

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

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 In the Matter of Arbitration :
 Between: :
 THE CANADIAN CATTLEMEN FOR FAIR TRADE, :
 Claimants/Investors, :
 and :
 THE UNITED STATES OF AMERICA, :
 Respondent/Party. :
 -----x Volume 2

HEARING ON THE PRELIMINARY ISSUE

Wednesday, October 10, 2007

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

The hearing in the above-entitled matter came on,
pursuant to notice, at 9:08 a.m. before:

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- MR. JAMES BACCHUS, Arbitrator
- MS. LUCINDA A. LOW, Arbitrator

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P R O C E E D I N G S

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

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

QUESTIONS FROM THE TRIBUNAL

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

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

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

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17 objects, we shouldn't do it.

18 I see no objection. You go ahead, please.

19 (Pause.)

20 PRESIDENT BÖCKSTIEGEL: Could be added to the
21 transcript.

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

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09: 12: 40 1 PROFESSOR GRIERSON-WEILER: Yes, Mr. President. It's
2 being transmitted to the University of Calgary, and I can't
3 quite remember the name. It was the Hamlet Room, but I can't
4 remember the name of the building, but I knew it was the Hamlet
5 Room.

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

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

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

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

18 All right. Now we have a second try.

19 ARBITRATOR BACCHUS: We shall emerge from the

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

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

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09:13:50 1 I have a few more questions, and I think Ms. Low and
2 the President will have some follow-ups, and I think the
3 President will have a few questions of his own after I have
4 finished.

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

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

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

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

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

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09:15:41 1 what they did. And I would like to hear a little more in the
2 way of an explanation from the United States as to what
3 significance this has, in your view, beyond what you said
4 yesterday.

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

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

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

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

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

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

09:17:01 1 been accidentally taken out or done as a matter of accident.
2 We have never, ever said that. We have not said that it was
3 intentional or accidental. All we have said is we have
4 questioned whether it has the change that they attribute to it,
5 and we said that it does not.

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

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

14 ARBITRATOR BACCHUS: Let me interject.

15 MS. MENAKER: Yes.

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

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

09: 18: 26 1 our reading. I can't attribute the motivation to the people
2 who were actually scrubbing the text. I can tell you we have
3 tracked down everyone who we know who was involved in this
4 process, and no one has a recollection of this particular
5 change.

6 MR. WOODS: Excuse me, Mr. President. My friend is
7 going into territory where I don't think it's appropriate in
8 terms of discussing. She just said that we cannot go back in
9 time to discuss what the individual scrubbers were thinking or
10 not thinking. My friend, I think, just said that she has
11 no--has discovered no recollection. I would submit that any
12 such recollection, in any event, would not be appropriate at
13 today's hearing because that would be new evidence, for one
14 thing.

15 And secondly, the Vienna Convention makes it quite
16 clear that you look at the text, there may be secondary means
17 of interpretation, but you can't go back and get the
18 negotiators to come and explain to you what they did or what
19 they didn't do.

20 ARBITRATOR BACCHUS: Thank you, Mr. Woods.

21 Ms. Menaker, go on.

22 MS. MENAKER: And I understand what counsel is saying,
23 which is why we have--I mean, I'm not offering testimony here,
24 obviously, but when pressed by the Tribunal I want to be as
25 responsive as I can be.

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09: 19: 48 1 ARBITRATOR BACCHUS: We appreciate that.

2 MS. MENAKER: So, there is nothing, and certainly

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

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

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

23 MS. MENAKER: Yes.

24 And so my only point is that--

25 ARBITRATOR BACCHUS: Isn't it irrelevant whether they

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09:21:00 1 actually go back and discuss them again? I mean, they could,
2 if they wish, if they still had problems.

3 MS. MENAKER: Right.

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

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

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

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

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09: 22: 21 1 Would you agree with that characterization?

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

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

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

10 ARBITRATOR BACCHUS: Now, this is my next question,

11 Ms. Menaker. You've answered the first one.

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

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

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09:23:50 1 hadn't kicked in, and I had been flying half the night before.

2 Why--if it's needed in these other provisions, why isn't it
3 needed here?

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

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

10 Go on.

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

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

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

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

21 PRESIDENT BÖCKSTIEGEL: I would say that happens all
22 time.

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

25 MS. MENAKER: The practice of using what people call

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09:24:55 1 belts and suspenders is used all the time. Whenever you have a
2 Treaty provision that starts off "or greater certainty,"
3 typically that provision is unnecessary. Those words are
4 unnecessary because it's just providing greater certainty for
5 what is already explained.

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

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

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

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

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

25 ARBITRATOR BACCHUS: It's hard to expropriate

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09:26:11 1 something if it's in another country.

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

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

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

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

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

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

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09:27:46 1 of its goods.

2 PRESIDENT BÖCKSTIEGEL: I would express some doubt--

3 ARBITRATOR BACCHUS: Me, too.

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

7 ARBITRATOR BACCHUS: Government procurement.

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

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

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

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

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

23 ARBITRATOR LOW: Yes.

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

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09:28:53 1 country, so that was my point.

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

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

9 But the logic of that argument falls back, it seems to
10 me, on the nature of your interpretation of the word
11 investment, and another question I have, another problem I
12 have, is that if you look at the definition of investment in
13 1139, I mean, it goes on for two pages, and unless I missed it,
14 there is no territorial limitation there; am I correct? Did I
15 read past that? Are there specific references to territorial
16 limitations in the definition of investment?

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

23 ARBITRATOR BACCHUS: Well, I think the Claimants would

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

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

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09: 30: 35 1 from (b) because an investor is someone who is making or
2 seeking to make an investment.

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

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

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

09:31:59 1 bit of literalness, and I worry if you get too far beyond the
2 literal in terms of interpretation, then you have a tendency to
3 stray from the intent of the negotiators, and I want to make
4 certain that we don't do that.

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

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

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

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

18 ARBITRATOR BACCHUS: Right.

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

09: 33: 15 1 States contemporaneously with the adoption of the Treaty, it
2 was very clear that what they were intending to do--

3 ARBITRATOR BACCHUS: I'm going to come back to that.

4 MS. MENAKER: --was to promote and protect foreign
5 investment and the investors that make that investments, and
6 that is the clear, in our view, object and purpose of this
7 Treaty.

8 The--there was one other point that--

9 ARBITRATOR BACCHUS: Take your time.

10 MS. MENAKER: I'm trying to--

11 PRESIDENT BÖCKSTIEGEL: We could take it up later.

12 ARBITRATOR BACCHUS: I'll come back to you.

13 What about these questions I have been asking? I want
14 to give the Claimants a chance to weigh in. Do I understand
15 your arguments correctly? Do you have any response to what
16 Ms. Menaker has just said?

17 PROFESSOR GRIERSON-WEILER: We think that you
18 adequately portray our arguments in large extent. I suppose
19 one thing that we would want to add is to go back to the
20 discussion I had with you yesterday about symmetry, the fact
21 that Article 101(2) starts with noting the importance of
22 nondiscrimination both in national treatment and a
23 most-favored-nation treatment aspect. And then we see in
24 Article 1101(a) and (b) the (a) claim and the (b) claim, and
25 then we see in Article 1102 the (a) claim and the (b) claim

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

4 claim regardless of nationality or territoriality issues.

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

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

17 I would note that with respect to Article 1106, it
18 seems to us that the question of how a measure relates to an
19 investment in the territory was very much on the minds of the
20 drafters in that they first mentioned in Article 1101(1)(c)
21 that it applies to all investments, so it's trying to say that
22 the measures apply to all investments, was trying to broaden
23 out and make clear all investments. And then, when you go to
24 1106, in the chapeau of (1), again, it says--it explains in
25 detail the kind of measures that might impact upon an

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09: 36: 34 1 investment of an investor of a Party or of a nonparty in its
2 territory.

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

6 It's funny because they say spelling out exactly the

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

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

18 We think that's the same reason why 1102(4) works that
19 way, but we would note that it's difficult for one to argue
20 that the word "territory" doesn't matter or is surplusage in
21 Article 1110, and yet it's very, very important for Articles
22 1102(4) and 1111. I would submit that she can't have it both
23 ways, that either territory is important or it's not important,
24 and in that regard we would propose that the simple, plain, and
25 ordinary meaning of the text and the symmetry I've described to

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09: 38: 23 1 you works. It makes sense within that context. There's no
2 contradictions with regard to any of these provisions. If one
3 understands that there are (a) claims and (b) claims, that it
4 would make sense when they mention the territorial restriction
5 and when they don't.

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

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

12 ARBITRATOR LOW: Maybe you can convince me, but I
13 would just like to pause on what you said with regard to
14 Article 1111 to make sure that I heard it correctly, and if I
15 heard it correctly, what you were saying with regard to Article
16 1111 is that it only applies to claims with respect to
17 investments under 1101(b), which cannot be the case if you look
18 at the text of it.

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

21 (Pause.)

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

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09:40:20 1 sense that in that context if one is going to have one's
2 stocks, even if one doesn't have a business presence in the
3 U.S., if one's going to have one's stocks listed in the U.S.
4 and trade in the U.S., it would make sense why that
5 extraterritoriality would apply and those kinds of special
6 formalities might kick in--

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

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

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

20 ARBITRATOR LOW: Not in connection with the
21 establishment of investments within 1111(1) by investors of
22 another Party, or with respect to--it's not routine information
23 for informational or statistical purposes as well within
24 1111(2). So I'm--this is not the central point, but it
25 troubles me that you are using something that I don't

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09:41:38 1 understand to fit within this provision at all to support your
2 argument.

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

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

16 ARBITRATOR LOW: Well, let's go back to the main
17 question with respect to 1111 because, for example,
18 1111(2)--I'm just going to read the language, and I want you to
19 confirm that you're reading it the same way--1111(2), for
20 example, talks about investors of another Party or its
21 investment in the territory. That in the context of 1102 and
22 1103, both of which contain provisions, if memory serves, in
23 (a) for investors and (b) for investments.

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

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09: 43: 13 1 to cover both. Can you just comment on that question.

2 PROFESSOR GRIERSON-WEILER: Sure.

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

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

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

18 PROFESSOR GRIERSON-WEILER: It simply covers the

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

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

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09:44:54 1 Services Survey Act, which I believe was one of the provisions
2 that was contemplated by this section, which can apply with
3 respect to the establishment of an investment by an investor,
4 so it can apply at the pre-establishment or establishment
5 phase.

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

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

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

18 PROFESSOR GRIERSON-WEILER: You mean 1111?

19 ARBITRATOR LOW: 1111, I'm sorry. I said 1112. Yes,
20 1111.

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

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

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

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09:46:19 1 involved in a (b) claim. National treatment involves
2 establishment. So, an investor who is either in the process of
3 or desirous of establishing an investment is protected, if it
4 makes a (b) claim and would make a (b) claim for protection
5 under 1102(2).

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

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

16 ARBITRATOR BACCHUS: I actually have read Chapter
17 Eleven before.

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

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

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

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

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

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

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

11 We disagree with Claimants' characterization of
12 Article 1111 as being confined to so-called (b) claims. All
13 1101(1)(a) and (b) say is (a) says that it applies to measures
14 that relate to investors, and (b) says it applies to measures
15 that relate to investments. Here, when you look at 1111, it
16 says in 1111(2), for example, a Party notwithstanding certain
17 Articles, a Party may require an investor of another Party or
18 an investment to provide routine information. If a Party--if a
19 Claimant were challenging that, and it was an investor, the
20 measure would have imposed on the investor an obligation to
21 provide information. It would be bringing a claim saying that
22 requirement violates Article 1111(2). The measure that that
23 investor would be complaining about would be a measure that
24 related to it as an investor. That is 1101(a). It's fairly
25 simple.

09: 49: 13 1 If the measure imposes a requirement on the
2 investment, by contrast, it would be 1101(b). And there is no
3 sort of magic to this. I mean, most--many claims have
4 challenged measures that relate to both the investors and the
5 investment. And I mentioned the Methanex case yesterday. I
6 mean, there the measure it was alleged related to the investor.
7 Under Article 1101(a), they brought a national-treatment claim
8 under Article 1102(1) because they allege that Methanex as an
9 investor was treated less favorably.

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

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

21 ARBITRATOR LOW: Yes.

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

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

25 PRESIDENT BÖCKSTIEGEL: Okay. Let me just say, this

09: 50: 37 1 (a) and (b) claim issue has now been discussed in abstract and

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

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

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

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

16 PROFESSOR GRIERSON-WEILER: Not to my knowledge.

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

19 PROFESSOR GRIERSON-WEILER: Correct.

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

25 PROFESSOR GRIERSON-WEILER: Certainly.

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09: 52: 20 1 ARBITRATOR BACCHUS: Thank you, Mr. President.

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

4 I want to examine the issue of subsequent practice

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

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

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

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09: 54: 22 1 Statement of Administrative Action presented by the U. S.
2 Government, and then I think it was said by Canada and Mexico
3 at the time, and then there are some arguments that have been
4 made in the context of particular disputes, and that seems to
5 be it. All of that is whether it's tantamount to agreement,
6 and that's what I'd like to explore because if there is
7 agreement among the Parties, then I think that's very important

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

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

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

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

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

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

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09:55:45 1 required, but there's certainly not an Article 1131(2)
2 interpretation which, at least arguably, is vying in the mind
3 of the Tribunal. And then we come to then 1128, which you
4 identified as well.

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

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

13 So, they never make a determination with respect to
14 whether or not 1128 interpretations, in fact, fall to the
15 31(3)(a). In any instance, we say, and I think you
16 characterized it right, there isn't such agreement. Canada has
17 not put in an 1128 interpretation as requested here by the
18 Tribunal, which was supposed to be filed as of March 1st, 2007.

19 ARBITRATOR BACCHUS: Let me ask you a question.

20 Someone was kind enough to leave four pages up here with us
21 this morning in big print. Was this from the United States?

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

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

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09:57:42 1 ARBITRATOR BACCHUS: That's okay. I'm happy to have
2 them. They're relevant, and they are in big print.

3 MR. ALEXANDROFF: We haven't seen them.

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

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

8 Give him a copy of it.

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

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

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

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

18 PROFESSOR ALEXANDROFF: Yes.

19 ARBITRATOR BACCHUS: This is my question.

20 Mr. Bettauer was talking about the desire of the United States
21 always wanting to be consistent in its pleadings in different
22 disputes and different places, and I'm going to ask him a
23 little bit more about that in a minute.

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

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09: 58: 49 1 the effort to try to prevail on those disputes necessarily
2 going to be or should be persuasive along the way? Are the
3 NAFTA Parties obliged to consistency, in your view, and should
4 we--should we, even if something does support a position, is it
5 necessarily going to be persuasive a little later on in another
6 dispute?

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

16 ARBITRATOR BACCHUS: This is my problem. In terms of

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

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

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10: 00: 30 1 ARBITRATOR BACCHUS: Then what would subsequent
2 practice be that would persuade you that there has been
3 agreement because what other opportunities are there other than
4 to make submissions in particular cases?

5 PROFESSOR ALEXANDROFF: It would seem that what we are
6 looking at, then, is 31(3)(b). First, our friends don't argue
7 that. They argue (a) in terms of agreement, but if we are
8 talking about (b), then they have argued an instrument which is
9 31(2)(b), and they have raised that with respect to the
10 statement of interpretation.

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

17 So, in--

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

20 are really statements that are contemporaneous--

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

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

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10: 01: 54 1 PROFESSOR ALEXANDROFF: Then it would fall to, as you
2 correctly said, then it would fall to the--they have raised the
3 S. D. Myers case in their pleadings as presumably representative
4 of subsequent practice. This is the position that the Canadian
5 Government took.

6 ARBITRATOR BACCHUS: Okay.

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

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

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

23 I want to turn to the United States.
24 Mr. Bettauer, is this your issue or is this
25 Ms. Menaker's issue?

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10:03:12 1 MR. BETTAUER: Depends on how we tee up the issue, but
2 I can comment on the extent to which we are bound by our
3 assertions, but I think Ms. Menaker would want to do a little
4 bit more on the agreement of the Parties.

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

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

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

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

10: 04: 44 1 application as subsequent practice?

2 MS. MENAKER: We think that, indeed, they should be
3 because it is a statement by the Government of its view on the
4 interpretation of a provision of a treaty; and, as you
5 recognized, that is the context in which these issues are most
6 likely to arise is in the context of a case.

7 ARBITRATOR BACCHUS: Is there something in the NAFTA
8 that supports what you just said?

9 MS. MENAKER: That...

10 ARBITRATOR BACCHUS: That we should see that--that we
11 should see such things as being tantamount to agreement.

12 MS. MENAKER: No, there is nothing specifically in the
13 NAFTA, but through the Vienna Convention. I think certainly
14 one can find agreement of the Parties based on statements that
15 the Parties have made, and one can certainly find State
16 practice in statements they've made on positions that they have
17 taken.

18 We have even heard in some cases that somehow the only
19 positions or statements that should be given any weight by
20 Tribunals are made when the United States is acting in an
21 offensive capacity. When we are acting on behalf of our own
22 investors, who are making claims either under the NAFTA or
23 under a BIT, and we intervene as a third Party or we espouse
24 their claim, but the statements that we make when we are
25 defending claims are somehow accorded less weight, and they are

10:06:04 1 less indicative of the United States Government's views, and
2 there is absolutely no basis on which to draw any such
3 distinction. The Vienna Convention certainly would not support
4 any such distinction.

5 ARBITRATOR BACCHUS: Let me interject here. As you
6 reminded me, I'm new to the NAFTA, but I have been involved in
7 several hundred disputes in the WTO where the United States
8 makes arguments every day that are oftentimes inconsistent with
9 one another, and that's perfectly okay. The United States will
10 argue that the sky is blue one day and the sky is red the next,
11 and so will Canada, by the way, and everyone accepts that.

12 And in my entire several decades of dealing with those
13 kinds of things, first in GATT and WTO, I never heard any
14 contracting Party to GATT or member of the WTO ever once argue
15 that any member should be held to have--to have taken
16 definitively a position for all time and for all purposes,
17 based on an argument that they have made and the position they
18 took in the context of any one particular dispute.

19 MS. MENAKER: I think this is quite--

20 ARBITRATOR BACCHUS: And what's telling to me is, I
21 thought there might be something I was missing in the NAFTA
22 that said, well, for purposes of the NAFTA, for purposes of the
23 NAFTA if you argue consistently in these cases, that has a
24 credence and a stature that it wouldn't otherwise have in the
25 context of, you know, a garden variety international commercial

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10:07:38 1 dispute.

2 MS. MENAKER: No, I think it's quite different from

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

7 ARBITRATOR BACCHUS: I think you are.

8 MS. MENAKER: Excuse me?

9 ARBITRATOR BACCHUS: I think you are.

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

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

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

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

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10:08:48 1 quite well that every country that is defending a claim brought
2 by one of our investors looks at every defense we raise and
3 will invoke that defense against the claim of one of our
4 investors.

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

6 problem.

7 MS. MENAKER: Okay.

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

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

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

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10:09:57 1 official character for the Government of the United States,
2 have you made any statements outside of the context of
3 particular disputes?

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

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

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

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

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

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

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

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

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10: 11: 26 1 we deal with international litigation, whether it be NAFTA, the
2 International Court of Justice, and ad hoc arbitration, we are
3 very much conscious of trying to maintain consistent positions
4 across the board, whether we are in a Claimant or a Respondent
5 position. We know those positions are made public. We publish
6 them in the Digest of U. S. Practice, which comes out annually.
7 We know others rely on them. We know that there is even
8 jurisprudence which not terribly well-thought-of domestically
9 of the International Court of Justice that says you can, in
10 fact, be committing yourself to a position as a matter of law
11 if you take it and others rely on it. And we know that other

12 rely on the positions that we take.

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

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

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

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

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10:13:08 1 about the lot.

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

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

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

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

15 have to obtain before you make your pleadings.

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

21 I just think that the weight of that consideration
22 falls.

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

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10:14:22 1 here, in part at least, is statements that put forward with
2 respect to Canada's position, and that's entirely another
3 story.

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

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

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

18 aspects of--

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

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

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10:15:53 1 should try to concentrate what is really relevant or different
2 from things we have all knowing or at least supposed to know
3 from public international law what is different in our specific
4 NAFTA case.

5 ARBITRATOR BACCHUS: I agree.

6 The United States has answered my question.

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

21 investment back home.

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

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10:17:51 1 of the Treaty that allows jurisdiction here but not everywhere,
2 and so we are thinking about that.

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

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

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

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

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10:19:37 1 proximate cause reason in its case, the horizon of investors,
2 the horizon of Claimants that it sought, and it said a direct
3 impact would satisfy what it referred to as a significant legal
4 relationship and then later on a significant legal connection.
5 So, I think what we saw then was basically that "relates to"
6 became "significant legal relationship" and/or "significant
7 legal connection" and what significant legal relationship or
8 connection meant was direct impact.

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

10: 21: 26 1 appeared to be less favorable. It would ask all these
2 questions on a prima facie basis whether or not the Claimant
3 has pled--

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

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

21 ARBITRATOR BACCHUS: One is. Maybe three.

22 ARBITRATOR LOW: More than one.

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

10: 22: 54 1 of contributing legal theories and thoughts even if they are
2 not on all fours, and even if you seriously doubt everything
3 else they say, you might find something useful.

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

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

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

23 ARBITRATOR BACCHUS: That's beef; right?

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

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10: 24: 33 1 Holsteins.

2 ARBITRATOR BACCHUS: I couldn't resist that.

3 PROFESSOR GRIERSON-WEILER: Is there sufficient meat

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

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

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10:26:02 1 obligation. And then you ask whether or not the treatment did,
2 indeed, appear to be less favorable, and if that meat looks
3 good, you know if you go to--what's that restaurant we were at?
4 Morton's. If you go to Morton's, you know, they give you this
5 big thing of steaks, and they say, "This is the meat we offer
6 you." Well, if you think that, you know, that cut looks good,

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

11 Of course, and the test is relating the measure to the
12 investor, so--and they say it's not an easy threshold to meet,
13 but I think it is the one that Parties probably need to meet if
14 they want to establish that a measure relates to an investor
15 vis-a-vis other investors, and that really only makes sense
16 because under Article 1101--I'm sorry, under 1102(1) and
17 1103(1), there isn't that normal territorial restriction which
18 would apply for treatment of investments--

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

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

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10:27:48 1 it's this Tribunal's job to judge this case and not others, but
2 being mindful of the facts that other tribunals will look to
3 what we do as we look to what others did before us, we want to
4 be careful not to prejudge future cases. Are you of the view
5 that this type of an inquiry can be done efficiently and
6 effectively on a case-by-case basis?

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

9 ARBITRATOR BACCHUS: All right. So, we understand

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

12 I want to give the United States a chance--

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

15 ARBITRATOR BACCHUS: Sure. Take several.

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

25 PROFESSOR GRIERSON-WEILER: The first thing I would

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10:29:27 1 mention is just so that I'm clear, and I apologize if I wasn't,
2 I don't suggest--I don't advocate a series of tests, but rather
3 the simple concept that if we are talking about "relates to"
4 under 1101, and we understand--let me borrow from Methanex that
5 "relates to" means a significant legal relationship, then we at
6 least, one, have established you need a direct economic impact.
7 Fine.

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

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

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

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

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10: 31: 13 1 significant enough-- significant-- that significant relationship
2 and they put enough meat on the bones to qualify that.

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

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

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

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10:33:01 1 think, in making that statement.

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

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

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

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

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

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

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10:34:47 1 that's one of the differences between their case and this case,
2 whereas in that case, what the Tribunal was effectively saying
3 was there was no expectation of the kind of circumstances that
4 were alleged in that case. We are suggesting that here it was
5 very reasonable for an investor to have an expectation that
6 they would be in a position to reap the benefits of an
7 integrated market, protections of fairness and fair deal and
8 noncompetition that they would have based on what the NAFTA
9 said and just a general character and flow of the regulatory
10 cooperation between the two Parties.

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

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

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

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10:36:27 1 would submit.

2 ARBITRATOR BACCHUS: Let me see if I understand.

3 You're saying it was less reasonable for the Texan farmers to
4 expect to continue to get access to the Mexican water?

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

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

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

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

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

24 ARBITRATOR LOW: Could I come back to that? Because

25 that was my original question.

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10:37:50 1

What is the promise here?

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PROFESSOR GRIERSON-WEILER: Fair--

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ARBITRATOR LOW: Can you cite the provisions of the

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NAFTA and respond to the Article 710 point that Respondent made

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yesterday. This is very important to understand.

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PROFESSOR GRIERSON-WEILER: Well, as I understand the

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Article 710 argument, that's really--that's just another

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example of what we would refer to as a watertight compartments

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theory. There is no--in Article 1112, there--you need an

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inconsistency, and there is no inconsistency with Chapter Seven

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or with Chapter Three or with any other Chapter. So, it

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doesn't matter what the Parties say they want to be governed by

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or what rules they want to submit to State-to-State practice.

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That's nice. It's the same thing with Chapter Nineteen.

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

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mentioned the preamble.

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

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ARBITRATOR LOW: We have the object and purpose,

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Article 1102. And what else do you have?

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PROFESSOR GRIERSON-WEILER: We have Article 1102(1),

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and then, of course, which goes back to the question that

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Mr. Bacchus had yesterday, and then you have the term of trade

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"national treatment," and what that means--

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ARBITRATOR BACCHUS: I'm going to come to that linked

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in a minute as soon as Mrs. Low has had a chance to ask all her

10: 39: 15 1 questions.

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

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

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

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

10: 40: 45 1 you know that I'm going there so that it wouldn't surprise you

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

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

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

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

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

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

10:42:21 1 What they proposed here is a far-reaching inquiry that
2 goes way beyond the jurisdictional threshold, that gateway of
3 1101, but deep into the merits looking at whether there is
4 significant competition, whether the market is integrated,

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

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

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

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

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10:44:08 1 some points in their argument, they argue that NAFTA is a
2 unique agreement. It's not like an ordinary BIT, that it gives
3 broad new special rights to investors. You find nothing in the
4 actual text that will allow you to distinguish an investor that
5 has an integrated market, an investor that has just a business
6 in Canada and other competitors across the border. There is
7 nothing there, but at the same time, they're worried that you

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

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

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

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

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10: 45: 45 1 MR. BETTAUER: That's right.

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

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

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

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

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10:47:17 1 if one thinks of, and I always hesitate to get into trade
2 hypotheticals, given the panel, but one thinks of a measure
3 imposing a tariff on a good, and suppose that someone is in the
4 other State and wants to export that good into the United
5 States, is not an investor in the United States, has no
6 investment in the United States. That is, I think, a
7 quintessential trade measure, and yet that person is certainly
8 directly impacted by that tariff. It's going to have a direct
9 impact. And if they wanted to bring a claim, what claim other
10 than national treatment would they bring? I mean, that is a
11 national treatment, albeit we would say national treatment for
12 treatment of goods--

13 ARBITRATOR BACCHUS: Actually, a tariff is a border

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

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

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

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

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10:48:40 1 question in the WTO, they merely say here is a tariff. That
2 has a direct impact on me, and it's not according my
3 investment. My investment is the goods that I'm producing in
4 Canada. They're being treated less favorably than similar
5 goods in the United States.

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

16 The third point is they have put forward a test on

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

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

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10:50:08 1 integration. Why is that integration limited to the cattle
2 industry? Why wouldn't everyone have the same argument and say
3 that same promise of economic integration was made with respect
4 to my industry? Why can't I get through the door?

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

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

20 through the door on this reliance test.

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

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10:51:38 1 because as we have shown in that agreement, that agreement
2 contains language that is more similar to the agreement, the
3 language that is contained in our other treaties, where
4 Claimants could not make the argument they are putting forth
5 here because it clearly limits the scope to investors that have
6 investments in the territory of the other Party. That language
7 is contained in that agreement.

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

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

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

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

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10:53:04 1 PROFESSOR GRIERSON-WEILER: I will endeavor to be very
2 brief.

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

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

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

11 PROFESSOR GRIERSON-WEILER: Incredibly more
12 integrated.

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

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

10: 54: 15 1 context for the background of the negotiation of the NAFTA.

2 And, finally, fair treatment wasn't an aspirational
3 goal for these clients. It was a reality, day-to-day reality,
4 until the 20th of May 2003.

5 ARBITRATOR BACCHUS: I thank the Claimants.

6 Let me go on to the first of my two final questions.

7 MS. MENAKER: May I ask one, not in response to that.

8 I just wanted to see--

9 ARBITRATOR BACCHUS: You have a question?

10 MS. MENAKER: Yes. I'm just wondering when might be
11 an appropriate for a five-minute break.

12 PRESIDENT BÖCKSTIEGEL: Right now.

13 (Brief recess.)

14 PRESIDENT BÖCKSTIEGEL: All right. We continue.

15 We have come to the last question of Mr. Bacchus,
16 please.

17 ARBITRATOR BACCHUS: I want to do my part to move the
18 proceedings along now that we are properly refreshed and
19 fortified.

20 I said I would have two questions. I'm only going to
21 have one. I wanted to defer my first question to when and if
22 we ever get to the merits in this dispute, but I wanted to
23 signal my question to the parties so you might be able to think
24 about it.

25 One of my concerns is that, in terms of national

11: 07: 10 1 treatment, investment dispute tribunals generally in Chapter
2 Eleven and investment tribunals, to the extent that they had to
3 address the issues, thought they had to invent the notion of
4 national treatment in every given case, when, in fact, the
5 NAFTA Parties and lots of other countries have been dealing
6 with national-treatment issues, internationally in dispute
7 settlement and international treaties for decades now. And as
8 someone who spent more time on trade than on investment, I find
9 that facet strange, and it would be my thinking that, if and
10 when we got to the merits on national treatment, that we would
11 consider what had been done elsewhere on national treatment to
12 be relevant, taking into account, of course, any differences in
13 language in the NAFTA such as the phrase "in like
14 circumstances. "

15 That said, let me go to my one remaining question. I
16 think it would be for Ms. Menaker. Yesterday, I presented a
17 hypothetical situation to you relating to the phrase "relating
18 to," and I wanted to ask if you could give some thought to
19 that. Again, we were talking about the nature of these
20 measures and that are at issue here, and the hypothetical
21 situation in which our Canadian friends who have brought this
22 particular claim had in that hypothetical world also made
23 investments in the United States. And the question I had for
24 you was--well, would there be sufficient legal connection, in
25 your mind, between these particular measures and their

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

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

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

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

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

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

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

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11:10:42 1 we go our interagency group and vet what we say about it.

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

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

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

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

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11:12:16 1 And they looked to the language "relating to" simply
2 as context--as further support to further buttress their
3 conclusion that there could be no jurisdiction when there was
4 no investment in the territory. So, it wasn't grounds for a
5 separate jurisdictional objection; it was just further context.
6 And it was in that respect that I was invoking that language.

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

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

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

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

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11:13:50 1 you could decide--decline jurisdiction on other grounds,
2 although we have reserved our rights to bring further
3 objections that may be characterized as jurisdictional.

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

7 PROFESSOR GRIERSON-WEILER: No.

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

10 PRESIDENT BÖCKSTIEGEL: Thank you very much.

11 Any further questions from you at this time?

12 ARBITRATOR LOW: Not at this time.

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

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

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11:15:20 1 MR. BETTAUER: I think it will be up to an hour but
2 less, probably.

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

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

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

14 Why don't you start.

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

17 REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

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

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

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11:16:33 1 or the practice of the Parties or any of those other things;
2 nor have we put forward a so-called "sovereignty defense," as
3 Claimants yesterday suggested. They said, and I quote, "The
4 State which has consented to arbitration cannot invoke immunity
5 to jurisdiction," but that begs the question. The question
6 here is whether we have, indeed, consented to arbitration. And
7 we have cited numerous authorities for the proposition that the
8 consent of the State needs to be clear. Here, it's far from
9 clear. I think that any reading of the text shows that the
10 United States has not consented to arbitrate this claim.

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

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

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

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

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11:18:02 1 forth by the United States. Yesterday, Claimants, in our view,
2 incorrectly argued that supplementary means like the travaux
3 can only be resorted to when the interpretation that would
4 otherwise result would lead to an absurd result, but that's not
5 the case. When you look at the Vienna Convention, it clearly
6 states that it can be used to confirm the meaning, which is how
7 we used it. There is not much difference because, if one were
8 to conclude that interpreting the agreement in light of its
9 ordinary meaning and its context would lead to the results that
10 Claimants propound, we would urge upon you that that would lead
11 to an absurd result and then urge you to look to the
12 supplementary means of travaux that you have, the draft rolling
13 texts.

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

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

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11: 19: 38 1 relate to the investments. The only protections that are
2 accorded to investments are those that are accorded to
3 investments within the territory of the Respondent State.
4 Investors, of course, are entities or persons that make
5 investments, and the only investors that are granted protection
6 must be those that had made or are seeking to make investments
7 in the territory of the Respondent State. Again, the
8 substantive provisions of the NAFTA confirm this. The
9 national-treatment provisions, as you will see, as you have
10 seen, grant national treatment to investors but only with
11 respect to their investments. Again, the only investments that
12 are accorded any treatment under the NAFTA are those that are
13 in the territory of the Respondent State.

14 We submit that Claimants are reading out the term
15 "with respect to investments" in Article 1102(1) and instead
16 are seeking to import the words "in like circumstances" and
17 other phrases that we discussed this morning into Article
18 1101(1) (a).

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

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

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11: 21: 05 1 Now, as an initial matter, the Tribunal will
2 appreciate that the citations that Claimants put up yesterday
3 during their arguments in support of their claim that the NAFTA
4 created this integrated market were all very general and
5 aspirational in nature, and those simply can't inform the
6 jurisdictional reach of NAFTA Chapter Eleven.

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

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

11: 22: 43 1 Claimants repeatedly assert that the NAFTA's goal is
2 economic integration; but, as I mentioned again earlier, why
3 would this integration be only with respect to this one
4 industry? Nothing in the NAFTA limits this aspirational goal
5 of economic integration to the cattle industry. And the fact
6 is that there is just no way to limit the reach of such a
7 decision and remain true to the text of NAFTA Chapter Eleven,
8 just like there is no way to read into Article 1101 an
9 exception for those investors that invest in an integrated
10 market.

11 Now, I won't repeat the arguments that I made earlier
12 when I was explaining that the distinction that Claimants tried
13 to draw between Articles 1101(1)(a) and (b) are artificial. I
14 referred to, unless the Tribunal has questions on both the
15 Methanex and the Loewen cases, where these claims certainly
16 concerned Article 1101(1)(a) and claims were certainly brought
17 under Article 1102(1). So, Claimants' claims are not as unique
18 as they would like you to believe that they are.

19 And I know the President indicated yesterday that he
20 didn't necessarily feel the need for us to discuss the Bayview
21 case anymore; but, with the Tribunal's indulgence, I would just
22 like to respond to a point made by Claimants.

23 PRESIDENT BÖCKSTIEGEL: You are absolutely free to do
24 that, obviously.

25 MS. MENAKER: Thank you.

11: 24: 26 1 Claimants today said that, at the very last minute,
2 the Bayview Claimants amended their claims to get into
3 Article--to make it into an Article 1101(1)(a) claim, and
4 that's simply not true. They have throughout these proceedings
5 tried to limit the import of that case by suggesting that that
6 was really an 1101(1)(b) case, as they say, and not under
7 1101(1)(a).

8 So, I just want to point the Tribunal to a few
9 citations so you can all see for yourselves why that isn't the
10 case.

11 First, in the hearing binders that we set out
12 yesterday, you will see in Claimants' Supplemental Memorial on
13 page 10 they clearly state that Mexico adopted measures
14 "relating to investors of another Party," and then they cite
15 Article 1101(1)(a). And this was not any new thing that was
16 brought up in their Supplemental Memorial. If you look their
17 Notice of Arbitration, one of the first submissions filed, you
18 will see just paragraphs 59 and 72, for example, they are
19 making a claim under Article 1102(1). They are claiming that
20 they are alleging that they, as investors, were accorded less
21 favorable treatment. They're not alleging in those paragraphs
22 that their investments were accorded less favorable treatment.
23 They are claiming that they were. So, it's necessarily they
24 are complaining about a measure that related to them as
25 investors.

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11: 25: 51 1 So, the Claimants clearly made that clear.

2 Second, the Bayview Tribunal noted in its award that
3 Claimants were invoking Article 1101(1)(a) as well as Article

4 1101(1)(b), and this is in paragraph 43, and I will just cite
5 that. They state: "The Claimants asserted that their claim
6 concerns the measure taken by Mexico both to investors of
7 another Party and to an investment located in Mexican
8 territory."

9 Third, Claimants have, in fact, acknowledged this. If
10 you look at footnote 58 from your Counter-Memorial, they say,
11 "The investors in that case made some" what they characterize
12 as "rudimentary arguments in respect of application of Article
13 1102(1) to them as investors."

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

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

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11: 27: 25 1 its own," and that's at paragraph 101.

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

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

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

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11:28:50 1 the Tribunal somehow indicated that they would lose.

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

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

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

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

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11: 30: 17 1 extend the so-called "nondiscrimination principle" so broadly,
2 so widely, and they are urging you to read into every provision
3 a kind of super-gloss nondiscrimination principle, why is it
4 that if the NAFTA Parties decided that it was in their interest
5 to extend this principle so far that they wanted to extend it
6 to investors in Canada that had made investments in their home
7 territory, why would they have not accorded that same treatment
8 to those investors' investments? It just simply does not make
9 any sense. The NAFTA Parties clearly wanted to protect
10 investors and their investments, and the national-treatment
11 provision, as it works, as everyone agrees under Article
12 1102(2), if an investor makes an investment in another NAFTA

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

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

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

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11:31:50 1 Treaty's express provisions, and we cited ample authority for
2 that basic proposition. Again, the Claimants argue about
3 this--their argument rests on this supposedly broad
4 nondiscrimination objective; but, quite apart even from the
5 additional reasons I just offered, it doesn't mean that the
6 Tribunal has to interpret every provision to provide for
7 nondiscrimination because, clearly, there are exceptions to
8 national treatment throughout the agreement. In giving the
9 exception effect can't be said to advance the Treaty's object
10 and purpose of providing for nondiscriminatory treatment, but
11 that is not a reason to avoid the express provision of the
12 Treaty.

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

16 the objective of transparency.

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

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11:33:26 1 provided for an obligation of transparency, and that Claimant
2 could not simply rely on the objectives of the Treaty alone to
3 find that obligation. If you look through the Treaty, that
4 obligation of transparency was contained, albeit in Chapter 18,
5 but that obligation could not be read into every provision
6 because it was an overarching objective of the Treaty. And the
7 same is true for the nondiscrimination objective.

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

18 The Claimants focused on a few other objectives and

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

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11:34:49 1 disputes, namely those objectives that really talk about
2 investment.

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

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

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

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

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11: 36: 11 1 Now, of course, that Tribunal in that case was
2 interpreting a different Treaty, and the case was factually
3 different, but it was faced with a similar jurisdictional issue
4 as the one that is faced by this Tribunal, and that is whether
5 the absence of the words "in the territory" in some provisions
6 of the investment agreement at issue should be construed to
7 allow investors to seek protection for investments that were
8 made outside the territory of the Respondent State.

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

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

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

25 investments by nationals of one contracting Party in the

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11:37:44 1 territory of the other, and that the absence of qualifying
2 words of limitation to the word 'investment' itself did not
3 broaden the class of investments included in the BIT. "

4 Claimants have sought to Gruslin on the grounds that
5 the scope and coverage of that BIT in question restricted the
6 Treat's application to, "investments made in the territory of
7 either contracting Party by nationals or companies of the other
8 contracting Party. "

9 But the Claimant in Gruslin sought to bring its claim
10 because the Treaty allowed for, quote-unquote, any dispute
11 arising directly out of an investment, and it allowed for any
12 of those disputes to be brought to arbitration, and that clause
13 didn't contain any territorial limitation, but the Tribunal
14 said that that didn't matter. The absence of that language in
15 the territory in that provision didn't matter since the meaning
16 of the provision was clear.

17 And the scope and the coverage of NAFTA Chapter Eleven
18 and Article 1101 is similarly clear, we submit, and that the
19 absence of the words "in the territory" in Article 1101(1)(a)
20 do not matter because Article 1101 restricts the agreement's
21 application to investments made in the territory of another
22 NAFTA Party and to investors that have made or are seeking to
23 make such investments.

24 So, although Claimants are trying to isolate the term
25 "investor" from the related term "investment" in Article 1101,

11:39:13 1 that type of artful pleading is precisely what the Gruslin
2 Tribunal disallowed.

3 Now I would like to turn briefly to agreement of the
4 Parties.

5 Today, Claimants acknowledged that an FTC
6 interpretation by the Parties is not what is required to show
7 an agreement of the Parties. And they instead are seeking to
8 cast doubt on the probity of the views or positions that are
9 expressed by a Party in an arbitration or litigation. But as I
10 mentioned earlier, there is no basis on which to make such a
11 distinction or draw any distinction and discount some State
12 practice and not other State practice.

13 And as the Tribunal noted, Mr. Bacchus noted, when it
14 comes to interpreting the provisions of Chapter Eleven, much,
15 maybe all, but certainly much of the State practice will be in
16 the form of positions that the States themselves have taken in
17 arbitrations under Chapter Eleven, and that's just to be
18 expected. And there is no reason to say that that State
19 practice is somehow less probative or less relevant than other
20 State practice.

21 And again, I won't go through all of the arguments,
22 but we urge the Tribunal to keep in mind that these positions,
23 they are statements of the Government of what its positions are
24 in interpreting a provision of the NAFTA. We have indicated
25 why we believe our positions are taken with careful

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

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

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

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

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

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

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11: 42: 25 1 disagrees. As the United States, we certainly would not want
2 tribunals to be drawing inferences as to our positions on the
3 basis of nor intervening in a case.

4 There are many reasons why a State may choose not to

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

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11:43:58 1 So, what are those statements? So, let me put up the
2 first slide, which is a statement from Canada's Statement on
3 Implementation.

4 And that says, and I quote, "Canada has negotiated
5 investment agreements both to protect the interests of Canadian
6 investors abroad and to provide a rules-based approach to the
7 resolution of disputes involving foreign investors in Canada or

8 Canadian investors abroad. The NAFTA builds on that
9 experience." Their statement clearly indicates that the
10 Chapter applies to Canadian investors who invest abroad; that
11 is, not to those Canadian investors that invest at home and
12 vice versa. And it was this statement that the Bayview
13 Tribunal relied on when it found an agreement among the three
14 NAFTA parties on this point.

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

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

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11:45:32 1 that's important for the reasons which I will go into right
2 now.

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

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

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

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11:47:00 1 was complaining about measures that were directed towards this
2 investment.

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

14 at the liability phase of the Myers case.

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

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11: 48: 34 1 The Tribunal rejected that defense. They said as a
2 matter of corporate structure, it's true that the U. S. company
3 didn't directly own the investment in Canada, but because there
4 was this commonality of shareholder ownership, they said it
5 didn't matter. But that's a different issue.

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

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

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

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

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

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11: 50: 05 1 as defined by NAFTA Chapter Eleven.

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

5 "The terms of Article 1102 provide that the national
6 treatment guarantee is extended to both the investment, Article
7 1102(2) and the investor with respect to the investment,
8 Article 1102(1). The latter obligation does not mean that the
9 national treatment obligation applies to the investor's
10 activities in its home country. The obligation only applies to
11 the investor with respect to its investment in the foreign
12 country, in this case Canada."

13 Now, here Claimants have argued that Myers was a
14 so-called (b) claim under Article 1101(1)(b). And that's a red
15 herring. In this passage, Canada is clearly expressing its
16 view as to the improper interpretation of Article 1102(1), and
17 that's a so-called (a) claim in Claimants' parlance. That is,
18 they are arguing here, expressing their view as to Article
19 1102(1) that provides for national treatment for investors with

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

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11:51:46 1 that are made in the foreign country in another NAFTA State.

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

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

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

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11: 53: 30 1 Canada. "

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

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

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

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

11: 55: 22 1 We have also shown other provisions where the language
2 is not expressly there, and yet Claimants concede that the
3 provision has to be read with the language. And in particular,
4 I note Article 1105(1) they mentioned in that regard.

5 Now, Claimants today argued that we were somehow
6 seeking to have it both ways, that we were saying that the
7 language was necessary in some places and not necessary in
8 others, and that is not what we have said. We said it
9 certainly in the scope and provision Chapter provision--excuse
10 me, scope and coverage provision; there it makes sense to have
11 the language in 1101(1)(b), but insofar as the other provisions
12 that we were discussing, as far as they were concerned, our
13 position has been entirely consistent.

14 So, in Article 1102(4), for instance, we have never
15 contended that the language there was necessary. We have shown
16 that the language there has--at one point it was in the text,
17 then it was taken out, and then it was put in again. But could
18 anyone conclude from that that the lawyers, when they were
19 doing this over a matter of days or weeks, that they were
20 dramatically, drastically expanding and then restricting the
21 scope of Chapter Eleven and then expanding it again day by day
22 as they were making these changes? I think that's just
23 implausible.

24 Now, recall that Article 1102(4) is again one of those
25 Articles that is there for greater certainty. It doesn't add

11:57:08 1 any substantive obligations. It gives examples for when
2 national treatment should be accorded to investors. So, in
3 other words, it's under Article 1102(1). And we submit it
4 provides further evidence that the words in the territory are
5 sometimes superfluous because since it's not actually meant to
6 expand the substantive obligations, by taking the words in and
7 out, it is not making any substantive changes, and it shows
8 that it could be done either way, and you get a bunch of
9 lawyers in a room, and there will be lots of different ways
10 that one would choose to draft any particular provision.

11 Again, I don't want to repeat everything we already
12 said this morning, so I will just take one moment to see if
13 there were any other additional points I wanted to make with
14 respect to the travaux.

15 I think I can just sum up on this point by noting that
16 once the text went to the lawyers for the lawyers' revisions or
17 the lawyers' scrub, it indicated that at that point in time
18 there was agreement among the Parties as to the substance of
19 the provisions that were at issue, and what was left was again
20 for the lawyers to conform the text and to do the scrub. And
21 you can see that because the first text that is labeled
22 lawyers' revision on August 22nd, 1992, there are almost no
23 brackets that are remaining. Prior to this time you will see
24 bracketed texts. You will also see an indication in brackets
25 which says Mexico, Canada, or U.S., indicating that one of the

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

3 texts and the bracketed Parties are all gone from Articles
4 1101, 1102, and 1103, except for a notation in what would
5 become Article 1101(3), which states that further coordination
6 still needs to be made with the financial services Chapter.

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

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

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

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12:00:43 1 of the texts. Here, you'll see when this change is made, it's
2 is not accompanied by a footnote. There are no brackets.
3 There are no indications that Mexico or Canada or the U.S. is
4 proposing this change. It is simply a change that was made by
5 the lawyers in order to polish up the text, and we submit that

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

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

12 PRESIDENT BÖCKSTIEGEL: Mr. Bettauer, please.

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

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

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12: 02: 34 1 earlier decisions, but will certainly carefully consider such
2 decisions where appropriate. "

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

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

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

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

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

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

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

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

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

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

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

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

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

25 The ordinary meaning in context and in light of the

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12: 08: 53 1 investment protection objective and purpose of the Treaty
2 compels a negative answer before this Tribunal. This--this is
3 consistent with the agreement and practice of the three NAFTA
4 Parties, as Ms. Menaker has just demonstrated, which also
5 compels a negative answer to the question before the Tribunal.
6 And in addressing the same, the exact same question, that's
7 what the Bayview Tribunal correctly concluded. This is
8 entirely on point and persuasive, and there is no good reason
9 for this Tribunal to come to a different conclusion.

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

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

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

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

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

2 PROFESSOR GRIERSON-WEILER: Yes.

3 PRESIDENT BÖCKSTIEGEL: Very good.

4 (Brief recess.)

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

7 REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANTS

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

12 ARBITRATOR BACCHUS: He is the President.

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

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

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

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

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12: 26: 20 1 questions and said it's--I call it the "van den Berg model,"
2 and I see that President Lowe adopts it, too, of providing
3 directed questions to the parties in advance of the--immediate
4 in advance of the hearing; and thus, indeed, the relevant
5 question for us was one of those questions in that case. The
6 summation of the Bayview Claimants before and after that
7 Tribunal in respect of this issue is before the Tribunal, and
8 the Tribunal can read it itself. The Tribunal can also read
9 our submissions about the case, Respondent's, as well as the
10 Award itself, so we need say no more than that.

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

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

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

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12:27:54 1 the trial court, and it was a trial court judge named Judge
2 Tysoe. I frankly would back one particular horse there. I
3 think Lauterpacht versus Tysoe on what transparency means with
4 regard to the minimum standard of treatment, I think I would
5 probably go with Professor Lauterpacht.

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

11 With regard to Myers, at page 14, note 42, of our
12 Rejoinder, we cite the Myers Statement of Claim and in
13 particular paragraph 130 of the Myers Statement of Claim. I
14 remember it because I helped draft it. The claim was made for
15 Article 1102(2) to the protection of Myers and its investment
16 as your typical foreign investment claim. We did not make an
17 1102 subpoint claim.

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

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

12: 29: 49 1 too, read Bayindir, Gruslin, and Ethyl again, and we have the
2 results of our homework before you. Three slides, one of them
3 at the top there.

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

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

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

25 With respect to Gruslin versus Malaysia--

12: 31: 43 1 (Pause.)

2 PROFESSOR GRIERSON-WEILER: I'm sorry, it's a
3 Microsoft issue.

4 (Pause.)

5 PROFESSOR GRIERSON-WEILER: With regard to Gruslin
6 versus Malaysia, I want to alert you to a set of paragraphs of
7 note. We think in looking at it one more time, we think that
8 these paragraphs are the most relevant to the issues before
9 you.

10 One is paragraph 13.1, where it says that the
11 objection made by the Respondent is, "As a single contention
12 that the requirements laid down in Article 25(1) of the ICSID
13 Convention for the jurisdiction of the ICSID are not met." So,
14 clearly, it was an ICSID Convention case. It was about whether
15 or not this claim qualified under the provisions of the ICSID
16 Convention, which, of course, are not relevant in an UNCITRAL
17 Tribunal.

18 At paragraph 15.7, "The Parties were agreed that the
19 characterization of whether or not the Claimant had made an
20 investment in the territory of Malaysia under the terms of the
21 investment agreement was a matter to be determined by reference
22 to the laws of Luxembourg." Well, that's no surprise for ICSID
23 practice because it's very common to refer to the local laws in
24 addition to international law; terribly inappropriate in NAFTA
25 where Article 1131(1) says "international law shall govern in

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12: 33: 20 1 addition to the Treaty. "

2 At paragraph 13.3, the Tribunal notes the Respondent's
3 citation of a number, a large number, of provisions of the

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

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

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

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

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

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

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12:34:51 1 therefore looks to the NAFTA itself and applicable rules of
2 international law," which we submit would be the correct
3 approach to follow again.

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

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

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

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

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12: 36: 38 1 basis. At paragraph 63, it does, though, say, "Canada cites no
2 authority and does not elaborate any argument as to why the two
3 Chapters' obligations are incompatible." So, it does make some
4 finding that suggests that Canada has perhaps not fully briefed
5 that issue, and perhaps that's why Canada elected to let it go
6 on to the merits, and the Tribunal agreed.

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

10 investment made in the Respondent Party's territory and that
11 the link to Canada made by Ethyl was for compensation for an
12 expropriatory measure which Article 1110 specifies must be
13 related in the territorially situated investment. So,
14 basically, Canada said, "Hey, look, you're making a claim under
15 1101 for an investment that you say was taken." Canada says,
16 "If you're going to do that, you have to have--your claim has
17 to be restricted to the territory."

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

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

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12: 38: 34 1 claims that an expropriation that occurred inside Canada but
2 the investor's resulting losses were suffered both inside and
3 outside." The Tribunal goes on to explain that, given the
4 nature of the question, that this is an issue that was properly
5 decided on the merits.

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

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

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

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

17 PRESIDENT BÖCKSTIEGEL: Mr. Haigh, please.

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

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

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

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12:40:02 1 times in the last two days, but the difference between us is
2 not the principle to be applied but how, in fact, to read these
3 words.

4 We ask you to keep in mind that, in our submission,
5 1102 contains a very clear promise to investors. 1102(1) is a
6 promise to investors. It's not directed at investors and their
7 investments or investments of investors in the territory of the
8 Party. It is simply to investors.

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

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

25 The conditions that we have pointed to that show "in

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12: 41: 48 1 like circumstances" include pricing mechanisms, the
2 quality-control mechanisms, the same slaughterhouses, the same
3 suppliers, the same breeds of cattle, the same pasturage, the
4 same conditions for businesses to be conducted. These are all
5 like circumstances. These are all factors that the drafters of
6 the Treaty themselves contemplated. They didn't open the
7 Pandora's Box. They included something that is potentially
8 quite limiting. There would rarely be an instance in which a
9 Party such as the United States would be according treatment
10 for investors of another Party like those of Canada, unless
11 they were in like circumstances, and that would be the issue
12 for you to address on the merits of this case.

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

19 "like circumstances" can justify the bringing of such a claim.
20 We began with the allegation that the text says what
21 it says and that it should be relied on. We end with that same
22 request, that you be guided by exactly what the drafters of the
23 Treaty have said, by exactly what the Parties have agreed to.
24 Nothing read in and nothing read out. Just what it says. That
25 should be good enough.

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12:44:10 1 And with that, I will close on behalf of the Claimant,
2 and we thank you for your patience and for all the good
3 questions. We know that you have a difficult task, and we wish
4 you well with it.

5 PRESIDENT BÖCKSTIEGEL: Thank you very much, indeed.

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

8 ARBITRATOR LOW: No.

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

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

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

22 hearing.

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

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12:45:42 1 be possible for the parties to put the hearing binders on a CD
2 so that we have them available electronically? We will take
3 them home, don't worry, and I basically would like paper, but
4 it would be helpful for traveling purposes and so on if you
5 could provide us with CDs. How long do you think that will
6 take?

7 MS. MENAKER: Maybe a week?

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

10 A week?

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

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

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

19 PROFESSOR GRIERSON-WEILER: No.

20 MR. BETTAUER: None.

21 MS. MENAKER: No.

22 PRESIDENT BÖCKSTIEGEL: That's also good to hear.

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

25 Tribunal, that there is no need for Posthearing Briefs.

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12: 47: 08 1 PROFESSOR GRIERSON-WEILER: We agree.

2 MR. BETTAUER: We agree.

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

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

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

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

17 (Pause.)

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

21 PRESIDENT BÖCKSTIEGEL: All right.

22 MR. HAIGH: Thank you.

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

12: 48: 49 1 MR. HAIGH: Thank you.

2 PRESIDENT BÖCKSTIEGEL: That would mean we need cost
3 claims in some written form as soon as possible.

4 Let me say that I would not expect that you will send
5 us piles of invoices and all that. It should be rather
6 detailed, obviously, given the kind of costs you have had, for
7 which purposes, so it would be a small binder or whatever you
8 want to call it, but don't add any additional proof. If the
9 other Party complains, then you may still have to provide it.

10 What would be a decent time for that? Is two weeks
11 too short?

12 MS. MENAKER: We could do two weeks.

13 PRESIDENT BÖCKSTIEGEL: It might be more difficult for
14 you.

15 PROFESSOR GRIERSON-WEILER: We have multiple parties,
16 so three weeks.

17 MR. HAIGH: Could we say at least three weeks,
18 Mr. President?

19 PRESIDENT BÖCKSTIEGEL: When you say three weeks,
20 should be say four weeks?

21 MR. HAIGH: Thank you.

22 PRESIDENT BÖCKSTIEGEL: We will not decide the case
23 within a week. I don't think we could manage. So, four weeks
24 would be more realistic. Four weeks from now, if we count it
25 from now, we would expect cost claims from each side.

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

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

5 MR. HAIGH: All right.

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

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

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

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

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

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12: 51: 43 1 Swiss account, and transfer it electronically.

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

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

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

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

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CERTIFICATE OF REPORTER

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

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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