IN THE MATTER OF AN ARBITRATION UNDER THE UNITED STATES – COLOMBIA TRADE PROMOTION AGREEMENT, SIGNED ON 22 NOVEMBER 2006 AND ENTERED INTO FORCE ON 15 MAY 2012

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, AS REVISED IN 2013

(the "UNCITRAL Rules")

PCA Case No. 2018-56

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In the Matter of Arbitration Between: :

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1. ALBERTO CARRIZOSA GELZIS :
2. FELIPE CARRIZOSA GELZIS :
3. ENRIQUE CARRIZOSA GELZIS :

:

Claimants, :

:

and :

:

THE REPUBLIC OF COLOMBIA, :

:

Respondent. :

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VIDEOCONFERENCE: HEARING ON JURISDICTION

Wednesday, December 16, 2020

Washington, D.C.

The hearing in the above-entitled matter convened at 9:00 a.m. (EST) before:

MR. JOHN BEECHEY, CBE, Presiding Arbitrator

PROF. FRANCO FERRARI, Co-Arbitrator

MR. CHRISTER SÖDERLUND, Co-Arbitrator

ALSO PRESENT:

Registry of the Permanent Court of Arbitration:

MR. JOSÉ LUIS ARAGÓN CARDIEL
PCA Secretary of the Tribunal

MR. MARKEL EGUILUZ PARTE
Assistant Legal Counsel

MR. LUIS POPOLI
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Assistant to the Tribunal:

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT BEECHEY: Very good. We will embark upon Day 3 of the Hearing in this matter. We have received the lists of the principal participants from the Parties. Thank you. And there was a three-page slide presentation submitted by Claimant, which has also been received. Unless there are any housekeeping matters, we can proceed to hear the evidence of Mr. Wethington.

MR. MARTÍNEZ-FRAGA: Mr. Chair--

PRESIDENT BEECHEY: --other issues the Parties wish to raise?

(Overlapping speakers.)

MR. MARTÍNEZ-FRAGA: Mr. President and Members of the Tribunal, there is one housekeeping matter for which I apologize in advance for taking your time.

We have removed the factor of Mr. Reetz's presentation, and we want clarification on the ruling concerning the Kenneth J. Vandevelde reference that was made during his presentation.

Mr. President may recall that the Vandevelde issue arose in connection with the Article 10.28(g), Footnote 15, on what Respondent has christened the preclusory, prejudgment, preclusion language or whatever, of Footnote 15 to subsection (g) of Article 10.28. And the Tribunal at that point said something to the effect that

because it was not part of the record, the citation to this doctrine, to this scholarly work, that, of course, it could not be introduced, it would not be fair, et cetera.

Mr. Reetz did raise at that time that this authority had been brought to Respondent's attention, quite frankly, on November 14, over one month ago. This is an issue with respect to which, of course, there is no award or any cases. What exists is the doctrine that--I'm not going to argue it here, I'm not going to plead it. This is not why I'm raising the issue. I'm going to get to the heart of the issue in one second.

What exists is the doctrine. Now, this particular citation was raised on November 14. One of the three arbitrators, of course--Mr. Söderlund--knows about it. He heard argument on it. Respondent knows about it. This is not evidence. This is law.

Now, this is Article 38, classical material. And we just want a clear ruling, if, in fact, the Tribunal is telling us that we cannot at all cite to this authority and bring it to the Tribunal's attention because doing so would prejudice Respondent--and if that's the ruling, that somehow bringing this information that already--that is not evidence, that is law, that has already been communicated to the Party over one month ago, that one of the three arbitrators knows about, raising it for 30 seconds, putting

it on the record, or even less, somehow causes more prejudice to the Respondent than precluding Claimants from raising it. Then we want that ruling to be clear on the record. And that's the subject of this housekeeping issue that I have brought to Mr. President and the Tribunal's attention.

PRESIDENT BEECHEY: Yes. What do Respondents got to say?

MR. DI ROSA: Yes. Mr. Chairman--

(Audio interference.)

PRESIDENT BEECHEY: We can't hear you, I'm afraid. You're on mute.

(Discussion off microphone.)

MR. DI ROSA: So, yes. Mr. President, Members of the Tribunal, Mr. Martínez-Fraga is talking--

PRESIDENT BEECHEY: You are on mute. You are on mute, Mr. Di Rosa. Very sorry. You're showing mute. Still can't hear you. Do you want to start again?

MR. DI ROSA: You still can't hear me?

PRESIDENT BEECHEY: We can hear you now.

(Discussion off microphone.)

MR. DI ROSA: I'm really sorry, Mr. President, but every day it's a new technical adventure.

PRESIDENT BEECHEY: Not at all.

MR. DI ROSA: So, I was saying that

Mr. Martínez-Fraga is referring to an entirely different arbitration. It was presented in this other arbitration, but it's not in the record in this Arbitration. And just because, you know, it happened to be brought to our attention in some other proceeding doesn't necessarily mean that it's part of this record. There is no transitive property to these things. So, we would object simply on the basis that it's not in the record in this case.

MR. MARTÍNEZ-FRAGA: If I may, Mr. President.

PRESIDENT BEECHEY: One second. Yes.

MR. MARTÍNEZ-FRAGA: If I may, right now Mr. Di Rosa has said in a quote "entirely different arbitration." But throughout this proceeding, he has referenced the parallel ICSID proceeding as a parallel ICSID proceeding. At one point it was characterized as the "identical case," which is actually a slide that I'm preparing for closing argument. The whole point is, does raising the point of law prejudice Respondent because it would surprise Respondent, because it's ambush tactics, because it is something that they could not have foreseen, because it provides us with a tactical advantage at the expense of due process.

And we're saying that the answer to all those questions clearly and unequivocally must be and cannot be anything other than no.

Does it prejudice Claimants? Yes.

Why? Because it's directly on point. It is whatsoever--it is what exists because there is no other authority. There is only scholarship. Now, there is a lot of scholarship on this, and it's all a single voice, but that's neither here nor there.

And the only thing we are saying is, how could it be possible that we cannot present this, even though it is very clear that it cannot under any reasonable analysis of fact, logic, or equity prejudice the Respondent, who now says, "No, we are just"--"our objection is that it's a different proceeding."

Well, until yesterday, literally, you were saying that it was the parallel ICSID proceeding that was the same as this case and that these things are not transitive.

Let me tell you what is transitive. What is transitive is the universal obligation to bring to a Tribunal's attention adverse authority. That is transitive, that is universal, and it hasn't been done here. And we just want a clear ruling on this issue.

Thank you.

MR. DI ROSA: Mr. President, if I could respond just very briefly. First of all, we have been saying that it is a parallel proceeding. It is a parallel proceeding. We are saying it is substantively identical, but it is a

separate arbitration. That cannot be denied by anybody. And it's not really a matter of whether this particular authority is prejudicial or is not prejudicial. It's an academic piece; we don't think it has any evidentiary value.

But that's not the point. The point is that Colombia would be prejudiced by a violation of the procedural rules that govern this Arbitration, and, you know, and it has practical implication, Mr. President, because if Mr. Martínez-Fraga's position is upheld, that would mean that either Party could show up at the Closing, for example, and put up all sorts of documents and Authorities that were presented in the other arbitration that happened not to have been presented in this Arbitration. It would be, frankly, a bit of a mess.

So, you know, I think just as a matter of principle, it can't be upheld.

Thank you.

MR. MARTÍNEZ-FRAGA: The Briefs are identical, even the grammatical mistakes.

PRESIDENT BEECHEY: Well. All right. Thank you. We will take that away and not waste time now. We'll take it away over the mid-morning break and decide what we're going to do.

Mr. Di Rosa, just as a practical matter, you came

over loud and clear just now, but your screenshot, as I see it, is showing you firmly muted.

MR. DI ROSA: My screenshot?

PRESIDENT BEECHEY: Yeah. Looking at you on the screen, at the bottom where it gives your name, it shows you as being muted.

MR. DI ROSA: Yeah. It would be a lot to explain, Mr. President, but that was part of my confusion.

PRESIDENT BEECHEY: Well, all I'm concerned about is this: You better be aware and get it fixed because, otherwise, if you are having an aside with one of your colleagues over there, you'll be broadcasting to the entire room.

MR. DI ROSA: No, I understand. It just has to do with the fact that we're in the same conference room but sharing the same microphone, Mr. President. We'll try to be mindful of it.

PRESIDENT BEECHEY: Well, as long as you're aware of it.

MR. DI ROSA: Yes. Thank you.

PRESIDENT BEECHEY: All right. Anything else we need to think about before we turn to the evidence of Mr. Wethington?

MR. MARTÍNEZ-FRAGA: Not on Claimants' part, Mr. President.

PRESIDENT BEECHEY: Thank you very much.

Respondent?

MS. HORNE: Not for our part either, Mr. President.

PRESIDENT BEECHEY: Ms. Horne, thank you very much.

OLIN WETHINGTON, CLAIMANTS' WITNESS, CALLED

PRESIDENT BEECHEY: All right. Mr. Wethington, good morning or good afternoon; but good morning, I think, in your case.

THE WITNESS: Good morning to you. Thank you. I'm happy to have this opportunity to appear.

PRESIDENT BEECHEY: Well, thank you for being here. As a starting point, there is, I think, a declaration which should be put up on the screen in front of you. And I shall be grateful if you could read that on to the record.

THE WITNESS: Yes.

I solemnly declare, upon my honor and conscience, that my statement will be in accordance with my sincere belief.

PRESIDENT BEECHEY: Thank you very much.

Mr. Martínez-Fraga, I think you're introducing the expert evidence of Mr. Wethington; is that correct?

MR. MARTÍNEZ-FRAGA: That is correct, sir. May

I?

PRESIDENT BEECHEY: You may, indeed. And we have allowed 30 minutes for direct.

MR. MARTÍNEZ-FRAGA: Thank you. Thank you, sir.

DIRECT EXAMINATION

BY MR. MARTÍNEZ-FRAGA:

Q. Mr. Wethington, is there anything in your Witness Statements, sir, that you care to change at this time?

A. No, there is not. Thank you.

Q. Sir, do you stand by your Witness Statement?

A. Yes, I do.

Q. Both of them? Both of them, sir?

A. Yes, both of the statements, yes.

Q. Sir, what is the scope of your testimony in this proceeding in the capacity as an expert witness?

A. I have been asked to testify with respect to certain provisions of the NAFTA Treaty and also the Colombia-U.S. Trade Promotion Agreement.

Q. Were you asked to find specific findings and reach specific conclusions, sir?

A. No, I was not.

Q. Okay. Sir, are you aware that the textual language of 31CFR1.11(f) provides: "An employee or former employee shall not provide with or without compensation opinion or expert testimony concerning official

information, subjects, or activities except on behalf of the United States or a party represented by the Department of Justice without written approval of agency counsel."

Are you aware of that language, sir?

A. Yes, I am. Yes, I am.

Q. Now, up on the screen, sir, we have 31CFR1.11(f). Sir, do you see the words "former employee" in the regulation itself that's right there in front of you?

Do you see those words?

A. Yes. I see those words.

ARBITRATOR SÖDERLUND: I'm sorry. Is this an issue in the case?

MR. MARTÍNEZ-FRAGA: Yes, sir. It's an issue in the case because the United States has commented on Mr. Wethington's testimony as being against the law, and I thought that it was important for the Witness to testify the extent to which he opines that his testimony is or is not against the law. But if the Tribunal wishes for me to not elicit that testimony from the Witness, I am prepared to move on.

ARBITRATOR SÖDERLUND: Yeah. I could do without it, but I have to listen to opposite--and co-arbitrators.

MR. MARTÍNEZ-FRAGA: I'll make it easy for the Tribunal. I'll withdraw the entire line of questioning.

ARBITRATOR SÖDERLUND: Okay.

MR. MARTÍNEZ-FRAGA: Thank you, sir.

BY MR. MARTÍNEZ-FRAGA:

Q. Sir, are you testifying here on behalf of the United States of America?

A. Of course not. I testify independent of the United States Government.

Q. Of course. Sir, as of January 1, 1994, the date on which the NAFTA entered into force, was there anyone in the United States more qualified than yourself to opine on the context, object, and purpose of the NAFTA?

And I'm talking about the NAFTA Chapter Fourteen.

A. Right. Well, Counselor, you asked me a bit of an awkward question, embarrassing question, but I would say I don't believe so, no.

I was chief negotiator of this chapter, Financial Services Chapter. The Treasury was given by the Administration very broad authority to negotiate the provisions of this chapter.

I was also, I might add, involved in the run-up to the negotiations during the time I served in the White House; and subsequent to my service at the Treasury, I wrote a book that was published in 1994 on financial market liberalization under the NAFTA. And it was not a best seller, but it is there. I think it's the only book on this chapter that has been written.

Q. Well, thank you, sir.

Sir, was the NAFTA intended to be a model for other free trade and trade protection agreements in this hemisphere, meaning in North and South America?

A. Yes. Very definitely. I testified to this in my Witness Statement, and I would refer the Tribunal to the book again that I referenced, where in that book--this is almost 30 years--writing almost 30 years ago now, 28 years ago--I very clearly explicitly said that during the negotiation, we regarded it as a template for future agreements.

Q. Sir, is the U.S.-Colombia TPA one such hemispheric treaty based on the NAFTA, in your opinion?

A. Yes, very definitely.

Q. Sir, as a former Assistant Secretary of the Treasury for International Affairs and lead negotiator of Chapter Fourteen, Financial Services of the NAFTA, did you have a specific mandate identifying specific priorities for Chapter Fourteen of the NAFTA, the predecessor chapter to Chapter 12 of the Treaty that here concerns us?

A. Yes, very definitely. I had a core set of priorities. If I was to summarize that very briefly, I would say there were four of them that were of top priority. The first was the inclusion in the separate Financial Services Chapter of an enforceable national

treatment standard. The second was a very broad MFN, Most-Favored-Nation, standard provision. The third was a strong access and establishment provision that would give America and, in this case, also Canadian investors access to that market, and the fourth was a robust investor-State Dispute Settlement mechanism.

These were regarded, all four of these, as essential for the protection of investment flows for the protection of investors. I must say we had at that time, as did the financial sector in the United States, frankly, very little confidence in the Mexican judicial system. We regarded it as not impartial. It was frequently corrupt, and we could not leave U.S. investors with solely a set of standards without enforceability.

Q. Thank you, sir.

As part of your mandate as lead negotiator for the United States Chapter Fourteen of the NAFTA, were you charged with providing Financial Services Investors with ISDS rights limited only to the treatment protection standards imported from Chapter Eleven to Chapter Fourteen of the NAFTA, meaning from the standard chapter on investments to the Chapter Fourteen Financial Services Investor chapter?

A. No. Not at all. To the contrary. I must emphasize this. To the contrary. My mandate was to

include within an investor-State provision under Chapter Fourteen the entirety of Chapter Fourteen commitments. It was not limited simply to two imported commitments from the general investment chapter. Had we sought--if I might, Counselor. Had we sought to limit--

PRESIDENT BEECHEY: I'm so sorry, Mr. Wethington. Mr. Wethington, I'm so sorry to interrupt you. May I be quite clear. You say--is this correct on the Transcript: "My mandate was to include within an investor-State provision under Chapter Fourteen the entirety of Chapter Fourteen commitments"?

Is that what you intended to say?

THE WITNESS: Yes. All commitments in Chapter Fourteen were to be subject to investor-State Dispute Settlements.

PRESIDENT BEECHEY: Very good. I'm so sorry--

(Overlapping speakers.)

THE WITNESS: Now, in addition, we imported--Mr. President, obviously, we imported several provisions into that process that are found in the general investment chapter, but that was a supplementation. It was not a limitation on the application of ISDS to Chapter Fourteen protections.

Had we sought--had we sought to limit it, had we sought to exclude the entire Chapter Fourteen, as

Respondent and the U.S. Government now take the position, we would have violated, in my view, the mandate that I was under. We would have done it directly. This would have been a large exception. It was an exception larger than the prudential and monetary exceptions which are expressly provided for in the chapter. This would have been a monumental reversal of position had we excluded the entire Chapter Fourteen provisions from ISDS.

BY MR. MARTÍNEZ-FRAGA:

Q. Sir--

A. It would have met with the opposition, I would suggest, if I might, an additional point or two.

It would have met with the opposition of the American Congress, of the U.S. financial industry, which had been told, which believed that the chapter included all the provisions of--that ISDS included all the provisions, and it would have been contrary to the politics at the time.

In 1992, the Administration was engaged in a reelection campaign where the primary candidate--an independent, primary independent candidate, Ross Perot--made the NAFTA a centerpiece. If we had gone to the people with a weak chapter, it would not have received support. It would have opened the Administration to vulnerability to Mr. Perot, additional vulnerability, and

it would not have been accepted to exclude enforceability from this Agreement.

And the contemporaneous evidence that was presented in 1993 to the American Congress, that's represented in the Services Policy Committee Report shared by the Chairman of Citibank, all confirm that any violation--these are the words of the Administration--"Any violation of investor protection under Chapter Fourteen is subject to direct action by investors under this ISDS provision."

BY MR. MARTÍNEZ-FRAGA:

Q. Thank you, sir.

As part of your mandate as lead negotiator for the United States of Chapter Fourteen of the NAFTA, did your mandate consist in providing Chapter Fourteen Financial Services Investors with less enforceable treatment protection standards pursuant to ISDS than those that were accorded to its Chapter Eleven general investment chapter counterparts?

A. No. No. Again, to the contrary. My constituency was the American financial industry. I could not go to them, and I consulted with them on a regular basis before and after virtually every negotiating session, and say to them: "We have not done as well for you as we have done for general industry."

That would have been an unthinkable proposition. It was at least as good. Comparability was an element of this negotiation, and I would refer, respectfully, the Panel to my Witness Statement on this point. This is also in my book as well. It is supported by that contemporaneous writing that comparability was an element of this negotiation. It would have been unthinkable to go--for the Treasury to go to its constituents and say, "On this key point of enforceability, we've failed you." Unthinkable.

Q. Sir, is the current U.S.--thank you.

Is the current U.S. administration's policy of providing financial service investors with less rights enforceable by ISDS consistent with the U.S. Administration's policy on that subject as of January 1, 1994, when the NAFTA entered into force?

A. No. There's a big difference between current policy and the policy in effect in 1994.

Back in 1994, we viewed ISDS as an essential part of the international architecture for the protection of investment flows and investors. Today, ISDS is in disfavor. The current administration is hostile to ISDS. This is reflected in the recently revised NAFTA, the USMCA. The task that is before me is to interpret, as I saw it at the time, the meaning of these provisions when the Treaty

went into effect, 1994, with no eye to current administration policy.

I must say, in my testimony I take no position on current policy. Yes, it is different. It is very clear it is different. It is a break with 30 years of support for ISDS by every successive American administration, but the debate over current policy is not what's before this Tribunal. It is: What did this Agreement mean at the time it was entered into? I am seeking to provide not only the textual support for this position, but also the policy behind it, the treaty practice that's behind it, an explanation of my mandate as negotiator of this chapter, and also the contemporaneous evidence that is available to this Tribunal--which, I must say, with all due respect, Respondent and the U.S. Government have sought not to address in this proceeding.

Q. Sir, thank you.

Was Article 1406 of the NAFTA, sir, and its TPA counterpart, 12.3--that's the Most-Favored-Nation clause--intended to be primarily enforced pursuant to State-to-State arbitration?

A. No. No, that was not the intent.

This NAFTA has two dispute settlement mechanisms. One is for enforceability; that is applicable to investors or financial institutions. The other is the State-to-State

mechanism which you just referenced; that mechanism provides no enforceability. It does not make investors whole for violations. It is prospective. It is a very different approach.

Both were written in, but they carry two different approaches.

Q. Thank you.

Was Article 1405, the Most-Favored-Nation clause of the NAFTA, the counterpart to 12.2 of this Treaty, of the Colombia-U.S. TPA, intended to be primarily enforced pursuant to State-to-State arbitration, sir?

A. No. It was available. State-to-State could encompass MFN. But the enforcement, the enforceability of that provision--that is, to make whole where wrongs occurred--rested under the investor-State provision.

Q. Thank you.

Sir, you identify in your Witness Statement providing Financial Services Investors with robust and fulsome ISDS procedural rights, most-favored national treatment protection standards, subject to ISDS enforcement, and national treatment protection standards, subject to ISDS enforcement.

Are you aware, sir, other than your testimony as a lead negotiator, of any contemporaneous evidence supporting those propositions?

A. Yes, definitely. I would, in response to your question, refer to the testimony of the U.S. Treasury before the House Banking Committee that provided testimony on these points. It very clearly stated that investors were protected by the investor-state dispute settlement mechanism under the NAFTA Agreement.

Q. Sir, why were financial service investors provided with a chapter separate and distinct from all other investors? Why were all other investors placed in one chapter--in that case Chapter Eleven, and in our case Chapter 10--and Financial Services Investors treated separately and distinctly with Chapter Fourteen?

A. Our view at the time was that the financial sector was foundational, that it deserved its own set of rules. We sought to make those rules robust, and we were responding to that mandate by creating a separate Financial Services Chapter.

There was precedent for that in the Canadian free trade arrangement. This was not the first time in an FTA. But we were seeking to build on that, to enlarge it, to accommodate the peculiar features of the financial industry.

Q. Sir, what role did State-to-State arbitration have in the context of your mandate as lead negotiator for Chapter Fourteen of the NAFTA?

A. I'm sorry, could you--

Q. Sure.

A. Can you repeat that? The sound didn't--

Q. Sure. What role--I apologize for the technology.

What role did State-to-State arbitration have in your mandate, with respect to your mandate as lead negotiator for Chapter Fourteen of the NAFTA?

A. State-to-State was available for addressing disputes that were primarily prospective in nature. It was focused on--it was forward-looking. It was not remedial in the sense that investor-State-related arbitration was. But it was a mechanism for the ongoing management of the Agreement.

Q. Sir, is Section 4.1.2(b) of the Colombia-U.S. TPA based on Section 1401 of the NAFTA?

A. I'm sorry. I'm going to ask you, Mr. Martínez-Fraga, to repeat your question.

Q. Sure. Was Section 12.1.2(b) of the TPA based on Section 1401 of the NAFTA?

A. Yes. Yes, it was.

Q. Was Article 12.1.2(b) of the U.S.--of the Colombia-U.S. TPA at all intended to limit the enforceability of substantive provisions contained in Chapter 12 pursuant to ISDS rights, in your opinion?

A. No, it was not.

Q. Sir, I just have two more questions.

One, I just want you to give me a brief yes-or-no answer. You don't need to into any explanation of the relevant case law. Do you opine that your testimony here is against or contrary to U.S. law?

A. I'm not sure I heard your question, Mr. Martínez-Fraga.

Q. I apologize again.

Do you believe that your testimony here today is contrary to U.S. law? And I just ask that you provide us with a yes or no and maybe a two-sentence explanation.

A. No, I do not. The U.S. Treasury Regulation does not apply to former employees, in my judgment. There is case law to that effect. We have researched it. It is contained in a letter dated March 15 that lays out the case law on this point. There is no case law to the contrary that extends the Treasury Regulation to former employees.

Q. Do you have any--

A. There are eight cases that rule the other way, 8 to 0.

Q. Did you ever discuss this point with the Treasury or State?

A. Yes.

Q. Did they provide you with any Authority suggesting that it was illegal other than the Regulation

that they promulgated themselves?

A. No. They rested on the text of the Regulations, which, in my view, exceed the statutory authority. The statute does not extend to former employees.

Q. Did you testify that there was authority to that extent on that point, that there were legal cases holding your view, supporting your view, that the statute--that the Regulation is beyond the scope of the enabling statute?

A. Yes. There is ample authority and none to the contrary on that issue. I list in a letter that I wrote May 15 the eight cases that have been identified that support that proposition.

Q. This is the final question. Do you have any personal reasons for testifying here today, sir?

A. Well, I think when one spends as much time on an issue as I have on this and was so involved in the formulation of this, the financial chapter of the NAFTA, one becomes a bit, at minimum, intellectually attached to it. I'm not in the business. I have never testified as an Expert Witness in any other international arbitral proceeding in my life. But I've chosen to do so here because I care about the historic record.

Q. Thank you so much.

A. This case should not, with all due respect, be influenced by current administration policy, U.S.

administration policy. That is very different than it was at the time.

At the time, we viewed ISDS as part of the international architecture related to investment flows and investment protection. Today, this administration has broken with that position, with that tradition, and is hostile to ISDS, and that's evidenced in the revised NAFTA, the USMCA.

I want to see the historic record upheld. That is my personal--the personal component.

Q. Thank you, sir.

MR. MARTÍNEZ-FRAGA: Mr. President, I have no further questions.

MS. HORNE: Mr. President, I believe you're on mute.

PRESIDENT BEECHEY: Forgive me.

Mr. Grané, I think you're conducting the cross-examination; is that right?

MR. GRANÉ: No, Mr. President. It will be my colleague Ms. Horne.

ARBITRATOR FERRARI: I'm sorry if I interrupt. I would like to have a short talk with my colleague.

Could we please, José, go into a breakout room?

PRESIDENT BEECHEY: Yes. Of course.

SECRETARY ARAGÓN CARDIEL: Absolutely.

PRESIDENT BEECHEY: Ms. Horne, back to you in a moment. I hope.

MS. HORNE: Not at all. Thank you.

(Tribunal conferring.)

PRESIDENT BEECHEY: Mr. Wethington, Ms. Horne, I'm very sorry to keep you waiting. We're back. And I now can't see Mr. Wethington. I can see you, but Ms. Horne I can't see.

I've got you both. Very well.

All right. Apologies for that intervention. Over to you.

MS. HORNE: Thank you very much, Mr. President.

CROSS-EXAMINATION

BY MS. HORNE:

Q. Good morning, Mr. Wethington. Can you hear me?

A. Yes, I can. Good morning to you.

Q. Very nice to meet you over Zoom.

A. Likewise. Thank you.

Q. My name is Katelyn Horne and I represent the Republic of Colombia in this proceeding, and I'd like to thank you for testifying today.

This testimony is being transcribed, so it will be very important for us not to speak over each other. I will therefore ask that you let me finish my question before you start to answer, and I'll also let you finish

your answer before I begin my next question.

That said, we are operating under a strict time constraint, so I will ask that you do answer the question as it is posed and not entertain long explanations of those answers unless requested.

Please do also let me know if you need a break at any time.

A. Thank you.

Q. Earlier this morning we provided your counsel with a set of documents. I'll display documents on the screen to the extent it is helpful to you, but I wanted to confirm that you do have access to those documents.

A. I'm not sure I do, personally. I'm sorry.

My assumption had been that documents that were involved in my questioning would be shown on the shared screen feature. I'm not technologically very adept. So, if you sent them to me, I apologize.

Q. No, not a problem at all, Mr. Wethington. We will display theme on the screen as it's helpful, and if you feel that you need to refer to a document, do just let me know.

A. Thank you.

Q. Mr. Wethington, do you agree that consent is a fundamental requirement of investor-State arbitration?

A. Yes. I do.

Q. Are you familiar--I apologize. Yes?

A. Yes. Yes, I do.

Q. Thank you, sir.

You're familiar with the rules of interpretation set forth in the Vienna Convention on the Law of Treaties?

A. Yes, generally familiar.

Q. Do you agree that those rules of interpretation reflect customary international law?

A. The answer would be yes, but, as counsel--I'm not serving here as counsel, and I was not asked to opine on that issue, but that's my understanding.

I note the United States is not a party to that Convention, but it does represent the international consensus.

Q. Thank you, Mr. Wethington. And you're aware that one of rules of treaty interpretation is that a treaty must be interpreted in accordance with the terms' ordinary meaning?

A. Yes. That's the text of--I think it is Article 31, but accompanying with that are some additional elements. This ordinary meaning in light of context and object and purpose, they go together, in my view.

Q. Certainly. Article 31 does include those additional features, but my question is: One of the fundamental rules of treaty interpretation is that a treaty

must be interpreted in accordance with the ordinary meaning to be given to its terms; is that correct?

A. That's correct, as a general statement.

Q. And, Mr. Wethington, you've stated that you base your opinions on the interpretation of the TPA, at least in part, on your interpretation of the NAFTA; is that correct?

A. With respect to some provisions, yes. I do that because the language in the TPA is taken almost verbatim on the key provisions here from the NAFTA. And as I wrote in my book, it was the intention, at least of the U.S. side, the U.S. negotiators, that an eye would be placed on the future on negotiation of FTAs, so we were very cognizant of the NAFTA being a template for future Free Trade Agreements.

In my view, the Colombia-U.S. agreement reflects that ambition and the implementation of that objective.

Q. Thank you. So, with that understanding, I'll start with the text of the NAFTA itself.

Now, I understand NAFTA includes an investment chapter, Chapter Eleven, and then a separate chapter on financial services; that is Chapter Fourteen.

Do you agree?

A. Yes, I agree with that.

Q. In your Expert Report and again in your testimony this morning, you've stated your opinion that Financial

Services Investors under Chapter Fourteen can submit to arbitration claims alleging breaches of any of the substantive provisions of Chapter Fourteen; is that correct?

A. That is correct. That is my view.

Q. I'll ask that we project NAFTA on the screen. And we'll begin with Chapter Eleven, which, as you indicated, is the investment chapter. That starts on Page 265 of the document on the record as CLA-0113.

Do you see the first page of NAFTA on your screen, Mr. Wethington?

A. Yes. I see a portion of the first page, yes. Now it's enlarging.

Q. Thank you.

We'll do our best to keep things in context.

A. I understand.

Q. To the extent that you want to see other pages, you can certainly let us know.

A. I understand.

Q. So, we'll begin with the first page of the investment chapter, which is Chapter Eleven. And you see here, Mr. Wethington, Section A at the top. Is it correct to say that Section A of the investment Chapter includes that chapter's substantive obligations?

A. Well, I want to be careful how I respond to that

and what the meaning of "substantive obligations" is. There are substantive--

Q. Perhaps I can clarify--

A. There are obligations in Section B which I would also characterize as of a substantive nature.

Q. I'm not attempting to draw any particular distinction there, Mr. Wethington. I'm just trying to demonstrate Section A has some of the protection we're discussing--national treatment, Most-Favored-Nation--and then Section B contains the Investor-State Dispute Settlement mechanisms.

Is that accurate?

A. Yes. That is generally accurate, yes.

Q. Let's turn now to that Section B which begins on Page 272. This section, you'll see, is entitled "Settlement of Disputes Between a Party and an Investor of Another Party"; is that correct?

A. That's correct.

Q. And this section includes Article 16--1116, rather, which begins on the bottom of the page.

Do you see that?

A. I don't see the full Article. I see a portion of it.

Q. I think it stretches onto two pages, so you'll see the beginning there.

A. Yes. I see where you're referencing. Umm-hmm.

Q. The first part of Article 1116 reads: "An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: Section A," and then the Article continues.

Did I read that correctly?

A. Yes.

Q. And as we've just clarified, Section A includes those protection obligations that we were discussing, like national treatment, Most-Favored-Nation Treatment?

A. Yes, it does.

Q. So, Article 1116 here states that investors under this chapter can submit to arbitration claims that a State has breached the protections of Chapter Eleven; is that correct?

A. Yes.

Q. Let's turn now to the first page of Chapter Fourteen of the NAFTA. This is the Financial Services Chapter.

Now, Mr. Wethington, Chapter Fourteen doesn't include its own Section B like Chapter Eleven did, that has a full Investor-State Dispute Settlement mechanism.

That's correct; right?

A. That's correct.

Q. So, instead, we see here the only reference--or the first reference, rather, to investor-State arbitration comes in the form of Article 1401(2). And I'll mention there that the second sentence begins: "Articles 1115 through 1138"--and I'll stop to clarify.

Do we agree that refers to the Section B of Chapter 11, the investor-State settlement dispute mechanism?

A. Yes. The second sentence incorporates that.

Q. And that second sentence proceeds: "Articles 1115 through 1138 are hereby incorporated into and made a part of this chapter solely for breaches by a party of Articles 1109 through 1111, 1113, and 1114, as incorporated into this chapter."

Did I read that correctly?

A. Yes. You read it correctly.

Q. So, at the very least, we can agree that through Article 1401(2), Financial Services Investors are authorized to submit to arbitration claims of a breach of those Articles, 1109 through 1111, 1113, and 1114? We agree on that; correct?

A. Correct.

Q. Now, Mr. Wethington, can you please point me to the provision of Chapter Fourteen that expressly authorizes a Financial Services Investor to submit to arbitration

claims that a party has breached an obligation contained in Chapter Fourteen?

A. Yes. The intention of the incorporation, in my view, was to add to the imported provisions of Chapter Eleven--the addition, I should say, of those imported provisions. It did not limit the reach of the Section B incorporated provisions.

This references, really, a subset of the provisions that are subject to the imported ISDS mechanism and limits the imports, the substantive imports from Chapter Eleven, to those that are referenced. And there are really--really only two of them: It's the expropriation and the transfers provision.

Q. Yes. But Mr. Wethington, you began your answer with reference to the intention. And we can certainly discuss that later on, but can you point me to a particular provision in Chapter Fourteen that expressly authorizes a Financial Services Investor to submit a claim to arbitration under one of the provisions of Chapter Fourteen--under one of the protections of Chapter Fourteen?

A. The language of your question is not included in this provision, but I can attest that it was the intention via the incorporation of Section B to reach the provisions of Chapter Fourteen.

If we had sought to exclude them, we would have had, I think, two options: One would be to create a carve-out, as we did for the prudential and monetary exception, of this entire chapter. As I had indicated earlier, this would have been a monumental point, more significant even than the prudential chapter; or, alternatively, we could have left the ISDS provision in Chapter Eleven, not imported it into Chapter Fourteen, and simply made applicable, in a Chapter Eleven context, to financial investors.

We did neither of those.

Q. I understand, Mr. Wethington, but just so that I understand and we're on the same page, you've stated the language in my question, which is an express authorization for a Financial Services Investor to submit to arbitration a claim under one of the protections of Chapter Fourteen, that language is not included in the text of the Treaty.

Do we agree?

A. We agree it is not express in the words of your question, but, in my view, as the negotiator of these provisions--again, I'm not speaking for the Government. I'm speaking from my expertise involved in this Chapter--the intention was to reach all the substantive provisions of Article 14. Otherwise, this entire structure in this Chapter makes no sense. If we were to have

negotiated rights without remedies, we would have provided an exception, an express exception. It was that important.

The interpretation of this that, with all due respect, you are suggesting would never have been accepted by the Congress. It would never have been accepted by the U.S. financial services industry, and I can tell you definitively it was not within my mandate.

Now, I can accede to some ambiguity in this provision--

Q. Thank you, Mr. Wethington.

A. --but that does not answer the question of interpretation. Such a meaning was incorporated; the question is its scope, and to suggest the scope carved out the entire Chapter Fourteen substance simply is not tenable. There is no support in the record anywhere: Congressionally, among industry, among administration submissions to the Congress--

Q. Thank you, Mr. Wethington.

A. --that indicates we were eliminating this Chapter from ISDS.

Q. No support in the record except, perhaps, the text of the TPA and--

PRESIDENT BEECHEY: Forgive me. Ms. Horne, I'm so sorry. I just want to be absolutely clear.

Your question was very clear. Your question at

38/5 was that this language was not included in the Treaty. And then came the answer that that language is not express--it was not included in the language of your question. And I'm not sure, with all due respect to Mr. Wethington, you got a straight answer to the question you put, which was: Was this language actually in the Treaty?

MS. HORNE: Thank you, Mr. President. I agree it would be helpful to clarify, at least for the sake of having a clean record. So, I'll restate the question.

PRESIDENT BEECHEY: Would you do it--forgive me. In fairness to Mr. Wethington, would you do it with precise reference to the Transcript, which has now jumped ahead of me, but it started at Page 38, Line 15, I think?

MS. HORNE: Thank you very much, Mr. President.

PRESIDENT BEECHEY: That's your question. And then it's the first part of his answer which changed the text from "treaty" to "the question itself."

MS. HORNE: Certainly. Thank you.

BY MS. HORNE:

Q. Mr. Wethington, is there a provision in Chapter Fourteen that expressly authorizes Financial Services Investors to submit to investor-State arbitration claims alleging a breach of one of the protections in Chapter Fourteen? Yes or no.

A. There is no provision as you describe because it was not necessary. It was understood that the incorporation of Section B from Chapter Eleven reached the provisions of Chapter Fourteen. This would have been otherwise--any interpretation otherwise would have been contrary to the practice, the treaty practice, and structure of this agreement.

Where we intended exceptions of this magnitude, we did it specifically, explicitly, and there is no indication whatsoever that the intention of the Parties was to carve out from Section B all of the obligations of Chapter Fourteen. There is nothing in the record that supports that. And, in fact, everything in the record that is contemporaneous--and I understand why Respondent and the State Department have not addressed it, because everything that is contemporaneous is to the contrary. The Treasury's testimony--

(Overlapping speakers.)

Q. Mr. Wethington, I'm sorry to interrupt, but I've asked a yes or no question. And I believe he's answered that question, so I'd like to move forward, if I may, Mr. President.

A. Please.

Q. Thank you, Mr. Wethington.

I do apologize, but we are operating under time

constraints, so I have to keep moving forward?

A. I understand. I'm sorry to monologue there.

Q. It's understandable, and we'll certainly endeavor to cover as much as we can during the time that is allowed.

So, Mr. Wethington--yes or no--you are testifying based on your personal recollection as to what the intent of the United States was at the time; is that correct?

A. Yes, what our intent is and what we, in fact, accomplished.

Q. Do you believe that the intent of one treaty party alone to a multilateral treaty is determinative in interpreting that treaty?

A. I think interpretation is supported by a variety of sources. I am testifying as to what at the time this provision meant, and that view was shared at the time by the other governments.

Q. Do you believe that your Expert Reports submitted in this Arbitration constitute travaux, or preparatory works of the Treaty under the Vienna Convention?

A. My Expert--my testimony?

Q. Your Expert testimony, correct.

A. You are asking me a legal question as to the definition of preparatory work, and I'm sorry, I'm not able to answer that, and I have not testified on that point.

Q. You had addressed the Vienna Convention rule--

A. I testified based on my understanding as the negotiator of this Chapter--

Q. I understand.

A. --what these words mean.

Q. I understand. Thank you, Mr. Wethington.

In your Expert Reports, have you cited any contemporaneous documents exchanged between the NAFTA Treaty Parties--México, Canada, and the United States--during the negotiation of NAFTA?

A. During the negotiation?

Q. Correct.

A. I don't think so in my book. But the book itself I regard as contemporaneous, and that book was made available in draft to the other two governments. It was reviewed. I'm not going to say they cleared it in a formal sense. Did they write a letter and say "all good" or whatever, but I did have feedback from all Parties, and, as I said in the book itself, I was encouraged by the other Finance Ministries that published the book, and they reviewed it. Some of them made suggestions as to the text of that book.

Q. I understand, but, just to clarify for the record the question, in your Expert Reports, have you cited any contemporaneous documents exchanged between México, Canada, and the United States with respect to the negotiation of

the NAFTA? Yes or no.

A. Not in the Expert Report, no.

Q. Mr. Wethington, would you agree that the three NAFTA States Parties have a common understanding as to the proper interpretation of Article 1401(2), which we just discussed?

A. I don't know what the current interpretation is of the other governments.

Q. Are you aware, Mr. Wethington, that México and Canada submitted years ago formal interpretations of Article 1401(2) in which they reached a common agreement?

A. I am not aware of that. My assumption is you're referring to the Fireman's Fund case. And in response to your question, as you have asked it, I do not believe, even between México and Canada there was a common view expressed as to the application. And I'm glad to elaborate on that.

Q. Certainly. And what I'll do is bring us directly to the documents that I was referencing, and we'll begin calling up on your screen RLA-0114, which you'll see from the first page is the submission of Canada in the Fireman's Fund v. México arbitration.

Do you see that on your screen?

A. Yes, I do.

Q. And we'll turn to Paragraph 16 of this submission. And you'll see there the Statement from Canada

indicates as follows: "As a general rule, disputes arising under Chapter Fourteen are subject to the general State-to-State dispute settlement provisions of Chapter Twenty, as modified by Article 1414."

"The NAFTA Parties incorporated into Chapter Fourteen the investor-State Dispute Settlement provisions of Section B of Chapter Eleven (Articles 1116 through 1138) solely"--and that word is underlined--"for breaches of Articles 1109 through 1111, 1113, and 1114, as incorporated into Chapter Fourteen by Article 1401(2)."

Do you see that?

A. Yes. Yes, I do. I see that.

Q. All right. And now, we're going to turn to the submission of México, Mr. Wethington. That's RLA-0113, but I'd like to ask first, do you speak Spanish?

A. No, I'm sorry, I do not.

Q. Not at all. What we will do, instead--this document is, of course, submitted in Spanish. We have provided a translation of the relevant provision in our Rejoinder. So, I ask that we put that section of the Rejoinder on the screen.

This is Paragraph 240 of Colombia's Rejoinder in this Arbitration. And I'll read here from that translation in our Rejoinder. "If a claim relates to an investment in a financial institution, only Chapter XIV applies, in

accordance with the above. Article 1401(2) expressly incorporates the entire Section B of Chapter XI, the provisions that establish and regulate the investor-State procedure, but with the important reservation that these provisions are here by incorporated...solely for the breaches by a Party of Articles 1109 through 1111, 1113, and 1114, as incorporated into Chapter XIV. In other words"--and these words are bolded--"an investor in a financial institution can only resort to investor-State Dispute Settlement procedure with respect to those provisions of Chapter XI that have been expressly incorporated into Chapter XIV and may not invoke any of the remaining obligations from Chapter XI or Chapter XIV in such proceeding."

Did I read that correctly?

A. You read that correctly, yes.

Q. And now, we will turn to the U.S. non-disputing Party submission in the present case. We will pull that up on your screen. And we will turn to Paragraph 10. And here, the United States in its submission in the present proceeding, has discussed the Fireman's Fund arbitration. And it observed: "The Fireman's Fund Tribunal considered the scope of NAFTA Chapter Fourteen and explained how the NAFTA Parties arrived at the more limited scope of investor-State arbitration for claims falling within the

scope of that chapter than for NAFTA's Investment Chapter."

Do you see that?

A. I see that language, yes.

Q. And on the next page in Paragraph 11, the United States continued by saying: "The Fireman's Fund Tribunal correctly noted that the NAFTA Parties did not consent to arbitrate National Treatment or Minimum Standard of Treatment claims for financial services matters. Rather, such claims were subject to State-to-State dispute resolution, not investor-State dispute resolution."

Do you see that?

A. Yes, I see that. I see that language.

Q. Now that we've reviewed these three submissions from the three NAFTA Parties, do you agree that the United States, México, and Canada are in agreement that Article 1401(2) limits the set of claims that a financial services investor can bring to arbitration under NAFTA?

A. No, I do not agree with that.

Q. You do not agree that the Parties have reached agreement from those three submissions that I've indicated?

A. No. And I'm happy to explain the reasons for my position.

Q. I'm not sure that that's necessary. You can perhaps do so with counsel.

(Overlapping speakers.)

ARBITRATOR FERRARI: I'm sorry, Counsel, if I can interrupt you.

Sorry, Counsel, I would like, since it's a surprise answer to you, in my opinion?

THE WITNESS: Sorry. Mr. Ferrari, I'm not--the sound is not--I'm not hearing you.

ARBITRATOR FERRARI: Do you hear me now?

THE WITNESS: Yes. Thank you.

ARBITRATOR FERRARI: So, it seems it looks like this was not the answer Ms. Horne was expecting. She does not want you to elaborate, but I would like you to elaborate on why you have this different view, given that we now saw three different submissions from the Treaty Parties saying something differently.

Could you succinctly--because I don't want to take too much time, but since it was apparently a surprise answer I would like you to elaborate on this.

MS. HORNE: And Professor Ferrari, I--certainly, my only concern was the time constraint. I would certainly be happy to hear from the Witness on this as well. So, thank you for your intervention.

THE WITNESS: Yes. Let me try to address this by maybe starting with the Canadian submission that you had on the shared screen. You had put, if I recall, Paragraph 16.

BY MS. HORNE:

Q. That's RLA-0114. We can project that on the screen.

A. Yes. I do not take either of these sentences that are in Article 16 as standing for the proposition you indicate. The first sentence that says, as a generally rule, disputes arising under are subject to general, yes, there can be Party-to-Party dispute settlement proceedings with respect to disputes that may also arise under investor-State, in my view. These are not exclusive remedies for dispute settlement.

The second thing I would say about this--so, it's a limited statement. It's true, but limited. It does not encompass investor-State, that first sentence. It does not exclude the option of investor-State.

The second thing I would say as to that sentence is, even if it did, it does not recognize the fact that there are incorporated provisions under this provision. The second sentence in my reading is nothing more than a repetition of the provision itself in Article 1401. It doesn't add anything beyond the text of the provision. It doesn't explain. It doesn't talk about the implications.

It doesn't talk about the intention of the Parties, and so this is a statement that is not representative and not applicable to the proposition that all of Chapter Fourteen is excluded. It does not stand for

that proposition.

So, this is a very limited statement, and, as I said, even the first sentence is not--is not accurate on its terms.

Q. I think I understand, Mr. Wethington. Your--

A. I do not take this Canadian statement as responsive to your question.

Q. So, the second sentence that states: "The NAFTA Parties incorporated into Chapter Four--Fourteen the investor-State Dispute Settlement provisions of Section B solely"--and that word "solely" is underlined--"for breaches of Articles 1109 through 1111, 1113 and 1114."

A. That's essentially a--

Q. Your submission that the word "solely" doesn't really mean "solely" in that context?

A. Well, it's a repetition of what's in the Treaty. It doesn't explain.

Q. A repetition with an emphasis, but, again, it's your submission that when Canada here used this language and underlined the word "solely," what they meant to say is "solely these Articles, as well as some others."

A. No, I'm saying that, as to imported Articles, they are making reference, as I have understood the provision, only to the specified Articles that were imported. That's the meaning of "solely." It's not to

exclude. There is no indication in this statement of general exclusion of Chapter Fourteen from ISDS. It's a very limited statement that essentially quotes the provisions of Article--of the Article in the NAFTA, 1401.

And so, I do not agree that Canada is expressing the sweeping--the view contained--the sweeping view that your sentence suggests.

Q. I understand, Mr. Wethington.

And it's based on that reading of the second sentence of Canada's submission that you have stated that the Parties to NAFTA do not have a common understanding as to the interpretation of Article 1401(2); is that correct?

A. That's one of the--that's one of the reasons. I mean, it's not clear to me in your statement whether, if you're making a statement of current view, I don't know today what the current Canadian view is. This does not necessarily represent their view today because of the limited nature of this statement. So, if your Statement is that the view today, there's no indication here that it is.

Q. I'm happy to clarify.

My question is based on these three documents that I've just shown you, which are submissions of each of these State's Parties, is there an agreement on the interpretation of Article 1401(2)? Yes or no.

A. No. In my view there is not.

Q. I understand. Thank you for your view on the text of these submissions.

A. There is also no indication here as to what--this was a proceeding a decade and a half ago. I do not know today whether the Mexican or the Canadian government would subscribe to the interpretation that you are suggesting.

Q. And I'm not asking you to speculate about that--I've asked about the documents whether they--

(Overlapping speakers.)

MR. MARTÍNEZ-FRAGA: Let him answer the question.

(Interpreter clarification.)

MS. HORNE: I said my question, and I think we can move forward. I think we have concluded this line and--

MR. MARTÍNEZ-FRAGA: Not if he hasn't finished testifying we can't move forward. No. Have you finished testifying, sir?

MS. HORNE: Mr. President, I believe you're on mute. Mr. President.

PRESIDENT BEECHEY: It pays sometimes not to be courteous and put myself on mute. Would you please--

THE WITNESS: I say given the limitations of this--

(Overlapping speakers.)

PRESIDENT BEECHEY: Forgive me, please. Would

you not speak across one another.

Ms. Horne, pick up where you left off. Mr. Wethington, you will get your chance to reply and then we will move on.

THE WITNESS: Thank you. My apologies, Mr. Chair.

PRESIDENT BEECHEY: No apologies necessary.

MS. HORNE: Thank you very much, Mr. President.

BY MS. HORNE:

Q. My question is merely based on these three documents that I've just shown you, the submissions, the written submissions of Canada, the United States and México. Do you consider that there is an agreement on the interpretation of Article 1401(2) in these documents?

A. No, I do not.

Q. Thank you, Mr. Wethington.

A. If I could elaborate. This is a very limited statement as to the Canadian view, and does not address the other components that I'm referencing. Also, the United States did not take a position in this proceeding. We are now 15 years later, and 15 years later we have no statement that's contemporaneous with the present as to what either the Mexican or the Canadian view is, so I do not agree that there is consensus on this point.

Q. I understand your position. Thank you,

Mr. Wethington.

Now, you've testified that it's your recollection that Chapter Fourteen and its protections were of great strategic importance to the United States; is that correct?

A. Great strategic importance? Did I understand the question?

Q. Correct. Of significant importance.

A. I'm sorry. I've got to ask you to repeat the question to make sure I'm responding accurately, would you please?

Q. Not a problem. Not a problem.

You have testified that it's your recollection that Chapter Fourteen and its protections were of great strategic importance to the United States.

Is that correct?

A. I have testified a great strategic importance?

Q. In fact, you've indicated that providing investors with investor-State arbitration under Chapter Fourteen, I think you've used the word "essential"; is that correct?

A. I'm not sure what you're--I must ask you for your reference. I'm not saying I haven't made those statements, but I'm not understanding your question. I apologize.

Q. I noted that from your testimony this morning, but rather than just a direct quote, perhaps, could you

indicate, in your view, was it of essential importance that Financial Services Investors had resort to investor-State arbitration? Is that accurate?

A. Yes.

Q. Okay. Mr. Wethington, do you agree that the Fireman's Fund Tribunal is the only Tribunal to date that has interpreted Article 1401(2) of NAFTA?

A. They have provided, I would say, a dicta on that. The core of that Decision, in my view, related to definitional issues, and Claimants in that case were asserting that the case came under Chapter Eleven. They were not making a Chapter Fourteen case.

Q. But you're aware that the Fireman's Fund Tribunal did, in fact, interpret and apply Article 1401(2) of NAFTA; correct?

A. Well, you've got several concepts in your question. One is "interpret" and the other is "apply." They clearly did not--they clearly did not--I'm sorry, I lost my train of thought here. Forgive me. Kindly repeat your question again. I'm going to be sure I'm responsive.

Q. Are you aware that the Fireman's Fund Tribunal interpreted Article 1401(2) of NAFTA?

A. They offered commentary on that.

Q. "They offered commentary" is your testimony?

A. Yeah. I would put it in the category of a dicta.

Q. You would put it in the category of dicta. I understand.

Are you aware of any other Tribunal that has interpreted or applied Article 1401(2) of NAFTA?

A. I'm not aware of any other.

(Interruption.)

Q. Thank you very much. Do we agree that the Fireman's Fund--well, perhaps I'll begin with this question.

Have you reviewed the Jurisdictional Decision of the Fireman's Fund Tribunal?

A. I guess I would have to say I have read it, yes.

Q. Do we agree that you've called it "commentary," I've called it the "interpretation" of Article 1401(2) by the Fireman's Fund Tribunal was that it limits the set of claims that a Financial Services Investor can submit to arbitration?

A. Yes. I would say that's an interpretation that could be made of that Decision.

Q. To your knowledge, has the United States ever criticized or disagreed with the Fireman's Fund Tribunal Decision?

A. I am not aware. I mean, they've made commentary in the--in their May 1 submission. Prior to that, I'm not aware of any. I'm not saying it doesn't exist. I'm sorry,

I'm just not aware. I don't believe so, to try to be responsive.

Q. Thank you, Mr. Wethington.

I understand you testified earlier that Article 12.1.2(b) of the TPA is nearly identical to Article 1401(2) of NAFTA; is that correct?

A. It's nearly identical, yes.

Q. And you're aware--

PRESIDENT BEECHEY: Ms. Horne if you're about to change gears--if you're not, carry on until you are, when you next come to change gears, I suggest we pause for 15 minutes. As matters stand, you have got, I think, around 40 minutes still left. I'm proposing to add some of those--eight minutes or so for the time that we took out that--so, you have got some idea of what you're shooting for at the moment. All right.

MS. HORNE: I'm very grateful, Mr. President. And I will conclude this line of questioning in the next five or ten minutes--

(Overlapping speakers.)

PRESIDENT BEECHEY: That's absolutely fine. You tell me when you're ready but thereabouts. Okay.

MS. HORNE: Thank you very much, Mr. President.

BY MS. HORNE:

Q. And, Mr. Wethington, you're aware that the TPA

was negotiated and signed after the Fireman's Fund Decision; is that correct?

A. I believe that's correct, yes.

Q. Okay. So, just to sum up the timeline that took place, there was a provision--in your view, the United States intended, and it was essential for the United States to intend, that Financial Services Investors have access to investor-State arbitration for the protections of Chapter Fourteen; correct?

A. Umm-hmm.

Q. Now, it was essential, but as you've already acknowledged, there is no explicit statement in the Treaty, in NAFTA to that effect? That's correct?

A. I interpret it as reaching that, yes.

Q. So, this key provision, Article 1401(2), did not include an explicit statement authorizing Financial Services Investors to submit claims under Chapter Fourteen protections; correct?

A. It's to be interpreted.

Q. But there's no--we did clarify this earlier. I'm just summing up where we stood, which is that there is no explicit authorization in NAFTA for Financial Services Investors to submit claims under Chapter Fourteen protections.

A. No, I would not. I would not agree with that

statement.

Q. Okay. Mr. Wethington, we can refer back to your earlier testimony on that subject, but just to return to our timeline, NAFTA was negotiated, Article 1401(2) was put in earlier, and in your Witness Statement--in your Expert Report, rather, you were unable to point to a specific provision of NAFTA Chapter Fourteen that expressly authorizes Financial Services Investors to submit claims under Chapter Fourteen to arbitration.

And then the Fireman Fund arbitration rolls around. México and Canada made submissions that we've already discussed, and it's correct to say that the Fireman's Fund Tribunal interpreted Article 1401(2) to provide limited consent to arbitration.

That's correct?

A. I understand--I understand your Statement. I do not think that the NAFTA was so limited.

Q. You do not think so, but the Fireman's Fund Tribunal interpreted it to have limited consent to arbitration under Chapter Fourteen; correct?

A. I would agree with that.

Q. And, according to you, that determination, that interpretation by this Tribunal, did not reflect what you considered to have been the United States' intent in NAFTA; correct?

A. That's correct.
Q. Because, according to you, there was supposed to be broad consent to arbitration under Chapter Fourteen; correct?
A. Yes.
Q. So, you believe that the United States intended to create that same broad consent in the TPA by reinserting the language of NAFTA Article 1401(2) into the TPA, even though the Fireman's Fund Tribunal had already interpreted that exact same language to narrow consent; is that correct?
A. Well, I was not involved in the negotiation of the TPA, so as you frame your question, I'm not--I'm not able to answer what the intent was. Yes.
Q. But you believe Article 12.1.2(b) of the TPA includes the same broad consent that you allege the United States intended under NAFTA Article 1401(2)?
A. Umm-hmm. Yes.
Q. And to reach that conclusion, we have to imagine that the United States ignored the interpretation of the Fireman's Fund Tribunal, simply reinserting the exact same language into the TPA; is that correct?
A. I think Fireman's Fund was a limited Decision, and it did not incorporate at the time U.S. views, and I think the Canadian expression was also limited. And it

turned on a narrower claim, a narrower issue, which is whether the financial holding companies were financial institutions. And so, I think it has--Fireman's has limited applicability.

Q. I understand your interpretation of the Fireman's Fund Tribunal Decision, but you earlier acknowledged that it did provide what you called "commentary" on Article 1401(2) as providing a limited scope of arbitration.

But it's your submission that the United States included the same language in the TPA after the Fireman's Fund Decision, and it's your testimony that that same language provides for broad scope of consent; is that correct?

A. I don't know what the--how the negotiators of the TPA regarded--

Q. I'm asking for your submission on this--

(Overlapping speakers.)

A. --of Fireman's. I think they took the language of the NAFTA. That was the expectation, and incorporated it into the TPA intending to give it the same application that it had earlier on.

Q. You submit that the--from your understanding, the United States intended there to be broad scope of consent in the TPA, and, to effect that intent, they inserted the same language from NAFTA Article 1401(2), even though that

had been interpreted otherwise by the Fireman's Fund Tribunal.

That's correct?

A. Correct.

Q. Thank you, Mr. Wethington.

MS. HORNE: Mr. President, this would be a convenient time for a break.

PRESIDENT BEECHEY: Very well.

Mr. Wethington, we are going to have a stop for 15 minutes. Forgive me for saying this, but you are under cross-examination, and the rule in this game is that, whilst you are under cross-examination, you should not speak about the case with anyone. So, by all means, go and commune over a cup of coffee, but then we'll see you back on the screen in 15 minutes, if we may.

THE WITNESS: Very good. Thank you.

PRESIDENT BEECHEY: Very well. We'll start again at--where are we now--just a little beyond five minutes to the hour, so three minutes, four minutes to the hour, if we may. Thank you very much, indeed.

Do you need a time check, Ms. Horne, or are you okay?

MS. HORNE: A time check would be very helpful, Mr. President, given the change, but we're happy to take that after the break, if helpful.

PRESIDENT BEECHEY: Yes. Of course. We will do it.

MS. HORNE: Thank you very much.

(Brief recess.)

PRESIDENT BEECHEY: Very good.

Ms. Horne, José has a time check for you, so he'll give you that now.

SECRETARY ARAGÓN CARDIEL: Yes. The time used for cross-examination was 46 minutes, which means that Ms. Horne has 39 minutes left.

MS. HORNE: Thank you very much. I appreciate that.

Mr. President, may I resume?

PRESIDENT BEECHEY: You may.

MS. HORNE: Thank you very much.

BY MS. HORNE:

Q. Mr. Wethington, can you hear me?

A. Yes, I can.

Q. Thank you, sir.

So, Mr. Wethington, we'll now turn to the TPA, which is the Treaty at issue in this case, but we'll address it more briefly as I know you weren't involved in the negotiations.

The TPA is on the record as RLA-0001, and we are going to project it on the screen now.

Do you see there the preamble? This is the first page of the TPA as it's on the record.

A. Yes, I see that. Umm-hmm.

Q. And we're going to start with the investment chapter, which is Chapter Ten. This begins on Page 10-10 of the document.

I apologize, the investment chapter itself begins on Page 10-1. And you'll see here that's the--do you see on your screen the first page of Chapter Ten on investment?

A. Yes, I see that, umm-hmm.

Q. Thank you.

And you'll see, just as with the NAFTA, there is a Section A on investment, and that section includes certain investment protections, like national treatment and Most Favored Nation Treatment; is that correct?

A. That's correct, yes.

Q. And we'll now turn to Page 10-10, which is the first page of Section B of Chapter Ten. And do you see there, Section B is entitled "Investor-State Dispute Settlement"?

A. Yes, I see that, umm-hmm.

Q. And Section B is the investor-State Dispute Settlement mechanism of Chapter Ten; is that correct?

A. Yes, that's correct, umm-hmm.

Q. And this includes Article 10.16.

Do you see that at the bottom of your screen?

A. Yes. I see a portion of it, yes.

Q. Again, it continues on two pages, so we'll focus here on the first part, Article 10.16.1. And that Article begins: "In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation, the Claimant, on its own behalf, may submit to arbitration under this section a claim that the Respondent has breached an obligation under Section A." And then the Article continues on the next page.

Did you see that?

A. Yes, I see that, umm-hmm.

Q. So, here, Article 10.16.1 of the TPA authorizes Claimants under Chapter Ten to submit to arbitration claims alleging a breach of the protections in Chapter Ten; is that correct?

A. That's correct, umm-hmm.

Q. We'll turn now to Chapter Twelve, which is the Financial Services Chapter, and that's the chapter that's been invoked by Claimants in this Arbitration. It begins on Page 12-1.

And we are removing it briefly. At certain times it is difficult to move the PDF during the share-screen feature, so we apologize for the slight delay,

Mr. Wethington.

Here it is.

Do you see the first page of Chapter Twelve of the TPA on your screen?

A. Yes, I see that, umm-hmm.

Q. And Chapter Twelve does not have its own Section B, its own section providing articles on investor-State dispute resolution.

Is that correct, Mr. Wethington?

A. Yes. It's incorporated, correct.

Q. And I'll direct your attention to Article 12.1.2(b) on your screen.

A. Umm-hmm.

Q. And that provides: "Section B: "Investor-State Dispute Settlement of Chapter Ten 1 is hereby incorporated into and made a part of this chapter solely for claims that a party has breached Articles 10.7, 10.8, 10.12, or 10.14 as incorporated into this chapter."

Did I read that correctly?

A. Yes. You read it correctly. Umm-hmm.

Q. And we agree, Mr. Wethington, that at least this particular provision, Article 10--12.1.2(b), authorizes a Financial Services Investor to submit to arbitration claims alleging a breach of Articles 10.7, 10.8, 10.12, or 10.14.

Is that correct?

A. That's correct, at least, umm-hmm.

Q. Now, Mr. Wethington, can you point me to the provision of Chapter Twelve that authorizes a Financial Services Investor to submit to arbitration a claim alleging a breach of one of the provisions, the protections of Chapter 12?

A. This is--I'll try to respond to your question. This is a TPA version of the question you posed in the context of the NAFTA, as I recall it.

The intention of the negotiators was not to exclude the provisions of Chapter Twelve. I'm reflecting now that this is the template--I mean that the NAFTA was the template for this chapter, which I believe carried over into this TPA. It was not to exclude the provisions of Chapter Fourteen. For such a monumental exclusion, under our treaty practice, it would have required an express carve-out, and that simply was not done.

Q. I'm sorry, Mr. Wethington. I don't believe you answered my question, and I'll just read it back.

It was: "Can you point me to the provision of Chapter Twelve that authorizes a Financial Services Investor to submit to arbitration a claim alleging a breach of one of the protections of Chapter Twelve"? "Yes" or "no."

A. Yes. I would reference the sentence that you've

got highlighted that says Section B is incorporated and made part of this chapter.

Now, as I indicated earlier, I think in the drafting, there is some ambiguity here. I referenced that. But the treaty practice was to make exceptions to general principle, and for something this significant, if we were to have carved out under the NAFTA--and, again, the carryover, I presume, into the TPA--we would have done that through an express carve-out, as we did for the prudential exception and the monetary exception.

The intention, as was stated by the Treasury, in the one testimony to the Congress, was that any investment protection is subject to ISDS. I'm paraphrasing, but that's the language of the--the meaning of his statement.

Q. Okay. Mr. Wethington, so I understand the answer to my question, which is to identify the provision that authorizes investor-State arbitration for claims alleging breaches of the Chapter Twelve protections, your testimony is that that provision is Article 12.1.2(b), that it provides express authorization.

Is that correct?

A. I believe it does. It is included within the incorporation of Section B from Chapter Eleven, that that incorporation extended to the provisions of Chapter Fourteen. This is not--this provision is not a

carve-out limited only to two substantive standards, but the intention--and there is nothing in the record that says to the contrary; nothing in treaty practice that is to the contrary.

If the intention was to carve-out this entire chapter, which, as I said, would have been a monumental carve-out, it would have been done explicitly. It would have been unthinkable.

Otherwise, we would have been going to the Congress with a deceptive presentation.

Q. So, this was of monumental importance that Financial Services Investor had broad scope of consent to arbitration.

That's what you just testified to; correct?

A. That it extended to the provisions of the Financial Services Chapter, yes. That was my mandate in the NAFTA context, which is the template for the TPA.

Q. It was your mandate, and it was of monumental importance to the United States, and, yet, it was not expressly stated in terms similar to those in the investment chapter saying that Financial Services Investors can submit to arbitration, claims of breach of the protections of Chapter Twelve.

Is that correct?

A. No. I'm saying that, if we had intended to carve

out the entire chapter, that that would have been of monumental significance.

Q. So, it's not the existence of consent that would have been expressed, in your view. The existence of consent was fundamental, but it is not that that would have been expressed; it is, rather, an exception to consent that would have been expressed.

A. I'm saying that if we had intended, as negotiators--and I'm talking now about the NAFTA, which carries over because of the essential similarity in the language. If we had intended to carve out the Financial Services Chapter obligations from investor-State settlement, we would have done so expressly.

The congressional record says that very explicitly in the testimony of my deputy. I had already left the Treasury by that point when the new administration came in.

The Services Policy Advisory Committee chaired by the Chairman of Citibank, Citibank being the only--Citicorp being the only U.S. banking institution with a presence in México at the time of the negotiation, did not think that investor-State--I mean that Chapter Fourteen was carved out of investor-State.

The belief by the Congress, the belief by the industry, the belief by the sector Advisory Committee, and

also expressed in my book of 1994, all are uniform in their conclusion that Chapter Fourteen in its entirety was subject to investor-State Dispute Settlement.

Up until the end--there had been no dissent from that view by the U.S. Government up until its May 1 filing. And as I said, I don't know what motivated it, but there is today a change in attitude, a policy shift, with respect to investor-State. It is in disfavor.

Now, I cannot prove to you that that is what is motivating this change in position, but in Fireman's Fund, the U.S. took no position with respect to the scope of investor-State, despite the fact that that issue was discussed in that proceeding. This is a departure, and it's a departure that is inconsistent, I am saying, with what the American side concluded what its position was in the NAFTA context, that the provisions of the Financial Services Chapter were covered by the imported investor-State Dispute Settlement mechanism from the general investment chapter.

The listing of these provisions is to indicate what is imported, that subset of general investment chapter provisions that are imported into investor-State under Chapter Fourteen. It is not to limit the application of ISDS.

And as I said, that would have been a change that

runs contrary to our treaty practice in this Agreement, contrary to the understanding of industry, and contrary to what we represented to the American Congress. It is not conceivable in my judgment.

Q. I understand your position with respect to the intent, Mr. Wethington. But we're focusing on here on the text of the Treaty, which is Article 12.1.2(b).

Would you agree that nowhere here is Section B of Chapter Ten made expressly and specifically applicable to breaches of Chapter Twelve? "Yes" or "no."

A. I would say it was not necessary.

Q. So, to be clear--

A. The incorporation of investor-State was intended to include the provisions of Chapter Fourteen. I mean, it wasn't simply to make accessible for financial investors two provisions of the General Investment Agreement. We were committed. There was a--an awareness; more than awareness, experience.

No one was better equipped to express that, to understand it than the Chairman of Citibank, and he certainly believed--if you read his Report, he certainly believed that this chapter was covered. That's what was represented. That's what was represented to the Congress.

Now, I can accept some ambiguity in the drafting. I referenced that, but--

Q. You accept ambiguity in Article 12.1.2(b); correct?

(Overlapping speakers.)

(Stenographer clarification.)

THE WITNESS: I'm sorry.

MS. HORNE: Certainly.

BY MS. HORNE:

Q. You've just indicated, Mr. Wethington, that there is ambiguity in the text of Article 12.1.2(b); correct?

A. That's what I said, yes. I think there is ambiguity.

Q. Thank you.

A. The only way to--

Q. Mr. Wethington--

A. If I could clarify. The only way to resolve that is by reference--as the Vienna Convention says, is by reference to context and object and purpose. And when one looks at the context, the contemporaneous evidence, the treaty practice--what I have testified my mandate was--as the chief negotiator, it is clear to me what is intended. And it was clear to the Congress what was intended at the time and to the industry.

It would have been a deception, a deception of the Congress and the American financial services industry if we had negotiated something and misrepresented that to

the Congress.

Q. Mr. Wethington--

A. It is so significant an issue that that is unthinkable, in my view.

Q. Mr. Wethington, in support of your interpretation of Article 12.1.2(b) of the TPA, have you cited any documents that were exchanged between Colombia and the United States during the negotiation of the TPA?

Yes or no.

A. Not between Colombia and the United States. But my interpretation of the Colombia TPA rests on my understanding of what was intended in the NAFTA, and there is nothing in the record that indicates the kind of limitation that Respondent's--that is the limitation that the carve-out of all of Chapter Fourteen, the carve-out of all of Chapter Fourteen from investor-State Dispute Settlement.

Q. Nothing, indeed--

A. I would refer the Tribunal, with all due respect, to the testimony of my deputy. I had left the Treasury when the Administration changed in January of 1993. The testimony--the only testimony in the record by a member of the Administration--he spoke on behalf of the Administration. He said very clearly that "any violation of these investment protections under Chapter Fourteen are

subject to investor-State Dispute Settlement." He used the term "direct action."

I don't know what stronger evidence there could be than that very clear declaration. He was speaking on behalf of the Administration. There is no rebuttal of that.

Q. Mr. Wethington, I'll stop you there. I did ask a yes-or-no question, and I'll ask, very respectfully, that you do answer with "yes" or "no," when possible.

A. I thought I answered, but I was elaborating on my answer. I apologize.

Q. I understand.

A. But it's a critical point.

Q. On that, we certainly agree.

A. The drafting isn't necessarily perfect.

(Overlapping speakers.)

(Stenographer clarification.)

MS. HORNE: Thank you.

THE WITNESS: Sorry.

BY MS. HORNE:

Q. Mr. Wethington, do you consider that the United States Government's interpretation of its own treaties has any weight under international law?

A. This is an interpretation, I think, of the--of a component of the Vienna Convention, and I'm not equipped to

opine on that, and I wasn't asked to opine on that provision under Article 31 and 32.

In direct response to your question, I would say an ex post separated by so many years, at best, would be given limited weight, particularly since the policy predicates of this Administration are so different than what they were at the time of the NAFTA.

The charge, I would say respectfully, is to interpret this NAFTA Agreement in the context--again, the language of the Vienna Convention--the context and the purpose and object that existed at the time the Agreement was entered into.

This is a shift in position.

Q. Mr. Wethington, you're aware that the United States and Colombia, the two Treaty Parties, have reached an agreement on the proper interpretation of Article 12.1.2(b) through their submissions in this proceeding, are you not?

MR. MARTÍNEZ-FRAGA: Mr. President, I'll object. There is absolutely no testimony and no proof of any agreement having been reached. In fact, the United States didn't even agree with Colombia. Colombia is saying that there's an agreement. The United States has not even agreed. So, there is absolutely no predicate for this.

MS. HORNE: Mr. President, there are, in fact,

two submissions, sets of submissions on the record here by the United States in writing and orally yesterday, as well as by the Republic of Colombia. If necessary, we can take the Witness through those documents, but in order to proceed efficiently, we wanted to ask Mr. Wethington his awareness of the two Treaty Parties' positions and whether those positions are the same with respect to Article 12.1.2(b). I think that's a perfectly fair question.

PRESIDENT BEECHEY: Might I suggest you deal with it this way: You put it to him as a hypothesis. If there's an argument about the underlying documents, we can go to it afterwards and we'll look at it. I've heard exactly you said about that. And we'll deal with it if we have to. But in the interest of time, you can perfectly frame that question as a hypothesis.

BY MS. HORNE:

Q. Mr. Wethington, in your review of the documents for this proceeding, have you reviewed the submissions of the United States and the Republic of Colombia?

A. Yes.

Q. Are you aware that both of the Parties to the Treaty have interpreted Article 12.1.2(b) in their submissions?

A. They have provided some interpretation, yes, some

various aspects of it.

Q. Are you aware that the interpretation of the Republic of Colombia is in contradiction, in disagreement with your testimony in this proceeding?

A. Yes.

Q. Are you aware of the same with respect to the United States, that the United States' position is contradicted by your testimony in this proceeding?

A. Yes.

Q. Mr. Wethington, do you believe that your opinion carries more weight under international law than the official written submissions of the Republic of Colombia and the United States on the interpretation of the TPA?

MR. MARTÍNEZ-FRAGA: Mr. President, I object. It calls for a legal conclusion. That has nothing to do with his testimony. He's not saying that it weighs more or less, and that is just a legal conclusion of a very particular issue that we are going to brief at the end of this.

PRESIDENT BEECHEY: I think the shorter way of putting it is you think that's a matter of submissions, and I might agree with you on that.

MR. MARTÍNEZ-FRAGA: Yeah, that's it. That's it. Yes. That's all. Thank you. It's a great issue.

MS. HORNE: I understand, Mr. President.

BY MS. HORNE:

Q. Mr. Wethington, do you believe that your opinion with respect to the interpretation of the Treaty at issue should prevail in this Arbitration?

A. I believe that my views should prevail, not because they are mine but because I believe I am representing what the governments at the time intended, and that that was carried over into the TPA. And there's nothing in the record that departs from that conclusion.

Q. Nothing in the record except for the text of the TPA itself.

A. It's the same--

MS. HORNE: Mr. President, that concludes my questions.

MR. MARTÍNEZ-FRAGA: Improper statement. No question.

THE WITNESS: It's the statement that is in the NAFTA, with all due respect.

PRESIDENT BEECHEY: Thank you, Ms. Horne.

Before I invite my colleagues to let me know whether they have any questions, Mr. Martínez-Fraga, are there any matters you want to raise in reexamination?

MR. MARTÍNEZ-FRAGA: Absolutely not, Mr. President. None.

PRESIDENT BEECHEY: Very well. In that case,

I'll go to Professor Ferrari first and see whether he has any questions.

ARBITRATOR FERRARI: No, I'm fine. I would have just pointed out when Ms. Horne refers to agreement, of course, she did not refer to an agreement between the U.S. and Colombia in the sense of TPA meaning an international agreement, and that was very clear--

THE WITNESS: I'm sorry. I'm very sorry, Mr. Ferrari. If you're asking me--

ARBITRATOR FERRARI: No. I'm not asking a question. I'm making a comment.

THE WITNESS: The sound isn't good. Thank you. That is much better. Please.

ARBITRATOR FERRARI: Sorry.

PRESIDENT BEECHEY: Mr. Söderlund?

ARBITRATOR SÖDERLUND: No, it's fine. Thank you.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT BEECHEY: Very well.

Mr. Wethington, would you indulge me, please, to this extent. Do you have Chapter Twelve in front of you, or can it be put on the screen? I'm looking at 12.1, Scope and Coverage, and then 1 and 2, is what I'm after, if that can be put up on the screen.

MS. HORNE: We can project that, Mr. President.

PRESIDENT BEECHEY: Do you mind? And then,

perhaps, after that you would have available 12.18.

MS. HORNE: Not at all. TPA Article 12.1.2(b); is that correct?

PRESIDENT BEECHEY: Yeah. Well, the first page of it. It is 12.1. Chapter Twelve, as I've got it. It headed "Article 12.1, Scope and Coverage."

MS. HORNE: We are projecting that now.

PRESIDENT BEECHEY: Okay. Thank you very much, indeed.

Mr. Wethington, can you help me with this? And I'm looking at the text without the benefits of the very considerable experience that you have had of being involved in the drafting of the NAFTA Agreement before it.

But this is the text of the TPA, and it sets out in 12.1.1: "This chapter applies to measures adopted or maintained by a party relating to" and then we have (a), (b), and (c).

Then comes in 12.1.2, "Chapters Ten investment, and Eleven (cross-border trade in services) apply to measures described in Paragraph 1 only to the extent that such Chapters or Articles of such Chapters are incorporated into this Chapter."

Now, am I right in understanding that that means literally what it says. In other words, Chapter Ten and Chapter Eleven will be applied to those measures--(a), (b),

(c) in 1 above--only to the extent that they are incorporated into the chapter.

Is that a proper reading?

THE WITNESS: Yes. I would agree with that, Mr. President.

PRESIDENT BEECHEY: So, if that's right, then we note that Articles 10.7, 10.8, 10.11, 10.12, 10.14, and 11.11 are hereby incorporated into and made part of this chapter.

So, that's clear? They are specifically incorporated in; is that right?

THE WITNESS: Yes. That's correct. Umm-hmm.

PRESIDENT BEECHEY: And then (b) says, "Investor-State Dispute Settlement of Chapter Ten investment is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached" and it lists "Articles 10.7, 10.8, 10.12, or 10.14, as incorporated into this chapter."

Now, that language, it seems to me, is clear on its face, and it is clear what's in and it is clear what's out, or should I put another reading on it?

THE WITNESS: The reading that, with all due respect, I would put on it is that the investor-State provisions from Section B of the investment chapter are, indeed, incorporated; and that also the other provisions

that are referenced are incorporated as well. But it does not exclude from investor-State the provisions of Chapter Twelve.

If we were intending--and I'm referencing now the NAFTA text. I obviously wasn't there for the TPA, the language is essentially the same--to include--to exclude from investor-State the entire chapter, we would have done so expressly.

PRESIDENT BEECHEY: Well, I hear that. Help me with this. Have a look--sorry. Go ahead.

(Overlapping speakers.)

THE WITNESS: Please.

PRESIDENT BEECHEY: Go ahead. I'm so sorry. I didn't mean to cut across you. Go ahead.

THE WITNESS: I can admit to some ambiguity in this provision, but that ambiguity does not reflect--is not reflected in the record. The record is very clear.

(Overlapping speakers.)

PRESIDENT BEECHEY: Yes. I've understood your evidence--

THE WITNESS: It is clear. There was--this would--to have removed this entire chapter from the agreement and leave only provisions of the investment chapter subject to investor-State, and to have not informed the Congress or the industry that we were taking

them out, we were taking this entire chapter out at the time of the NAFTA, and this is simply a carryover, it would have been bad faith. It is inconceivable to me, and there is nothing in the testimony that the U.S. Treasury presented that says anything different than that.

PRESIDENT BEECHEY: Well, here's what's causing me the curiosity which perhaps you'll tell me will kill the cat.

Look at Article 12.18. And 12.18(1) says Section A, Dispute Settlement, of Chapter 21--dispute settlement applies--

(Interruption.)

(Stenographer clarification.)

PRESIDENT BEECHEY: You're on the right page at the moment. Thanks for actually--you're on Page 12-9, Article 12.18. If you look at that, it says: "Section A, Dispute Settlement, of Chapter 21 applies as modified by this Article to the settlement of disputes arising out of this Chapter."

Now, is it a reasonable or is it an appropriate interpretation on my part that, taking that at face value, that would suggest that, all things being equal, that is the dispute settlement procedure to be adopted in the case of this particular chapter of the TPA?

THE WITNESS: This is State-to-State, isn't it?

PRESIDENT BEECHEY: It is. That's the point. That's why I'm asking the question, because it says that "this applies as modified by this Article to the settlement of disputes arising under this Chapter."

What I'm seeking to do is to reconcile how I read that, if that's right, with the language of 12.1.2(b), which provides--I'm sorry to use the expression--a carve-out, as it were, for investor-State dispute settlement. Because you are quite right; I mean, Chapter 21 deals at great length with the way in which State parties go about resolving disputes.

THE WITNESS: Yes. The intention in the NAFTA context that was carried over, I believe, into the TPA was that, for investor-State, the provisions of the Financial Services Chapter were incorporated into that process. That was our intention. That is my fundamental point.

PRESIDENT BEECHEY: Okay.

THE WITNESS: And that was carried over into the provisions of the Colombia-U.S. TPA.

PRESIDENT BEECHEY: Thank you. That's helpful. I hear that.

Very well. Are there any questions arising from counsel in light of that exchange?

MR. MARTÍNEZ-FRAGA: Not on Claimants' part. Thank you, Mr. President.

MS. HORNE: None from Colombia. Thank you, Mr. President.

PRESIDENT BEECHEY: Thank you very much indeed.

Anything more from my colleagues? Okay.

Mr. Wethington, thank you very much. You have been patient and I'm grateful.

THE WITNESS: Thank you.

PRESIDENT BEECHEY: And much appreciated.

THE WITNESS: Thank you.

PRESIDENT BEECHEY: You are released. Thank you.

(Witness steps down.)

PRESIDENT BEECHEY: All right. We can proceed, I think, to Professor Mistelis' evidence; is that right?

MR. MARTÍNEZ-FRAGA: Yes, sir. With the--Mr. President's indulgence and that of the Tribunal, I will excuse myself.

PRESIDENT BEECHEY: Very well. We'll pause for five minutes, if it helps, and--oh, you know what? It's much quicker. You've only got to change seats, as opposed to microphones and rooms and all the rest. Okay. I follow.

MR. REETZ: Exactly.

PRESIDENT BEECHEY: Good afternoon, Mr. Reetz.

MR. REETZ: Good afternoon, Mr. President.

PRESIDENT BEECHEY: Very well. I think we're all

here.

LOUKAS MISTELIS, CLAIMANTS' WITNESS, CALLED

PRESIDENT BEECHEY: Loukas, Professor Mistelis, good afternoon. How are you?

THE WITNESS: Very well. Thank you. Good afternoon.

PRESIDENT BEECHEY: All right. Now, there should be in front of you, I hope, a declaration to be read into the record.

THE WITNESS: Yes.

I solemnly declare, upon my honor and conscience, that my statement will be in accordance with my sincere belief.

PRESIDENT BEECHEY: Thank you very much indeed.

Mr. Reetz, you're going to introduce the evidence?

MR. REETZ: Thank you, Mr. President.

DIRECT EXAMINATION

BY MR. REETZ:

Q. Professor Mistelis, you submitted two Expert Reports in this case; is that correct?

A. That is correct.

Q. And are there any changes that you'd like to make in them?

A. No, no changes to make.

Q. Okay. I'd like to ask you first about the First Expert Report in this case. What were you asked to do in connection with that Report?

A. I was approached by counsel for Claimant, by your firm, and asked whether I would be prepared to prepare an Expert Opinion in response of a number of questions that were set--that were given to me.

Q. And does your Report reflect the specific questions that you were asked to answer?

A. It does indeed. I have listed the questions, although I have taken the liberty, as an academic, as I am, to perhaps rephrase some of these questions, to make them more meaningful from my perspective, with all due respect.

Q. And it's the questions that we see in Paragraph 7 of your First Report?

A. Correct.

Q. And were you asked to reach any particular conclusions in connection with those questions?

A. Not at all.

Q. Okay. And what did you do, in terms of what particular steps did you take in the course of answering these questions?

A. I have considered the Request for Arbitration, and I have considered the academic writing on the topic as well as case law.

I was reasonably familiar with the scholarship and case law on Maffezini because I've been teaching in this area since 2002, but, of course, an opportunity of an Expert Opinion means that one has to go perhaps a bit further and look at things that are not the same, something that they have looked before.

So, I have done that as extensively as I could have done in the circumstances.

Q. Okay. And let me ask you about the--let me ask you first: When you referred to the history, what did you do in connection with the history of MFN provisions?

A. I think I knew already that there was quite a bit of discussion in cases like Ambatielos, et cetera, but I wanted to see how MFN clauses have evolved, because a big part of the context of this Arbitration is the scope of an MFN clause, and I wanted to ascertain with as much academic certainty as one can to see whether there's a possible evolution of MFN clauses. So, I looked a bit further than just the text of the TPA.

Q. And I believe you mentioned something about cases. Could you tell us a bit more about what you did in that regard?

A. Yes. I mean, obviously I would be familiar with the recent case law, but I thought I have to go a bit further back and see whether there's any historical

evidence, dated, that I could bring into my opinion.

Q. And apart from those sources, what else did you incorporate in your analysis?

A. Case law and academic writing and a few comparable texts from other treaties.

Q. Okay. And we have the bases of these in your Report; is that correct?

A. Indeed you have.

Q. All right. Let me ask you next about your Second Expert Report.

How did that come about?

A. Yes. As you know, this is entitled "Supplementary Expert Opinion." In some cases it is not uncommon in arbitration that there are responsive Expert Opinions, but it seems to me since Colombia did not file an Expert Report, I was given the opportunity of reading the submissions--later submissions by Colombia, and I thought that invited my need to do a supplementary opinion, and I will explain why.

Obviously I exercise some reserve. I don't--stay very much close to the questions, but I understood that in the process of the dispute, the debate has become a bit broader. And I thought we had to address on these questions, which I have not done in the First Report.

Q. Were there particular questions that you were

asked to focus on?

A. Yes. And one of the questions that I thought it was appropriate to address is the wording of MFN clauses--for example, the question of treatment versus own matters--and also a number of other issues that perhaps relate mostly with some NAFTA case law, which is not my expertise as such, but, of course, I have a reasonable level of familiarity.

So, I felt that I needed to sort of expand, as my duty as an Expert is to assist the Tribunal to make a decision, ultimately.

Q. Okay. And the questions that you were asked to address were in Paragraph 4 of your Report; is that correct?

A. Correct. Correct. Correct.

Q. And what extra work--you mentioned a little bit, but what extra work did you perform in connection with preparing the Second Report?

A. I have done something which I have not appended, meaning I looked, again, at other things that have been written in the meantime. We have been blessed--and I use that in inverted commas--with a very large number of databases these days, so the research is much more extensive. I have looked at the Investor-State Law Guide--

(Interruption.)

(Stenographer clarification.)

A. Yes, because we have been blessed, and I'm using that in quotation marks, by very comprehensive databases. So, I looked at sources like Investor-State Law Guide, Jus Mundi, italaw, et cetera, to make sure that I have covered as much as I could cover.

Q. Okay. I'd like to turn back your First Report and ask you some questions about some of the conclusions that you reached. And, in particular, I'm looking at Paragraph 9 on Pages 2 and 3, and looking in particular within Paragraph 9 on Paragraph 9(c)(3), which is on Page 3 of your Report.

In that paragraph you say: "Absent any express restriction in the MFN clause, it would, and indeed should, cover both substantive and procedural matters."

How did you arrive at that conclusion?

A. The--my primary tool in looking at practice is, of course, what Tribunals have said, but also what treaty language suggests. In treaty language, one scholar of a continental European background would be looking at the Vienna Convention on the Law of Treaties, and I understand that even countries that have not subscribed fully to the Vienna Convention do accept it as customary law. And the language of the treaty is, perhaps, of paramount importance.

So, my view is that whenever contracting parties--that is, States--in drafting agreements, they won't introduce limitations to the text. They will do that expressly. And in the context of MFN, we have seen practice in the last, perhaps, 10, 15 years where the limitations have been introduced either in the body of the MFN group revision or by way of footnote, as is the case in here in Article 10.4.

The U.K. Model BIT, for example, has a clarification within the text of the provision rather than the footnote. And that's quite expansive.

So my view is, in looking yourself at case law, I think there are about 18 or 19 cases that are going that direction, say that absent any express limitation, the treaties--the MFN clause should not be read in a restricted way.

Q. And apart from those Authorities that you mentioned, can you explain why you came to that conclusion with respect to the language, the meaning of the language?

A. It is pure application of the Vienna Convention and the grammatical interpretation. I perhaps should have had the whole debate in this case, but there's a lot of cases.

But MFN came about from academic writing, I mean, up to a case which I understand is not everyone's favorite,

and some people might even read as discredited--I think it's a fair statement--Maffezini v. Spain. There was not much debate as to whether the MFN clause is restricted or not.

And then we have after that a body of scholarship, perhaps best exemplified by Professor Zachary Douglas, which takes the view that treatment cannot be substantive protection. Then we have other bodies of scholarship, primarily perhaps best represented by Professor Stephan Schill, that takes the view that, if you don't see a limitation--

(Interruption.)

(Stenographer clarification.)

A. --perhaps best exemplified by Professor Stephan Schill--that would be S-c-h-i-l-l--take the view that the only guidance is the text of the treaty, and that we don't put policy considerations to limit or expand the text. And, perhaps some way in the middle, we have other scholars like Professor Paparinskis, who takes the view that context is relevant, but it has to be expressed with reasonable certainty.

So, I have not written on the topic, but I have researched and taught on the topic for nearly 20 years, and my understanding of how the Vienna Convention would operate is that a distinction in treaty language has to be express.

Q. Okay. In addition to these factors, did the historical treatment of concepts of procedure and substance play any role in your conclusion?

A. Yes. Yes, indeed. That's why I have looked at the historical interpretation. The modern distinction between substance and procedure, at least in civilian law systems can be traced somewhere to the 1840s. If one looking--read scholarship at about that time--perhaps the primary example would be Savigny, S-a-v-i-g-n-y--there is no distinction between procedural law and substantive law. Rights and remedies are connected; they're two sides of the same coin.

And the academic creation of civil procedure as a discipline started to separate procedural law from substantive law--again, very clearly seen in German legal scholarship, particularly in Windscheid, W-a-i-n-d--and from that point we have the distinction between substance and procedure. Then procedure becomes a very technical sort of issue of competence that has--we have all studied in law schools.

So, it's an academic creature. It is not an innate feature of law. But we live with that distinction, and I think international law specifically--which, in my view, is well-embedded in Roman law and jus gentium--does not really know this distinction. It's a distinction that

has been introduced by scholars sometime in the 20th century.

Q. At the risk of asking you to state the obvious, how does that analysis play into your conclusion about the application of MFN clauses?

A. My conclusion would be that, absent any specific language, then we take treatment as a holistic matter which doesn't distinguish between procedure and substance.

Q. Does the general goal or purpose of MFN treatment or protection play any role in your analysis?

A. Yes. MFN clauses create beneficiaries of these clauses as part of a network. If you are--if you have rights under a treaty with an MFN clause, then automatically you can avail yourself of a broader network of opportunities. So, if you wish--I don't know. I mean, what would be the appropriate modern example? If you fly American Airlines, then can you get all the benefits of the Oneworld alliance; or if you fly Lufthansa, you get all the benefits of the Star Alliance, but you can't get the benefits from the other conglomerates.

So, MFN clauses create that network of benefits that are potentially expanding to the extent that the language of the Treaty allows to you expand, because it could be that even within the MFN clause in that network, there are limitation of the language, and we have to take

the language as it is. We can't change it.

Q. Certainly. If I could ask, then, about the next conclusion in your Paragraph 9, which is Paragraph 91, in that paragraph you say in the first two sentences--in the whole paragraph, actually: "There seems to be a critical mass of cases where Tribunals state that, absent an express exclusion or other policy reasons, dispute settlement provisions are covered by the scope of an MFN clause. In my view, this line of cases suggests the current state of affairs."

I wanted to ask what you meant by the phrase "critical mass of cases."

A. Yes. That is me being cautious. I have done--in preparation for the Hearing I have done the exercise in, more or less, counting how many cases have included dispute settlement as part of the MFN, and the number is 18 plus 1, and I will explain to you the plus 1. And on the other side--on the other camp, the cases that have not allowed the extension to dispute settlement is 14. So, perhaps I should be saying that the majority of cases assumes that an MFN covers also dispute settlement.

Q. What did you mean by 18 cases plus one?

A. The plus one case is a case that I particularly like in so many respects, and this case is the Salini Impregilo v. The Argentine Republic, which did not decide

the fact of the matter on the MFN, but it has a broader discussion, and the discussion is in favor of the interpretation of the dispute settlement covering civil procedure.

And Salini Impregilo v. Argentine Republic is important in two respects. First of all, I think the Tribunal is an incredibly well-informed and well-placed Tribunal. I mean, the Chair is James Crawford, a judge at the International Court of Justice; Kaj Hobér, a very experienced investment arbitration lawyer and arbitrator; and, most importantly for our purpose, Professor Jürgen Kurtz, who, although he is not a household name in investment law, has a very strong background in WTO and international trade law. He has the sensitivity of understanding MFN clauses, even in the context of a TPA because of this WTO background.

Q. Okay.

A. So, I think that's a very, very interesting case.

And the second part, of course, also addresses issues of the Limitation Period, which I understand is one of the issues before this Tribunal.

Q. Okay. And when you say that this line of cases, the critical mass, suggests the current state of affairs in your opinion, could you tell us why?

A. Yes. Because I think it is so easy to be

focusing on the academic debate, and sometimes the academic debate is a parallel universe. I could, perhaps, even refer to Karl Popper and how sometimes theory and practice do not coincide.

I think in the practice still the majority of cases sees the extension of the classical MFN clauses to be covering dispute settlement. The academic debate is very much operating in the way the law ought to be in the light of the academics, de lege ferenda, and sees why we should be building up caveats in MFN clauses. And we see that in the number of very--Model BITs and further agreements. But this is the law as it would be, not the law as it is, and that's why the current state of affairs.

Q. Okay. I'd like to ask you about the next paragraph in your conclusions, Paragraph 92, and here is the one-sentence--the first sentence that I wanted to ask you about.

You say that: "While different views have been expressed in this respect, it is my own view that, unless specific, narrow, and restrictive language has been employed in the MFN clause, the interpretation ought to be such as to enable the clause to fulfill its purpose."

I wanted to ask first: What are the different views to which you're referring here?

A. The different views are, perhaps, a writing like

by Professor Zachary Douglas, that you take the view that there is a policy-driven interpretation. So, a policy-driven interpretation, that has the potential for modifying the unconditional language of an MFN clause.

But I think--I mentioned other scholars earlier, and I won't repeat them because they are already in the Transcript. The other views take the view that we cannot introduce policy-driven interpretation where the text of the treaty is very clear.

Q. Okay. And in your own view, you refer to specific, narrow, and restrictive language.

What do you mean by that? Can you give us an example?

A. Either a footnote or something that would indicate that the MFN clause only applies to certain type of matters; either particular provisions in the treaty, or particular chapters or sections of the treaty, and so on.

Q. Okay. I'd like to turn now to your Second Report and ask about your conclusions relating to the specific Treaty at issue, the Colombia-U.S. Trade Promotion Agreement here.

And before I turn, actually, to that, let me ask: Are you aware that the MFN clause found in Article 12.3 of the TPA is phrased in terms of treatment?

A. Yes.

Q. Okay. So, I'm turning to Page 4 of your Report to Paragraph 6.1, where you give the conclusion that: "The definition of 'treatment,' absent any specific, restrictive language, can and should be interpreted as including dispute-settlement provisions contained in a third Treaty."

And what's the basis for this conclusion?

A. My conclusion is that, although I understand that the reference to "treatment" is not the same as referring to all matters or something of that nature, one would have to try very hard to give substantially different meanings to the scope of the two words.

And there's, indeed, I think, quite a number of cases that take the view that the word "treatment" covers not just a right, but possibly how this right has been exercised.

So, yes, the fact that the--that we have this reference to "treatment" is not in any way unduly limiting, in my view, the scope.

Q. Okay. And in this conclusion, you refer again to "specific, restrictive language." You're aware of Footnote 2 to Article 10.4 of the TPA; correct?

A. Yeah. Yeah. Yes, I am.

Q. How does this footnote affect your conclusion in the case of Article 12.3?

A. My conclusion is that where the contracting

parties, the States, want to reduce limitation, they have opportunity and they have mechanisms to do that by introducing a footnote. 10.4 at Paragraph 2 has Footnote 2. Article 12.3 has no footnotes. So, I assume there is no restriction whatsoever.

Q. Have you given consideration in other ways in which Footnote 2 could be carried into Article 12 in some way?

A. Yes, of course. I have looked also to Article 12.1, where there is an introduction of a dialogue between Article 10 and Article--sorry, Chapter Ten and Chapter Twelve. And, if I'm not mistaken, Chapter--Article 12.1.2(b) refers to a number of provisions of Chapter Ten that are being imported, incorporated into Chapter Twelve. And I wanted to see whether we have in this grand importation of Article 10.4, but this is not referred there.

We have 10.7, 10.8, 10.12, 10.14. So, again, I assumed that there is no incorporation in this way.

Q. Okay. Returning to your conclusion in Paragraph 6.1 about the interpretation of the definition of "treatment," how does this conclusion apply to the question of applying under Chapter Twelve of the TPA the longer Limitations Period that is set forth in the Colombia-Switzerland BIT?

A. Yes. I think this is coming, perhaps, reasonably close to a schoolbook example of an MFN clause, in the sense that Colombia and the United States have agreed that there will be a Limitation Period of three years, but there is an access to ISDS. So, what the MFN clause does is, within the same opportunity of being within the ISDS, it still extends the Limitation Period from three years to five years. And that's obviously a more favorable treatment for the investor because it allows the investor a bit more time to exercise the rights.

So, the treatment is there. And it becomes more favorable by having extended that three years' period to five, and I think that's a classical more favorable treatment.

Q. Thank you, Professor.

MR. REETZ: I have no further questions.

PRESIDENT BEECHEY: Thank you, Mr. Reetz.

Ms. Horne, are you on again, or is Mr. Grané taking over?

MS. HORNE: I am, Mr. President.

PRESIDENT BEECHEY: Very well. The floor is yours.

MS. HORNE: Thank you very much.

CROSS-EXAMINATION

BY MS. HORNE:

Q. Good afternoon, Professor Mistelis.
Can you hear me?
A. I can hear you very well. Good morning.
Q. Excellent. My name is Katelyn Horne and I represent the Republic of Colombia in this proceeding. We'd like to thank you for testifying here today.
As you will have already heard, we have transcribers on the line who are transcribing the testimony. So, for that reason, it will be important for us to speak slowly and also for us not to speak over each other. I will therefore ask that you let me finish my question before you start to answer, and I will do my best to let you finish your answer before I start my next question.
But, with that said, as you may have already heard, we are operating under time constraints, so I will ask that you answer my question as it is phrased without expounding. You will have an opportunity on redirect to provide further explanation, if you consider it necessary.
Please also let us know if you need a break at any time, Professor Mistelis.
A. Thank you.
Q. I believe you've just indicated that you're familiar with the rules of interpretation set forth in the Vienna Convention on the Law of Treaties; is that correct?

A. It is.
Q. And it's your understanding that the VCLT placed primacy on the ordinary meaning of the text of a treaty; is that correct?
A. Correct.
Q. Professor Mistelis, do you agree that consent is a fundamental requirement of investor-State arbitration?
A. Yes.
Q. In drafting and concluding treaties, States have the right to create and limit consent to arbitration as they see fit; is that correct?
A. Correct.
Q. So, for instance, a State can in a treaty specify that investor-State arbitration is only available for certain types of claims; is that correct?
A. Correct. Yes.
Q. Professor Mistelis, I believe you've reviewed the Expert Reports submitted by Mr. Wethington?
A. Yes. I have seen it.
Q. And you stated in your Second Report that you concur with his opinions; is that correct?
A. Yes. My view is that our opinions cover different scopes, and I do not opine and I have no expertise in NAFTA, but the way I find his opinion to be quite--very interesting piece of evidence of how NAFTA was

negotiated.

Q. And you agree with Mr. Wethington that the similar structure and wording of NAFTA render it a useful tool for interpreting the TPA; is that correct?

A. That is correct.

(Interruption.)

MS. HORNE: I believe a Court Reporter is speaking, but I'm having trouble understanding.

PRESIDENT BEECHEY: I think maybe the interpreter.

SECRETARY ARAGÓN CARDIEL: The Court Reporter lost interpretation for a minute. It should be working now.

PRESIDENT BEECHEY: Thank you.

MS. HORNE: All right. We will proceed.

PRESIDENT BEECHEY: Go ahead, Ms. Horne.

BY MS. HORNE:

Q. Professor Mistelis, you referred in your Report to the use of the MFN clause to import provisions from other treaties, and, in doing so, you drew a distinction between using an MFN clause to import more favorable dispute-resolution requirements versus using an MFN clause to import consent to arbitration; is that correct?

A. Correct.

Q. In some treaties, States limit their consent to

arbitration to only certain types of claims, for example, only to expropriation. Is that correct?

A. That is correct.

Q. And are you aware that a number of tribunals have rejected attempts by claimants to expand the scope of consent by means of the MFN clause?

A. Yes, of course.

Q. Professor Mistelis, did you cite in your Report a case involving a treaty that did not provide consent to arbitrate on fair and equitable treatment clause where the Tribunal allowed the Claimant to use an MFN clause to submit a claim under the fair and equitable treatment clause?

A. I believe I have. I don't have my Expert Report in front of me, but I can call it up in my computer, if you want me to.

Q. Please.

A. Yes. Just allow me a couple of seconds.

Are you referring to the First or the Second Opinion?

Q. No. I just asked you generally if you have cited such a case.

A. Oh, yes. Yes, I have. The answer was, yes.

Q. And which case is that, Professor Mistelis?

A. I think I have referred to RosInvest and Garanti

Koza, at least.

Q. It's your submission that the RosInvest Tribunal allowed a claim for breach of fair and equitable treatment where consent to arbitrate such claims was not provided in the treaty?

A. I think what I'm arguing in this case is that the Tribunal, having looked at the number of issues, have also looked at the extent to which an import of another provision can bring about benefits. And that was covering the effet utile as well, yes.

Q. Let's explore that case a little bit further, Professor Mistelis.

So, if you recall, in that case the dispute-resolution clause provided consent to arbitrate only the amount of compensation due for an arbitration; is that correct?

A. Yes.

Q. And, in fact, the Tribunal applied an MFN clause to allow the claimant to submit to arbitration, not only the amount of compensation for expropriation, but the fact of expropriation; is that correct?

A. Yes.

Q. The Tribunal did not allow a fair and equitable treatment claim, did it?

A. I think the critical paragraph from RosInvest

that I have referred to is the paragraphs at 132 and 135, of the Award on Jurisdiction. And I think, if I recall correctly, the Tribunal was arguing that if the matter was to--just, perhaps, particularly aside from there, if this affect is generally accepted in the context of substantive protection, the Tribunal sees no reason not to accept it in the context of procedural clauses and suggested arbitration clauses.

Quite to the contrary; it could be argued that, if it applies to substantive protection, then it should apply even more to only procedural protection, but the Tribunal feels that this latter argument cannot be considered that decisive but that, rather, as argued further above, an arbitration clause, at least in the context of expropriation, is of the same protected value as any substantive protection afforded by applicable provisions such as Article 5 of the BIT. That BIT was the Russia-U.K. BIT.

Q. Are you aware, Professor Mistelis--I apologize. We've had two Experts in a row.

Are you aware, Professor Mistelis, that the Tribunal was applying an MFN clause that was applying the specific language of a unique MFN clause in that case?

A. Yes. Yes, of course. I don't disagree with that. I mean, but I think every MFN clause is unique and

has to--and sometimes generalizations are, perhaps, misleading. Not all MFN clauses are the same.

Q. Perhaps--it may be helpful for the benefit of all to put the relevant parts of the Decision on the screen. So we are going to project CLA-0070, which is the RosInvest Decision, and we will begin with the text of the MFN clause that the Tribunal was applying that is at Page 29.

I believe it may be on the next page.

A. It is actually the page before.

Q. Thank you very much. We're just determining that. It is Article 3.

A. Article 3, yes.

Q. Correct.

A. Page 28.

Q. Here it is on the screen.

There are two parts of this MFN clause. The first we'll see on the screen: "Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of investors of any third state."

Did I read that correctly?

A. Correct. Yes.

Q. And now there's a second part of the MFN clause, which is: "Neither Contracting Party shall in its

territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment, or disposal of their investments to treatment less favorable than that which it accords to investors of any third state."

Did I read that correct?

A. Correct, yes.

Q. Mr. Wethington--I do apologize again.

Professor Mistelis, is it--are you aware that the Tribunal in this case applied the second part of the MFN clause?

A. Yes. I'm aware of that, yes.

Q. And are you aware that, in its analysis, it specifically relied on this language as regards their management, maintenance, use, enjoyment, or disposal of their investments?

A. Yes.

Q. Does that language appear in the MFN clause of the TPA at issue here?

A. No. The language is not identical. I am not disputing that.

Q. Have you cited in your Reports to any other case in which a tribunal expanded the scope of consent to arbitration to claims that were not allowed to be submitted to arbitration using an MFN clause?

A. That would not allow using in terms of having a restrictive MFN provision really.

Q. I'll rephrase the question.

Have you cited in your Reports any other case in which a Tribunal was faced with a treaty clause that limited consent to arbitration to a certain set of claims and in which the Tribunal used an MFN clause to import and create consent to other types of claims?

A. Yes. I think I have cited the number of questions, number of cases. The RosInvest is relying on the Russia-U.K. BIT. There's a number of other cases which, based on U.K. BITs of the earlier generation, the early '90s, that would have very similar language. For example, some of that language--well, it's a variation of that language.

You can find in AWG Group and Argentine Republic. It is not all the way to the TPA, but it is not the language of the RosInvest, or an argument is that that the similar language even in the Hochtief and Argentina--the particular clause there is in Spanish. And then there's similar language also to the RosInvest in the Garanti Koza, which is, again, a Turkmenistan-U.K. BIT. There is another case which was not at that time was cited, but I refer to in my cases as another case, which is not a public case called Krederi and Ukraine where Ukraine-U.K. BIT, similar

language to RosInvest, came to the same conclusion.

Q. So it's your submission that in those cases a Tribunal allowed a claimant to submit a claim to arbitration that fell outside the scope of the limited consent to arbitration provided in the Treaty?

A. Yes. And I think one can see in some of these Decisions that effectively the restrictive language or, rather, the very specific language, that we call it, that we see in the Russia-U.K. BIT was not seen by Tribunals as being overly restrictive because if one looks at the--what you have just read, management, maintenance, use, enjoyment or disposal of their investment, some Tribunals see that as quite broad language already.

Q. Thank you, Professor Mistelis.

Now, it's your testimony that generally worded MFN clauses, MFN clauses without explicit restrictions, can be applied to dispute-resolution provisions; correct?

A. Correct.

Q. You base this opinion, in part, on what you've called a critical masses of cases; is that correct?

A. Correct.

Q. And you are referring there to the Maffezini v. Spain and its progeny; is that correct?

A. Yes. "Progeny," perhaps, is a bit used inappropriately here, but I will call it "Decision," other

Tribunals that have perhaps taken similar view.

Q. Are you aware that most attempts to apply an MFN clause to procedural requirements other than the 18-month litigation requirement that was at issue in Maffezini have all failed?

A. Yes. I will not call it in all other cases because I think detail is critical. And I'm not sure whether we have the time to go into that discussion. I think the immediately--or soon after Maffezini we have cases like Plama that take the view that this is not just the period of exhaustion of local remedies that one needs to look at but is even the type of dispute resolution that is relevant.

So, there we have the questions that you have described there in your--as the type of consent that the State might have given. So, that is not a refusal, as such, to import more favorable dispute-resolution provisions or more favorable procedural conditions, if you wish, but the Tribunals have been sort of quite careful not to extend unduly the protection that is there and by operation for the MFN clause.

Q. You referenced in your Reports, I believe, a report of the International Law Commission from 2015; is that correct?

A. Yes.

Q. And if I represent to you that there's a statement in that Report that says "attempts to use MFN to add other kinds of dispute settlement provisions going beyond an 18-month delay have been generally unsuccessful." Would you disagree with the ILC on that conclusion?

A. That is the ILC conclusion. I'm not a member of the ILC, yet. So, that is what they say.

Q. And in your Reports, you did, in fact, analyze the Maffezini Decision; is that correct?

A. Yes, I have.

Q. And are you aware, Professor Mistelis, that the Maffezini Tribunal noted that there are some situations in which it's not proper to apply an MFN clause to dispute-resolution provisions?

A. Yes.

Q. Let's turn to the Maffezini Decision, which is CLA-0031. We'll display that on your screen.

Let's turn to Paragraph 62 of that Decision. And the second half of that paragraph reads: "As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting Parties might have envisaged as fundamental conditions for the acceptance of the Agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus

be narrower than it appears at first sight."

Do you see that?

A. Yes.

Q. And now let's turn to Paragraph 63 which, from the beginning of the sentence, it says: "Here, it is possible to envisage a number of situations not present in the instant case."

Do you see that?

A. Yes.

Q. And then on the next page, near the bottom of Paragraph 63, the Tribunal states: "Finally, if the Parties have agreed to a highly institutionalized system of arbitration that incorporates precise Rules of Procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the Contracting Parties."

Do you see that?

A. Yes.

Q. So, the Maffezini Tribunal here indicated that the creation in a treaty of a specialized arbitration regime with particular Rules of Procedure, like the one in NAFTA, will militate against the use of an MFN clause to

alter the procedural rules.

Is that correct?

A. Correct. And, for example, one of the issues I think that one could see is that NAFTA provides for consolidation of cases, which is not provided before by ICSID, for traditional arbitration rules. So, that will be availing a remedy that would not have been--anticipated for by Contracting States or transparency.

Q. Yes.

Professor Mistelis, you consider that the treaty practice of States' Parties to a treaty is relevant; correct?

A. Correct.

Q. In fact, you have testified that reviewing the treaty practice of the Parties is "the best and most appropriate approach."

Does that sound accurate?

A. Correct, yes.

Q. I'll ask you to direct your attention now to your Second Report, which we'll display on the screen, and specifically to Paragraph 87 of that Report. In Paragraphs 87, 88, and the ones that follow, you're reviewing the treaty practice of the State's Parties to the TPA?

A. Umm-hmm.

Q. And starting at Paragraph 89, you quote the MFN clauses in a number of treaties signed by the United States and by Colombia. These are examples of clauses that specify that the MFN clause does not apply to dispute-resolution provisions; is that correct?

A. Right.

Q. The first example in Paragraph 89 is Article 10.4 of the Perú-U.S. TPA. The provision quoted begins with the phrase "for greater certainty."

Do you see that?

A. Yes.

Q. The next example at Paragraph 90 is Article 11.4.3 of the Korea-U.S. FTA. And the provision there begins with the term "for greater certainty."

Do you see that?

A. Yes.

Q. And in Paragraph 91, you've quoted Article 804(3) of the Canada-Colombia TPA, and the provision begins "for greater clarity."

Do you see that?

A. Yes.

Q. And your fourth and final example here is Article 10.5 of the Colombia-Israel FTA, and that provision begins "for the sake of avoiding any misunderstanding, it is further clarified that."

Do you see that?

A. Yes.

Q. So, in each of these provisions from U.S. and Colombian Treaties that you cited in which the Treaty Parties clarified that the MFN clauses did not apply to dispute-resolution provisions, the Treaty Parties introduced that clarification with the phrase "for greater certainty" or something like it. Is that accurate?

A. Absolutely.

Q. Are you aware that the United States ascribes a very particular meaning to the phrase "for greater certainty" in its treaty practice?

A. Absolutely. And it has created even a drafting style which has been adopted by many other Parties.

Q. And that interpretation, that understanding of the United States is that the term "for greater certainty" precedes a sentence that does not change but, rather, clarifies the meaning of a treaty term; is that correct?

A. Correct.

Q. And this treaty practice of the United States should be taken into account when interpreting the TPA; correct?

A. Correct.

Q. Professor Mistelis, do you consider that the common understanding of a treaty by the State's Parties to

that treaty should be taken into account in interpreting the Treaty?

A. Yes. Let me, perhaps, provide, if I may, two caveats. So, for this--for the greater certainty part, we do have it actually in 10.4. That is actually the footnote. So, that the U.S. has used that in the footnote leading to the scope of the MFN clause in 10.4, but we don't see it, for example, in 10.3. And the second point that you have made, yes, of course, practice of States in negotiating and drafting are critical.

Q. Thank you, Professor Mistelis.

Is it your view, Professor Mistelis, that when interpreting the TPA, Mr. Wethington's Reports could be considered "preparatory works" within Article 32 of the Vienna Convention?

A. Yes, although I understand that Mr. Wethington was not involved in the drafting of the TPA. So, in the context of NAFTA, yes, this is historical to travaux préparatoires, perhaps, context.

Q. Professor Mistelis, are you aware of any case in which a Tribunal, when interpreting a treaty provision, has relied on the personal recollections of an individual and ignored the agreed interpretation of the Treaty Parties to the Treaty?

A. No. Can I--no, I'm not. But can I ask you what

you would see as the agreed interpretation?

Q. With respect, Professor Mistelis, I'll be--I've been asking the questions, and that's a matter for submissions by the Parties, perhaps, during their Closing Arguments rather than a question from you.

A. Okay. Fair enough.

MS. HORNE: Mr. President, that concludes our questions.

Professor Mistelis, we thank you for your time.

THE WITNESS: Thank you.

PRESIDENT BEECHEY: Thank you, Ms. Horne.

Is there any redirect?

MR. REETZ: Yes, Mr. President, briefly. If I may. I'm just trying to figure out the permanent unmute button.

PRESIDENT BEECHEY: Okay.

MR. REETZ: I have just a few minutes if that helps with timing.

PRESIDENT BEECHEY: By all means.

REDIRECT EXAMINATION

BY MR. REETZ:

Q. Professor Mistelis, you were asked a bit about the language of the MFN in the second paragraph of the RosInvest MFN clause. And you remember that that is language that is roughly similar to the language in the

TPA's MFN provision in Article 10.4.

Do you know the provision that I'm talking about?

A. Yes. Yes, I do.

Q. Okay. Are you able to tell us your view as to the comparative breadth of the MFN clause in Article 10.4 of the TPA and Article 12.3 of the TPA, which does not have that extra language?

A. Before I go there, if I may, I think the RosInvest case is to be seen in the context of a BIT, not a TPA. But the BIT between countries is a very different socioeconomic structure. So, the Russia on the one side, and the United Kingdom, and, of course, there both Parties are very critical in being mindful of trying to limit contents. I think Russia would anticipate, for example, what they will get from the U.K. as an investor in oil and gas which is critical because it is needed, but also critical because it affects a lot of resources.

In the context of the TPA, we don't have a BIT, but we have effectively a Free Trade Agreement, a trade promotion agreement is a free trade agreement. And there, the States already have agreed, as the end of the negotiation of the FTA, that the economic relations are so substantial that they are not having just an Investment Agreement, but they have a broader Treaty agreement with an investment chapter.

So, I think it is useful to look at the RosInvest, but also in the context of the TPA, or an FTA, Free Trade Agreement, the cooperation is so much stronger that one would expect more.

And to go to a point that you wanted to ask me, I think, that the comparison of the languages of 10.4 and 12.3. If I understood correctly.

Q. Yes.

A. Is that what you wanted to ask, Mr. Reetz? So--

(Overlapping speakers.)

Q. Yes. Are you able to tell us the comparative breadth of the language in those two provisions?

A. Yes. 12.3 speaks of a treatment no less favorable than, of course, the investors. And no more caveats in that language. While 10.4, if I find it quickly, which I hope I would. Let me just find 10.4.

10.4 speaks--has this RosInvest caveat, establishment, acquisition, expansion, management, conduct operation, and sale or other disposition of investment.

I don't see that as covered as such. I think that term is introduction of specificity rather than an introduction of limitation. That's the way I would read it because the treatment no less favorable, it appears in 10.4 in both paragraphs, 10.4(1) and 10.4(2). And it does appear in 12.3. So, the broader objective is treatment no

less favorable, and then with respect to--is specification, is the least of issues which particularly would be covered. So, 12 is broad, 12.3 is very broad.

Q. Okay. Let me ask, do you view a guarantee of treatment generally as being broader than a guarantee of treatment with respect to particular aspects?

A. Yes.

Q. Okay. Thank you. You were also asked about the particular context of many of the cases that you cited with respect to the application of an 18-month delay period as the provision that was the subject of MFN treatment.

Do you view such a delay period as distinguishable, in principle, from a limitations provision for purposes of MFN treatment?

A. A limitation period, I think, in most cases is introduced for purposes of legal certainty. So, one would like to know what is the risk of further proceedings from a series of events occurring, whether that is three, five, or six years, whatever. We do have it as a matter of domestic law.

So, I think in the case where what we talk about is a Limitation Period, both contracting Parties, the contracting States, have assumed the risk that they would be sued if a series of events occurred, and they try to limit that risk by introducing a limitation period.

Now, I think the MFN clause effectively brings about an extension of that Limitation Period, and one could talk hours about Limitation Periods, especially academics, whether they are of substantive nature, whether they are a procedural nature. In some systems are one or the other. And to the extent that I could ask from a number of Colombian students, I have heard I think in Colombia is rather a mixed nature. You could not really think that it belong to one or the other group.

So, I think, for me, that is very much like extending the 18 months, domestic or proceedings period because you know that eventually there will be an ISDS process. The question is then what time it starts or by what standard time it can operate.

Q. In that context, do you view the use of MFN to extend a limitations period as an example of rewriting a dispute settlement regime?

A. Not at all. I think it's the clear activation of the more favorable treatment is that network capacity that I have described before is the benefit you have for being part of an alliance.

MR. REETZ: Thank you, Professor. I have nothing further, Mr. President.

PRESIDENT BEECHEY: Thank you Mr. Reetz.

Mr. Söderlund, any questions.

ARBITRATOR SÖDERLUND: No, thank you.

PRESIDENT BEECHEY: Thank you.

Professor Ferrari.

ARBITRATOR FERRARI: Mr. Mistelis--

PRESIDENT BEECHEY: You need to speak up. You need to speak up.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR FERRARI: Professor Mistelis, in the very beginning of your testimony, you actually referred to the view of Professor Zachary Douglas; is this correct?

THE WITNESS: Indeed, yes.

ARBITRATOR FERRARI: As a view that takes one position?

THE WITNESS: Yes.

ARBITRATOR FERRARI: Strongly takes one position, or how would you define his view? Because you didn't define it.

THE WITNESS: Quite strongly. Quite strongly. I think there's a number of writings of Professor Douglas that have--are already in the same direction, effectively.

ARBITRATOR FERRARI: Okay. Okay. I don't--can I ask you, is there somebody else you could point to has similar views that are similarly strong?

THE WITNESS: I have mentioned Professor Schill, but I think Professor Schill--

ARBITRATOR FERRARI: On the other side.

THE WITNESS: On the other side. Yes.

ARBITRATOR FERRARI: Sorry.

(Overlapping speakers.)

THE WITNESS: Yes.

ARBITRATOR FERRARI: That is not what I was asking. Sorry if I was not clear.

So, since you expressly refer to Professor Zachary Douglas' view, I wonder whether you can associate any other scholar with the view held by Professor Zachary Douglas, meaning the views that you just said is a strong view.

THE WITNESS: I think the view that he takes in his--actually, over a very good book on investment of claims, which is--aims to be a restatement of the law, but, perhaps, a bit prematurely, so because the restatement of the law that has been about 10 or 11 years ago, when we have got only about 30, 40 years of practice of ISDS. I cannot agree on that particular point.

And I think in that sense it is not a restatement of this based on 100 years of jurisprudence, or I think on that particular point, both on the black letter of what he suggested, there is a lot of personal opinion rather than the reflection of practice.

ARBITRATOR FERRARI: Yes. But, again, I do not

want any opinion on Professor Zachary Douglas' book. It's a great book. So, that's really not my question.

I asked whether you know of others, of commentators, of academics, or those who want to be academics who hold a similarly strong view, meaning one as strong as Professor Zachary Douglas' view on MFN?

THE WITNESS: The answer is no.

ARBITRATOR FERRARI: Thank you.

PRESIDENT BEECHEY: Thank you very much.

Professor Mistelis, thank you for your time. We are very grateful for your assistance. And you are released.

THE WITNESS: Thank you. Thank you.

(Witness steps down.)

PRESIDENT BEECHEY: So, that brings our evidentiary phase of the hearing to a close.

I'm conscious that we have a little homework to do, which is the objection that was raised at the start of the day about Vandevelde. We will look at that now, briefly. And then let the Parties know our answer overnight, so that you have it before you start a full day tomorrow, no doubt.

Is there anything else we need to deal with this evening?

MR. REETZ: Not for the Claimants, Mr. President,

sorry.

PRESIDENT BEECHEY: Very well. Okay.

For the Respondent.

MS. HORNE: Not for Colombia, either, Mr. President. Thank you.

PRESIDENT BEECHEY: Thank you very much.

All right. Well, in that event, we will adjourn now. We will get you an answer on that Application that was made this morning, and otherwise, we will see you at 2:00 p.m. GMT on Friday.

MR. REETZ: Thank you.

MS. HORNE: Thank you.

PRESIDENT BEECHEY: Thank you very much indeed. Thank you. Good night.

(Whereupon, at 12:45 p.m. (EST), the Hearing was adjourned until 9:00 a.m. (EST) the following day.)

CERTIFICATE OF REPORTER

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

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

Dawn K. Larson

Dawn K. Larson