were incorporated into Chapter 14 offer
7 another good example.

8 As I already said on other occasions, it
9 is not a simple passing on from Chapter 11 to
10 Chapter 14 of the same provisions, but rather the
11 precise provisions are carefully included. Even
12 Section B of Chapter 11 is incorporated in its
13 entirety into Chapter 14. It is incorporated only
14 for specific purposes, and the treaty carefully
15 establishes which Articles this section refers to
16 and what type of claim these provisions could be
17 applied to under Chapter 14 under the terms which
18 were incorporated.

19 Thus, the fundamental difference lies, I
20 would say, not in the level of protection that I
21 have said, but rather in the specificity of the

14:27:10 1 matter and the nature of the services and the
2 investment being regulated.

3 Chapter 14 in this regard is not the only
4 one which is subject to regulation of this type.
5 We find other examples in the treaty, and this
6 includes tax measures.

7 Now, if you look at taxation measures,
8 2103 sets out with the same care those provisions
9 which specifically are applicable--those provisions
10 of the treaty--both in terms of the trader of goods
11 as in services and investment, which are applicable
12 to taxation measures, and it also has its own
13 exceptions in terms of settlement of differences
14 under Section B of Chapter 11.

15 I would like to indicate that among those
16 Articles which are not applicable to taxation
17 measures, this includes Article 1105, one which has
18 been under discussion during the course of this
19 proceeding. Consequently, it cannot be considered
20 that the scope of the right of action, which has
21 been granted to the parties, or rather that the

14:28:54 1 parties have granted to private investors through
2 the mechanism of investor state results in a
3 greater or lesser degree of protection for the
4 investment. And this is in reply to question
5 number nine that was presented by Professor
6 Lowenfeld yesterday, even though my colleague,
7 Dr. Thomas, will refer to this further.

8 Now, it is not the mechanism to resolve
9 differences that gives the greater or lesser
10 degree. We have the substantive provisions that
11 provide the protection. These are substantive
12 provisions, and here I refer to national treatment,
13 to most-favored-nation treatment, expropriation,
14 transfers, et cetera.

15 The fact that this right of action has not
16 been extended to the parties under the Free Trade
17 Agreement and opted to not extend it to the
18 investors, does not affect the level of protection
19 that is substantively granted.

20 And we must not forget that the investor
21 state mechanism is an extraordinary or special

14:30:22 1 procedure. With all due respect, I believe Judge
2 Schwebel is wrong. Yesterday, he commented on the
3 enormous number of Bilateral Investment Treaties
4 subscribed to, and the enormous number of countries
5 that have subscribed to these treaties, that this
6 represented the rule. And he suggested that it
7 was, thus, part of international common law. This
8 is incorrect. The fact that private parties have
9 access to international procedure in order to
10 ventilate claims that derive from duties and rights
11 agreed to among states is a special situation, an
12 extraordinary situation.

13 Now, the World Trade Organization
14 agreements are the best example. The broadest
15 disciplines are put forth in terms of trade
16 liberalization. Private parties under none of
17 these have access to international tribunals.

18 The Free Trade Agreement itself is another
19 good example. The provisions that private parties
20 in and of themselves can use as a cause of action
21 in an international arbitration procedure are

14:31:51 1 extremely limited. They are in Chapter 11, a
2 couple in Chapter 15, in regard to investment in
3 Chapter 11 itself, and with the variations we have
4 referred to under Chapter 14. The great volume of
5 rights and duties set forth in the treaty are not
6 actionable by private parties by means of this kind
7 of procedure. Thus, the rule is for the states to
8 ventilate this type of dispute, and this arises
9 from duties among states and not duties in terms of
10 state vis-a-vis a private individual.

11 I would now like to look at investments
12 which are really at the center of this dispute. As
13 I stated yesterday, and I think there is no doubt
14 regarding this, the investment by Fireman's Fund
15 had to do with mandatory conversion of stocks.
16 That basically it is an investment in the financial
17 sector, regardless from what angle you look at
18 this. And we heard this stated by witnesses
19 yesterday, Fireman's Fund is a financial
20 specialist, a sophisticated investor. As I stated,
21 it is a subsidiary of a corporation that is known

14:33:36 1 as a worldwide corporation providing financial
2 services.

3 The investments were not in any specific
4 debt instrument. Let us not lose sight of the
5 nature of the instruments, even without getting
6 into specific details regarding the definitions
7 contained in the NAFTA agreement. We are talking
8 here about the debentures and obligations.

9 Fireman's Fund, as was stated--Fireman's
10 Fund, unlike a bank, did not have the intention to,
11 for example, invest in the construction of a
12 highway or provide loans to bail out a mining
13 enterprise. The intention was that through a debt
14 instrument, it would acquire--it would acquire
15 securities that would make it a major stockholder
16 of the company, and Fireman's Fund would acquire
17 the shares, and, as I said, it would become the
18 owner of that holding company.

19 From the testimony we heard yesterday as
20 well as this morning with Mr. Borja, it is very
21 clear that the holding companies are not mere

14:35:11 1 vehicles of holdings of stockholders. Mr. Borja,
2 in fact, made an effort, which later he retracted
3 the statements after a specific question posed by
4 Mr. Lowenfeld, by qualifying or characterizing
5 these holding companies as shell companies.

6 In fact, the obligations acquired by
7 Fireman's Fund issued by this holding company, the
8 aim principally had to do with capitalizing the
9 bank or the banking group. And this holding
10 company was closely associated with all of the
11 activities pertaining to that group, whose main
12 anchor was not one, but actually two banks.
13 Therefore, the holding companies, in fact,
14 constitute once again not a mere vehicle for
15 maintaining stocks. Actually, it's a key mechanism
16 for providing financial services within that
17 country.

18 Another example has to do with the
19 BanCreceer bailout program that was structured, and
20 we heard this stated yesterday by Mr. Fernandez
21 Garcia, through the holding company. The bailout

14:36:43 1 program of the entire group was structured through
2 the holding company. And perhaps here, Professor
3 Lowenfeld--this is where we saw a confusion by both
4 yourself and the Members of the Tribunal between
5 the bailout program and the interventions in the
6 holding companies and the subsidiary, there was not
7 an administrative intervention by the financial
8 authorities, but the financial authorities were
9 closely involved in trying to bail out a financial
10 institution and a group of financial institutions,
11 and the structure itself revolved around a holding
12 company.

13 The bailout plan, the fact that the
14 bailout plan failed, whether it failed or succeeded
15 is a separate issue, but this illustrates the
16 significance for the financial authorities in
17 Mexico and for the financial system in Mexico, this
18 has particular for this individual group, and the
19 financial nature of the holding companies is
20 obvious.

21 The fact that the holding companies do not

14:38:04 1 provide financial services directly to the public
2 is really irrelevant, especially with regard to its
3 financial nature.

4 The claimant has made a major effort to
5 try to distinguish between the holding companies
6 and the financial intermediaries, and I think today
7 it's very clear that when we referred to financial
8 institutions, the claimant was referring, or is
9 referring, exclusively to a subset, a very small
10 subcomponent of these financial intermediaries, and
11 it doesn't even include all of them. Only those
12 who are included in Article 7 in the law for
13 regulating financial institutions.

14 There are also other financial
15 intermediaries, including other financial
16 intermediaries as well as financial institutions as
17 stipulated in the NAFTA agreement, for example, the
18 development banks that are part of the government
19 whose aim, principal aims, consists of funding
20 development programs, initiatives, structural
21 initiatives in Mexico as part of the government's

14:39:26 1 responsibilities, and they are also covered in
2 Chapter 14 that are not explicit on the list of the
3 Article. Therefore, not only is it focused on
4 intermediaries, only some of those intermediaries.

5 It also purports--Mr. Borja in his
6 testimony stated that the financial institutions
7 are the same as financial entities that are the
8 same as those included on Article 7's list, and he
9 almost said that it was the same as financial
10 intermediaries as an obvious conclusion. We have
11 also seen that it's true that Mexican legislation
12 does not specifically define as Mr. Mancera said
13 yesterday, does not specifically define the concept
14 of financial institution per se.

15 Mr. Carrillo asked where will we find,
16 within the Mexican legislation, a financial
17 institution. That definition surely does not
18 exist, but the definitions that the legislation
19 does provide give us a good indication, and we
20 would need to, first of all, look at the CNBV law
21 that includes many financial institutions, not all

14:41:08 1 of them, of course, as was stated this morning by
2 Mr. Borja, but a large number of them, and they
3 specifically define them horizontally as entities
4 of the financial sector or financial entities.

5 So, although an effort was made by him to
6 try to say that they may be these or those, but the
7 fact of the matter is that both terms within the
8 law apply to all of them. And for the National
9 Banking Commission and Securities Commission, as
10 Mr. Garcia stated, according to the law, all of
11 them are considered financial entities. Although
12 it's true that this is not the final conclusion,
13 but I think it gives us a very good indication.

14 If we look at another law that has
15 horizontal implementation, it applies to just about
16 the entire financial sector. This is the law for
17 protecting the users of financial services that
18 does provide us a definition of "financial
19 institution." I don't purport with this to let you
20 believe that this is the definition we should use
21 regarding the treaty, but it does provide another

14:42:30 1 very clear indication. It's a definition that also
2 has a horizontal application to the entire
3 financial sector. The law stipulates that
4 these--all of these components are financial
5 institutions, is also a very good indicator.

6 Then we have the Holding Company Law,
7 which refers to holding companies and financial
8 entities. The law regulates both. Basically the
9 law in generic terms, it regulates the financial
10 groups. Although this isn't the complete picture,
11 but it gives us a very good indication.

12 So, if we look at the broader and overall
13 levels, we will find that the Mexican financial
14 system considers as financial institutions to be
15 those entities that comprise them, including public
16 sector entities, development banks, as well as
17 private sector institutions. We are not going to
18 get the response, despite the efforts of the
19 claimant. We are not going to get the answer
20 through this exhaustive identification of terms.

21 The first thing that Mr. Borja and the

14:44:00 1 claimant stated, stated that financial institutions
2 are institutions described in this Article that has
3 been mentioned so many times, but the term that is
4 used is not one of financial institution.

5 So, then he consults a dictionary, which
6 basically is looking for synonyms, similar terms.
7 Perhaps, in some terms and some cases it applies,
8 and other cases it doesn't, and continues with the
9 arguments in this fashion. Once this
10 terminological skill--skillful use of terminology
11 was continued, then there was a need to withdraw,
12 though Mr. Borja used, and I also used, both of
13 these terms more specifically when we talk about
14 the law on holding companies. Both of us referred
15 specifically to financial entities. The claimant
16 also has alluded to other specific characteristics
17 of holding companies vis-a-vis the financial
18 intermediaries, but let's not lose sight of the
19 fact that even in the best case scenario that is
20 what they are. They are very separate elements.

21 He also stated a different level of

14:45:30 1 regulation, and he provided specific examples.
2 Although the list wasn't concluded, but he began to
3 go down the list, asking Mr. Mancera if the holding
4 companies have minimum capital adequacy, minimum
5 and capitalization adequacy minimum, which is a
6 separate issue, and requirements for reserve
7 deposits, as well as ceilings imposed on
8 concentration of loans, portfolios. I think the
9 answer was very clear by Mr. Mancera. The
10 financial entities that Chapter VII--Article 7
11 pertains to, not all of them meet all of these
12 criteria.

13 So, this leads us to the understanding
14 that, in terms of Mexican legislation, the more
15 detailed and more complex regulation, banking
16 regulations, we begin with that--but then we begin
17 to see, for example, that securities entities are
18 facing less regulations in the banks, and that
19 continues and so on. For example, the exchanges
20 may--some of them may pertain to them, others
21 don't. Investment houses less and less. And the

14:47:02 1 holding companies may share some of these
2 requirements, but many others, no. So in other
3 words, each financial entity is subject to
4 regulations that are different. This is entailed
5 within the Mexican regulatory framework.

6 So, Mr. Borja began stating that Mexico
7 determined to adopt a system of financial
8 intermediations that what is done by one entity
9 cannot done by another. This is a common element
10 within the holding companies.

11 The fact that there are specific
12 restrictions for carrying out specific activities
13 and transactions, that still doesn't constitute a
14 distinction because that is the characteristics of
15 financial intermediation, systems that we have
16 adopted. The banks cannot do what securities firms
17 can do. Securities firms cannot do what financial
18 leasing corporations do as well as holding
19 companies. They cannot do what these other
20 entities do and vice versa.

21 We have financial entities that specialize

14:48:17 1 in specific fields, devoted to different operations
2 and obviously also relies on it. It depends on the
3 level of risks, and this determines the type of
4 regulation it's subject to. But none of this gives
5 it the criteria of the nature of financial sector.
6 There is no doubt that we here are talking about
7 the financial sector. All of the experts agreed on
8 this point. They firmly agreed on this, that these
9 are member components of the Mexican financial
10 system.

11 In response to your question,
12 Mr. Carrillo, in other words, how do we--how can we
13 determine what is a financial institution, I would,
14 first of all, have to look at the financial system
15 as a whole, and on the basis of that, begin to
16 identify the common denominators, in other words,
17 those components that are common to each one of
18 these without distinction.

19 We here are talking about the financial
20 regulatory framework, so the financial legislation
21 would apply to each one of these institutions.

14:49:44 1 These laws are implemented and enforced by the
2 financial entities. We have several.

3 We have already discussed in detail the
4 Bank of Mexico, the Ministry of Finance, as well as
5 the National Banking and Securities Commission.
6 Mr. Borja this morning also added to this
7 information. For example, he also mentioned the
8 National Commission on Securities and Bonds, as
9 well as many other entities from the financial
10 sector.

11 The common denominator basically is that
12 these Commissions that focused on specific areas of
13 expertise, all of them work within the framework of
14 the financial regulations. All of them administer
15 and enforce these regulations. All of them
16 regulate as well as supervise the financial
17 institutions.

18 Another common denominator, therefore, is
19 the authorization for doing business. We need to
20 remember that each one of these, without any
21 distinction, requires authorization in order to

14:51:13 1 become incorporated, and also for doing business,
2 to be established and do business. These are all
3 pertinent to the financial sector.

4 There was another question proposed by the
5 Tribunal: What distinguishes between businesses
6 and financial entities? Well, it's basically this
7 financial regulatory framework, this supervisory
8 responsibility.

9 A restaurant, for example, does not have
10 to obtain a permit. They simply--it's based on the
11 desire of a group of people to establish a
12 restaurant. Perhaps you have to get a health
13 permit and meet with some specific requirements in
14 that area, and that's the same in Mexico and any
15 other part of the world. All financial entities,
16 all the financial institutions must also meet these
17 requirements.

18 What really makes the distinction is the
19 authorization provided by the financial
20 authorities, not only to become established, but
21 also to do business; and if they lose this

14:52:26 1 authorization, then this denies them with the basic
2 essence of their existence. They would have their
3 license or authorization revoked, and they would no
4 longer be in business. They would have to dissolve
5 that entity.

6 Another element that was described in
7 broad terms by the claimant had to do with
8 the--providing public financial services. Now, we
9 have not seen anywhere in the Mexican legislation
10 having seen financial entities defined as those
11 that provide financial services to the public. The
12 intermediaries, for the most part, do provide these
13 financial services to the public.

14 We are talking here of financial
15 intermediaries; and, as was already stated by
16 Mr. Carrillo, was asked, and it was corroborated by
17 Mr. Borja, this legislation does not provide us
18 with a clear definition of "financial
19 intermediaries." I share Mr. Carrillo's concerns.
20 I would like to also find out more about this.

21 What the claimant purports is to read into

14:53:52 1 Chapter 14 that if a financial institution is
2 defined as a financial intermediary, and I press
3 the point. If we go to Mexico, we would have to
4 conclude not even only all the financial
5 intermediaries not covered, and this would make
6 this definition completely useless, and it goes
7 against the principle of the effectiveness of
8 international law.

9 To the degree that the claimant had read
10 or could read the definition in Article 1416, as a
11 financial institution implies, a financial
12 intermediary, period. Otherwise, we would have to
13 conclude with something that seems absurd here. A
14 financial institution is any financial intermediary
15 or enterprise authorized to do business and is
16 regulated or supervised as a financial
17 intermediary, according to the legislation of the
18 party, which would make the second part completely
19 redundant.

20 Those that negotiated the treaty were very
21 careful, and this is, I believe, the element that

14:55:17 1 refutes the claim made by the claimant; and with
2 all due respect, we believe that the holding
3 companies are expressly incorporated. The Mexican
4 holding companies created according to the laws of
5 holding companies, the Mexican law are explicitly
6 incorporated and regulated within Chapter 14.

7 Professor Lowenfeld asked the question,
8 and there was a question, and the response is very
9 straightforward. We have Article 1403 that
10 provides the right for the establishment of
11 financial institutions. The very first reservation
12 by Mexico, prepared by the Mexican negotiating
13 team, of course it was agreed upon by all three,
14 but drafted by the Mexican negotiating team, the
15 first sector, the first subsector covered are these
16 holding companies. Therefore, the reading of the
17 claimant would make completely irrelevant the
18 holding companies. But we shouldn't lose sight of
19 the fact that we're talking about the
20 reservations--

21 PRESIDENT van den BERG: Excuse me just a

14:57:00 1 second. Would you please repeat the last sentence.

2 MR. PEREZCANO: Well, the issue was,
3 Mr. President, that the readings of this claim
4 would be completely deemed irrelevant, and the
5 reservations with regard to the holding companies
6 in the Annexes that are applicable that derive from
7 Chapter 14; but in addition to this, Mr. Borja
8 referred in depth to paragraph 5, Section 5, within
9 the same Annex.

10 And the Section C, as was already
11 confirmed by Mr. Borja today, represents a specific
12 commitment on the part of Mexico in terms of the
13 financial sector. In the absence of this
14 commitment, the financial, foreign financial
15 institutions would not be able to make investments
16 only in brokerages, and they could not invest, for
17 example, in holding companies. Therefore, they
18 control other kinds of financial institutions.

19 Mr. Borja, although he did not participate
20 in the negotiations of the treaty, he mentioned
21 this commitment. If we look at Article 27-B,

14:58:33 1 regarding the law on holding companies created in
2 1993, in order to implement the NAFTA agreement, in
3 the chapter pertaining to financial services, it
4 stated that this investment in holding companies is
5 only allowable when the international treaties so
6 provide for. Therefore, the international treaty
7 referred to in the law was only pertaining to
8 Chapter 14 of the NAFTA agreement, the North
9 America Free Trade Agreement.

10 I want to briefly discuss another issue
11 that was not taken into account by the claimant in
12 the memorial, and the response on the preliminary
13 issues was not taken into account by the claimant
14 throughout the proceedings of this hearing, and I'm
15 referring to the subordinate debentures that are
16 considered as capital in terms of regulatory terms.

17 Mr. Borja confirmed this morning that the
18 only place that the term capital, in terms of
19 regulatory terms, has to do with debt instruments
20 specifically the debentures acquired by the
21 claimants. We do not have a specific definition of

15:00:40 1 that term. The respondent provided a definition or
2 the meaning, the current meaning, of these terms.

3 It is a debt instrument. It is considered
4 capital with regard to the regulation, with the aim
5 of regulating and supervising the financial--on the
6 part of the financial authorities the National
7 Banking and Securities Commission has indicated
8 that contrary to the Generally Accepted Accounting
9 Principles, has indicated that these debentures as
10 debt tools or mechanisms should be considered as
11 liabilities. There is a legal obligation to
12 account for them as capital. There is no doubt,
13 and we have been very specific, very clear, that
14 the exhibits provided have been have been
15 irrefutable.

16 The Tribunal asked what is the interaction
17 or the impact, if it does exist, with the Basel
18 Committee Agreement of 1988, and the new Basel
19 Agreement, the references to both of these Basel
20 Agreements or specifically as background, providing
21 some background to describe exactly where the

15:02:22 1 concept of regulatory capital arose, and the answer
2 is very straightforward.

3 Let me just also add that the agreement
4 does not apply to Mexico. Mexico is not even a
5 member of the Basel Committee or the Group of 10.
6 Mexico has not officially adopted this agreement.
7 However, it has been implementing it in practice as
8 with almost every other country in the world.

9 But I want to make this--provide this
10 specific information. This serves as background
11 because the Basel Agreement indicates that the
12 banking capital, the Basel Agreement regulates
13 banks. The bank capitals that allow for assuming
14 risks is broken down into two levels, the two
15 tiered capital: The core capital as well as
16 supplementary capital.

17 Core capital, is capital that I don't
18 think really requires too much explanation.
19 Supplementary capital includes various components.
20 They are all considered long-term instruments that
21 permit the bank to avail itself of sufficient

15:03:45 1 resources in order to address its obligations,
2 respond to risks, without having to get hold of its
3 viability--or put in jeopardy the viability of the
4 bank. The subordinate debentures or subordinate
5 debt as well as the debt that is convertible into
6 shares are two examples that the agreement
7 indicates. That we also have reserve investments,
8 nonexplicit investments, and these are--simply
9 provide some background information as to why
10 something that is not core capital but merely a
11 component that allows banks to address risks, debt,
12 and obligations.

13 What new differences in the new Basel
14 accord that enters into force in 2004 as compared
15 to the 1988 accord is that it begins to broaden the
16 concept to other financial institutions, including
17 financial holding companies.

18 Now, as we are speaking of banks, the
19 Basel accord makes reference to bank-holding
20 companies, but I insist it's not that we have
21 adopted officially. The Basel accord is not

15:05:21 1 binding on Mexico. It's simply background which
2 provides us with indicia as to what this concept of
3 regulatory capital means or where it comes from,
4 and this is the same general concept as one finds
5 in the treaty.

6 Mr. President, Members of the Tribunal, I
7 would now like to give the floor to Mr. Steve
8 Becker, to address some of the other questions
9 raised by the Tribunal. I have referred to several
10 of them, perhaps not one by one specifically, but I
11 would give him the floor to address question six of
12 the Tribunal as to if we were to apply the facts in
13 opposite manner; that is to say, were it a holding
14 company in the U.S. or Canada, would the definition
15 apply.

16 And if you will, I would like to give him
17 the floor at this time.

18 MR. BECKER: Good afternoon. What we are
19 handing out right now are the references to the
20 U.S. law, that I will be making. These are just
21 some excerpts from the U.S. statutes, the Bank

15:06:43 1 Holding Company Act and the implementing
2 regulations, and they have been numbered as
3 exhibits.

4 As Mr. Perezcano says, the Tribunal asked
5 whether an investment would fall under the
6 definition of Article 1416 of the NAFTA, if the
7 same facts applied in the reverse situation. The
8 example given was what if Fireman's Fund were a
9 Mexican insurance company? It would require
10 subordinated debentures in a financial holding
11 company in the United States or Canada?

12 In response to this question, I'm going to
13 make a very brief presentation on the provisions of
14 U.S. law that we believe are valid as to the
15 Mexican laws we have been discussing the last few
16 days.

17 I'm going to start by noting as in the
18 case of Mexico, U.S. law does not contain a
19 definition of "financial institution" that applies
20 across the board in all circumstances. In other
21 words, there is not a global definition of the term

15:07:38 1 "financial institution."

2 With regard to reporting requirements, the
3 Federal Reserve requires that bank holding
4 companies have to provide annual reports concerning
5 their financial condition and activity, and that's
6 pursuant to 12 USC Section 1844(c)(1), and that's
7 at record page number 1474 in the package I have
8 given you, and also in the implementing regulation
9 at 12 CFR Section 225.5(b), which is at page 1482.

10 Unless you want to look at these
11 provisions specifically, I would suggest we just
12 keep moving along.

13 As you have heard today, of course,
14 holding companies in Mexico also have to present
15 regular reports to the Mexican Banking Commission.

16 The Federal Reserve performs examinations
17 of holding companies under its authority in 12 USC
18 Section 1844(c)(2), that's at record pages 1474 and
19 75 of the package I have given you, and the
20 implementing regulation is at 12 CFR Section
21 225.5(c), which is at record page 1482.

15:08:55 1 In fact, there is a specific bank holding
2 company supervision manual that's used for these
3 inspections, and notwithstanding Mr. Borja's
4 suggestion that there is little to audit at a bank
5 holding company because it doesn't deal with the
6 public, this U.S. manual is over 1,400 pages long.

7 With regard to subordinated debt,
8 subordinated debt of U.S. bank holding companies is
9 treated as tier two capital. Mr. Perezcano just
10 explained about the tiers of capital, and that is
11 explained at 12 CFR Part 75--I'm sorry, Part 225,
12 Appendix A, subparagraph D, and that's on record
13 page 1491.

14 Accordingly, the reference to subordinated
15 debt in Article 1416 of the NAFTA has meaning for
16 the United States as well as for Mexico.

17 I'm going to address capital requirements.
18 The Federal Reserve generally requires bank holding
19 companies to comply with capital adequacy
20 requirements at the holding company level.
21 However, bank holding companies with less than

15:10:07 1 \$150 million in consolidated assets normally are
2 exempt from this requirement, and I'm going to ask
3 you to take a look at that reference. That's also
4 at Appendix A, Part I, on page 1489 of the record.
5 That's the third page from the end of the package
6 you have here.

7 ARBITRATOR LOWENFELD: I have to at least
8 turn the pages?

9 MR. BECKER: Yes. Third page from the
10 end, 1489. If you look over in the right-hand
11 column about halfway down the page, the second full
12 paragraph, the first sentence reads: "The
13 risk-based guidelines apply on a consolidated basis
14 to bank holding companies with consolidated assets
15 of \$150 million or more."

16 Now, in the following sentence, it sets
17 out some exceptions to the exception, but the point
18 we are trying to make here is that not all bank
19 holding companies in the United States are subject
20 to capital adequacy requirements.

21 Now, where the capital adequacy

15:11:15 1 requirements do apply, they're not for the holding
2 company alone. Rather, the capital is measured on
3 a consolidated basis for the entire organization.
4 That is, the combination of the holding company
5 with the subsidiaries. That means that a holding
6 company can meet its capital requirements based on
7 solely on the capital held by its subsidiaries if
8 that is sufficient to meet the minimum
9 requirements. In other words, the holding company
10 itself is not necessarily required to have its own
11 capital beyond what's required by basic corporation
12 law, provided its subsidiaries have sufficient
13 capital to meet the global requirements. So, it's
14 not a situation where you just take the holding
15 company and look at it a loan. It's always looked
16 at on a consolidated basis.

17 Finally, bank holding companies that want
18 to become diversified financial entities and take
19 advantage of expanded powers provided by a law
20 known as the Gramm Leach Blylie Act, which
21 authorizes bank holding companies to do such things

15:12:19 1 as engage in insurance and full-service security
2 activities have to become not only bank holding
3 companies, but also financial holding companies.

4 And the law on that is filed in 12 USC
5 Section 1843(1)(1), which is at record page 1480,
6 and 12 CFR Section 225.86, which is found at record
7 page 1486.

8 Now, while financial holding companies are
9 required to maintain all of their subsidiary
10 institutions at, quote, well capitalized, unquote,
11 levels, there are no separate specific capital
12 requirements at the holding company level separate
13 from the requirements that already apply to bank
14 holding companies.

15 Based on what I have just gone through, we
16 think that the U.S. system is closely similar to
17 that of Mexico in the relevant respects. We think
18 this is not surprising, as the U.S. system has
19 served as a model for many countries, and it
20 therefore appears that the interpretation of the
21 claimant, that is, the holding companies are not

15:13:31 1 financial institutions if they don't deal with the
2 public, would compel the result that U.S. banking
3 and financial holding companies are also completely
4 outside the scope of Chapter 14. Conversely,
5 Mexico's interpretation would lead to the
6 conclusion that the holding companies are within
7 the scope of Chapter 14.

8 Thank you.

9 MR. PEREZCANO: I would now like,
10 Mr. President, to give the floor to Mr. Thomas to
11 address some of the other issues raised.

12 MR. THOMAS: Mr. President, and Members of
13 the Tribunal, one of the questions that was posed
14 by the Tribunal was prompted by submissions made by
15 Judge Schwebel yesterday. And he made reference to
16 over 2,000 Bilateral Investment Treaties or BITS as
17 they have come to be known, which have been
18 concluded in order to confer certain international
19 law protections upon the investors of the
20 signatories to those treaties. And Judge Schwebel
21 referred to the right of direct access, and urged

15:14:46 1 the Tribunal to not restrict this fundamental
2 right.

3 One hesitates to take issue with such a
4 distinguished jurist, but we respectfully disagree
5 with the thrust and some of the specifics of his
6 submissions because in referring to this network of
7 over 2,000 Bilateral Investment Treaties, Judge
8 Schwebel's submission downplayed the significant
9 differences between this investment protection
10 agreement found in this Comprehensive Free Trade
11 Agreement, and what might be called the ordinary
12 BIT.

13 Now, when I use the term "the ordinary
14 BIT," I recognize immediately that there are
15 differences in expression and differences in
16 wording, and differences in concepts as between
17 BITS. But there are fundamentally different
18 differences between BITs, and the chapters that you
19 are presented with in this particular
20 jurisdictional objection.

21 And NAFTA illustrates the point very

15:15:45 1 nicely. This ties in to the question, why were
2 financial services decided to be separated out for
3 separate treatment in the NAFTA?

4 When I was examining that question and
5 examining the question posed about Judge Schwebel's
6 thesis, I went back and looked at the file note or
7 the note that was attached to Mr. Fernandez's
8 testimony, and you will note at page two of that
9 note it's the file record is C0027. The treaty to
10 which Allianz, the German company, made reference
11 was the Mexico-Federal Republic of Germany
12 Agreement concerning the reciprocal promotion and
13 protection of investments. That is stated
14 explicitly at page two of the note.

15 Now, I don't wish to go into lengthy
16 dissection of that Bilateral Investment Agreement.
17 The Tribunal could easily get a copy of it or we
18 could provide a copy of it, if you wish, but I'll
19 make the following very simple points. The entire
20 text of that treaty in English is 15 pages long, as
21 compared to 31 pages for NAFTA Chapter 11, not

15:17:01 1 including its Annexes, 18 pages for Chapter 14 not
2 including its Annexes, and 18 pages for the
3 state-to-state dispute settlement mechanism of
4 Chapter 20.

5 Now, what this illustrates is that while
6 BITS and NAFTA Chapter 11 and NAFTA Chapter 14, to
7 the extent NAFTA obligations have been expressly
8 incorporated therein, may share the same or similar
9 philosophies. It is absolutely crucial that
10 tribunals that are presented with claims thereunder
11 examine precisely the expression of the substantive
12 obligations that are put before them, the
13 relationship between other remedies and the
14 investor-state mechanism, the relationship between
15 bodies that may be established by the treaty or the
16 investor-state on or about arbitration mechanism,
17 and the other issues that the states, parties to
18 the treaties, have found necessary in order to
19 conclude the treaty.

20 And in this respect, we do not agree with
21 the suggestion that Chapter 14 is an exception for

15:18:16 1 Chapter 11. Chapter 14 is a stand-alone chapter
2 that deals with cross-border financial services,
3 the establishment of financial institutions,
4 investment and financial institutions and various
5 actions that the parties may take in relation to
6 the financial sector.

7 Far from being an exception, the Chapter
8 14 negotiators whom, as we heard and it's
9 uncontroverted between the parties, were comprised
10 of representatives of the Department of Finance and
11 the Departments of Treasuries of the states
12 concerned. They convened, and they dealt with the
13 need to address the financial services issues
14 entirely in one chapter.

15 And that must be kept in mind when one is
16 considering this counterintuitive. It could only
17 be considered a counterintuitive argument advanced
18 by the claimant.

19 The authorities were emphatic that there
20 be a negotiating group for separate financial
21 services. They saw significant opportunities for

15:19:20 1 expanding investment and trade in financial
2 services, but these market-opening considerations,
3 which were actuating the negotiations, were also
4 counterbalanced and influenced by their concern to
5 be able to regulate, to be able to supervise, and
6 to be able to take prudential measures where
7 necessary. And you have seen the kind of language;
8 it preserves that ability to regulate.

9 They insisted on defining the chapter,
10 scope, and coverage, and that scope and coverage is
11 set out in 1401.

12 In Article 1401, when they incorporate all
13 of the appropriate aspects of Chapter 11, in other
14 words, the ability to establish a tribunal such as
15 this, how the tribunal will operate, all of that is
16 incorporated expressly by way of Article 1401,
17 paragraph 2.

18 But then the financial services
19 negotiators then looked at Chapter 11 and said,
20 which of the Chapter 11 obligations contained in
21 Section A of Chapter 11 will we allow to be

15:20:29 1 included in Chapter 14 in order to form the basis
2 for an investor-state claim? And those are listed
3 exhaustively in Article 1401, paragraph 2. And I
4 refer the Tribunal to the language which says
5 "Articles 1109 through 1111, 1113, 1114, and 1211,
6 are hereby incorporated into and made a part of
7 this chapter. Articles 1115 through 1138 are
8 hereby incorporated into and made a part of this
9 chapter, solely," and I emphasize the word
10 "solely," for breaches of a party of Articles 1109
11 through 1111, 1113, and 1114, as incorporated into
12 this chapter.

13 It cannot be more precise, what provisions
14 of Chapter 11 were expressly incorporated into this
15 chapter, and those are the only provisions of the
16 NAFTA which are subject to investor-state
17 arbitration when we are concerned with an
18 investment in a financial institution.

19 The short answer, therefore, to the
20 additional question today, with respect to
21 Article 1405, is that Article 1405 is not listed in

15:21:52 1 Article 1401(2), as an obligation of the alleged
2 breach of which could be made the subject of
3 investor-state claim under Chapter 14 as it has
4 been drafted by the authorities.

5 Now, I want to point out one other thing.
6 We have made in our written submission filed with
7 the Tribunal, the respondent devoted a considerable
8 amount of space to explaining the interaction of
9 Chapter 11 and Chapter 14, and I want to note that
10 at footnote 60 of the countermemorial which has
11 been filed by the claimant, it is stated that,
12 quote, Fireman's Fund does not take issue with
13 Mexico's extended explanation of how, as a legal
14 matter, the dispute settlement provisions of these
15 two chapters intersect. That's at footnote 60 of
16 the countermemorial.

17 In its description, although Mexico
18 pointed out it did not apply in this case because
19 there is no inconsistency between the chapters,
20 there was a rule noted that Chapter 11 includes
21 something that the negotiators called an override

15:23:10 1 clause, and the override clause which is contained
2 in Article 1112, paragraph 1, states that in the
3 event that there is a conflict between Chapter 11
4 and another chapter of the NAFTA--I see you nodding
5 your head, Professor Lowenfeld--the other chapter,
6 not Chapter 11, would prevail to the extent of the
7 inconsistency. We have set this out at paragraphs
8 19 to 26 of the memorial, and I would respectfully
9 urge you to review that, especially given that the
10 claimant has not taken issue with this analysis.

11 Now, Mr. Perezcano has alluded already to
12 the Mexican view that the level of protection
13 between Chapter 14 and Chapter 11 is not
14 significantly different. In fact, he said it was
15 very, very close, indeed. We have already shown
16 you by the chart that was included in the memorial
17 that there is a substantial overlap in the
18 substantive obligations between the two chapters.

19 The second point to note is every
20 substantive obligation of Chapter 14 is subject to
21 dispute settlement. Unlike some other chapters of

15:24:27 1 this agreement, for example, Article 1501, the
2 competition clause, that's expressly exempted from
3 party-to-party dispute settlement. But Chapter 14,
4 the substantive obligations are subject to
5 state-to-state dispute settlement, which, as
6 Mr. Perezcano pointed out, is the general rule. It
7 is investor-state arbitration, which is the
8 exception in the NAFTA, and it was carefully
9 delineated by the drafters of the agreement.

10 Now, why is it that the states may have
11 wanted to delimit the obligations that could be
12 made subject to the investor-state? It's not just
13 this issue of the potential for political
14 embarrassment or the desire, the problem that was
15 state to state you may have a politicization of
16 disputes. There are fundamental policy interests
17 at stake, and the policy interests are, and the
18 belief of the negotiators is, that if you do
19 not--if you make it subject to state-to-state
20 dispute settlement, the states will be concerned
21 not only with their interest as a potential

15:25:37 1 complainant, but as their interest as a potential
2 respondent. In other words, there is a balancing
3 of interests within the state with respect to
4 international dispute settlement against another
5 state.

6 That balancing, that filtering, and the
7 consideration of positions, of legal positions that
8 will be articulated to a state-to-state dispute
9 settlement panel does not occur in the case of
10 private investor bringing a claim. A private
11 investor does not have the long-term systemic
12 interest in the interpretation of the provisions.
13 And that's a fundamental difference there. It was
14 the states' choice--the three parties to the
15 NAFTA--their choice to decide which of these they
16 would allow to be the subject of investor-state
17 arbitration.

18 Now, I would point out that there has been
19 the assumption that if this party were to be
20 governed entirely by Chapter 11, which we say is a
21 counterintuitive, anomalous, and nonsensical

15:26:47 1 interpretation of this particular provision of
2 financial services, that somehow these levels of
3 protection are higher. May I point out to the
4 Tribunal that the national treatment provision in
5 Chapter 11 requires the application of certain
6 tests in order to establish liability.

7 And may I also point out to the Tribunal
8 that Article 1108 of Chapter 11 contains exceptions
9 that will excuse a state's otherwise apparent
10 breach of the national treatment rule.

11 In this respect, I was struck by the
12 opening submission of Mr. Price where he said that
13 the repurchase of the peso-denominated debentures
14 was, quote, made through BanCreceer with monies
15 guaranteed by the Mexican Government.

16 And then he went on to say, without the
17 Mexican's government's participation, endorsement
18 financial support and approval, those debentures
19 could not have been re-purchased.

20 That's at, I believe, page 37. I didn't
21 have the hard copy of the transcript when I pulled

15:27:56 1 out the quote.

2 Similarly, Mr. Fernandez testified from
3 the market, the market knew that FOBAPROA were, in
4 fact, the fact of covering the whole liability, so
5 it was a kind of a government guarantee of the
6 funding of the bank. Well, Article 1108, paragraph
7 7, excludes from the national treatment obligation,
8 quote, subsidies or grants by a party, including
9 government-supported loans and guarantees. So,
10 there should be no illusions here that there is
11 some significantly higher degree of protection in
12 Chapter 11 than there is in Chapter 14.

13 The states party to Chapter 14 are
14 interested in seeing these obligations are fully
15 complied with, and there are exceptions in Chapter
16 11 which are available to the states that are
17 finding themselves in the position of being a
18 respondent.

19 I just want to turn just by way of
20 conclusion, if I could ask the Tribunal just to go
21 back to the definition of "financial institution,"

15:29:11 1 because we have labored long and hard to understand
2 precisely what it was the claimant was doing when
3 it rendered the interpretation that it rendered.
4 And if you could put Article 1416 in front of you,
5 that definition of "financial institution," our
6 considered conclusion after listening to their
7 submissions and analyzing the witness statement of
8 Mr. Borja is this: They would read out of the
9 definition certain words. They would prefer--they
10 said they accepted it's in there, but they would
11 prefer "or other enterprise" not to be in that
12 definition. But they would read it to mean any
13 financial intermediary or other enterprise that is
14 authorized to do business, and then they would
15 square bracket insert "with the public as a
16 financial intermediary," end of square brackets,
17 and regulated or supervised as a financial, and
18 they would delete "institution" and insert
19 "intermediary," under the law of the party in whose
20 territory it is located.

21 But that's not what the drafters did. The

15:30:27 1 drafters expressly included the idea of any
2 financial intermediary or other enterprise that is
3 authorized to do business. And we have admitted at
4 paragraph 26 of Mr. Borja's--of his statement, that
5 financial holding companies are authorized to do
6 business among other things by issuing debentures,
7 the very kind of debentures that were at issue in
8 this case. He admits they are authorized to do
9 business, but he says it's a very limited type of
10 business, but you don't see a de minimis limitation
11 in this definition. You don't see any qualitative
12 level that has to be met by the financial entity,
13 and it's regulated or supervised--again, regulated
14 or supervised. There are two different forms of
15 governmental participation.

16 This is a broad definition. The breadth
17 of the definition is reflected in the fact that
18 when Mexico took reservations, as Mr. Perezcano has
19 pointed out, and the very first reservation that
20 Mexico took to Chapter 14, not to Chapter 11, the
21 reservation was expressly relating to, among other

15:31:46 1 types of entities and institutions, Mexican
2 financial holding companies. And if we look at
3 where the reservation was taken, it was taken to
4 Article 1403 and Article 1405. What is the title
5 of Article 1403? Establishment of Financial
6 Institutions.

7 In our respectful submission, this
8 language should be read given its ordinary meaning
9 in the context and in light of the object and
10 purpose of this agreement, and it would be
11 extraordinary to consider that an investment in a
12 financial holding company should suddenly be taken
13 out of Chapter 14, which was a stand-alone chapter
14 dealing comprehensively with financial services and
15 investment, and taken into another chapter.

16 Thank you.

17 MR. PEREZCANO: Thank you, Mr. President.
18 I would simply wish to conclude.

19 Question number eight submitted by the
20 Tribunal is if, in putting aside definitions which
21 could be narrow, is there a rationale to

15:33:11 1 differentiate one financial group from a financial
2 intermediary for purposes of the protection of
3 investments under the NAFTA?

4 Now, the response of the Mexican
5 Government is that there is no rationale.
6 Mr. Thomas and I have already referred to the
7 levels of protection granted under the treaty by
8 Chapter 14-or by Chapter 14 in terms of substantive
9 levels of protection. Substantive protection is
10 not provided by the discipline of settlement of
11 controversies.

12 And I would lastly wish to conclude, and I
13 touched on this in my initial presentation, I would
14 like to conclude with the implications that an
15 interpretation such as that suggested by the
16 claimant, in spite of what was said on several
17 occasions by Mr. Fernandez yesterday, as is
18 indicated in the note which references to his
19 testimony and referred to by my colleague,
20 Mr. Thomas, the measures adopted in 1995 and years
21 following were related to the stability of the

15:34:36 1 financial system.

2 Given the problems being suffered,
3 numerous financial institutions, among others, the
4 BanCreceer group, the rescue plans were directly
5 related to this. This is a fundamental safeguard
6 that countries require, and Mexico, subsequent to
7 joining the Free Trade Agreement, has suffered the
8 need to adopt measures to protect its financial
9 system, and it did so, protecting its duties under
10 the treaty.

11 But it is also important to stress what
12 was said by Mr. Borja today. Before the Free Trade
13 Agreement, there were almost no investments in the
14 financial sector. In the best of cases they were
15 minority investments in some institutions. The
16 Mexican financial system has been transformed
17 during the last 10 years of the treaty, in large
18 measure thanks to the provision of Chapter 14 that
19 allows for investment not only in banks and in
20 brokerage firms, but in groups and in holding
21 companies, which today make up the most important

15:36:04 1 financial groups in the country. Financial
2 institutions are the greatest weight in the country
3 and which have been able to participate thanks to
4 these provisions of the NAFTA which were
5 implemented by many, including Mr. Borja.

6 Thus to now move backwards and to say that
7 it was not one thing but rather another to attempt
8 to have the whole pie, the benefits of investment
9 in the financial sector without those issues which
10 have to do with the safeguards adopted by the
11 parties, is not possible.

12 Thus, I insist the matter before us, the
13 matter of nonjurisdiction set forth by Mexico, has
14 policy implications, regulatory and financial,
15 which go much beyond a dispute between Fireman's
16 Fund and the Government of Mexico.

17 With this, gentlemen, I conclude my
18 presentation. Thank you for your attention.

19 PRESIDENT van den BERG: Thank you,
20 Mr. Perezcano.

21 I think you have requested, Mr. Price,

15:37:34 1 30-minutes recess?

2 MR. PRICE: Yes, Mr. President.

3 PRESIDENT van den BERG: I grant it. Half
4 an hour recess.

5 (Brief recess.)

6 PRESIDENT van den BERG: Mr. Price, please
7 proceed with your closing.

8 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

9 MR. PRICE: Thank you very much,
10 Mr. President and Members of the Tribunal. I must
11 say that you have been extraordinarily patient in
12 listening to the oral presentations of the parties
13 these last two days on sometimes very technical
14 matters, and I wish I could say that the
15 presentation on the technical matters and
16 interpretations of Mexican law has ended, but it
17 has not.

18 As Mr. Perezcano quite properly pointed
19 out, the NAFTA was a carefully negotiated document.
20 The laws implementing NAFTA were carefully
21 prepared. It is for this reason that we paid close

16:25:23 1 attention to both the terms of both NAFTA and the
2 implementing legislation. This is not a
3 preoccupation with formalities. These are not
4 technical niceties. Governments express themselves
5 in language. They must be understood to mean what
6 they say, and it is, therefore, that we focus on
7 those terms.

8 I'm going to ask my colleague,
9 Mr. Alexandrov, to address the Tribunal on a
10 definitional aspect, and then I will resume the
11 closing and address the questions posed by the
12 Tribunal.

13 PRESIDENT van den BERG: Mr. Alexandrov.

14 MR. ALEXANDROV: Thank you, Mr. President.

15 Mr. President and Members of the Tribunal,
16 I would like to focus not only on the definition
17 for "financial institution" under Chapter 11,
18 Chapter 14, but those provisions that relate to
19 that definition and discuss what the financial
20 institution actually is.

21 And I would like to walk over

16:26:32 1 Article 1403, Annex VII(B) and VII(C), and
2 interpret them together with the provisions of the
3 law on the financial holding companies or Ley para
4 Regular las Agrupaciones Financieras, and in
5 particular Article 27-A, which in your claimant's
6 binder is Tab H, and Article 7 of the same law,
7 which in your claimant's binder is Tab D. And I
8 will start with Article 1403.

9 Paragraph 5 of Article 1403 defines an
10 investor, an investor of another party engaged in
11 the business of providing financial services. This
12 investor under paragraph 1 of Article 1403 is
13 permitted to establish a financial institution in
14 the territory of another party, and the reason I'm
15 focusing on this provision is because the concept
16 and term "financial institution" appears here.

17 PRESIDENT van den BERG: You say in
18 paragraph 5, Article 1403, the term "financial
19 institution" appears?

20 MR. ALEXANDROV: No. Under paragraph 5 of
21 Article 1403, an "investor" is defined as an

16:28:54 1 investor engaged in the business of providing
2 financial services.

3 ARBITRATOR LOWENFELD: As I read this,
4 investor of another party, let's say an American
5 financial group, to use a neutral term, means an
6 investor of an American domicile or establishment,
7 engaged in the business of providing financial
8 services in the territory of the United States.

9 MR. ALEXANDROV: Yes. Let's assume that's
10 a U.S. bank, right. This U.S. bank under paragraph
11 1 of Article 1403 is permitted to establish a
12 financial institution in the territory of Mexico.
13 If you will permit me for ease of reference I will
14 use U.S. bank then, instead of investor of another
15 party.

16 A U.S. bank, under paragraph 1 of
17 Article 1403, is permitted to establish a financial
18 institution in Mexico, and I am beginning the
19 analysis here because the analysis will be focused
20 on what is it that the U.S. bank is permitted to
21 establish in Mexico because, the way we see it,

16:30:13 1 this is how we can determine what financial
2 institution is.

3 The reservation Mexico made in Annex
4 VII(B), paragraph 14 was the following.

5 ARBITRATOR LOWENFELD: Reservation?

6 MR. ALEXANDROV: As to what kind of
7 institution can be established in Mexico.

8 ARBITRATOR LOWENFELD: So, 1403(1) says
9 the investor could choose the judicial forum it
10 likes, and then the Annex is a reservation to that?

11 MR. ALEXANDROV: Right. It limits the
12 types of financial institutions that the U.S. bank
13 can establish in Mexico.

14 And this is how it does that. I'm
15 referring to paragraph 14 of Annex VII(B), and I'm
16 reading it, in part, Mexico may limit the
17 eligibility to establish a foreign financial
18 affiliate in Mexico to an investor of another party
19 that is directly or through any of its
20 affiliates--and I emphasize engaged--in the same
21 general type of financial services in the territory

16:31:57 1 of the other party; and B, limit such an investor
2 to no more than one institution of the same type in
3 Mexico.

4 And if you will permit me to use the
5 illustration with the U.S. bank, under the general
6 provision of 1403, a U.S. bank can establish a
7 financial institution in Mexico, but under
8 the--under the limitation in Annex VII(B) paragraph
9 14, Mexico is saying if you're a U.S. bank, you can
10 only establish a bank in Mexico, because this is
11 the institution engaged in the same general type of
12 activity, and you can establish only one.

13 ARBITRATOR LOWENFELD: Fireman's Fund,
14 being an insurance company, can't establish a bank
15 in Mexico.

16 MR. ALEXANDROV: Cannot establish a bank.

17 ARBITRATOR LOWENFELD: And then you get to
18 that?

19 MR. ALEXANDROV: That's correct, but
20 taking it one step at a time, and under Annex
21 VII(B), paragraph 14, an insurance company can only

16:33:15 1 establish--a U.S. insurance company can only
2 establish a U.S. insurance company in Mexico.

3 But if you don't mind, I would like to
4 stick with the bank example because of what will
5 follow, because Mexico has other restrictions.

6 Now, what I want to emphasize, looking at
7 Annex VII(B), paragraph 14, is that from Mexico's
8 perspective, this affiliate that is established by
9 the foreign investor, foreign financial
10 institution, engages in financial services, the
11 same general type of financial services, financial
12 services in the territory of Mexico.

13 If I can stop for a moment here, and
14 before going into the exception from this
15 limitation, I would like to refer you to Article 27
16 of the Ley para Regular las Agrupaciones
17 Financieras, which is Tab H of your binders. Tab H
18 which is Article 27(a), Roman one. Because it is
19 this provision that explains, that defines in terms
20 of Mexican law what is the affiliate established by
21 the U.S. bank, in my example, under Article 1403

16:35:20 1 and Annex (B)(14). It is a Mexican
2 corporation--I'm reading Roman one of 27-A--a
3 Mexican corporation authorized to be organized and
4 operate under the corresponding law such as any of
5 the financial institutions that are listed in the
6 first paragraph of Article 7 of this law.

7 PRESIDENT van den BERG: You translate
8 "entidades financieras" as "financial
9 institutions"?

10 MR. ALEXANDROV: Let me do that for these
11 purposes. I will refer to the same term in Article
12 7, so I would submit that because it doesn't matter
13 because--

14 PRESIDENT van den BERG: Because my
15 limited Spanish, knowledge of Spanish would be
16 institucion financiera, isn't it?

17 MR. ALEXANDROV: Mr. President, for the
18 purposes of this discussion, let us translate those
19 entidades financieras financial entities. I accept
20 your--

21 PRESIDENT van den BERG: I'm simply trying

1 to follow the textual exercise.

2 MR. ALEXANDROV: I was simply reading from
3 this translation, but financial entities is fine.

4 And the reason it doesn't matter is
5 because if you look at Article 7, which is Tab D,
6 it is the same term in Spanish, entidades
7 financieras that is used in the first paragraph of
8 that Article, and that Article has been extensively
9 discussed yesterday and today, but what I want to
10 emphasize here is that whether or not this is a
11 definition of a financial institution, I don't want
12 to discuss that point now. It clearly makes a
13 distinction between a holding company and, to
14 follow the language of 27-A entidades financieras,
15 and it lists the entidades financieras, and I
16 submit to you that if you look together at 27-A and
17 7, the entidades financieras listed in Article 7
18 are the affiliates as defined in Article 27-A,
19 which are those affiliates that a U.S. bank can
20 establish under Annex VII(B), paragraph 14.

21 So if I may summarize, a U.S. bank or

16:38:16 1 another U.S. financial institution can establish
2 under VII(B)(14) the same type of a financial
3 institution referred to in Mexican law as an
4 affiliate and this affiliate is one of the
5 entidades financieras referred to in Article 7, and
6 it is not a controladora. In other words, under
7 Annex VII(B) 14, a U.S. bank or another U.S.
8 financial institution cannot establish by itself a
9 controladora in Mexico.

10 Now, if you allow me to proceed, this
11 limitation in Annex VII(B)(14) has an exception,
12 and the exception is in Annex VII(C)(5), and if you
13 will permit me, I will read it, and then I would
14 like to offer to you the interpretation that the
15 claimant attaches to this text.

16 Investor of another party--again, let's
17 assume a U.S. bank or another financial
18 institution--that in accordance with Section B is
19 authorized to establish or acquire, and establishes
20 or acquires a commercial bank or securities firm in
21 Mexico. So, let me stop here, and again

16:39:57 1 illustrate. A U.S. bank, therefore, it is
2 authorized and allowed to establish a bank in
3 Mexico, which is an affiliate, an entidad
4 financiera.

5 And now the exception. May also establish
6 a holding company in Mexico, and thereby establish
7 or acquire other types of financial institutions in
8 Mexico under the terms of Mexican measures.

9 And the way we interpret that is, as I
10 said, a U.S. bank cannot establish a controladora
11 in and by itself. A U.S. bank is permitted under
12 VII(B)(14) to establish a Mexican bank. And if the
13 U.S. bank wants to establish other types of
14 financial institutions in Mexico, it has to
15 establish a controladora, and thereby through that
16 controladora establish other types of financial
17 institutions.

18 ARBITRATOR LOWENFELD: I asked Mr. Borja
19 this morning, and I didn't get a good answer, so
20 let me ask you: Other than what? That is, one way
21 to read this is to say, well, financial holding

16:41:24 1 company is a financial institution, and then there
2 are other types of financial institutions, but I
3 take it that's not your reading?

4 MR. ALEXANDROV: Professor Lowenfeld, you
5 are once again correct. This is not my reading.

6 And the reason this is not my reading is
7 because I'm looking at paragraph 5 of Annex VII(C)
8 in the context of Annex VII(B)(14), which says the
9 only thing a U.S. bank is allowed to establish in
10 Mexico is a Mexican bank, a financial institution
11 that engages in the same general type of services.
12 Again, I emphasize, a U.S. bank cannot establish a
13 controladora in and by itself. Therefore, when I
14 read paragraph 5 of Annex VII(C), the way I read it
15 is the U.S. bank that is already permitted to
16 establish a Mexican bank can establish or acquire
17 other types of financial institutions, meaning
18 other than the bank, that Annex 7(B) has already
19 permitted it to establish, but the way to do that
20 is to establish a financial holding company.

21 ARBITRATOR LOWENFELD: It's other than

16:42:43 1 the, quote, same general characteristics as the
2 American bank?

3 MR. ALEXANDROV: Yes, absolutely.

4 ARBITRATOR LOWENFELD: That's your
5 reading?

6 MR. ALEXANDROV: And this reading is also
7 confirmed by the implementing legislation, and I
8 want to refer you again to Article 27-A, which is
9 Tab H.

10 Let me recall that Annex VII(B)(14)
11 referred to an affiliate. The Mexican bank
12 established by the U.S. bank is an affiliate, and
13 we have a definition of an affiliate in Roman one
14 of 27-A. A definition which, once again, excludes
15 controladoras because it refers to the list of
16 entidades financieras in Article 7. However, if
17 you look at Roman three, Roman three defines the
18 holding company affiliate. And the reason there is
19 a separate definition of a "holding company
20 affiliate" is precisely because in paragraph 5 of
21 Annex VII(C), the other types of financial

16:44:30 1 institutions that are established through a
2 controladora exclude the controladora itself. The
3 controladora is within the scope of that separate
4 definition of a holding company affiliate.

5 ARBITRATOR LOWENFELD: Could you say that
6 again slowly. I had trouble following you.
7 Apparently I'm not fast enough.

8 MR. ALEXANDROV: I apologize. I will do
9 it again.

10 ARBITRATOR LOWENFELD: No, no, you do it
11 very well, but do it again, please.

12 MR. ALEXANDROV: There are two separate
13 definitions in Article 27-A which, let us recall,
14 is the implementing legislation. Under Roman one,
15 we have an affiliate referring to entidades
16 financieras. Under Roman three, we have a holding
17 company affiliate, in other words, a foreign-owned
18 controladora. The reason we have those separate
19 definitions is that under Annex B paragraph 14, the
20 U.S. financial institution can establish a Mexican
21 entidad financiera, a Mexican financial

16:45:47 1 institution, which is defined as an affiliate. It
2 cannot establish a controladora. It cannot have a
3 holding company.

4 Under Annex VII(C)(5), this U.S. financial
5 institution, a bank, can establish other affiliates
6 in Mexico, other affiliates, meaning other
7 financial institutions, other entidades
8 financieras. Once it has already established one,
9 once it has established its bank in Mexico under
10 (B), under Annex B, it can establish others under
11 (C)(5), but the only way to do that is through
12 establishing a holding company affiliate, a
13 controladora. And the definition of a holding
14 company affiliate is different in the implementing
15 legislation from the definition of an affiliate.
16 It is taken out. It is not within the list of the
17 financial institutions or entidades financieras
18 that are listed in Article 7 of the law.

19 ARBITRATOR LOWENFELD: What was BanCreceer?
20 The American--in our case, the Fireman's Fund
21 didn't establish this group.

16:47:12 1 MR. ALEXANDROV: No, BanCreceer had nothing
2 to do with Fireman's Fund. Fireman's Fund--the
3 investment of Fireman's Fund--and this is,
4 Professor Lowenfeld, the core of our case, is not
5 under Chapter 14 because it is not under 1403. We
6 don't have an insurance company establishing a
7 financial institution in Mexico. We do not have an
8 investment under Annex (B)(14) where an insurance
9 company in the United States establishes an
10 insurance company in Mexico, a company engaged in
11 the same general type of services. This is not the
12 type of case.

13 And we do not have a case under Annex
14 (C)(5) where a U.S. financial institution, let's
15 say Fireman's Fund, Fireman's Fund would be under
16 VII(C)(5), if Fireman's Fund established first an
17 insurance company in Mexico as an affiliate under
18 Annex VII(B)(14). Then, if Fireman's Fund
19 established a controladora, and through that
20 controladora established other affiliates, other
21 financial institutions in Mexico, let's say a bank.

16:48:21 1 So, in the end, Fireman's Fund would first
2 establish an insurance company in Mexico, and then
3 through a controladora, a holding company affiliate
4 would establish, let's say, a bank or another
5 financial--

6 ARBITRATOR LOWENFELD: BanCreceer is not an
7 affiliate at all. It might become one if there was
8 conversion of the debentures into shares, then it
9 might become an affiliate, but that never happened.

10 MR. ALEXANDROV: Well, even if that
11 happened, and when that happened, Fireman's Fund
12 would end up with shares in the controladora and
13 not necessarily majority shares. We are talking
14 about establishment, but Fireman's Fund would never
15 end up with ownership in BanCreceer, the bank.

16 Therefore, none of the structures that I
17 described here under 1403, under Annex (B)(14), and
18 under Annex (C)(5) is applicable to this case.

19 ARBITRATOR CARRILLO: Just one question.

20 So, that means that to the extent a
21 foreign investor, which engages in an investment

16:49:41 1 with any country that is a party to NAFTA, to the
2 extent the foreign investor has not established a
3 controlling person in that jurisdiction in Mexico,
4 for example, affiliate, that means that the foreign
5 investor would not have a valid claim?

6 MR. ALEXANDROV: A valid claim under
7 Chapter 11?

8 ARBITRATOR CARRILLO: Under Chapter 14.
9 That's your reading?

10 MR. ALEXANDROV: No, that is not my
11 reading. All I was saying was that Fireman's Fund
12 investment is not one of the investments that are
13 covered by the provisions that I was talking about,
14 but--and therefore, Fireman's Fund investment is
15 covered by Chapter 11. But the purpose of this
16 interpretation, if I may take you back to where I
17 started, was not to discuss the essence of the
18 investment. That was in response to Professor
19 Lowenfeld's question.

20 The point that I was trying to make is
21 that the interpretation of the term "financial

16:50:48 1 institution," if you look at 1403, if you look at
2 Annex VII(B)(14) and Annex VII(C)(5), and if you
3 look at the definition of an affiliate in a foreign
4 holding company and the implementing legislation,
5 27-A, and if you look at Article 7 of the law on
6 the financial holding company that says
7 controladoras and entidades financieras, it becomes
8 clear that what is established in Mexico under the
9 provisions of 1403 and what is meant by "financial
10 institution" in paragraph 1 of 1403 is an
11 affiliate, affiliate, entidades financieras under
12 Mexican law, not a controladora, not a holding
13 company affiliate under 27-A, and not a
14 controladora under Article 7 of the law.

15 PRESIDENT van den BERG: 1403, is that the
16 only triggering Article for Chapter 14? I ask you
17 the question because paragraph 1 refers
18 that--states that the principle, the parties
19 recognize the principle that an investor of another
20 party should be permitted to establish a financial
21 institution in the territory of a party due to a

16:52:17 1 form chosen by such investor. That concerns
2 establishment.

3 You just stated that this was not an
4 establishment because they acquired in this case
5 convertible bonds in a financial holding company, a
6 controladora. So, I follow your exercise through
7 this, that 1403, the difficult mechanisms,
8 VII(B)(14) and VII(C)(5) is not applicable as such
9 because that is all directed to the establishment
10 as such. But--and then you would like to state, of
11 course, that the next step you make, for that
12 reason, a controladora is not a financial
13 institution.

14 MR. ALEXANDROV: That's correct.

15 PRESIDENT van den BERG: But may that not
16 be a little bit too much focused on 1403? Because
17 1403 was your point of departure. Now, if 1403
18 would not be exclusively controlling, but what
19 would be controlling is simply as a financial
20 institution, that that is what is applicable to
21 what Chapter 14 applies. Because we have first to

16:53:34 1 look to Article 1401 to scope and coverage, isn't
2 it? And it says this chapter applies to measures
3 adopted or maintained by party relating to (A),
4 financial institutions of another party; and (B),
5 investors of another party, and investment of such
6 investors in financial institutions in the party's
7 territory; and (B), as you have stated that in your
8 memorial, so actually that is for all practical
9 purposes or for all legal purposes, is where we
10 have to look at.

11 Then the next step you have to make or may
12 have to make, depending I'm in your hands, the
13 question is well, what of the financial
14 institution? What you do is you start off the
15 analysis of 1403 and go to the annexes and then go
16 to the implementing law. However, should you not
17 make first the step and go to 1416 and ask
18 yourselves what does the definition mean? Leave
19 out the question on the 1403 where you have--you
20 talk about establishing one.

21 MR. ALEXANDROV: Mr. President, to

16:54:41 1 summarize your question, your question is why don't
2 we step on the definition of 1416, but have to go
3 through the exercise of 1403 in the Annexes to come
4 to the definition of a financial institution?

5 PRESIDENT van den BERG: We come there
6 because you take it as a point of departure, I may
7 characterize it as sophisticated reasoning, you go
8 by step by step by step, and then you say, look at
9 the result, when you depart from establishing a
10 financial institution in the territory of another
11 party, then you end up, the financial controladora
12 would not fall under it?

13 MR. ALEXANDROV: I think I understand the
14 question, and let me try to give you a brief
15 response. In our briefs, in our written materials,
16 and in our argument we did, indeed, start from the
17 scope of Chapter 14, Article 1401(b), where the key
18 point is whether the investment by Fireman's Fund
19 is an investment in a financial institution. We
20 then went into the definition of a "financial
21 institution" to see what that means, and we have

16:55:46 1 exchanged written submissions, arguments, and
2 testimony, and apparently we have--respondent and
3 claimant have different understanding of what this
4 definition means and what is the meaning of
5 "financial institution" under Mexican law.

6 So what I was trying to do was, through an
7 interpretation of other provisions of NAFTA, as
8 implemented in Mexican law, to support our argument
9 that, indeed, the definition of a financial
10 institution under NAFTA and under Mexican law
11 excludes controladoras.

12 PRESIDENT van den BERG: Of course I do
13 recall what you have advanced also in your
14 memorial, that you stated to, look, this is one of
15 the arguments. But it seems to me that the
16 argument takes this point of departure, the
17 situation in which you are going to establish one.
18 And as you just said yourself, this is not a
19 situation which you established a financial
20 institution, but where a foreign investor acquired
21 an interest, let's put it in neutral terminology,

16:56:49 1 in a financial holding company.

2 Is it not, then, you only have to look to
3 1401 to the scope provision in connection with the
4 definitions in 1416, or is still that analysis
5 limited to wait a moment, no, when we talk about
6 taking interest in a financial holding company, you
7 have to look to the other provisions and to go to
8 this root in order to find out that indeed the
9 definition under 1416 excludes financial holding
10 company?

11 MR. ALEXANDROV: We have argued the
12 former, Mr. President, but as there have been
13 disagreements and different arguments on the
14 latter, this is the argument that we are advancing
15 now to assist and to enlighten our interpretation
16 of what is a financial institution under Mexican
17 law and under NAFTA.

18 And again, we are not arguing here that
19 this investment had anything to do with the
20 establishment of a controladora or the
21 establishment of a financial institution in Mexico.

16:57:50 1 It's not the establishment that is an important
2 element. It's simply to clarify the meaning of the
3 term "financial institution."

4 ARBITRATOR LOWENFELD: I hope you don't
5 mind if we interrupt you, but this is the last
6 chance to answer our questions, and we are
7 listening carefully. Let me follow up the
8 Chairman's question and ask you what were these
9 notes that your client brought? I thought I should
10 look at investment, the definition of "investment,"
11 since it's not establishment, as you just
12 confirmed. It seems to be a debt security; am I
13 right? Look at 1416 under the definition of
14 investment, all right?

15 MR. ALEXANDROV: Yes, Professor Lowenfeld.

16 ARBITRATOR LOWENFELD: It seems to be a
17 debt security; isn't that right? I mean, it's a
18 loan that has some convertible aspects, but it's
19 basically a debt security; is that right?

20 MR. ALEXANDROV: Yes, but--

21 ARBITRATOR LOWENFELD: And then the next

16:59:02 1 question is issued by whom?

2 MR. ALEXANDROV: Issued by a financial
3 institution.

4 ARBITRATOR LOWENFELD: Is that the animal
5 that we are dealing with, or are we back to the
6 same--

7 MR. ALEXANDROV: We are back to the same
8 discussion because the point we are making is that
9 the controladora is not the financial institution.
10 And once we have established, which was the point
11 of my discussion, that a controladora is not a
12 financial institution, then this definition is
13 simply not applicable.

14 ARBITRATOR LOWENFELD: Well, then, is it
15 an investment?

16 MR. ALEXANDROV: Not under Chapter 14.

17 ARBITRATOR LOWENFELD: You're saying it's
18 not an investment at all under Chapter 14, then we
19 better look at 1139, shouldn't we?

20 MR. ALEXANDROV: I think so, Professor
21 Lowenfeld.

16:59:49 1 ARBITRATOR LOWENFELD: Let's look at--debt
2 security. There is an investment definition in
3 1139 as well, isn't there?

4 MR. ALEXANDROV: Yes.

5 ARBITRATOR LOWENFELD: You are on 1139,
6 investment, paragraph C, and that's where you come
7 out?

8 MR. ALEXANDROV: Yes, Professor Lowenfeld,
9 and if I may submit, this has not been disputed by
10 respondent. But what respondent is asserting is
11 this investment, which is an investment under
12 Chapter 11 is also an investment, is also covered
13 by Chapter 14 because it's an investment in a
14 financial institution, and therefore Chapter 14
15 prevails.

16 But the fact this is an investment under
17 Chapter 11 has never been disputed.

18 ARBITRATOR CARRILLO: Your argument is
19 that it could not be under Chapter 14 because you
20 don't have the filial in Mexico, or a controladora
21 in Mexico?

17:01:06 1 MR. ALEXANDROV: No. We are saying that
2 the investment is not in a financial institution.

3 ARBITRATOR CARRILLO: It would be
4 different if you had a filial in Mexico?

5 MR. ALEXANDROV: Yes, it would be
6 different if we had a filial in Mexico, then we
7 would have been under Chapter 14.

8 Mr. President, if you have no other
9 questions, I would like to defer to Mr. Price.

10 PRESIDENT van den BERG: The questions are
11 all Tribunal time, Mr. Price.

12 MR. PRICE: No, we encourage you to ask
13 questions, Mr. President, Members of the Tribunal.

14 PRESIDENT van den BERG: I'm sure it's
15 about timing. Feel free.

16 MR. PRICE: I would like now to address
17 some of the questions put by the Tribunal to the
18 parties, and I'm going to state these questions
19 before I address them, and if any Member of the
20 Tribunal would like to clarify the question, I
21 would welcome that.

17:02:16 1 The first question was what are the
2 statutory and/or regulatory differences between
3 ordinary holding companies and financial holding
4 companies under Mexican law?

5 PRESIDENT van den BERG: Actually, that
6 was question number two. What are the statutory
7 and regulatory differences between an ordinary
8 holding company?

9 MR. PRICE: I'm starting with question
10 two. I believe that Mr. Fernandez addressed quite
11 adequately question number one.

12 PRESIDENT van den BERG: Okay.

13 MR. PRICE: What are the statutory and/or
14 regulatory differences between ordinary holding
15 companies and financial holding companies under
16 Mexican law? What is the reason for these
17 differences, if any?

18 First, a nonfinancial holding company is
19 not prohibited from engaging in the activities of
20 its subsidiaries. Now, I hasten to add that there
21 is no special law in Mexico creating a general

17:03:28 1 category of nonfinancial holding companies. There
2 is, however, a specific provision under Mexican tax
3 law, the sole purpose of which is to permit the
4 filing a consolidated return by a nonfinancial
5 holding company.

6 In contrast, under that same law,
7 financial holding companies cannot file a
8 consolidated return. More critically, financial
9 controladoras cannot engage in the activities of
10 their subsidiaries. That is, they cannot engage in
11 the provision of financial services.

12 And the reason for the special and
13 additional regulation of financial holding
14 companies is not to regulate holding companies as
15 financial institutions, but rather to ensure that
16 they are precluded from ever becoming, indeed,
17 financial institutions.

18 I would like to move on to question number
19 three. As I understood it, it was under NAFTA, is
20 it not correct that only companies engaged in the
21 financial services sector of their home country can

17:05:06 1 become a financial holding company?

2 We have spent some time on the margins of
3 that question, but let me say this. If by the word
4 "become" a financial holding company, you mean
5 "acquire a controlling interest" in a financial
6 holding company, or establish a financial holding
7 company, then the answer is yes. That is, in order
8 to acquire a controlling interest in a controladora
9 or establish a controladora, you must be a
10 financial institution in your home country.

11 But I would note that this is only the
12 case for foreign investors in controladoras. There
13 is no such limit on Mexican owners of a
14 controladora. A Mexican company engaged in the
15 manufacturing of shoes may own a controladora.

16 ARBITRATOR LOWENFELD: That's irrelevant
17 to NAFTA.

18 MR. PRICE: It's irrelevant to NAFTA. It
19 is relevant to a number of the questions that have
20 been put by the Tribunal.

21 If, on the other hand, by "become" you

17:06:32 1 mean "invest in", that is with less than a
2 controlling interest, then the answer is no. Any
3 entity in the United States may invest in a
4 controladora in the sense of what happened here,
5 acquiring the debt securities of that controladora.

6 And by acquiring the debt securities of a
7 controladora, one thereby invests in that holding
8 company, a debt security being a form of investment
9 both under Chapter 14 and under Chapter 11.

10 The point is the identity of the foreign
11 investor is not relevant for purposes of
12 determining who may make an investment. It is
13 coincidental that Fireman's Fund is also a
14 financial institution. We would be here today if
15 the claimant were a manufacturing company that had
16 acquired 50 million in debentures.

17 And while we are on this point--well,
18 Professor Lowenfeld, let me ask, has Mr. Alexandrov
19 satisfied your question of what "other" means in
20 (C)(5)?

21 ARBITRATOR LOWENFELD: I'm not ready to

17:08:07 1 render a decision, but I need no more.

2 MR. PRICE: Then I'll move on. I'd like
3 to move on to question four.

4 What is the scope of limitations of
5 Article 16 of the Financial Holding Company Act?
6 In particular, is the offering of convertible bonds
7 by a financial holding company engaging in
8 financial services to the public, and therefore a
9 characteristic of a financial institution?

10 Our answer is no. The exercise by a
11 controladora of that limited enumerated power is no
12 different than the issuance of debt securities by
13 any other corporation. The only way, though, that
14 a controladora can use the proceeds of that
15 issuance is to capitalize its subsidiaries, acquire
16 other subsidiaries, or merge subsidiaries.

17 By contrast, when a financial institution
18 issues debt, it is permitted to take the proceeds
19 and lend it to others, to the public, capturing the
20 essence of intermediation. Mr. Mancera himself
21 confirmed that were a controladora to use the

17:09:33 1 proceeds of a bond issuance in this fashion, it
2 would be a criminal offense under the banking law.

3 ARBITRATOR LOWENFELD: Excuse me, but
4 didn't Mr. Borja today say the mirror transactions,
5 the proceeds of the bonds go immediately to the
6 subsidiary which then in turn lends? I thought--he
7 used the word "mirror" several times. Isn't that
8 the same thing?

9 MR. PRICE: No, I do not believe he said
10 the subsidiary then takes the money and lends to
11 the public.

12 ARBITRATOR LOWENFELD: The Chairman said
13 by "mirror" you mean back-to-back, and you said,
14 Well, it was about the same thing, something like
15 that?

16 MR. PRICE: I think it was an issuance to
17 the controladora, between the subsidiary and the
18 controladora, not to the public.

19 ARBITRATOR LOWENFELD: There is one more
20 tier?

21 MR. PRICE: I'm sorry?

17:10:26 1 ARBITRATOR LOWENFELD: The controladora
2 passes the funds on to the financial institution,
3 which, in turn, if it's a bank, lends? The leasing
4 company leases them; it extends credit one way or
5 the other; is that wrong?

6 MR. PRICE: What, that a bank lends money?

7 ARBITRATOR LOWENFELD: Yes, a bank lends
8 money.

9 MR. PRICE: A Bank lends money.

10 ARBITRATOR LOWENFELD: The money it lends
11 it just got from the controladora selling bonds; is
12 that wrong?

13 MR. PRICE: No, no, that's not wrong.
14 When the controladora capitalizes the subsidiary,
15 it permits the subsidiary to engage in business,
16 and that business, if it's a bank, may include
17 lending. But there is no suggestion by any
18 financial regulator that I'm aware of that the act
19 of a parent issuing bonds, taking the proceeds, and
20 capitalizing the operations of their subsidiaries
21 itself constitutes intermediation.

17:11:39 1 ARBITRATOR LOWENFELD: You equate
2 intermediation with doing business?

3 MR. PRICE: I equate intermediation with
4 the transaction outside the group.

5 The reference to Mr. Mancera's testimony,
6 if I may, is at the transcript pages 132 and 133.

7 Mr. Fernandez also testified that if a
8 holding company were to loan the proceeds of a debt
9 issuance to the public, it would be transformed
10 into a financial institution, and that's the
11 transcript at page 165.

12 I would like to go to question number
13 five: What is the influence of, or interaction
14 with, if any, the 1988 Basel capital accord, in
15 particular paragraph 10 of the Basel Committee, on,
16 (A) Mexican law; and (B) definition of "financial
17 institution" in Article 1416 of the NAFTA? The
18 same question for the proposed Basel accord of
19 January 2001, in particular paragraph 2.

20 I think that yesterday's testimony was
21 quite instructive on this point. Mr. Mancera

17:13:08 1 asserted that there was no capital requirement
2 applicable to controladoras other than the 50,000
3 peso amount applicable to all corporations
4 generally: Transcript, page 112.

5 When asked by Professor Lowenfeld whether
6 Article 30 of the Financial Holding Company Act
7 authorized the Finance Ministry to impose capital
8 requirements, Mr. Mancera stated, yes, it would,
9 but he noted that the imposition of capital
10 requirements depends on the entity and on the risks
11 involved: Transcript at page 117.

12 To us, it follows from this that the
13 absence of a capital requirement on the holding
14 company must mean that the operations of the
15 holding company itself present no risk to the
16 public, and this concept is reflected in the
17 principle of the two Basel accords. Neither Basel
18 I nor Basel II have capital adequacy requirements
19 for holding companies. The 1988 accord only
20 applies to banks and their subsidiaries, not to
21 holding companies. Basel II, to be implemented in

17:14:45 1 the future, maybe--thank you--extends its capital
2 adequacy requirements to include holding companies,
3 but only on a consolidated basis. Like its
4 predecessor, Basel II does not contain stand-alone
5 capital requirements on the holding company as
6 such.

7 Thus, apparently even the drafters of the
8 Basel accords recognize that the holding companies
9 themselves as entities present no risk to the
10 public.

11 In our view, because neither Basel accord
12 imposes capital adequacy requirements on holding
13 companies, neither lends support to the proposition
14 that a holding company is regulated or supervised
15 as a financial institution under Mexican law.

16 I move to question six.

17 ARBITRATOR LOWENFELD: Before you do, sir,
18 I guess that's consistent with your notion--I mean,
19 coming back to the previous colloquy we had, or I
20 had, I guess, with Mr. Alexandrov, that you're not
21 under the definition of 1416 investment because

17:16:08 1 that gets you into the question of whether it's
2 regulatory capital. And you say it's not, does not
3 have regulatory capital; is that right?

4 MR. PRICE: We are arguing that our
5 investment in this controladora is an investment
6 within the meaning of Chapter 11.

7 ARBITRATOR LOWENFELD: Only?

8 MR. PRICE: Only. For purposes of this
9 proceeding, certainly. An important qualification.

10 Question six: Would an investment fall
11 under the definition of Article 1416 of the NAFTA
12 if the same facts applied in a reverse situation?
13 I will be very brief.

14 There is no way that we know or can know
15 the answer to this question because there would
16 have to be an exact legal parallel to the
17 controladora under U.S. or Canadian law. It has
18 not been shown that this is the case. The fact
19 that the United States has something called the
20 Bank Holding Company Act which uses the same two
21 words "holding company" does not for a moment mean

17:17:28 1 or suggest that it is the same thing as a
2 controladora under Mexican law.

3 For present purposes, we do not need to
4 assert or deny that a U.S. bank holding company is
5 a financial institution.

6 The question before this Tribunal is
7 whether a controladora, as established under
8 Mexican law, is a financial institution, not
9 whether an enterprise or entity under somebody
10 else's law, which may also have the power to hold
11 shares in financial institutions, the question is
12 not whether that entity is a financial
13 institution--

14 ARBITRATOR LOWENFELD: It's interesting
15 because as far as I can tell, I haven't read every
16 page of this thousand-page document, but the
17 reference to the local law shows up only in the
18 definition of "financial institutions." In
19 general, you have reciprocity, and here is a
20 difference.

21 So, American law has one provision, and

17:18:43 1 Mexican law has another provision, Canadian a
2 third. They don't have to be parallel.

3 MR. PRICE: Exactly.

4 ARBITRATOR LOWENFELD: Okay.

5 MR. PRICE: And that is why, contrary to
6 what has been suggested, a holding by this Tribunal
7 that a controladora is not a financial institution
8 will have no bearing on the question that may come
9 up in a future hypothetical case as to whether or
10 not a bank holding company under U.S. law is a
11 financial institution because in each case--in each
12 case, your examination is under the domestic law of
13 the relevant party.

14 I would like to move on to question seven:
15 Does authorized to do business, in quotes,
16 "authorized to do business," as referred to in
17 Article 1416 include the situation where a special
18 purpose company holds the majority share in other
19 companies that are engaged in rendering financial
20 services?

21 Our answer is no. As used in

17:20:05 1 Article 1416, the phrase "authorized to do
2 business" must be read in conjunction with the
3 latter half of that sentence to mean authorized to
4 do business as a financial institution.

5 Mr. Mancera confirmed this reading of the
6 phrase yesterday: Transcript page 106, and I
7 quote:

8 "QUESTION: So, then, you agree that
9 to be within that definition, 1416, an
10 enterprise must be authorized to do
11 business as a financial institution?

12 "ANSWER: Yes."

13 Further argument in support of our reading
14 is found at paragraphs 8 through 12 of claimant's
15 submission of February 4th. It follows from this
16 analysis that a special purpose company described
17 by the Tribunal is brought within Article 1416 only
18 if it is authorized to do business as a financial
19 institution, and regulated or supervised as a
20 financial institution. An authorization by a
21 financial authority to acquire a majority interest

17:21:25 1 in a financial institution does not constitute
2 authorization to do business as a financial
3 institution.

4 I return to the company engaged in the
5 manufacturing of shoes. A shoe manufacturer
6 requires an authorization of the Ministry of
7 Finance to acquire a controlling interest in a
8 bank, and it may acquire a controlling interest in
9 a bank.

10 But when that authorization is given, is
11 the shoe manufacturer then a financial institution?
12 No. And if I--if an investor were to acquire the
13 debt securities of that shoe company, would that be
14 an investment in a financial institution? No.

15 I move on to question eight, I'm now
16 reading the question: Leaving aside narrow
17 definitions, is there a rationale for
18 distinguishing a financial group from a financial
19 intermediary for the purpose of investor protection
20 under the NAFTA?

21 We believe there is a significant

17:22:51 1 difference. An investment in financial
2 intermediaries would, under Article 1416,
3 constitute an investment in a financial
4 institution. An investment in a member of a
5 financial group may or may not be an investment in
6 an intermediary or other financial institution. If
7 the investment in the member of the group is an
8 investment in the holding company, it is not.

9 Now, it's important to recall that an
10 investor invests in a particular entity. An
11 investor under NAFTA cannot invest in a financial
12 group because the financial group itself has no
13 legal personality. The group does not issue shares
14 or bonds; only the members of the group do. If an
15 investor invests in the holding company member of
16 the group--that is, the member which is not engaged
17 in financial services--it has not invested in a
18 financial institution and is entitled to all of the
19 protections under Chapter 11.

20 ARBITRATOR LOWENFELD: That's again your
21 verbal answer. What's the rationale?

17:24:15 1 MR. PRICE: Your question was, Is an
2 investment in the group the same thing as an
3 investment in an intermediary? By which I assume
4 you meant, is an investment in a grupo necessarily
5 the same thing as an investment in something which
6 is undeniably a financial institution? And my
7 answer is no, it's not the same thing, because it
8 depends on which member of the group you invest in.

9 ARBITRATOR LOWENFELD: But question eight
10 was designed to explore parts of the argument,
11 which both you and Mr. Alexandrov have made quite
12 skillfully. If we say the overall notion of the
13 NAFTA was to protect investors, encourage and
14 protect investors, and there were certain
15 carve-outs in the financial area, what's the
16 rationale for drawing the line where you want to
17 draw it as compared to where Mr. Perezcano wants to
18 draw it?

19 MR. PRICE: Because, if you draw the
20 line--if you ignore the fact that an investment in
21 a controladora is different from an investment in

17:25:31 1 one of its subsidiaries, you're simply ignoring the
2 legal personality. You are simply saying that if
3 you invest in a company which has a controlling
4 interest in something that everyone agrees is a
5 financial institution, you have an investment in a
6 financial institution, and that's not how NAFTA
7 works. You're not free to disregard the separate
8 corporate existence of that controladora.

9 ARBITRATOR LOWENFELD: Let me try once
10 more because I think this is in a way the heart of
11 the question. If an American company invests in a
12 Mexican shoe firm, to use your example, that's an
13 Article 11--Chapter 11 investment, no question
14 about it--if the American investor invests in a
15 Mexican bank, that's Chapter 14, and here we have
16 the controladora, what's the rationale, the policy
17 reason, for putting it here and not there? That's
18 the thrust of question eight.

19 MR. PRICE: It's the same policy reason
20 for putting the shoe manufacturer in Chapter 11
21 where the shoe manufacturer also owns a controlling

17:26:49 1 interest in the bank. By that line of questioning,
2 whenever an investor invests in an entity which
3 controls a financial institution, it crosses the
4 line, and that is not the case under NAFTA. It's
5 only where you invest in a financial institution
6 itself. If you invest in an institution that
7 itself owns a controlling interest in a financial
8 institution, you aren't by virtue of that
9 investment in chapter 14. That's the rationale.
10 And that's why we have these words of limitation in
11 1416: The entity must be regulated or supervised
12 as a financial institution.

13 There is further support for the view that
14 an investment in the holding company is not
15 equivalent under NAFTA to an investment in the
16 underlying financial institutions. I refer the
17 Tribunal to Annex VII(B)(2) and (B)(5). These
18 paragraphs, paragraph 2 and paragraph 5, set forth
19 market caps established by Mexico on foreign
20 investment in Mexico's financial sector.

21 These are set forth as reservations to the

17:28:36 1 establishment of financial institutions. These
2 Annexes do not include holding companies in the
3 list of institutions subject to the reservation.
4 If foreign investment in holding companies were
5 considered the same thing as investment in the
6 financial institutions themselves, surely they
7 would have been included in this list and so
8 included within the market caps. If they embrace
9 the theory that, Well, it's the same thing, it's
10 just indirect, they would have put restrictions on
11 the market share of controladoras, but they did
12 not.

13 I would like to move on to question nine.
14 I guess it's nine and ten. What is the difference
15 between what investor rights are impaired if you're
16 under one or the other? We have two lines of
17 response to this question, and it's important for
18 us to be clear on the procedural and substantive
19 consequences of a decision as to whether this
20 dispute is under 1411.

21 ARBITRATOR LOWENFELD: Chapter 11.

17:30:19 1 MR. PRICE: I'm sorry, Chapter 11.

2 The key question is whether or not certain
3 claims can be advanced by Fireman's Fund in this
4 proceeding. We are going to talk generally about
5 the consequences of denying investor claim.

6 Claimant is pressing three claims: denial
7 of national treatment under 1102, denial of fair
8 and equitable treatment under Article 1105, and
9 expropriation under 1110. Professor Lowenfeld has
10 also mentioned 1405, Chapter 14's own national
11 treatment provision, and I would like to address
12 what happens to each of these claims if the
13 Tribunal determines that this is a Chapter 14 case.

14 If the Tribunal rules that this case is
15 under 14, Fireman's Fund will not be able to
16 advance its claim for violation of national
17 treatment nor its claim for denial of fair and
18 equitable treatment. Fireman's Fund will be able
19 to advance its expropriation claim in its
20 proceeding before you because of the three claims
21 only 1110 is directly incorporated into the

17:32:05 1 substantive protections of Chapter 14.

2 Fireman's Fund may not advance a claim
3 under 1405 for violation of national treatment
4 before you. In fact, you--constituted as an
5 investor state panel--lack jurisdiction over a
6 claim under Article 1405. Such a claim can only be
7 advanced by a party to NAFTA in a new and separate
8 state-to-state proceeding governed by Chapter 20.
9 It's important to note that no one, no entity,
10 Fireman's Fund nor the United States, would be able
11 to pursue claims for violation of 1105 for denial
12 of fair and equitable treatment because that
13 provision hasn't been incorporated into Chapter 14.

14 I would like to read the provision because
15 it bears on the question of whether there are
16 different substantive protections and whether one
17 is greater and one is lesser. Article 1105
18 requires that each party accord to investors of the
19 other party treatment in accordance with
20 international law, including fair and equitable
21 treatment and full protection and security.

17:33:57 1 It also provides that each party must
2 accord nondiscriminatory treatment with respect to
3 measures it may adopt. And I'm looking at
4 paragraph 2.

5 I leave aside for a moment Mr. Thomas's
6 point about Article 1108 7)(b)--I'm sorry, (7)(a),
7 I think it was. No, (7)(b). Because if respondent
8 was so confident that that was a dispositive
9 defense, they would be arguing before you that this
10 should proceed under Chapter 11, so I'm not going
11 to respond to that.

12 I return to 1105. This core provision
13 contains substantive protections not duplicated in
14 Chapter 14. These are fundamental protections.
15 Whether one calls them customary international law,
16 a minimum standard under customary international
17 law, a position on which I don't take a view, a
18 question on which I don't take a view for present
19 purposes, they are critical protections, and they
20 appear in virtually all Bilateral Investment
21 Treaties. That protection would not apply under

17:35:26 1 Chapter 14.

2 The bottom line for present purposes is
3 that if this dispute is governed by Chapter 14,
4 this Tribunal will not have a national treatment
5 claim, nor a claim for denial of fair and equitable
6 treatment, nor a claim for treatment inconsistent
7 with that otherwise required by international law.
8 The other consequence is that Fireman's Fund will
9 not be able to seek any remedy for discriminatory
10 treatment it has suffered. Fireman's Fund will not
11 be able to seek any remedy.

12 Let's then see the consequences of denying
13 the direct right of investor state dispute
14 settlement for that claim, for that discrimination
15 claim. Precluding the investor state action is not
16 simply a procedural step. The investors' claim may
17 never be heard at all. Why? The U.S. Government
18 may refrain from commencing a Chapter 20
19 state-to-state proceeding and for reasons unrelated
20 to the merits of the investor's claim. These
21 reasons may be political--that is, other diplomatic

17:37:04 1 priorities take precedence--or it may involve a
2 tradeoff in connection with some other dispute.

3 The reasons for not bringing the case may
4 be practical. The government has limited resources
5 to deploy to NAFTA cases. Or the reason may be
6 strategic. The government may be more concerned
7 about its defensive interests and about the
8 precedent--and the implication of precedent for its
9 defensive interests--than it may be concerned about
10 pressing the claim of the investor.

11 So, it's not really--the choice before you
12 is not simply the choice between should this be a
13 Chapter 11 case or Chapter 14 case. It may very
14 well be the decision as to whether it's a Chapter
15 11 case or no case at all. If you decide this goes
16 under Chapter 14, the bringing of that
17 discrimination claim is solely within the
18 discretion of the U.S. Government.

19 Even if the U.S. Government were to decide
20 to bring the case, it may not frame the issues or
21 make the legal arguments that the investor would

17:38:31 1 make. Government strategic concerns, defensive
2 concerns, others that I have indicated, may again
3 take precedence over the investor's stronger
4 arguments. In a case like this one, you face the
5 risk of conflicting strategies and arguments in two
6 cases proceeding simultaneously. An investor state
7 case before you confined to Fireman's Fund
8 expropriation claim, and state-to-state case under
9 Chapter 20 based on exactly the same events and
10 measures, but looking at the question of whether
11 there has been discriminatory treatment.

12 Third, there is a significant difference
13 in the end result of a proceeding under Chapter 11
14 and under Chapter 20. In a Chapter 11 case, if the
15 investor were to win and establish damages, there
16 is a binding award by this Tribunal directing the
17 Government of Mexico to pay damages to the
18 investor. In a state-to-state case, if the claim
19 succeeds, the decision of the Chapter 20 panel
20 takes the form of a recommendation that the
21 government bring its measures into compliance with

17:40:03 1 its NAFTA obligations. It is not clear at all what
2 that might mean in the particular case of Fireman's
3 Fund. In effect, Fireman's Fund's claims as
4 advanced by the United States could succeed and yet
5 Fireman's Fund itself receive nothing at all. Now,
6 clearly this is a drastic diminution of an
7 investor's real rights.

8 I would like to offer a few closing
9 thoughts, and then I will finish.

10 Respondent, in its submissions and during
11 this hearing, has showered the Tribunal with a
12 cascade of laws which regulate different aspects of
13 Mexico's financial sector broadly construed.
14 Because some of these laws mention controladoras or
15 regulate their activities, respondent would have us
16 conclude that controladoras are necessarily
17 regulated and supervised as financial institutions,
18 and therefore fall within the scope of
19 Article 1416. But as Mr. Fernandez testified, as
20 Mr. Borja testified, there are many institutions
21 that are not financial institutions that are

17:41:43 1 nonetheless part of the financial sector.

2 Mr. Perezcano asked Mr. Fernandez whether
3 the definition of "financial institution" in 1416,
4 and he posed the same question to Mr. Borja,
5 required that an entity provide financial services
6 to the public. While the definition of "financial
7 institution" does not expressly include that
8 requirement, it does so implicitly. The problem
9 with this definition in Article 1416 is that it
10 contains within its text the very term to be
11 defined: A gift from the negotiators.

12 It appears on its face to be circular, but
13 it's not. It was not circular to the negotiators,
14 one of whom, Mr. Fernandez, has testified that the
15 inherent nature of the concept of a financial
16 institution was the provision of financial services
17 to the public. That's what the regulators were
18 concerned about.

19 When Mr. Perezcano asked, "Well, does it
20 contain the words 'to provide services to the
21 public'?" Mr. Fernandez answered, "Believe me, the

17:43:14 1 regulators that know these matters did not need to
2 clarify that."

3 This inherent yet unarticulated character
4 of financial institutions was echoed by--in the
5 Mexican President's transmittal statement when he
6 said, in essence, that the legal nature of
7 financial entities entails the provision of
8 financial services. It is also, as Mr. Alexandrov
9 explained, reflected in Mexico's implementing
10 legislation.

11 The Tribunal's task is admittedly not an
12 easy one because of the wording of the definition.
13 The Tribunal must discern from the authority
14 presented whether the nature of the activities
15 undertaken by a controladora constitute doing
16 business as a financial institution, and whether
17 the regulation and supervision of controladoras
18 institutes regulation or supervision as a financial
19 institution.

20 But, in both cases, the words "as a
21 financial institution" contained in the definition

17:44:31 1 cannot be disregarded. Those are words of
2 limitation. They have meaning and content.
3 Mr. Perezcano, in his opening statement,
4 effectively asked the Tribunal to ignore the
5 meaning and content of the phrase "as a financial
6 institution" by suggesting that it was enough that
7 a holding company is part of the financial sector.
8 But that's not what Chapter 14 says; it's not what
9 Chapter 14 means. And this dispute is not what
10 Chapter 14 was meant to cover.

11 The consequences of sending this matter to
12 Chapter 14 would mean relinquishing jurisdiction
13 over the discrimination claim, extinguishing the
14 claim of denial of fair and equitable treatment,
15 and effectively working an injustice to this
16 claimant not contemplated and not required by the
17 NAFTA.

18 We thank the Tribunal for its courtesy and
19 attention in this proceeding, and look forward in
20 due course to its decision.

21 PRESIDENT van den BERG: Thank you,

17:45:50 1 Mr. Price and Mr. Alexandrov.

2 Okay, then, I come to the closing of the
3 hearing. First of all, the representatives of the
4 Governments of Canada and the United States, you
5 had announced that you would not make an oral
6 submission, and you have been faithful to that.
7 However, both sides, I think, have reserved the
8 right to submit a posthearing memorial by 27
9 February 2003. May I ask the representatives of
10 Canada whether, indeed, a posthearing memorial will
11 be submitted by the 25th of February?

12 MR. KEVIN S. THOMPSON: At this time, we
13 haven't made a definitive determination as to
14 whether or not we would be submitting 1128
15 submissions, but we will notify the Tribunal in due
16 course. Is that sufficient to answer your
17 question? I'm trying to be as diplomatic as
18 possible.

19 PRESIDENT van den BERG: We have to simply
20 schedule our work, and if we know a submission is
21 forthcoming, we have a different schedule, then if

17:47:17 1 there is no submission forthcoming, if you
2 understand what we mean.

3 MR. KEVIN S. THOMPSON: Perhaps I could
4 suggest this: I, obviously, with my colleague,
5 have to go back and consult the relevant
6 authorities back in Canada and report on what
7 transpired during these hearings.

8 May I suggest that we respond to the
9 Tribunal within a week's time to indicate whether
10 or not we will be filing 1128 submissions?

11 PRESIDENT van den BERG: That's fine.

12 We have the same question for the
13 representative from the United States of America.

14 MR. PAWLAK: Similarly, the United States
15 would like to inform the Tribunal as soon as
16 possible upon consultation with the other agencies
17 in the U.S. Government as to whether or not we will
18 go ahead and file by the 27th.

19 PRESIDENT van den BERG: You could also be
20 as specific as far as dates are concerned as your
21 colleague from the Government of Canada? About

17:48:12 1 within a week?

2 MR. PAWLAK: We would hope to do it as
3 soon as possible, but we would like to have a few
4 additional days because we have several officials
5 out of the country at least for the next work.

6 PRESIDENT van den BERG: We would
7 appreciate it if you inform us timely.

8 MR. PAWLAK: Certainly will do so.

9 PRESIDENT van den BERG: All right. Then
10 the thing I would like to inquire also with the
11 parties and the Secretary of the Tribunal, the
12 correction of the transcripts, which is now live in
13 the air in front of the Secretary of the Tribunal,
14 they will be finalized before next Wednesday.

15 The representative of Canada still has an
16 additional observation.

17 MR. KEVIN S. THOMPSON: I just consulted
18 with my colleague from the Department of Finance
19 that some members of the Department of Finance may
20 be unavailable next week, so we may have difficulty
21 in making that deadline.

17:49:16 1 Would it be possible that if prior to next
2 Friday we advise you, if we are--if we have
3 decided, then we will advise you by next Friday.
4 If we have not yet decided, we will advise you next
5 Friday to ask for an extension?

6 PRESIDENT van den BERG: Yes, I
7 understand.

8 MR. KEVIN S. THOMPSON: As you can
9 imagine, it's an issue that requires a degree of
10 consultation.

11 PRESIDENT van den BERG: I think we should
12 apply equality to both governments since we have
13 permitted also the Government of the United States
14 of America to state as soon as possible without
15 giving an indefinite time which I think the same
16 would be applied to the Government of Canada.
17 There is no need to request for an extension of
18 time, but that does not mean that we wouldn't
19 highly appreciate if you could let us know as soon
20 as possible the position.

21 MR. KEVIN S. THOMPSON: We will be as

17:50:08 1 expeditious as possible.

2 PRESIDENT van den BERG: Thank you.

3 The transcript that is on schedule, so it
4 will be finalized by next Wednesday? Both sides?
5 Mr. Price?

6 MR. PRICE: Yes, Mr. President.

7 PRESIDENT van den BERG: Also,
8 Mr. Perezcano?

9 MR. PEREZCANO: Yes, Mr. President.

10 PRESIDENT van den BERG: Then there is
11 another thing finally. This arbitration is
12 governed by the International Commercial
13 Arbitration Act of Ontario, and that Act contains a
14 provision in Article 18, which reads, "The parties
15 shall be treated with equality and each party shall
16 be given a full opportunity of presenting its
17 case." I think these days you have to say "its
18 case," but it's under the old language.

19 And Article 38 of--sorry, excuse me, 34 of
20 the Additional Facility Rules provides that a party
21 which knows or also to have known that the

17:51:16 1 provision of these rules or any other rules agree
2 with applicable to the proceedings or of an order
3 of the Tribunal has not been complied with, which
4 fails to state promptly its objections thereto,
5 shall be deemed to have waived the right to object.

6 You see the question coming of the
7 Tribunal. Has the Tribunal complied with the
8 provisions of Article 18 of the Act I just quoted?
9 If not, please, then, now is the opportunity to
10 state your objections.

11 Mr. Price?

12 MR. PRICE: No objections.

13 PRESIDENT van den BERG: All right.

14 MR. PRICE: Which is to say, "yes."

15 PRESIDENT van den BERG: Mr. Perezcano?

16 MR. PEREZCANO: We don't have any
17 objections, Mr. President.

18 PRESIDENT van den BERG: Then I would like
19 to thank, first of all, the interpreters. I
20 improperly called them translators. I know it's
21 the wrong word I have used. Many thanks for all

17:52:14 1 the efforts you have done and for going on your
2 one-hour lunch.

3 I would like to also thank the Court
4 Reporters for helping us out so quickly, which I
5 understand it to have been an excellent transcript.

6 And I would also like to thank the
7 Secretary, the Acting Secretary, because he's now
8 on double workload since his colleague is happily
9 absent.

10 Above all, the Tribunal would like to
11 thank counsel for both sides for, first of all, the
12 courtesy they extended in the proceedings. It's
13 one thing to end proceedings, but it's another
14 thing if you have such enjoyable counsel, but also
15 we have enjoyed very much both sides the
16 professionalism and the skillfulness with which you
17 presented arguments in these proceedings.

18 That being said, then, of course both
19 sides are eagerly awaiting for the awards. You
20 know the schedule provides for, I think, the 30th
21 of March.

17:53:14 1 One thing we could reveal to the parties
2 is here is a document which has advanced to page 31
3 which purports to be the document which contains
4 our decision. So, we are making progress, and we
5 really do hope that we will make it by the 30th of
6 March. It also depends on the posthearing
7 submissions and the interpolations of the question
8 which could be characterized, to use the British
9 expression, as a subtle question.

10 That being said, I think I can close the
11 proceedings at this stage, and I thank you all for
12 your attention and your patience.

13 Mr. Perezcano, you would like to say
14 something?

15 MR. PEREZCANO: On behalf of the
16 Government of Mexico, I would also like to thank
17 the Tribunal as well as the interpreters for their
18 work, the Court Reporter, as well as Mr. Price and
19 his colleagues. Thank you very much. And the
20 Secretary of ICSID.

21 MR. PRICE: Mr. President and Members of

17:54:17 1 the Tribunal, to all involved in these proceedings:
2 Counsel, distinguished counsel, friend, and members
3 of his team, the interpreters and the Reporters,
4 and thanks to all of you who put up with this for
5 the last two days, thank you very much.

6 PRESIDENT van den BERG: Thank you. The
7 hearing is closed, and we hope you all have a safe
8 trip back home.

9 (Whereupon, at 5:54 p.m., the hearing was
10 adjourned.)

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby testify 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 record 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, RDR-CRR