

Mr. GILLES GAUTHIER: Thank you Mr. Chairman. My name is Gilles Gauthier, I'm the Director of the Investment Trade Policy Division at the Department of Foreign Affairs and International Trade, and to my right is my colleague, Éric Leroux, who is Senior Counsel in our Trade Law Bureau.

THE CHAIRPERSON: Please proceed. **PRESENTATION BY THE DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE - Mr. GILLES GAUTHIER**

Mr. GILLES GAUTHIER: Thank you Mr. Chairman, and thank you for inviting our Department to appear before the Panel.

We understand that the issue of compliance with NAFTA obligations has been raised in the context of your work, therefore our purpose this morning is to provide you with further information on the content of Chapter 11 of the NAFTA, and to explain to you how and to what extent it may be relevant to your proceedings.

Of course, we will be happy to answer any questions that you may have. I hope we'll get this working. Okay. Let me start by just outlining some

general goals of NAFTA Chapter 11. It is a comprehensive trade agreement, and in any trade agreement now, it is recognized that investment is the other side of the coin for trade, so you need to compliment trade obligations with investment obligations if you want to foster liberalization. The objective, the central objective of Chapter 11 is to provide predictability and stability to all investors in North America and ensure that there is also an enforcement mechanism through a binding dispute solving mechanism.

The interpretation of the NAFTA Chapter 11 has to be taken in its whole context of the NAFTA, and you have in the NAFTA preamble some reference to of course fostering economic growth and fostering trade, but you also have reference to general objectives of governments to promote sustainable development and to act in manners consistent with environmental protection and conservation.

So these general objectives are cast in the overarching structure of the NAFTA.

So in terms of the specifics of Chapter 11, what does it apply to? It applies to any government measures, by all levels of government, and we intend by "measures" being any laws, regulation, procedure, requirement, practices, policies of government.

It applies to measures that affect investors and their investment, and investors is defined as any enterprise that is seeking or has made an investment in the other country. So I understand in this particular instance, you have an investor from the United States wishing to make an investment in Canada, therefore it definitely is a covered investment.

An investment can be the establishment of a production facility in Canada or any other type of property rights that the investor would acquire in the country.

Here is a run down of the main obligations contained in Chapter 11 of the NAFTA. Those that are in bold here, I'll get to it in a bit more detail.

I'm happy to answer questions on the others, but my sense is that these would probably be more relevant to your examination.

So let's begin with the National Treatment obligation. This is a standard obligation that we find in just about every trade and investment agreement.

The object and purpose is to deal with discrimination on the basis of nationality of the enterprise. So that's what we want to avoid by this obligation, it is pure discrimination simply on the fact that the enterprise is owned by an investor of the other country. DEPT. It prohibits both de facto or de jure discrimination. By that, we mean that for instance in Canada, we have the Investment Canada Act that screens large foreign take-overs, so obviously this is a de jure discrimination, it is a specific law applying only to foreign investors.

So that's an example of de jure discrimination.

A test of National Treatment is a relative standard, so you compare a foreign investor to a domestic investor.

For that comparison to be relevant, it ought to be made in like circumstances, i.e. you have to compare apples with apples and you need to look at the facts of the case to determine whether the two investors are really comparable.

Are they in the same business sector? Are they in competition? Are they in the same business line?

Or even, there may also be legitimate public policy rationales for justifying differential treatment, for instance in a recent case involving Canada Post and UPS (United Postal Service the Tribunal ruled that the two (2) were not in like circumstances because Canada Post had to comply with international postal

commitments. It had to provide services across the country to all citizens, which was not the purpose of UPS, and therefore the Tribunal ruled that they were not in like circumstances.

So there is... Again, I reemphasize that the facts are very important here to a determination of like circumstance.

Then you have to apply that comparison within the proper jurisdiction. In Canada, if the measure is at the national level, well then presumably the comparison is across Canada, but if the authority granting the measure is at the sub-national entity, well then the comparison ought to be made within the jurisdiction of that authority deciding on the measure.

So for a sub-national or a provincial measure, you have to look at within the Province to make the comparison.

And it applies of course to all phases of the investment, from the authorization to the lifespan of the investment, including to its liquidation.

A second important obligation of Chapter 11 is that you need to accord treatment in accordance with international law, including fair and equitable treatment and full protection and security.

These are broad terms designed to provide a minimum standard of treatment, so it is an absolute standard.

It's not a relative standard like the national treatment, but it is an absolute standard.

It's not about a contract dispute of commercial nature. It has got to be anchored into international law, and even more specifically in terms of customary international law.

What the jurisprudence says and how this particular test has evolved, it essentially tried to deal with instances where there is a lack of due process, there is a denial of justice, and for instance limitation on the ability of the investor to have recourse to domestic courts in case of a problem.

It aims at things that are grossly unfair, you know, capricious, very arbitrary in the decisions of governments.

So it is an obligation that is essentially directed at dealing with instances of very wea

of the concept governance regime. That's the basic thrust of that obligation.

Here's some recent cases involving NAFTA investors and how the tribunals have applied the test of minimum standard of treatment. Again, you know, the first one, in terms of a shock or surprise of the measures implemented by the Government; manifest injustices, and then the last one; which is probably the most full elaboration of the concept of minimum standard of treatment, something that is completely arbitrary, unjust and discriminatory.

So that's the gist of the minimum standards of treatment.

It is a very difficult standard for an investor to prove. It must come forward with substantial evidence that the authority implementing the measure has behaved in such a way to deprive the investor of its basic rights. That's basically what it aims to deal with.

Then there is an obligation pertaining to performance requirements.

These are things that as a condition of operating the investment, the authority imposed some behavioural commitment on the investor.

The aim here is to prohibit measures that would create trade distortions, for instance imposing a requirement to export the production, a requirement to purchase all your inputs locally with no regard to the economics of the business, requirement to transfer technology to unrelated parties so that the Government in fact stimulates competition from a local enterprise.

So these are the types of measures that are deemed to be trade distorting, and therefore should be prohibited. But of course, when governments either provide a grant or an authority for a project in particular, they can impose some requirements on the fulfilment of the project, including a requirement in terms of employment, requirements in terms of the location of the production, and there are other examples, for instance, the requirement in terms of research and development activities. Requirement to have services to the communities, et cetera.

These are things that are perfectly legitimate in the context of the NAFTA.

In fact, this article is very clear that there are only five or six that are prohibited, and the rest is expressly authorized.

Then there is the concept of expropriation and compensation.

Again here, the purpose of the article is to recognize the right of governments to expropriate when there is a public purpose for that expropriation, and when it is done in accordance with the law.

But of course, an investor which sees its investment expropriated is entitled to compensation equivalent to fair market value. There are two types of expropriation. One is a direct expropriation; that's a pretty straightforward one. If the Government seizes over the title of the property, that there is a transfer of the title of the property, well then it is a direct expropriation, and of course the investor is entitled to compensation in that case.

And then the second one is a little bit broader, it talks about indirect expropriation.

That deals with instances where there is not expressly a transfer of the legal title of the property, of the ownership of the property.

So there is either a series of measures that result in an expropriation or de facto measures that without affecting the legal title of the property still nullify the benefits for the investor of the enjoyment of its property.

I have here some considerations that are relevant in deciding whether or not there is an indirect expropriation.

So the measure in question must result in a substantial deprivation of the ownership rights. So it's not regulatory measures that simply interfere with the investment, but it ought to substantially deprive its rights to continue its business.

There is a concept of reasonable expectation of the investor. This is aimed at dealing with situations where there is arbitrariness being invoked, and where the investor was led to believe that if they were continuing to operate under a series of conditions, they would be able to continue their investment, but suddenly there is a change in the measure and therefore that leads to depriving the investor of its rights.

And then you have to look at the overall context and purpose of the Government taking action.

But I think what is key here, and we have in the NAFTA experience that clearly confirms that, is that in general, non-discriminatory measures designed to apply and that apply to protect legitimate public welfare objectives such as public safety, health and the environment do not constitute indirect expropriation.

That is very clear in the jurisprudence, and I have on the next slide a quote from probably one of the most relevant cases of the NAFTA involving a Canadian company, Methanex, against the United States, regarding an environmental measure that the State of California wanted to apply. Methanex challenged the U.S. or the State of California, but the Tribunal ruled that it was perfectly legitimate for the Government to introduce that measure, that ban on the particular product, because there was compelling evidence that this measure was necessary to safeguard a public welfare objective of protecting the environment.

So the Tribunal ruled that in that particular instance, there was no indirect expropriation and the investor, despite the fact the measure was effectively banning their product in the territory, was not entitled to compensation.

The NAFTA also provides for a series of exceptions and reservations. I don't think in that particular instance here these are relevant to your purpose, but I think it's important to know that there are many exclusions and exceptions to the obligations.

Then the NAFTA Chapter 11 also contains one article dealing with environmental measure.

It has two specific provisions, one is to recognize that it is improper for a government to compete to attract investment by lowering your environmental or health and safety standards.

So that would be deemed as unfair competition, simply to lower your environmental standard to attract investment.

Then, there is a recognition also that each country can take measures in its territory to deal with matters sensitive to environmental concern. I think here the important point is that in putting that language into the NAFTA, governments wanted to make a clear indication that there can be no conflict between environment and investment obligation, that it is up to each party of the NAFTA to decide what they need to do to achieve their environmental objectives, that there is no threat constraints put on setting your environmental standards, that this is a sovereign decision of each party to decide what it is that they want to achieve in their territory for public policy reason, including for the environment.

What it says though is that once a government decides to act in a matter sensitive to environmental concerns, they have to do it in compliance with the basic

obligation, those that I have mentioned earlier in terms of ensuring that there is no discrimination on the basis of ownership, that these measures have been implemented with due process of law, with thorough justification, and they're not designed to essentially implement disguised restrictions or being completely arbitrary.

Then, the NAFTA Chapter 11 includes a dispute-settlement mechanism where the investor that feels that one of the governments has not lived up to its NAFTA obligations can seek redress through international arbitral procedures.

So an investor has the right to launch a case directly. You don't need the consent of the Government.

The process is then taken up in International Tribunal under either the general U.N. Commercial Arbitration Rules, or under the Centre for Settlement of Investment Dispute.

And once the matter is filed by an investor, the Government of Canada is the responding party and will defend the case.

The procedures that are before an arbitral panel or arbitral procedures would have to conduct its hearing in the public domain.

The NAFTA parties have issued clear statements in that regard a few years ago, so now tribunals essentially are aware that they will have to have open hearings of their case and that anybody that has a specific interest and can demonstrate so before the Tribunal can apply to participate in the hearings and submit briefs, and we have witnessed that in many instances of the NAFTA Tribunals.

A NAFTA Tribunal can only award monetary damages. A Tribunal cannot force a change of policies, cannot force the Government to do new legislation or et cetera.

The only authority of the Tribunal is to award monetary damages to the investor, and such awards are final and binding on the parties.

Our experience suggests that it takes at least two to three years, if not more, to get through a process of dispute settlement under Chapter 11. The recent UPS case was even longer. It took seven years to wrap itself up.

So that's basically an overview, fairly succinctly I must admit, of the NAFTA Chapter 11 and how it may be relevant to you.

I could point out that the Government issued about a year ago a little practical guide for Canadian municipalities that have some concern about their own regulatory activities, their own approval process and how this may raise some concerns on Chapter 11.

That guide is available on this Website, and I would be happy to provide the Panel with copies of that if warranted, but it is sort of a layman explanation of the NAFTA Chapter 11, and other obligations as a matter of fact, and how it could interfere with regulatory action taken at the city level.

I would be happy to answer any questions you may have, thank you.

THE CHAIRPERSON: Thank you Mr. Gauthier, that was very concise, very clear. I do have some questions

QUESTIONS BY THE PANEL ON Mr. GAUTHIER'S PRESENTATION

THE CHAIRPERSON: My first question would be... Some of these may be repetitious, but these were assembled prior to your presentation and so I'll run through them and if they are repetitious, then we'll just move on.

I would like to touch on all of them. I have six questions here which I think probably summarize the concerns that we have.

The first is do provisions under NAFTA in any way suggest that government approval of a project such as this one, such as the Whites Point Quarry and Marine Terminal Project, would oblige Government to permit further coastal quarries?

So approving this one, allowing it to go forward, is there implicit in that decision to allow it to go forward... Does it automatically facilitate the development of further coastal quarries?

Mr. GILLES GAUTHIER: Well, it's always difficult to answer questions of a hypothetical perspective, but the NAFTA obligations apply across the board to each individual government measure and regulation. The fact that you apply it to your particular project may or may not be relevant. It depends on the circumstances of the other project.

The framework exists for all government measures, so each case will have to be taken one by one on its face.

There is no precedent value in one particular instance versus the other. You need to apply the same framework in each and every instance, that is you have to

respect the non-discriminatory obligation, you need to respect the minimum standard of treatment, you need to respect the test of expropriation in every instance.

It's not because you have done it once that necessarily it will be relevant to the other.

THE CHAIRPERSON: The second question that I have for you is that coastal quarries, which are owned by U.S.-based companies and which ship most of their product to the United States already exist in Nova Scotia and other parts of Canada.

Do the past or ongoing environmental assessments and environmental approvals of these operations influence or limit conditions of approval that may be imposed by the Whites Point Quarry assessment?

Mr. GILLES GAUTHIER: I'm afraid I will probably repeat myself here. It is essentially the same answer here.

The obligations of the NAFTA apply to existing projects as well as to future projects. Can you draw inference from the past to decide what to do now? You'll have to assess whether the circumstances are comparable, whether you have gone through the same set of process and whether at the end of the day, you feel confident that in your assessment of that particular project, that the requirements of the framework of the NAFTA have been respected.

THE CHAIRPERSON: Yes. I'm beginning to get a sense of that. So there's an encompassing umbrella of rules, but one project doesn't guarantee or facilitate or encourage another project simply because the first has been approved.

In this question we just asked you about environmental regulations, the environmental regulations are offered on individual projects, but there has to be a kind of overall uniformity of sorts in their application.

Mr. GILLES GAUTHIER: And the same goes for the NAFTA. It is a framework that is applicable to all the projects individually.

THE CHAIRPERSON: I told you there might be some repetition here. Would NAFTA provisions... And this is number three. Would NAFTA provisions support the Proponent in challenging conditions of approval involving environmental components if such conditions are not already imposed on similar coastal quarries? Is that more of the same?

Mr. GILLES GAUTHIER: Again, each project has to be examined on its own merit, and again the compliance will be with respect to that particular project.

Mr. GUNTER MUECKE: Perhaps just to clarify in my own mind. From your presentation, I gather that when it comes to environmental considerations or environmental constraints imposed on a project, that that is excluded, that each jurisdiction can impose its own environmental standards and those can change with time so that environmental restrictions...so that if there were no environmental restrictions placed on a past quarry, it doesn't mean they can't be imposed in the present situation, is that a correct reading?

Mr. GILLES GAUTHIER: The NAFTA Chapter 11 does not have specific rules on what an environmental standard ought to be for each country. It's up to each country to decide what it is. If you have in the same region two products that are identical in all respects, you'll have to be able to demonstrate that in one particular project, the conditions attached to it were justified on reasonable grounds and that you have done a process of examination that was thorough and complete to get to your final conclusion. I think that's the process here that is key.

It's very difficult to draw linkages from one project to another because I'm sure environmental experts as you are, you know that it is very difficult to have exactly two identical situations that you're dealing with.

So I think here the importance is to ensure that the framework itself, which is applicable to each project, is respected.

And it may be respected through different ways, different mechanisms, but the framework is the same for everyone.

Mr. GUNTER MUECKE: Thank you.

THE CHAIRPERSON: Thank you, I will continue.

The fourth question is would approval of the quarry under current provincial regulations, specifically regulations that apply to royalties and aggregate tax, would that in any way limit the Province from applying royalties or fees for aggregate extraction in the future?

--- Pause At the present time, aggregates are in a separate category, they're not classified as minerals and there are no royalties paid on them and there's no such thing as an aggregate tax, and that applies uniformly across the Province at the present time.

But if the Province decided a decade from now to change that ruling, would that be a threat in some way under the NAFTA?

Mr. GILLES GAUTHIER: This one is a bit more difficult to answer because it very much depends on what is the nature of the royalty here.

Of course, governments under NAFTA have complete discretion with respect to tax matters in general, income tax in particular, but again it's a question of whether there will be some discriminatory intent behind a government measure of that nature.

Is it targeting a particular firm in a particular region? Is there a justification for such targeting?

So then, you know, you're... It would be important to examine the issue thoroughly at that point there. THE CHAIRPERSON: What if you have 50 aggregate producers and some of them are internationally owned and some of them are provincially owned, some of them are Canadian but not provincial, so you have three levels, the rule is applied...

Or the legislation changes, the rule is applied and it's across the board, so it in no way discriminates against the organization which is American say relative to the other two...

Mr. GILLES GAUTHIER: As a rule of thumb, measures that are non-discriminatory are very difficult to challenge under the NAFTA.

THE CHAIRPERSON: Yeah, okay. Good.

Mr. GUNTER MUECKE: What could be challenged under NAFTA is if let's say the tax was aimed at exports only?

Mr. GILLES GAUTHIER: Well, you have to be careful here exactly about how the taxation issues are dealt with, because you have many different aspects of the NAFTA that deal with tax matters.

There is for instance a prohibition on export tax under the NAFTA, but not under Chapter 11. It's Chapter 3, on trading goods.

It's simply because, you know, you want to have a free trade area, you don't want to have countries imposing tax on the exports or imports. In general, income tax are not covered by the NAFTA. Other taxes can be covered, and are covered essentially for the obligation of non-discrimination, so I think if the tax is non-

discriminatory, it will be an uphill difficulty for the investor to challenge that this was contrary to the obligations.

THE CHAIRPERSON: The fifth question, and I think I know the answer to this one, but we'll ask it anyway, and that is would provisions in a Whites Point Quarry approval compromise the Government's ability to manage environmental effects of any future coastal quarries?

We've already touched on that, yes?

Mr. GILLES GAUTHIER: Yes.

THE CHAIRPERSON: Okay. And then the final question is could project-specific mitigation measures involving shipping such as ballast water management or whale avoidance specified shipping lanes be challenged under NAFTA provisions if they have not been applied to existing similar operations?

Mr. GILLES GAUTHIER: Well as I mentioned earlier, in terms of the imposition of performance requirements, there are only very few that are prohibited under Chapter 11, and they deal with trade distorting practices.

Other requirements that the Government feels are necessary for the viability of the project, if they're reasonable, if they're based on the record... I suppose the investor is perfectly aware of these requirements at the time that the approval is made.

It's hard to see how this could be interpreted as either raising problems in terms of discriminatory treatment or even minimum standard of treatment.

If they were imposed with a due process of law and are perfectly legitimate and not arbitrary... Again, you need to get into the specifics of the case, but I'm just outlining for you the general consideration here, okay?

So if these general considerations have been thoroughly examined at the time that you impose such requirements, I think the burden of proof of showing that these were grossly unfair, unjustifiable, depriving the investor of its substantial right will be on the shoulders of the investor, to make that claim.

And judging from our experience in the NAFTA, these are not things that are easy to demonstrate. You need to have compelling evidence that these have occurred in order to substantiate a claim and require compensation Ms. JILL GRANT: Can I

just get some clarification about... You mentioned something about the concept of reasonable expectation of investors.

I wonder if you could clarify for us what that means and the conditions under which an investor might have a reasonable expectation that a project would go ahead?

Mr. GILLES GAUTHIER: Again, you need to look at it in the context of a particular set of circumstance.

The jurisprudence in the NAFTA suggests that if the Government duly authorizes a project and leads the investor to believe that as long as the investor will comply with all these requirements, there is no issue, and so the investor was led to believe that he could go ahead according to the set of circumstance, and for a reason that is nebulous, arbitrary, the Government decides to change the measure in question and roll back the commitments that were made to the investor, maybe the investor in that instance would have some grounds to challenge the Government on the basis that this was not justified and is depriving its ability to carry on the investment.

I would add that this concept of legitimate expectation is only one of the factors also that you have to look at in determining an indirect expropriation.

An investor that operates in a heavily regulated industry knows as a starting point for the conduct of his business that the regulations are bound to change from time to time.

He doesn't have I guess a legitimate expectation at that point that the regulatory regime of today will necessary be the same 5, 10, 15, 20 years down the road.

You're operating in a heavily regulated environment and in a regulated context, and regulations do change over time and you know...

Over the past 15 years of the NAFTA, of course many regulations were changed to fulfil different policy objectives. You have to look at what were the specific conditions that were made or what were the specific circumstances that led to the change in the regulatory measure and if it is an arbitrary act, capricious, grossly unfair, well then maybe you may have a problem.

But if it is perfectly legitimate, to fulfil a public policy objective, why would that be a problem?

THE CHAIRPERSON: Thank you Mr. Gauthier.

Mr. GILLES GAUTHIER: Okay

QUESTIONS BY THE PROPONENT

Mr. PAUL BUXTON: I don't think we have anything new or specific Mr. Chair, but I would like to return to your last question and ask for perhaps a little bit more definition from the speaker.

THE CHAIRPERSON: Would you like me to repeat that last question? Mr. PAUL BUXTON: If you would please Mr. Chair.

THE CHAIRPERSON: Yes, certainly. Could project-specific mitigation measures involving shipping, such as ballast water management and whale avoidance specified shipping lanes, be challenged under NAFTA provisions if they have not been applied to existing similar operations?

Mr. PAUL BUXTON: Perhaps I could be a little bit more specific. Let us suppose that there are 800 rule vessels and about 2,500 non-rule vessels using the international shipping lanes in the Bay of Fundy, and typical speeds range from who knows, 10 knots for a slow boat to 28 knots, all within the standards of Fundy traffic

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Would it then be seen to be a reasonable condition under NAFTA if one Proponent's ship was told that they could only use the shipping lanes at four knots?
Mr. GILLES GAUTHIER: As you may appreciate Mr. Chairman, it's difficult for us to give you a yes or no answer to these types of questions.

We're unfortunately no experts in the detail of this particular project. Again, I would refer back to the standards that are included in the obligations of the NAFTA, and these standards ought to be: "Is this measure discriminatory?" Including the concept of: "Is there a legitimate public policy rationale for imposing a discriminatory measure?" "Are the measure imposed here justified from a reasonable standpoint?" These are general concepts of governance. I think that's..

Mr. PAUL BUXTON: No. Mr. Chairman, that's not really the question that I asked at all, and I think... I realize that we can't get into specifics here, but I think that the principle that the Chair was getting at, certainly I didn't get a clear answer to it so I doubt that the Panel did, but what we're talking about here is whether or not on a project such as this that conditions could be imposed which are unique, which do not follow the standard practices currently going, whether you're talking ballast water management or any other sort of regulation, it would be rather like sort of saying: "The speed limit on Nova Scotia roads is 100 kilometres an hour, but this company can only drive its trucks at 40 kilometres an hour", are you getting my point here?

Mr. GILLES GAUTHIER: Very much so, but let me repeat that we cannot give you a yes or no answer on a specific set of circumstances. This is not within the purview of our responsibility.

We can explain to you what the framework is, and then if you think that a particular measure is being contemplated in the context of your specific project that does not fit that framework, it will be up to the investor to seek appropriate legal advice, and at that point also to take the reasonable measures that they see necessary.

We cannot upfront, in a hypothetical scenario, give you a yes or no answer to these kinds of question.

Mr. PAUL BUXTON: I wonder whether you would then mind repeating your answer to the Chair's specific question.

THE CHAIRPERSON: Frankly, I don't know if it's necessary. It's in the transcript. I mean, we have the original in the transcript, and I don't know what would be served by saying it again verbally, unless there is something I have missed.

Mr. PAULBUXTON: Well, I certainly didn't understand it Mr. Chair so...

THE CHAIRPERSON: Let me paraphrase what I heard, which is that I sympathize with DFAIT in their inability to give us a yes or no answer, because they're not the Tribunal and they certainly don't have all the information available, but they do have general rules.

So what they're suggesting to us is that under most circumstances, that there's a uniformity of rules that are applied, but that doesn't account for the fact that individual projects, individual entities, individual companies, or whatever, can have something unique or specific which might change the application of these.

So I think what I'm hearing is that in general, it would not apply... The 40 miles an hour would not apply, except of course if there were extenuating circumstances that allowed it to apply. That's how I understand it. I don't know if my colleagues understood it that way, but... It seems to me the uniformity principle is... The way I interpreted it is that uniformity is a two-way thing, but in this particular case I don't think that Bilcon would be biased against, unless there was some reason to bias against it, and only then could it be challenged because... I'm way in over my head here. But that's how I understand it. Mr. PAUL BUXTON: Thank you Mr. Chair. We're satisfied.

THE CHAIRPERSON: Okay. And was that acceptable, what I said? I mean, was it okay?

Mr. GILLES GAUTHIER: Yes, Mr. Chairman.

THE CHAIRPERSON: Okay. That's my understanding of it, all right?

Mr. GILLES GAUTHIER: It's a question of case by case, depending on the particular circumstances.

THE CHAIRPERSON: Yes.

Mr. GILLES GAUTHIER: You have to look at the particular circumstances and compare it to the framework, and then you're able to make your assessment.

THE CHAIRPERSON: My reading of your presentation was that this is a uniform process, except when it isn't. And when it isn't, that's when it become challengeable, right? All right. Is that... I'm afraid I muddied the water. Okay.

Now, we will entertain any questions from Government sources, if they happen to be in the audience. Is there anybody representing Provincial or Federal Government that would like to... There's a hand back there?

UNIDENTIFIED SPEAKER: [Inaudible - no microphone] THE CHAIRPERSON: Is there anyone else, registered presenters, that would like to come to the microphone and ask a question? You're a registered presenter are you?

Come to the microphone and identify yourself, please.

Mr. ANDY MOIR: My name is Andy Moir. I live in Freeport, Nova Scotia.

I'd just like a clarification on the various levels of government and what they can do under NAFTA. We have got Federal Government, we have the Provincial Government, and then we have here a Municipal Government. I would like to know, just as an example, for instance, if the Municipal Government of the County of Digby, or Digby County, said: "Okay, we're going to bring in zoning by-laws that say we're not going to allow quarries anymore", and let's assume that this one is approved.

Could they still bring in a by-law that says there won't be any other quarries or coastal quarries, or could the Province, which right now doesn't have a coastal planning, any coastal planning provisions, could they...

Even if this one is approved, could they at some future point come in say: "Okay, we're going to develop a coastal plan that says there will be no coastal quarries"?

Thank you.

Mr. GILLES GAUTHIER: The NAFTA obligations, as I mentioned on one of the slide, applies to all levels of Government, including at the local levels.

On questions of change of zoning and all of that, again, you know, you have to look at the specifics of the case.

Again, if a project is duly authorized and then there is a change of zoning which, de facto, annuls all the previous approval, does that amount to an indirect expropriation? Well, you'll have to look at the specifics of the case and on the basis of the standards that I just outlined.

Of course governments are free to introduce new policies that apply across their jurisdiction, there is nothing in the NAFTA that, you know, freezes the Government from acting in the pursuit of their public policy objective. They only have to do so in a manner that is consistent with the basic standards that the NAFTA provides for. You know, governments have introduced many laws, regulation, policies, at all levels of governments, over the past 15 years.

THE CHAIRPERSON: Thank you. Additional questions? Please? Please identify yourself.

Mr. JEREMY ACKERMAN: Yes, I'm Dr. Jeremy Ackerman, A-c-k-e-r-m-a-n. I'm a financial analyst and professor and farmer and a few other things.

But today my question is about NAFTA and about the rulings of the Tribunal to date, and I want to know how many of those respected the environmental concerns that were put forth in those cases.

Mr. GILLES GAUTHIER: Well, in the Canadian context, there were maybe a couple of instances where environmental issues were raised. There was one case called **S.D. Myers** and it dealt with a prohibition on the export of PCBs to a location south of the border.

The Tribunal in that particular instance did not focus on the question of environment, but the ruling against the Government of Canada was essentially based on a compelling evidence brought before the Tribunal that this particular measure was for a protectionist purpose and not to deal with an environmental concern.

The landmark decision involving an environmental issue is the **Methanex** case, involving the Canadian investor challenging a measure of the State of California, and the Canadian investor did not succeed in that particular instance. The ban imposed by the State of California for environmental reason was upheld by the Tribunal.

THE CHAIRPERSON: No follow-ups, I'm sorry. In order to keep on schedule, we will have to break the questioning at quarter after ten, because have another presentation coming at 10:30. So we have room for one or two more questions, maybe three if they're relatively quick.

So Mr. Stanton, come forward, and then I saw some other hands, so I'll try and fit you in. Okay. Yes?

Mr. KEMP STANTON: If there's a challenge to the NAFTA agreement, like if this Panel imposed conditions and it was challenged, would the conditions imposed by the Panel be... They have to be in effect until the challenge is dealt with, or is it seven years that the company can just do whatever they want, without the conditions?

Mr. GILLES GAUTHIER: The Panel, as I said, is only empowered to provide monetary compensation to the investor. The Panel is not obligated, not empowered, to impose behavioural measures on the part of the investor.

THE CHAIRPERSON: So Mr. Stanton, I think the answer was that you need not be concerned. Mr. Mullin?

Mr. DON MULLIN: Just a quick question. There's a variation, but it may get at something slightly more insightful.

If the Province wanted to stop the quarrying and/or the shipment of aggregate due to unexpected, adverse environmental effects that are project specific, would the Proponent be able to challenge that ruling under NAFTA?

Mr. GILLES GAUTHIER: Again, it will depend very much on the facts of the case. If the measure is reasonable, justified, imposes due process of law, the investor will have a tough case to make.

THE CHAIRPERSON: Okay. Time for one more question, I believe. Please come forward, Madam?

Ms. MARILYN STANTON: My name is Marilyn Stanton. I'm a resident of Sandy Cove.

I'd just like some clarification. I find myself a bit confused in where it differentiates between NAFTA and the Provincial regulations, and you say that NAFTA is a heavily regulated environment. We all know our Province is not heavily regulated.

Should this change over the 50-year period, could the quarry operation expect or demand grandfathering in the area of our guidelines, our regulations, or laws, and who would enforce that? Would it be NAFTA? Is it all separate? I find all the lines blurred.

Thank you.

Mr. GILLES GAUTHIER: The NAFTA does not deal with the regulatory-making process of individual provinces or governments. In particular example you

outlined, if the Government in the future decide to introduce a new regulatory measure, there will be compliance with the general laws of Nova Scotia in terms of how the regulatory measure ought to be implemented.

The NAFTA is something separate here that provides a framework in terms of the compliance with the international obligation, but it does not directly interfere in the normal regulatory process of the governments.

THE CHAIRPERSON: Mr. Gauthier, I think we're going to finish off, but I have one question that I would ask you myself, which is that if the Tribunal makes a judgement and awards a financial return, or let's say against Canada in an international situation, and it doesn't directly change the regulations within that country, doesn't it indirectly force a change in regulations?

"Indirectly" in the sense that if you continue to do what you've always done, you're going to go to the Tribunal again, and you'll be arguing... So in effect, you're indirectly forcing a change, without being specific as to what that change ought to be?

Mr. GILLES GAUTHIER: Again, it will very much depend on the type of circumstance. We have never experienced that in any of the rulings so far, neither in Canada or U.S. or Mexico.

THE CHAIRPERSON: Well, the day is young yet.

Mr. GILLES GAUTHIER: Yes [laughs].