INTERNATIONAL CENTRE FOR SETTLEMENT OF

INVESTMENT DISPUTES

GAMI INVESTMENTS, INC., Claimant,	:	
v.	:	NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING
UNITED MEXICAN STATES, Respondent.	:	

Volume I

Wednesday, September 17, 2003

Room H1-200
The World Bank
600 19th Street, N.W.
Washington, D.C.

The hearing in the above-entitled matter was convened at 9:33 a.m. before:

JAN PAULSSON, President

JULIO LACARTE MURO

MICHAEL REISMAN

ZACHARY DOUGLAS, Secretary

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ALSO PRESENT:

DOUGLAS HEATH, Government of Canada
JENNIFER TOOLE, U.S. Department of State

C O N T E N T S

P R O C E E D I N G S

PRESIDENT PAULSSON: Good morning, ladies and gentlemen. Welcome to the hearing on issues of jurisdiction and admissibility in the case of GAMI versus Mexico.

For the record, I'm presiding at this arbitration, Jan Paulsson. The co-Arbitrators are, to my right, Professor Reisman; to my left, Dr. Lacarte Muro. The Administrative Secretary of the Tribunal, Zach Douglas, is seated to my left as well.

Could we have again for the record introductions of the delegations and the observing delegations? I will turn to GAMI first.

MR. AGUILAR: My name is Guillermo Aguilar Alvarez, and I am joined by Chip Roh; Don Liebentritt, an officer of GAMI; Lucia Ojeda, Sloane Strickler, and Alicia Cate.

MR. PEREZCANO [Interpreted from Spanish]: Thank you very much, sir. Good morning. Good morning, members of the Tribunal. I am Hugo Perezcano, Legal Adviser of the Ministry of Economics and the representative from Mexico in this procedure.

To my left, Lilia Ochoa, General Coordinator of Legal Affairs of the Ministry of Agriculture. To her left, Ms. Jimena Valverde, head of the unit for Legal Affairs of the Department of Economics.

Next, Luis Alberto Gonzalez, Legal Adviser of the Department of Economy; Mr. Cameron Mowatt, an external attorney of the Department of Economics; Mr. Rovirosa, attorney of the Department of Agriculture; Mr. Irwin Alpshuler, also external legal adviser. To my right, Mr. Stephan Becker, external attorney of the Department of Economy; and Mr. Mullick, also an external attorney of the Department of Economy and the representative of the Legal Department for Negotiations here in the city of Washington.

Thank you very much.

MS. TOOLE: My name is Jennifer Toole. I'm here with the United States Department of State on behalf of the United States Government, and with me I have Wara Serry-Kamal, also of the Department of State; Carrielyn Guymon, also of the Department of State; and Mark McNeill of the Department of State.

PRESIDENT PAULSSON: Thank you very much.

MR. HEATH: Doug Heath with the Canadian Government.

PRESIDENT PAULSSON: Welcome. Thank you.

We will do our best to conclude today, as the circumstances of the weather are of great interest to all of us now in terms of planning for our traveling. However, the Tribunal accedes to the request of the Respondent in terms of the time available for oral rebuttals this afternoon. In other words, to the extent that you find it useful to take a full hour, with the same right of response, obviously, we will accord that, on the understanding, obviously, that you are responding to what you will have heard in the morning and not holding anything back for the afternoon.

We also wish to take advantage of the fact that we are meeting here to discuss matters of housekeeping and how we might go forward under the foreseeable hypotheses that we have at the end of the afternoon. So we will be sure not to depart without having some notion of how we'll go forward.

That being said, this morning's exercise, as the Tribunal has understood the agreement of the parties, will consist of a presentation limited to 90 minutes, starting with the applicant on the exception on jurisdiction and admissibility, namely, the Respondent, a half-hour break following that, and then leading up to lunch, a maximum of 90 minutes response by the Claimant responding on

the application.

Are there any matters of housekeeping or any other observations you wish to make before that? I turn to Mr. Perezcano as the applicant.

MR. PEREZCANO [Interpreted from Spanish]: None. Thank you.

PRESIDENT PAULSSON [Interpreted from Spanish]: I would like to say something for the Spanish speakers. It's not easy for me to speak in Spanish because I'm afraid I would be very much ashamed of my many mistakes. However, I do have the impression that I would be able to understand what you have to say, but under one condition: Please speak slowly so that I can listen to you directly without having need of headphones. And I would be extremely grateful to you.

[In English] It's always a pleasure for a Tribunal to hear people speak slowly and clearly so that we follow you.

[Interpreted from Spanish]: As we say in France, the word is yours.

MR. PEREZCANO [Interpreted from Spanish]: Thank you very much, Mr. President, and once again, good morning to the three members of the Tribunal and to the delegation of the Claimant/Party, my colleagues, and all of the teams here with us.

Now, the GAMI claim has two fundamental defects that mean that this Tribunal cannot consider it. The first is that the measures claimed by GAMI in this procedure, both the decree for expropriation of September 2001 as well as what GAMI has referred to as the implementation by Mexico of its measures and laws regarding the sugar industry and the management of its sugar program, are measures that apply to GAM, the company in which GAMI is a shareholder and the sugar mills of which GAMI was owner. None of these measures apply to GAMI. None of these measures are relevant to GAMI as an investor, as one party, nor of the actions of GAMI. These measures, consequently, are outside of the scope of Chapter 11 of NAFTA and, consequently, would not fall under the jurisdiction of the Tribunal.

GAMI has not identified a single measure applicable to GAMI as a shareholder of GAM nor of the actions of GAM. That is, there has not been the identification of a single measure to which Chapter 11 can apply.

Second, the impact or the effect alleged by GAMI in regard to its investment necessarily is derived from an impact or an effect on GAM, or, that is to say, an impact that GAMI attributes to GAM and to the sugar mills. Consequently, the harm claimed is no more than a proportion of the harm that GAM argues it has suffered, either directly because of expropriation or indirectly because of the management of the sugar program.

But in order to establish that the measures claimed have affected or have had an impact on GAMI's investment, it would be necessary to establish, first of all, that GAM or the sugar mills, whichever be the case, were affected or suffered the impact or the harm attributed by GAMI. And this is something that only GAM or the sugar mills can do.

In order to establish that the legal interest was affected, what GAMI is attempting to do is to submit a claim that is derivative, but it does not have the right of action per se. I insist this would only be a right of action of GAM or the sugar mills because GAMI does not have the procedural legitimacy to do so.

And, thirdly, we must not ignore that the expropriation decree, the measure considered by GAMI to be the heart of its claim, is still sub judice. It is under a legal process that was begun by GAM that

has not yet concluded, and it has not yet concluded the harm which has not occurred.

I will touch on these three topics in greater detail later on, but, first of all, I wish to refer briefly to the facts which are relevant regarding the exception submitted by the Government of Mexico.

The following facts are not disputed: GAMI is a minority shareholder of GAM, and its only investment is in shares that represent 14.18 percent of the capital of GAM. All of the measures claimed are measures that apply to the Mexican sugar mills or the controlling corporations of the sugar mills; that is to say, the sugar mills of GAM that were property of GAM among the first and GAM among the second. And here I wish to focus on a detail and ask Mr. Luis Gonzalez to explain the facts as they have arisen during this stage of the procedure how the sugar industry is organized or, rather, how the sugar sector is organized in Mexico and GAMI's position as a company based in Las Vegas, Nevada, that undertook an investment in GAM.

I will give the floor to Mr. Gonzalez.

MR. GONZALEZ: Thank you very much.

The sugar sector is made up of three sectors: the public sector, which is made up of the Federal Government as a regulating agency; the sugar producers who are represented at a national level, and there are two confederations--the peasant confederation and the rural producers confederation; then there are the sugar mills themselves, represented at a national level, represented by the national industry of sugar.

The sugar growers' decree establishes a system which regulates the relationship between the sugar mills and the cane producers. And, thus, they set up the Committee for Sugar Agroindustry. This committee is a tripartite agency that includes the participation of the cane growers through the farmers' organizations and the industrialists through the chamber of the sugar industry and the Federal Government through the Department of Agriculture and the Department of Economics.

Now, the decree also establishes an Arbitration and Conciliation Board. This is also tripartite, with the participation of the cane growers or cane producers, the industrialists, and the government, and which is charged with settling disputes between cane producers and industrialists.

Now, then, the relationship between the cane producers and the mills is established through the committees for cane production, and these are made up of representatives of each one of the mills and the cane producers of that given mill. In other words, for each sugar mill, there must be a sugar production committee, the decree of 1991.

Now, in the country, there are 61 sugar mills, five of which belong to GAM: El Naranjal, San Pedro, Lazaro Cardenas, Benito Juarez, and Jose Maria Martinez known as TALA. These are the mills.

Now, then, GAM is the controlling corporation, and in addition to the five mills we have mentioned, it had other affiliates: a packing company known as PAMSA, a provider of corporate services known as GAMSA, a provider of work services, of labor, known as EMYSOR, and a trading company known as TALA.

Now, GAM as the controller shareholder was set up as follows: The GAM shareholders among which Juan Gallardo, the majority shareholder with 64.82 percent, the investing public with a share of 17.19 percent, other investors who in their totality represent 3.81 percent, and GAM Investments with a minority share of 14.18 percent. This in general terms is the structure of the sugar industry as set forth by the

Claimant.

MR. PEREZCANO [Interpreted from Spanish]: Now, one of the measures claimed by GAMI is the standards for the sugar sector that apply to what we see on the screen, that is to say, this set of participants in the sugar sector, it applies to the committee, the sugar committee, the producers, the mills, but it does not cover the controlling corporations of the mills.

Now, the other measure claimed in this procedure is expropriation, and that only covers 27 of the 61 sugar mills in Mexico. None of these applies to GAMI as a shareholder nor to the actions of GAM. In fact, none of these measures applies to any one of the shareholders of GAM or the controlling corporations of the sugar mills.

Now, what GAM is claiming is harm to GAMI, and this is only a proportion of the damage to GAM which is being claimed in this procedure. The harm alleged by GAMI is the loss of value of the shares as a consequence of the loss of the total value of GAM given the application of the measures which are being contested. There is no harm that is independent to GAMI of any harm attributed to GAM. GAM and the sugar mills are Mexican companies, and they are owned by Mexicans, and they are controlled by Mexicans and, consequently, do not have any procedural legitimacy here and would not fall under the protection of NAFTA.

I would like now to go to the first point which I referred to at the beginning of my presentation. Article 1101 of Chapter 11 clearly sets forth that it applies to measures that refer to investments from elsewhere of the other party and the actions of investments of the other party in the territory of the host nation.

Now, here I wish to establish a clear difference as to how GAMI interprets Article 1101 and the clear text of the Article. GAMI suggests that Article 1101, which sets forth the scope of the application of the Treaty, indicates that the chapter applies to investors of the other party, the investments of investors undertaken in the territory of the party, and performance in terms of the environment and the rest of the chapter.

However, we must not ignore that Article 1101 establishes very clearly that the chapter applies to those measures which are adopted or applied to measures which are of the investments of the other party, the investments of these--of the other party, and as well as to performance requirements and environmental issues to all investments in the territory of the party. And what this sets forth is a very clear difference because Chapter 11, more than being a chapter on investment, is a chapter on government measures in regard to investors and investments.

And the rules of interpreting treaties demand that the terms be given their common meaning within their context, and the principle of effectiveness means that the proper meaning needs to be given to each one of the terms.

Thus, if the measures claimed do not go--are not relevant to the investor of another party or to the investor, they are outside of the scope of application of the Treaty and, consequently, the dispute does not fall under the jurisdiction of the Tribunal.

There is no question that none of the measures claimed by GAMI as we have seen apply to GAMI as a shareholder of GAM or of its shares. As I've already said, it does not apply to any of the shareholders of GAM or any of the controlling companies of the sugar mills, the regulatory framework of the sugar sector. And in reference to expropriation of the mills, the shareholders of these mills are completely--the matter is completely irrelevant.

The Government of Mexico has already submitted the meaning of Article 1101 as to the terms in Spanish of the version in Spanish as well as to the version in English of the English version.

Now, both of these versions are equally authentic, at least insofar as to the subject matter we have now before us. We do not see any difference between one version and the other. And I must say that Mexico is in agreement with the different definition of the term "relative," which has been submitted by both parties in this procedure, both the definition in English for the term in English as well as for the definitions in Spanish for the term in Spanish.

Mexico argues that the definition of "relative to" in either language denotes a nexus or a nexus that is closer than the term "affects." We have already made reference to the definition suggested by Maria Moliner in her "Dictionary on Spanish Usage." She says "concerning," "referring to," "touching on," under paragraph 8 of our Rejoinder. Or if we look at the Webster's definition in English, it means "a logical link between or be in relationship with," and we do not dispute other definitions that have been proffered. The meaning is the same.

Now, Mexico also argues that the Tribunal in Methanex v. U.S. established correctly that the term "relative" requires a legally significant connection between the measure claimed and the investor or the investment in question. The position of Mexico in the sense that this legally significant nexus is required between the investor and the investment is necessary so that Chapter 11 be applicable and is consistent with the obligations of the chapter.

If we review Articles 1102, National Treatment, 1103, Most Favored Nation Treatment, 1104, Minimum Level, and 1105, which is Minimum Treatment under International Law, all of these provisions are standards for treatment, and they refer to the standard to the investor or the investment. And the Government of Mexico maintains that any measure which is considered to be treatment to the investor or the investment must have a legally significant link with one or the other.

Articles 1105, Performance Requirements, 1107, Senior Management and Boards of Directors, and 1109, Transfers, deal with measures that manifest a legally significant link with the corporate rules for corporations. 1110 refers to direct expropriation and indirect expropriation or equivalent measures, and it also requires a legally significant nexus with the investment in order to be established.

In other words, the Tribunal may note that the terminology used in the substantive obligations of the chapter inform the interpretation of the term "relative to" under Article 1101. Sufficient nexus is required between the measure claimed and the investor or the investment.

The problem for GAMI is that it has not identified a measure that has this legally significant nexus with it or with its shares. What is true is that the Government of Mexico has not adopted nor has it maintained nor does it maintain a measure that refers to the legal interest of GAMI protected by the Treaty, that is, the rights that GAMI has and that derive from its quality as a legal shareholder.

We must not lose sight of the fact that GAMI is a shareholder of GAM. However, the rules under the sugar sector, as we've seen, both expropriation as well as management as well as implementation of the legal provisions on sugar, apply to the sugar mills and to the sugar producers. And these are not related in any way to the shareholders of the mills nor their legal interests as shareholders, and even less so with the shareholders of the shareholders of the sugar mills.

As a shareholder, what GAMI has is a share in the duty of GAM in proportion to its shares, 14.18 percent. None of the measures' claims have undermined the rights of GAMI which are associated with this participation; that is to say, its rights as a shareholder of GAMI.

GAMI has not been deprived of the rights that it has as a shareholder. The treatment that, according to GAMI, violates Articles 1102 and 1105 is a treatment towards GAMI towards the sugar mills. On the other hand, the Government of Mexico expropriated GAM's mills and stated that it is going to indemnify GAM at a fair market value to those people that are able to show a legitimate legal interest.

In that regard, GAM, which is the company of which GAMI is a shareholder, has elected not to accept the compensation offered by the Government of Mexico and to challenge the legality of the expropriation decree. No measure of the Government of Mexico has affected the right that GAMI has to derive benefits from the result of the lawsuit installed or started by GAM.

Now, if GAM wins the amparo proceedings, there was no expropriation, and GAM can actually benefit from the sugar business of GAM. Now, if GAM loses the amparo proceedings, then it is entitled to an indemnization by the Mexican Government at a fair market value, and GAMI as a shareholder may benefit of its shareholders--of a shareholder from the company.

Now, the lawsuit started by GAM is still going on. GAMI as a shareholder has a right to derive benefit from the result of the claim started by GAM, whichever that result may be.

The GAMI has said that the measure of the government is stated there and it keeps the holding of 14.18 percent of the shareholdings in GAM. The situation connected with the expropriation is not defined so far, and this has to do with the strategies that GAM has. And apparently, GAMI is not in agreement with these strategies. GAMI would want GAM not to have challenged the legality of the expropriation decree in order to establish, as it suggests in paragraph number 17 of the Memorial that the expropriation is final and that indemnization has something paid or that the indemnization or the compensation has not been paid at a fair market value, as it says in paragraph 2. And it says that the only thing that is right now at stake is the damages that need to be paid.

This is not the position of GAMI, however. GAM did not want to collect the indemnization of the compensation that the law gave to it. The idea is again to revert the expropriation and to recover the mills. GAM does not understand that the expropriation has been done with the effects that GAMI stated. They say that this expropriation was illegal. The fact that GAM actually moved away from the empower proceedings, and GAMI also states that in its pleadings. This implies that GAM has admitted the legality of the decree as least as regards those two mills.

I don't think there is any coincidence in connection with the claim regarding the legality or illegality of the expropriation decree.

The position of GAMI and GAM in connection with the legal effects and the factual effects of the expropriation do not match. GAMI and GAM have different interests. This is the situation where GAMI finds itself, and this derives from its capacity as a minority shareholder. And GAMI does not have the capacity to make decisions in GAM. And this is something that the Government of Mexico understands.

The legal interests of the shareholders and of the companies where they have their shareholders and that are protected by NAFTA are different interests and that they are protected under different rules. Mexico understands that international law in general and in particular

NAFTA offers protection to minority shareholders and to majority shareholders, and NAFTA also protects a company that is an investor of a party investor. So this derives from the protection of the property of foreigners under international law.

However, this does not mean that the legal interests of one and the others are the same. The legal interest of a company cannot be mistaken with the legal interest of its shareholders because both are protected under NAFTA.

This is to the extent that we are dealing with an investor under the definitions of the treaty. The Government of Mexico said that the Tribunal has to understand and state which are the rights that GAMI has under NAFTA as an investor of one of the parties and the rights of the investment, meaning the shares it has.

These rights should not be mistaken with the rights that GAM has in connection with the mills, and these are not protected under the treaty in connection with property and ownership.

In connection with my second point that I raised at the beginning of my presentation, as I mentioned before, GAMI claims that there is a damage that GAM has suffered. The damages that it claims is the loss of value of its shares, as a result of the loss of the total value of GAM and GAMI needs to establish this in order to get the amount that corresponds to this shareholding, 14.18 percent.

We could look at this graph here. And this is GAM and GAM's shares. These are the mills that were the property of GAM. GAMI needs to establish that there was a damage suffered by the whole body of GAM. To say that 14.18 percent of the damage, of the total damage, is indeed the damages that has been sustained by GAM.

Now GAM and the mills can claim these damages in connection with the whole of GAM and its related companies, because it is a damage that they suffered. GAMI is a minority shareholder, so therefore it cannot do this. The universal principle of corporate law says that corporations have a legal personality that is different from the personality of shares, international court of justice in the Barcelona Traction case and we have actually referred to this in detail in our pleadings, stated that the concept and the structure of a company are based on a firm distinction between the separate personality of the company and the personality of its shareholders.
So each one of them has different legal interests.

The fact that NAFTA and in general international law grant protection to shareholders regardless whether they are minority shareholders or majority shareholders, and they also protect companies at the same time, this does not mean that the interest of one and the other are one and the same.

So the company actually promotes the interest of the shareholders' base. And the fact that the corporate decisions of the company are those, well, that is fine, but shareholders have no right to modify these decisions, and NAFTA does not modify these principles of corporate law. This is a kind of corporate law that is common to all countries and international law recognizes these principles as principles that are virtually universal.

Article 1117 of the treaty shows this. It is a principle of international common law that in economic matters the state cannot state that its own state has violated international law. And Article 1117 modifies, however, this rule to allow that an investor of one party that holds the property or control of a country that is an artificial person, that is an entity of another party submits to an arbitration proceeding based on an obligation that has to do with the breach of Chapter 11 and

the company, I underline the company, has suffered losses or damages in connection with this breach.

Article 1135 requires that compensation be given to the company and not to the investor. Article 1117 does not confuse the different rights and legal rights that the company and the shareholder have. So it does not promote their own interest. The shareholder does not promote his or her own interest as a majority or a controlling shareholder.

Article 1117 acts representing the company and claims the composition of damages for the company. Article 1117 of the treaty does not go as far as Article 25 of ICSID, which considered that entities are parties of the contracting state, and they have a direct access to the international forum.

However, in 1117 of the treaty, the investor holding the property or the controlled company just as a vehicle, because the company, even if it is a foreign company or it is under the control of the foreign investor, the company cannot act by itself in the international arena.

GAMI claims that the expropriation and the claims and the sugar-related policy damaged GAM and the mills. However, this claim may only be brought by GAM and the mills, as the case may be.

The International Court of Justice in the Barcelona Traction case stated as follows, and I am going to quote. "Notwithstanding the different legal personality, a damage to the company causes a damage to its shareholders. Both company and shareholders suffer a damage. However, this does not mean that both can claim compensation. So it cannot concluded that the same events that affected entities and that are different in nature cannot be claimed. So when the interests of the shareholder have been damaged by an act to the company, the shareholder has to go to the company for the company to take the necessary action. Perhaps two entities may have suffered the same claim. However, the rights of only one of them have been breached."

This is the end of the quote. You are going to find this in one of our pleadings in paragraph number 24. GAM and the mills are Mexican companies and they are owned by Mexican shareholders and they are under the control of Mexican shareholders but they cannot come to these proceedings saying that the measures claimed by GAMI caused them the damage that is claimed by GAM. But they have not done this in other fora.

In connection the facts that GAMI has stated in these proceedings, the position of GAM and the mills is different from the position stated by GAMI here, and their interests are opposed. GAMI in paragraph number 48 of the Memorial states that the Government of Mexico flagrantly and systematically stopped enforcing the law. But the mills did not challenge the alleged actions or missions by the Government of Mexico before Mexican courts. GAMI also claims that the Government of Mexico expropriated GAM's mills and has paid no compensation. However, GAM has elected not to collect the compensation and to challenge the legality of the expropriation agreed with the idea of averting the expropriation.

Now in these proceedings, GAM cannot state that it has suffered the damage that it says it has suffered. What it really wants to do is to revert the expropriation and go back to the sugar business.

And this takes me to the last point that I raised at the beginning of my presentation. By virtue of the strategies of GAM and its corporate decisions, the action that is the base of the claims of GAMI which is the core of the position of GAMI, the expropriation of the

mills, is undergoing a process of challenging the validity of the decree, and that legal proceedings is still going on. The Government of Mexico informed the Tribunal that the court that is hearing the claim in connection with the expropriation of the mills granted power to the mills. It actually held the decision in favor of the mills.

And the party says that all the parties actually appealed the decision. The proceedings are still going on and the reason is that GAM judicially opposed the expropriation decree. If the expropriation is reverted, the Government of Mexico will actually comply with the decision made by Mexican courts. The elements of the expropriation will be eliminated, but this Tribunal cannot presume that the government will not actually go ahead and do that.

If GAM loses the empower proceedings, it will have a right to compensation that has decided not to actually applied but that right will still be valid. The compensation will be paid to the person that has the right to it, and the expropriation will be paid at fair market value.

The Tribunal cannot presume that the government will not actually comply with the law or comply with the provisions of the decree that it passed. In the rejoinder the government explained the anomalies that would arise from this idea of confusing legal interests of shareholders and company, including the right of the other government of having to have two different compensations. So this illustrates the point that I am trying to raise here.

GAMI states, and this is the argument offered by GAMI, that if this Tribunal determined that Mexico expropriated its investment, Mexico would have to take the place of GAMI in its shareholding. So whatever remedy would take under domestic law would benefit Mexico also because it would be a shareholder of GAMI. GAMI says that if Mexico compensates GAM or gets back the mills to it, it can be assumed that you, this Tribunal, would take into account the degree of compensation in order to adjust the amount of damages accordingly.

Firstly, if the remedy obtained by GAM under domestic law would benefit Mexico as a shareholder of GAM, well, of course, it will also benefit GAM to the same extent. GAMI argues that the Tribunal would consider the degree of restitution or compensation granted by Mexico and would adjust the damages accordingly. This means that if Mexico gets back the mills or pays a full compensation at a fair market value, then the adjustment that the Tribunal would have to do would have to bring the damage amount to zero. That is, there would not be any damage amount.

Once the judicial processes that GAM has decided to pursue, once these are concluded, the assumption is that Mexico is not going to give a full restitution or a full payment of damages. The Tribunal cannot assume all this. These arguments by GAMI showed that the claimed measures have no relevant legal connection with GAMI or with its shares. These are measures connected with GAM and with the mills.

Second, the claims made by GAMI is damages to GAM and not an independent damage, and that the damages to GAM claimed by GAMI have not even occurred because GAM cannot obtain the full compensation at a full fair market value for two of the mills that it left aside at the empower proceedings and also the full restitution of three of the remaining mills or full compensation in connection with these mills.

If we go back to this diagram right here, this is the situation where the mills would be and what the fair market value would be. This situation is not defined. The Tribunal has to assume that the Government of Mexico is going to revert ownership of the mills or it will pay the full compensation if the Government of Mexico wins the empower proceedings.

If this has not happened so far, it is because of the strategies that GAM has adopted and the corporate decisions that GAM has adopted. The Tribunal has to understand that if there is a damage to a company, any compensation belongs to the company, assuming that that company has standing for it. This is because the company faces a number of obligations vis-a-vis its creditors. Because there is a distinction between the legal interests of the company and other shareholders, those obligations cannot be passed on to the shareholders.

Through these proceedings, GAMI wants to obtain a compensation, a compensation that is direct in nature in order to avoid the order of payments established by the law and also avoid the provisions of Article 1135 that has to do with payments of the company so that the company can actually meet its obligations. This is really a delicate matter for a company like GAM because GAM is in a process of not paying its debts as they come due.

This is the end of my presentation. Thank you so much for your attention.

PRESIDENT PAULSSON: Since you invited us to ask questions at any time, with respect to your submissions about the conceivable effect of the pending court actions in Mexico, and you said that the circumstances are such that if the complaints about the expropriation measures succeed ultimately before the Mexican court--I think at one point you went so far as to say "no hai expropriacion" [ph]-- couldn't it be said against you that it is an unattractive paradox to find that the liability under NAFTA of the government depends on the alacrity of the victim of an unlawful expropriation in the sense that the government benefits if the victim is more energetic than if the victim is passive? Let me put it this way.

If we assume that a NAFTA government has engaged in a common law for expropriation, by definition in my question we cannot argue against it--this is something that NAFTA exists to prohibit--if we find ourselves in that situation, the paradox would be then that the--I use the word "victim" because that allows me to put to the side any discussion about direct and indirect in your Barcelona Traction problem--if the victim of the expropriation does nothing, presumably at some point in time, maybe immediately, the claim matures, and the government would be responsible, whereas if the government is lucky enough to have a victim which objects and brings a court action and succeeds, then there is no liability. What would you say if that is argued against your position?

MR. PEREZCANO [Interpreted from Spanish]: Just one minute, Mr. President.

PRESIDENT PAULSSON: If you want to come back to it later, that is fine with me.

MR. AGUILAR: Let me perhaps just note for the record that we have been joined by Adam Strochak, also a counsel to GAMI.

MS. TOOLE: Also for the record, another representative from the United States is here, Mr. Gary Sampliner from the U.S. Department of the Treasury. Thank you.

PRESIDENT PAULSSON: Thank you. I wouldn't be disappointed if you chose to come back to this later.

MR. PEREZCANO [Interpreted from Spanish]: I would like to say, Mr. President, if we can ago back to the last overhead. The truth is there would be no difference, because the Government of Mexico, what is offered is full compensation which our law determines is at the fair market value of the property expropriated, in this case the sugar mills. So it cannot be presumed--indeed, at this time one should presume that

the measure would be lawful, and it cannot be presumed that in due course when this whole process concludes due to the decisions of the company that is not involved in that proceeding that the company will not make full restitution or will not make full compensation.

What we are saying is that the value of the sugar mills and the fair market value coincide. And to this day, the damage that GAMI attributes to GAM, which is a different juridical person, has not even come to pass.

So the situation that you raise would be exactly the same. Had GAM opted to accept the validity of the decree and had gone to the window to collect the check for the fair market value, it would have been in terms of the offer of the Mexican Government a quite legal expropriation. The Treaty does not regulate illegal expropriations. The Treaty recognizes the rights of states to expropriate and the Government of Mexico has exercised this right. It needs to change in this offer to pay this fair market value and, moreover, it has complied with all the other requirements.

The situation was that before GAM held a series of sugar mills. Today it has the benefit of either reversing the expropriation, and that is why I am saying there was an expropriation, the legal effects of expropriation would be at a nub or a right or an accounts receivable for the fair market value of the sugar mills. And tomorrow it will have one or the other.

Given that the value of these three are the same, the value of GAM has not changed and has not suffered harm as GAMI alleges.

PRESIDENT PAULSSON: For our information, you are facing a series of conceivable court actions and appeals. When would that process reach an ultimate solution.

MR. PEREZCANO [Interpreted from Spanish]: If there are no further complications due to procedural matters, it should last from six to eight months more, according to the attorneys. That would be the end of the day when a determination would have been made consummating the expropriation process.

PRESIDENT PAULSSON: That concludes your presentation?

MR. PEREZCANO [Interpreted from Spanish]: Yes, and I thank you once again.

PRESIDENT PAULSSON: We will take a half an hour break before the floor to the claimants. So we will reconvene precisely at 11:05.

Thank you.

[Recess.]

PRESIDENT PAULSSON: Shall we resume if everyone is ready?

MR. PEREZCANO [Interpreted from Spanish]: Mr. President, a very quick question before kicking off. We have now given to Secretary Douglas a copy of our slides, and those can be distributed to the members of the Tribunal.

So the floor belongs to the Claimant's response.

MR. AGUILAR: Thank you, Mr. Chairman and members of the Tribunal. Good morning to opposing counsel and to the representatives of the U.S. and Canada as well.

We are glad to meet with the Tribunal in person and we will try to cooperate in every way that we can. I have introduced our delegation. I will say that we have had ample opportunity to respond in writing to Mexico's jurisdictional objections. The statement just made appears to have been largely a reaffirmation of Mexico's own written statements. Therefore, the remarks that we have prepared and which essentially summarize some of the issues that have been touched upon this morning of our two rounds of Memorial can be, in fact, much more than our

allotted time. Of course, we will happy to respond to questions from the Tribunal at any point.

It is not contested that GAMI is a U.S. investor that has invested in GAM, a Mexican corporation. And this is perhaps a good point to note that the similarity and acronyms of GAM and GAMI is purely a coincidence.

GAMI Inc.'s name, in fact, derives from Great American Management Investments Inc. and it has no relation to GAM, Grupo Azucarero Mexico, other than, of course, the shares that are the object of this procedure. There is no overlap in ownership between the two companies, and there is no relation between them prior to GAMI's investment in GAM.

So if in the process of our presentation, either chip or I get confused between GAMI and GAM, we ask for your indulgence.

Likewise, Mexico has not contested that the Claimant has met the various procedural steps and time limits to the extent that they are relevant, and I would simply direct the Tribunal to our Memorial, pages 6 to 12 of our first round, and 6 to 16 of the Rejoinder on this issue.

Mexico is basically making three arguments that in its view would oust jurisdiction of this Tribunal over the claims as they have been submitted by GAMI. Mexico is saying first that Claimant as a minority shareholder has no standing under Article 1116 to complain about loss or damage arising out of a breach that also harms and causes loss to GAM.

And second, Mexico is saying that the measures that Claimant complains about are not within the scope of Chapter 11 unless they meet Mexico's notion of being related to Claimant, which Mexico argues to require that the measures actually refer to Claimant.

Finally, Mexico argued this morning that so long as domestic proceedings initiated by GAM are pending, there is no damage to GAMI. As Claimant has shown, these arguments are wrong, and we take them seriatim. I will address Article 1116 and the domestic proceedings issue, and Chip will deal with the scope and coverage of Chapter 11.

GAMI is entitled to bring a claim under Article 1116 and Mexico's attempt to narrow the scope of Chapter 11 should be dismissed. Mexico's theory is that Claimant cannot make a claim for losses that it incurs as a result of Mexico's breaches, no matter how egregious this breach reaches if the harm and losses to Claimant also harm and cause losses to GAM.

Mexico is not merely asserting that claims on behalf of an enterprise can only be made under Article 1117. That much, of course, would be true. Rather Mexico is going much further. It is saying that violations of NAFTA, that harm and enterprise cannot also be subject to claims by an investor under Article 1116 for the losses that the investor incurs, and that arise out of the same breaches. There is obviously no basis for this assertion in the text of Article 1116.

Article 1116 states, and I quote paragraph 1, "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 the investor has incurred loss or damage by reason of or arising out of that breach." Thus, on its face, Article 1116 of the NAFTA allows Claimant to submit a claim that Mexico has breached its obligations under Section (a) of Chapter 11, and that Claimant has suffered loss or damage by reason of or arising out of that breach.

The Claimant has done just that. The Claimant undisputedly an investor of the U.S. has brought a claim under Article 1116 complaining that Mexico has breached its obligations under Section (a) of

Chapter 11 and that Claimant--not GAM, but the Claimant--has incurred loss or damage by reason or arising out of that breach.

Obviously, Claimant's claims are for breaches and losses with respect to Claimant and Claimant's investment. This is the first case yet under NAFTA Chapter 11 where a government has actually issued a federal expropriation decree. Mexico has by its actions destroyed the value of Claimant's ownership interest in GAM. Even the U.S. concedes that a minority investor can make a claim for indirect expropriation of shares under Chapter 11, and that is at paragraph 9 of the U.S. submission.

It would thus be an extraordinary result, totally unwarranted by the NAFTA and obviously inconsistent with its object and purpose to promote investment, as Claimant was in the circumstances denied the right to an award on the merits of its claims.

Claimant has also asserted violations of Article 1102 for discrimination against Claimant and its investment in GAM. Claimant's claim is that Claimant in like circumstances was treated less favorably than Mexican investors and that Claimant's investment in like circumstances was treated less favorably than the investments of Mexican investors.

Perhaps unintentionally even Mexico seems to concede that jurisdiction over a national treatment claim is possible under both Article 1116 and Article 1117, and this would be at paragraph 43 of Mexico's second submission.

Finally, Claimant's third claim is that Mexico has accorded GAMI in GAMI's interest in GAM treatment below that required by Article 1105 in the operation of Mexico's laws and regulations concerning sugar and with respect to the expropriation of Claimant's shares.

This is, by the way, exactly the situation that the Tribunal and CMS v. Argentina was confronted with, a minority investor with a claim for failure to provide fair and equitable treatment.

Claimant's request for damages further demonstrates that GAMI's claim is for losses incurred by GAMI and is not a claim on behalf of GAM. Claimant has requested no less than $27.8 million as compensation for the expropriation of Claimant's interest in GAM. As is evident from the supporting calculations in our evaluation report--and that would be at Exhibit C-26--this amount would, of course, have been much, much higher if GAMI was bringing a claim for GAM.

Claimant has not requested additional compensation for losses GAMI has incurred by reason of Mexico's violation of Articles 1102 and 1105. And that is because these losses would be duplicative of the losses already claimed and owed in connection with the violations of Article 1110.

Finally, an award in Claimant's favor does not benefit GAM because this award is for GAMI's losses as a result of Mexico's breaches, not those of GAM. GAM, as I said earlier does not own shares in Claimant, and it is not and would not be entitled to any compensation that may be awarded to Claimant in this proceeding.

I would now like to address some of the arguments that Mexico has made this morning in support for its contention that, notwithstanding all of this, GAMI should not be protected under NAFTA Chapter 11. Mexico has referred to Barcelona Traction. Mexico has alleged certain risks or anomalies. It has invoked domestic law, and it has invoked the prospect of compensation to GAM under domestic procedures.

Let's take Barcelona Traction first. Barcelona Traction on which Mexico so heavily relied in its first submission but then appeared to abandon in its second submission is totally in opposite for at least

the following reasons. First, the case does not stand for what Mexico purports. The central legal issue in Barcelona Traction has to do with the right to diplomatic protection of a corporate entity.

The court followed the traditional customary international law rule that attributes the right of diplomatic protection to the state of incorporation, Canada, rather the state of nationality of its shareholders, Belgium.

Second, the ICJ specifically stated that it was not deciding whether shareholders could bring a claim for losses to their interest, since the only claim made was for losses to the enterprise. This would be at paragraph 16, footnote 9 of Claimant's first brief. In other words, Barcelona Traction did not examine whether international law provided an independent source of rights and protection for shareholders.

Third, as Barcelona Traction itself recognized, however, states can and have by treaty established different rules that supersede customary international law. Most recently again in CMS Gas Transmission Company v. the Republic of Argentina, decision is of 17 July 2003 and Claimant's drew the attention of counsel and the Tribunal to this, the Tribunal in Barcelona Traction recognized this reality by indicating at paragraph 43 of the decision that Barcelona Traction did not rule out the possibility of extending protection to shareholders in a corporation in different contexts.

Of course, claims by shareholders are recognized by international law and most immediately by decisions of Tribunals operating under the substantive rules of the NAFTA in at least three decisions, Pope & Talbot, Mondev and S.D. Myers. The Tribunal was concerned not with the question of controlling majorities. Rather, the arbitrators were concerned with the possibility of protecting shareholders independently from the affected corporation.

In S.D. Myers the Tribunal recalled the objectives of the NAFTA and the obligation of the parties to interpret and apply its provisions in light of its objectives, and it indicated, and I quote, "The Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by the Claimant in order to organize the way in which it conducts its business affairs." And this would be at paragraph 229, Exhibit C-87.

In Pope & Talbot the Tribunal noted, and I quote, "It could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise." And this would be at paragraphs 79 and 80 of Exhibit C-88.

In Mondev, finally, in the Tribunal's view, and I quote, "It is certainly open to Mondev to show that it has suffered loss or damage by reason of the decisions it complains of even if loss or damage was also suffered by the enterprise itself." And that would be at paragraph 82, Exhibit C-44.

Now the CMS decision also cites with approval the decision Goetz v. Republic of Burundi where the Tribunal noted and observed that prior ICSID jurisprudence does not hold that only the legal persons directly concerned by the matters at issue have the capacity to act as Claimant. Rather, the Tribunal noted it extends this capacity to the shareholders of these legal persons who are the real investors. In part, on the basis of the decision in Lanco v. Argentina and on the annulment decision in Vivendi, the CMS Tribunal concluded that Claimant in that matter has jus standi under the U.S./Argentina bilateral investment treaty, a blueprint of the NAFTA, I may add international law in the ICSID Convention.

Alleged anomalies in Mexico's own term. Mexico raises primarily the specter of double-dipping. We have said in our submissions that this is a red herring. Article 1117, paragraph 3, provides for a consolidation of cases where a minority investor and a majority investor who is claiming on behalf of the enterprise brings claims arising out of the same event.

Now even if the cases were not consolidated, the second Tribunal would have the authority to take into consideration the award of the first Tribunal. For instance, compensation of the enterprise under 1117 would reduce or eliminate claims for losses to an investor to the extent those losses were to its interest in the enterprise.

If Claimant is awarded compensation for the expropriation of its ownership interest in GAM, Mexico will be entitled to Claimant's interest, for which it will have paid full compensation. This Tribunal award could be so conditioned. Any relief obtained by GAM in domestic courts would to that extent benefit Mexico as a successor to Claimant's interest in GAM. Claimant has not chosen to be put in this position. Claimant has been put in this position by the acts of Mexico. In the CMS award the Tribunal notes again with approval that Claimant has offered to surrender its shares.

Conversely, if GAM is awarded compensation for the taking of the mills or, as Mexico argues, if the mills are returned to GAM, this Tribunal would be entitled to consider in its award the degree to which Mexico restores the value of Claimant's interest that was destroyed by Mexico's breaches of Chapter 11. And I will come back later to an issue which is very important. We are entitled to compensation under Article 1110 and whatever happens in the Mexican courts is dispositive of that issue.

PRESIDENT PAULSSON: Before you leave this point, what in your submission is the archetypal case that could only lead to recovery under 1117 and, therefore, explains the presence of 1117 because 1116 by hypothesis would not be sufficient?

MR. AGUILAR: Well, 1117 is a provision that would allow for a claim to be brought directly to the benefit of the enterprise, and 1116 applies to situations where because the investor, as in this case, does not control, its only recourse is to bring a claim under Article 1116.

MR. ROH: Excuse me. Just to note that under 1117 an investor that, say, owns 51 percent of the enterprise can be a claim on behalf of the entire enterprise and, of course, he will have had to waive the rights of the enterprise as well. But that benefits the whole enterprise and in a way, of course, the minority shareholders, some of them who may be nationals of the company can benefit to the extent that the enterprise benefits. And that certainly cannot be addressed under 1117.

PRESIDENT PAULSSON: And the recovery is then that of the enterprise?

MR. ROH: Yes. And it for the whole damage done to the enterprise.

MR. REISMAN: Mr. Aguilar, may I go back to something you said just before the Chairman posed the question, just to make sure I understood it. The reference now is to 1110. Did I understand you to say that even if Mexican processes were to reinstate GAM that a claim would still lie for GAMI under 1110?

MR. AGUILAR: To that I would say two things. What I said is that the amparos in Mexico are proceedings to determine whether the expropriation of GAM's mills was done in accordance with domestic law. And as such, domestic proceedings would not be dispositive of the issue

submitted by GAMI to this Tribunal, namely compensation due under NAFTA Article 10.

PRESIDENT PAULSSON: What if they happen to satisfy the NAFTA criteria?

MR. AGUILAR: If that was the case and this Tribunal was so satisfied, true there would be no claim and GAMI's claim would be reduced to zero if it received compensation commensurate with what is required under Article 1110 by way of the proceedings that were initiated by GAM in Mexico.

PRESIDENT PAULSSON: You are coming back to this subject?

MR. AGUILAR: Yes. The questions go also to Article 1135, at least the Chairman's questions. Claimant's claims, GAMI's claims do not circumvent the requirements of 1135. We have pointed out that Article 1135 is, in fact, an appropriate corollary to Article 1117, and a controlling majority investor that makes a claim on behalf of the enterprise should not be personally awarded compensation intended for the entire company. That would, of course, be unfair to other shareholders.

However, this in no way proves that a minority shareholder or a majority shareholder, for that matter, is prevented from bringing a claim for harm to its interest in the corporation under 1116. Creditors and other shareholders would not be deprived of any rights to compensation if compensation to Claimant is limited to losses suffered by Claimant by reason of or arising from Mexico's breaches of Chapter 11.

And Claimant's interpretation does not create an open-ended right either to bring claims under 1116. Mexico has argued in its written submissions that Claimant's interpretation would create an open-ended right for shareholders in GAMI and of shareholders in GAMI to bring claims. This argument can, of course, be dismissed.

The Claimant has an investment in Mexico. A non-controlling minority shareholder in Claimant, however, does not have an investment in Mexico, but rather has an investment in the United States since the Claimant is a U.S. corporation.

The substantive obligations of Chapter 11 in addition create no liability with respect to such an investor. For instance, Article 1110 on its face only creates liability for expropriation of investments in a party's territory and, of course, an investment in Claimant, GAMI, is not an investment in Mexico's territory.

Mexico has also sought support for its position in corporate law, domestic corporate law and in dicta by the amparo judges in connection with the ability of shareholders to appear before a court under Mexican federal procedure rules.

The starting point here, of course, is Article 1131 of the NAFTA. That is the tool available to this Tribunal to resolve this dispute. The article is entitled "Governing Law," and it provides in paragraph 1 that a Tribunal established under this section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law.

Faced with a very similar factual situation, again the CMS Tribunal, in paragraph 42, dismissed application of Argentinean corporate law and decided that the matter was to be resolved under the BIT and the Washington Convention, and I quote, "however true the legal distinction between shareholders and corporation may be under Argentinean law."

Let's pause on the amparos for a minute. Compensation under domestic proceedings. I will note first that as a matter of fact, GAMI disputes that Mexico has even offered compensation, and I note that two years have elapsed since the expropriation decree. In any event, our submission is that the domestic proceedings and compensation under the

domestic proceedings is not relevant for purposes of our claim here with respect to what's being claimed in substance. First, Chapter 11 does not require exhaustion of local remedies before a complaint can be instituted, and GAMI cannot be compelled to await the outcome of Mexican courts, adjudicating complaints under Mexican law over which GAMI has, as was rightly noted, no control.

As I said earlier, the amparos are proceedings to determine whether the expropriation of the mills conforms to Mexican law and in particular Mexican constitutional guarantees. These domestic proceedings are consequently not dispositive of the issue that GAMI has brought before this Tribunal, namely a breach of Articles 1102, 1105 and 1110. Accordingly, the amparos proceedings are at least in that respect not relevant to the mandate of the Tribunal in this proceeding.

There is also contextual support for the position of GAMI with respect to Article 1116. First, Article 1117 is not deprived of meaning by a reading of Article 1116. Allowing GAMI's claims to proceed under 1116 would by no stretch of the imagination deprive 1117 of its reason to exist. The distinction is clear. 1117 enables a controlling shareholder to bring a case that would not be possible under 1116, a claim on behalf of the entire company and all its investors or domestic for the losses of the company that arise out of that breach. Conversely, under 1116 an investor can only makes claims for its own losses that arise out of the breach and not for the losses to the whole enterprise. We noted earlier that 1117 in paragraph 3 in fact anticipates that minority shareholders and enterprises could make claims that arise under the same events, and it provides for consolidation of those claims. Of course consolidation would have less utility if those claims, as Mexico argues, could not overlap.

Let's pause on Article 1121 for a second, and this has been a matter of some debate in the written submissions of the parties. We say that 1121 strongly supports the Claimant's view. Under Article 1121 both the controlling investor that is making a case under 1116 for loss or damage to its interest in the enterprise--remember, this is under 1116--and the enterprise itself, majority investor and enterprise must waive the right to initiate or continue domestic proceedings.

Mexico contends that a shareholder has no standing under 1116 to complain about loss or damage that arises from a breach that also harms and causes loss to the enterprise. This is Mexico's concept of a derivative claim.

I would note two things. First, 1121 makes clear that the losses claimed by an investor under 1116 may be for loss or damage to an interest in an enterprise, which is precisely opposite of what Mexico is saying. And second, if, as argued by Mexico, no claim under 1116 is possible, that is derived from harm to the company, it would be utterly unfair to require the company to waive all its rights merely because its controlling shareholder is bringing a claim under 1116.

Let's take an example. Let's assume, for instance, that the State party restricts the transfer of funds in a manner that is inconsistent with Article 1109. Why should the enterprise waive its rights to recover losses for this breach merely because the controlling investor has brought a claim under 116 for damage to its alleged nonconflicting direct right to track Mexico's concept, as Mexico would read Article 1116, there is no reason for that waiver. And Mexico has not provided a response to this very fundamental question.

Article 1132 again is an appropriate corollary. An investor that owns a partial interest of the enterprise should not be awarded or permitted to walk away with the entire value of the claim, particularly

where the enterprise has been required to waive all its rights. In any event, nothing in 1135(2) proves that a shareholder cannot otherwise bring a claim for harms to its own interest in a corporation, and again, creditors and shareholders are protected because Claimant would simply be compensated for its losses by reason of or arising out of a breach of section (a) of Chapter 11.

Object and purpose. NAFTA was intended to protect investment, and in a way this case brings together two very different conceptions of Chapter 11 and what it's intended to do. In Mexico's view, despite the language of Chapter 11, certain categories of investors are not protected, certain categories of investments are not protected, and that depends on several factors, according to Mexico, whether claims are derivative or not, whether the measure at issue refers or not to the investor, and on the other hand, our view is that the text, as it is written, is broad in coverage and does not support the limitations that Mexico now advocates. Mexico's argument in particular to truncate jurisdiction over claims by minority investors is not only inconsistent with the ordinary meaning of the relevant NAFTA provisions, it also flies in the face of the Treaty's own object and purpose.

The preamble of the NAFTA states that the NAFTA parties have, and I quote, "resolved to ensure predictable commercial framework for business planning and investment," close quote.

In addition, one of the main objectives of the NAFTA, under Article 102, is the objective of increasing, quote, "substantial investment opportunities in the territories of the parties," close quote. The implication of Mexico's argument is that a minority investor has no redress for violations of Chapter 11 that harm its ownership interest, other than as Mexico has acknowledged, the right to vote if the shares are directly taken, the rights to dividends, or to proceeds of liquidation.

So in Mexico's view, unless there is a majority investor in the enterprise who is able and willing to bring a claim under Article 1117, there is no redress for the minority investor. I repeat, nothing about the design or structure of Chapter 11 suggests any intent to create rights and protections for a minority investor without redress under Section B. Mexico would also like to convince this Tribunal that the scope of Chapter 11 is further restricted by 1101, an issue that will be addressed by my colleague, Chip Roh.

MR. ROH: Thank you, Mr. Chairman, Members of the Tribunal. Greetings and good morning to all. I have the disadvantage of being the speaker before the lunch break.

So as Mr. Aguilar stated, I'm going to address the part of Mexico's argument that actually came first this morning in their presentation, that is, Mexico's argument that none of the measures of which GAMI has complained, not the expropriation, not the discrimination, not the treatment below international minimum standards, none of those measures fall within the scope of Chapter 11. The basis of this argument does not appear to have changed. Mexico relies essentially for this argument on a kind of a dictionary view, a rather curious dictionary view of Article 1101 of Chapter 11, and on the first jurisdictional award in the Methanex case.

Mexico's argument is essentially as follows as we get it. It goes like this. Article 1101 says that Chapter 11 applies to, quote, "measures of a party" relating to, quote, "investors of another party or the investments of investors of another party." The one new thing, by the way, that Mexico said this morning was they said that GAMI ignores the word "measures" in Article 1101. I don't think if you read our

second submission, or our first submission, you'll see that is our argument at all. We have a fundamentally different view of the effect of 1101 and the interpretation relating to, but indeed it is part of our argument that 1101(1) is a rather broadly stated provision, not least in terms of using the terms measures.

Anyway, Mexico bases its arguments on five points basically that I will take up. One is, as I said, the Methanex first jurisdictional award, and we considered it, quite frankly, as is evident in our second submission, that at least as interpreted by Mexico and maybe beyond that, it is not good law or authority for the interpretation of 1101.

Second, we would say that even if the Methanex award were considered to be correct, Mexico tries to extrapolate from that award and take it places that is unjustifiable, even by the terms of the Methanex Tribunal itself.

Third, neither the Methanex Tribunal nor dictionaries provide any support for Mexico's notion that the scope of Chapter 11 depends on who is complaining. If you read Mexico's argument carefully, it seems to be that a measure is only within the scope of Chapter 11. If it refers to GAMI or GAMI's investment, when the words indeed are relating to investors or of another party or investments, or their investments.

And lastly, and we went on at some length in our submission, all of which has been, I might add, completely ignored by Mexico, there is a huge amount of context that it simply cannot, in the form of other provisions of Chapter 11, other provisions of other chapters of the NAFTA that use the term "relating to" and the various annexes of the NAFTA, all of which are simply inexplicable, if indeed, as Mexico asserts, the 1101 "relating to" means that the measures must have some legally significant relationship beyond effect, or even worse, must refer to the investor.

Let me start with Methanex. The first point I would note is that that is a very distinguished Tribunal, no question, so part of the question here is why is it so different or why do we take issue with it? I think in part the Methanex Tribunal was dealing with a very different set of facts from that which is before this Tribunal. The issue there, as we understand it, was essentially that the investor in question was producing an input that it sold to the product that was being regulated in a way that was alleged caused damage to the investor, and this is in a way, it's a very different factual situation from what we're dealing with here, where GAMI--there's no question that what GAMI is interest is in, a company that owns sugar mills and those are what was taken. It's the allegations that Mexico is making concern the indirection of GAMI's ownership, not the question of a supplier of an input to a regulated product.

In any event, as we see the Methanex award, it got off, it started off with the assumption that 1101(1), and this seems to be Mexico's assumption, that 1101(1) simply has to be a significant gateway, kind of a jurisdictional threshold that will weed out measures from the scope of Chapter 11 that might otherwise contravene Chapter 11. Otherwise, this has to be the case for Mexico because basically they've announced the expropriation decree was not within the scope of the Chapter 11 because, after all, it doesn't refer to GAMI. It may refer to the mills and so forth.

There really isn't any evidence for that proposition, and we would submit, in fact, that if you look at the various chapters of the NAFTA--and there are 22 of them--many of them have provisions similar to Article 1101 as the first article or second article of the chapter, and typically these articles announce what the chapter is about. They deal

with questions like in some cases whether there's a general exception that applies to coverage. They also often deal with the question of whether this chapter takes precedence over other chapters in the event of an inconsistency or whether the other chapters should take precedence. But I don't think there is any example of any of these provisions where the intent is in a positive statement of coverage such as 1101(1) that this chapter applies to measures relating to investments or investors. That is used as a weeding-out tool, to take measures out of the scope of the chapter that otherwise might infringe the chapter.

The Tribunal also, in Methanex, also said that their decision that "relating to" must be given some sort of legally significant meaning or must require some legally significant relationship beyond effect, advanced the object and purpose. It's hard for me to see where that comes. The object and purpose of the agreement, as we've discussed, is to encourage the free flow of investment by protecting investment. And there is nothing that we see in the object and purpose that is about sort of minimizing the responsibility of states for their violations by excluding measures.

The Tribunal also in Methanex said that the fact that awards are supposed to be enforceable under the New York Convention was a supporting point for them, and that the 1101(1) had to be given a rigorous or restrictive interpretation in order to make awards enforceable under the New York Convention. But that's surely wrong. I don't know whether this was pointed out, but Article 1101, well, the NAFTA Chapter 11 as a whole is very similar to bilateral investment treaties as all of you gentlemen know extremely well. It is built like the typical BIT in most ways, except that it's got a different feature in having an 1101; there is no Article 1101 in other bilateral investment treaties of the United States or Mexico. There may be similar provisions to that in NAFTA clone free trade agreements that they do that include an investment chapter, but the bilateral investment treaties don't have an 1101, and so far as we're aware, the lack of an 1101 has never interfered with enforcement of awards in terms of the New York Convention.

And last of all, and I don't know to what extent this was even before the Methanex Tribunal, there's a tremendous amount of context that we have gone into and which doesn't support that interpretation. But let me revert to the point that even if you took--I don't know if you really have to deal with the Methanex award or not, because Mexico would be wrong even if you assumed that the Methanex Tribunal were right. Nothing in the Methanex Tribunal says "relating to" means "referring to." The Methanex Tribunal, quite properly, rejected the dictionary approach to interpreting the provisions of the NAFTA. The Methanex Tribunal also specifically rejected interpreting "relating to foreign investors" as requiring that the measure be, quote, "primarily directed at the foreign investors."

But Mexico certainly seems to go at least that far and beyond in what it would require for a measure to be within the scope of Chapter 11. And I would refer you--and I think Mexico repeated it this morning--to paragraph 12 of the second Mexican Jurisdictional Submission. What they said--I have in front of me, by no coincidence--is that regulations governing the sugar sector only apply to mills and sugar cane growers, they do not even apply to GAM as a holding company, so if GAM were wholly-owned by an American company, it would have no, be Mexico's lights, the sugar regulations that have so deteriorated the conduct of the sugar regulations, that has so reduced the value of the enterprise and of GAMI's shares. That would be outside the scope of Chapter 11, untouchable. I guess it would be within the scope of Chapter 11, since

Mexico has this view that the scope of Chapter 11 depends on who's complaining, that if perhaps a direct personal owner of a sugar mill brought the complaint, then I guess it would be within the scope.

And then they also say that the expropriation decree applies, it is within the scope, but only for shareholders in the mills, i.e., GAM, but not for a shareholder in GAM. So GAM, as a shareholder in the mills, they say, well, the measure does relate to GAM, but it doesn't relate to anyone who owns shares in GAM. So if GAMI were a majority owner of GAM, apparently the measure disappears from the scope of Chapter 11. Now, this is a little bit inconsistent of course with what we've been hearing under 1116 and 1117, and it's certainly inconsistent with the protection that NAFTA affords to investors, whether they invest directly or indirectly. But this just gives you a feel for the scope of their argument.

On the context, first, my colleague suggested that we should just say a word further on structure and why we have cited the examples we have. As noted, NAFTA's got 22 chapters. It's got, I think it was 262 pages of annexes. It sometimes seems like more than that when you're trying to read it. And most of those, the way the agreement is structured--and obviously Chapter 11 is just one of the 22 chapters--the annexes contain--and this is said specifically in the case of Article 1108--nonconforming measures. The annexes deal with measures of parties. Usually they're particular to a party that are not in conformity with the basic obligations that are laid out in the mother text. The annexes are, by the way, an integral part of the NAFTA. So in short, you don't put a measure into an annex unless you need to, because otherwise you would have to get rid of it, and the annex contains the terms of your reservation. Sometimes it's time limited. Sometimes a party, as these annexes were all negotiated, sometimes a party would insist on maintaining a reservation but agree to some improvement in the measure that would be reflected in the terms of the annex.

We've provided just a host of examples of provisions of the NAFTA and of the annexes that simply make no sense, that would have no point if in fact measures were excluded from the scope of Chapter 11 or similar chapters that have the same "relating to" kind of language. If they were excluded from the scope, there would be no need to take a reservation, and yet you have all of these provisions that simply can't be explained on Mexico's theory of "relating to."

I want to just take up three of them for fun, or as examples, but we'd be happy to deal--if you have questions on any of them, we can be probably--you've seen our capacity to produce them. For example, in paragraph 4 of 1101, the very article that contains the "relating to" language, there is an exception that says, "Nothing in this chapter shall be construed to prevent a party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, Social Security," et cetera. I won't read it all. These measures are not going to refer to foreign investors or their investment, and so the exception wouldn't be necessary, or you could say, well, maybe there would be a few. But any state with even half a brain of course could write its measures n a way that didn't refer to the investors or didn't have any relationship to them other than effect. I'm sure Mr. Liebentritt can tell you that a relationship of effect can be dramatic indeed, even without the optics of intent or a stated animus.

Article 1109, the Transfers Provision, is another example we've cited. Transfers, the prohibition of restricting transfers, this is a provision that is in very many BITs. It's all familiar to you. You've probably written about it and know it far better than I. It's one

of those obligations in a BIT that doesn't depend on whether there is discrimination. There is simply a requirement not to interfere in transfers by an investor, a foreign investor, regardless of whether there is an interference with transfers of domestic investors.

Now, that point, of course, is going to be wholly lost in the Mexican view because a measure that interfered with all transfers by anyone would not refer to foreign investors. It would simply restrict them in the same way it restricted everyone else. It would have no relationship to foreign investors other than effect. And yet by the Mexican view, Article 1109, even as an affirmative obligation, simply gets reduced to--or at least even a state that is half-clever, and reduce it to simply a ban of discriminatory transfers.

Then it goes on, and there are two exceptions provided in 1109 in paragraphs (4) and (5) to the rule against limiting transfers. Because it's shorter, I'll read paragraph (5), which is--it says paragraph (3), which is one of the restrictions, "shall not be construed to prevent a party from imposing any measure through the equitable, non-discriminatory, and good-faith application of its laws relating to the matters set out in paragraph (4)," which are things like bankruptcy, trading, and securities.

Well, again, I ask the question. This paragraph simply makes no sense if these measures are not within the scope of Chapter 11 anyway. So there's no need to make another exception for them, and Mexico referred this morning to the principle of effectiveness. Part of the principle of effectiveness, as I recall--I hesitate to say this in front of people who teach, but it is that you can't reduce whole clauses or whole phrases of a treaty to a nullity or to give them no point. And yet this would give no point to these exceptions.

We've provided a lot of other examples. I don't think I need to go on with them. As I say, we will be very happy to answer questions you have about the examples we've provided and any others you might have in mind.

Let me close where Mr. Aguilar closed this morning. Mexico's interpretation of Article 1101 and the "relating to" standard would really rip a very large hole in NAFTA's protection. One of the trends of modern states--and I used to work for a big modern--well, sort of modern government. Governments--and this is certainly something that Mr. Lacarte will have experienced in the WTO. Governments are pretty good about writing their regulations in a way that can be highly restrictive, interfering, and so forth, without saying I'm trying to get the foreigners, I'm trying to get the foreign investors, I'm trying to get the foreign products, what have you. And one of the developments of international law over time is that Tribunals and the WTO Panels and so forth have no patience for the exercise that says, you know, this tax is non-discriminatory, anybody who produces shochu liquor will benefit from this tax break and it's just a coincidence that 99 percent of the production is Japanese and so forth.

The fact is if you take away--if you apply a standard like "relating to" here, you will invite states to embark on a great course of restriction of investment. And while it may feel good when a state is defending its conduct in a particular dispute, where, after all, it's under tremendous pressure to try to avoid liability, it actually defeats the whole purpose for which the state engaged in the negotiation in the first place. There's a kind of an irony for governments. You go out and negotiate these treaties because you want to encourage investment, and that this is one way to encourage investment by protecting it. Well, then you go into the individual cases where you have to defend yourself,

and you try to adopt positions that will only result in discouraging investment in the long run.

I'd be happy to take any questions, Mr. Chairman. That concludes these remarks.

PRESIDENT PAULSSON: Thank you very much.

MR. LACARTE [Interpreted from Spanish]: There are a series of questions one could ask, and the way of beginning is quite arbitrary, but perhaps we could begin with the expression "relating to." It seems clear to me that the Tribunal needs to work in light of how it interprets the provisions of the Treaty, which is what the Treaty itself requires that we do. So we need to see exactly what is the meaning of and what is the scope of those words, "relating to."

GAMI assigns it a broad meaning, and Mexico clearly a more restrictive meaning. We have had different versions of these words. Here I have legal bond, which is Mexico's position. If there's not a legal bond, then the provision is not applicable.

Some previous Tribunal has said a mere effect is not sufficient. I believe that the United States has spoken of a proximate effect, or words such as these. And also "primarily directed" was cited. So we must see exactly what it is that we have in our hands.

The general provisions of the Treaty establish a purpose of promoting investment, as GAMI said just a moment ago. And one can't lose sight of this because that is part of the context of what we're considering. So we have a wide array of possible interpretations of these words.

My question is--and perhaps the parties can go into more depth than they already have--is: Must the Tribunal interpret that "relating to" requires a clear legal bond? And here various considerations come into play. GAM is a holding company. In this case, it's a holding company. GAMI invested in GAM because GAM is the owner of a series of sugar mills. Were it not the owner, then obviously the investment wouldn't have been made.

So we have here an effect, and of what order? Well, there's also an expropriation, and GAMI tells us that it is tantamount to their case. GAMI's shares weren't directly expropriated, of course, but with the expropriation of the sugar mills, they're saying that their investment loses all its value. So specifying the meaning of "related to," is it as broad as GAMI proposes? Or is it as restrictive as Mexico proposes? Or should the Tribunal situate itself at an intermediate position?

Now, you see, I'm not making statements. I'm simply asking questions. And I would ask the parties if they have anything further to say in addition to what they've already said on this particular point.

MR. ROH: Well, for the moment, I only wanted to say that I don't know that the Tribunal has to draw a firm line for all cases as to what "relating to" means. We've expressed the doubt that 1101 really was intended to be a filter in terms of tossing out any measures. But you don't have to decide that either, but we have a lot of doubt--we certainly think it's not something that depends on who is complaining because it's impossible to reconcile that. But the reason we've suggested that if it's a filter at all--and we doubt that--it's a very broad one, is all the context we have provided. But I should say that we would be content if you simply said wherever the line draws, the measures that GAMI has brought before the Tribunal sure fall on the correct side of it.

Thank you.

[Laughter.]

MR. AGUILAR: I would just add that the point that the parties, when they negotiated this agreement, wrote 260 pages of measures they considered not to be in conformity with Chapter 11. Many of those don't refer to "relate to" or even mention any investor or any investment of an investor. A reading of Article 1101, as suggested by Mexico, would simply render many of those 260 pages useless.

MR. PEREZCANO [Interpreted from Spanish]: Thank you, Mr. President. The answer of the Government of Mexico is that the rules of interpretation of treaties under customary international law and as recognized in the Vienna Convention require that terms be given their common meaning in context. The Mexican Government referred to the common meaning, which is what we find in dictionary definitions, and I insist we have looked at several dictionaries here, dictionaries of the Spanish language, of the English language, and the Government of Mexico accepts all of them. At the end of the day, they all lead us to the same place.

What is clear is that "relating to" means that there has to be a connection, a relationship with or to, and if one reads the definition of terms such as "affectar," it's a different meaning. This is why we've said there has to be a sufficient nexus.

Translated into legal terms, because the Free Trade Agreement is a legal instrument regulating the relationships among three states, we have said that this translates into the need for a bond or a connection that is legally relevant. It is not a question of drawing blind in one place or another for the purposes of a given case. It's a question of giving terms their meaning, beginning with the common meaning, and, of course, seen in context.

In this regard, I would take issue with the opinion of my colleagues and friends in that Article 1101 can be used as a filter, as a machine for removing measures from the scope of application of the Treaty. Well, it's precisely the opposite. Article 1101 defines the scope of application of the chapter. It defines to what the subsequent provisions apply. Mr. Aguilar referred, for example, to all the annexes that establish measures that are not in conformity with the Treaty provisions, measures which, as a matter of principle, have to do with the question of investment; otherwise, they wouldn't have been included in the annexes on investment. And as a matter of principle, their provisions are applied, but there are points of inconformity that are expressed in the terms of the reservations themselves.

So it's not a filter for excluding but, rather, beginning with 1101, the Tribunal is to determine which measures come into it based on the claim before it. I think it's a bit difficult for the Tribunal to be able to say the expropriation decrees fall outside the investment chapter. But if the measure called into question by the investor in the circumstances of the particular case are or are not--do or do not have that relationship or do or do not have that connection, which, as I say, according to the government, must be legally relevant, with the investor or with the investment, then it will be protected by the subsequent provisions of Chapter 11. And if it is not so related or connected, then the chapter doesn't cover it.

In many cases, in most cases, it will depend on the particular circumstances of and the specific facts of the case, and how the claim is put to the Tribunal.

PRESIDENT PAULSSON: I hope you won't take it as a criticism if I say that that seems relatively abstract. Let me ask you a concrete question to see how your submission would apply to a concrete case.

If one would imagine that one of the companies owning a mill were entirely American, and the expropriation was of the mill, the land

and the structures on it, but the company as such was left untouched as a company, would the company then as a Claimant be able to say or would it not be able to say that there was, to use your expression, una conexion (?)-menta significativa or relevant?

MR. PEREZCANO [Interpreted from Spanish]: Mr. President, it depends on the various legal interests. That is why I referred in some detail to Article 1117, which doesn't erase the distinction between the legal interest of the shareholder, which could well be the sole shareholder of a given enterprise, and the enterprise itself.

Now, if in the case that you raise the expropriation was of the company's assets, the question is whether the shareholder can file a claim--whether it can file a claim with respect to the loss suffered in their capacity as a shareholder and in terms of shareholder rights, or whether the damage was suffered by the company in terms of the company's rights.

Now, if it's a U.S. shareholder and it's the sole shareholder, then the claim can be presented in representation of the company, but that doesn't make it into a claim of the investor. It continues to be of the company for damage suffered to the company. In order for the shareholder to have the right to claim damage to himself or herself, he or she would have to show that his or her own rights as shareholder had been affected.

PRESIDENT PAULSSON: If it were presenting its claim only on that basis, loss of value of the shares, value of its company, of which it continues to be the owner, there having been no expropriation. You might think it's an error of pleading, not having used the opportunity to claim in the name of the company because it controls it. But if this was the pleading being made, is, therefore, the purposes of your view of "relating to," is this something which qualifies or not in terms of the conexion which you think should be required?

MR. PEREZCANO [Interpreted from Spanish]: Well, my answer, Mr. President, would be if there's an expropriation of the assets of the investment, then it is a measure that is related to the investment and not to the investor.

PRESIDENT PAULSSON: Any answer related to my question?

MR. ROH: I'm having a hard time recalling your question--

[Interpreter cuts in.]

MR. ROH: --back and forth between sort of 1116 and 1117 issues and your question, which is related--I think your question is related to--well, 1101, so, you know, is a measure within the scope of--

PRESIDENT PAULSSON: Let me do it again. Very simply, if the Claimant is 100 percent owner of a company which owns assets--

MR. ROH: Right, clearly owns all of GAM.

PRESIDENT PAULSSON: All the assets are nominally and truly expropriated, but the company as such is not--

MR. ROH: Right.

PRESIDENT PAULSSON: --touched as a corporate structure. My question then was: Was that for, in Mexico's submission, a sufficient conexion (?)-menta (?) for the purposes of--

MR. ROH: Right. From GAMI's point of view, the answer is clearly--you know, is that a sufficient connection? Of course.

PRESIDENT PAULSSON: Yes, I just wanted to give you the chance to comment on anything you heard--

MR. ROH: Oh.

PRESIDENT PAULSSON: We know what your position is.

MR. AGUILAR: Mexico is really saying something different, or at least they have so in writing. They've said unless the expropriation

decree refers to the investor or the investor, "refers," then it is not covered. And that leaves open the question of what happens to 1102 and 1105, and, again, there Mexico has said unless the expropriation decree targets the Claimant under Chapter 11, he's out.

PRESIDENT PAULSSON: You have your rebuttal after lunch, so note that as an item you might wish to come back to.

MR. LACARTE [Interpreted from Spanish]: When we introduce a variant, let us suppose that Mr. Gallardo is not Mr. Gallardo but, rather, his name is Mr. Brown and he lives in Montreal and he's a Canadian. And for whatever reason, Mr. Brown follows the same policy of GAM.

Now, under these conditions, that is to say, not making use or not resorting to the Treaty but, rather, limiting himself to what is established by Mexican justice, now this would be conceivable. Under these conditions, in the judgment of Mexico does GAMI have a valid claim?

MR. PEREZCANO [Interpreted from Spanish]: Not in our opinion, Professor Lacarte. That would be a corporate decision of the company, and this is exactly one of the cases that we submitted in one of our pleadings. I forget if it was the first or the second.

Now, the company may decide through its directing body--it doesn't even require a majority of the shareholders--that it would be in its best interest to not bring an international case before the Mexican courts. But in doing so, it would be acting to promote the interests of the enterprise and of the interests of its shareholders without knowing who they are. And the measure being related to the enterprise and it affecting the enterprise, the enterprise would then have the option of following up in whatever forum it would feel would best promote its interests as a corporate entity and, thus, also protecting the rights of the shareholders as a whole. So this would not alter the circumstances of the claim of other shareholders.

MR. LACARTE [Interpreted from Spanish]: Following up, would it be conceivable for a minority investor, in this case GAMI, to differ profoundly with the policies being pursued by Mr. Brown? Now, then, according to the Mexican interpretation, the Treaty does not provide GAMI with any possibility of seeking recourse under the Treaty in spite of the content of Article 1116, as is indicated in the response.

MR. PEREZCANO [Interpreted from Spanish]: Well, once again, it depends on what the effect of the measure has been and what the legal interests affected are. It is not clear that harm--well, first, if a minority shareholder dissents strongly against the decisions of the majority shareholders, well, this is simply a fact of corporate life, and it's found among the best of corporations. And the minority shareholders would then have corporate rights or rights provided by legislation to the minority shareholders and no more. And this doesn't mean that the Treaty provides no protection to the minority shareholder. It offers the shareholder all of the protections under the Treaty as to differing legal rights.

If the legal rights differ, which is something contemplated under the Treaty, then these rights are protected in a different manner. And this does not go against the provisions of the Treaty.

MR. LACARTE [Interpreted from Spanish]: One more. Well, then, there's a logical question that arises. What then are, according to Mexico's interpretation--because we already know what GAMI's version is--what are the rights of an investor, a minority investor, in terms of the Treaty? We've had interpretations given by Mexico in its pleadings, but we would like to hear these arguments. Once again, concrete case, let us say in a company such as GAMI a minority investor under the

Treaty.

MR. PEREZCANO [Interpreted from Spanish]: Professor Lacarte, the Treaty is not a corporate legal instrument, nor does it protect the interests of either majority or minority shareholders. It, rather, protects the interests of investors and investments that come from those investors.

The Treaty does not differentiate. Certainly, under the Treaty one of the types of investment is investments in shares. The Treaty does not differentiate between a majority shareholder or a minority shareholder. If the individual has a single share, whether it is a question of the shareholding public or whether it is a group of friends who are investing, it is the investment and the investment defines the investor.

Now insofar as the investor demonstrates that he, she has the quality of being an investor for the other party because it has undertaken an investment under the terms of the Treaty, then it would be necessary to establish the legal interest in order to see to what degree the Treaty offers protection. But very clearly, the differences under 1116 and 1117 recognize different legal interests between investors and the legal interests of only certain types of enterprises. You know that the definition given to enterprise under the Treaty is very broad, but under 1117 it is limited to those enterprises that are moral persons.

So this difference is recognized that there are these different legal interests. Establishing this different legal definition, protection is offered to all.

PRESIDENT PAULSSON: Sorry.

MR. ROH: Just one comment. I think Mexico is now muddling. You are asking questions about 1101 but they have slipped into 1116 versus 1117. Let's bear in mind that Article 1101, our allegation is regardless--well, of course, in Mexico's view they have rewritten 1101. So it says this Treaty applies its investment to who is complaining. But leaving that aside, it is a scope Article and if you don't follow within the scope, forget it, it doesn't matter whether you need all the criteria for bringing an investors' state case. And for that matter, at least as we read it, the United States of America could not bring a complaint against Mexico if a measure is outside the scope of 1101. And I think that is to be borne in mind.

But the question that our Mexican friends are dealing with is they have sort of shifted back to a place I guess they feel more comfortable, which is arguing about the relative of minority versus majority shares.

Also just a note. You were asking about the question of where things fall on the spectrum. From GAMI's point of view, as has just been conceded, we are U.S. investor with an investment in the form of shares whose value has been destroyed. At least from our point of view, at a human level it is hard how you can deny the rather intimate effect or rather strong legal connection our value has been destroyed. And Mexico's response to that seems to be, well, sorry but we didn't say that is what we were doing or we didn't name you while we were doing it.

Thank you.

PRESIDENT PAULSSON: Mr. Reisman.

MR. REISMAN: I would like to go back and ask some questions about a different defense or objection to jurisdiction that has been raised, and that has to do with the ongoing judicial procedure within Mexico.

Mr. Perezcano has said that the Tribunal cannot assume that if there is an order for reinstatement that Mexico will not comply, which

seems to me to be quite correct. I will put it in stronger terms. The Tribunal must assume that Mexico would comply. In any case, you have stated that the government would comply, which is a statement that certainly confirms it to the Tribunal.

I would like to understand what happens to this case if the judicial process that is underway and that concludes within six to eight months, as you said, reinstates GAM, undoes the effect of the expropriation decree, what then is the case before this Tribunal? I would appreciate it if I could here Mr. Perezcano's explanation of this if I correctly understood the objections of jurisdiction, and also if I could hear GAMI's.

PRESIDENT PAULSSON: If you wish to deal with the question in the afternoon, that is fine as well. We were throwing questions at you. I know what it feels like.

MR. PEREZCANO [Interpreted from Spanish]: Mr. President, I will be very happy to respond to the question, but I have some other concerns. And so I would like to ask for a brief recess. Now if the Tribunal prefers for us to come back in the afternoon, we would now like to take a quick break.

PRESIDENT PAULSSON: Why don't you note that question? I am seeking to understand how the notion of exhaustion of remedies who really does come into the question and, since you alluded to it, I am trying to think my way through it.

Let's take the case of something which is alleged to be tantamount to expropriation rather than expropriation. And we have an agent of the executive branch of a government, say, a sheriff in Mississippi, and let's assume that his acts are imputable to the central government, just assume that. But I purposefully took the instance of a relatively lower level agent of the executive branch of the government who does something quite eccentric and impounds the assets of an investor. It does explain what he is doing, and I said it is eccentric. So he could not point to any law that enables him to do it, and he certainly isn't issuing a decree explaining what he is doing. But the investor says this is tantamount to an expropriation. I cannot use my assets.

Now since we are contemplating something alleged to be tantamount to an expropriation, you might accept that it would be difficult for the investor to sue the central government on the basis that there has been an expropriation by saying that under the relevant treaty I don't have to exhaust local remedies.

If it seems rather easy to go to a higher local authority, like this sheriff's supervisor, and just tell him to undo this eccentric thing that he did, and then perhaps we are not talking about exhaustion of local remedies so far as satisfying ourselves that it really was an action tantamount to an expropriation if it was relatively easy to undo it. So put that on one side.

I wonder if one could really give so much weight to the notion that you don't have to exhaust local remedies, that even the actions of this sheriff could be examinable on the merits by an International Tribunal.

Now we move to a case of what is clearly by hypothesis an expropriation decreed by a relevant government with a text, a decree which has the word "expropriation". We hereby expropriate, absolutely no doubt about it.

The owner of the expropriated asset I suppose--I am sorry for the long question, and you will just tell me what parts you disagree with or agree with or want to explain to me--the owner of the expropriated

asset, knowing he doesn't have to exhaust local remedies goes straight International Tribunal.

Now we have the third and last case, and it is related to the second one. The shareholder in the company, which is the owner of the expropriated asset, says the same thing, I want to go before an International Tribunal because my interest, my investment has been affected. But in this circumstance the direct owner, the company which owns the asset which has been expropriated has chosen to go before local courts. Now where are we in terms of the exhaustion of local remedies? I am struggling with how it should work and how it reasonably was contemplated to work. Again if you wish to reflect on it.

MR. ROH: Can we reflect on it? But on the first one, on the sheriff, bear in mind that at least under the NAFTA there are these notice requirements. You know, you are supposed to try to negotiate. I realize now it is debated, but you really have to pay attention to those things, but there they are. And in any event, as we all know, a Tribunal doesn't get convened in a day.

And actually, what happens in that kind of a situation is that the executor or the government has its opportunity to fix it. And my reading of the Loewen case the issue they were wrestling with the courts you have got to give them a chance to fix it. And I think the difference is when it is the executive or the administrative authority, they get a chance to fix it because the investor who feels aggrieved typically doesn't show up by Venus popping out of the half shell with his claim the day after it happens. There is a lengthy process, and if the government wants to fix it, it can if it considers that it has done something wrong.

Now if the government is unable to do anything about it, then I think you have an expropriation. If the Tribunal I suppose comes with the conclusion that somehow or another it should have been easy to achieve restitution--as I recall, you can say give restitution or else you will have to pay something.

PRESIDENT PAULSSON: We are, of course, not worrying about the case of the sheriff but just in terms of understanding the entire spectrum. When you egt to the case of this situation where one could imagine two Claimants, because of the corporate structure of the investments, and one could very easily imagine that the majority shareholder also is qualified under the international treaty and chooses one particular option. I am just struggling to understand it.

MR. ROH: I think we have dealt with that in our second jurisdictional submission. But if we as a shareholder are the minority shareholder in that situation can only bring a claim for the losses or damage it incurs arising out of the alleged breach, so it is perfectly okay for the majority shareholder, be he Canadian and in the case of a Mexican case, as exists here, he has no choice, but if Mr. Gallardo had been Canadian and he had chosen to pursue his remedies domestically, we would have the same situation that we have here in our case. If he pursued it as a NAFTA claim, of course, you know there are provisions calling for consolidation and all that other stuff, then that tends to take care of it.

If you have situations as frequently as seem to be existing in these Argentine cases where you have multiple bits and all kinds of complications, I think that the Tribunals then have to sort of work their way through and try to concentrate on the fact that they can only compensate the investor that is for the loss or damage that it incurs or that has happened to its interest.

PRESIDENT PAULSSON: If the minority shareholder prosecuted

an international claim for the diminution of the value of his investment and succeeded, it is a 10 percent shareholder, so it gets 10 of the $100,000 total, that lost value. And the company in which it was a 10 percent shareholder prosecutes its claim as well, as is being done here, and let's say it is in a national forum, and then recovers market value, it happens to be the same thing where we are living in a world of hypothesis where everybody accepts the underlying phenomenon. So you have $100,000.

And it is then said to the company, actually you are only getting 90 because 10 have already been allocated and awarded elsewhere. Might not the company say when we have income as a corporation, it doesn't instantly go to our shareholders. We actually had other things in mind to do with that money, investments, paying other creditors, we have our corporate strategy in mind. Isn't there a problem at that level as well?

MR. PEREZCANO [Interpreted from Spanish]: My apologies, sir. I will ask Mr. Becker representing me.

PRESIDENT PAULSSON: I think we will break now and resume at two o'clock. Hold that thought.

MR. BECKER: We will resume at two o'clock?

PRESIDENT PAULSSON: Is that a problem?

MR. BECKER: No, I guess not.

[Luncheon recess.]

AFTERNOON SESSION
[2;19 p.m.]

PRESIDENT PAULSSON [Interpreted from Spanish]: Let's begin then. Mr. Perezcano?

MR. PEREZCANO [Interpreted from Spanish]: Thank you, Mr. President. First of all, I wanted to offer my apologies for the delay, and also to my colleagues, I would like to apologize for my delay.

The Tribunal has to understand that this is a first impression kind of case. This is the first case that involves the interest of a minority shareholder and within the context of the NAFTA treaty. In all the other cases that have come before this Tribunal in connection--or, rather, in accordance with the NAFTA, the Claimant has been the only and sole proprietor of the investment subject matter of a dispute.

In the Asinian (ph) case, there were three Claimants that together represented 100 percent of the shareholding interest. Although there was a dispute related to the cause of action of one of them, the Tribunal rejected the claim and decided that it did not have to resolve the issue. But this is the first time that a minority shareholder interest comes before the Tribunal in this regard.

I would like to go back to the question that Professor Lacarte asked me. What is the protection that the Treaty offers to minority shareholders? I gave a general answer to that question in connection with the provisions of the Treaty, and I would like to offer a number of examples in that regard.

For example, if the Government of Mexico--and, of course, we have to bear in mind that the Government of Mexico expropriated sugar mills, expropriated the shares that GAM held in the companies that we have called sugar mills. If the Government of Mexico had taken the same kind of measure and also expropriated the shares held by GAMI. In connection with the legal interest of GAMI, of course, NAFTA would offer protection against such expropriation.

PRESIDENT PAULSSON [Interpreted from Spanish]: Are you talking about the shares of GAMI, the American company?

MR. PEREZCANO [Interpreted from Spanish]: Yes. I would say if the Government of Mexico had expropriated the shares of GAMI, NAFTA actually offers that protection. Assuming that the expropriation does not actually abide by the provisions of the Treaty, it does not regulate illegal expropriation. It establishes a number of criteria. In that case, obviously, NAFTA offers a direct protection against the expropriation of the shares. If the Government of Mexico prevented foreign investors held shares of companies belonging to the sugar sector, not only if it deprived them of holding those shares or forced them to sell those shares, probably in that case they would have a claim and they would enjoy the protections of NAFTA and they would be able to institute a claim against the government because the government could say, well, we could give you 20 days to sell your shares and, of course, a situation like that would affect the price of the shares, and they would have the right of action against the Government of Mexico.

If the Government of Mexico decided to adopt dividend transfers, let's think of the hypothesis. The Government of Mexico pays the compensation to GAM, the full compensation to GAM, and GAM decides to liquidate itself and to distribute its assets, and the Government of Mexico says, look, the money from the compensation cannot be sent overseas. All transfers overseas are blocked. Then in that case, GAMI could have a case arising from the protections awarded to it by the provisions of NAFTA.

If Mexico were to restrict voting powers in meetings of shareholders, in general meetings of shareholders, and it were to say right now shareholders do not have--foreign shareholders do not have the right to vote for board members or to have no voting rights in connection with the approval of financial reports, if the Government of Mexico were to establish a confiscatory tax on dividends, for example, or on taxes related to dividends that were to be repatriated, or perhaps imposes a tax on the repatriation of equity, then all of these situations are situations that fall within the purview of NAFTA, but none of these situations are connected with the rights that GAMI has as a shareholder, and GAMI has suffered no loss because of measures taken by the Government of Mexico.

I want now to touch upon the term that we used, "relating to." In response to the question posed to me by Professor Lacarte, I already explained the reasons why there is a need for a legally relevant nexus or link. In this regard, Chairman Paulsson asked what would happen in the hypothetical case of the majority shareholder, the sole owner of the company, what would happen if he made a mistake when instituting the claim, and instead of instituting the claim on behalf of the company, it instituted the claim on its own behalf?

The answer in that regard is that in all cases a relationship with the investment has to be established by the investor. The Treaty defines an enterprise as an investment apart from the shares, and a legally relevant link has to be established vis-a-vis the investment, and this apart from the shareholder's capacity as a shareholder. So that legally relevant link needs to exist.

We have to remember here--and President Paulsson talked about this shareholder making a mistake when instituting his claim. But perhaps an investor, in trying to avoid the consequences of 1117 and 1135, when the damage is suffered by the company and the compensation is to be paid to the company, in this case the Treaty does not allow that a claim under 1117--when an investor claims that it has suffered itself a loss or damage, the Treaty does not allow that investor to benefit on behalf of the company, and this in connection with 1116 and 1117.

In connection with the phrase "relating to," I wanted to clarify something. GAMI in the Counter-Memorial in connection with jurisdictional issues and even today GAMI said a number of times that the Government of Mexico had used the term "referring to." We have read our own pleadings very carefully, but it's not the term that we used. We used the term "relating to" in all our pleadings, which is the term used in the Treaty. I wanted to clarify that because we are talking about synonymous terms.

GAMI, however, says that this is akin to a different situation. For the expropriation decree to be related with the measures taken by GAMI or with the sugar policy, then the decree should have named GAMI as one of the subjects that fall within the purview of the provisions of the decree. The argument of Mexico is that there has to be a link between the measure that is claimed against and the investment that the investor made. We did not, however, use the term that GAMI says we used, and we did not use the term in the sense that GAMI says we used it.

I would simply like to draw the Tribunal's attention to the arguments we already put forth in our pleadings with respect to the structure of the Treaty and how it uses the terms "relating to" and when it uses other terms or another structure.

We note in our pleadings how the term is used in Chapters 6, 7, 10, 11, 12, 13, and 14, and the different use made in Chapters 3, 7,

9, and 19 of the Treaty. So I would simply draw the Tribunal's attention to paragraph 9 of our Rejoinder.

Professor Lacarte asked whether the definition was a question of moving from the extremes toward the center, that is to say, in terms of arriving at a definition. I answered this morning and I would reiterate here, in the view of Mexico, the proper meaning is the definition according to which a relationship must exist and that relationship must be legally relevant. And the examples that Mr. Roh referred to this morning of all the exceptions and exclusions contained in the annexes by the three parties, that is, the annexes to the chapter on investment, would make no sense where the measures that were excluded from the scope of the Treaty by 1101. Well, these measures make perfect sense when it comes to existing or future measures in sectors in which the foreign investment might participate and where, in order to establish such participation, it would be necessary to find such a bond or relationship between the specific measure and its application and the investor or the investment.

I would now like to refer to the issue addressed mainly by Mr. Aguilar in terms of the damages to the enterprise and the damages to GAMI according to Mr. Aguilar. This morning he indicated or reiterated what they had already said in their briefs, which is that GAMI is seeking damages for no less than $28.6 million--I believe that's the correct amount--and indicated that it would be much more if they were presenting a claim on behalf of GAM.

Now, could I tell you how much more it would be? It would be 28.7. It is just 14.18 percent of the value of GAM. The claim for the total value of GAM, well, one would have to add the remaining 86 percent to account for 100 percent. What this shows, as we already indicated, is that GAMI first needs to establish in its claim, for it to prosper, it first needs to establish that there is harm to GAM so as to then simply take the proportion that would be equivalent to 14.18 percent, as was done to arrive at the figure of $28.7 million. And this is one of GAMI's fundamental problems. The fact that it is claiming a value less than the total value of GAM is not what makes the difference.

The problem is that it is seeking relief for harm to GAM, which it attributes to GAM in a value that GAMI attributes to GAM, considering the amounts claimed in this--intended to be claimed in this procedure. And this morning, Mr. Aguilar pointed out that it is incorrect that GAMI cannot present a claim for harm which is also harm to GAM. In other words, that's not the right order because GAMI isn't claiming damage additional to damage that GAM may or may not have suffered. What GAMI is claiming is damages derived from harm to GAM.

And going back to the questions that were asked by President Paulsson this morning and by Professor Reisman, President Paulsson asked Mr. Aguilar what would happen if Mexico were to pay full compensation to GAM and it abides by all requirements of the Treaty. And Mr. Aguilar conceded that in that case, there would be no claim.

Now, if the compensation that the government pays GAM is full, then Mr. Aguilar conceded the damages in this proceeding would drop to zero because full compensation would have been made for the value of GAM, 14.18 percent of which is the value of GAMI's investment. And in this connection, I take the opportunity to answer Professor Reisman's question, for he asked: What would happen if upon the conclusion of the judicial proceedings instituted by GAM in Mexico there were full restitution? And I understood this in the sense of what would happen if the Government of Mexico gives back all of the sugar mills.

We have said that there's no difference between the sugar

mills, the value of the possibility of collecting on the totality of the sugar mills, or getting full compensation, and the future situation in which GAM would either have a check for compensation at fair market value or sugar mills, or a combination of the two. So as regards value, there's no difference.

Now, if there is full restitution of the sugar mills, then I go back to a point that President Paulsson had focused on this morning, where I said there was no expropriation. One of the measures as set forth in the claim did not happen. The expropriation would be rolled back and the effects would be annulled.

The next question or perhaps the final part of Professor Reisman's question was: So what happens with this Tribunal? Assuming that there's not full restitution or, under the other example, that there's not full compensation, what would happen with this Tribunal? Well, that's not a claim that's before this Tribunal today. As Professor Reisman already indicated, this Tribunal cannot presume that the Government of Mexico is not going to fully perform on its obligations. To the contrary, it will presume that it will comply fully.

Now, in the extraordinary event that the Government of Mexico were not to do so, then perhaps one could derive a claim for affected interests as GAMI would have been deprived of its share as the corporate assets of GAM would have been taken and there would be no possibility--that is to say, if the Government of Mexico keeps the sugar mills and the amount of compensation, then, in effect, it would have deprived the enterprise of everything, and then one could establish direct harm to the shareholders of the company as there would be no economic basis any longer for their shares.

But that's not the situation we face today. That's not the claim that is before this Tribunal, and the Tribunal cannot rule on hypothetical cases. The only reason why we are not facing a situation of full return of the sugar mills or, moreover, the only reason that we're not yet in a situation in which full compensation has been paid to GAM is because GAM opted not to collect compensation. GAM is litigating the validity of the decree with a view to roll it back and get the sugar mills back and continue its involvement in the sugar industry.

That is a decision that was made by GAM. Certainly it is a right that it has, and it's a decision of the company as such to protect its own interests.

So the harm that GAMI alleges it has suffered and which refers to harm that it attributes to GAM has not yet happened because GAM might well find itself in a position of recovering the sugar mills, at least three of them, and getting compensation for two of them, or, as the case may be, all of them if they do not prevail in the amparo proceeding.

Finally, I'd like to refer very briefly to the CMS v. Argentina case. Mr. Aguilar referred several times to the CMS case this morning. Before getting into the points, I would simply like to note that President Paulsson's office participated in the claim in that case. We don't consider the case to be applicable. We just want to make note of that. Nor do we believe that there may be any conflict of interest, but we do want to state it for the record, and we're certain that if there could be any conflict of interest in this respect, the President would so inform us.

Having said that, Mr. Aguilar touched on several points this morning, one having to do with the application of municipal law, municipal corporate law, noting that the CMS Tribunal discarded the application of municipal law, according priority to the application of the (?), the ICSID Convention and one other.

Mexico doesn't dispute the application of NAFTA and international law. This is provided for in Article 1131, and there is no dispute in this regard. Mexico is not suggesting that the Tribunal should apply U.S., Mexican, or Canadian corporate law, which we've referred to in some detail in our briefs. Mexico's point is that we are talking about universal principles, as I called them this morning, of corporate law.

The fact that they are reflected in the legislation of practically every country, or to put it inversely, the fact that as they are in the legislation of practically every country and, therefore, are taken up by international law is relevant because that's how enterprises operate everywhere worldwide. And the Free Trade Agreement does not include any provision that would change those corporate relationships. So it's not a question of Mexico seeking application of municipal law; rather, it's simply relevant for the information of the Tribunal.

The CMS Tribunal concludes that based on the facts and circumstances of that case as international law and in that case the U.S.-Argentina BIT protect the rights of all shareholders, be they minority or majority shareholders and, therefore, it grants a right of action, it grants standing to the Claimant to be able to move on to the merits.

What the CMS Tribunal did not address are specifically the distinct legal interests of the different kinds of shareholders. Moreover, the NAFTA establishes, as we've indicated, certain distinctions which are relevant. Article 1117 draws a very significant distinction. Article 1117 is a recognition of the distinct legal interest that is protective of the enterprise with respect to the interests of its shareholders or other investors, for clearly there may be--well, in the NAFTA we're now talking exclusive about enterprises and shareholders. There might be bondholders. There might be other types of economic relationships with others that represent an investment. But it certainly recognizes the distinct category in terms of the legal rights that are protected, an issue which the CMS Tribunal simply does not address.

What we have said here is that GAMI not only cannot show, cannot establish that there is harm independent of harm to GAM, and can't establish that harm to GAM because it is only up to GAM to establish whether there was or was not such harm. I reiterate GAM not only has not done so, but it is litigating to recover the sugar mills that were expropriated from it so as to wipe out the impact of the expropriation with which it would be eliminating or wiping out any damage that GAMI is attributing to it today.

Mr. President, with this, I will conclude my reply arguments, and I thank you very much for your attention.

PRESIDENT PAULSSON: Thank you very much, Mr. Perezcano, for in CMS, bringing up the issue which was on your mind about my firm's participation in CMS, it's better if things are said rather than left as some point of anxiety, and I appreciate the form in which you did it.

Let me say--I think as a practicing lawyer you will appreciate all this--I don't know the name of a single person in CMS. I have not billed a single minute to that file, not written a single page of the briefs in that case, nor read a single page in that brief, and though I have read the award, I have not discussed it for a minute with any of our lawyers who were involved in that case, not because I didn't want to but because we've been on vacation and I just haven't had the occasion to do so.

Now, perhaps the expression wouldn't necessarily be "conflict of interest," but I think it's legitimate to be concerned if you thought

the President of a Tribunal had been spending weeks of his life thinking about how to defend a particular thesis which might be relevant to your case, and that simply has not been so. I might say that the identity of the arbitrators in that case are those persons known to me and very much respected by myself. So I am very interested in their opinions, but I don't think that's any different from that of any arbitrator active in the international area. But that's what I have to say about that.

MR. AGUILAR: We have reached the point where the parties did not agree on how to proceed with respect to the afternoon session, and we would like at this stage to request for a break to prepare our closing remarks.

PRESIDENT PAULSSON: How much time would you like?

MR. AGUILAR: Thirty minutes.

PRESIDENT PAULSSON: Let's see where that leaves us. And you will have equal time. We would also like to discuss housekeeping matters, as I said this morning, about where we go from here. Since you're the Claimants, wishing to establish our jurisdiction, on the assumption that the Tribunal upholds its jurisdiction to consider your client's claims or any of them, we look at our scheduled, which was interrupted by our decision to consider these objections separately, and therefore the dates were vacated. That's the words we used in the relevant procedural order.

One of the things that I want to burden you with during the pause as well is for you to tell us what in your submission on that hypothesis should be the sequence and timing that you propose if we go back onto a schedule now in light of our decision. And in light of that we will have, Mexico will obviously be able to respond to that part of it. Well, the substance of course is the final word.

So 20 after?

[Recess.]

PRESIDENT PAULSSON: So over to GAMI.

MR. ROH: Mr. Chairman, we thought we would first deal with the questions of Mr. Reisman and yourself, and Mr. Aguilar is going to go first on Mr. Reisman's question.

MR. AGUILAR: Thank you. Professor, you asked about where this case would go in the event that there is restitution of the mills and pursuant to the Mexican proceedings, if I understood correctly. This takes me back to our point of departure. Our case is for indirect expropriation of GAMI's shares in GAM, and our case has been brought under Article 1110 of Chapter 11 of the agreement.

Now, if there is restitution of the mills as a result of the Mexican legal proceedings and that restores the value of our shares pursuant to the international standards or to the level of the international standards under 1110, then GAMI will have made Mexico whole, Mexico will have made GAMI whole, and at that point this Tribunal will only be seized with a request for a decision on costs.

If restitution, or compensation for that matter, does not make GAMI whole, then we would still have a claim for the difference in addition to costs.

PRESIDENT PAULSSON: Make whole according to what standard?

MR. AGUILAR: I'm sorry?

PRESIDENT PAULSSON: According to what standard?

MR. AGUILAR: The standard is always the NAFTA. I started out with Article 1110. The standard for compensation in the case of GAMI under the NAFTA is Article 1110 and not the standard under domestic legal proceedings.

As I said, if restitution does not restore our value, for

instance, because the shares of the mill are returned in bad shape or what-have-you, we would still have a claim for the difference in addition of course to costs. In any event--and we want to make this very clear--we do not believe that this is an issue of jurisdiction, and that it does not get in the way of jurisdiction by this Tribunal to adjudicate the merits of a dispute. It may be an issue of valuation. We may run into this discussion at the time of liquidation of a possible award, but it is not an obstacle to jurisdiction of the Tribunal under section (b) of Chapter 11.

MR. REISMAN: Am I correct in understanding that Mexico has raised this as an objection to jurisdiction?

MR. AGUILAR: No. I only say it because this is the jurisdictional hearing.

MR. REISMAN: I understand your position, but I am uncertain about two things. First, whether you call this jurisdiction or not, if the Mexican judicial process produces a judgment of restitution within six to eight months before this Tribunal renders an award, there will be some consequence, whether you call it jurisdictional or give it a different title. It will certainly change the nature of the mission that this Tribunal has. That's why I think it is something that has to be clarified at this point.

I was uncertain as to what you meant when you said if there is restitution and GAMI's value, GAMI receives in return the value that it had, that refers only to the physical quality of the mills when they're returned. It does not refer to, let's say, a market benchmark that occurred at some point before the expropriation which is to be compared to the situation afterwards.

MR. AGUILAR: No. I only--we see it, Professor, as an issue of valuation. We don't know what value restitution will restore in our shares. But of course the physical state of the assets and other criteria may intervene in determining whether the value of the shares has been restored.

MR. REISMAN: Thank you.

MR. ROH: Just to note, of course, your comments pertained I think to the expropriation claim rather than the 1105 and at least aspects of the 1102 claim. Of course the six to eight months, you know, it's a hoped-for event I think is the way Mexico put it. Mexico is sort of in the odd position of saying, well, why don't you hold up your proceeding because maybe in this domestic law proceeding that we are nearly fighting, it will turn out that something will happen that will affect the value of the claim of GAMI, and we don't see the basis in the NAFTA Treaty for holding up on that account.

As noted before, given the position, at least what we think is the logical position, that if you award us compensation for the expropriation of our shares which would, in the way we calculate it, also resolve the 1105 and 1102 issues, Mexico will get the shares. So whenever the Mexican Courts speak and whatever they do, Mexico will stand as GAMI's successor as far as that's concerned.

The question I'm going back to is I think it was the fireman and the--

MR. AGUILAR: The sheriff.

MR. ROH: The sheriff. Sorry, my wife's father was a fireman.

The sheriff, I think, given the answer that we would give, which is in the nature of these things, the executive will have ample opportunity if it's within its control to be able to fix the situation. I don't think as in practice you're going to be dealing with any

situation where a sheriff, you know, where an easily reversible operation won't be therefore easily reversed. And if it is not easily reversed it's because the state is contesting its legality, or rather, contesting whether it needs to reverse it at all, and then you have a proper issue for our arbitration.

PRESIDENT PAULSSON: It isn't very rational conduct, I admit, for the victim to start an international arbitration rather than asking for somebody to review the lower official. So it's really out of control.

MR. ROH: Yes.

MR. AGUILAR: Well, Chapter 11 doesn't start with the international arbitration. There's a cooling off period and people talk, and the agencies get together, and hopefully it can be fixed at that stage.

MR. ROH: As I say, I had at least the strong sense that you were partly alluding to the issues that they were wrestling with in Loewen, that a big difficulty when you had a court proceeding was the sense that you hadn't given the court a chance to fix it because of course the Executive Branch, the State Department has no authority, or the Ministries of External Relations have no authority to tell the courts what to do, and I think there was a certain notion of you've got to let the court speak, at least have a chance to fix it. But the Executive certainly has a chance to fix it beforehand.

Your second example I think was very easy, but if you wouldn't mind repeating it. It was something like the complaint is by a 100 percent foreign owner; GAMI owns all of GAM, and there's not really an issue there surely. It's just they have a right to bring the treaty complaint, or what's the--

PRESIDENT PAULSSON: What I was imagining there is there wouldn't be much discussion about exhaustion of remedies, which was the object of my inquiry because in that case the 100 percent owner makes the choice. I don't have to exhaust local remedies. I don't care what local remedies there are. I have my treaty rights. I go to NAFTA, nothing else.

MR. ROH: Further, I have to--even have to waive my local remedies.

PRESIDENT PAULSSON: Correct.

MR. ROH: Or at NAFTA, actually, you could have pursued your local remedies for a while and gotten--decided for whatever reason to waive further action and pursue them--

PRESIDENT PAULSSON: Now, that's only by way of background to the third example.

MR. ROH: Right. And you have a minority owner that owns 10 percent, and it has brought a Treaty case, but the majority company decides to pursue its local remedies, right?

PRESIDENT PAULSSON: Either because it can do nothing else, because it doesn't have NAFTA quality, or it would have NAFTA quality but chooses not to do it.

MR. ROH: Right, chooses not to. That's the situation that we're addressing here, and our views, to some extent our views are set out of course in two written submissions, but we would say we have the perfect right to bring our--the minority shareholder has the perfect right to pursue its interests under 1116 for losses to it and to its interests in the company, arising out of the breach of the treaties.

PRESIDENT PAULSSON: And the possibility of inconsistent results is inherent in the structure which has been set up, which is what it is.

MR. ROH: Absolutely. Partly also because in domestic law--I mean this has been said over and over again by no end of Tribunals, that in domestic law you're pursuing your domestic legal remedies, and in the Treaty we will be pursuing our Treaty remedies. There was no condition that says that you can't if--that this can't happen.

So we would see the duty of the Tribunal as being to decide has there been a breach, and has there been loss or damage to the investor or its investment, or its investment arising out of that, and if so, how much? And the domestic Tribunal would pursue its side as well. Then in a sense we're back to Professor Reisman's kind of example. They can have effects. I don't think it's so difficult or unresolvable as it sometimes seems, as Mexico tries to say.

There is, at the end there is also the comment of the CMS Tribunal, and I don't think they're the only ones to have said this, that when you've got multiple investment treaties and domestic laws and possibilities for procedures, it may not be perfect in terms of a neat and tidy package in which nothing falls between the gaps and nothing is either overcompensated or undercompensated. Tribunals can certainly do their best within the field they're working with.

Again, we don't see that though as a jurisdictional issue.

MR. REISMAN: Just to distinguish, the problem that I'm grappling with, which may or may not be jurisdictional, and the problem the Chairman raised, which you have just addressed. Certainly international law is familiar with the fact that an alien is entitled to different remedies than is a national, and so the same action visited on both will produce differential results. That doesn't seem to be problematic. The question that I was raising was, that aside, if this issue is resolved in the sense that the expropriation is expunged, what is the role of this Tribunal? And I understand Mr. Aguilar's observation that there is still 1105 issues that have to be considered. I understand that submission.

MR. ROH: Yes. And then we have asked for costs, and as Mr. Aguilar was saying, it's the treaty law standard is what you apply. To take a simpler one, suppose that Mexico had paid compensation to GAM the company on the day after the expropriation. That surely would not extinguish the right to come in and say that compensation does not meet the standards of Article 1110, and it would be measured by the Treaty, not by the fact that Mexico's law--even if Mexico's law is phrased in exactly the same words as the Treaty, that does not necessarily mean it will be Treaty standards.

MR. REISMAN: The only point that I would make is that that has different jurisdictional consequences than does a complete removal of the expropriation.

MR. ROH: Yes.

MR. REISMAN: At least as far as 1110 is concerned, not as far as 1105 is concerned.

MR. ROH: It also raises an interesting issue, which troubles courts and Tribunals, which is of course there's a temporal element here, yes. After two years or two and a half years or whatever, the mills will be returned in some form or another, raises the issue is compensation owed for the two and a half years? Those observing the Mexican sugar scene would say the sugar mills that didn't have the privilege of being expropriated are doing very nicely indeed. So that's another aspect of all this. So I don't think we see the claim as being extinguished, that is, a merits issue.

PRESIDENT PAULSSON: Any comment from your side on those matters?

MR. PEREZCANO [Interpreted from Spanish]: Mr. Chairman, very briefly, I would say that we have given our answer to Professor Reisman, and I'm satisfied with it. I would simply say, in connection with the last comment that Mr. Roh made, that if the Treaty protects the parties against expropriation, which is a permanent and definitive taking of property for a period of two years, then I think then it's difficult, because we're now talking about a full deprivation of property. The passing of time has been so because GAM has decided to go to the local courts and exercise its rights there.

PRESIDENT PAULSSON: So you have very brief comments.

[Laughter.]

MR. AGUILAR: All right. I would like to start out by saying simply that we welcome acknowledgement by Mexico that had the shares in GAM that GAMI owns been directly seized, GAMI would have a claim for direct expropriation under Article 1110 that was not apparent in its briefs or in its presentation before this afternoon.

Mexico has also given a number of examples of instances where GAMI would also be entitled to bring a claim under Article 1116. Number one, they said if GAMI shares were to be directly--shares in GAM were to be directly expropriated. If Mexico were to prohibit investment in the sugar sector, for example, if Mexico were to prohibit the transfer of funds in hard currency as required by 1109, if Mexico restricts voting rights or the rights to dividends, or I think the last example was--

PRESIDENT PAULSSON: Confiscatory taxation.

MR. PEREZCANO: Confiscatory taxation, exactly. That's all fine. Now, we still have the "relating to" problem, and I am a little bit confused as to what the position of Mexico is in that respect. If you go back to Mexico's second round of submissions, for instance, and they said that this afternoon as well, respecting "relating to" and "referring to" are really synonyms, and this is in footnote 9 to their second submission. In paragraph 10 they go on to say, los medidas [ph], the measures that GAM is complaining about, the measures don't refer to GAMI as a shareholder of GAM and the measures do not refer to GAMI as a shareholder in GAM or to the shares GAMI holds. So the standard appears to be "referring to", is written in Mexico's submission. So on top of all these rights that Mexico has listed, it would appear that the measures would in addition have to refer to GAMI for a right of action to be available under Article 1116.

Mexico briefly referred also to the annexes in Chapter 11. We still believe that the party stipulated in Article 1108 that they would include in annexes all the measures that they would consider to be nonconforming, and they did so in 260 pages, as Mr. Roh was saying. Many of the reservations in those annexes, as we said this morning, do not meet the test of "relating to" as defined by Mexico in its legal brief, and if they don't, then there is no reason for the exception because that measure would have been outside the scope of Chapter 11 anyway.

And finally, I would only note the clarification by Mexico that it is not invoking corporate law either as grounds for its request to oust jurisdiction for this Tribunal, nor as some sort of lex mercatoria [ph] that would apply because it is the law applied in the countries relevant in this dispute. I will conclude with that.

Do you have something else, Chip?

MR. ROH: No.

MR. AGUILAR: I think we will not burden the Tribunal any further.

PRESIDENT PAULSSON: All right. Thank you very much. It seems appropriate that the Respondent on the application has the last

word, so unless there's a burning desire--thank you very much, Mr. Perezcano.

Before we discuss administrative matters, I've been informed by the Secretary of the Tribunal that the U.S. delegation wished to address the Tribunal for a very brief period of time. Is there any objection from the parties?

MR. AGUILAR: No, Mr. Chairman.

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

I actually only wanted to let the Tribunal know and the parties know that the United States has not decided whether or not it will exercise its right to make a submission on matters of interpretation of the NAFTA that have arisen in this case. But should we decide to do so, we will notify the parties, the disputing parties in writing, pursuant to Article 1128 of the NAFTA, and of course we'll notify the Tribunal as well. That's all that I have.

PRESIDENT PAULSSON: Well, in connection--any comment by Mexico?

MR. PEREZCANO [Interpreted from Spanish]: No, Mr. President.

MR. AGUILAR: No, Mr. President.

PRESIDENT PAULSSON: Why?

[Laughter.]

PRESIDENT PAULSSON: I'm sorry, but I would like to know something about what this implies in terms of timing.

MS. TOOLE: I am not able to speak to that now because first the decision has to be made and then we need to confirm the matter of timing. So I wouldn't be able to tell you but if you were thinking about a schedule, of course, we would want that to be considered and built into a schedule to give us enough time.

PRESIDENT PAULSSON: Yes. You still have no comment?

MR. PEREZCANO: No.

MR. ROH: Could we suggest that with all respect to the United States which has already made a written submission and has had this kicking around for quite some time, and we have been trying to proceed, I don't think we should hold up the proceedings to see whether the United States is going to--there is a sort of feeling like that--an amparo proceeding. Maybe we will make up our mind soon.

So if we could either set a time limit or just suggest that the Tribunal could carry on and, if the United States makes an intervention that is timely, so be it.

MS. TOOLE: The United States is not suggesting that the Tribunal should hold the proceedings on our behalf, only our right to file a submission is considered when creating the schedule.

PRESIDENT PAULSSON: Right. Okay. We are going to consider the schedule now. So you are, of course, listening in and you will hear how we try to accommodate everyone concerned.

Thank you very much.

MR. HEATH: Thank you, Mr. Chairman.

Like the United States, I will have to check back with Ottawa but Canada will review today's proceedings and we will let the Tribunal know as soon as possible whether we make a comment on them.

PRESIDENT PAULSSON: Do you take essentially the same position that you request the Tribunal to take account of this possibility but not otherwise to impede a scheduling.

MR. HEATH: Thank you very much.

PRESIDENT PAULSSON: Now before we broke, I can only invoke the slight effect on jet lag. But you might not be convinced that. I

did forget what we had decided in terms of procedure in that we have the original procedure order number one which contemplated that there would be a decision in May for the proposal of bifurcating the hearings on jurisdiction. And if that decision were taken affirmatively as it has been that the subsequent date would be vacated.

After that, we had further discussion. And in connection with the discussion of the bifurcation, it was agreed that the defense on the merits would come 30 days after the last date of the hearing and in due course the dates would be filled in.

Now it is perfectly obvious to anyone who has experience of international litigation that ultimately the point of having jurisdictions determinations in a bifurcated way is to obviate briefing, examining, preparing for issues that may not be heard. So it is somewhat of a curiosity.

But as far as I can recall, this was part of--I hesitate to say this--but it was part of a packaged response to the observations of the parties, on the one side, the Claimant wanting to go ahead and not wishing for the bifurcation, Mexico saying we prefer a bifurcation; we assure you we are not attending to slow anything down. And so that explains I believe why that decision was taken.

That being the case, the Tribunal now needs to consider how we go forward, and I would like to hear your observations on that in light of your understanding of where we are today on the side of the Claimant.

MR. AGUILAR: Mr. Chairman, GAMI was working on the assumption that procedural order two as issued would apply. The parties have had that procedural order since May, and we have not heard any complaint about having to file a response on the merits within 30 days of today, and I would add that Mexico has had the statement of claim since February.

MR. PEREZCANO [Interpreted from Spanish]: Thank you, Mr. President.

As you had anticipated, it is a concern for Mexico, particularly as the whole purpose of bifurcating the procedure was proposed by Mexico initially, and the idea was to not have to get into the merits if all or part of the merits issues could be dismissed, as Mexico has proposed.

This has obvious complications which you already noted, which could even be if the Tribunal admits one part of the Claimant or checks another part, it could affect how we would present the brief.

Certainly, this is an issue we have not revisited, but I think that this wipes out the purpose of the bifurcation. Our suggestion and what we were seeking was that the time should begin to run once we have the award, such that if the Tribunal decides to proceed, we could structure our briefs accordingly. And I reiterate it is not obvious that the Tribunal will dismiss or admit the claim in its full extent or in its entirety.

And so as I say, this could complicate how we structure our arguments in response.

PRESIDENT PAULSSON: In addition to the notion of an award, I don't think that we have necessarily contemplated or promised that our decision would take a particular form, and I don't we are required to do under the UNICTRAL rules. Correct me if you have a different understanding.

MR. PEREZCANO [Interpreted from Spanish]: I was referring to the Tribunal's decision.

PRESIDENT PAULSSON: So it is conceivable--I am speaking now

under the control of my co-arbitrators who I welcome to slow me if I am heading net income the direction which is not consonant with our discussions. But the discussion which we have had today, which is extremely interesting, has touched on a number of problems, some of which may straddle issues of jurisdiction and the merits. In all instances, we must be concerned with the fact that we are operating under NAFTA, the object and purpose of which might be relevant if we encounter difficulties of interpretation, but the object and purpose of which probably should not enter our thinking to the extent that we don't find issues of interpretation and we have to take it as it is. It is not for us to bend it because we think the object of purpose might have been better achieved in some other way.

So we have a document which we must read and apply. We have claims that have been made with respect to which I have not heard any other proposition, any suggestion to the contrary. We would follow the traditional line that all factual premises are as pleaded by the Claimant, and we go forward on that basis to examine whether those claims on the basis of the allegations claimed do or do not fall within the framework of NAFTA jurisdiction as that instrument exists.

Considering the fact that a number of the difficulties which the parties have raised, as I said, may straddle issues of merits and jurisdiction. It may be useful for the decision on jurisdiction at that time to take the form of an indication to the parties whether the Tribunal believes that the Claimant has stated the case, the relevance of which fall within the purview of NAFTA.

If we take a contrary decision and there is nothing we believe to fall in the jurisdiction of NAFTA, well then that must take the form of an award obviously and be fully motivated. To the extent that we reach a contrary decision and find that the claim as stated falls within the purview of NAFTA jurisdiction, we might decide that that is the indication we wish to give to the parties in a lapidary form because it may occur that we find in our consideration of the merits that we wish to refine the reasons that are relevant to our decision on jurisdiction.

It may be particularly in the interest of the Respondent which has recurring cases under the same international instrument that the Tribunal proceeds as carefully as possible in this respect. That is why I think the solution might particularly commend itself to the Respondent. I think for procedural reasons it might also commend itself to the Claimant who would probably prefer, from all they said, that the Tribunal proceed as expeditiously as possible and, therefore, simply on that limited basis not be detained by thinking carefully about the fully motivated decision on jurisdictional issues.

You have not corrected me so far. So on that basis, if your choices are no jurisdiction whatsoever, well then we will take our time and explain why we came to that conclusion. To the extent that there is jurisdiction, our decision may take the form of a brief indication to the parties that we find that the Claimant has made all the case for jurisdiction and that, therefore, we will proceed to the merits.

Our thinking on the jurisdictional issue may, therefore, be refined and informed by what we encounter when we proceed to the merits. That also has the additional advantage of our being able to receive the observations of the two other state members of NAFTA when they find it appropriate to make comments on what they observe in these cases and in accordance with their rights.

I have spoken very freely and informally, but I wonder if you could react to what I have said so far, Mr. Perezcano.

MR. REISMAN: May I ask a question?

PRESIDENT PAULSSON: Yes.

MR. REISMAN: So assuming the eventuality which you have just described of a conclusion that there is a prima facie jurisdiction and the parties are instructed to continue, would that mean that the schedule of submission that had been established earlier would simply go into place mutatis mutandis with a different benchmark?

PRESIDENT PAULSSON: Mr. Perezcano can say what he thinks also in respect to that.

MR. PEREZCANO [Interpreted from Spanish]: Mr. President, perhaps it is confusion on our part, but a great deal in terms of how we proceed will depend on the Tribunal's decision. And there are various different alternatives, but if the Tribunal decides to proceed with the whole case as presented by GAMI, then it becomes obviously a more complicated. If the Tribunal decides that it doesn't have jurisdiction, for example, to resolve the 1105 claim, then perhaps the expropriation claim is simpler. If the decision is expropriation but 1105, then it could be more complex.

The time that we would need to answer will really depend largely on the Tribunal's decision when it makes the decision and the form the decision takes.

If I could cite an example. If we are saying the Tribunal might admit the entirety of the claim, and the other alternative is for it to dismiss it, it might be simpler. But since the Tribunal could decide to admit part of the claim and dismiss part of the claim, well that will necessarily impact on the structure of our arguments. It becomes difficult to have submitted a brief which we would then have to adjust in light of the Tribunal's decision.

And I can tell you we are most willing to proceed in the most expeditious possible fashion, but once we know the Tribunal's decision on how we are going to proceed in this case and whether the case should proceed.

PRESIDENT PAULSSON: I know what you are going to say. Go ahead.

MR. ROH: Understanding the difficulties just expressed, as of May 20th or so, Mexico was supposed to be prepared to submit its full statement of defense on June 15th. That was the point at which the Tribunal decided no, we are going to bifurcate, and it is no longer June 15th. And you gave us a new schedule within a couple of weeks that said it was October 20th.

So at least since February they have had our statement of claim and supposedly they were within three weeks of being ready for a full statement of defense on the assumption they had to defend all. So that part of it should be taken into consideration too. This has been a prolonged process.

Thank you.

PRESIDENT PAULSSON: Those points are well taken. Equally, the Tribunal has from its internal discussions already today over lunch benefited from the discussion today, and has found that there are elements of the case which commend themselves to us as requiring quite a lot of prudence in the way we approach. And I don't think either side would encourage us to act in a different way.

So the point you have just made, Mr. Roh, we will take account of that when we make and communicate our decision and, depending on the factors that Mr. Perezcano has mentioned, to the extent that we find them relevant in the framework of the particular decision we reach--and now I am only talking about the hypothesis that there will be a continuation on the merits because otherwise, as you said, things are

simple for you anyway.

We would then express our decision in a summary form. You would ultimately have the full reasons and in a definitive form perhaps as late as the final award, and you would already have been advised obviously we are going onto the merits. But when you get that decision we would also indicate in light of the claims that are going forward what deadline we would fix for Mexico's defense on the merits. And I think that is as much as I can say.

Are there other concerns of a procedural nature from the Claimant?

MR. AGUILAR: No, Mr. Chairman.

PRESIDENT PAULSSON: We are all here. So this is the time to raise matters.

MR. PEREZCANO [Interpreted from Spanish]: We don't have anything further, Mr. President.

PRESIDENT PAULSSON: Well, all that remains is to thank both sides for making life difficult for us as usual, and especially for your courtesy and for your respect for the time limits.

I thank people as well who have been possible for the infrastructure and the services from which we will benefit as we have the transcript available in two languages.

Thank you very much to all of ICSID for putting its facilities at our disposal. The observers have, of course, been welcome to be with us and though you did not make substantive interventions, your very presence has weighed on the Tribunal in terms of reflecting on the seriousness of what we are up to.

So unless there are any other remarks, I will close this session, and you will hear from us soon.

Mr. Perezcano, yes.

MR. PEREZCANO [Interpreted from Spanish]: Mr. President, before we leave, on behalf of the Government of Mexico I would like to tell the Tribunal and also thank the interpreters for their work, the stenographers, and Mr. Douglas and Mr. Flores and ICSID for the support given to us. And also we would like to thank out counterparts for their courtesy and likewise the delegations of the U.S. and Canada.

PRESIDENT PAULSSON: Thank you.

[Whereupon, at 4:20 p.m., the proceedings were concluded.]