

1979

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES (1976)

Case No. UNCT/14/2

ELI LILLY AND COMPANY
Claimant
vs.
GOVERNMENT OF CANADA
Respondent

MINUTES OF ARBITRATION
Washington, D.C.

Wednesday, 8 June 2016

(Pages 1978- 2346)

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A P P E A R A N C E S

THE ARBITRAL TRIBUNAL:

PRESIDENT:

PROF. ALBERT JAN VAN DEN BERG
HANOTIAU & VAN DEN BERG
IT Tower, 9th Floor
Avenue Louise 480-Box 9
1050 Brussels
Belgium
ajvandenberg@hvdb.com

CO-ARBITRATORS:

MR. GARY BORN
WILMER HALE
49 Park Lane
London W1K 1PS United Kingdom
gary.born@wilmerhale.com

SIR DANIEL BETHLEHEM, KCMG QC
20 Essex Street
London WC2R 3AL

SECRETARY:

Ms. Lindsay Gastrell

THE COURT REPORTERS:

Ms. Laurie Carlisle
Diana Burden Reporting

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A P P E A R A N C E S

ON BEHALF OF CLAIMANT:

MS. MARNEY L. CHEEK
MR. ALEXANDER A. BERENGAUT
MR. JAMES M. SMITH
MR. MICHAEL A. CHAJON
MR. JOHN K. VERONEAU
MS. GINA M. VETERE
MS. NATALIE M. DERZKO
MR. NIKHIL V. GORE
MS. LAUREN S. WILLARD
MR. ALEXANDER B. ARONSON
MS. TINA M. THOMAS

COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2041
202.662.6000

MR. RICHARD G. DEARDEN
MS. WENDY J. WAGNER

GOWLING LAFLEUR HENDERSON LLP
160 Elgin Street, suite 2600
Ottawa, Ontario
K1P 1C3 Canada
613.233.1781

ALSO PRESENT:

Mr. Steve Caltrider
Mr. Arvie Anderson
Ms. Eilgen Palmborg
Ms. Hilda Gonzalez-Carmona

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A P P E A R A N C E S

ON BEHALF OF RESPONDENT:

MR. SHANE SPELLISCY
MR. ADRIAN JOHNSTON
MS. KRISTA ZEMAN
MR. MARK LUZ
MS. MARIELLA MONTPLAISIR
MS. SHAWNA LESAUX
MR. MARC-ANDRE LEVEILLE
MS. SYLVIE TABET

TRADE LAW BUREAU
DEPARTMENT OF JUSTICE AND OF
FOREIGN AFFAIRS
TRADE AND DEVELOPMENT
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2
CANADA

ALSO PRESENT:

Mr. Sanjay Venugopal
Mr. Denis Martel
Mr. Brad Jenkins

FOR THE UNITED STATES:
Ms. Lisa Grosh

FOR MEXICO:
Mr. Aristeo Lopez

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1 THE PRESIDENT: Good morning, ladies
2 and gentlemen. I open the hearing on Day 8. There
3 are procedural issues or questions at this point.
4 May I invite the representative of the United States
5 to make the application she has announced prior to
6 this hearing this morning?

7 MS. LISA GROSH: Good morning,
8 Mr. President, members of the Tribunal. The United
9 States has been following these proceedings,
10 including the oral presentations that have been made
11 by the parties and also the questions that the
12 Tribunal has posed to the parties. We would seek to
13 make a very limited statement in light of our
14 consideration of the discussion and particularly the
15 questions that the Tribunal posed to the parties. We
16 would not propose to actually answer those questions,
17 but we think that they raise issues that touch on the
18 statements that we made in our 1128 submission, and
19 we would just propose to provide further views in
20 connection with that statement that was already made.
21 Thank you.

22 THE PRESIDENT: And the length,
23 Ms. Grosh, of your proposed oral submission would be?
24 MS. LISA GROSH: They're rather
25 limited in nature. I would imagine five minutes. At

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1 most, ten minutes.

2 THE PRESIDENT: And do you have them
3 in writing already?

4 MS. LISA GROSH: Yes, we do.

5 THE PRESIDENT: Are they handwritten
6 notes, or are they notes that you could distribute?

7 MS. LISA GROSH: They are typewritten
8 but with some handwritten notations that I'm not sure
9 we would be comfortable sharing.

10 THE PRESIDENT: They're not
11 publishable at this point in time.

12 MS. LISA GROSH: Correct.

13 THE PRESIDENT: Then I would like to
14 give the parties an opportunity to comment on the
15 application, after which the Tribunal will retire for
16 considering the application.

17 Ms. Cheek, please, for the Claimant?

18 MS. CHEEK: Thank you, Mr. President.
19 The procedural orders governing this dispute,
20 specifically procedural order No. 1 at 17.1,
21 specifically address the role of the non-disputing
22 NAFTA parties in this proceeding. 17.1 of procedural
23 order 1 makes clear that the United States and Mexico
24 may make submissions to the Tribunal by the date
25 indicated in Annex B. The non-disputing NAFTA

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1 parties, Mexico and the United States, have had that
2 opportunity to make their submissions by the date
3 indicated. Those were their written submissions
4 under Article 1128, and you will recall they were
5 also granted an extension of time to ensure that they
6 could comment fully on all of the submissions, amicus
7 and otherwise, that have been made in this case.

8 Procedural order No. 1 at 17.1 goes on
9 to clearly state that the non-disputing NAFTA parties
10 may attend oral hearings. Full stop. That they may
11 attend. Similarly, in procedural order No. 5, which
12 is the pre-hearing order issued by the Tribunal at
13 paragraph 11, it states that in accordance with
14 section 21 of the confidentiality order, the
15 non-disputing NAFTA parties may attend the hearing in
16 the hearing room.

17 The procedural orders governing this
18 dispute provided for written submissions, which have
19 been made, and for attendance here at the oral
20 hearing but no more. And for this reason, Claimant
21 asks that the Tribunal does not depart from the
22 procedural orders already in place in this case but,
23 instead, follows those procedural orders and decline
24 to accept the application of the United States.
25 THE PRESIDENT: Thank you.

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<p>1 Mr. Spelliscy for Respondent? 2 MR. SPELLISCY: Thank you, 3 Mr. President. Procedural orders can't change 4 Article 1128 of NAFTA, and that's what governs in 5 this case. Article 1128, the wording of it is clear. 6 A party may make submissions to the Tribunal in a 7 question of interpretation of the Agreement. The 8 United States has indicated that it seeks to make 9 submissions to the Tribunal on a question of 10 interpretation. In our view, they have an 11 unqualified right to do so. 12 On the question of oral submissions, I 13 would note that previous tribunals have considered 14 this issue and the ADF Tribunal correctly observed 15 that the parties recognize that the governments of 16 Canada and Mexico have the right to make both written 17 and oral submissions pursuant to Article 1128. The 18 fact also that the United States and Mexico have had 19 the opportunity to make written submissions already 20 is also irrelevant. Article 1128 is clear. It does 21 not limit the number of written submissions that can 22 be made. So in our view, the application of the 23 United States, in fact, must be accepted under 24 Article 1128 and that the language is clear and that 25 we should be following what the treaty provides and</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>1986 09:06</p>	<p>1 we have to follow what the treaty provides. We can 2 also provide an opportunity to respond as well. The 3 parties can. 4 MR. BORN: Did either of the parties 5 receive notice, either written or oral, of the 6 United States' intention to apply for leave? 7 Claimants and Respondent. 8 MS. CHEEK: The Claimants received no 9 written notice of the United States' application 10 presented this morning, and no oral notice either. 11 MR. SPELLISCY: With respect to 12 written notice, I would suggest that the 13 United States indicated its intention to make 14 submissions months ago when it filed its letter 15 saying it would make 1128 submissions. On this 16 particular application, we learned this morning of 17 the United States' desire to make an oral 18 application. I don't think that that can be overly 19 determinative as a fact as the Tribunal just issued 20 its questions on Monday evening. And this would have 21 been the first opportunity that would have come. 22 THE PRESIDENT: One question to the 23 representative of Mexico. Does Mexico intend to make 24 an application similar to that which the United 25 States just made Mexico?</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>1987 09:07</p>
<p>1 MR. ARISTEO LOPEZ: Not at this 2 moment. 3 THE PRESIDENT: What do you mean by 4 not at this moment, Mexico? 5 MR. ARISTEO LOPEZ: During this 6 hearing we are not planning to do so. We waive our 7 right to do it here. 8 (The Tribunal retired for 9 deliberation) 10 THE PRESIDENT: The Tribunal has 11 considered the application by the United States. The 12 Tribunal has taken note that Article 1128 requires 13 written notice to disputing parties to make a 14 submission in these proceedings. No such written 15 notice has been received, as has been acknowledged by 16 all. Even not an oral notice has been received. We 17 only got knowledge and the parties got knowledge -- 18 by we, I mean the Tribunal -- this morning just prior 19 to the hearing. And the Tribunal considers that too 20 late in light of the preparation that the parties 21 have to conduct for the oral closing statements. So 22 in that respect the application by the United States 23 is denied. 24 The Tribunal is mindful that the 25 United States wishes to make the observations and</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>1988 09:09</p>	<p>1 already has prepared a note, so the Tribunal invites 2 the United States to submit that note by midday today 3 so the parties can read it and study it and comment 4 on it today and in their post-hearing briefs. 5 Are there any other matters of 6 procedural or organizational nature that the parties 7 wish to raise? 8 MS. CHEEK: Not from the Claimant at 9 this time. 10 MR. SPELLISCY: None from the 11 Respondent at this time. 12 THE PRESIDENT: Ms. Cheek, then you 13 may now start your opening statement. Your three and 14 a half hours start now. 15 CLOSING STATEMENT ON BEHALF OF CLAIMANT 16 MS. CHEEK: Mr. President, members of 17 the Tribunal, over the last week we've heard a lot 18 about patents. You've heard there's three core 19 requirements for patentability, an invention needs to 20 be new, non-obvious and useful. You've heard that a 21 patentee's exclusive rights, the patent monopoly, 22 extends to the claimed invention, and you've heard 23 that there is a patent bargain that in exchange for 24 the monopoly, the patentee must disclose to the 25 public how to make and use its invention.</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>1989 09:21</p>

<p>1990 09:24</p> <p>1 The patents at issue in this case, the 2 '113 patent for Zyprexa and the '735 patent for 3 Strattera reflect this patent bargain at work. It's 4 uncontroverted that Zyprexa is a revolutionary 5 medical advance in the treatment of schizophrenia, 6 and that was not a lucky guess. How do we know that 7 it was not a lucky guess? We know because there's a 8 credible, specific, real-world utility, a real-world 9 use apparent on the face of the claims. And without 10 raising any concerns regarding utility, the Canadian 11 Intellectual Property Office granted the '113 patent. 12 Now, as an aside, the '113 patent is a 13 selection patent, and so CIPO also looked to see if 14 the stated advantages of the '113 patent met the 15 non-obviousness standard. As Mr. Dimock testified at 16 pages 1035 of the record, "If there is a very clouded 17 state of the art, you would want to indicate some 18 advantages in order to support your case that it's 19 not obvious." Professor Siebrasse, at transcript 20 pages 635, 643 and 736, and Professor Merges at 21 page 1296, all indicate the same, that stated 22 advantages go to the non-obviousness requirement. In 23 the record at C-36, C-64 and C-65 is the record 24 before the Canadian IP office that also this standard 25 of non-obviousness was met as well.</p> <p>www.dianaburden.com</p>	<p>1991 09:25</p> <p>1 But, of course, that was not the end 2 of the story for this patent, the '113 patent. It 3 was invalidated by the courts. And while I would say 4 we can put all the other grounds on which it was 5 challenged to one side, because it's undisputed that 6 the Zyprexa patent was revoked on a single ground -- 7 and that was a lack of utility under what Claimant 8 asserts is a new promise utility doctrine in 9 Canada -- it's worth noting that it was also 10 challenged for being non-obvious -- or for being 11 obvious. It was challenged because it was not new. 12 The disclosure was challenged. It was challenged for 13 making false statements. There's been a lot of 14 litigation about the '113 patent. But all of those 15 grounds were placed to one side, and it was upheld on 16 all of those grounds with the exception that this 17 patent, the '113 patent, lacked utility. 18 The fact that the court construed a 19 promise from the disclosure of the '113 patent and 20 refused to consider post-filing evidence to see if 21 Claimant's patent met that promise is common ground 22 between the parties. At the transcript at pages 201 23 to 202, Canada read for you the same heightened 24 promise that the Claimant did, that the judge 25 concluded that the patent promised olanzapine treats</p> <p>www.dianaburden.com</p>
<p>1992 09:27</p> <p>1 schizophrenia patients in the clinic in a markedly 2 superior fashion with a better side effects profile 3 than other known anti-psychotics. 4 We also noted that the court found an 5 additional promise, implied promise of long-term 6 clinical effectiveness, and Canada doesn't deny that 7 nor did they highlight it. Canada also does not deny 8 that there was a heightened evidentiary burden and 9 that there was no consideration of post-filing 10 evidence to determine if the heightened promise was 11 met. There was no consideration of post filing 12 studies showing efficacy or commercial success. 13 Canada also acknowledged the language 14 in the decision -- and this is Canada at transcript 15 page 283 -- that in the language of the Zyprexa 16 decision, the Canadian court said that he could not 17 find that the promise of the patent was so small. 18 But in that provision, which is paragraph 209 of the 19 challenged measure, which is C-146, the court stated 20 that the Zyprexa patent, the '113 patent, had a 21 utility. The court said, "If the utility of the 22 invention in the '113 patent relates merely to a 23 compound with potential anti-psychotic properties 24 that might have relatively low EPS liability" -- 25 that's the side effects -- "that utility has been</p> <p>www.dianaburden.com</p>	<p>1993 09:29</p> <p>1 demonstrated by the tests conducted prior to the 2 filing date." 3 The '113 patent had a utility. 4 According to the very court that invalidated it under 5 the promise utility doctrine. 6 In Tribunal question No. 27 -- I 7 should mention we have received your questions and we 8 will as we did in the opening try to answer them as 9 we go. We do take note that some of these answers 10 may be provisional and we might provide more fulsome 11 answers in our post hearing submissions. But with 12 regard to question 27, the Tribunal asked Lilly to 13 clarify whether a breach of NAFTA stems from the 14 promise utility doctrine as a whole or whether it can 15 be traced to the individual components of the 16 doctrine. The violation stems from the doctrine as a 17 whole because that was the utility requirement in 18 Canada that was applied to the '113 patent and the 19 '735 patent to invalidate those patents solely for 20 lack of utility. We look at what the utility law was 21 in Canada that was applied to our patents. 22 So the Zyprexa patent met the mere 23 scintilla test. It had a utility when Lilly applied 24 for the patents in the 1990s and according to the 25 court decision it also had a utility when it was</p> <p>www.dianaburden.com</p>

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1 challenged in the 2000s.
 2 THE PRESIDENT: I didn't want to stop
 3 you in the middle of the sentence but in the prior
 4 response you gave to Tribunal question No. 27 as a
 5 whole, so there's three components as what you
 6 develop -- the Claimant developed in 2002, 2005 and
 7 2008 that if you consider the components, you say
 8 well, we attack all of them at the same time as a
 9 whole.
 10 MS. CHEEK: That's correct because
 11 when the courts apply the utility standard in Canada,
 12 they apply all three of those elements to the patent.
 13 THE PRESIDENT: And they came to --
 14 I would almost use the word "fruition" but that
 15 probably is the wrong word from your side. When the
 16 courts invalidated the patent in 2011.
 17 MS. CHEEK: Yes, in 2010 and 2011,
 18 correct. The utility test -- the promise utility
 19 doctrine was established before that time. These are
 20 not the first cases in which they were applied. But
 21 what we are looking at is what was the utility test
 22 in Canada that was applied to our patents, and that
 23 would include all three of the elements that we've
 24 discussed over the course of the last week, 2002,
 25 2005 and 2008.

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1 SIR DANIEL BETHLEHEM: Can I just
 2 follow up on that? Are you then saying that in your
 3 view, the utility standard crystallized the
 4 Raloxifene decision? I appreciate you say the breach
 5 occurred in 2011 and following with the decisions in
 6 respect of Zyprexa and Strattera, but are you saying
 7 the utility standard crystallized in 2008 with the
 8 last of the trilogy as it were in the sequence.
 9 MS. CHEEK: The utility standard that
 10 was applied to these patents invalidate them in 2010
 11 and 2011 was crystallized in 2008 with the Raloxifene
 12 decision. However, there were decisions even before
 13 the Raloxifene decision that were applying the
 14 promise utility doctrine. So you will recall a
 15 question that came up at the opening, which is at
 16 what point did Canada have this new and different
 17 test. And in our view, that's 2005. But this latent
 18 component of it, the disclosure requirement, does not
 19 come to fruition or crystallize until 2008.
 20 SIR DANIEL BETHLEHEM: I appreciate
 21 that. The language that you used was the violation
 22 stems from the doctrine as a whole, and I think the
 23 question, in part, was trying to identify whether you
 24 regard a violation of the NAFTA, for example, as
 25 having arisen at the time of the AZT decision in

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1 2002, or whether it's only when you put together each
 2 of these three elements that a breach of the NAFTA
 3 would have arisen which was subsequently crystallized
 4 with the Strattera and Zyprexa decisions.
 5 MS. CHEEK: That's a question -- I
 6 think you summarized it accurately. What I would say
 7 is that Ms. Wagner is going to go into more detail
 8 summarizing the state of the evidence in terms of
 9 what we've learned about the promise utility
 10 doctrine, so I might defer more detailed questions to
 11 that time. I suppose to just reiterate, the reason
 12 we challenge the elements as a whole is because as a
 13 matter of fact, those elements as a whole are the
 14 utility test in Canada that is applied to determine
 15 whether or not a patent is valid or invalid for lack
 16 of utility. So we take it as it comes. That's the
 17 law in Canada that was applied to our patents and it
 18 had all three elements when it was applied to our
 19 patents.
 20 SIR DANIEL BETHLEHEM: We'll leave it
 21 to Ms. Wagner to respond further.
 22 MR. BORN: Can I, with apologies
 23 because we're taking your time, follow up just very
 24 briefly? It may be something you want to come back
 25 to later but I think the thrust of the questions was,

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1 is it your case not just that all three of the
 2 elements put together constitute a violation but that
 3 any one or two of those elements would also
 4 independently constitute a violation?
 5 MS. CHEEK: So it is not our case that
 6 each element taken separately would, on its own,
 7 constitute a violation, nor is it our view that that
 8 is the appropriate level of analysis, if you will.
 9 And the reason that that's not the appropriate level
 10 of analysis is because those are three components of
 11 a single holistic legal standard, the utility test in
 12 Canada.
 13 THE PRESIDENT: I do not correct
 14 Mr. Born but simply to clarify that we are not taking
 15 your time. When we ask questions, it's our time.
 16 MR. BORN: Sounds like a correction.
 17 MS. CHEEK: So one question we've
 18 asked is how do we know that the '113 patent had
 19 utility. How do we know that it had -- it met the
 20 low threshold for utility that was the test in Canada
 21 prior to the promise utility doctrine. And one way
 22 we know is that that '113 patent was issued in
 23 81 jurisdictions, in 81 countries, and I put up the
 24 names of those countries in our opening presentation.
 25 Canada is the only jurisdiction out of 81 countries

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<p style="text-align: right;">1998</p> <p>09:36</p> <p>1 all over the world who invalidated this patent on 2 grounds of inutility, and Canada has no response to 3 that. 4 And its conflation argument doesn't 5 help. It's not that these patents, the '113 patent, 6 was invalidated on a slew of other grounds in other 7 jurisdictions. That's simply not the case. The 8 '113 patent was not invalidated in any other country 9 except for Canada on utility, and in terms of the 10 other NAFTA jurisdictions, there was no invalidation 11 on any ground of the '113 patent. 12 Now let's turn to Strattera, the 13 '735 patent. As we discussed in the opening, 14 Strattera is an important advance in the treatment of 15 ADHD. Again, this was not a lucky guess, and how do 16 we know? Because on the face of the claims there is 17 stated a specific, credible, real-world use, the 18 treatment of attention deficit/hyperactivity 19 disorder. And again, CIPO granted the '735 patent, 20 and it didn't raise any concerns on utility. 21 The '735 patent was then challenged in 22 court. It, too, was challenged on some other grounds 23 for which it survived. Canada acknowledged this in 24 the transcript at page 203, noting that the court had 25 found that the '735 patent cleared the hurdles of</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">1999</p> <p>09:38</p> <p>1 obviousness and anticipation. Anticipation being 2 novelty. So again, we're in the same place. The 3 '735 patent is invalidated solely for lacking 4 utility. And once again, the fact that the court 5 construed a promise from the disclosure, refused to 6 consider post-filing evidence, and in this ground 7 refused to consider pre-filing evidence not in the 8 patent, that is common ground among the parties. 9 THE PRESIDENT: Ms. Cheek, can you 10 please tell me, what you have on the screen is slide 11 7 which has in the right-hand column a caption 12 "Canada's response." But my slide 7 says Promise 13 Utility Doctrine. 14 MS. CHEEK: One moment. 15 THE PRESIDENT: There's no problem, we 16 simply have to delete it on our slides because this 17 is the most recent version that you show on the 18 screen, isn't it? 19 MS. CHEEK: Yes. Perhaps we will 20 provide you with an addendum to your bundle at some 21 point. 22 THE PRESIDENT: It's necessary. I 23 think we can simply do it by hand. 24 MS. CHEEK: I think it's a labeling 25 issue, not a legal issue.</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2000</p> <p>09:40</p> <p>1 THE PRESIDENT: I think the same 2 labeling issue existed on the previous slide, 3 slide 4, which showed Canada's response. But don't 4 be concerned about this. We can change it ourselves. 5 As long as the electronic version that you send to us 6 has the correct version. 7 MS. CHEEK: Very good. The electronic 8 version we send will be the correct version, and we 9 can provide an errata to that. 10 On slide 7, again, Canada acknowledged 11 at the transcript page 203 that the judge construed a 12 heightened promise for the Strattera patent. "He 13 found as a fact that in the context of a patent 14 claiming treatment of ADHD, which is a chronic 15 disorder, a skilled reader would understand treatment 16 to require sustained treatment." It's not surprising 17 there's common ground because the parties are reading 18 the same paragraph of the decision. Canada has not 19 contested that there was a heightened evidentiary 20 burden and a ban on post-filing evidence when Lilly 21 was asked to meet this heightened promise. The court 22 then also required Lilly to demonstrate the promise 23 based only on pre-filing evidence but given the 24 heightened promise, even the clinical trial that they 25 had pre-filing, the Massachusetts General Hospital</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2001</p> <p>09:41</p> <p>1 study showing significant treatment in ADHD patients, 2 was not enough to meet demonstrated utility. 3 And so the additional disclosure 4 requirement for soundly predicted utility kicked in 5 for the Strattera patent, and Canada also has 6 acknowledged that the court applied the additional 7 disclosure rule for sound prediction, refusing to 8 look at the pre-filing evidence that it had 9 considered under the demonstrated prong of utility. 10 At the transcript at page 204, Canada noting, "nor 11 did the patent disclose any factual basis to support 12 the sound prediction of utility. The MGH study was 13 not mentioned anywhere in the patent." 14 Once again, as for the Zyprexa patent, 15 the Strattera patent met the mere scintilla test at 16 the time that it was invalidated for failing to meet 17 the promise utility doctrine, and the Canadian court 18 said it was so. The decision is C-160, and at 19 paragraph 93, the court says, "Lilly argues that it 20 need only show that atomoxetine had a mere scintilla 21 of utility. If that phrase means only that 22 atomoxetine be shown to be somewhat useful in 23 treating ADHD, I accept Lilly's point." 24 Again, Canada does not dispute the 25 words of the decision, nor could it, but the</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2002 09:43</p> <p>1 Strattera patent suffers the same fate, of course, as 2 Zyprexa. That patent that had a utility at the time 3 it was granted and a utility at the time that it was 4 challenged, failed to meet the heightened promise 5 utility doctrine requirement. Once again, as with 6 Zyprexa, the patent was granted in 36 jurisdictions. 7 Not a single other jurisdiction has invalidated that 8 patent for lack of utility, and Canada has no 9 response to that. And specifically with regard to 10 the other NAFTA jurisdictions were they just doing 11 the same thing, another test? These two patents were 12 not invalidated in Mexico or the United States on any 13 ground. 14 So what happened to Lilly's patents -- 15 this is probably a long way of saying what happened 16 to Lilly's patents is not really disputed. They were 17 revoked for lack of utility. Nor is it disputed that 18 the steps that the Canadian courts took to do that 19 analysis in the two revocation decisions that are 20 challenged here. So the only real factual dispute, 21 which perhaps goes to the Tribunal's earlier 22 questions, is is this thing which the Canadian courts 23 have called the promise doctrine, we have called the 24 promise utility doctrine, is that thing dramatically 25 new?</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2003 09:45</p> <p>1 Lilly would submit that the evidence 2 supports and, indeed, compels a conclusion that this 3 is a new and additional utility requirement that was 4 applied to invalidate Lilly's patents. The 5 contemporaneous evidence in the record, that of the 6 CIPO examiners -- and one of these slides is on the 7 screen at slide 9. The contemporaneous evidence in 8 the record of the CIPO examiners questioning the new 9 utility requirement being incorporated into the MOPOP 10 is significant. It's significant because it's 11 contemporaneous. It's significant because it's not 12 addressed at all by Canada. 13 Further, it's not addressed at all by 14 Mr. Gillen. Even though Mr. Gillen was at CIPO 15 during the relevant time period when all of these 16 patent examiners are asking questions about new court 17 cases and how the MOPOP is changing. Mr. Gillen was 18 at CIPO from 2006 to 2014, which covers the time 19 period of all of this confusion we see by patent 20 examiners at the time that the law is changing in 21 Canada. 22 Further, Mr. Wilson testified, at the 23 transcript at page 773, that "under the traditional 24 utility requirements, examiners didn't comb through 25 applications in search of promises and they didn't</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2004 09:46</p> <p>1 consider statements of advantages as the utility of 2 an invention." 3 Also of note, Mr. Gillen never used 4 the word "promise" in his presentation, and he never 5 used the word "promise," I don't believe, in any of 6 his testimony. And I would submit that that's 7 because Mr. Gillen, during his 14 years as a patent 8 examiner, from 1988 to 2002 did not examine patent 9 applications looking for promises of utility. 10 Just to crystallize a discrete point, 11 both Mr. Wilson and Mr. Gillen agree -- and this is 12 at slide 14 -- that the MOPOP reflects Canadian law. 13 The promise utility doctrine was not 14 an evolution. It was a revolution. To the extent 15 there's any doubt the outcomes in these cases, the 16 surge in invalidation decisions under the promise 17 utility doctrine from 2005 onwards, reflect that 18 dramatic change. Now let me say a word about 19 Canada's arguments that the promise utility doctrine 20 was simply applied to Lilly's patents to police 21 speculation. That argument, quite simply, has fallen 22 apart. 23 There was one fact witness supporting 24 Canada's assertion that Lilly files speculative 25 patents, and he walked back from that assertion</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2005 09:48</p> <p>1 during his testimony before this Tribunal. 2 Mr. Brisebois had asserted at paragraphs 41-43 of his 3 statement that the doctrine applies with particular 4 force to secondary modifications to an already 5 well-known drug. But as Mr. Brisebois explained in 6 his testimony at pages 503-505, Canadian patent law 7 doesn't make a distinction between primary and 8 secondary patents. He also clarified that secondary 9 patents are not patents on known drugs. They are 10 simply patents on molecules that were previously 11 protected by a patent. 12 Mr. Brisebois also asserted that Lilly 13 files speculative patents on multiple uses of 14 individual compounds, but when asked for the basis 15 for that assertion; he conceded that he was not privy 16 to any scientific research at Lilly. He had no 17 factual basis or knowledge of any of the decades of 18 research that Lilly was conducting on olanzapine, 19 atomoxetine and the Raloxifene compounds. And third, 20 Mr. Brisebois had asserted that because Lilly didn't 21 commercialize all of the patented uses, that that was 22 further evidence of speculation. But when he 23 testified before you, at page 510 of the record, he 24 said he had no idea how Lilly decides which uses of 25 its drugs should come to market.</p> <p style="text-align: center;">www.dianaburden.com</p>

<p>2006 09:50</p> <p>1 Further, this Tribunal was told by 2 multiple expert witnesses the type of speculation 3 that the traditional utility requirement is designed 4 to address -- and besides examples of the perpetual 5 motion machine, which I think we will come back to 6 later, what we also learned is the invention is 7 something like gene snippets, because gene snippets 8 have no articulated real-world use. On slide 17 9 there's the example of gene snippets from the WIPO 10 documents that we looked at, as well as 11 Professor Merges, who explains at page 1357 of the 12 transcript, "they were basically using the gene 13 fragments to go look for genes, but they didn't say 14 anything about what those genes did or what they 15 coded for." 16 Olanzapine and atomoxetine are not 17 gene snippets. They are not an intermediate research 18 step for which no use is known. To the contrary, 19 they're valuable, useful medicines to treat ADHD and 20 schizophrenia. They provide effective long-term 21 treatment for those conditions, and they continue to 22 do so to this day for Canadian patients. Those real 23 uses were identified in the claims of these patents 24 when they were granted, and yet, the Canadian courts, 25 acknowledging that the patents had a utility and a</p> <p>www.dianaburden.com</p>	<p>2007 09:52</p> <p>1 real-world use, nevertheless revoked them under the 2 promise utility doctrine. 3 Now let me give you a sense of what 4 else you'll hear from us this morning on. On 5 slide 18 -- this is actually Canada's slide that they 6 presented in their opening, and they noted that this 7 Tribunal has four decisions to make. 8 First, whether denial of justice is 9 the exclusive theory of liability for judicial 10 measures. Second, whether Lilly's claim is 11 time-barred. Third, whether there was a dramatic 12 change in the law. And fourth, whether Lilly has 13 proven its claims under Article 1110 and 1105. 14 Canada argues that Tribunal must decide for Lilly on 15 all four of these issues in order for Lilly to 16 prevail. And we agree and we believe that Lilly does 17 prevail on all four of these questions. 18 SIR DANIEL BETHLEHEM: May I just 19 clarify? Do you agree with this decision tree? 20 MS. CHEEK: Well, we will take the 21 time bar issue first, which I will address very 22 briefly. Then we will look at the denial-of-justice 23 question, which Mr. Berengaut will address. We will 24 look at the dramatic change of the law, which 25 Ms. Wagner will address, and then we will look at the</p> <p>www.dianaburden.com</p>
<p>2008 09:53</p> <p>1 violations of 1110 and 1105. 2 SIR DANIEL BETHLEHEM: Apart from 3 inverting 1 and 2, are you otherwise in agreement 4 with this? 5 MS. CHEEK: Yes, we are. 6 SIR DANIEL BETHLEHEM: Thank you. 7 MS. CHEEK: I'm going to speak very 8 briefly about Canada's belated jurisdictional 9 objection related to the timing of Lilly bringing its 10 claims, and then I will hand it over to Mr. Berengaut 11 to talk in more detail about the denial-of-justice 12 issues. 13 As you're well aware, prior to filing 14 its rejoinder, Canada had expressly declined to 15 object to the Tribunal's jurisdiction. In its 16 Counter Memorial at paragraph 209 it stated, "Canada 17 is not seeking dismissal of the claim on a basis of 18 lack of jurisdiction." And, yet, in its rejoinder it 19 brought forth for the first time, of course, it's 20 time bar objection. 21 We continue to maintain that that 22 objection is untimely, and on that basis alone, this 23 Tribunal should dismiss it. UNCITRAL rule 21(3) is 24 clear in that regard, which is on slide 20. A plea 25 that the Arbitral Tribunal does not have jurisdiction</p> <p>www.dianaburden.com</p>	<p>2009 09:55</p> <p>1 shall be raised not later than in the Statement of 2 Defense..." 3 Canada argued in its opening 4 statements that that rule didn't really mean what it 5 says it means because rule 21(3) was intended for 6 situations, and this is at page 254, "where the 7 Statement of Defense will be the only written 8 submission from the Respondent prior to the oral 9 submissions at the hearing," but we see no basis for 10 that assertion. Rule 21(3) does not refer to the 11 Statement of Defense or further written statements. 12 Rule 21(3) is clear and tribunals enforce rule 21(3) 13 as written. Also, there is prejudice to the delay in 14 asserting a jurisdictional objection for the first 15 time in a rejoinder. 16 Under the UNCITRAL rules, the point of 17 21(3) is also to provide Claimant with notice at the 18 beginning of its case that there is a jurisdictional 19 objection by the Respondent, and that notice we did 20 not receive until the briefing in this case was 21 complete. It also prejudiced Lilly by creating the 22 need for additional briefing, of course, which was 23 granted by this Tribunal, increasing arbitration 24 costs and compromising efficiency. 25 SIR DANIEL BETHLEHEM: The time bar</p> <p>www.dianaburden.com</p>

<p style="text-align: right;">2010</p> <p>09:57</p> <p>1 issue is addressed in 1116 and 1117. It's a 2 treaty-based issue. Leaving aside for the moment 3 your point about prejudice and the fact that this was 4 only raised in the rejoinder, is this something that 5 Canada could waive simply by not raising the issue, 6 or is this a matter that the Tribunal, of its own 7 motion, would have to consider when considering its 8 jurisdiction? 9 MS. CHEEK: I believe in this case, 10 purely with regards to the timing question of whether 11 these claims were brought within the three-year time 12 window, that that is something that Canada can waive 13 under Chapter 11 of NAFTA. I don't believe that the 14 Tribunal would need to reach that issue on their own 15 necessarily to determine that they had competence to 16 hear Lilly's claims. 17 Let me maybe get to the heart of the 18 matter which is that the reason that Canada said it 19 could bring its jurisdictional objection late is that 20 Lilly changed its claims. Of course, as we've 21 already explained, we've consistently argued that the 22 promise utility doctrine operated to deprive Lilly of 23 its investments in the Zyprexa and Strattera patents, 24 and there's simply been no change in our claims or 25 our legal arguments in this proceeding. Even the</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2011</p> <p>09:59</p> <p>1 headings of our Reply Memorial state very clearly 2 what the claims are in this case. 3 Of course, on the law, a time bar 4 objection relates to a particular investment for 5 which an investor seeks a remedy for breach and for 6 loss and Canada has no support for its argument that 7 in the treatment of one of its investments, the 8 Raloxifene patent, somehow started the time 9 limitation clock on claims regarding the future 10 expropriation and mistreatment of two legally and 11 factually distinct investments at issue in this 12 arbitration, the Strattera and Zyprexa patents. 13 To propose a quick hypothetical to 14 illustrate the point, as we understand Canada's 15 position, they would have this Tribunal adopt a rule 16 that would force investors to file claims before 17 they're ripe. So let's consider that in 2008 there's 18 a new mining regulation. Slide 22. And that mining 19 regulation is applied in some way to indirectly 20 expropriate one of three mines, say separately 21 incorporated, that I own as an investor. Those mines 22 are separate investments, they're in different parts 23 of the country, and I don't know if or when that new 24 mining regulation might apply to my two other mines. 25 Then it turns out that in 2010 and 2011, in fact,</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2012</p> <p>10:01</p> <p>1 that new mining regulation is applied to my mines and 2 they are expropriated. 3 So should I, as an investor, bring a 4 claim in 2008 for the possible future expropriation 5 of my mines in 2010 and 2011? What about a 4th or 6 5th mine to which the regulation may or may not be 7 applied. We're not aware of a single Tribunal that 8 has taken the view that Canada has asserted. In the 9 opening statements on page 270 Canada's position was, 10 "You don't wait, you can't wait until that 11 legislation is applied against you in order to bring 12 a challenge under NAFTA." 13 Lilly at any given time has a lot of 14 patents on valuable medicines in Canada. Not all of 15 those are challenged under the promise doctrine. 16 Some of them that have been challenged have been 17 found valid and, yet, under Canada's theory, Lilly 18 would have brought -- must have brought all of their 19 claims with respect to all of their patents in Canada 20 the moment that its Raloxifene patent was found to 21 lack utility in 2008. And that's just simply not how 22 the investment arbitration system works. An investor 23 that loses one investment does not initiate 24 arbitration in connection with all potential future 25 claims.</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2013</p> <p>10:02</p> <p>1 As we've stated in our submissions, 2 the Raloxifene patent is discussed in these 3 proceedings simply to provide factual context and a 4 factual predicate to our claim. There are many 5 tribunals that have reached similar decisions and 6 noted that the mere fact of providing factual 7 background and context does not defeat a claim with 8 respect to expropriation of specific investments. 9 And with that, I will have 10 Mr. Berengaut discuss Canada's attempt to limit 11 Lilly's claims to those involving denial of justice. 12 MR. BERENGAUT: Thank you. Before I 13 address this topic, members of the Tribunal, I'd like 14 to briefly come back to Sir Daniel's question about 15 our response to the Canadian decision tree in 16 slide 18 of our closing statement. 17 We would, as Ms. Cheek said, submit 18 that the items 1 and 2 should be flipped because time 19 bar is a jurisdictional issue, of course. We would 20 also submit that just as a matter of analysis, it 21 makes sense to consider point 3, which is a question 22 of fact, prior to the questions of law, which we 23 would submit encompass both 1 and 4. Although we 24 don't quarrel that since Proposition 1, in Canada's 25 view, sweeps across both 1110 and 1105, it makes</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2014 10:04</p> <p>1 sense to consider that proposition generally. 2 SIR DANIEL BETHLEHEM: So just to be 3 clear, your decision-making tree, in terms of the 4 chronology of it, would be 3, 2, 1, 4? 5 MR. BERENGAUT: It would be 2, 3, 1, 6 4. 7 SIR DANIEL BETHLEHEM: Thank you. 8 MR. BERENGAUT: Just one additional 9 point with regard to the decision tree. On point 3, 10 the proposition of change, we just want to make 11 clear, as we did in response to the Tribunal's 12 question 11 from the opening, as Ms. Wagner will 13 explain and as we've submitted over the course of the 14 hearing, the promise utility doctrine was new as a 15 matter of doctrine. Even if the Tribunal were to 16 disagree with that, it is still new as a matter of 17 application. And both of those propositions of 18 change are relevant to our case. 19 THE PRESIDENT: Mr. Berengaut, to be 20 clear, then, could you provide us with a revised 21 slide 18 as representing the decision tree of the 22 Claimant? 23 MR. BERENGAUT: We would be happy to. 24 THE PRESIDENT: When would that be 25 possible? In the course of the day?</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2015 10:05</p> <p>1 MR. BERENGAUT: Yes, we would be able 2 to do it today. 3 THE PRESIDENT: Timely, because I 4 think the Respondents also would like to have a look 5 at it. 6 MR. BERENGAUT: Yes, understood. 7 SIR DANIEL BETHLEHEM: May I just come 8 back to the substance of what you were saying? You 9 say "...over the course of the hearing the promise 10 utility doctrine was new as a matter of doctrine. 11 Even if the Tribunal were to disagree with that, it 12 is still new as a matter of application." When you 13 say, "it is still new as a matter of application," 14 you mean application to the Strattera and Zyprexa 15 patents. Is that what you say? 16 MR. BERENGAUT: Well, I think that's 17 certainly true with respect to those particular 18 patents, but also what I'm really referring to here 19 is our statistical evidence, demonstrating that 20 starting in 2005, there was this dramatic pattern of 21 invalidations of pharmaceutical patents. 22 SIR DANIEL BETHLEHEM: Thank you. 23 MR. BERENGAUT: Turning, then, to the 24 question of denial of justice, Canada has contended 25 that denial of justice is the sole theory of</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2016 10:06</p> <p>1 liability for judicial measures under articles 1105 2 and 1110. And Canada then maintains that Lilly has 3 not alleged a denial of justice, and accordingly, 4 Canada reasons that Lilly's claim must be dismissed. 5 Now, it is true that Lilly is not 6 alleging that it was denied due process in Canadian 7 courts. Accordingly, we agree that it is important 8 to address Canada's assertion that under customary 9 international law and NAFTA, denial of justice, 10 properly understood, is the only theory of liability 11 for judicial measures. An assertion, to be clear, 12 that no tribunal has embraced before. 13 But before we address the substance of 14 Canada's contention, it is important at the outset to 15 be clear what we are talking about and what we are 16 not talking about when we use the phrase "denial of 17 justice." The Tribunal has also asked specifically 18 in questions 34 and 38 how the parties understand the 19 concept of denial of justice as it relates to 20 articles 1110 and 1105. 21 From the outset of this case, we have 22 associated ourselves with Professor Paulsson's 23 definition of denial of justice, which is to say that 24 denial of justice is always procedural. Now, there 25 are two corollaries to this proposition. The first</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2017 10:07</p> <p>1 is that a Claimant cannot generally allege a 2 misapplication of domestic law at the international 3 level. Rather, the only theory for misapplication of 4 domestic law is denial of justice. 5 As Professor Paulsson puts it in this 6 excerpt from his book, "To the extent that national 7 courts disregard or misapply national law, their 8 errors do not generate international responsibility 9 unless they have misconducted themselves in some 10 egregious manner which scholars have often referred 11 to as technical or procedural denial of justice." 12 So if Lilly's argument was that the 13 Canadian courts misapplied Canadian law and the 14 promise utility doctrine is not actually Canadian 15 law, then fair enough. Canada could argue that our 16 claim is barred because the only theory of liability 17 available in that circumstance is denial of justice. 18 The second corollary, however, is that 19 if a Claimant alleges a violation of a rule of 20 international law, that is not a denial of justice at 21 all but, rather, a free-standing basis of liability. 22 As Professor Paulsson puts it, "To the extent that 23 the decisions of national courts disregard or 24 misapply international law, they are subject to 25 international censure like any other organ of the</p> <p style="text-align: center;">www.dianaburden.com</p>

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<p>1 state." 2 Or as he explains elsewhere discussing 3 a fair and equitable treatment clause like NAFTA, 4 incorporating a reference to customary international 5 law, "Such a provision naturally opens the door to 6 liability, as found by an international tribunal, for 7 denial of justice as a fundamental rule of customary 8 international law. But denial of justice is not the 9 only rule of international law. If other rules are 10 disregarded by national courts to the detriment of an 11 alien entitled to rely on this provision, the 12 judgment is not compliant with international law and 13 should properly be disregarded by an international 14 tribunal competent to apply the treaty. But that 15 does not mean that there has been a denial of 16 justice." 17 Or, as the tribunal in Feldman put it, 18 "As the Respondent concedes, this tribunal could find 19 a NAFTA violation even if Mexican courts uphold 20 Mexican law. This tribunal is not bound by a 21 decision of a local court if that decision violates 22 international law." 23 Or as we noted in our opening, Judge 24 Arechaga's statement that denial of justice and state 25 responsibility are not co-extensive expressions and</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>1 that state responsibility for acts of the judiciary 2 does not exhaust itself in the concept of denial of 3 justice. Such a violation of international law is 4 exactly what Lilly is alleging here. Lilly has 5 alleged that Canada's application of the promise 6 utility doctrine to the Zyprexa and Strattera patents 7 constitutes a violation of international law which is 8 entirely distinct and a free-standing basis of 9 liability apart from denial of justice. 10 Bearing this distinction in mind, 11 let's take a look at the authority on each side for 12 Canada's categorical assertion and against. Let's 13 start with Canada's authorities. 14 As we mentioned in our opening, there 15 is really only one source that arguably supports 16 Canada's assertion, and this is Professor Douglas' 17 article R-323. Canada again gave top billing to this 18 article in its opening. Now, in its opening 19 Canada -- page 208-209 of the transcript -- urged the 20 Tribunal to read the Article's 118 footnotes. The 21 implication is that the number of footnotes in the 22 article supports the specific point for which Canada 23 has cited it. Most of the footnotes and the article 24 as a whole are off point, focused on taxonomy of 25 procedural denial of justice and the rule of</p> <p style="text-align: center;">www.dianaburden.com</p>
<p>1 finality, which is not implicated in this case. 2 Only one section of the article is 3 devoted to the relevant question, which is, "Can the 4 transgression of an international legal norm within 5 the context of a domestic adjudicative procedure 6 supply the predicate conduct for the delictual 7 responsibility towards foreign nationals." 8 If you look at that section of the 9 article, pages 30-34, you'll see there is really only 10 one authority that Professor Douglas is discussing, 11 and that is Frontier Petroleum versus Czech Republic, 12 which he criticizes, as we noted in our opening. We 13 acknowledge that Professor Douglas advocates for the 14 same rule as Canada, and presumably he advocated for 15 the same rule when he served as counsel for the Czech 16 Republic in Frontier Petroleum before writing his 17 article. Yet, the tribunal disagreed with Professor 18 Douglas, and Frontier Petroleum stands as one of 19 several cases that recognizes that denial of justice 20 is not the exclusive basis of liability for judicial 21 measures under customary international law. 22 Apart from this article, what does 23 Canada have? It has cases that fall basically into 24 two buckets. The first bucket are cases where the 25 claim is actually an alleged procedural denial of</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>1 justice. In the second bucket are cases involving 2 allegations of misapplication of national law. 3 What's an example of the first bucket? In Loewen, 4 for example, the complaint was with a proceeding 5 tainted by nationality-based, racial, and class-based 6 testimony which was insulated from review by an 7 exorbitant bonding requirement. You can see here the 8 trial judge refusing to give an instruction to the 9 jury that discrimination was impermissible and a 10 bonding requirement that effectively foreclosed 11 Loewen's right of appeal. 12 Another example is Waste Management, 13 RL-14, where the Claimant alleged denial of justice 14 based on an alleged obstruction -- and here I quote 15 from paragraph 87 -- of its access to judicial and 16 arbitral forums to resolve claims under the 17 concession. 18 This line of cases, this is bucket 1, 19 obviously lends no support to Canada's assertion that 20 denial of justice is the only theory of liability for 21 acts of the judiciary. The second bucket is where 22 Claimant's claim was based on a misapplication of 23 domestic law. Here you can see Arif vs. Moldova, 24 RL-63, a case that Canada cites frequently in its 25 briefs. The tribunal noted that Claimant's position,</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2022</p> <p>1 in essence, is, rather, that the actual 2 misapplication of Moldovan law by the courts amounts 3 to expropriation. The same is true of Liman Caspian, 4 RL-27 at paragraph 431. 5 Another example falling into this 6 bucket is Grand River. During its opening, slide 78, 7 Canada showed the Tribunal this paragraph, 234, 8 noting that issues of U.S. Constitutional and Indian 9 law belong in the national courts, not an 10 international Tribunal. This paragraph suggests that 11 if the national court system fails to address these 12 questions in a proper way, then there might be 13 grounds for a true claim of denial of justice. 14 Now, the proposition that Canada 15 wishes for you to take from this case is, again, that 16 denial of justice is the sole theory of liability, 17 but let's look at paragraph 232, two paragraphs 18 before the one that Canada calls out. 19 There the Tribunal made clear that 20 Claimant's position was that states could not apply 21 their complementary legislation to on-reservation 22 sales not subject to their escrow laws and, second, 23 that the complementary legislation could not be 24 applied to commerce between Native Americans. The 25 complaint, in short, was that states were applying</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2023</p> <p>1 their state law to Indian affairs, which are supposed 2 to be covered by Federal law. This is an alleged 3 misapplication of domestic law, not an alleged 4 violation of international law. 5 Now, the one case that doesn't fit 6 neatly into either bucket which Canada relies on 7 heavily is Azinian, CL-61, in which 8 Professor Paulsson was the chair. Azinian was 9 basically a breach-of-contract case and the Claimants 10 had a waste industries concession contract entered 11 into with a Mexican municipal city council. The 12 Claimant's complaint was that the city council 13 breached the concession contract in violation of the 14 Mexican law of contract. And the Tribunal held that 15 the Claimants could not prevail simply by persuading 16 the Tribunal that the city council had breached the 17 contract. They needed to also challenge the 18 subsequent court decision, which the Claimant did not 19 do. This is paragraph 100. But the Tribunal did not 20 want to dismiss the claim on a mere pleading error, 21 so they went forward to analyze whether the judicial 22 proceedings amounted to a denial of justice. Canada 23 again takes from this decision the rule that denial 24 of justice is the only theory of liability for 25 judicial measures. But when you actually look at the</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2024</p> <p>1 case, you see that it was a case where the complaint 2 was with a misapplication of domestic law. This is 3 paragraphs 100 to 105. Thus, the Tribunal's focus on 4 denial of justice, which it never described as the 5 exclusive available doctrine, is entirely consistent 6 with Professor Paulsson's scholarly writings. And 7 this does not detract at all from the proposition 8 that when a court engages in a violation of 9 international law, its conduct is attributable to the 10 state on the same terms as any other organ. 11 Now, one other case bears specific 12 mention, and that is Mondev. Again, Canada does not 13 address the specific facts of the case and 14 extrapolates from the fact that denial of justice was 15 the appropriate mode of analysis on the facts of the 16 case, to reach the conclusion that denial of justice 17 is the only theory of liability. But this conclusion 18 is contrary to the plain language of the award. 19 Canada has not once -- not in its 20 rejoinder, not in its opening statement -- addressed 21 paragraph 134 of Mondev where the Tribunal pointed 22 out that a judicially articulated prerogative to 23 violate investment contracts would appear to be 24 inconsistent with the principles embodied in 25 Article 1105.</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2025</p> <p>1 The Mondev Tribunal did not need to 2 address this issue because it was not the basis for 3 the Massachusetts court's decision. Yet, the Mondev 4 Tribunal's language makes clear that it would not 5 feel restrained to analyze the issue for procedural 6 fairness only. We discuss Canada's authorities in 7 greater details in paragraph 250-252 and 325-334 of 8 our reply. The bottom line is apart from 9 Professor Douglas' unsupported article section, 10 Canada cites no authority that would undercut the 11 basic distinction that Professor Paulsson draws 12 between judicial measures that violate national law 13 and judicial measures that violate international law. 14 Now, those are Canada's authorities. 15 If Canada were right, of course, and denial of 16 justice were the only theory of liability, then you 17 would never see tribunals scrutinizing judicial 18 measures outside of this one context. But Canada is 19 not right on this point, and this is evidenced by the 20 numerous cases across expropriation, fair and 21 equitable treatment, and the minimum standard context 22 that have analyzed judicial measures for their 23 substantive compatibility with rules of international 24 law. 25 Let's start with the expropriation</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2026 10:19</p> <p>1 context. Let's begin with Saipem, which holds clear 2 as can be that denial of justice is not a 3 precondition for a judicial expropriation. Canada 4 has argued that this case involved egregious judicial 5 behavior, but this argument is no answer to the 6 Tribunal's clear holding, to which Canada has no 7 response. Nor was denial of justice found in ATA 8 versus Jordan, in which an expropriation was found 9 based on judicial measures. Now, Canada has tried to 10 distinguish this case by arguing that it did not 11 involve a judicial measure at all but, rather, a 12 measure of the legislature. And this is Counter 13 Memorial paragraph 341. Yet, as you can see in this 14 slide, the Tribunal clearly placed responsibility for 15 the measure with the Jordanian judiciary, noting the 16 court could have complied with their duty in this 17 case by refusing to apply retroactively the new rule 18 introduced in the Jordanian arbitration law. 19 There are other cases, Rumeli Telecom. 20 CL-58. Canada has tried to distinguish this case by 21 arguing in its briefing and its opening, pages 22 242-243 of the transcript, that it involved 23 "collusion between the state and the competitor that 24 was manifested in a court decision." 25 But this characterization elides the</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2027 10:20</p> <p>1 fact that the improper collusion was limited to 2 Kazakhstan's executive branch and Rumeli's 3 competitor. It did not involve the Kazakh court 4 proceedings, and no denial of justice was found. 5 Paragraph 715. To the contrary, the Tribunal found 6 that the final act of the taking was the decision of 7 the Supreme Court. The Tribunal was satisfied that 8 this decision was made for a public purpose and that 9 there was no evidence that it was not made in 10 accordance with due process of law. 11 In the fair and equitable treatment 12 and minimum standard context, the situation is the 13 same. Multiple tribunals have recognized that the 14 fair and equitable treatment standard and minimum 15 standard are not exhausted on the concept of denial 16 of justice. We showed this slide in the opening. 17 This is from Liman Caspian. Let's look in a little 18 more detail at how Liman Caspian and the other cases 19 in this bucket analyzed the judicial measures at 20 issue. In Liman Caspian, for example, the Tribunal 21 held that the judicial measure at issue would breach 22 the standard of fair and equitable treatment if it 23 violated the minimum standard as set out in Waste 24 Management, which is to say not limited solely to 25 denial of justice. In White Industries, the Tribunal</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2028 10:22</p> <p>1 analyzed a judicial measure for denial of justice but 2 also, among other things, for frustration of the 3 Claimant's legitimate expectations. And in Frontier 4 Petroleum, the case that Professor Douglas was 5 criticizing, which was decided under the minimum 6 standard, the Tribunal also considered whether the 7 judicial measures at issue violated a substantive 8 norm of international law, not just scrutinized them 9 for a denial of justice. 10 So not only has Canada not supported 11 the proposition that denial of justice is the only 12 theory of liability for judicial measures. There is 13 a lot of authority pointing in the other direction. 14 And for good reason. When Canada tries to articulate 15 a rationale for its position it refers, as it did in 16 the opening, page 221, to the "special role that 17 courts play in the neutral adjudication of justice." 18 This refers to only one of the roles that courts 19 play. Courts resolve disputes under national law, 20 it's true, but particularly in common law countries 21 they also are a law-creating body. And Canada has 22 never provided a rationale for why the articulation 23 of a new legal rule through the judiciary should be 24 treated differently than the articulation of the very 25 same legal rule from a different branch of</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2029 10:23</p> <p>1 government. 2 Let's consider, for example, the 3 measure that Professor Gervais provided that would 4 arguably violate Article 1709(1), a utility standard 5 requiring that a medicine work 100 percent of the 6 time. Now, if Canada passed this law through its 7 legislature and under the law revoked patents for 8 drugs that don't work 100 percent of the time, then 9 that would likely be an expropriation, even under 10 Canada's interpretation. Yet, under Canada's view, 11 if it articulated the very same rule through the 12 judiciary, then that could not be an expropriation 13 because it is not a denial of justice. There is no 14 basis for treating these two measures differently. 15 Indeed, accepting Canada's 16 interpretation would have perverse consequences, in 17 the sense that it would treat countries that 18 articulate new legal rules through their judiciaries 19 better than countries that rely on other organs of 20 government. It would, in other words, create a 21 special immunity for countries that articulate new 22 legal rules through their judiciaries, even if those 23 rules would otherwise violate international law. 24 These troubling consequences are 25 additional reasons to reject Canada's categorical</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 assertion that denial of justice is the only theory
2 of liability for judicial measures under
3 international law.

4 Thank you.

5 THE PRESIDENT: Mr. Berengaut, I have
6 a question. You introduced your presentation by
7 saying it would answer the Tribunal's questions 34
8 and 38?

9 MR. BERENGAUT: Yes, let me just find
10 my Tribunal questions here. Yes.

11 THE PRESIDENT: If you look to
12 question 34, the question is somewhat broader than
13 the denial of justice issue. Especially we have the
14 question about the source and current content of the
15 customary international law principle of minimum
16 standard of treatment of aliens and denial of
17 justice.

18 I assume you or somebody else on your
19 team will address also the sources and content in
20 other respects?

21 MR. BERENGAUT: Yes. Thank you for
22 the question. We, indeed, plan to address the other
23 part of question 34 in the section of our
24 presentation on Article 1105.

25 THE PRESIDENT: It also may have a

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1 fundamental question whether awards are a source.
2 MR. BERENGAUT: Yes, we indeed will
3 address that aspect of the analysis, too.

4 SIR DANIEL BETHLEHEM: May I also ask
5 a question, just to clarify Claimant's position?
6 Are you then saying that there are
7 three possible aspects that we may need to consider?
8 One is denial of justice, and you're saying that's
9 not the only potential ground. The second is, if I
10 may just take you to question 28 which was addressed
11 to the Respondent, but there, the Respondent in the
12 record appeared to accept that a decision by a court
13 that is so fundamentally baffling that no reasonable
14 judge could ever come to that conclusion -- I think
15 I've used the term "irrationality" to describe it.
16 So you would accept that irrationality may also
17 engage denial of justice or would be a sort of
18 separate ground for impugning a judicial decision.
19 And then third, as you've just put it, I think to
20 paraphrase, the articulation of a new legal rule by a
21 court that was in breach of international law -- and
22 then I'm adding -- and engaged the Tribunal's
23 Chapter 11 competence could give rise to a breach of
24 1105 or 1110. Are those the three strands that
25 you're putting before us? Denial of justice,

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1 irrationality, articulation of a new legal rule in
2 breach of international law.

3 MR. BERENGAUT: Let me take the 2 and
4 3 parts of your question separately, if I may.

5 The question about a baffling or an
6 irrational national court decision, I think the way
7 we would analyze that question is to first ask why is
8 it baffling. If the decision is irrational because
9 it is a misapplication of national law, then we would
10 agree that it fits within Professor Paulsson's first
11 category, and the only theory of liability there
12 would be a denial of justice.

13 Now, setting aside whether national
14 law has been applied properly or improperly, even if
15 it's been applied properly, if the decision is
16 unpredictable and incoherent and totally irrational,
17 then we would say liability does attach, and the way
18 we've argued that liability attaches under that
19 circumstance is because the measure is arbitrary in
20 violation of Article 1105 as a substantive matter.

21 Now, to your third question, I'm not
22 sure I would say that we believe the articulation of
23 a new legal rule is a third legal bucket. We refer
24 to that, I think, to illustrate the absurd
25 consequences of Canada's position. If Canada's

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1 position were accepted, it would have this unjust --
2 create this unjustifiable distinction between the way
3 in which new legal rules are articulated. Our view,
4 I think, is so long as we are -- that the court
5 decisions themselves violate rules of international
6 law, as they did here under Article 1110 and
7 Article 1105, then the Tribunal should just proceed
8 to analyze those measures under those standards and
9 not apply any special rules to the fact that they
10 originate out of a judiciary as opposed to a
11 different branch of government.

12 SIR DANIEL BETHLEHEM: Thank you.

13 MS. WAGNER: Good morning,
14 Mr. President, members of the Tribunal. I'm going to
15 be talking about the promise utility doctrine and the
16 extent to which it's a change in the law.

17 I just wanted to address, Sir
18 Bethlehem, your opening question. I think I would
19 say that hypothetically each element could possibly
20 sustain a breach and maybe different breaches if
21 we're looking at Chapter 17, but it's hypothetical
22 and it's not possible to know, because the fact is
23 that this is applied as a single construct, as a
24 single test.

25 Certainly by 2005, two elements were

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<p style="text-align: right;">2034</p> <p>1 applied in a way that was a substantial departure 2 from international standards. But again, it's really 3 a hypothetical question because we're dealing with 4 the law that was applied to the Strattera and Zyprexa 5 patents. 6 SIR DANIEL BETHLEHEM: My question, 7 though, is whether it is quite so hypothetical. We 8 heard a lot of testimony, for example, going to the 9 AZT decision. I think if I'm recalling correctly, 10 elements 1 and 2 of the test were referenced back in 11 the judgment itself to Monsanto. The point that was 12 made was that element No. 3 was just invented out of 13 wherever. What I think we were trying to get at with 14 this question is whether it's Claimant's position 15 that at the point that Justice Binnie articulated the 16 Canadian court's decision in AZT, whether it would 17 have been your contention that there was a breach of 18 NAFTA. 19 MS. WAGNER: Again, I think it depends 20 what provision of NAFTA you're referring to. It 21 would, in the terms of 1709(8), it would be a law 22 that was not previously applied when the Strattera 23 and Zyprexa patents were filed and granted. In other 24 contexts, we simply don't know what the impact of the 25 AZT decision would have been if taken on its own and</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2035</p> <p>1 not in combination with the other elements. And in 2 particular, in combination with the promise element. 3 And we would disagree that the promise element has 4 the antecedents that Canada maintains that it has. 5 But I'll get into that further in the context of the 6 presentation. But if that answers your question. 7 SIR DANIEL BETHLEHEM: Thank you. 8 I'll wait to hear more. 9 MR. BORN: I'd like to just pursue it 10 just one more round, if I can. You said I think I 11 would say that hypothetically each element could 12 possibly sustain a breach, and then you went on to 13 say that's just hypothetical. But since we're in the 14 world of hypotheticals, suppose the Tribunal were to 15 disagree with you with regard to one of the three 16 elements. Is it your case that the other two 17 elements -- or one of the other two elements would be 18 capable, independently, of constituting a breach? 19 MS. WAGNER: Again, I think that's 20 very difficult to determine, because although we have 21 considered them as elements, it is one legal 22 requirement. And that's what was applied to the 23 patents in this case, and that was also what was 24 applied at least by 2005 that began the stream of 25 invalidations on inutility grounds that were not seen</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2036</p> <p>1 before. 2 So again, if you're looking at 3 discrimination and you're looking at impact, you 4 don't see that impact until a few years after 2005 5 when things really get rolling or as of 2005 and then 6 really picking up around 2008. But I think it will 7 become clear as we go through the elements of the 8 doctrine, certainly the promise element sets an 9 elevated standard that's quite unique and different 10 and a departure from prior law. But so did the other 11 elements. They each depart from prior law very 12 significantly and radically in our view. 13 MR. BORN: Thank you. 14 MS. WAGNER: So my points of argument 15 are as follows: First, the promise utility doctrine 16 is new. It's applied as a single construct before 17 the Patent Office and the courts. It's fundamentally 18 different than the requirement that applied when 19 Lilly's patents were filed and granted, and there's 20 no dispute that it was applied in this case to revoke 21 the patents. 22 Second, each element of the law is 23 new. And this is an answer to Tribunal question 29. 24 And each is a complete reversal from prior law, each 25 element. And applied together in each case the</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2037</p> <p>1 result is an incoherent doctrine that sets the bar 2 for utility much higher than before and much higher 3 than anywhere else. And third, the purported policy 4 rationales advanced by Canada, we submit, do not 5 explain the dramatic increase in inutility 6 invalidations since 2005. The change in the law is 7 what explains that. And the doctrine does not serve 8 to ensure the patent bargain. Instead it resulted in 9 the revocation of Lilly's patents which met that 10 bargain. 11 Canada's attempt to conflate utility 12 with other patent law requirements such as the 13 inventive step or non-obviousness requirement or the 14 enablement or sufficient disclosure requirement is an 15 after-the-fact attempt to explain why so many patents 16 are being invalidated on this ground now and they 17 weren't before. But we submit it's a failed attempt 18 because Lilly's patents fulfilled all these criteria 19 when they were filed and granted and in fact they 20 fulfilled these criteria when they were challenged. 21 And Lilly's patents were revoked only by application 22 of this new legal construct. And it was surprising 23 to Lilly when that happened because the law, as we've 24 seen, is applied inconsistently and even under the 25 existence of the doctrine, they may have assumed they</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2038</p> <p>1 could prevail. But they did not. 2 What is the doctrine? Courts find 3 promises beyond the use of the claimed invention. 4 These promises elevate the standard, but post-filing 5 evidence is no longer considered. And evidence to 6 support predicted utility has to be disclosed in the 7 application itself, which the courts have referred to 8 as a "heightened requirement." 9 This table of contents taken from a 10 case at Exhibit C-48 depicts how this is applied in 11 each case that comes before the courts now. In this 12 judgment, this consumed 183 paragraphs of the 13 judgment and in contrast to the simple inquiry in 14 prior law which is, was the claimed invention useful? 15 The court considers whether promises have been 16 demonstrated or soundly -- or determines what the 17 promise of the patent is, considers whether those 18 promises have been demonstrated or predicted, and 19 must then differentiate between demonstration and 20 prediction because this has implications for the 21 invocation of the heightened disclosure rule. 22 The construct is new, and Canada has 23 not shown otherwise. In fact, while Canada's 24 Canadian law expert, Mr. Dimock, had asserted that at 25 least the promise element was applied in prior law,</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2039</p> <p>1 an assertion that we say is incorrect, even he 2 conceded that in no case prior to 2005 did the court 3 find a patent invalid for failure to demonstrate a 4 promised utility. And why is that? It's because 5 this framework of the law, this construct, did not 6 exist. 7 So a comparison using Canada's Manual 8 of Patent Office Procedure between the prior utility 9 requirement, which was in effect when Lilly's patents 10 were filed and granted, and the current requirement 11 shows or illustrates how completely different they 12 are. And the Patent Office witnesses that you heard 13 from during the proceeding agreed that the MOPOP is 14 not the law but that it reflects the law and it's a 15 guide that's used by examiners and agents. 16 And the 1990s MOPOP reflected a simple 17 test for utility. An invention must not be totally 18 useless and must have application in industry. 19 Utility had to be apparent, but no other disclosure 20 obligation was imposed. And these excerpts are from 21 C-54 and C-55. 22 At the time in the MOPOP, it was the 23 Northern Electric case that provided the authority 24 for the court's understanding of utility, and it 25 stood for the simple proposition that the claimed</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2040</p> <p>1 invention must be operable for the purpose for which 2 it was designed. 3 The utility requirement when Lilly's 4 patents were filed and granted was also consistent 5 with international understandings of the requirement 6 as they existed then and also as they exist today. 7 And as an example here, the Patent Cooperation Treaty 8 guidelines provide guidance for the preliminary, 9 non-binding review that's conducted under that 10 treaty. And they, too, consider whether the claimed 11 invention is inoperative or clearly non-operable or 12 without application in industry. And this is Exhibit 13 C-194. 14 Contrast this to the 2009 and 2010 15 MOPOPs, a dramatic change. Now operability means 16 that promises must be established no later than the 17 filing date. And where these promises are said to be 18 based on a prediction, it must be supported by 19 evidence included in the description. This is 20 Exhibit C-59 and C-60. And we can see that today's 21 requirement as it exists now, it's complicated, it's 22 onerous, and it's uncertain in its application. 23 Though it is well-established as a legal doctrine. 24 Here we have a contemporaneous 25 document produced by the Canadian Patent Office in</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2041</p> <p>1 this proceeding that shows that shortly after the 2 overhaul in the MOPOP, the Patent Office provided 3 guidance to examiners on the new requirements. We 4 submit you wouldn't need such detailed guidance if 5 this was such long-standing law. 6 Here, Consolboard is cited for the 7 promise analysis, although as our Patent Office 8 witness, Mr. Murray, had testified it was not cited 9 for this purpose in the 1990s. The 2002 AZT decision 10 is cited in support of the requirement to establish 11 promised utility based on demonstration or 12 prediction, and then the recent 2009 and 2010 13 decisions are cited for the proposition that 14 affidavit evidence now is only accepted where the 15 utility is thought to be demonstrated, but can't be 16 used for sound prediction. 17 These concepts are inherently 18 difficult to apply. How is the office to consider 19 promises of utility now that these are assessed as 20 potential additional requirements over and above the 21 basic use of the claimed invention? In what 22 circumstances will they be thought to be demonstrated 23 versus merely predicted? But it matters, because in 24 the latter case, all the evidence has to be in the 25 patent itself. They're difficult questions, and the</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2042</p> <p>10:41</p> <p>1 examiners had difficulty answering them. In this 2 exercise of nine examiners, three would have allowed 3 the application. Three would have objected to the 4 application. And three were on the fence. The 5 guidance session was held, but afterwards the polling 6 done brought no change in the outcome. It's an 7 incoherent construct today, even when the law is 8 known, but it presents an impossible construct for 9 patentees who have had to contend with it before the 10 courts where the requirement is applied retroactively 11 to invalidate patents that were filed when it did not 12 exist.</p> <p>13 Turning now to my second point of 14 argument. It's our position that not only is the 15 construct new. Each element of it is also a radical 16 change. I'll start with discussing the promise 17 element.</p> <p>18 This graphic illustrates what 19 characterizes the promise element, and in Canadian 20 law, as you heard, the patent specification is 21 defined in law as the entire patent, claims and 22 disclosure. It's the claims that define the scope of 23 exclusivity. The disclosure is intended to fully 24 disclose the invention and how to make and use it. 25 And it's always been uncontroversial that the claimed</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2043</p> <p>10:43</p> <p>1 invention must be operable. If the claimed invention 2 is, as here, useful to treat glaucoma, the invention 3 cannot be inoperable for that purpose. And that use 4 will probably also be stated in the disclosure.</p> <p>5 But what's new is that under the 6 promise approach, the court may find additional uses 7 based on statements from the disclosure or even 8 statements implied from the disclosure. And this 9 stands contrary to the basic patent law principle 10 that what is not claimed is disclaimed. Patentees 11 would not expect statements in the disclosure to be 12 taken as promises, and it becomes particularly 13 significant when this promise element is applied as 14 it is in conjunction with other elements of the 15 current utility requirement, because not only must 16 the promises be true; they have to be established on 17 work done pre-filing. And if it's not enough to 18 demonstrate utility, such that it must be based on a 19 prediction, that work will be disregarded if it's not 20 in the patent itself.</p> <p>21 If the requirement is clinical 22 effectiveness in the long term based on the promise, 23 it may be impossible to establish this prior to the 24 filing date. Not least because disclosure of such 25 testing may mean that the patent will no longer meet</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2044</p> <p>10:44</p> <p>1 other patentability requirements. And we referred to 2 this in our opening as a catch-22 situation.</p> <p>3 We've changed the order in the slides 4 as compared to what's in your hard copy, so if you 5 want to look at your hard copy, you'll have to 6 advance a few pages to page 61. Then we'll come 7 back.</p> <p>8 It's not simply Lilly that's 9 asserting, without foundation, that finding these 10 promises that go above the use of the claimed 11 invention is contrary to patent law concepts. In 12 these proceedings, Canada's U.S. expert witness, 13 Mr. Holbrook, seemed to assume -- this is at 1476 of 14 the transcript -- that utility would be assessed by 15 reference to the claimed invention. It was taken as 16 a given, and he didn't even seem to realize that 17 Canada had departed from this approach. He based his 18 testimony on it but didn't realize it. And that 19 utility is assessed by reference to the claimed 20 invention is also part of the understanding of the 21 utility requirement internationally. Again, we have 22 PCT guidelines and whether considered as a matter of 23 utility or industrial applicability, the focus 24 remains on the claimed invention. This is 25 Exhibit C-194.</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2045</p> <p>10:45</p> <p>1 Now, we heard a lot about Consolboard, 2 and as we know, the Canadian courts today rely on 3 Consolboard as an authority for a bifurcated 4 standard. A mere scintilla of utility is all that's 5 required unless the courts find additional promises 6 that go beyond the use of the claimed invention. 7 Consolboard is at C-118. It's a 1981 decision, so it 8 raises the question did this bifurcated approach 9 exist as of 1981 or perhaps even earlier? Did 10 Consolboard confirm it?</p> <p>11 As we reviewed during the course of 12 the hearing, the language that today is interpreted 13 to give rise to this notion of a bifurcated standard 14 is on the slide, and its utility means that the 15 invention will not work, either in the sense that it 16 will not operate at all or, more broadly, that it 17 will not do what the specification promises that it 18 will do.</p> <p>19 But it's our submission that 20 regardless of the meaning attributed to this 21 language, the evidence does not support that 22 Consolboard or any other decision prior to 2005 was 23 understood to impose the bifurcated standard that we 24 see today. Before 2005, the jurisprudence didn't 25 articulate this and the jurisprudence didn't apply</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2046</p> <p>10:47</p> <p>1 this. In every case the courts considered what is 2 the utility of the claimed invention, and is it 3 operable for its intended purpose. 4 At most, we'd argue that prior to 5 2005, the phrase "or more broadly, that it will not 6 do what the specification promises that it will do" 7 might be taken to mean that if the invention claims a 8 particular result, it must be operable for that 9 purpose. Because there is not always a use that is 10 specifically claimed. 11 There were certainly cases that we saw 12 that stood for this unremarkable proposition, and the 13 operative language here is "promises in the 14 specification" which is defined to necessarily 15 include the claims. But the Consolboard decision 16 itself, when it was cited for utility, was 17 consistently cited for the proposition that an 18 invention met the utility requirement if it worked. 19 And that was how it was considered until 2005 when 20 it's clear that new meaning was given to this phrase. 21 During the course of these proceedings 22 Canada searched far and wide to present the 2005 23 cases, which Canada's expert Mr. Dimock seemed to 24 concede were the first to really apply the modern 25 approach, as having simply resurrected an already</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2047</p> <p>10:48</p> <p>1 existing and latent promise analysis. But we would 2 submit to you that what we see today is not the 3 dusting-off of an old concept. It's a new way of 4 doing things. And we know this because we have here 5 Mr. Dimock's chart, and he put up a lot of decisions, 6 but not one sets the requirement for utility by 7 reference to additional promises that go beyond the 8 basic use of the claimed invention. 9 Several of the cases he cited stand 10 for the simple proposition that to be useful, the 11 claimed invention must work. In other cases, a 12 patent was held invalid because the claimed invention 13 was inoperable. 14 In some of the cases the word 15 "promise" was used simply to refer to the basic use 16 of the invention, but no similar analysis was 17 applied. 18 One case that was on the chart was a 19 UK case which applied the doctrine of false promise 20 that used to exist in UK law. It's not a Canadian 21 case. Several of the cases that were cited by 22 Mr. Dimock actually rejected an analysis that would 23 be similar to today's promise approach. And then 24 Mr. Dimock relied on a number of commentators that 25 for the most part discussed the cases that were</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2048</p> <p>10:50</p> <p>1 already on the timeline, and I'm going to return with 2 a few words about the commentators later. 3 Mr. Dimock included the filing dates 4 for the Zyprexa and Strattera patents on the chart, 5 but at the time those patents were filed, the 6 requirement was that the claimed invention be 7 operable at the date of challenge and with no 8 requirement to even disclose the utility, much less 9 proof of utility. 10 So turning to the second element, the 11 bar on post-filing evidence, a product of the 2002 12 decision of the Supreme Court of Canada. This was a 13 significant change in the law, and it had dramatic 14 impact when placed in the context of the current 15 utility requirement. And contrary to how Canada has 16 attempted to characterize it, the decision certainly 17 was not an implementation of one part of Canada's 18 current utility requirement. It preceded the other 19 elements, and it has become central in the context of 20 the doctrine because additional promises, high 21 promises like clinical effectiveness, are very hard 22 to show based only on work done pre-filing. This 23 means that the patentee now must often rely on 24 predicted utility, which also gives rise to the 25 unanticipated heightened disclosure requirement.</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2049</p> <p>10:51</p> <p>1 Canada's attempt to assert that AZT 2 did not introduce the bar on post-filing evidence is 3 surprising because the evidence is starkly to the 4 contrary. You have the representations of generic 5 company Apotex when it attempted to amend its 6 pleadings in a case after the AZT decision on the 7 basis that AZT had changed the law. And the judge 8 considered Apotex's motion to amend and agreed with 9 Apotex that AZT had, in fact, changed the law. It is 10 Exhibit C-533 and C-532. 11 The decision of the judge that had 12 affirmed this change in the law was raised with 13 Canada's expert witness, Mr. Dimock, during 14 cross-examination and he noted that the decision had 15 been appealed. And in redirect, Counsel for Lilly 16 had asked Mr. Dimock whether that Court of Appeal 17 decision had any bearing on the motion judge's 18 finding, and his response was that the Court of 19 Appeal had overturned the motion judge's decision and 20 did not allow Apotex to amend its pleading but that 21 was because Apotex had waited too long to try and 22 amend. 23 I submit to you that what the Court of 24 Appeal did not do was take issue with the trial 25 judge's conclusion that AZT had changed the law.</p> <p style="text-align: center;">www.dianaburden.com</p>

<p>1 Canada's Patent Office witness, 2 Dr. Gillen, had stated that AZT marked a new 3 development in the law, and Canada's Canadian law 4 expert, Mr. Dimock, did the same. He was unable to 5 point to a single case before 2002 where the court 6 did not allow a patentee to rely on post-filing 7 evidence. AZT changed the law. It's at 8 Exhibit C-213.</p> <p>9 You heard during the course of the 10 proceedings that, well, at least this decision was 11 ostensibly connected or related to an objective 12 that's at least relevant to the utility requirement, 13 deterrence of speculation. We submit that the 14 decision cannot be viewed independently of Canada's 15 utility requirement. Rather, this decision 16 illustrates how the requirement operates as a unified 17 construct. The elements of the construct, possibly 18 problematic individually -- certainly problematic 19 individually -- become more so because they are 20 applied as one test. And the court in AZT actually 21 surmised that there would be few challenges to 22 products that actually worked as a result of the 23 change in the law, but that's not what transpired. 24 In fact, the patent in AZT was upheld, but the result 25 may not be different if today's requirement was</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>2050 10:53</p>	<p>1 applied. 2 Like Strattera, the claimed invention 3 in AZT was a known compound for a new use. That was 4 prevention and treatment of HIV/AIDS. There's no 5 doubt that that is a chronic condition. But unlike 6 in Strattera, the court in AZT didn't read in an 7 additional promise of clinical efficacy in the longer 8 term based on the chronicity of the disease and as a 9 result, based on in vitro studies alone, the utility 10 of AZT was held to have been soundly predicted as of 11 the date of filing. And although AZT stated a test 12 related to disclosure that was later interpreted as 13 imposing a heightened requirement, evidence from 14 outside the patent was, in fact, relied on by the 15 court, as testified to by our experts. And it's 16 possible -- this is what you have to consider. It's 17 possible that a patentee may be able to show the 18 treatment of HIV/AIDS is soundly predicted based on 19 pre-filing evidence alone, absent the higher promise 20 standard. And that was the holding in AZT. And it's 21 possible, and actually it's even very likely, that a 22 patentee may be able to show clinical efficacy in the 23 longer term based on post-filing evidence such as 24 commercial success. But under the promise utility 25 doctrine, patentees are confronted with the</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>2051 10:54</p>
<p>1 requirement to potentially show long-term clinical 2 effectiveness of a drug based only on pre-filing 3 evidence, which may be impossible. Especially when 4 it's combined with the additional requirement that 5 evidence to support a prediction must be in the 6 patent itself.</p> <p>7 So the interaction between the 8 elements of the test brings us back to the prior law 9 commentators, some of whom did seem to suggest that 10 Canada had or potentially could adopt a false promise 11 doctrine similar to that which was abolished in the 12 UK in the 1970s. And perhaps this gives us some 13 context for the types of warnings that the 14 commentators were making that we heard about, be 15 chary of making certain comments in the specification 16 and these types of statements. Even though a false 17 promise analysis was not actually applied in Canada.</p> <p>18 But it's essential to realize that 19 even if the promise element of the current test had 20 some antecedent in this old English concept, the test 21 that is applied today bears no similarity to the 22 doctrine that was abolished in the UK in 1979. It's 23 radically different from anything that went before 24 anywhere. As Professor Siebrasse had testified, the 25 old UK false promise doctrine required material</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>2052 10:56</p>	<p>1 statements in the patent to be false in fact. It 2 wasn't actually a utility requirement. It was based 3 on the discretionary grant of letters patent in the 4 UK and the false promises didn't always relate to the 5 utility at all. If there's any comparator in modern 6 Canadian law it's in section 53 of the Patent Act, as 7 we heard, which provides a statutory framework to 8 address material, untrue representations that are 9 willfully made. And as was noted in the course of 10 the proceedings, Lilly's Zyprexa patent was 11 challenged on this basis, and the challenge was 12 rejected because the court found that there were no 13 untrue statements made in the patent. But Canada's 14 current promise utility doctrine, or the current 15 utility test, doesn't bear any resemblance to UK 16 false promise or to section 53 of the Patent Act. 17 It's presented as a utility requirement, though it's 18 a layered on or additional test and, key, it requires 19 the promises to be established as of the date of 20 filing. It's not a false in fact analysis. It has 21 no materiality requirement and it's coupled with a 22 heightened disclosure requirement that is 23 considered -- and I'll return to this -- to be part 24 of the statutory test for utility, not part of the 25 traditional disclosure requirement. And that arises</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>2053 10:57</p>

<p style="text-align: right;">2054</p> <p>10:58</p> <p>1 only where utility is based on a prediction. 2 Turning to the third element of the 3 test, the evidence again appears uncontradicted that 4 the heightened requirement to include proof of sound 5 prediction within the patent itself is new. The 6 court in the Strattera case that's at issue in these 7 proceedings actually tied the new disclosure rule to 8 the 2008 Raloxifene decision. The court did observe 9 that it was in the AZT decision that the requirement 10 was stated, but as per paragraph 118 of the judgment, 11 held that it was applied in 2008 in the Raloxifene 12 decision. And the Strattera decision is at C-160. 13 While the decision of the Supreme 14 Court in Canada certainly made obiter statements 15 about the disclosure requirement in the context of 16 sound prediction, courts that considered the issue 17 after AZT but before Raloxifene did not interpret AZT 18 as requiring the studies that provide the foundation 19 for the prediction to be in the patent itself. This 20 is Exhibit C-215, a Court of Appeal judgment from 21 2007. And in this decision the court considered a 22 rat study that was done after the priority patent was 23 filed, and on cross-examination, Canada's expert, 24 Mr. Dimock, had confirmed that it was reasonable to 25 assume that that study was not in the Canadian filed</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2055</p> <p>11:00</p> <p>1 patent application since its addition to the priority 2 application would have given rise to a risk of loss 3 of priority. 4 And the Canadian Patent Office also 5 ties the new requirement that proof or evidence to 6 support a prediction be in the patent itself to the 7 2008 Raloxifene decision and, as well, to subsequent 8 decisions. And this is Exhibit C-68 and C-491. 9 Canada's expert, Dr. Gillen, agreed that the 10 Patent Office only considered it a requirement to 11 include the factual basis and sound line of reasoning 12 within the patent itself after the 2008 and 2009 13 decisions. He had testified that after the AZT 14 decision there was a question as to whether the 15 disclosure requirement was in the application itself 16 or whether the support could be provided at some 17 later date. And he confirmed that it was only after 18 Raloxifene that it was considered a requirement. 19 This is the transcript, 963-964. 20 And contemporaneous evidence at the 21 time, as issued by Mr. Reddon's law firm, considered 22 the requirement to be new and characterized the 23 requirement as a watershed decision. And that's 24 C-499. 25 So we submit to you that each element</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2056</p> <p>11:02</p> <p>1 of Canada's law marks a dramatic departure from prior 2 law. It's a reversal in every sense. For the 3 promise element, before the change in the law, courts 4 had actually rejected the idea that utility could be 5 defined or ought to be defined by statements in the 6 disclosure if not claimed. After 2005, it's 7 commonplace for the courts to find additional 8 promises that go beyond the use of the claimed 9 invention and even multiple promises and even implied 10 promises. 11 As regards post-filing evidence, we 12 see that prior to the change in the law, the notion 13 of sound prediction was a defense, and it was 14 relevant only in the context of a claim for a class 15 of compounds where some had not yet been tested. And 16 per the Monsanto decision of the Supreme Court of 17 Canada, the burden was on the challenger to show that 18 a prediction was unsound. Today it's a completely 19 different context and a completely different 20 situation. Today sound prediction is a sword. In 21 fact, people refer to it as a doctrine of sound 22 prediction as a way to invalidate patents because 23 patentees had difficulty actually demonstrating that 24 the utility requirement is met when it is based on 25 elevated promises, and so they have to now rely on a</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2057</p> <p>11:03</p> <p>1 sound prediction. And that leads to an additional 2 requirement that the evidence had to be in the patent 3 itself. Although as the patentee, you have no idea 4 when you come before the court did I demonstrate 5 utility? You thought you demonstrated utility, but 6 if the evidence is considered to be insufficient, 7 then if it's not in the patent itself, it's 8 disregarded. It's a wholly irrational rule. 9 Then turning to the issue of 10 disclosure of utility, in prior law applicants were 11 always allowed to present more materials to show that 12 utility was met and there was no expectation 13 otherwise. Today, where sound prediction is relied 14 on -- which I note is often the case due to the 15 onerous standard imposed by the promise -- and an 16 inability to successfully assert utility is 17 demonstrated, there's an inability to do that, then 18 the support must be in the patent itself for the 19 prediction. 20 The result of these changes. Each a 21 significant reversal in their own right applied as 22 one test. A dramatic spike in inutility 23 invalidations in the pharmaceutical sector starting 24 in 2005 as depicted by this figure. And contrary to 25 what was initially suggested by Canada's expert</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2058</p> <p>1 witness, Mr. Dimock, the spike in these invalidations 2 is certainly not explained by the rise of or the 3 advent of the patented medicine notice of compliance 4 regulations and the increase in litigation in the 5 pharmaceutical field. 6 As is shown here, the PM(NOC) 7 litigation was introduced or the ability to make use 8 of that form of litigation was introduced in 1993 and 9 from that time until 2005 there were no inutility 10 allegations. But after 2005, the statistics changed 11 very dramatically. And this is an updated chart 12 based on Professor Levin's errata, so it includes the 13 additional cases. And, in fact, Canada's expert 14 witness, Mr. Dimock, conceded that from 1993 to 2004, 15 there was not a single PM(NOC) decision in which a 16 pharmaceutical patent was found to lack utility. And 17 as we saw after 2005, there have been many. 18 So coming to the third point of 19 argument, Canada has put forward certain arguments to 20 try and explain why we're seeing so many 21 pharmaceutical patents fall on grounds of inutility 22 now when, according to Canada, the law has not 23 changed. And Canada uses these same arguments to 24 present the promise utility doctrine as being a 25 longstanding feature in Canadian law with solid</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2059</p> <p>1 policy underpinnings. This doesn't work. The law 2 has changed. And it's changed for largely 3 inexplicable reasons, because all of the purposes 4 that Canada says are served by the promise utility 5 doctrine are already addressed by other patent law 6 requirements that have long been part of Canadian 7 patent law and that continue to exist today. The 8 promise utility doctrine is a layered on, additional 9 requirement not seen in prior law and not seen 10 elsewhere. And Canada has focused in these 11 proceedings so much on new use and selection patents, 12 it would not be surprising if you were left with the 13 impression that this is the only type of patents to 14 which the promise utility doctrine has been applied. 15 That it's only these types of patents to which it's 16 relevant and for which it is required. That's not 17 true. All types of pharmaceutical patents have been 18 held to lack utility under the doctrine, including 19 new compound patents. 20 Especially with respect to selection 21 inventions, Canada has attempted to portray the 22 promise utility doctrine as playing some of the role 23 of the inventiveness or non-obviousness requirement, 24 and in this way they try to present the doctrine as 25 valid in its application to these types of patents,</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2060</p> <p>1 although it's not only these types of patents that 2 are affected, and as comparable to other 3 jurisdictions. But there are several problems with 4 this <i>post hoc</i> justification of the change in the law. 5 The first is that the new utility 6 requirement does, in fact, layer on an additional 7 obligation that goes beyond what is needed to meet 8 the patent bargain for these inventions. And this is 9 aptly identified by the Zyprexa case. From the 10 perspective of obviousness the court held there would 11 be a need to have advantages over compounds of a 12 genus in order to be patentable. And the obviousness 13 requirement was met. And the cases are at Exhibit 14 C-46 and C-146. But the promise utility doctrine 15 went much further. Promises were read from the 16 disclosure requiring marked superiority over all 17 other known anti-psychotics, and in addition, that 18 this be shown by long-term studies. And second, 19 considering these promises as a matter of utility now 20 has dramatic implications because of the onerous 21 requirements applied by the doctrine as a whole. 22 Post-filing evidence can't be considered, which is 23 not the case for the obviousness assessment. 24 Evidence to support predicted utility must be 25 disclosed in the patent itself, which again layers on</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2061</p> <p>1 an additional onerous requirement. 2 As is the case in potentially every 3 case in which the promise utility doctrine is 4 applied, the bar is significantly raised because the 5 patentee now has to have long-term studies at the 6 date of filing that establish marked superiority in 7 this case over all other known anti-psychotics. It's 8 a high burden, and it does not comport with what is 9 customarily required to show that the patent bargain 10 has been met for selection inventions. 11 In fact, the extent to which this is a 12 <i>post hoc</i> justification is again assembly identified 13 in the Zyprexa case because during examination by the 14 Patent Office, Lilly was asked to provide evidence to 15 support the inventiveness or non-obviousness of 16 Zyprexa, and it did so. And this Exhibit is an 17 office action that was issued to Lilly in 2003 asking 18 for additional support relating to inventiveness. 19 It's at Exhibit C-63. And Lilly responded to that 20 and, in fact, most of the response was based on 21 pre-filing evidence, but one piece of post-filing 22 evidence was submitted, and it met the burden and 23 then it met the obviousness burden again when it came 24 before the courts. But the burden that Lilly could 25 not meet was the additional burden that was imposed</p> <p style="text-align: center;">www.dianaburden.com</p>

<p>2062</p> <p>11:11</p> <p>1 by the promise utility doctrine and that did not 2 exist when its patents were filed and granted. 3 And Canada's own expert, Mr. Dimock, 4 has argued in other cases that the obviousness or 5 inventive step requirement ought not to be conflated 6 with the utility requirement, and he testified that 7 he stands by that submission today. And that may be 8 why we didn't hear more about the reading up/reading 9 down theory that was addressed by our expert, 10 Mr. Reddon, who explained that the courts don't 11 consistently treat inventive step and utility as the 12 same, though a few courts have advanced this as a 13 <i>post hoc</i> justification for the promise analysis. 14 The promise utility doctrine is 15 applied in these cases because it's applied in every 16 case, not because of some relationship with another 17 patentability requirement. 18 Strattera. Canada tries to present 19 the Strattera decision as a normal application of 20 Canadian principles of claim construction, and this 21 is also not supportable. Canada's own expert, 22 Mr. Dimock, had said in his Expert Report that the 23 promised utility in the Strattera case was, in fact, 24 derived from the disclosure of the patent. And I'm 25 referring to paragraphs 186-187 of his First Report.</p> <p>www.dianaburden.com</p>	<p>2063</p> <p>11:12</p> <p>1 The additional promise that the court 2 construed set a significantly higher bar than the 3 claimed invention requiring effective treatment in 4 the longer term. Again based only on pre-filing 5 evidence. The Strattera decisions are at C-67 and 6 C-160. And this had serious consequences. Because 7 based on this higher standard, the court rejected 8 that Lilly was able to demonstrate utility with the 9 MGH study. And this meant that Lilly had to assert 10 that utility was soundly predicted, but this meant 11 that the evidence to support its prediction could not 12 be considered because it wasn't in the patent itself, 13 even though they would have had no idea that this 14 requirement existed and even though they filed a PCT 15 application and this was not a requirement that was 16 permissible under the PCT. 17 And even if the court's analysis has 18 been presented as a matter of claim construction, it 19 would still have to be considered as a claim 20 construction exercise that is a marked departure from 21 settled claim construction principles, including that 22 resort to the disclosure is not permitted to vary the 23 scope or ambit of the claims. So no matter how it's 24 viewed the exercise applied in Strattera and in other 25 cases remains a unique by-product of the promise</p> <p>www.dianaburden.com</p>
<p>2064</p> <p>11:14</p> <p>1 utility doctrine. 2 The additional disclosure rule. As 3 regards to this heightened requirement, I submit to 4 you that it cannot reasonably be viewed as flowing 5 from Canada's longstanding requirement or associated 6 with the requirement that patentees provide 7 sufficient disclosure of their invention. It's a 8 new, unique requirement that is part of the law of 9 utility, and recent courts, including the Supreme 10 Court of Canada in 2002, Exhibit C-197, confirm that 11 this additional disclosure requirement is situated 12 within the test for utility found in section 2 of the 13 Act. And according to the courts -- and a lower 14 court considered this matter at C-48 -- there's no 15 basis for the heightened or additional disclosure 16 obligation within the normal, sufficient disclosure 17 part of the Act, which is in section 27 of the Act. 18 It's simply not a sufficiency or enablement 19 requirement. And Canada justifies this additional 20 burden as part of the <i>quid pro quo</i> for the patent 21 bargain, but it's to state the obvious that taking 22 the context of the Strattera patent, the contribution 23 to society made by the invention is no less if the 24 MGH study is in the text of the patent itself, as 25 opposed to having been published in a peer reviewed</p> <p>www.dianaburden.com</p>	<p>2065</p> <p>11:15</p> <p>1 medical journal. The contribution to society is the 2 use of the molecule. And generic companies don't 3 seek to replicate the MGH study but rather to make 4 and sell Strattera and they were of course able to do 5 so based on the information in the patent, and that 6 the heightened disclosure requirement is an 7 additional or enhanced requirement that has nothing 8 to do with the requirement to enable or sufficiently 9 describe is also apparent from the Zyprexa decision 10 at issue in these proceedings. Sufficiency of 11 disclosure was advanced as a separate challenge and 12 rejected because, as the court stated, the 13 '113 patent describes the compound of the invention, 14 its advantages and how to make it and the range 15 within which it can be dosed. This is the normal 16 enablement-sufficient description requirement as set 17 out in Canada's Patent Act as contemplated by the 18 Patent Cooperation Treaty and as in line with the 19 expectations of patentees when they are preparing 20 their patent applications. The enhanced disclosure 21 requirement is part of Canada's current utility 22 requirement and it's a requirement that didn't 23 previously exist in Canada and does not exist 24 elsewhere and could not have been anticipated. 25 So in sum, Canada's current utility</p> <p>www.dianaburden.com</p>

<p style="text-align: right;">2066</p> <p>11:16</p> <p>1 requirement is an outlier. It's dramatically 2 different from prior law and it's dramatically 3 different from the law in the other NAFTA parties. 4 In other jurisdictions, as we heard in testimony, the 5 debate about utility usually occurs right off the 6 chart, right off this continuum at the bottom, 7 because the debate occurs for inventions that are 8 attempted to be patented so far upstream that the 9 issue is whether they identify a use at all. And 10 that's like the gene fragments in the In re Fisher 11 case that came up in the U.S. expert testimony. It's 12 also well recognized that totally impossible 13 inventions will not meet the threshold for utility. 14 And Canada's traditional utility test, like Mexico 15 and the United States, required the claimed invention 16 to be operable and capable of use in industry. 17 Uncontroversial. But today, moving far up the 18 continuum, depending on what additional promises are 19 construed, the current promise utility doctrine sets 20 an extremely high bar. In some cases requiring 21 clinical studies showing long-term effectiveness 22 before the patent application is filed. The doctrine 23 is an outlier and it is radically so. 24 THE PRESIDENT: Would this be a good 25 moment for a break?</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2067</p> <p>11:18</p> <p>1 SIR DANIEL BETHLEHEM: May I just ask 2 a question following on this before we break. 3 Just for sake of the discussion, if we 4 accept everything that you say about Canada's utility 5 doctrine, does this mean that in Claimant's view, 6 Claimant would have had a cause of action in respect 7 of the Raloxifene decision in 2008? 8 MS. WAGNER: As stated in opening, the 9 issue is that the application of the doctrine is 10 uncertain in every case. So when Lilly came before 11 the courts with respect to the Zyprexa and Strattera 12 patents as well as the Raloxifene patent, they had no 13 idea whether they would win or lose. 14 SIR DANIEL BETHLEHEM: I understand 15 that, and I'm not seeking to follow this through -- 16 follow the argument through. I'm just trying to 17 establish whether if we accept everything that you 18 say about the newness of the Canadian, as you 19 describe it, promise utility doctrine, does that mean 20 that in response to the judgment of Hughes J. in 2008 21 in respect of Raloxifene, that you would have had a 22 cause of action in respect of the Raloxifene patent? 23 MS. WAGNER: Technically probably no, 24 although we didn't have to contend with this issue, 25 because it was not finally invalidated in those</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2068</p> <p>11:19</p> <p>1 proceedings. The patent was not revoked, if you 2 will. There were PM(NOC) proceedings. The leave to 3 appeal that was sought to the Supreme Court of Canada 4 was in the context of PM(NOC) proceedings. Had Lilly 5 continued down a path of litigation, they would have 6 been entitled to bring an infringement action, and 7 then that would have -- if the same doctrine had been 8 applied there and that had gone before the courts, of 9 course it would be the same claim as exists today. 10 But that was not the case. The decision was not a 11 revocation of the patent. 12 SIR DANIEL BETHLEHEM: Thank you. 13 THE PRESIDENT: Thank you. 15 minutes 14 break. 15 <i>(Recess taken)</i> 16 THE PRESIDENT: Ms. Cheek, please 17 continue your closing statement. 18 MS. CHEEK: Thank you. 19 Mr. Berengaut and I will now address 20 Lilly's claims under Article 1110, which I will 21 address, and Article 1105, which Mr. Berengaut will 22 address. We'll also do our best to provide 23 preliminary responses to the Tribunal's questions 24 related to the violations NAFTA Chapter 11. 25 I'll begin as a threshold matter by</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2069</p> <p>11:39</p> <p>1 affirming, to the extent there is any doubt, that 2 patent rights are protected under NAFTA to the same 3 extent as other property, and Canada has continued to 4 argue at this hearing that patents are some kind of 5 conditional right, that once invalidated by a court, 6 they never existed in the first place. 7 In substance, that means Canada's 8 arguing that Lilly has no protected investment under 9 Canadian law and presumably, then, no protected 10 investment under the Treaty. But as with the time 11 bar, this is a jurisdictional objection that was 12 raised belatedly after Canada's Statement of Defense. 13 That said, let's go ahead and address it directly. 14 Canada does agree that patents are 15 property rights that are protected under NAFTA and 16 that Mr. Spelliscy said, at pages 298 and 299 of the 17 transcript, that "there are circumstances in which 18 patents can be taken or expropriated by the state. 19 So certainly patents are, in general, property 20 capable of being expropriated." 21 In this particular context, when the 22 revocation or the taking of the patent is done 23 through the courts, Mr. Reddon has testified that the 24 judicial declaration that the patent is invalid does 25 not change the fact that it was initially granted and</p> <p style="text-align: center;">www.dianaburden.com</p>

<p>2070 11:41</p> <p>1 when it was initially granted it was an immediately 2 enforceable property right from the date of grant. 3 Mr. Reddon testified at pages 818-822 of the 4 transcript that even when your patent is revoked by 5 the court, it does not undo any underlying licenses 6 that relied on that patent. It doesn't divest 7 regulatory agencies of their jurisdiction and 8 authority related to the pricing of patented 9 medicines, for example, and that really, the judicial 10 revocation void ab initio is for a simple practical 11 reason which Mr. Reddon explains here in the 12 transcript at page 820, which is, "The real effect 13 and intent of the judicial statement that a patent is 14 void ab initio is really only this: You can't sue 15 for damages on it anymore, and all the other bundle 16 of rights and commercial realities that existed under 17 the patent are not erased or unwound by the 18 declaration." 19 In other words, there just needs to be 20 some assurance that having had your patent 21 invalidated, you can't still sue for infringement 22 under the patent. And in that case it's a legal 23 fiction or a legal construct. Mr. Reddon's 24 explanation of how exactly reliance on patents 25 granted in Canada's system and the fact that a</p> <p>www.dianaburden.com</p>	<p>2071 11:42</p> <p>1 declaration when the patent is revoked that the 2 patent is void ab initio does not unravel any of that 3 reliance on the patent grant, has not been challenged 4 in this proceeding. It did feature prominently in 5 Mr. Reddon's presentation and in his Expert Report, 6 but we've never heard anything really to the 7 contrary, as Mr. Reddon has presented it to this 8 Tribunal. 9 Rather, what's clear is that a 10 successful validity challenge, as for the '113 and 11 '735 patents at issue here, revokes an existing 12 property right. 13 Canada does argue that somehow patent 14 validity litigation might be somehow different than 15 litigation over other property rights, but Canada has 16 failed to substantiate that point, and we can think 17 of other examples where you litigate real property, 18 but that doesn't necessarily undo everything related 19 to that property right in the first instance. So 20 what Canada has relied upon is the fact that there is 21 some uncertainty, of course, when you get your patent 22 as to whether, due to future litigation, the patent 23 will be invalidated. But as Canada stated at the 24 transcript at page 1325, I believe quoting their 25 Exhibit R-437, "Virtually all property rights contain</p> <p>www.dianaburden.com</p>
<p>2072 11:44</p> <p>1 some element of uncertainty when it comes to 2 litigation." 3 SIR DANIEL BETHLEHEM: Ms. Cheek, may 4 I just ask, are patents valued individually for 5 purposes of a balance sheet assessment of the value 6 of a company whether or not they're reflected -- but 7 would Lilly, for example, have an assessment of the 8 value of each of its patents for purposes of valuing 9 the company or selling a patent on to some purchaser? 10 MS. CHEEK: It could. It really is on 11 a case-by-case basis, company by company and based on 12 its patent portfolio. I believe Mr. Armitage did 13 testify as to the way in which Lilly assesses the 14 value of its patent portfolio, and although I don't 15 have a recollection of the exact cite at the moment, 16 we can certainly make sure that we point you in the 17 direction of Mr. Armitage's testimony in that regard. 18 SIR DANIEL BETHLEHEM: Thank you. 19 MR. BORN: Where does this issue fit 20 into the decision tree? 21 MS. CHEEK: It is, I believe, not on 22 Canada's decision tree, and, therefore, perhaps it's 23 a question for Canada. And I guess because from our 24 perspective, because the invalidation of the patent 25 is precisely the measure that we are challenging</p> <p>www.dianaburden.com</p>	<p>2073 11:45</p> <p>1 here, the legal measure that we challenge under 2 Chapter 11, its status as a matter of domestic law is 3 not relevant in that regard. And frankly, I don't 4 know if Canada means to concede this point or not, 5 since it wasn't in its decision tree, but it does 6 appear to accept the fact that if we had made purely 7 a denial of justice challenge based on the 8 invalidation of our patent, that we would be able to 9 bring a claim. And in order to bring a claim, we did 10 have to have some kind of valid investment. So it 11 may be that at this point the issue is moot. 12 SIR DANIEL BETHLEHEM: Isn't it simply 13 part of the analysis of 1110, expropriate an 14 investment, and there's been some discussion about 15 whether it's an investment and this is the question 16 of validity ab initio. Isn't that simply part of 17 item 4 on the decision tree? 18 MS. CHEEK: I guess you could look at 19 it that way. I'd note that Canada, in their opening 20 statement at 165-166 regarding the denial of justice 21 allegation said, "The Claimant could have made such 22 an allegation. It would have failed as a matter of 23 merit, but it could have done so under Chapter 11. 24 However, the Claimant never alleged a denial of 25 justice."</p> <p>www.dianaburden.com</p>

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1 So at least in accepting the principle 11:47
 2 that that would have been an investment for purposes
 3 of a claim of denial of justice, I don't know that
 4 Canada was limiting their objection solely to 1110,
 5 but perhaps that would be a question for Canada.
 6 THE PRESIDENT: This is still Tribunal
 7 time, don't worry. If you go to slide 18, your
 8 slide, there you find the decision tree of Canada,
 9 and earlier you stated that step 01, should come
 10 after 03, according to the Claimant. Maybe between
 11 01 and 4, there needs another step to be, and is
 12 there a breach of Article 1105 or 1110. Should we
 13 not have a step in between them? Unless you consider
 14 that as an issue, 04, because the way it's phrased
 15 here it says "did not breach" or should it be a
 16 question. This is Canada's thing. We are eagerly
 17 waiting for your new slide.
 18 MS. CHEEK: Perhaps this could be
 19 clarified on the new slide. Originally I think we
 20 thought that this objection, when it was first
 21 raised, would fall under the same bucket as 2 in that
 22 it was a jurisdictional objection raised as to
 23 whether we actually had any investment at all on
 24 which to bring the claim. And that is the way to
 25 which we responded to it because we saw it at the

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1 time as untimely. But then we proceeded to address 11:50
 2 the decision on the merits. So if Canada's position
 3 is we have no investment at all, then it's difficult
 4 to reach the substantive provisions of 1110 and 1105.
 5 THE PRESIDENT: But also probably the
 6 phrasing of issue 04 that you would like to review.
 7 MS. CHEEK: We will discuss the
 8 phrasing as well having decided to use Canada's --
 9 THE PRESIDENT: Adopting the slide
 10 from the other side.
 11 MS. CHEEK: Yes.
 12 MR. BORN: I'm afraid we've lost the
 13 forest for the trees. I was inviting Ms. Cheek to
 14 return to her presentation, us having distracted her
 15 enough.
 16 THE PRESIDENT: We are at slide 98?
 17 MS. CHEEK: Yes, we are at slide 98,
 18 which brings us to the measure at issue that in our
 19 view is expropriatory and violate NAFTA Article 1110.
 20 There were a few threshold questions,
 21 I believe, that the Tribunal had. First, the
 22 Tribunal asked at question 25 a question of both
 23 parties, which was what are the "applicable rules of
 24 international law" that are referred to in articles
 25 102(2) and 1131(1) of NAFTA that are applicable in

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1 this case. There, this may be common ground between 11:51
 2 the Claimant and the Respondent that the reference s
 3 to applicable rules of international law in articles
 4 102(2) and Article 1131(1) would refer to customary
 5 rules of international law including the Vienna
 6 Convention regarding the interpretation of treaties
 7 which I will discuss in greater detail when I discuss
 8 the Chapter 17 violations at issue here.
 9 SIR DANIEL BETHLEHEM: I think the
 10 question goes beyond that because the way that you've
 11 just described it refers to rules of interpretation,
 12 and I think one of the issues that we'd be interested
 13 to hear you on is whether it also refers to
 14 substantive rules.
 15 MS. CHEEK: I'm sorry. I may have
 16 misspoken, but that applicable rules of international
 17 law refer to customary rules of international law and
 18 custom, of which the treaty interpretation principles
 19 in the Vienna Convention is a part.
 20 SIR DANIEL BETHLEHEM: Yes, I'm sorry,
 21 and I may be misunderstanding or misreading the
 22 transcript here. When you say including the Vienna
 23 Convention regarding the interpretation of treaties,
 24 what I'd just like a clarification of is whether you
 25 are simply regarding those as process rules, rules of

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1 interpretation or actually substantive obligations as 11:53
 2 well.
 3 MS. CHEEK: Those references to
 4 applicable rules of international law refer to
 5 customary international law.
 6 THE PRESIDENT: The way I understand
 7 it, because you refer to Vienna law of treaties
 8 because the United States has not ratified the treaty
 9 and it is here treated as customary to international
 10 law -- here in the United States.
 11 MS. CHEEK: Yes, so perhaps out of
 12 habit, so that the Vienna Convention would be an
 13 example of a treaty that codifies customary rules of
 14 international law.
 15 SIR DANIEL BETHLEHEM: I'm sorry, I'm
 16 still being slow. Let's take, for sake of the
 17 question, that there is another treaty out there that
 18 establishes substantive patent law obligations.
 19 1131(1) says "a Tribunal established under the
 20 section shall decide the issues in dispute in
 21 accordance with this agreement and applicable rules
 22 of international law."
 23 So my question is: Does that phrase
 24 "applicable rules of international law" incorporate
 25 other substantive rules, or does it only do so by a

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<p>2078 11:54</p> <p>1 device of treaty interpretation? For example, 2 Article 31(3)(c), the relevant rules of international 3 law. Is this an applicable law clause which brings 4 in the rest of relevant and applicable international 5 law? 6 MS. CHEEK: We do believe this 7 Tribunal can reach other relevant rules of 8 substantive international law that are embodied in 9 Chapter 17 of NAFTA, for example. We do not believe 10 that the Tribunal needs to rely on this provision to 11 do that, and it is our view that under an analysis of 12 indirect expropriation under Article 1110 -- and 13 taking into account the broad definition of 14 expropriation under 1110 -- that you can reach those 15 specific relevant rules when examining whether or not 16 the nature or the character of the measure violates a 17 substantive rule of international law. That said, I 18 don't think it's our position either that 1131(1) 19 would limit you in any way in that regard. 20 SIR DANIEL BETHLEHEM: Again, just to 21 be clear because we'll get on with your submissions 22 as I see from your slides relating to Chapter 17, 23 looking beyond NAFTA, some of Claimant's witnesses 24 have, in their testimony, alleged breaches of other 25 treaties. I'd just like to be clear whether it's</p> <p>www.dianaburden.com</p>	<p>2079 11:56</p> <p>1 Claimant's position that the alleged breach of other 2 treaties is cognizable by this Tribunal under the 3 rubric of other applicable rules of international 4 law. 5 MS. CHEEK: If I could address your 6 question in detail in a moment when I get to the 7 relevance of Chapter 17 for purposes of our 8 expropriation analysis, but the limited answer I 9 would give to your question at the moment is that it 10 is not through 1131(2) that we believe the 11 Tribunal -- that that's the vehicle through which the 12 Tribunal is permitted to look at Chapter 17. We 13 believe that there's an independent basis for you to 14 look at Chapter 17 apart from 1131(2). 15 THE PRESIDENT: If I may, on this 16 point, it would be indirectly because I think the 17 question is via customary international law you come 18 to Vienna, but Vienna is considered part of customary 19 international law. Then you get the question under 20 31 of Vienna whether you may take into account also 21 other treaties. You probably are familiar with the 22 criticism about this because this opens the 23 floodgates of anything in that whole universe of 24 treaties certainly comes onto your plate, also as an 25 Arbitral Tribunal, and what is your position in that</p> <p>www.dianaburden.com</p>
<p>2080 11:57</p> <p>1 regard? And that applies specifically if you look 2 to -- you come to that to 1701(2) you see number of 3 treaties are mentioned because it says you have to 4 minimum comply with this. One which is not mentioned 5 is the patent cooperation treaty and there have been 6 allegations that there were breaches of that treaty 7 which also has another interesting question whether 8 substantive revisions were not in it. I raise it 9 because this is one of the fundamental questions you 10 face. This is also, of course, for the Respondent to 11 answer that one later on. 12 SIR DANIEL BETHLEHEM: Let me make the 13 President's question even more tangible. 14 Professor Erstling, one of the witnesses for the 15 Claimant, made a very clear statement that in his 16 view, Canada's utility doctrine was in breach of 17 Article 27(1) of the PCT. Now, it's not clear to us 18 let me put it this way. I'm seeking clarification as 19 to whether Claimant is maintaining a violation of 20 Chapter 11 in consequence of violation of what your 21 witnesses alleged is a breach of Article 27(1) of the 22 PCT, for example. 23 MS. CHEEK: It is not our position 24 that through Article 31(3)(c) of the 25 Vienna Convention that you open the floodgates. To</p> <p>www.dianaburden.com</p>	<p>2081 11:59</p> <p>1 the contrary, it is our view that the underlying 2 violation which the Tribunal needs to address its 3 attention is a violation of a substantive rule of 4 international law. Chapter 17 would be directly 5 relevant in that regard, given that it provides 6 substantive obligations of the parties that are 7 directly related to the challenge measure at issue 8 because it provides substantive obligations for 9 Canada regarding its revocation of patents. 10 The PCT, it's common ground, is a 11 procedural treaty and does not get to substantive 12 rules of international law. That's a limiting 13 principle here, and so while Mr. Erstling is of the 14 firmly held view that Canada is in violation of its 15 PCT commitments, Lilly does not rest its allegations 16 of a breach of Article 1110 on a violation of the PCT 17 in that it's agreed that that is a procedural treaty 18 that does not embody substantive rules -- substantive 19 rules of -- and international obligations as between 20 the parties. 21 At the risk of repeating myself, I 22 will place what I just said in the context of how 23 Lilly has pled its claims and how this Tribunal finds 24 that there is a violation of Article 1110 with regard 25 to the revocation of Lilly's patents for Strattera</p> <p>www.dianaburden.com</p>

<p style="text-align: right;">2082</p> <p>1 and Zyprexa. 2 Article 1110 refers to direct 3 expropriation, indirect expropriation and measures 4 tantamount to expropriation. I believe that the 5 Tribunal had a question at No. 39 about the 6 relationship between Article 1110 and expropriation 7 in general international law. And given the broad 8 framing of Article 1110, direct expropriation, 9 indirect expropriation or measures tantamount to 10 expropriation, our view would be that that language 11 in 1110 is certainly no narrower than the concept of 12 expropriation under customary international law, and 13 it may arguably be broader and in any case, its broad 14 wording should be given effect in this context. 15 So what are the steps that this 16 Tribunal takes to determine whether there's an 17 indirect expropriation or measures tantamount to 18 expropriation under Article 1110? As we've 19 explained, because this is a judicial expropriation, 20 it's necessary, but not sufficient, that there's been 21 a substantial deprivation. We've quickly moved 22 beyond substantial deprivation in this case more or 23 less because Lilly's patent rights, the bundle of 24 exclusive rights that it was granted, have been 25 revoked, and so we would posit that that substantial</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2083</p> <p>1 deprivation is clear. 2 The second question is whether this 3 revocation of patent rights had an unlawful 4 character. And how does this Tribunal decide if 5 these judicial revocations, the challenged measures 6 here, have an unlawful character? And in that 7 regard, the Tribunal may examine whether there's a 8 violation of a substantive rule of international law. 9 We've pointed to the Tribunal's reasoning in Saipem V 10 Bangladesh, CL-62, as charting an appropriate path 11 that we believe is equally appropriate here, and that 12 is when a judicial measure is challenged for a 13 substantive violation of a treaty breach, the 14 question of whether the challenged measure is 15 unlawful in character is the same inquiry as -- or at 16 least a co-extensive inquiry for our purposes as to 17 whether those measures violate a substantive rule of 18 international law. 19 In our case, the substantive 20 deprivation, as I said, is the revocation of patents, 21 and was the action unlawful in character, was there a 22 violation of substantive international law, and for 23 that, the Tribunal looks to violations of Chapter 17. 24 As I mentioned in our discussion 25 regarding the PCT, our view is there needs to be a</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2084</p> <p>1 nexus between the challenged measure and the 2 substantive rules of international law that apply, 3 and that's a limiting principle. So here, since the 4 challenged measure is the revocation of two patents 5 and there's no dispute between the parties that 6 Chapter 17 articulates substantive rules of 7 international law that apply to Canada's revocation 8 of patents generally, it is appropriate to look to 9 Chapter 17 when evaluating whether the measure at 10 issue here was applied to Lilly's patents in a way 11 that constitutes an expropriation. And as I said, 12 consistent with that view that the focus is on a 13 violation of substantive obligations, the PCT, as a 14 procedural treaty, is out of bounds. 15 THE PRESIDENT: May I ask a question 16 here? You had addressed question 39 of the Tribunal, 17 or you will come back on that? The question about 18 the relationship between 1110 and expropriation in 19 general international law. 20 MS. CHEEK: To that question our view 21 is that Article 1110 is certainly no narrower than 22 what the customary international law standard is and 23 it may even be broader because of the language 24 tantamount to expropriation. 25 THE PRESIDENT: The question I have</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2085</p> <p>1 because I think it's also mentioned somewhere in your 2 submissions, is that you may have to take into 3 account the distinction which is made in general 4 international law between compensable and 5 non-compensable takings, which has to be 6 distinguished from another distinction you sometimes 7 see in arbitral awards these days, unlawful 8 expropriation. But leave that aside for the time 9 being. Compensable and non-compensable. 10 Non-compensable in the sense that it is in the 11 regulatory space: A, is that part of general 12 international law and, B, do we have to read that 13 into 1110 or is 1110 itself a self-standing provision 14 regarding expropriation? 15 MS. CHEEK: That clarifies the 16 question that the Tribunal has. I think rather than 17 answer it now, we will answer that specific question 18 when we come back for rebuttal, if that's all right. 19 THE PRESIDENT: It's fine for us. 20 MS. CHEEK: I guess at least as a 21 preliminary response, which may only partially answer 22 your question, to the extent that we are saying the 23 fact that these measures violate IP obligations that 24 are substantive obligations that Canada has related 25 to the revocation of patents, does that go to the</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2086</p> <p>12:09</p> <p>1 bona fide nature of the measure as part of your 2 inquiry. And if that's the question, yes, in that 3 when the Tribunal is adopting a totality of the 4 circumstance approach in examining the measure, it is 5 as part of that approach that we think it's 6 appropriate to be looking at these international 7 obligations that have a direct and substantial nexus 8 to the challenged measure. There is, of course, also 9 in this particular treaty another vehicle for that, 10 which is specific to the treaty, and that is 11 paragraph 1110(7) of NAFTA, so perhaps I will turn to 12 that paragraph now which we believe provides an 13 additional basis for looking at Chapter 17 to 14 determine whether the measures challenged in this 15 case are expropriatory under 1110. 16 The Tribunal did ask several questions 17 about 1110(7) which I hope to answer over the course 18 of the next few minutes, including question 37, 19 inviting us to elaborate on our position, which I 20 intend to do, as well as question 30 on whether or 21 not Chapter 11 allows or requires you to reach 22 Chapter 17. So I hope to address those issues during 23 the course of my discussion of the 1110(7) provision. 24 In our view 1110(7) establishes that 25 judicial measures that violate Chapter 17 may engage</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2087</p> <p>12:10</p> <p>1 Article 1110. Let me explain what I mean by this. 2 Article 1110(7) makes explicit the general principle 3 that I was just referring to, which a relevant 4 substantive rule of international law, Chapter 17, 5 that relates to expropriation of intellectual 6 property rights, i.e. the revocation of 7 pharmaceutical patents, is relevant to the 8 determination under Article 1110 as to whether an 9 expropriation has taken place. And we've had some 10 preliminary conversations about what the meaning is 11 of 1110(7). Is it an if/then clause? What would 12 happen if you stopped halfway through the provision 13 so it only read that the article does not apply? And 14 as we consider what 1110(7) means, I think it's 15 useful to consider it in context. When I say in 16 context, I mean in a Vienna Convention sense, and 17 that is what is distinct about this provision versus 18 other provisions in NAFTA Chapter 11. For example, 19 if you simply wanted a carve-out, there are 20 carve-outs in NAFTA Chapter 11. For example, 1103, 21 scope and coverage, just simply says the chapter does 22 not apply to measures that are adopted or maintained 23 to the extent they are covered by chapter 14, 24 financial services. So if intellectual property was 25 supposed to have its own unique dispute settlement</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2088</p> <p>12:12</p> <p>1 regime, there would be a clear indication of that in 2 the text as there is regarding financial services. 3 Similarly, there's a section, 4 Article 1108, on reservations and exceptions that 5 articulate several reservations and exceptions, at 6 least one of them which actually references back to 7 the national treatment provisions of Chapter 17. But 8 that's not what we have here. Article 1110(7) is not 9 simply an exclusion and the parties seem to be in 10 agreement that essentially it's an if/then clause. 11 We just simply disagree as to the significance of 12 that. 13 So if the measures are consistent with 14 Chapter 17, then Article 1110 is not engaged. And 15 Canada submits that that is purely a safe harbor for 16 itself. But we would submit that the plain reading 17 of 1110(7), that the article does not apply to the 18 revocation of intellectual property rights to the 19 extent that the revocation of intellectual property 20 rights is consistent with Chapter 17, is a statement 21 that Chapter 17 is relevant to this Tribunal's 22 examination of whether or not a measure is in breach 23 of Article 1110. So not every -- to be clear, we 24 think this if/then construction does not mean that 25 every violation of Chapter 17 is a breach of 1110.</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2089</p> <p>12:14</p> <p>1 Again, we don't think that it opens the floodgates. 2 What we think it does mean is simply that if you're 3 evaluating an alleged expropriation and there's a 4 specific substantive rule of international law in 5 Chapter 17 embodied in this very treaty that's 6 relevant to the inquiry, you need to consider those 7 provisions when deciding whether or not there's been 8 an expropriation based on the challenged measure. 9 I guess put another way, if you're 10 doing a fact bound analysis as to whether when you 11 look at the totality of the circumstances related to 12 this alleged indirect expropriation, there's been an 13 unlawful revocation of intellectual property rights, 14 that must include an inquiry as to whether that 15 revocation was consistent or not with Chapter 17. 16 And in this regard, intellectual property is unique. 17 It's recognized by the NAFTA parties as unique. 18 There's a specific provision referencing specific 19 types of substantive obligations in Chapter 17 that's 20 embedded in Article 1110. There's not another 21 chapter of NAFTA that I am aware of that provides 22 substantive protections for a specific class of 23 covered investments, but here with Chapter 17, 24 there's no dispute that intellectual property are 25 covered investments that are provided by Chapter 11.</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 And in this case the NAFTA parties agreed to a
2 chapter specifically about substantive obligations
3 related to those intellectual property rights.
4 So in this unique case where those
5 substantive obligations are directly related to the
6 challenged measure, a revocation of pharmaceutical
7 patents, it's appropriate and, indeed, in our view
8 the Tribunal must consider whether the challenged
9 measures are consistent with Chapter 17 or not. So
10 the Tribunal's question 30 was whether Chapter 11 --
11 or particularly 1110(7) -- allows you to look to
12 Chapter 17 or whether it requires it. In our view,
13 to ignore Chapter 17, which provides specific rules
14 that Canada must follow regarding pharmaceutical
15 patents and the revocation of those patents, is to
16 not engage in the totality of the circumstances
17 inquiry that a claim of indirect expropriation under
18 Article 1110 requires.
19 In other words, Chapter 17, the
20 specific obligations in Chapter 17, go to the core of
21 your inquiry regarding the character of the
22 challenged measure. Now, Canada does concede that
23 you have competence to look at Chapter 17, so that
24 basic question, do you have the competence to
25 evaluate whether a measure is consistent or not with

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1 Chapter 17, I believe it's common ground between the
2 parties that you have that competence. The
3 difference between the parties is that Canada says
4 it's only a safe harbor. You can only look to the
5 consistency of Chapter 17 if they're the ones that
6 invoke it. But there's nothing in the language of
7 Article 1110(7) that says that's the approach.
8 That's not how 1110(7) is drafted. It doesn't say
9 that if there's a violation of Article 1110, that
10 Canada may raise a defense that it satisfies its
11 obligations under Chapter 17. That's not how the
12 provision works.
13 The provision talks about the fact
14 that there is a question, when you're challenging a
15 revocation of intellectual property rights under
16 Article 1110, to the extent to which that challenged
17 measure may be consistent or inconsistent with
18 Chapter 17. Now, we would agree that if the Tribunal
19 finds that the challenge measures are consistent with
20 Chapter 17, that that is a defense for Canada. But
21 at the same time, if the Tribunal takes into account
22 Chapter 17's obligations and finds an inconsistency,
23 you're not free to ignore that result because it's
24 part of your undertaking under Article 1110.
25 THE PRESIDENT: A question here.

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1 Assume that 1110(7) was not in NAFTA, hypothetically.
2 I think then your alternative route is via Saipem and
3 then you get Chapter 17 still in.
4 MS. CHEEK: Correct.
5 THE PRESIDENT: Is that correct? But
6 now assume if you leave that one aside, the Saipem
7 route, and you look to 1110(7) and assume it's not
8 in, could you then reach Chapter 17, apart from your
9 Saipem route?
10 MS. CHEEK: Well, if you take away my
11 Saipem rule, so then all I'm relying on is the
12 language in Article 1110, I guess it's difficult for
13 me to answer your question because I disagree with
14 the premise in that I think if you're examining
15 whether or not there's an indirect expropriation or
16 measures tantamount to an expropriation, you need to
17 be looking at the unlawful character of the measure.
18 And to the extent that there are substantive rules
19 that are directly relevant, then we would say that
20 you need to engage with those substantive rules. And
21 I think in particular in this case where it is a
22 judicial expropriation, just knowing that there's
23 been a substantial deprivation is not enough, and so
24 you need a further inquiry. So it's difficult for me
25 to grapple with your hypothetical.

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1 THE PRESIDENT: Okay, let me then put
2 a hypothetical differently. Is it your case that we
3 should read article 1110(7) in the following manner:
4 This article applies to the revocation of
5 intellectual property rights to the extent that they
6 are inconsistent with Chapter 17?
7 MS. CHEEK: No. I think if it read as
8 you suggest, that that would be a slightly different
9 proposition, because to just simply say that this
10 article applies to the revocation of intellectual
11 property rights to the extent that they are
12 inconsistent with Chapter 17, you're reading out the
13 words "to the extent that."
14 THE PRESIDENT: No, I include them.
15 Maybe if you want one step further -- I am not a
16 treaty designer -- this article also applies to the
17 revocation of intellectual property rights to the
18 extent that the revocation is inconsistent with
19 Chapter 17.
20 MS. CHEEK: What I would say that for
21 purposes of the exercise of Article 1110, you're
22 still grounded in an Article 1110 inquiry, so to the
23 extent -- if 1110(7) is read to say this article also
24 applies to the revocation of intellectual property
25 rights to the extent that the revocation is

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<p style="text-align: right;">2094</p> <p>1 inconsistent with Chapter 17, then I believe you 2 would still have an obligation to grapple with 3 whether or not the revocation is inconsistent with 4 Chapter 17. So I guess in my own mind that leads to 5 the same result that I believe we have under the 6 language as drafted. 7 SIR DANIEL BETHLEHEM: I have a 8 question, just to clarify going back to the 9 president's first question of if we leave aside 1110 10 and we leave aside Saipem, is there any other basis. 11 Going back to what you said earlier on, it is not 12 Claimant's position that Chapter 17 comes in by 13 reference to applicable rules of international law. 14 That's what you said earlier. I just want to nail 15 that point. 16 MS. CHEEK: That's correct. Those are 17 the two theories -- those are the two separate 18 theories that we have put forward as to why it's 19 appropriate for this Tribunal to consider Chapter 17. 20 Separately, Mr. Berengaut will mention that 21 Chapter 17's related to our legitimate expectations, 22 which is part of our 1105 argument. But here, to the 23 extent that the Tribunal grapples with a substantive 24 question of the extent to which the measure that's 25 challenged is consistent or inconsistent with</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2095</p> <p>1 Chapter 17 those are the two pathways we see, either 2 through Saipem because it's related to the unlawful 3 character of the measure generally, or specifically 4 through 1110(7). 5 SIR DANIEL BETHLEHEM: Right. A 6 second question, if I may. You said -- I don't have 7 the exact language that you used but I think you said 8 something to the effect that it is common ground 9 between the parties that the Tribunal can look at 10 Chapter 17. I'd just like to clarify what you mean 11 by "look at Chapter 17" because that goes to the 12 words in question 30, the Tribunal's competence. Can 13 we look at Chapter 17 for purposes of making a 14 finding? I mean I'm hesitant about becoming a kind 15 of Scalia originalist, but he was prepared to look at 16 everything but he was only prepared to make findings 17 on the basis of the Constitution. 18 Can we look at Chapter 17 for purposes 19 of making a finding of a breach, and in that regard 20 and if you want to take this question away and come 21 back at a later stage, please do so. But the 22 FTC 2001 notice, that referred in part -- it's a 23 Chapter 11 notice but it referred to minimum 24 standards of treatment, but the language in B3 is a 25 determination that there has been a breach of another</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2096</p> <p>1 provision of the NAFTA does not establish that there 2 has been a breach of 1105. That seems to imply that 3 there may be a determination of a breach of another 4 provision of the NAFTA. I'd like to know whether 5 that's a determination that the Tribunal that is 6 hearing the particular case can make or whether that 7 is a determination that comes in some other context. 8 For example, from a Chapter 20 panel that has found 9 that there has been a determination. 10 MS. CHEEK: In our submission you have 11 the authority to make a finding as to whether there's 12 a consistency with Chapter 17 or not. Regarding the 13 provisions of Chapter 17 that are substantive 14 obligations that directly relate to the challenged 15 measure. I do recall a colloquy with Respondent 16 during the opening where they seem to have a view 17 between breach versus consistency, and I guess it 18 would be a question for them as to what exactly their 19 distinction was in that regard. But from our view in 20 the first instance you have the authority to make the 21 finding. In the second instance, the FTC note to 22 which you refer under the minimum standard of 23 treatment, of course, only applies to Article 1105. 24 But in the third instance, it is not our view that 25 any breach of Chapter 17 is automatically a breach of</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2097</p> <p>1 Article 1110. That is not our view. You still would 2 need to establish that there has been a substantial 3 deprivation, which as I say, we believe we have done 4 in this case but certainly there are many violations 5 of Chapter 17 that would not constitute a substantial 6 deprivation. I think Professor Gervais referred to a 7 WTO case, China IP rights. So there, if China was 8 breaching its TRIPS obligations, which are consistent 9 with NAFTA, because they were confiscating 10 counterfeit goods but then kind of selling them out 11 into the market, okay, so does that substantially 12 deprive you of the value of your trademark? Actually 13 I think that would require substantial inquiry. And 14 there's a few other examples of breaches of 15 Chapter 17 that would not probably amount to a 16 violation of Article 1110, precisely because you 17 don't have a substantial deprivation as well. And we 18 cited to some of those -- I believe it's paragraph 32 19 of our comments on the amicus and 1128 submission s. 20 So there is a limiting principle there as well in 21 that not every breach of Chapter 17 would be 22 sufficient to -- well, in no way would it be 23 sufficient to establish a breach of 1110. In this 24 case because we also have a substantial deprivation, 25 we believe the substantial deprivation plus that</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2098</p> <p>1 inconsistency leads to a finding that the challenged 2 measure is unlawful and a violation of Article 1110. 3 SIR DANIEL BETHLEHEM: I don't want to 4 divert you from the rest of your submissions and you 5 can, either on rebuttal or in your post-hearing 6 briefs, come back to this issue if you think it would 7 be relevant. But it would be, I imagine, useful for 8 you to join up the dots on the question of the 9 Tribunal's competence because 1116(1) and 1117(1) 10 appear to give this Tribunal, a Chapter 11 Tribunal, 11 competence in respect of alleged breaches of 12 Section A of Chapter 11. And there is still I think 13 an outstanding question as to how come, on what 14 basis, on what legal principle our competence goes 15 beyond simply the alleged breaches of Section A of 16 Chapter 11 to allow us to look at other provisions of 17 the NAFTA and make, as you've said, a finding of a 18 breach. 19 MS. CHEEK: So perhaps in that regard, 20 then, I would amend my remarks to be quite consistent 21 with the specific language of Article 1110(7) and 22 refer to the consistency of the measure with 23 Chapter 17, which I think is within the Tribunal's 24 remit. Whether that means you need to make an 25 independent finding of a breach, perhaps it falls</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2099</p> <p>1 short of that, but I see no way to read 1110(7) that 2 does not give you the competence to determine whether 3 or not there's been a consistency with specific 4 provisions of Chapter 17 and in that regard, the 5 alternative safe harbor reading also gives that you 6 competence to determine the consistency. 7 SIR DANIEL BETHLEHEM: Thank you. 8 THE PRESIDENT: For the record, we are 9 on slide 102? I read it simply for the record. 10 MS. CHEEK: Yes. We are at slide 102, 11 and I think now we will go to slide 104. I will talk 12 about the underlying provisions of Chapter 17. It 13 says "Chapter 17 Violations" on the top of our slide, 14 and it could equally say inconsistencies with 15 Chapter 17. Those are 1709(1), 1709(7), 1709(8) and 16 1701(1), which I will take in turn. The Tribunal did 17 ask a question, 33, on the meaning of 1709(1), so I 18 guess that is what I will address in the first 19 instance. 20 And as you know, 1709(1) is a 21 provision of a treaty and, therefore, the 22 Vienna Convention, is the appropriate framework to 23 use to interpret that provision. 1709(1) 24 specifically says "each party shall make patents 25 available for any inventions in all fields of</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2100</p> <p>1 technology provided that such inventions are new, 2 result from an inventive step and are capable of 3 industrial application." And the treaty specifically 4 finds "capable of industrial application" and useful 5 to be synonymous terms. 6 Slide 106, which is a summary of the 7 treaty interpretation that we put forward at 8 paragraphs 185-206 of our Memorial and 9 paragraphs 259-90 of our Reply Memorial summarized 10 the analysis under the Vienna Convention, and I won't 11 go into every minute detail but let me make a few 12 important observations. And that is, as reflected in 13 our memorials, looking to the ordinary meaning of 14 1709(1) in context and in light of its object and 15 purpose, we believe reaches the conclusion that 16 capable of industrial application, useful as used in 17 this provision, had meaning and that that meaning was 18 that utility is a low substantive requirement related 19 to having a practical use. 20 In this specific regard, I think it's 21 quite appropriate to look at Vienna Convention 22 Article 31(3) related to both subsequent practice of 23 the parties and relevant rules of international law 24 which, of course, Mr. President, you referred to 25 earlier. Of course, under Article 31(3) when</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2101</p> <p>1 interpreting a treaty provision such as 1709(1) of 2 NAFTA, there shall be taken into account under 3 31(3)(b), subsequent practice in the application of 4 the treaty which establishes the agreement of the 5 parties regarding its interpretation. So I'd like to 6 briefly discuss the practice of the parties related 7 to the utility requirement in Canada, United States 8 and Mexico after this agreement entered into force. 9 But let me actually make a preliminary observation 10 regarding just the fundamental exercise in which we 11 are engaged in interpreting the language of 1709(1). 12 Professor Gervais, in his testimony at page 1826, 13 said that -- and I'm sorry, I don't have the direct 14 quote, but he essentially said that under some free 15 trade agreements, you don't need to have a single 16 interpretation of a treaty's meaning but, rather, you 17 can have multiple credible interpretations. 18 We would submit that is not correct. 19 That is not an appropriate Vienna Convention analysis 20 of what a treaty provision means, and the two cases 21 cited by Professor Gervais, which were World Trade 22 Organisation cases, one was DS362, the China IP 23 rights case, and the other was DS350, zeroing 24 methodology. I'm sorry I don't have the citations to 25 the record for those.</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2102</p> <p>1 But the only reason that that zeroing 2 methodology case came up with multiple 3 interpretations was because under the specific 4 agreement at issue, the WTO anti-dumping agreement, 5 the WTO anti-dumping agreement has a specific 6 provision, Article 17.63, that permits more than one 7 interpretation of the treaty. But in a case like 8 China IP rights that was related to the TRIPS 9 Agreement, the Tribunal -- or the panel there -- did 10 not find multiple interpretations of the same 11 provision. Indeed, it does what panels normally do 12 and it engaged in a Vienna Convention interpretation 13 to find the meaning of the treaty language in context 14 and in light of its object and purpose. 15 So as I mentioned, our view is that 16 capable of industrial application, when you look at 17 the ordinary meaning "capable of industrial 18 application" is a low threshold test. But the 19 practice in Canada, the United States and Mexico 20 underscores that the parties understood it to be a 21 low threshold test. 22 Before I discuss the United States, 23 let me just quickly revisit the fact that Canada, 24 before the promise utility doctrine, when it had its 25 what we call mere scintilla utility requirement,</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2103</p> <p>1 looked like the requirement in the U.S. and Mexico. 2 So there were no cases, as Ms. Wagner said, barring 3 post-filing evidence until AZT in 2002. Mr. Dimock, 4 when he testified, noted that there are no cases 5 declining to consider evidence of a sound prediction 6 of utility prior to the Raloxifene. And this mere 7 scintilla test simply applied. 8 The other thing that's important is 9 that Canada used to have one utility standard, and 10 now it has an additional utility test. But after 11 NAFTA entered into force post-1995, all three of the 12 NAFTA parties had a threshold -- a single threshold 13 utility requirement that they were providing -- or 14 applying, I'm sorry, to patents. 15 So what did we learn about the United 16 States practice subsequent to NAFTA? We learned that 17 the utility bar is low. Professor Holbrook said as 18 much. He said it's a low bar. We also learned that 19 utility in the U.S. is focused on the claims as it 20 used to be in Canada and as it still is in Mexico, 21 that post-filing evidence of utility can be relied 22 upon in the United States, as it can be in Mexico and 23 as it used to be in Canada; that evidence of a 24 predicted utility, if you will, does not need to be 25 in the application itself in the United States, as it</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2104</p> <p>1 used to be in Canada and still is in Mexico; and as a 2 factual matter, utility and challenges and 3 invalidations are very rare in the United States, as 4 they are in Mexico and as they used to be in Canada. 5 Now let's turn to what we've learned 6 about Mexican practice on the utility requirement. 7 Mexico's standard is set by the 8 keywords in its patent statute that the invention 9 must be susceptible to or include a possibility of 10 industrial application. And what we learned from the 11 Mexican witnesses is that in 2008, there was a 12 proposal in Mexico to raise the industrial 13 application standard by replacing the word 14 "possibility" with "fact" and that Mexico refused to 15 make that change because it believed it was 16 constrained by its international treaty obligations. 17 Here Mr. Smith asked Ms. Lindner -- 18 this is slide 112 and it's also in the transcript at 19 page 1955. An additional reason and the first reason 20 they, that's the Senate, mentions in their report was 21 the international law obligation of Mexico not to 22 make this change. And Ms. Lindner said yes, "That is 23 correct." 24 Also, looking at outcomes in Mexico, 25 there's been no application denied and no patent</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2105</p> <p>1 nullified by IMPI for a lack of industrial 2 application. Quite similar to the pattern that you 3 see in the United States and in Canada prior to the 4 promise utility doctrine. 5 So knowing that there's a consistent 6 standard between Canada, Mexico and the United States 7 that was applied consistently by those parties, and 8 at least Mexico in one instance said it felt 9 explicitly constrained to that standard based on its 10 international obligations, Canada's argument is that 11 this subsequent practice under the Vienna Convention 12 presumably doesn't really matter or needs to be put 13 in a much broader frame because they say that the 14 United States just does what Canada is doing under 15 its promise utility doctrine under a different label 16 of enablement or written description. 17 So I'd like to explore that claim. In 18 the first instance, the principle under the 19 Vienna Convention for interpreting a treaty is 20 focused on the text of the treaty itself and is 21 looking to subsequent practice in the application of 22 those treaty obligations. So on that alone, given 23 that the focus here is on the obligation to make 24 patents available and they meet the capable of 25 industrial application requirement, looking to other</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 requirements is not an appropriate inquiry. But
 2 nevertheless, let's see what we learned about -- or
 3 what we've heard from the witnesses about enablement
 4 and written description.
 5 SIR DANIEL BETHLEHEM: Ms. Cheek,
 6 before you get there, 31(3)(b), subsequent practice
 7 in the application of the treaty, are you looking at
 8 that subsequent practice within a restricted temporal
 9 framework, what about Canada's subsequent practice in
 10 the application of the treaty through its AZT Aventis
 11 Raloxifene decision? So what is the temporal
 12 framework of the subsequent practice in the
 13 application of the treaty that you're looking at?
 14 MS. CHEEK: The temporal framework is
 15 the decade of implementation of that standard after
 16 NAFTA entered into force. So roughly 1995 to 2005.
 17 Given the consistency of the practice during that
 18 decade after NAFTA entered into force, it's our view
 19 that that's an indication that there was agreement of
 20 the parties that they were bound by 1709(1) to have a
 21 threshold utility requirement, which they all had
 22 when NAFTA was signed.
 23 SIR DANIEL BETHLEHEM: So you are
 24 reading 31(3)(b) as subsequent practice which
 25 establishes in the first instance the agreement of

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1 the parties rather than subsequent practice brought
 2 up to date, 2015 or whatever it would be, 2000, 2005,
 3 2008, which establishes the agreement of the parties.
 4 I mean if we take your submissions as they stand, if
 5 we accept your submissions as they stand that the
 6 Canadian utility doctrine is an outlier by comparison
 7 to the U.S. and Mexico, why -- I mean how does that
 8 show subsequent practice in the application of the
 9 treaty which establishes Canada's agreement relating
 10 to the interpretation of the treaty.
 11 MS. CHEEK: From our perspective, a
 12 decade of consistent practice is sufficient to
 13 establish that agreement. Further, the U.S.
 14 government, in the context of its international trade
 15 reports, has expressed I believe its substantial
 16 concern -- I know the word concern is in there --
 17 regarding Canada's practice. So I think it's also
 18 not gone unnoticed among the NAFTA parties that there
 19 has been a change in Canada.
 20 SIR DANIEL BETHLEHEM: Thank you.
 21 MS. CHEEK: With regard to enablement
 22 and written description, Professor Merges explained
 23 at pages 1290 to 1292 of the transcript that
 24 enablement and written description address very
 25 different concerns than utility or the capable of

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1 industrial application requirement, that enablement
 2 concerns support for the full breadth of the claimed
 3 invention and I believe he provided a graphic in one
 4 of his demonstratives to that regard. One of the
 5 cases that Professor Holbrook cites -- and I
 6 apologize I don't have a slide for this but it's in
 7 the In re Wright case, R-80, is instructive. And he
 8 discusses that case in the transcript at pages
 9 1452-1453.
 10 And there there was a patent
 11 application, and it claimed a wide range of vaccines
 12 against viruses. But it provided only a single
 13 working example. And there it was a U.S. case. The
 14 PTO decided that the claims were too broad. The
 15 claims covered too broad of a range of vaccines. And
 16 so they rejected the application for a lack of
 17 enablement. But that enablement example, the notion
 18 that the claims might have been too broad based on
 19 the disclosure in the patent really is inapposite in
 20 terms of the promise utility doctrine that was
 21 applied in Canada. And it's difficult to see how the
 22 enablement requirement is just the same as Canada's
 23 utility requirement. I mean in the first instance
 24 they're just distinct patentability requirements in a
 25 very technical area. But in the second instance,

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1 what the courts are doing in Canada when they apply
 2 the promise utility doctrine is just distinctly
 3 different from what either the PTO or U.S. courts are
 4 doing when they apply an enablement doctrine.
 5 The courts don't consider whether the
 6 claims of the invention are too broad. We've seen
 7 they go well beyond the claimed invention in their
 8 analysis. They don't look to see if the specific
 9 claims are supported in the disclosure. Instead,
 10 actually they're construing additional new promises
 11 of utility from the disclosure, and they don't really
 12 focus on the claims at all.
 13 So these inferred and elevated
 14 promises that you see in Canada, based on the
 15 description and not the claims, is just an entirely
 16 different exercise than what is happening in the U.S.
 17 under the enablement doctrine.
 18 The doctrine in Canada that resembles
 19 the enablement doctrine is the sufficiency of
 20 disclosure requirement. Those are the two parallel
 21 disclosure rules. But those two parallel disclosure
 22 rules are not what's at issue in this case and it's
 23 not what's in 1709(1), which is the language that we
 24 are interpreting and looking to subsequent practice
 25 of the parties for guidance in interpreting.

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<p>1 Again, I would make a note on 2 outcomes. One reason we looked to outcomes is 3 because in the legal environment when they're talking 4 about judicial decisions outcomes are indicative that 5 there's been a change in the law. In this case I 6 look to outcomes because surely if the enablement 7 doctrine in the United States and the promise utility 8 doctrine in Canada were similar, these patents, the 9 Strattera patent and the Zyprexa patent would have 10 been invalidated under the enablement doctrine in the 11 United States, and that's not the case. 12 The same patent, Strattera, has been 13 upheld in the United States on all grounds and the 14 same Zyprexa patent has been upheld in the United 15 States on all are grounds. 16 Let me turn now to Article 31(3)(c), 17 are there relevant rules of international law 18 applicable in the relations between the parties. 19 Here, at last, we have the answer of the relevance to 20 the PCT for this particular treaty interpretation 21 exercise, although as we've also mentioned, we 22 believe it's quite relevant to our expectations with 23 regards to the Strattera patent. But in this context 24 the PCT, as an international treaty that's applicable 25 to the parties, has a definition of utility that's</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>2110 12:49</p>	<p>1 well accepted. That definition is on slide 114. 2 This is in the context of the international 3 preliminary examination that both Mr. Erstling and 4 Mr. Reed discussed. The Patent Cooperation Treaty 5 is CL-73. This is Article 33(4), which says, "A 6 claimed invention shall be considered industrially 7 applicable if, according to its nature, it can be 8 made or used (in the technological sense) in any kind 9 of industry. Industry shall be understood in its 10 broadest sense..." 11 MR. BORN: What are we to make of the 12 prefatory phrase for the purposes of the 13 "international preliminary examination" that precedes 14 that definition? 15 MS. CHEEK: What you are to take from 16 that is that the 148, 152 -- that the many countries 17 who have signed the PCT, which include Mexico, United 18 States and Canada, have all agreed that in the 19 context of the preliminary examination of an 20 international application, this is the appropriate 21 utility standard to which all hundred plus countries 22 would agree is generally consistent with the norm. 23 Now, as I believe you heard from the witnesses, this 24 is a procedural treaty and not a substantive one. 25 But nevertheless, the core patentability</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>2111 12:51</p>
<p>1 requirements, new, non-obvious and useful, are 2 well-understood international requirements, and the 3 parties have agreed that as a result of this 4 preliminary examination, that this is a definition of 5 industrial applicability that is acceptable to all of 6 those countries. 7 THE PRESIDENT: Ms. Cheek, before we 8 continue, for timing purposes, you have used 9 140 minutes of your 210. That leaves 70 minutes. 10 Ample time for you to conclude. Only I'm worried 11 about two things. One is the court reporter. And 12 the other thing is the lunch entitlement of everyone 13 here in this room. So how would you propose to 14 proceed? I also look then to Mr. Spelliscy. How you 15 would fill the schedule of today in a meaningful way 16 taking into account these two factors. 17 MS. CHEEK: Let me confer one moment 18 with Mr. Berengaut to discuss how much time we might 19 have remaining. 20 We have 30 minutes left of our 21 presentation, and that would of course be our time 22 and not accounting for Tribunal questions, which we'd 23 be pleased to entertain. So we are flexible to take 24 the lunch break whenever you believe is appropriate. 25 THE PRESIDENT: I suggest we break now</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>2112 12:53</p>	<p>1 for five minutes so the court reporter can recover 2 and we will continue with concluding your 3 presentation to 1:30 and then we have a lunch break 4 of 45 minutes and then we have the closing arguments 5 by the Respondent if that's plan we should adopt it. 6 We have five minutes recess but really, keep to five 7 minutes. 8 <i>(Recess taken)</i> 9 THE PRESIDENT: Ms. Cheek, please 10 continue. For the record, we are on slide 115. 11 MS. CHEEK: I was hoping to take us 12 back to the text of 1709(1). Perhaps if you're 13 following along in the bound version, you could flip 14 back to that text for a moment just to conclude on 15 1709(1). That is, what does it mean that Canada has 16 an obligation that they shall make patents available 17 for inventions in all fields of technology that are 18 new, non-obvious and capable of industrial 19 application. 20 What that means is that if the utility 21 test was met, and the utility test was met for these 22 two patents when the patents were granted and they 23 actually met a utility test -- the utility test in 24 1709(1) when the patents were challenged, you don't 25 get to move the goal posts 100 meters farther down</p> <p style="text-align: center;">www.dianaburden.com</p>	<p>2113 12:55</p>

<p style="text-align: right;">2114</p> <p>01:03</p> <p>1 the field or withhold or deny a patent based on a 2 new, unilaterally redefined heightened utility 3 requirement. In other words, if the patent satisfies 4 the capable of industrial application standard that's 5 embodied in 1709(1), a patent cannot be withheld or, 6 in our case later revoked, for a want of utility. 7 That is what has happened here, and that is why we 8 would submit there's an inconsistency with Article 9 1709(1). 10 I'd now like to turn slide 115, which 11 is article 1709(7) which reads that "Patents shall be 12 available and patent rights enjoyable without 13 discrimination as to field of technology." The 14 discriminatory effects of the promise utility 15 doctrine on the pharmaceutical sector are 16 unmistakable. Challenges based on a lack of utility 17 are more frequent and more successful in the 18 pharmaceutical sector since Canada began applying its 19 new promise utility doctrine test. Since 2005 up to 20 April 2016, 41 percent of decisions in the 21 pharmaceutical sector result in a finding of 22 inutility. No cases, zero percent, of decisions in 23 the non-pharmaceutical sector result in a finding of 24 inutility. 25 This finding, the disproportionate</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2115</p> <p>01:04</p> <p>1 effect and the disproportionate impact on the 2 pharmaceutical sector is sufficient to establish an 3 inconsistency with 1709(7). It meets the legal test 4 for discrimination as to field of technology which 5 looks at the disproportionate, disadvantageous effect 6 on a particular sector, in this case the 7 pharmaceutical sector. 8 While not part of the legal test, 9 Lilly has presented evidence through Professor Levin 10 that this disproportionate impact is so significant 11 or so pronounced, shall we say, that it's 12 statistically significant. And Professor Levin's 13 finding of statistical significance, like I said, is 14 not the legal test, but the question is -- is the 15 observed disproportionate impact, the significant 16 disproportionate impact that you see on 17 pharmaceuticals, to be written off just due to a 18 small N, small numbers of cases, or chance. 19 Professor Levin testified, and that 20 testimony is un rebutted, that this is not merely due 21 to chance, that this is a statistically significant 22 disproportionate effect on pharmaceuticals. 23 What Canada has done is, through a 24 series of suggested tweaks, tried to obscure or erase 25 this disproportionate effect. Let's take Canada's</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2116</p> <p>01:06</p> <p>1 arguments one by one. 2 First, Canada says we should have a 3 different counting methodology. Canada wants to 4 count patents instead of case outcomes. 5 Mr. Brisebois made the suggestion he discusses in the 6 transcript at page 475. But counting patents rather 7 than cases barely moves the numbers. You still have 8 a disproportionate and significant adverse impact on 9 the pharmaceutical sector because 36 percent of 10 patents are found to lack utility in the 11 pharmaceutical sector, but that number is still zero 12 in the non-pharma sector. 13 Canada, through Mr. Brisebois, also 14 noted that there were a few cases that should have 15 been counted differently, so we accounted for both 16 counting patents instead of cases, and we also made 17 the case-specific corrections that they thought were 18 critical, although we dispute that, but in any case, 19 even if you accept their changes, these numbers 20 barely budge. We're still looking at a significant 21 disproportionate impact of the pharmaceutical sector, 22 35 percent of inutility finding for patents versus 23 zero percent in other non-pharmaceutical industries. 24 Canada next says that we should not 25 count the PM(NOC) litigation and we should remove</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2117</p> <p>01:08</p> <p>1 those cases from the calculus, even though, as you've 2 heard, those cases are heard by the same Federal 3 judges. They're considered precedential when it 4 comes to an application of the law, et cetera, and 5 actually the majority of pharmaceutical litigation in 6 Canada. In the transcript at page 477, Mr. Brisebois 7 says that those should be excluded from the analysis. 8 But still even applying -- even applying that tweak, 9 you're still looking at a significant 10 disproportionate, disadvantageous effect. So we've 11 changed for patents, we've changed for case 12 corrections, we've changed for PM(NOC) and the 13 picture is still the same. And Professor Levin 14 testified that he went ahead and ran the statistical 15 significance regarding all these changes, and it 16 still showed that this differential between 17 33 percent inutility findings and zero is 18 statistically significant. 19 So Canada's last-ditch attempt to 20 change the picture is to take two cases and count 21 them twice. That's the Eurocopter decision and the 22 Uponsor decision, which I will turn to in a moment and 23 which are discussed in the transcript at pages 497 to 24 499 and, again, the Uponsor case at transcript pages 25 501 and 502.</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2118</p> <p>1 So Canada decides to take these two 2 cases and code them twice as a win and a loss. Now, 3 that finally makes a dent because on the number of 4 non-pharma cases, now if you're counting cases as 5 both wins and losses, you up the greens to eight, but 6 you up the reds to two. And so suddenly, where you 7 had zero percent inutility findings, now that you've 8 found yourself two double-counted cases, you have a 9 20 percent inutility finding. Now, there's still a 10 significant difference, I would posit, between 11 20 percent and 33 percent, but I don't believe it's 12 appropriate for the Tribunal to even consider this 13 particular scenario. And there's two reasons for 14 that.</p> <p>15 The first is that Professor Levin 16 testified in the transcript at page 1227 -- this is 17 on slide 121 -- "You have to decide your unit of 18 analysis. If you're talking about claims, well, go 19 do that analysis. If you're talking about patents, 20 however, you can't all of a sudden clone a patent and 21 call it both valid and invalid. Obviously, for 22 example, if you look at the total number in the 23 margin of the table, you'd get the wrong number of 24 patents. So this is not a statistically valid 25 approach."</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2119</p> <p>1 It's also inaccurate when it comes to 2 the actual outcomes in these cases, because in the 3 Eurocopter case, the court found that the patent was 4 valid and infringed. The infringement related to the 5 commercialized embodiment of the invention, and the 6 court awarded punitive damages for infringement. And 7 in the Uponsor case, similarly, the court found the 8 patent valid and infringed. The infringement related 9 to the commercially valuable claims of the invention, 10 and the court awarded both damages and an injunction.</p> <p>11 So with the exception of this final 12 approach which Professor Levin has said is not 13 statistically valid, is inconsistent, and codes two 14 cases as both wins and losses, what you have is 15 overwhelming evidence that the promise utility 16 doctrine has disproportionate adverse effects on the 17 pharmaceutical sector alone and the invalidation of 18 Lilly's two pharmaceutical patents were the direct 19 result of that discriminatory measure.</p> <p>20 SIR DANIEL BETHLEHEM: This was a 21 question that I put to Professor Levin, and it's 22 addressed at pages 1266 and following on the question 23 of causation. And while he addressed the particular 24 scenario that I suggested, he was quite clear in 25 saying I think in the testimony at the bottom of 1266</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2120</p> <p>1 and into 1267 and following, that he was not making a 2 causation analysis. He was saying that it was 3 statistically significant, but it was not a question 4 of causation and he said, "I offered a statistical 5 opinion which is the rejection of the null hypothesis 6 was consistent with the causal hypothesis, that of 7 Claimants. I agree there could be other causes; I'm 8 not here to say one way or the other."</p> <p>9 Are you now making a causation 10 contention? Because as I take it from his testimony, 11 he was not.</p> <p>12 MS. CHEEK: I think, by the way, 13 that's accurate. In his testimony he does not 14 provide an opinion on causation. He provides an 15 opinion on whether the dramatically disproportionate 16 numbers would be due to chance or due to something 17 else. And he says they're not due to chance.</p> <p>18 Under 1709(7), Canada has an 19 obligation to make patent rights available and patent 20 rights enjoyable without discrimination as to field 21 of technology. Those outcomes, those 40 percent 22 invalidity decisions only in the pharmaceutical 23 sector, we would posit are discrimination as to field 24 of technology, because no other sector is 25 experiencing the invalidation rates of their patents</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2121</p> <p>1 under Canada's promise utility doctrine standard, 2 other than the pharmaceutical sector. So yes, we 3 would posit that there's causation. We don't think 4 it's difficult to posit that because there's 5 individual court decisions that are applying the 6 utility doctrine to patents in a specific sector, the 7 pharmaceutical sector, with a dramatically different 8 result.</p> <p>9 And if you look at -- and I don't know 10 that we have this slide in our current slide deck, 11 but if you look at what happened pre-2005, before the 12 promise utility doctrine was being routinely applied, 13 and what you see is it's flat. So there is not any 14 disproportionate effect pre-2005 on the 15 pharmaceutical sector. That line is flat. It's only 16 post-2005, once the courts start applying the promise 17 utility doctrine, that you see a dramatic uptick in 18 invalidity valuations on the basis of inutility 19 solely on the pharmaceutical sector.</p> <p>20 I believe as Ms. Wagner explained in 21 one of her slides, it's not just due to a general 22 uptick in pharmaceutical litigation because those 23 regulations that led to the increase in 24 pharmaceutical litigation went into effect in 1993; 25 and, yet, you only see this dramatic rise in</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2122</p> <p>01:16</p> <p>1 inutility determinations under the promise utility 2 doctrine once it starts to be applied in 2005. 3 SIR DANIEL BETHLEHEM: Thank you. 4 MS. CHEEK: Before I conclude and 5 Mr. Berengaut addresses our arguments under 6 Article 1105, let me look at 1709(8) of Chapter 17. 7 This provision reads, "A party may revoke a patent 8 only when: Grounds exist that would have justified a 9 refusal to grant the patent..." 10 Article 1709(8) provides a clear and 11 objective standard defining when it's appropriate and 12 when it's not appropriate to revoke a patent. And 13 the words "would have justified" are past tense and, 14 thus, expressly refer back to the time of grant, not 15 to the time of challenge or revocation, which I 16 believe Canada contends. If Canada's view were 17 correct that it simply means what was the state of 18 the law at the time of revocation, then 1709(8) would 19 be written differently. It would talk about a party 20 may revoke a patent only when grounds exist that 21 "would justify" refusal to grant a patent rather than 22 "would have justified." 23 The Tribunal asked us in question 32 24 whether article 1709(8)(a) of NAFTA applies to an 25 actual refusal to grant patent, or whether it would</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2123</p> <p>01:18</p> <p>1 apply to a situation in which the initial grant would 2 be refused. We believe the most appropriate reading 3 of 1709(8) is that it doesn't apply to a decision to 4 grant or deny a patent in the first instance, but it 5 only -- its focus is the decision to revoke a 6 previously granted patent. 7 Canada asserts that our reading would 8 freeze patent law indefinitely, and we don't believe 9 that that's the case. First, the obligation applies 10 on a patent-by-patent basis to the revocation of 11 particular patents. But second, as applied in this 12 case, there is a utility requirement under which 13 these patents were granted, and there is a 14 dramatically new, different and additional utility 15 requirement under which these patents are revoked. 16 And given that there is a new additional utility 17 requirement that's used to revoke these patents, in 18 our view that's a ground, the promise utility 19 doctrine, that did not exist in the late 1990s and 20 2000s when these patents were granted. 21 With that, I will hand to it 22 Mr. Berengaut to discuss Article 1105. 23 THE PRESIDENT: Thank you. 24 MR. BERENGAUT: At the outset, let me 25 further respond to Tribunal question 34 and respond</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2124</p> <p>01:21</p> <p>1 to question 35 regarding the sources and content of 2 the customary international law principles embodied 3 in the minimum standard. 4 We do not question the applicability 5 of the FTC notes to this dispute or to the fact that 6 customary norms, of course, ultimately derive from 7 state practice and opinio juris. From our 8 perspective, rather, there are two principal points 9 here of dispute between the parties on this issue. 10 The first point is whether the minimum 11 standard has been shaped by the 3,000 plus BITs in 12 force such that it has, in fact, converged with the 13 treaty-based fair and equitable treatment standard. 14 This proposition, as we discussed in our opening, was 15 embraced by Mondev and by Chemtura, CL-92, and the 16 rationale for this interpretation was articulated by 17 Judge Schwebel in a 2004 article that we have 18 exhibited as CL-98. 19 As Judge Schwebel explains, quoting 20 the ILC, "An international convention admittedly 21 establishes rules binding the contracting states 22 only, and based on reciprocity; but it must be 23 remembered that these rules become generalized 24 through the conclusion of other similar conventions 25 containing identical or similar provisions." It was</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2125</p> <p>01:22</p> <p>1 submitted by him that this is a process of which the 2 more than 2,000 BITs are the contemporary exemplar. 3 Judge Schwebel refers to 2000 BITs. We've used the 4 number 3,000 based on more recent data indicating 5 that as of 2011, the overall universe of treaties was 6 approximately 3,164 agreements. And that's C-181. 7 THE PRESIDENT: The question is here, 8 if you look at these 3,000 BITs or so and you look at 9 the provision relating to fair and equitable 10 treatment, what is now the content? Actually only 11 recently you see attempts being made to give some 12 meat, if I may call it that way, to the FTC standard, 13 for example CETA. But if you look at all these other 14 3,000 treaties, they also have fair and equitable 15 treatment without giving the Tribunal guidance what 16 it means. So of course you have to find it out 17 yourself. 18 That's actually the question, if you 19 make a sweeping statement, if I may call it that way, 20 that the 3,000 BITs have shaped the FTC standard, 21 then I wonder what is then the content? 22 MR. BERENGAUT: That, I think, brings 23 me precisely to the second point of disagreement, 24 which is the status of arbitral awards in this 25 framework, because we would submit that irrespective</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 of how the Tribunal decides that first question,
 2 whether they accept the principle of convergence as
 3 we have articulated it or not, either way, the
 4 appropriate way for the Tribunal to understand and
 5 apply the applicable standard, converged or not, is
 6 to look at arbitral awards that have interpreted and
 7 applied the same standard. And that is the reason --
 8 as all previous NAFTA tribunals have done. And that
 9 is the reason why, from the outset, we've taken the
 10 position that even if you narrow the scope of
 11 analysis to cases that are indisputably applying the
 12 minimum standard, NAFTA cases post-FTC note, then
 13 each component of our claim is rooted in that
 14 standard.

15 Canada, of course despite citing
 16 arbitral awards itself, has taken the position -- and
 17 here I quote from the rejoinder paragraph 259 -- that
 18 Lilly's reliance on such awards "falls short of what
 19 is required to meet its evidentiary burden." The
 20 evidentiary burden being the supposed burden on
 21 the part of the Claimant to prove up opinio juris and
 22 state practice with regard to each aspect of our 1105
 23 claim.

24 Yet, Canada really has no answer to
 25 the consistent practice of NAFTA tribunals including

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1 cases on which Canada relies, such as Mobil and
 2 Murphy and Waste Management (CL-112 and CL-64) which
 3 all rely on NAFTA case law to identify, articulate
 4 and analyze their cases under the applicable
 5 standard.

6 And in particular, Canada has not
 7 identified a single case in which reliance on
 8 relevant arbitral awards was held to fall short of
 9 the required evidentiary standard. So that I -- in
 10 answer to your question, Mr. President, the way the
 11 Tribunal can understand the content of the standard
 12 it should apply is through the relevant body of
 13 arbitral awards, convergence or not.

14 THE PRESIDENT: There are two things
 15 to this. One, we have the FTC note of 2001, the
 16 minimum standard applicable to aliens and the
 17 question of international law. So we have to look to
 18 the sources of customary international law. And what
 19 are then the specific sources here in this respect?
 20 Cannot be the awards. The awards may -- you would
 21 say, look, they are persuasive authority or
 22 persuasive precedent, but are they sources for
 23 international law, commercial international in this
 24 respect. Could you please then point me to what are
 25 the sources which, according to you, has evolved the

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1 Neer standard to something further?
 2 MR. BERENGAUT: We do not contend that
 3 the arbitral awards themselves are sources of
 4 customary international law. The sources of
 5 customary international law are state practice and
 6 opinio juris. That doesn't really answer the
 7 question of how, as you point out, the Tribunal, in
 8 practice, should apply the standard that's
 9 articulated in NAFTA, because it's a very generally
 10 worded standard that doesn't provide much of an
 11 analytical toolkit to decide whether there had been a
 12 breach or not. That is why NAFTA tribunals
 13 consistently look to the accumulated body of case law
 14 not as a source of law in and of itself, but, rather,
 15 as a reflection of the underlying customary standard
 16 as it has been applied in this particular context.

17 So they reflect and evidence and
 18 expand the standard rather than actually constituting
 19 a source of law in and of themselves.

20 THE PRESIDENT: That begs, then, the
 21 question where do these tribunals look at? Where do
 22 they find it? Not each side looking to the other
 23 one, but then you get eternally you have to go back
 24 to the spring. Which one is actually then referring
 25 to the source itself? They gave these dicta from

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1 this is customary international law. But where did
 2 they get it from?
 3 MR. BERENGAUT: Ultimately, the
 4 process for looking for a customary norm is a
 5 historical one. So the fact that they are, in turn,
 6 looking at earlier examples of arbitral awards that
 7 analyze the minimum standard, some under modern BITs
 8 and modern free trade agreements, some under earlier
 9 treaties of friendship and commerce, some under
 10 earlier treaties than that, the process that it's an
 11 iterative process of looking further back in time
 12 does not detract from the proposition that it's an
 13 underlying customary norm. That's the way customary
 14 norms are articulated and understood over time.

15 THE PRESIDENT: I take it, then, you
 16 disagree with the analysis made in the Glamis award?
 17 MR. BERENGAUT: We do.

18 Turning, then, to the specific aspects
 19 of the minimum standard that are at issue here, as we
 20 set out in our opening and our written submission,
 21 Lilly's Article 1105 claim is based on three
 22 recognized aspects of the minimum standard:
 23 Legitimate expectations, arbitrariness, and
 24 discrimination.

25 Let me here respond to Tribunal

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<p style="text-align: right;">2130</p> <p>01:29</p> <p>1 question 36 in regard to whether these points are 2 separate heads of argument or "strands of a single 3 allegation of breach." 4 In answer to the question, they are 5 separate heads of argument in the sense that each, 6 standing alone, is a sufficient basis upon which to 7 find a violation of Article 1105. If the Tribunal 8 concludes, for example, that Canada's measures 9 contravene Lilly's legitimate expectations, then the 10 Tribunal should find a violation of Article 1105 11 irrespective of whether the Tribunal also concludes 12 that Canada's promise utility doctrine is arbitrary. 13 The fact that these are separate heads 14 of argument, however, does not mean, in our view, 15 that the standards do not overlap or that some facts 16 are not relevant to multiple heads of argument. To 17 the contrary, these separate heads of argument each 18 reinforce one another. As Waste Management -- this 19 is CL-65 at paragraph 99, Bilcon, CL-104 at paragraph 20 442, and now Mesa Power have recognized, the minimum 21 standard is a flexible one that must be adapted to 22 the circumstances of each case. 23 So the fact that the measures at issue 24 are not only discriminatory but also are arbitrary 25 and also are inconsistent with legitimate</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2131</p> <p>01:30</p> <p>1 investment-backed expectations, the coincidence of 2 those facts should not be ignored. 3 Many of the facts relevant to our 4 Article 1105 presentation have already been discussed 5 with regard to arbitrariness and discrimination. I 6 will not repeat them here. I will make a few brief 7 comments about these two aspects of our claim, and 8 then I will turn to legitimate expectations. 9 With regard to arbitrariness, 10 Ms. Wagner has already explained how the promise 11 utility doctrine has not been and cannot be defended 12 by any legitimate policy rationale. To the contrary, 13 it has been recognized by CIPO's own examiners as 14 confusing and unethical and by Canada's largest 15 generic company, the prime beneficiary of the 16 doctrine, as a hopeless tangle of contradictory 17 approaches. 18 As we set out in our opening and 19 written submissions, this unpredictability and 20 incoherence is a basis for liability under the 21 minimum standard. In its submissions, and again in 22 its opening, Canada has identified other 23 manifestations of arbitrariness, including the ICJ's 24 definition in Elettronica Sicala (RL31) that 25 arbitrariness is willful disregard of due process of</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2132</p> <p>01:32</p> <p>1 law, an act which shocks or at least surprises a 2 sense of juridical propriety. 3 Canada argued in its opening, 4 page 231, that a reasoned rationale based on a 5 good-faith interpretation of a statute and 6 jurisprudence and the assessment of facts cannot be 7 arbitrary under international law. In other words -- 8 and I see this as a variation of Canada's argument on 9 denial of justice. If a court decision is 10 procedurally fair, then it cannot be arbitrary, 11 presumably because it would not satisfy the 12 Elettronica standard. But just because that case 13 states one manifestation of arbitrariness under 14 international law does not mean that it is the only 15 manifestation. And Occidental makes this point 16 clear, which is up on the slide. It is also not 17 alone in doing so. 18 Earlier in this case, for example, 19 Canada acknowledged that a measure is arbitrary under 20 international law when it has, "No legitimate 21 purpose." This is Counter Memorial paragraph 249. 22 It cited for this standard the Lemire decision, RL-29 23 on the slide here, which accepts Professor Schreuer's 24 definition of arbitrariness which includes, among 25 other things, "a measure that inflicts damage on the</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2133</p> <p>01:33</p> <p>1 investor without serving any apparent legitimate 2 purpose." 3 Turning briefly to discrimination, 4 Canada has argued that the customary norm regarding 5 discrimination is limited "to unjustifiable 6 discriminatory treatment in court proceedings founded 7 on the investor's foreign nationality, not mere 8 differential treatment." Counter Memorial paragraph 9 262. Yet, this interpretation would impose an 10 artificial constraint on the definition of 11 discrimination, which as noted in Saluka (CL-85) and 12 Tenaris (CL-187), protects against unjustifiable 13 distinctions without regard to nationality or any 14 other specific basis upon which that unjustifiable 15 distinction is drawn. 16 Here, Lilly's patents were 17 discriminated against by virtue of their field of 18 technology, and critically, Canada has never argued, 19 nor could it, that it is justifiable to treat 20 pharmaceutical patents to higher standards than other 21 types of patents. And even if the standard were 22 limited to discrimination on the basis of 23 nationality, Lilly's evidence would meet this test. 24 As we noted in the opening, every patent invalidated 25 under the promise utility doctrine was owned by a</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2134</p> <p>01:34</p> <p>1 foreign investor. Meanwhile, these invalidations 2 worked to the advantage of the generic pharmaceutical 3 industry, a prominent Canadian industry. And Canada 4 has not refuted this basic fact. 5 Turning, then, to legitimate 6 expectations, and to recap Lilly's contentions on 7 this point, Article 1105 protects expectations that 8 are grounded in a country's overall conduct, and here 9 that conduct includes Canada's longstanding and 10 well-understood utility requirement. This was 11 recognized in Thunderbird and elsewhere. Which is up 12 on the slide here, slide 131. 13 We have also acknowledged that some 14 tribunals, such as Mobil and Murphy, have required a 15 more specific representation on the part of the 16 state. This standard is unduly restrictive, but if 17 the Tribunal were inclined to require a specific 18 representation for purposes of legitimate 19 expectations, here the grant of the Zyprexa and 20 Strattera patents would satisfy that requirement. 21 In our opening, pages 144-145, we 22 noted that Canada's response to this argument was to 23 say that courts do not give representations to 24 investors. In its opening, Canada repeated the same 25 argument, arguing, as you can see in this slide, that</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2135</p> <p>01:36</p> <p>1 "no court gives assurances on the outcome of a 2 litigation." But as we explained, this assertion is 3 irrelevant, since Canada's representations were made 4 by CIPO, not by the courts. 5 Indeed, Canada's own expert has 6 acknowledged that it is not the courts that create 7 Lilly's legitimate reliance interest. It is the 8 grant of a patent. You can see here "akin to a 9 contract between the Crown and the inventor" that 10 gives rise to Lilly's legitimate expectations under 11 this frame of analysis. 12 Now, the evidence is clear that Lilly 13 had such legitimate expectations that its Zyprexa and 14 Strattera patents would not be invalidated on the 15 basis of a radically new utility requirement. In our 16 opening we explained that Lilly's expectations were 17 reflected in the consistent recollections of its 18 witnesses and in contemporaneous documents. This was 19 slide 92 and confidential exhibits C-130 and C-156. 20 Canada has not refuted, or even really 21 addressed, a single piece of this evidence. At the 22 outset of the hearing, our opening 147-148, we also 23 identified three arguments that Canada has leveled 24 against Lilly's legitimate expectations claim. Let's 25 see where each stands at the close of evidence.</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2136</p> <p>01:37</p> <p>1 First, Canada argued that Lilly could 2 not have had legitimate expectations because the 3 promise utility doctrine always existed. Ms. Wagner 4 has already addressed this point demonstrating that 5 the evidence during this hearing has further 6 substantiated Lilly's contention that the promise 7 utility doctrine represented a radical departure in 8 Canadian law. 9 Second, Canada argued that Lilly 10 cannot rely on the recollections of its witnesses 11 because none of them had any real understanding of 12 Canadian patent law. It was presumably in 13 furtherance of this argument that counsel for Canada 14 asked Lilly's fact witnesses questions about whether 15 they were briefed on specific Canadian court 16 decisions. Of course, business leaders like 17 Mr. Postlethwait and Ms. Nobles were not briefed on 18 AZT and on the routine back and forth with the Patent 19 Office that precedes the granting of a patent, and it 20 is no surprise that Mr. Stringer was not briefed on 21 every new Canadian decision. 22 The fact that Lilly's team was not 23 briefed does not detract from the basic proposition 24 that Lilly had a robust process to identify 25 patent-related risk and that this process worked in</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2137</p> <p>01:38</p> <p>1 this case. Mr. Armitage spoke to this process, 2 explaining that he was unaware of any more reliable 3 way in which to secure patent-related advice. And as 4 you can see here, he also said that on the issue of 5 utility, he'd be shocked if there were evidence that 6 advice on Canadian utility law had been given during 7 the time frame at issue, since it was so 8 well-understood that the threshold for meeting the 9 Canadian utility requirement for pharmaceutical 10 inventions was so low. 11 Mr. Stringer testified the same. So 12 did Mr. Postlethwait, and so did Ms. Nobles. And you 13 can see that here on slide 137. That no such risks 14 were identified and escalated to the leadership of 15 Lilly's Zyprexa and Strattera teams showed that at 16 the time Lilly legitimately expected that there would 17 be no issues with its patents in Canada. 18 Third and last, Canada argued that 19 sophisticated commercial parties do not place 20 reliance on patents because of the possibility that 21 patents might be invalidated. But as Mr. Armitage 22 explained during his cross-examination -- and Sir 23 Daniel, this portion of the transcript, I think, is 24 responsive to your question that you posed earlier -- 25 this argument disregards the reality that commercial</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 parties do rely on patents and that the due diligence
 2 conducted by sophisticated parties like Lilly
 3 conducted under existing law, as Mr. Armitage
 4 explains, generally yields a binary result as to
 5 whether such reliance is justified. The reason
 6 companies like Lilly conduct this analysis is because
 7 they can do so against the backdrop of a known legal
 8 framework.

9 So when Canada says, as it did during
 10 the opening, page 290, that patent grants do not
 11 create an expectation that such patents will
 12 withstand validity challenges, it is eliding the
 13 question of the law being applied in those validity
 14 challenges. If, as is the case here, that law is
 15 radically different from when the patents are
 16 granted, then patent holders are legitimately
 17 entitled to be surprised when their patents are
 18 revoked.

19 In short, members of the Tribunal, if
 20 CIPO's own examiners were surprised by the radical
 21 change in Canada's utility requirement, then surely
 22 it was legitimate for Lilly to be as well. If the
 23 only examples of patents lacking utility or
 24 industrial applicability that any country could
 25 identify during the SPLT negotiations you've heard so

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1 much about were inoperable inventions like perpetual
 2 motion machines and ghost catchers, then surely it
 3 was legitimate for Lilly to be surprised when Canada
 4 revoked its patents for want of utility when Zyprexa
 5 and Strattera were actually helping patients. And
 6 given the scores of countries where Zyprexa and
 7 Strattera were patented, surely it was legitimate for
 8 Lilly to be surprised when Canada was the only
 9 country where its patents were challenged on utility,
 10 let alone invalidated on that basis.

11 Lilly did not expect that the law
 12 would remain frozen in Canada, but it did expect,
 13 legitimately, that the rules would not change in the
 14 radical way they plainly have.

15 Thank you.

16 MS. CHEEK: That does conclude our
 17 presentation, and in the interest of time, we will
 18 conclude right there. But we would reserve some time
 19 for rebuttal, although we also are, of course,
 20 keeping our eye on the clock.

21 THE PRESIDENT: Secretary of the
 22 Tribunal, how many minutes?

23 MS. GASTRELL: You've used
 24 176 minutes. Sorry, 171 minutes.

25 THE PRESIDENT: So you have 39 minutes

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1 left, if my calculation is correct.

2 MS. CHEEK: We would reserve our
 3 remaining time for rebuttal, although we don't
 4 anticipate we will need all of the remaining time.

5 THE PRESIDENT: Thank you. Then I
 6 inquire with the parties now what time should we
 7 resume? Basically it's for Canada this time to
 8 respond.

9 MR. SPELLISCY: My view would be we
 10 can have a somewhat abbreviated lunch break. Maybe
 11 2:30. That's 45 minutes from now.

12 THE PRESIDENT: That's fine. Recess
 13 until 2:30.

14 *(Lunch Recess)*

15 THE PRESIDENT: We resume the hearing.
 16 Before we start with the closing statements for the
 17 Respondent, the first thing is have all parties
 18 received the supplemental submission by the United
 19 States, the 1128 submission?

20 MS. CHEEK: Yes, Claimant has received
 21 their submission.

22 MR. SPELLISCY: Respondent has
 23 received it.

24 THE PRESIDENT: And have you had time
 25 to study it during lunch?

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1 MS. CHEEK: Yes, we have had time to
 2 study it, and it does not appear to state anything
 3 new, in which case Claimant has no comments on it.

4 THE PRESIDENT: No comments. Okay.

5 MR. SPELLISCY: We have certainly had
 6 time to read it, but we obviously don't object to its
 7 submission, as we didn't object to it earlier.

8 THE PRESIDENT: Thank you. The
 9 further other three things because it may get late in
 10 the day, there are three dates still to be set. One
 11 is for the correction of the transcript. Two is for
 12 the first exchange of post-hearing briefs, and the
 13 other is for the reply post-hearing briefs.

14 Have the parties conferred amongst
 15 themselves about these dates?

16 MS. CHEEK: The parties have
 17 conferred. Are we correct in our understanding that
 18 the Tribunal may be providing us with further
 19 questions based on closing arguments? I don't know
 20 if you have to make a definitive decision either way,
 21 but the parties have conferred, that based on various
 22 considerations, that we would have post-hearing
 23 briefs due six weeks after the receipt of any further
 24 questions from the Tribunal, if any, and then we
 25 would provide, two weeks after that, for short

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1 replies, both of these being simultaneous
2 submissions. And those short replies we would limit
3 to 20 pages.

4 THE PRESIDENT: And then the
5 correction of the transcript?

6 MS. CHEEK: On that, we did not yet
7 agree on a date.

8 THE PRESIDENT: Shall we say within a
9 week from now?

10 MR. SPELLISCY: It may be possible we
11 might ask for the indulgence for at least the end of
12 next week because I think a lot of us are still in
13 Washington this week and won't be back in the office
14 until next week.

15 MS. CHEEK: That's amenable to the
16 Claimant.

17 THE PRESIDENT: The last is the date
18 of the cost submissions.

19 MR. SPELLISCY: This is another thing
20 that I don't think that we had discussed, that
21 perhaps we could discuss. In previous cases we've
22 suggested that it can be helpful to have cost
23 submissions after the award on the merits and
24 jurisdiction. We have done it the other way as well.
25 Sometimes we find it helpful to have the award to

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1 allows us to focus our arguments on what the results
2 were and how to digest those results in terms of
3 figuring out division of costs. But this is not
4 something we've had a chance to discuss with the
5 Claimant yet.

6 MS. CHEEK: I would suggest that the
7 parties confer on that, and we can put a proposal
8 forward to the Tribunal.

9 THE PRESIDENT: I am aware that it's
10 more the common law approach to have separate awards
11 on costs, especially in England and maybe in Canada.
12 In other settings we deal with costs also in the
13 award. My personal approach is to try to do it in
14 the award if it would reach this stage, the cost
15 decision. But subject to what the parties want us to
16 do, let us know.

17 Any other things that you can think of
18 that we have still to deal with?

19 MS. CHEEK: We do have what we've
20 labeled our slide 140, which is Claimant's decision
21 tree for the Tribunal. So we can just quickly
22 distribute it.

23 THE PRESIDENT: Maybe you can hand it
24 out now. How do you read this? Because Canada's
25 slide had arrows and lines to say agree, disagree,

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1 and we ended up either with bingo or nothing.
2 MS. CHEEK: You start from the top,
3 and then your decision tree flows down to the bottom.
4 And are all the answers in the affirmative or the
5 negative --

6 SIR DANIEL BETHLEHEM: You have to
7 succeed on each one.

8 MS. CHEEK: Yes, the Claimant would
9 need to succeed on each of these.

10 SIR DANIEL BETHLEHEM: And can I just
11 clarify? As I read this, the only thing that's
12 happened here, apart from some little rewording, is
13 that you've reorganized the sequence. For example,
14 in item 4, whereas Canada put it in terms of a
15 proposition and did not; you putting it in terms of a
16 question, but otherwise it's a reordering of the
17 decision tree that Canada proposed.

18 MS. CHEEK: Yes, as long as we are
19 engaging in the reordering exercise, we did put those
20 questions in our own words as we believe they're
21 properly framed for the Tribunal.

22 THE PRESIDENT: Mr. Spelliscy, I think
23 we can commence with the closing statement for the
24 Respondent.
25

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1 CLOSING STATEMENT ON BEHALF OF RESPONDENT
2 MR. SPELLISCY: Good afternoon,
3 Professor van den Berg, Mr. Bethlehem and Mr. Born.
4 I can agree with my colleagues from
5 across the aisle there on at least one thing they've
6 said this morning. That is we've certainly heard a
7 lot about Canadian patent law in this case. Over the
8 past two weeks we have had argument and heard from
9 numerous witnesses and numerous experts. But I would
10 suggest to you, as you go back and review the
11 transcripts, that what you heard from the witnesses
12 presented by the Claimant was advocacy and not
13 informed, independent expert opinion.

14 They presented Professor Siebrasse as
15 an expert on Canadian law; but as you saw, patent law
16 is not the focus of his teaching and he hadn't even
17 written on the question of the alleged promise
18 utility doctrine in Canada until 2012. Ironically,
19 around the same time that Claimant first brought this
20 case.

21 Further, as became apparent on
22 cross-examination, he had previously published
23 articles and other writings that directly
24 contradicted what he told you in his reports. His
25 response to these contradictions? He was wrong

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1 before. What he wrote wasn't careful before. Not
2 everything in there was gold. But, of course, he
3 wants you to believe that he is right now, after he
4 was retained by and being paid by the Claimant. That
5 is not credible.
6 They presented Mr. Reddon as an expert
7 on Canadian law and practice, who admitted that all
8 of his clients were solely pharmaceutical companies
9 who would benefit from the Tribunal finding in the
10 Claimant's favor here. And not only was his bias in
11 this dispute clear, but in addition, he admitted that
12 he had only a couple of years of experience in patent
13 law prior to the major changes that he alleged
14 occurred. And he had clearly done none of the
15 research on the older Canadian law which would have
16 been necessary to allow him to make a real assessment
17 of whether there had been a change in Canadian law.
18 They presented Professor Merges as an
19 expert on U.S. law and how it compared with Canadian
20 law, but he admitted that he had not read the
21 Canadian cases, had not canvassed Canadian academic
22 works and secondary authorities and had not studied
23 aspects of Canadian law other than utility. And,
24 yet, despite this, he apparently felt comfortable
25 offering his opinion on how Canadian law was aberrant

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1 and that the decision of the Supreme Court of Canada
2 in AZT was not rational.
3 They offered Mr. Kunin as an expert on
4 U.S. Patent Office practice and he presented data
5 from a U.S. database, PTAB. But he explained that he
6 had so limited the search that it only considered the
7 Claimant's point of view. The data he presented was
8 pointless and proved nothing.
9 They presented Mr. Erstling as an
10 expert on the PCT and Canada's alleged violation of
11 it, but he explained how he only started taking the
12 position he did after the Claimant first developed it
13 in litigation. In short, when he was retained in
14 2009 by the Claimant, he already knew exactly what it
15 was that his client wanted him to say. And he has
16 been parroting that position ever since, expressly on
17 behalf of and at the request of the Claimant.
18 They also presented Mr. Thomas on the
19 international harmonization efforts at WIPO, and he
20 offered his opinion without reference to the
21 contemporaneous documentary record that was prepared
22 by his own organization when he was there, a record
23 that contradicted what he said on its face. His
24 response, when confronted with the inconsistency, was
25 to suggest that practice didn't really mean practice

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1 in the documents; but, rather, somehow it meant
2 regulations. That is not credible.
3 Finally, they offered Ms. Gonzalez on
4 Mexican law, who as I understood it doesn't actually
5 practice patent law but, nevertheless, offered her
6 testimony on the 2010 amendments to Mexico's patent
7 law and stated that the changes were not significant.
8 Again, the documentary record is to the contrary. In
9 fact, that record shows that the drafters of the 2010
10 legislation were directly concerned with the same
11 sort of speculative patenting in Mexico that had led
12 the Supreme Court of Canada to reaffirm certain
13 longstanding principles of Canadian law eight years
14 earlier in AZT. Moreover, as we saw, her testimony
15 was unreliable. She put up a slide in her
16 presentation that purported to quote an article of
17 the law from 1994, but it did not. In fact, it added
18 a number of words, significant words, to it.
19 Her explanation? Just a transcription
20 error. That explanation is not credible. This
21 wasn't a spelling mistake or an inadvertent word
22 added. She quoted the 2010 version of the statute,
23 represented it was from 1994 and then argued that
24 there was no real significant change in the 2010
25 amendments.

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1 I think when you consider the evidence
2 offered by Canada's witnesses, including
3 Mr. Dimock -- who is the only patent practitioner
4 here who was around during the entire time that is in
5 question here. He was around in Consolboard. In
6 fact, he was a junior lawyer on that case. When you
7 consider his evidence and the evidence of the other
8 witnesses Canada presented, whose independence,
9 experience and credibility should not be questioned,
10 and when you review what the Claimant offered in the
11 appropriate light and context, I think you will agree
12 with me that this case must be dismissed.
13 Let me explain how we will address the
14 remainder of our arguments today. And you will
15 recall, because it's been discussed at length here,
16 how I presented the decision tree. So we're going to
17 talk about that decision tree, and we're going to
18 organize our arguments around that decision tree as
19 well. So we've got it pulled up on the screen.
20 After my opening remarks, I will discuss the first
21 reason that this claim must be dismissed, that there
22 is a failure to state a claim as a matter of law
23 because there has been no allegation of a denial of
24 justice.
25 Let me address something as a

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1 preliminary matter first. The Claimant, in the tree
2 that it just handed out, puts the time bar issue
3 first in the decision tree. That's not right. The
4 time bar question does not arise if what is at issue
5 here is a denial of justice. Canada has never taken
6 the position, and does not here, that if what the
7 Claimant is challenging is that the judicial
8 decisions invalidating its olanzapine and atomoxetine
9 patents denied it justice, that the claim is
10 time-barred. That would be a claim about the fair
11 application. But as we've explained before, this is
12 not a claim about the application. This is a claim
13 about the doctrine.

14 So when we talk about -- and why we've
15 put this first is it becomes a failure of pleading,
16 really. The Claimant has not alleged a denial of
17 justice. Therefore, it has -- and my U.S. roots will
18 come through -- failed to state a claim as a matter
19 of law. Its claim must be dismissed for that ground
20 alone, because as I will explain to you, the NAFTA
21 parties are agreed on the meaning of their treaty.
22 Under both Article 1105 and 1110, the only possible
23 claim on what is being challenged as a judicial
24 measure is for a denial of justice.

25 In my opening remarks at the hearing

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1 we went through the paragraphs which made clear that
2 as of the Reply, the Claimant was no longer alleging
3 a denial of justice. And this was again confirmed at
4 oral argument in this hearing, including this
5 morning. So this gets us to our first result on the
6 decision tree. Since the Claimant is not alleging a
7 denial of justice, this claim must be dismissed. I
8 plan to spend about 45 minutes or so on this part of
9 my argument. Then I will also briefly address our
10 second point here, and that's time bar. As I said at
11 the beginning of this hearing, even if you disagree
12 with Canada, the United States and Mexico as to the
13 meaning of their own treaty, this claim still fails
14 because it is time-barred.

15 In our opening remarks we explained
16 that NAFTA imposes a strict three-year limitations
17 period from the time that the investor knew or should
18 have known of the alleged measure in breach of the
19 NAFTA and that it had suffered loss. The evidence at
20 this hearing, I would suggest, is that the Claimant
21 was aware of both the measures and loss more than
22 three years prior to this claim being filed. As a
23 result of the Claimant's admissions, this claim is
24 time-barred by Article 1116(2).

25 THE PRESIDENT: Help me,

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1 Mr. Spelliscy. Why is it that you treat the time bar
2 as a second issue and not as a first issue, like the
3 Claimant does?

4 MR. SPELLISCY: I treat it as a second
5 issue in this decision tree because of the fact that
6 if this was truly a denial of justice case, that they
7 were not afforded due process in the atomoxetine and
8 olanzapine decisions, that would have happened in
9 2010 and 2011. So if it was a denial of justice
10 claim, there would be no time bar. The time bar
11 problem arises because they are not challenging the
12 application to them so much as they are challenging
13 the actual doctrine. If they were alleging, for
14 example, that this was, in fact, a misapplication of
15 Canadian law that rises to the level of a denial of
16 justice in 2010 and 2011, there would be no issue of
17 time bar. You could bring that claim. It would fail
18 on its merits as a denial of justice, but you could
19 bring it, because those judicial decisions happened
20 within the three-year limitations period.

21 The problem is that when they go back
22 to the doctrine and what they want to challenge is
23 not the application of the law to themselves, but the
24 actual doctrine underlying the law, that doctrine is
25 old. That doctrine, in our view, goes far back

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1 beyond 2002, but it certainly goes to 2008. And we
2 heard this morning, and I'll address this in more
3 detail later, it goes to the Raloxifene decision,
4 where they say all three aspects of the law were
5 crystallized. At that point, the doctrine existed,
6 it was crystallized, and it applied to the Claimant
7 causing them loss. So if you want to challenge the
8 actual doctrine, at that point, in our view, that's
9 where the time bar problem arises.

10 THE PRESIDENT: Is the first issue
11 not, since the Claimant has stated that they do not
12 assert a denial of justice claim, is that the claim
13 should not be entertained because there is no denial
14 of justice asserted?

15 MR. SPELLISCY: So yes, on our
16 decision tree we said an allegation of breach must be
17 based on the denial of justice, and we could have
18 made that slide a little bit longer. Or that line a
19 little bit longer. And, therefore, this claim fails
20 because they have not stated a claim as a matter of
21 law.

22 THE PRESIDENT: The way it is worded
23 now, I don't know if we're nitpicking, but it looks
24 like this is a non-issue.

25 MR. SPELLISCY: Right. I understand

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1 the question. Our point is that you must allege a
2 denial of justice. They have not alleged a denial of
3 justice; and, therefore, this claim fails as a matter
4 of law.

5 THE PRESIDENT: Thank you.

6 MR. BORN: Doesn't your first argument
7 require the Tribunal to interpret substantively what
8 Chapter 11, and in particular 1105 and 1110, mean?
9 MR. SPELLISCY: It does, indeed, and
10 we're going to get to that.

11 MR. BORN: And in order for us to do
12 that, don't we need to have competence under
13 Chapter 11?
14 MR. SPELLISCY: You do. And you
15 have --
16 MR. BORN: Sorry. And if you're right
17 about your point 2 with respect to time bar, don't we
18 lack competence?
19 MR. SPELLISCY: You only lack
20 competence to consider the doctrine that arose prior
21 to 2008. So I would say that you have competence to
22 assess a claim as to whether or not the application
23 somehow denied the Claimants justice under
24 Article 1105 and 1110. You have that competence.
25 And so when you look at what their claim is and if

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1 you look at what 1105 is, you can assess whether or
2 not they have actually stated a claim, whether they
3 have pled a claim. In the sense I say it portrays my
4 U.S. roots, because I view it as what is called in
5 the U.S. a 12(b)(6) procedure, that they have simply
6 failed to state a claim as a matter of law. So you
7 do have to understand what that law is in order to
8 understand whether a claim has failed to be stated.
9 But you certainly have the competence to do that.

10 MR. BORN: It's a long way back to my
11 U.S. roots, but I sort of thought that subject matter
12 jurisdiction came before 10(b)(6).
13 MR. SPELLISCY: Yes.
14 MR. BORN: And wouldn't time bar be a
15 question of our competence or, put differently,
16 subject matter jurisdiction?
17 MR. SPELLISCY: We're going to get to
18 that in answer to Sir Bethlehem's question; but yes,
19 it is. This is not a question that can be waived.
20 Again, you have to understand from our perspective,
21 if this was a denial of justice claim, there would be
22 no time bar issue. You would be able to consider it.
23 So that's why we've placed it second. So if you make
24 the determination that the only thing under 1105 and
25 1110 that is covered is, in fact, denial of justice,

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1 that is as far as you go, because there has been no
2 allegation, and you would have no competence to
3 consider essentially anything else.

4 THE PRESIDENT: Would it then be
5 characterized as an admissibility point?
6 MR. SPELLISCY: The denial of justice
7 question?
8 THE PRESIDENT: Yes.
9 MR. SPELLISCY: I think it relates,
10 in my view, more towards the substantive standards,
11 of what the content of these provisions is and how
12 these rights are to be protected.
13 I'm not sure that it would make much
14 of a distinction. It is not jurisdictional in the
15 sense that it requires a substantive assessment of
16 the law and then a simple review as to whether or not
17 the claim has been pled in a way that could possibly
18 be a breach of that law, even if the allegations are
19 accepted as true. And what we would hold to you is
20 that because they have not pled a denial of justice,
21 they simply do not have a possible claim.
22 THE PRESIDENT: Is then the standard
23 what you find in 41-5 of the ICSID rules, although
24 not applicable here? I try then to compare to find
25 out under which legal category it is. Probably it is

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1 my compartmentalization in my head which is unduly
2 bothering me.

3 MR. SPELLISCY: As I said, this is why
4 I went back to sort of a failure to state a claim,
5 that the categorization that I would have, this is
6 not a jurisdictional objection. You have the
7 competence to consider what the content of 1105 and
8 1110 are, and then you have the competence to assess
9 whether or not what has been pled actually meets
10 those standards. To my view, a decision on ground 1
11 would, in fact, be a dismissal on the merits. Not on
12 jurisdiction, not on admissibility, but on the
13 merits.

14 THE PRESIDENT: The reason we ask the
15 question is how should we go about in our award,
16 which comes first? That's the practical question.
17 There's nothing legal about it --
18 MR. SPELLISCY: No.
19 THE PRESIDENT: -- in that respect.
20 SIR DANIEL BETHLEHEM: Can I follow up
21 with trying to disentangle all of this? In bold
22 terms, are you saying we have to get to this point of
23 denial of justice, as you characterize it, because
24 it's Canada's allegation that the Claimant's case in
25 respect of Strattera and Zyprexa is, in fact,

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1 fictitious and what they are doing is they're
2 challenging the doctrine as a whole and that should
3 have been done previously? Is that what you are
4 saying?
5 MR. SPELLISCY: This is what we are
6 trying to get across and in far less elegant terms
7 that I'm doing here. But this is exactly what we're
8 trying to get across, that the challenge here is to
9 the doctrine. And we're going to go through a little
10 bit, and we'll offer remarks throughout that show the
11 challenges to the older things, not a challenge to
12 the actual application invalidations here.
13 SIR DANIEL BETHLEHEM: So if the
14 challenge is to the doctrine, but you accept that in
15 the context of a claim in respect of Zyprexa and
16 Strattera we, nonetheless, have the competence to
17 consider the doctrine, I suppose the question is does
18 it make any difference? Does your chronological tree
19 actually make any difference to the way in which we
20 approach this?
21 MR. SPELLISCY: Well, I think it comes
22 down to sort of the basis of the decision in terms of
23 the chronological tree. So our view is that that
24 time bar argument is an argument in the alternative
25 and that in our view, you shouldn't reach -- you

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1 don't need to reach that question in terms of the
2 structure of the analysis. The question that you
3 should first answer is what is the content of 1105
4 and 1110, and has the Claimant pled something that
5 could actually rise to the breach of that content.
6 If the answer to that is no, that the
7 Claimant has not made an allegation, then there is no
8 need to consider any of the other issues here.
9 SIR DANIEL BETHLEHEM: In slightly
10 different terms from the perspective of the Tribunal,
11 we have to consider whether there is quote/unquote
12 claim under 1116(1), and that's what you are
13 addressing. You are saying that the claim that is
14 being made by the Claimants is, in fact, a claim
15 against the doctrine, and the doctrine on the
16 Claimant's view was settled by no later than 2008?
17 MR. SPELLISCY: Certainly on the time
18 bar, and I would think you could even use that
19 approach on the first one. Have the Claimants made a
20 claim under 1116(2), and our view is if you're
21 challenging the courts as an arbiter of the law, then
22 a claim only lies if there is a denial of justice.
23 So if you do not state a denial of justice, you have
24 failed to state a claim under Article 1116(2) for
25 breach of one of the sections of NAFTA.

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1 SIR DANIEL BETHLEHEM: I think that
2 the confusion, insofar as at least arising in my
3 mind, is because of your use of the phrase "denial of
4 justice" rather than what the -- as it were, the
5 essence of the claim is that's in dispute between the
6 parties. But thank you.
7 MR. SPELLISCY: We're at point 3.
8 Point 3, as we get there, I'm going to sit down for a
9 while and Mr. Johnston will then explain why, even if
10 you disagree with us on those two points, this claim
11 must still fail because it depends on a false factual
12 predicate.
13 As I noted at beginning of the
14 hearing, the Claimant's claim necessarily depends on
15 there having been a dramatic change in Canadian law
16 after it received the last of its patents in 2002.
17 And I explain that because if that is not the case,
18 then you don't have jurisdiction to consider measures
19 before because they're measures before the
20 investments existed. Mr. Johnston will show you
21 there has been no such dramatic change.
22 We heard witness after witness from
23 the Claimants say that if there were significant
24 changes in Canadian law, they would have been
25 informed. And we heard witness after witness testify

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1 that at no point were they ever informed by Canadian
2 counsel that there had been a significant change in
3 Canadian law. That is evident from the documentary
4 record as well or, rather, the lack of the
5 documentary record.
6 I urge you to look through the record
7 submitted by the Claimant to support its claim. Look
8 at every exhibit they offered to support their claims
9 after the alleged radical changes in Canadian law in
10 2002, 2005 and 2008. There is not a single piece of
11 evidence showing that any of the people at the
12 Claimant, who said they would have been briefed,
13 were, in fact, briefed on any radical change in
14 Canadian law. And no evidence that they briefed
15 senior management at the Claimant in turn, as they
16 testified they would have.
17 Why? Because as we will show you,
18 there was no such dramatic change for them to be
19 briefed upon. Earlier today in this regard, my
20 colleague, Mr. Berengaut, said that we could not
21 expect Mr. Stringer or others to be informed of the
22 routine back and forth with the Patent Office or, in
23 his words, every new Canadian decision. Frankly, I
24 just don't understand this point. According to the
25 Claimant, the decision in AZT, the decisions in 2005

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<p style="text-align: right;">2162</p> <p>02:57</p> <p>1 and the Raloxifene decision were not routine, 2 every-day decisions. 3 The Claimant's case is that these were 4 radical decisions, dramatic departures that made 5 Canadian law aberrant and an outlier. If this is 6 true, I cannot understand what would be the sort of 7 changes in Canadian law that the Claimant would have 8 been briefed upon, because these seem like exactly 9 the sort of decisions that the Claimant's witnesses 10 testified that they would have been told about if 11 they were changes. There's no evidence they were. 12 Mr. Johnston will spend roughly 45 minutes on this 13 point. 14 At that point I would suggest we take 15 the afternoon break, though we can certainly do so 16 earlier if we begin to run over with questions. But 17 if we take a break at that point, when we return, 18 Ms. Zeman and Mr. Luz will take over. They will 19 address our final arguments, that even if the 20 Claimant is right that it need not prove a denial of 21 justice in these proceedings and even if it is right 22 that the claim is not time-barred and even if there 23 has been a dramatic change in the law, the Claimant 24 has failed to prove the facts necessary to support 25 its claims. Even if we accept its view of the law.</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2163</p> <p>02:58</p> <p>1 I want to clarify something here 2 because it came up on the question of property and 3 where that fits into this analysis. It fits into 4 point No. 4. 5 The Claimant's patents, we will show 6 you, as we argued in our opening, were not 7 expropriated in violation of Article 1110 because 8 they were declared to be invalid. They were declared 9 to be not property. There was a decision that they 10 did not constitute property that could be 11 expropriated. So the point at which we address this 12 is under point 4, that even if you accept all of the 13 Claimant's arguments up until this point, their 14 argument on Article 1110 still fails. 15 MR. BORN: That means, I take it, you 16 concede that the patents, even if revoked, were 17 investments? 18 MR. SPELLISCY: Yes. In our opening 19 presentation we have said this is not a 20 jurisdictional objection. In our opening 21 presentation we made reference to the fact that this 22 is a question of Article 1110. They still have a 23 claim of Article 1105. And the invalidation of the 24 patents, while it might mean that it can't bring a 25 claim under Article 1110, they could bring a claim</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2164</p> <p>02:59</p> <p>1 under 1105. This is not jurisdictional. 2 Ms. Zeman will look to Article 1105. 3 You'll remember from a few hours ago that the 4 Claimant has three claims as to why Canada has 5 breached its obligations under NAFTA, Article 1105. 6 That Canada's measures are discriminatory, arbitrary 7 and contrary to its legitimate expectations. As we 8 will walk through you in detail this afternoon, none 9 of these allegations are supported by the facts. The 10 Claimant's allegations of discriminatory treatment 11 rely on a statistical analysis that was based on a 12 dataset constructed by the Claimant in such a way 13 that it ensured there could be only one mathematical 14 result. Its statistical expert, Dr. Levin, admitted 15 he simply accepted the dataset as it was and that the 16 rules on coding were set by the Claimant. The fact 17 is the dataset is not reliable, and when corrected, 18 it is clear that there is no evidence of any 19 disparate impact on the pharmaceutical sector, let 20 alone discriminatory treatment. 21 With respect to the allegations of 22 arbitrariness, as we will show you today, the 23 Claimant's allegations amount to really nothing more 24 than a desire to have this Tribunal review the 25 decisions of Canadian courts on the merits and hold</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2165</p> <p>03:00</p> <p>1 that Canada should have different laws and different 2 policies than it does. Laws and policies that would 3 seem to allow them almost unfettered access to 4 patents. 5 I would suggest that their approach 6 would fundamentally unbalance the patent bargain, 7 eliminating the quid that the public gets for the 8 offered quo. The Claimant has not made out its case 9 that either the specific decisions with respect to 10 its olanzapine patent or atomoxetine patent or the 11 rules establishing Canadian law with respect to 12 utility are in any way arbitrary. 13 And, finally, Ms. Zeman will explain, 14 with respect to legitimate expectations, why patent 15 grants do not give rise to expectations of patent 16 validity. And she will also explain how the 17 Claimant's own witnesses testified how they were 18 uninformed about Canadian law. In short, they have 19 not shown that they have any expectations, let alone 20 legitimate ones, as a result. I expect Ms. Zeman 21 will spend about 30 minutes on this point. 22 Then Mr. Luz will talk about 23 Article 1110. He will explain that even if we accept 24 the Claimant's arguments that Article 1110 claims 25 challenging the acts of the judiciary are not limited</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 to claims for denial of justice, they have still not
2 made out the facts necessary to support a claim of
3 expropriation. And you will recall there were three
4 reasons why from our opening presentation. The first
5 I just mentioned, there was no taking of property.
6 Only a finding that property did not exist.
7 But Mr. Luz will also address how
8 Canada's actions were consistent with Chapter 17 and,
9 thus, pursuant to Article 1110(7), they cannot be
10 considered under Article 1110. In this regard, I
11 would suggest that even though the Claimant put it up
12 on their slides, they have, in fact, failed to do a
13 proper Vienna Convention analysis of the meaning of
14 obligations in Chapter 17. In particular, the
15 meaning of 1709(1). Mr. Luz will do that for you
16 this afternoon and review the evidence that was
17 presented at this hearing that shows that Canada's
18 approach to utility is consistent with its Chapter 17
19 obligations.
20 Finally, Mr. Luz will briefly address
21 that even if the challenges could be considered under
22 Article 1110, the Claimant has not submitted evidence
23 sufficient to establish that the invalidation of its
24 patents has amounted to an unlawful deprivation of
25 the value of its investments. Mr. Luz will spend

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1 about 30 minutes on this point. And as Mr. Luz and
2 Ms. Zeman will show you, even if you were to consider
3 these claims under the law the Claimant says is
4 applicable, they have failed to make out the facts
5 needed to support their case. And for this reason as
6 well, the claim must be dismissed.
7 After Mr. Luz, I will stand up and
8 offer a few concluding thoughts on Canada's position
9 and what you have heard this week. And we will
10 reserve whatever time we have left at the end, which
11 I estimate to be about 30 minutes, for rebuttal.
12 THE PRESIDENT: Mr. Spelliscy, one
13 simple question. Why is it that the Respondent
14 treats sequentially 1105 and 1110 in that order and
15 the Claimant does 1110 and 1105? Is it only because
16 you start numbering first 1105, or do you have
17 another reason for that?
18 MR. SPELLISCY: We don't have a
19 substantive reason for doing that. We believe that
20 you should look to 1105. I think a lot of what is
21 heard on 1105 is more important. And I guess I would
22 come back a little. The parties are clear that under
23 1105, denial of justice is a standard under 1105, and
24 I'm going to talk about that. But under 1110, our
25 position is that a court invalidation simply can't

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1 amount to an expropriation, and we will explain to
2 you more why.
3 THE PRESIDENT: You have to follow the
4 reasoning -- or at least the way Claimant presents
5 its case, first of all, there is a breach of 1110,
6 and if you would fail that one, in the alternative
7 you can look at 1105.
8 MR. SPELLISCY: I think that our
9 sections could probably be interchangeable in that
10 regard in terms of actually following to and
11 responding to the case. But in our view, as a claim
12 about judicial action, this case really should be an
13 Article 1105 case, not Article 1110.
14 THE PRESIDENT: Then you are restating
15 Claimant's case.
16 MR. SPELLISCY: Which is why we've put
17 Article 1105 first in our defense. In our pleadings
18 I believe we did address Article 1110 first, and I'm
19 sure that in this situation I could relatively easily
20 switch out Mr. Luz and Ms. Zeman if you were so
21 interested.
22 THE PRESIDENT: No, no. This is not
23 the point. Simply I would like to see what's the
24 deeper meaning of your treating this, but there is
25 not so much deeper meaning in it.

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1 MR. SPELLISCY: The meaning comes, I
2 think at most, from our view that a challenge for
3 judicial measures is an 1105 case.
4 Let me turn to my first topic, denial
5 of justice. And let me explain how I'm going to
6 approach this today in order to, I hope, help you
7 understand why it is the only possible claim here and
8 that since such a claim here has not been made, this
9 case must be dismissed.
10 I'm going to take this in three parts.
11 As an initial matter, I'm going to walk you through
12 the two provisions in NAFTA at issue. Article 1105
13 and 1110. I'll first cover 1105. I'm going to do so
14 at the start at a general level without focusing yet
15 on how Article 1105 applies in the specific context
16 of court decisions. But I will address the Tribunal
17 questions in this regard on the source of law and the
18 content of the standard generally.
19 Then I will turn to Article 1110,
20 again first at a general level without focusing on
21 court decisions. And in this context I will discuss
22 the content of Article 1110, what needs to be proven,
23 and the meaning of Article 1110(7) and how
24 Article 1110 relates to Chapter 17. And finally, I
25 will turn to how Article 1105 and 1110 apply

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<p style="text-align: right;">2170</p> <p>03:06</p> <p>1 specifically in the context of judicial decisions. 2 And I will do two things. I will explain to you that 3 they apply only insofar as there has been a denial of 4 justice, and then I will also try to offer you an 5 explanation as to what the content of the denial of 6 justice standard is in our view. 7 Before we begin, I want to answer the 8 Tribunal's preliminary question on No. 25 on the 9 meaning of the applicable rules of international law 10 as it's referred to in Article 102(2) and 1131(1) of 11 NAFTA. 12 We put those provisions for you in the 13 presentation, and we can bring them up quickly here. 14 Article 102(2) provides that the parties, meaning the 15 NAFTA parties, are to interpret and apply the 16 agreement in accordance with applicable rules of 17 international law, and Article 1131(1) provide that 18 Chapter 11 Tribunals are to decide disputes in 19 accordance with the agreement and applicable rules of 20 international law. 21 As explained in our opening, the 22 relevant rules of international law in deciding 23 disputes regarding the obligations in Chapter 11 are 24 the rules of treaty interpretation, including the 25 customary international law rules, the</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2171</p> <p>03:08</p> <p>1 Vienna Convention. They also include the rules on 2 state responsibility to the extent that such rules 3 have not been displaced by things like Chapter 15 and 4 lex specialis. But most importantly, and to answer 5 Sir Daniel's question from earlier, these decisions 6 do not import substantive treaty standards. These 7 provisions are not an invitation for the Tribunal to 8 range beyond the obligations contained in Section A 9 of Chapter 11 of NAFTA and consider whether or not 10 other substantive international obligations have been 11 complied with. That is not their point. 12 With that general background, let's 13 look at the specific articles in question here. I'll 14 turn to Article 1105 first. 15 SIR DANIEL BETHLEHEM: Sorry, 16 Mr. Spelliscy, may I just take you back to that 17 answer? You've made this point by way of assertion. 18 Are you going to come back to it by way of sort of 19 proof, as it were? Are you going to give us anything 20 more on what the meaning of applicable rules is, or 21 were you making it by way of assertion? 22 MR. SPELLISCY: It's certainly our 23 position that the rules referred to are rules of 24 interpretation. I think I come back for why that is, 25 particularly in the context of a Tribunal, is to</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2172</p> <p>03:09</p> <p>1 recognize the limited jurisdiction of the Tribunal. 2 So the Tribunal can't range beyond what is in 3 Article 1116 or 1117 in terms of its jurisdiction. 4 We're going to address this at several points 5 throughout my submissions on the content of 6 Article 1105 and 1110. 7 In our view, when you think about the 8 Tribunal as an Arbitral Tribunal constituted to hear 9 arguments about the violations of Section A, you 10 cannot read an applicable law provision which does 11 not expand the jurisdiction of the Tribunal as doing 12 so. In our view, this is simply how the Tribunal is 13 to understand the rules that it may apply, which are 14 only the rules in Section A of Chapter 11 of NAFTA. 15 SIR DANIEL BETHLEHEM: Leaving aside 16 the question of our competence in respect of 17 Chapter 17, 1701(2) sets out a number of different IP 18 treaties. Would you say that had any of those 19 treaties been relevant -- not relevant in these 20 proceedings, but had any of those treaties been 21 relevant, we would have been able to refer to them 22 only because they set out in 1701(2), not because 23 they are other relevant rules of international law 24 going to the subject matter? 25 MR. SPELLISCY: To the extent they</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2173</p> <p>03:11</p> <p>1 contain substantive law obligations, those 2 obligations would not be brought into Chapter 11. So 3 to the extent that they were to be looked at by you 4 for context, what they can't do is you can't make a 5 finding on them. 6 SIR DANIEL BETHLEHEM: In respect of 7 1103(2), in the event of any inconsistency between 8 this agreement and such other agreements -- and the 9 such other agreements refers to the GATT and other 10 agreements to which such parties are party -- this 11 agreement shall prevail to the extent of an 12 inconsistency. I mean doesn't 1103(2) contemplate 13 the possibility that insofar as there is consistent 14 other substantive law, that's relevant for purposes 15 of an assessment of the application of NAFTA? 16 MR. SPELLISCY: I think you're 17 talking -- specifically the reference is to GATT, and 18 I think there's reasons why, because obviously there 19 are overlapping subject matters here to some extent. 20 And the parties wanted to make clear that when you 21 are applying the obligations in Chapter 11, it is 22 Chapter 11 that applies, and so that's why you 23 establish the trumping rule. 24 I think with respect to some of these 25 other treaties, we do have to remember that this is a</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 treaty between states. So the states are taking on
2 obligations with respect to the other states as well,
3 and so in that sense the parties -- and I think this
4 is the important point about 102(2) is that it is the
5 parties shall interpret and apply. This is about the
6 relations between states. So the reason why I'm
7 somewhat reluctant to get further into how this
8 applies is that this is not necessarily applicable in
9 this Tribunal. This Tribunal is a Tribunal of
10 limited jurisdiction, and it cannot go beyond that,
11 which is why, in answering on 1131, I came back to
12 the limits of this Tribunal's jurisdiction.
13 SIR DANIEL BETHLEHEM: Well, that's
14 helpful. Your last observation, because I think one
15 of the reasons why we wanted to put in the 1102(2)
16 point as well as the 1131(2) point was to see whether
17 there was a counterpoint between them. From what you
18 just said, I understand you are focusing on 1131
19 because you are focusing on the competence of the
20 Tribunal, whereas the point you're making in respect
21 of 102 is that that applies to the parties but not to
22 the Tribunal.
23 MR. SPELLISCY: Certainly. In terms
24 of the jurisdiction and the competence of the
25 Tribunal, you are governed by Section B of Chapter 11

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1 of NAFTA.
2 SIR DANIEL BETHLEHEM: Thank you.
3 MR. BORN: Why exactly is it that you
4 think that the substantive rules of state
5 responsibility would be applicable but that other
6 substantive rules, like say estoppel or
7 jurisdictional limitations, wouldn't be?
8 MR. SPELLISCY: I guess it would come
9 down to depend on what we mean by substantive rules.
10 When we think of substantive rules, what we're
11 talking about is the substantive legal standards in
12 other treaties. In our view, the rules on state
13 responsibility that would apply here to the extent
14 they're not displaced by NAFTA, are about what
15 entities a state might be responsible for. They
16 don't set out what is or is not a breach of the
17 provisions of Chapter 11 of NAFTA.
18 MR. BORN: Is it only substantive
19 legal standards under other treaties that you say
20 aren't applicable, or is it also substantive rules
21 under customary law?
22 MR. SPELLISCY: It would also be
23 substantive rules that are not covered under the
24 customary international law minimum standard of
25 treatment of aliens. Obviously we have that brought

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1 in as well under Article 1105 expressly, which we'll
2 talk about in a second. But in terms of other rules
3 of international law that might be customary -- for
4 example, one can think of the customary international
5 law of the sea. These are not rules that are brought
6 into Chapter 11.
7 MR. BORN: And rules of estoppel or
8 waiver?
9 MR. SPELLISCY: I think that the
10 question there would be a little bit confined by what
11 is the treaty saying, so some of the rules of
12 estoppel, some of the rules of waiver might be
13 applicable on certain things, but it really would
14 come down to, when we talk about Article 1116(1),
15 that there are things that the treaty itself will
16 trump in that. So, for example, there are other
17 procedural rules we talk about, like privilege, that
18 come in. But these are all that are not in NAFTA
19 and, yet, we talk about solicitor/client privilege as
20 well. These are secondary rules, not primary rules,
21 and that's probably the distinction that I'm trying
22 to draw.
23 SIR DANIEL BETHLEHEM: And by
24 secondary and primary, just to clarify, that's using
25 the language that the state responsibility articles

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1 use to differentiate between the state responsibility
2 rules being secondary and primary rules being rules
3 of obligation in treaties. Is that correct?
4 MR. SPELLISCY: That's the distinction
5 we're trying to draw.
6 Let's talk about Article 1105. As I
7 say, this article obligates the NAFTA parties to
8 treat the investments of the investors from other
9 NAFTA parties in accordance with international law,
10 including fair and equitable treatment and full
11 protection and security. And this was definitively
12 determined by the NAFTA parties in the 2001 Free
13 Trade Commission note of interpretation as requiring
14 no more than the customary international law minimum
15 standard of treatment of aliens. And this is a
16 standard that has been recognized by every NAFTA
17 tribunal since the note was issued.
18 The Tribunal has asked in question 34
19 that the parties address the sources and current
20 content of the customary international law principle
21 of minimum standard of treatment and denial of
22 justice with particular reference to the FTC note of
23 2001. I will come back in a few moments to spend
24 more time addressing the content of the minimum
25 standard of treatment and denial of justice at

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<p style="text-align: right;">2178</p> <p>03:17</p> <p>1 customary international law, but let me focus a 2 little on the question about the source of the 3 obligations first. I think this was discussed 4 somewhat this morning, but it is useful to recall how 5 custom is established. 6 According to Article 38(1)(b) of the 7 statute of the International Court of Justice, custom 8 has two constitutive elements. The first element 9 requires consideration of whether there is an 10 extensive, uniform and consistent general practice by 11 states. The second element refers to the state's 12 belief that such practice is required by law, 13 generally referred to as opinio juris. 14 NAFTA Tribunals, like in Glamis, have 15 recognized this double requirement to identifying 16 whether a rule of customary international law exists. 17 Now let me turn to addressing the content of that 18 minimum standard of treatment generally. 19 As you will have seen, what we just 20 went through will show in our view there is only one 21 question in that regard, and that question is always 22 what is customary international law. The Tribunal 23 asked at the start of the hearing whether the Neer 24 standard was a proper standard under Article 1105. 25 To clarify, Canada's position is not</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2179</p> <p>03:18</p> <p>1 that customary international law recognizes egregious 2 as a proper standard for the minimum standard of 3 treatment in the abstract. Rather, words like 4 egregious, or outrageous or shocking or flagrant 5 describe the nature of the types of conduct that have 6 crystallized into rules of customary international 7 law for the protection of foreigners or aliens. 8 The nature of the minimum standard as 9 a floor means that governmental action must meet a 10 high threshold for a breach to be established. But 11 to establish the content of the minimum standard of 12 treatment, one must turn to customary international 13 law. So in this regard, let's first talk about some 14 things that Article 1105 does not do. 15 Article 1105 does not invite an 16 assessment of what the Tribunal simply feels might be 17 fair or equitable. The note of interpretation leaves 18 no space for a tribunal to construe the meaning of 19 the words "fair and equitable treatment" in 20 Article 1105. The NAFTA parties, in fact, rejected 21 an ordinary meaning interpretation of those terms and 22 the subjective determination of fairness it would 23 entail. Instead, again, in order to ascertain the 24 applicable standard of treatment, the Tribunal must 25 consider applicable customary international law</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2180</p> <p>03:19</p> <p>1 rules. 2 Article 1105 also does not invite the 3 Tribunal to question the policy decisions made by 4 government. As the Tribunal in Mesa explained, "It 5 is not for this Tribunal to second-guess a 6 government's policy choices or to ascertain whether 7 the policy goals of the government would have been 8 better served by resorting to other means." 9 As we're going to talk about in a few 10 minutes, this is even more true when it is judicial 11 decisions that are at issue. As also made clear by 12 the NAFTA Free Trade Commission in its note of 13 interpretation, Article 1105 also does not allow a 14 Tribunal to find a breach based solely on the breach 15 of another provision of NAFTA. In this regard I note 16 that in question 31, the Tribunal asked about the 17 consequences of a finding of a breach of Chapter 17 18 for purposes of Article 1105. A breach of Chapter 17 19 would not be relevant to whether there has been a 20 breach of customary international law. 21 Certainly none of the provisions that 22 the Claimant alleges have been breached in Chapter 17 23 form part of the customary international law minimum 24 standard of treatment of aliens. Customary 25 international law does not even require a state to</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2181</p> <p>03:21</p> <p>1 provide patent protection for inventions. This is a 2 choice that states make for themselves, as they make 3 the choice as to what their substantive conditions of 4 patentability will be. 5 Finally, Article 1105 does not allow 6 the Tribunal to find a breach -- or to found a breach 7 on the standards contained in other treaties or other 8 sources of law. The Tribunal asked in question 35 9 how the minimum standard has been affected by the 10 3,000 BITs that have been entered into. And you 11 discussed that with the Claimant this morning. 12 In our view, these treaties are not 13 relevant to determining the meaning of the minimum 14 standard of treatment of customary international law. 15 There is no evidence of state practice in support of 16 the convergence thesis that you heard the Claimant 17 talk about this morning, whereby custom is said to 18 have apparently evolved so rapidly as to now have the 19 same content as an unqualified fair and equitable 20 treatment clause in bilateral investment treaties. 21 Now, it is true that at international 22 law, treaties may contribute to the crystallization 23 or development of a rule of customary international 24 law. For example, the exclusive economic zone law, 25 the sea context that we just talked about, even the</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2182</p> <p>03:22</p> <p>1 Vienna Convention on treaty interpretation, but not 2 all treaties or series of treaties does that. And 3 there should be no presumption that they do. The 4 International Court of Justice in the Diallo case 5 considered the issue of whether bilateral investment 6 treaties could establish a new customary 7 international law rule on diplomatic protection, 8 vis-à-vis corporations owned by nationals, and it 9 noted the fact that such provisions on protection are 10 often included is not sufficient to show customary 11 international law exists on a point. 12 In the words of the court, it could 13 equally show the contrary. This is something that 14 all three NAFTA parties have consistently stated. 15 The treaties with autonomous fair and equitable 16 treatment standards are distinct from and cannot 17 establish the content of the minimum standard of 18 treatment of customary international law. As the 19 Cargill Tribunal noted in its analysis of 20 Article 1105, "Significant evidentiary weight should 21 not be afforded to autonomous clauses inasmuch as it 22 could be assumed that such clauses were adopted 23 precisely because they set a standard other than that 24 required by custom." For these reasons, as the 25 Glamis Tribunal stated, arbitral awards as well under</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2183</p> <p>03:24</p> <p>1 treaties with autonomous fair and equitable treatment 2 standards provide no guidance, not even persuasive 3 authority, in determining the content of the minimum 4 standard of treatment of customary international law. 5 Again, for the purposes of Article 1105, there is one 6 question that is required by customary international 7 law. Now let me come back to the Tribunal's question 8 No. 34 about Canada's -- 9 SIR DANIEL BETHLEHEM: I'm sorry to 10 break you. Taking your assertions at face value, 11 how, then, do we determine what the content of 12 customary international law is when the vast array of 13 practice out there is going to be practicing the 14 performance of the treaty, and if we are really 15 trying to deduce custom by reference to one or two 16 isolated instances, are you not then really saying 17 that customary international law is simply sort of 18 frozen in time to sort of pre-BIT practice? 19 MR. SPELLISCY: Certainly our position 20 has always been that customary international law 21 evolves. But when it comes to determining the 22 content, as we're going to talk about, you still have 23 to look back to state practice and opinio juris, not 24 necessarily treaty practice. This is something that 25 actually the UPS Tribunal actually did in its</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2184</p> <p>03:25</p> <p>1 decision. I don't have a slide for you there, but in 2 one of the claims it was asked to consider whether 3 something had emerged as customary international law. 4 And what it did was it went back to state practice 5 and opinio juris. Now, it should be noted that there 6 could be a tribunal decision applying the customary 7 international law minimum standard of treatment that 8 does that analysis, that goes back to state practice 9 and opinio juris. We are not at all saying that you 10 can't refer to such a decision as persuasive 11 authority if they have done the analysis of state 12 practice and opinio juris. And that is where, in our 13 view, that the rubber must meet the road. 14 SIR DANIEL BETHLEHEM: And do you 15 think that having regard to the record in this case, 16 that this Tribunal has the wherewithal to make that 17 assessment; or are you simply resting on an implicit 18 burden of proof argue that it's for the Claimants to 19 make this case? 20 MR. SPELLISCY: It will become more 21 explicit that it's their burden of proof in about 30 22 seconds. 23 MR. BORN: Maybe 90 seconds. 24 The Glamis Gold quote that you have 25 for us involves reasoning that awards applying an</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2185</p> <p>03:26</p> <p>1 autonomous standard provide no guidance. Would you 2 accept that awards applying the minimum standard do 3 provide guidance? 4 MR. SPELLISCY: I would accept that if 5 they do the requisite analysis of state practice and 6 opinio juris in finding customary international law, 7 then they can provide guidance. 8 MR. BORN: Why wouldn't they, in and 9 of themselves, be evidence of state practice? States 10 agree to resolve disputes judged by reference to the 11 minimum standard, the agreed decision-maker does 12 that? 13 MR. SPELLISCY: I guess my response to 14 that would be it depends on whether the agreed 15 decision-maker is actually doing that. As we come to 16 talk a little bit about arbitrariness, there is some 17 concern that not all decision-makers charged with 18 that are actually doing that. And so to the extent 19 that you have a decision that is supposed to be 20 applying the minimum standard of treatment and in 21 looking for a new principle of customary 22 international law, one that is not readily accepted 23 by states -- and we'll talk about what a few of those 24 are -- does the requisite analysis of state practice 25 and opinio juris, then I would say you can rely on</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2186</p> <p>1 that decision as persuasive authority. 2 MR. BORN: And as evidence of state 3 practice? 4 MR. SPELLISCY: And as evidence of -- 5 well, you might look to the evidence of what the 6 states are arguing in that context, but in terms of a 7 tribunal award, the tribunal award is not state 8 practice. 9 MR. BORN: And it's not reflective of 10 state practice? 11 MR. SPELLISCY: I guess it would 12 depend upon whether or not it actually is reflective. 13 So I would say you have to look at the award itself, 14 determine whether the Tribunal, in rendering its 15 decision, actually went out and understood or had 16 presented to it state practice. 17 MR. BORN: Okay. 18 MR. SPELLISCY: Let's talk about some 19 of the content of that standard and about where the 20 burden lies. 21 As I said just a few seconds ago, 22 there is no dispute that customary international law 23 protects against a denial of justice. That is 24 well-recognized. As is the requirement at customary 25 international law that the investments of aliens be</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2187</p> <p>1 afforded physical protection and security. But to 2 the extent that the Claimant wants to argue that the 3 customary international law standard of treatment of 4 aliens contains other rules such as a rule against 5 discrimination based on industrial sector or a rule 6 that requires the protection of legitimate 7 expectations, it must prove that such a rule exists 8 at international law. This is where I get to 9 question 26 from the Tribunal about the burden in 10 this case. 11 Let me be clear that as it pertains to 12 the content of the minimum standard of treatment, as 13 the ICJ, prominent scholars, the NAFTA parties and 14 several NAFTA tribunals have all confirmed, the 15 burden of proving the existence of a rule of 16 customary international law rests on the party that 17 alleges it. 18 In the words of the NAFTA Cargill 19 Tribunal, "It is for the party asserting the custom 20 to establish the content of that custom." 21 To get directly to your question, Sir 22 Daniel, the Cargill Tribunal also recognized that the 23 proof of changing the custom is "not an easy matter 24 to establish. However, the burden of doing so falls 25 clearly on the Claimant. If the Claimant does not</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2188</p> <p>1 provide the Tribunal with proof of such evolution, it 2 is not the place of the Tribunal to assume the task. 3 Rather, the Tribunal in such an instance should hold 4 that the Claimant fails to establish the particular 5 standard asserted." 6 The Claimant has failed to meet its 7 burden here. The standards that the Claimant asserts 8 Canada should be held to under Article 1105 have not 9 been proved to be part of customary international 10 law. With respect to discrimination, as set out in 11 Canada's pleadings, Canada is of the view that there 12 is no principle of customary international law 13 preventing host states from providing different 14 treatment to foreign investors. In NAFTA those 15 obligations are set out in articles 1102 and 1103. 16 Let me pause here, because again this morning I heard 17 the Claimant make what sounded like a 18 nationality-based discrimination argument. 19 Let's recall again in the notice of 20 intent in this case, there was an 1102 claim. They 21 have dropped it. There is no allegation of 22 nationality-based discrimination that you need to 23 decide here. 24 Certainly in our view as well, there 25 is no prohibition at customary international law on</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2189</p> <p>1 discrimination in the granting of patents based on 2 the industrial sector of operations. It is shown 3 most clearly, I think, by the fact that, as you heard 4 in this hearing, there are certain sectors where the 5 inventions are not even considered patentable. There 6 is no customary international law requiring that any 7 specific sector be granted any level of protection 8 for its intellectual property. 9 With respect to the alleged 10 prohibition against arbitrary measures, I note that a 11 number of NAFTA tribunals have suggested that a 12 certain level of arbitrariness violates the minimum 13 standard of treatment. In my view, none of these 14 tribunals have undertaken an analysis of state 15 practice and opinio juris to identify the content of 16 the rule. But whether or not a prohibition against 17 arbitrary conduct has crystallized into custom, or 18 has yet to crystallize, what is clear to us is that 19 it cannot be assimilated to an assessment of the 20 reasonableness of the government action. 21 As we described in our opening 22 statement a number of days ago, arbitrariness entails 23 the complete absence of a legitimate justification 24 for government action or the absence of any rational 25 connection between the government measures and the</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 purported justification. As I will discuss more in a
2 few minutes, considering arbitrariness in the context
3 of court decisions contains an additional risk as it
4 could easily become a mechanism to turn international
5 tribunals into review or appeals courts for domestic
6 decisions.

7 Finally, with respect to legitimate
8 expectations, the Claimant has also alleged that
9 failure to meet an investor's legitimate expectations
10 with respect to the legal framework for patents can
11 be a breach of Article 1105 in and of itself. You
12 heard them say that this morning. In our view, and
13 in the view of all the NAFTA parties, there is no
14 general obligation under customary international law
15 to protect an investor's legitimate expectations, nor
16 is there an obligation not to change the applicable,
17 regulatory or legal framework.

18 As recently noted by the Mobil
19 tribunal, Article 1105 is not, and was never intended
20 to amount to, a guarantee against regulatory change
21 or to reflect a requirement that an investor is
22 entitled to expect no material changes to the
23 regulatory framework within which an investment is
24 made.

25 THE PRESIDENT: One further question

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1 about the legitimate expectations. You say there's
2 no general obligation, but what about a state
3 undertaking a specific obligation vis-à-vis a
4 specific foreign investor? Would that fall
5 under the --

6 MR. SPELLISCY: A violation of the
7 minimum standard of treatment?

8 THE PRESIDENT: Yes.

9 MR. SPELLISCY: Again, in our view
10 certainly there have been tribunals that have talked
11 about there needing to be a specific written
12 representation, but in our view there is no
13 obligation to respect an investor's legitimate
14 expectations under customary international law.
15 Tribunals that have considered the issue have
16 considered it in the context of it might be a
17 relevant factor, but it is not a standalone
18 obligation in any sense.

19 MR. BORN: Would you accept the
20 definition of arbitrariness that the Claimant cited
21 from Professor Schreuer? This was in the Lemire and
22 the EDF Romania cases on slide 129. You might want
23 to think about that.

24 MR. SPELLISCY: I will ask one of my
25 colleagues to pull it up for me. But I would think

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1 what we have to be cautious of on definitions of
2 arbitrariness -- again, in our view the cases that
3 have talked about arbitrariness have still not done
4 the requisite analysis of state practice and
5 opinio juris to show that a rule is crystallized.
6 But if you want to talk about arbitrariness, I think
7 what you have to be cautious of is this is not a
8 reason to second-guess government decision-making.
9 We get down to the point of the complete absence of a
10 legitimate justification. If it means anything at
11 customary international law, it cannot go beyond that
12 because, otherwise, you're simply assessing under
13 reasonableness the policy choices of government.

14 THE PRESIDENT: It begs the question
15 whether Schreuer is opinio juris.

16 MR. SPELLISCY: I'm sorry? I missed
17 it.

18 THE PRESIDENT: It begs the question
19 whether Schreuer is opinio juris.

20 MR. SPELLISCY: Certainly in our view
21 Professor Schreuer is not the opinio juris.

22 MR. BORN: My question was different,
23 though. My question wasn't whether Professor
24 Schreuer is opinio juris. It is whether the standard
25 he stated reflects your view of the minimum standard.

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1 But in your own time.

2 MR. SPELLISCY: Perhaps when we pull
3 up the slide I can see exactly, since I don't
4 remember off the top of my head.

5 While we're looking that up, let's
6 move on to discuss Article 1110 at a general level as
7 well. Pursuant to Article 1110, the NAFTA parties
8 are agreed, they have a right to expropriate property
9 as long as certain conditions are complied with.
10 Now, the prerequisite to any analysis of whether
11 there was or has been an expropriation is correctly
12 identifying, first, the object of the taking. The
13 Tribunal must first consider the nature and scope of
14 the investment that is alleged to have been
15 expropriated. As we've explained before, the first
16 question is "is it property at domestic law that
17 could be taken?" My colleague, Mr. Luz, will address
18 that more in the context of patents in this case.

19 Once the right has been identified and
20 the Tribunal is satisfied that there is property at
21 domestic law that could be expropriated, I would
22 suggest that several factors must be considered to
23 determine whether there has been an expropriation.
24 If we are talking about direct expropriation, it
25 would require the state to seize the property for its

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<p style="text-align: right;">2194</p> <p>03:38</p> <p>1 own or someone else's possession. If we are talking 2 about indirect expropriation, there are generally 3 several more questions to consider. 4 The first factor is the impact of the 5 measure on the investment. The Tribunal must 6 determine whether the state conduct has resulted in a 7 total or near total deprivation of the investor's 8 investment and whether the effect of that measure is 9 permanent. 10 The second factor is the extent to 11 which the measure interferes with distinct, 12 reasonable, investment-backed expectations. I want 13 to be clear here, interference with such expectations 14 does not mean that there has been an indirect 15 expropriation. Whether the investor had a legitimate 16 expectation arising from a written and specific 17 commitment of the host state that the state would not 18 act in the way that it did is simply one of the 19 relevant considerations. 20 The third factor to consider is the 21 character of the measure. In other words, what is 22 the type of measure at issue. I think that this 23 comes to question 39 of the Tribunal and the question 24 of the President about what would be non-compensatory 25 takings. As well recognized under international law,</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2195</p> <p>03:39</p> <p>1 a measure that is non-discriminatory and designed to 2 protect legitimate public welfare objectives would 3 simply not amount to an indirect expropriation except 4 in rare circumstances. And, importantly, here 5 judicial decisions where the court is acting in the 6 capacity of a neutral and independent arbiter of the 7 rights of the litigants before it are the sorts of 8 measures that simply do not rise to the level of an 9 expropriation, even if they substantially affect the 10 value of an investor's investment. 11 We're going to turn more specifically 12 to the question of court measures in a second, but 13 before we get that, there's one other point I want to 14 make on the general standard of Article 1110. The 15 Claimant argued in its opening that Article 1110 is 16 violated if there has been a substantial deprivation 17 and a violation of a substantive rule of 18 international law such as a violation of an 19 obligation in Chapter 17 that leads to a violation of 20 1110. They said that leads to a violation of 1110. 21 This is just wrong. 22 And, frankly, I have trouble 23 understanding the distinction that the Claimant is 24 trying to draw in making its arguments here, because 25 I can't understand why a violation of Chapter 17</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2196</p> <p>03:41</p> <p>1 matters, but why that that does not open the 2 floodgates to challenges and to litigation of all of 3 the other substantive laws, international law, that 4 is out there. We think about Saipem. 5 Now, I understand that the hook the 6 Claimant wants to use is Article 1110(7). And I know 7 that the Tribunal has asked a number of questions on 8 Article 1110(7) in Chapter 17, which I'm going to try 9 to answer now. 10 Article 1110(7) does not bring any of 11 the obligations in Chapter 17 into the scope of 12 Chapter 11. Again, this doesn't mean that you can't 13 consider whether the measures are consistent with 14 Chapter 17. Let's pull up Article 1110(7). I think 15 it's important to see what it starts with. "This 16 article does not apply." So this article does not 17 apply. It is a shield. It is phrased in the 18 negative. 19 Now, it does allow you to review 20 whether a state's measures are consistent with 21 Chapter 17 when a state raises consistency with 22 Chapter 17 as a defense to an allegation of a 23 violation of Article 1110. But -- and this is the 24 important point, and it is one that all three NAFTA 25 parties have emphasized -- it is a shield only and</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2197</p> <p>03:42</p> <p>1 not a sword. In its 1128 submission, its first one, 2 the United States has said that Article 1110(7), 3 therefore, should not be read as an element of an 4 investor's claim under Article 1110(1). And Mexico 5 has said 1110(7) does not invite an Arbitral Tribunal 6 to determine whether the host party has complied with 7 Chapter 17. So we agree with the Claimant, if you 8 determine consistency with Chapter 17, if that's 9 raised a defense, there can be no claim under 10 Article 1110(7). But if you believe there is 11 inconsistency with Chapter 17, then all that tells 12 you is that the NAFTA party does not have the safe 13 harbor under Article 1110(7). 14 In opening arguments Sir Daniel asked 15 me about Article 1101(3) and the exclusion of Chapter 16 14 from Chapter 11, and I explained that Article 17 1110(7) was actually doing something different. But 18 let me point you to another article of NAFTA that I 19 think may help and contrast Article 1110(7). In my 20 opening remarks last week I said that your 21 jurisdiction is limited to assessing a breach of the 22 obligations of Section A of Chapter 11 of NAFTA. We 23 talked about that again today. Let's pull up 24 Article 1116(1). 25 That article provides an investor of a</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 party may submit to arbitration under this section a
 2 claim that another party has breached an obligation
 3 under Section A or Article 1503(2) or, B,
 4 Article 1502(3)(a) where the monopoly has acted in a
 5 manner inconsistent with the party's obligations
 6 under Section A.
 7 I would suggest when the NAFTA parties
 8 wanted to make the breach of the obligations in
 9 another chapter of NAFTA, the possible source of a
 10 finding of a breach of Chapter 11 by a Chapter 11
 11 Tribunal, they did so. Said another way, where the
 12 NAFTA parties wanted to give a Chapter 11 Tribunal
 13 the ability to rule on whether the provisions of
 14 another chapter of NAFTA had been breached, they did
 15 so expressly. They didn't do so for Chapter 17. I
 16 think the difference between those two provisions and
 17 when we look at Article 1110(7) is clear. Article
 18 1110(7) simply creates a shield. It means, in other
 19 words, there is no causal relationship between a
 20 breach of Chapter 17 and a breach of 1110. You
 21 cannot make a finding of a breach of 1110 solely
 22 based upon a breach of Chapter 17. As the U.S. said,
 23 Chapter 17 does not establish the content of
 24 Article 1110.
 25 SIR DANIEL BETHLEHEM: May I ask,

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1 would the position be different if there was some
 2 other determinative finding of a breach of
 3 Chapter 17? For example, have there been -- were
 4 there to be a Chapter 20 panel finding, that there
 5 was a breach of Chapter 17, would that be cognizable
 6 by a Chapter 11 Tribunal for purposes of a claim that
 7 arose in respect of a particular investment?
 8 MR. SPELLISCY: It would be cognizable
 9 only in the extent that it would mean that the
 10 Tribunal would likely conclude on that evidence and
 11 should conclude that, in fact, there is no defense
 12 under Article 1110(7). You would still have to
 13 consider and look at Article 1110 and determine is
 14 there an expropriation, but it would not be
 15 cognizable as a claim in and of itself.
 16 SIR DANIEL BETHLEHEM: So you are
 17 adopting the sequencing argument that the United
 18 States has just set out in its supplemental brief in
 19 paragraph 12. Is that correct?
 20 MR. SPELLISCY: The sequencing
 21 argument is essentially consistent with the way that
 22 we've seen and interpreted 1110(7) throughout these
 23 proceedings.
 24 MR. BORN: You say that you -- by
 25 which I mean the Tribunal -- cannot make a finding of

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1 the breach of 1110 solely based upon a breach of
 2 Chapter 17, and then you go on and say, as the U.S.
 3 said, Chapter 17 does not establish the content of
 4 Article 1110. If I understand it, neither of those
 5 propositions are things the Claimant would disagree
 6 with? Their case is, instead, that, if I understand
 7 it, a breach of Chapter 17 can be relevant to one
 8 element of either 1105 or 1110. Why exactly is it
 9 that a breach of Chapter 17, which set out
 10 internationally agreed substantive standards,
 11 wouldn't at least be relevant to the questions
 12 presented under 1105 and 1110?
 13 MR. SPELLISCY: I think with respect
 14 to Article 1105 first, as I mentioned earlier, what
 15 is contained in Chapter 17 is not part of the
 16 customary international law minimum standard of
 17 treatment of aliens. That refers to a specific
 18 standard. And the NAFTA parties free trade -- the
 19 note of the Free Trade Commission made that clear.
 20 The breach of another provision of NAFTA does not
 21 establish a breach. You have to look to customary
 22 international law.
 23 With respect to Article --
 24 MR. BORN: Just pausing there for one
 25 moment and trying to think about your view of the

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1 content of the minimum standard, why wouldn't a
 2 violation of international substantive obligations
 3 under Chapter 17 at least be relevant to questions of
 4 arbitrariness?
 5 MR. SPELLISCY: Again, I would come
 6 back down to a question of whether or not the
 7 Tribunal considered there was an arbitrariness
 8 standard and then whether or not what actually
 9 happened was a breach of a customary international
 10 law minimum standard of treatment principle. And so
 11 in our view, when we look at what's in Chapter 17,
 12 Chapter 17 is treaty law. It is not customary
 13 international law. It is specifically treaty law,
 14 and it's a treaty law that the NAFTA parties adopted
 15 and apply between each other. In our view it is not
 16 relevant to whether -- the mere fact of a breach of
 17 Chapter 17 is not relevant to the question of whether
 18 there is a breach of customary international law.
 19 You would have to look to the question if Chapter 17
 20 did not exist, if we took Chapter 17 out of NAFTA.
 21 At that point would what happened have breached the
 22 customary international law standard of treatment.
 23 That would be a separate analysis that you would do.
 24 MR. BORN: I guess just pushing you on
 25 that, though, if you'll remember -- I think it was

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1 Professor Holbrook's hypothetical about a patent that
 2 failed to cure 100 percent of the patients -- and I'm
 3 sure one of your colleagues will address this in
 4 detail, but assuming that he were right that that was
 5 a violation of Chapter 17 and that that measure was
 6 imposed, why wouldn't the fact that that measure
 7 violates Chapter 17 at least be relevant? At least
 8 be relevant to the question whether the state action
 9 was arbitrary or, if the Tribunal were to find such a
 10 rule existed, a violation of legitimate expectations?
 11 MR. SPELLISCY: I think it comes back
 12 to, again, that Chapter 17 doesn't necessarily play
 13 into that. The fact is you have to find some rule of
 14 customary international law. And if the question is
 15 is it arbitrary and you find that is a rule of
 16 customary international law based on state practice
 17 and opinio juris, then you can do that analysis
 18 without turning to Chapter 17. Chapter 17 sets out
 19 treaty obligations between the NAFTA parties. It
 20 does not codify or enshrine or crystallize any rules
 21 of customary international law and certainly not the
 22 customary international law minimum standard of
 23 protection for aliens.
 24 MR. BORN: Okay.
 25 MR. SPELLISCY: To come back to the

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1 Article 1110 point as to whether it would be relevant
 2 in the context of Article 1110, so a determination by
 3 a Chapter 20 Tribunal in the context of whether there
 4 is an expropriation, I think it would be relevant to
 5 an 1110 analysis because it would mean that the
 6 1110(7) shield does not apply. But as to whether
 7 there has actually been an unlawful expropriation
 8 that represents a compensatory taking in violation of
 9 Article 1110, that is a separate analysis that you
 10 would have to do. And it's not one that depends upon
 11 what happened in Chapter 17.
 12 SIR DANIEL BETHLEHEM: So is the only
 13 recourse for a patent owner, patentee, if it is
 14 concerned about consistency of practice with
 15 Chapter 17, to go along to its NAFTA party and try
 16 and push that NAFTA party to raise it at the level of
 17 an interstate party discussion or Chapter 20 case, is
 18 that the avenue of recourse?
 19 MR. SPELLISCY: Certainly in our view
 20 Chapter 20 tribunals are set up to resolve disputes
 21 under chapters like Chapter 17. So if there is a
 22 concern about a breach of the obligations of
 23 Chapter 17, it is to be resolved between the state
 24 parties to NAFTA under Chapter 20.
 25 SIR DANIEL BETHLEHEM: So we are

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1 informed in the record that, for example, that the
 2 United States has raised these issues with Canada,
 3 you would say that that is the avenue for these
 4 issues to be pursued between the United States and
 5 Canada?
 6 MR. SPELLISCY: It certainly is the
 7 avenue. I would caution you on one bit on the record
 8 there, and I think one of my colleagues will talk
 9 about what was raised by the United States in the
 10 specific context of whether there is a concern about
 11 the policy or a concern voiced about an actual breach
 12 of Chapter 17. One of my colleagues will discuss
 13 that in more detail later. Certainly if there was
 14 concern about a breach of Chapter 17, it is a
 15 state-to-state matter.
 16 SIR DANIEL BETHLEHEM: Thank you.
 17 Well, it would be -- I'll just take the point at the
 18 moment now just to reference that, because I think it
 19 would be helpful in the light of what Ms. Cheek
 20 mentioned, which is at 14:45:21 where she references
 21 this specifically. And then we have in the record I
 22 think C-331 and following, where the United States
 23 specifically addresses -- continues to have serious
 24 concern with the availability of rights. It would be
 25 helpful if, when you come to address that, you could

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1 pick up these points.
 2 MR. SPELLISCY: I think my colleague,
 3 Mr. Luz, will be addressing that in the context of
 4 what has happened between the NAFTA states since the
 5 signing of NAFTA. Let's move beyond the general
 6 obligations in Article 1105 and 1110 and talk about
 7 our view of the content of these obligations as
 8 applied specifically to judicial measures. We'll
 9 skip a couple ahead.
 10 We'll come to slide 41 and we'll start
 11 there. The Tribunal has asked the parties the
 12 question in 38 to discuss whether an alleged
 13 expropriation as a result of a judicial measure is
 14 limited to a denial of justice. Let me answer that
 15 for both Article 1105 and 1110. As I said at the
 16 beginning of my remarks, the NAFTA parties are in
 17 complete agreement on what their treaty, the NAFTA,
 18 means when it comes to the acts of the judiciary that
 19 are alleged to have breached the two specific
 20 articles at issue in this case, Article 1105 and
 21 Article 1110.
 22 Now, my colleague, Mr. Berengaut,
 23 walked through a number of cases, and what I found
 24 interesting, that all of the cases the Claimant
 25 relied upon, Saipem, ATA, Rumeli, not a single case

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1 involved a dispute under Article 1105 or 1110. All
 2 of the cases that involved disputes under those
 3 articles, the Claimant had to go to great lengths to
 4 try to distinguish. I'm going to go through and very
 5 briefly hit some of these. We've covered them
 6 extensively in our opening submissions and our
 7 written submissions.

8 I would suggest the fact is that there
 9 has never been a NAFTA case under Article 1105 or
 10 1110 that held judicial measures in breach of
 11 anything other than a denial of justice standard. In
 12 this vein that's not surprising because, as I say,
 13 the NAFTA parties are agreed. The United States has
 14 said about Article 1105 that an investor's claim
 15 challenging judicial measures is limited to a claim
 16 for denial of justice. And about 1110, that
 17 decisions of domestic courts acting in the role of a
 18 neutral and independent arbiter of the legal rights
 19 of litigants do not give rise to an expropriation.

20 Mexico has said about 1105 that with
 21 respect to judicial acts, denial of justice is the
 22 only rule. And about 1110, when legal rights are
 23 declared a nullity, a disputing investor would have
 24 to establish a claim of denial of justice under
 25 Article 1105.

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1 And the tribunals, I would suggest,
 2 the Claimant tried to distinguish have actually ruled
 3 the same thing. In Mondev the Tribunal ruled that it
 4 would only be concerned with the question of what was
 5 commonly called a denial of justice in considering
 6 the challenge to the decisions of the Massachusetts
 7 courts.

8 In Waste Management the Tribunal ruled
 9 that it would only find a breach by the Mexican
 10 courts if it could discern a denial of justice. And
 11 Loewen explained that the Article 1110 challenge to
 12 the decisions of the U.S. courts could only succeed
 13 if Loewen was able to establish a denial of justice
 14 in violation of Article 1105.

15 And finally, in Azinian, the Tribunal
 16 found that the failure to allege a denial of justice
 17 was fatal to the claim. The Claimant has asserted
 18 that the recognition of this rule, that for a measure
 19 to rise to some sort of breach of Article 1105 and
 20 1110 for judicial measure requires a denial of
 21 justice, they've asserted that this would amount to
 22 some sort of blanket judiciary immunity. This is
 23 nothing but a red herring. Let's take a
 24 hypothetical.

25 Let's assume that there was a specific

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1 provision in Chapter 11, within your competence, that
 2 said no court shall, under any circumstances,
 3 invalidate a patent once it has been issued by the
 4 Patent Office. If one of the courts of the NAFTA
 5 parties then invalidated a patent, even if it did so
 6 consistently with the domestic law, there would be no
 7 question that the act of the court breached an
 8 international law obligation in NAFTA. There would
 9 be no need to prove a denial of justice.

10 But, of course, NAFTA contains no such
 11 provision. We are talking just about whether there
 12 has been a violation of 1105 and 1110. The question
 13 is what is the content of those articles when it
 14 comes to the actions of the judiciary deciding the
 15 cases that have been brought before it. As I've
 16 walked you through the cases, the answer is and has
 17 always been it's limited to a denial of justice.

18 The Tribunal has asked in question 28
 19 about what our position on the content of the denial
 20 of justice standard is. Let me start with a simple
 21 statement of proposition, and I will quote Jan
 22 Paulsson here. "Denial of justice is always
 23 procedural."

24 Zachary Douglas, who you heard about
 25 this morning, has explained why denial of justice

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1 should be the only lens through which to consider
 2 consistency of domestic court decisions with
 3 international investment standards. In doing so, he
 4 explained that "international law is deferential to
 5 the particular virtues of adjudication by respecting
 6 the integrity of the process and the outcomes it
 7 produces. This deference is manifest in the finality
 8 rule and the idea that denial of justice focuses upon
 9 the procedural aspects of the adjudication rather
 10 than the substantive reasons for the decision." Let
 11 me explain a little bit more what that means in our
 12 view.

13 Obviously the first question is have
 14 the parties been afforded their day in court. But we
 15 would agree, of course, that one simply cannot look
 16 only to whether there was superficially fair
 17 procedures. Remember what we said in our answer to
 18 the primary question in this case. When it is the
 19 acts of a neutral and independent judiciary that is
 20 being challenged, the only possible claim is for a
 21 denial of justice. So if it is not a neutral and
 22 independent judiciary, no amount of process will
 23 matter. Let's be clear about something else. You
 24 are entitled to have due process -- an investor is
 25 entitled to have due process that means something. A

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1 procedure that means something. A real day in court,
2 not the pretense of a day in court. So in our view
3 how does the Tribunal tell if a process was a truly
4 fair procedure?
5 In this regard, the Tribunal might
6 consider whether there is a rational basis in law for
7 the decision or whether the decision appears bereft
8 of any reason or if it appears malicious. Such
9 evidence might be an indicia of whether there was, in
10 fact, no meaningful due process.
11 If we look to what the Tribunal in
12 Azinian said, it said it would consider the clear and
13 malicious misapplication of the law because there
14 might be merely a pretense of form. Does this mean
15 that there's such a thing as a substantive denial of
16 justice? No. International tribunals are not courts
17 of appeal, and they can't sit in judgment of whether
18 a domestic court has appropriately applied its
19 domestic law. The mere fact of a misapplication of
20 law will never be enough in itself to give rise to
21 the level of a denial of justice. As the Loewen
22 Tribunal said, "Defects in procedure or a judgment
23 which is open to criticism on the basis of either
24 rulings of law or findings of fact are not enough."
25 But if a decision is truly bereft of reason and an

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1 international Tribunal concludes that it was
2 malicious, that could be evidence of whether it was
3 actually a fair procedure, actually a fair hearing in
4 front of a neutral and independent arbiter of the law
5 that might lead that tribunal to conclude there has
6 been a procedural denial of justice.
7 So how does all of this apply here?
8 Let's recall. There is no allegation that there was
9 any sort of denial of justice in this case. There is
10 no allegation that the decisions that resulted in the
11 particular invalidations of the Claimant's patents
12 involved lack of fair procedure. There is no
13 allegation that Canada's courts are not a neutral and
14 fair and independent judiciary. The Claimant's own
15 experts admitted, as Mr. Siebrasse said, the Canadian
16 trial judges are usually pretty good and get the law
17 pretty right. And as Mr. Reddon explained, while
18 counsel lead cases, the Federal Court is rigorous in
19 its approach to decisions.
20 Further, there is no allegation that
21 the decisions with respect to the atomoxetine and
22 olanzapine patents did not correctly apply Canadian
23 law as it existed in 2010 and 2011. So there is no
24 allegation that these decisions at all represented
25 denial of justice. No failure of process. Not even

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1 an allegation of an innocent misapplication of the
2 law, let alone a malicious one, that might constitute
3 evidence that the process afforded was merely
4 pretextual or of a kangaroo court. As a result, we
5 would submit that this claim, because it has not pled
6 a denial of justice, must be dismissed.
7 Before moving to time bar, I do want
8 to take a step back, because it gets to something we
9 were talking about a little bit earlier. The
10 Claimant has stressed in its opening and in its
11 pleadings today that this case is about its patents
12 for atomoxetine and olanzapine. But the way that it
13 pled its case at the hearing has, in our view, shown
14 that its complaint is not about those decisions.
15 In the cross-examination of
16 Mr. Dimock, those judicial decisions were barely
17 mentioned. We spent almost the entire time talking
18 about AZT from 2002, the cases in 2005 and Raloxifene
19 from 2008.
20 What about those cases? I will
21 discuss why, in our view, any challenge to such
22 doctrines from those cases is time-barred, and my
23 colleague, Mr. Johnston, will explain that those
24 cases do not represent a dramatic change in the law.
25 But let me take a minute here and just ask you to

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1 assume two things.
2 Let's assume that the Claimant could
3 bring this challenge and it wasn't time-barred. And
4 let's assume that there was a dramatic change in the
5 law. Does this amount to a denial of justice? It
6 does not. Common law courts evolve and develop the
7 law. They cannot change a statute, and there is no
8 allegation here that they have done so. At most, the
9 allegation here is that they have dramatically
10 changed their judicial interpretation of the statute
11 from their previous judicial interpretation. That is
12 what courts sometimes do, particularly in patent law.
13 As Dr. Gervais explained, "How the
14 patent bargain, therefore, is applied will change and
15 evolve from jurisdiction to jurisdiction, and over
16 time I would submit that this is the nature of the
17 common law process, when the policy is mostly made in
18 and by courts."
19 As Mr. Siebrasse explained in his view
20 as well, patent law evolves through judicial
21 decisions. In fact, the doctrine of sound prediction
22 was one such evolution in the Monsanto case.
23 Mr. Merges also confirmed that as with
24 any doctrinal area that had a single word in the
25 statute, like "useful," it was necessary "to take off

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<p style="text-align: right;">2214</p> <p>04:07</p> <p>1 from a single word [...] and develop a body of law to 2 apply to the specific technologies and specific 3 situations" and that "common law elaboration and 4 application of the basic concept is necessary." None 5 of that happening should be surprising or shocking. 6 It's what courts do. They interpret. They evolve. 7 Sometimes they overrule. And sometimes they reach 8 into the attic to dust off an old principle. Or as 9 the Claimant's expert, Professor Merces, wrote in his 10 book, they "reach into their treasure chest of old 11 discarded principles to come up with an overlooked 12 gem in order to decide the case in front of them." 13 Many times the courts will look to the 14 past, read the cases, discern a rule and express that 15 rule in a synthesized way that will ensure that the 16 previous jurisprudence is appropriately understood 17 and will be correctly applied by lower courts. As 18 Mr. Merces explained, "Sometimes courts cite older 19 cases to apply basic rules to new facts." And 20 sometimes the Supreme Court of a country will be 21 required to correct the lower courts. For example, 22 during the examination of Mr. Dimock, we saw a lot of 23 references to the decisions of the Federal Court of 24 Appeal in Ciba-Geigy and the Federal Court of 25 Appeal's decision in AZT.</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2215</p> <p>04:08</p> <p>1 Let's assume that the 1982 Ciba-Geigy 2 decision said what the Claimant says. My colleague, 3 Mr. Johnston, will come back to that point. But 4 let's assume. Let's assume that the Supreme Court 5 told the Federal Court of Appeal in 2002 that they 6 were wrong and always had been wrong on Canadian law. 7 That is the role of the Supreme Court of Canada. In 8 fact, I would suggest it must be the role of the 9 Supreme Court of any country to sometimes tell the 10 lower courts they got it wrong. None of that amounts 11 to a denial of justice or a breach of international 12 law. 13 In fact, the same allegation was made 14 in Mondev, and it was rejected as a ground for a 15 basis of liability under the theory of 1105. I would 16 suggest that if you were to hold here in this case 17 that the mere fact that the lower courts embarked on 18 a path that they were later told was wrong by a state 19 Supreme Court, if you were to hold that that amounts 20 to a denial of justice or a violation of 21 international law, you would do nothing less than 22 pretty much indict the entire legal system of 23 virtually every state. You would be telling the 24 Supreme Court that they cannot correct the lower 25 courts because let's think about the nature of the</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2216</p> <p>04:09</p> <p>1 courts, and especially the Supreme Court. Not every 2 case goes to the Supreme Court. Sometimes they 3 settle before they get there or an appeal is 4 abandoned for other reasons. And even if they do go, 5 it takes a long time to get there and it takes a 6 while to decide. 7 So every time the Supreme Court 8 reverses a decision of the Court of Appeal, it is 9 changing the law that existed for at least some 10 period of time. That, by itself, cannot possibly 11 amount to a violation of international law. Let's 12 take it a step further because sometimes the Supreme 13 Court, especially in a common law jurisdiction, will 14 be called upon to correct its own jurisprudence. In 15 the common law world some of the most important legal 16 developments have occurred when a country's Supreme 17 Court overrules its own previously longstanding 18 judicial precedent. 19 We can talk about cases well known in 20 law school, like Brown v Board of Education in the 21 United States overruling Plessy v Ferguson. In our 22 area of arbitrability, the 1988 U.S. Supreme Court in 23 American Express/Shearson, overruling 35 years of 24 previous jurisprudence under its Wilko holdings. It 25 can come closer to home. Professor Merces testified</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2217</p> <p>04:11</p> <p>1 about the Alice case, and he admitted that Alice 2 might be a very important case that changes the law 3 significantly for U.S. patents. NAFTA cannot be seen 4 to prevent this. 5 Changes in the law, corrections, 6 consolidations, rationalizations of various 7 decisions, these are all normal aspects of a 8 functioning judicial system. If you hold otherwise, 9 you would be saying that NAFTA Chapter 11 tribunals 10 are, in fact, courts of appeal from the courts of the 11 NAFTA parties. That is not the role of this 12 Tribunal. 13 Without an allegation of a denial of 14 justice in respect of the particular decisions that 15 the Claimant alleges violated Article 1105 and 1110, 16 there is no allegation of a breach, and the Claimant 17 has failed to state a claim as a matter of law. 18 THE PRESIDENT: Mr. Spelliscy, is this 19 a good moment to break? 20 MR. SPELLISCY: Sure. Happy to do so. 21 SIR DANIEL BETHLEHEM: Will you be 22 coming back afterwards? I have a question to put. 23 MR. SPELLISCY: I will indeed. 24 THE PRESIDENT: Ten minutes break. 25 (Recess taken)</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 THE PRESIDENT: Mr. Spelliscy, please
2 continue. I think Sir Daniel has a question.
3 SIR DANIEL BETHLEHEM: I think it was
4 tactical to break before the question, because I've
5 now forgotten it completely. I'm going to try and
6 recreate the question. It really goes back,
7 Mr. Spelliscy, to the sweep of your arguments rather
8 than what you were saying before.
9 Mr. Berengaut made the point for
10 Claimants that in Claimant's view, quite apart from a
11 denial of justice, if there was a breach of
12 international law by a court, that that would be
13 actionable. I take it that you're saying that that's
14 not. It's only if there is a denial of justice. Can
15 I just clarify?
16 MR. SPELLISCY: Certainly under
17 articles 1105 and 1110 of NAFTA, which is why I
18 brought up the hypothetical that if there was a
19 specific provision of international law that applied
20 directly to a court that says no court shall do this,
21 then you wouldn't need one. But under 1105 and 1110,
22 most certainly.
23 SIR DANIEL BETHLEHEM: That's what I'd
24 just like to test and see what the limits of that
25 are. And just for sake of discussion, if, for

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1 example, there was a dispute -- and I'm looking at
2 NAFTA 1110 here. Let's say that there was a dispute
3 about whether compensation that had been offered
4 included interest at a commercially reasonable rate.
5 So it came within the scope of 1110(4). I'd just
6 like to test whether you would consider that to be a
7 denial of justice claim and the broader context --
8 and I take it that this is what Claimant were
9 referring to, although they didn't do so explicitly,
10 at least not in their oral submissions. That is that
11 Article 4 of the state responsibility rules, so
12 secondary rules of international law which you accept
13 are incorporated by reference to the applicable rule
14 standard, explicitly contemplates the possibility
15 that a judicial decision would amount to conduct
16 which is attributable to the state for purposes of
17 state responsibility.
18 So I'm really just trying to clarify
19 the space between what you are saying, the limitation
20 of sort of denial of justice, but the secondary rules
21 of international law which accept that a judicial
22 decision may itself be actionable if you like.
23 Rather, not actionable. Be attributable to the
24 state.
25 MR. SPELLISCY: And let's be clear

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1 from our position as well. Certainly there is no
2 question that acts of the judiciary are attributable
3 to the state. But there is a separate question, in
4 our view, which comes up. What is the content, what
5 is the primary rule, of the obligations of
6 international law when applied to the judiciary. And
7 this is where we differ from the Claimant because in
8 our view, the content of the substantive obligations
9 as applied to the judiciary are limited in
10 recognition of the judicial function so that it is
11 only in the context of a denial of justice.
12 On your example on the interest rate,
13 I would think, again, the question would be if the
14 Claimant were to go to a court and there was an
15 argument, which is what I take it, about what the
16 appropriate interest rate was, then it would fall
17 again, in our view, to a question if that was under
18 domestic law, if they wanted to challenge that
19 decision as to whether it was a denial of justice, I
20 would think in that determination there would also
21 have to be some sort of executive action offering
22 compensation. Because courts don't offer
23 compensation. As Mr. Luz explained, they have no
24 purse. So in that context there would have been an
25 expropriation, there would be an executive action,

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1 and if the compensation wasn't considered adequate
2 that was offered, you could bring the actual
3 expropriation, the executive taking, to arbitration.
4 Now, if you wanted to challenge the
5 judicial decision itself, then you would be limited
6 to a denial of justice.
7 SIR DANIEL BETHLEHEM: So in
8 circumstances in which, let's say, the executive in
9 the context of a taking offered a commercially
10 reasonable rate of interest which was, let's say,
11 6 percent and a Claimant challenged that saying
12 6 percent was too low -- this is before the local
13 court -- and that it really ought to be 11 percent
14 but that the court, in its wisdom, looked at those
15 rates and said, no, in fact 6 percent is too high, it
16 should be 4 percent, and gave a fully reasoned
17 decision, are you saying that that would not be, as
18 it were, sort of actionable as an alleged breach of
19 NAFTA because that was -- that did not amount to a
20 denial of justice?
21 MR. SPELLISCY: I think that the court
22 decision itself would not be actionable if it did not
23 amount to denial of justice. In that circumstance,
24 again, remember that the expropriation there and the
25 compensation that was offered, including the

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<p style="text-align: right;">2222</p> <p>04:29</p> <p>1 interest, was actually offered by the executive. So 2 what I think would be actionable in such a 3 circumstance -- I don't think it would succeed, but 4 what would be actionable would be a claim against the 5 taking itself as a violation of the rules in 6 Article 1110. So the argument would be that the 7 offer of 6 percent by the executive was not, in fact, 8 in conformity with Article 1110 and that it should be 9 11 percent. And that would be the argument so that 10 the argument I think there would challenge the 11 executive action in the taking. If you wanted to 12 challenge the subsequent judicial decision, it would 13 be limited to a denial of justice. 14 SIR DANIEL BETHLEHEM: Thank you. 15 MR. BORN: And that would be so even 16 if the court held instead of 4 percent, zero percent? 17 MR. SPELLISCY: I still think that 18 it's a government action. It's an executive decision 19 you would challenge. Certainly if you didn't wait 20 too long, you might have a claim to go to the 21 actual -- an investment Arbitral Tribunal under 22 Article 1110 and say that our property was taken and 23 we were not afforded compensation at a reasonable 24 amount of interest. And you could argue as to what 25 that interest rate should have been in front of the</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2223</p> <p>04:30</p> <p>1 Arbitral Tribunal. But the challenge there, the 2 expropriation challenge, would be to the executive 3 taking and to the compensation offered. If you 4 wanted to bring an allegation about the zero percent 5 which was set, about the specific judicial decision, 6 I think that is a decision under domestic law and 7 that would be a decision that's limited to denial of 8 justice. 9 MR. BORN: So even if the investor 10 entirely accepted that the taking was for a public 11 purpose, non-discriminatory, that the principal 12 compensation offered was fine, if what it wanted to 13 challenge was only the failure to provide 14 satisfactory interest which the executive had offered 15 but the court had, if I will, overruled -- 16 MR. SPELLISCY: I'm not sure I 17 understand the hypothetical because in the case where 18 the investor assents to the interest rate, then who 19 would have been taking it to court? 20 MR. BORN: No, the investor assented 21 to the principal, not to the interest rate. 22 MR. SPELLISCY: So I think in that 23 case, the question would still be is there fair 24 compensation under the terms of NAFTA. So if the 25 executive has offered a principal amount of</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2224</p> <p>04:31</p> <p>1 compensation plus interest, but that interest rate is 2 not sufficient in the investor's mind, they have a 3 challenge to the executive action taking, the actual 4 investment. 5 SIR DANIEL BETHLEHEM: And if in the 6 course of that process, the challenging of the award 7 of interest before the domestic courts, that domestic 8 judicial process took more than three years, then the 9 Claimant would be time-barred to challenge the 10 decision of the executive as regards its decision on 11 the award of interest? 12 MR. SPELLISCY: If the Claimant chose 13 during that three-year period not to file a notice of 14 arbitration, then yes, it would be time-barred. But 15 we have to remember, the Claimant can always preserve 16 its right simply by bringing the claim to 17 arbitration. It can file a notice of arbitration, 18 preserve its rights. But NAFTA is clearly set up to 19 allow, to require there to be a choice into how you 20 are to challenge when you are seeking damages. 21 So if you are seeking damages in front 22 of a local court, if you are seeking compensation, 23 then NAFTA is clearly set up. You have a choice to 24 make. Investment treaty arbitration or local courts. 25 If you choose the local courts and then it takes --</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2225</p> <p>04:33</p> <p>1 you wait more than three years to bring your claim, 2 then your claim might be a denial of justice claim if 3 you could bring it. But it is not a claim on any 4 other grounds. 5 MR. BORN: On a slightly different 6 topic, do the national treatment and MFN provisions 7 of Article 1102 and 1103 also fall within your rule 8 that national courts can only commit denials of 9 justice? 10 MR. SPELLISCY: We've very carefully 11 limited our comments here to 1110 and 1105, the only 12 two claims that are actually at issue here. There's 13 been no allegation of a violation of 1102 or 1103. 14 It's not before you. 15 MR. BORN: I'm trying to understand 16 how your theory of international law and Chapter 11 17 works. Do you not have a position on 1102 and 1103? 18 MR. SPELLISCY: I think the answer 19 gets a little more complicated, because if there's 20 truly a nationality-based discrimination in court 21 that would violate 1102 and 1103, it might be 22 difficult as seeing that not rise to a denial of 23 justice. The courts are supposed to be a neutral and 24 independent arbiter of the law. If it went beyond 25 that on an 1102/1103, I think we wouldn't take a</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2226</p> <p>1 position in this arbitration. 2 MR. BORN: Thank you. 3 MR. SPELLISCY: Time bar. 4 THE PRESIDENT: Simply for the record, 5 so that everybody can follow, when he or she is 6 reading it, we are now at slide 65. 7 MR. SPELLISCY: Yes, we are. We'll be 8 at slide 66 very quickly. 9 THE PRESIDENT: Okay, good. 10 MR. SPELLISCY: Let's talk about time 11 bar. And I will do this, as I said, relatively 12 briefly because I think we set out our arguments 13 extensively in the opening. Let me come back to a 14 question that Sir Daniel asked and give you our view. 15 Article 1116(2) and 1117(2) 16 circumscribe the jurisdiction of this Tribunal. 17 There are limits on what the Tribunal can consider, 18 and there are limits beyond which the Tribunal cannot 19 go beyond because they express the consent of the 20 NAFTA parties to arbitration. This is not a question 21 of admissibility. It is a question of the 22 jurisdiction of the Tribunal, and it is not one that 23 can be waived. Let me give you now, on substance, a 24 quick reminder of what our argument is here. 25 Article 1116(2) creates, in our view</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2227</p> <p>1 and the view of the NAFTA parties, a clear and rigid 2 limitation period of three years to bring a claim. 3 As I explained in the opening, it has two parts. 4 There must be actual or constructive knowledge of the 5 measures in question and actual or constructive 6 knowledge of laws. And as the NAFTA parties all 7 agree, it is not renewed merely by a continuing 8 course of conduct. As the Tribunal in Grand River 9 ruled, allowing such an approach would render the 10 limitations provision ineffective in cases involving 11 similar or related actions by states. 12 So let's look to the first requirement 13 in Article 1116(2). 14 SIR DANIEL BETHLEHEM: Before you get 15 there, just to clarify, so then you disagree with 16 UPS, which I think found that there was a 17 continuing -- 18 MR. SPELLISCY: I think we disagree. 19 The United States has voiced its agreement in its 20 other 1128 submissions. Mexico has. The NAFTA 21 parties are agreed, UPS is wrong on that. 22 What did we learn about what the 23 Claimant knew about what is being challenged here in 24 this case? I think this is where it gets a bit 25 challenging because in our view, it is actually not</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2228</p> <p>1 clear, especially after this morning, what exactly 2 the Claimant is challenging. As we've explained, the 3 way we read the Claimant's case is that it is not 4 challenging the application of the law to the 5 Claimant's patents with respect to the atomoxetine 6 and olanzapine decisions. Not really. 7 As I noted in the cross-examination of 8 Mr. Dimock, it focused -- and we, throughout this 9 hearing, have focused on other cases, not those 10 cases. AZT, the three in 2005 and the Raloxifene 11 case. All of these cases constitute the entirety of 12 what the Claimant alleges was a dramatic change in 13 Canadian law. It was over in 2009 at the latest when 14 the Supreme Court of Canada on October 22nd refused 15 leave to the Claimant to appeal the decision of the 16 Federal Court of Appeal in the Raloxifene dispute. 17 This morning my understanding is the 18 Claimant confirmed that it was the doctrine, that it 19 was this aspect of the doctrine that it was 20 challenging as constituting the violation of NAFTA. 21 So since then what has happened? There has been no 22 allegation or argument from the Claimant that the 23 courts have done something different since that 24 moment. The allegation is since 2009 -- or 2008 25 really -- the Canadian courts have simply continued</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2229</p> <p>1 to apply the same rules as they applied on that date. 2 As Ms. Cheek said this morning, the doctrine 3 crystallized in 2008. And the Claimant knew or at 4 least should have known those rules when it came into 5 existence. 6 As Mr. Armitage, the Claimant's former 7 general counsel, confirmed, the Claimant maintained a 8 network of competent Canadian patent agents who would 9 have engaged in communications back and forth with 10 the Claimant's in-house attorneys about relevant 11 changes in patent law. He also confirmed he would 12 have been briefed on any changes in patent law and 13 how those changes affected Lilly's patents in the 14 major markets. 15 Mr. Postlethwait similarly confirmed 16 that he would have been informed of changes and how 17 they affected Lilly's patent portfolio, the products 18 in its portfolio. Ms. Nobles testified to the same 19 thing. And, importantly, Mr. Armitage also confirmed 20 that if the Claimant lost a patent, it would consider 21 the implications of the decision for the other 22 patents it held in that jurisdiction. So the 23 Claimant knew, or should have known, of all of the 24 aspects of the alleged judicial doctrine that it 25 claims were new in Canadian law and allegedly</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 breached Canada's obligations under articles 1105 and
2 1110 when those developments occurred in 2002, 2005
3 and 2008.
4 And as Mr. Armitage's testimony makes
5 clear, it certainly knew and considered the impact of
6 those measures as related to all of its patents in
7 Canada, including its patents with respect to
8 atomoxetine and olanzapine, no later than 2008 when
9 it lost its Raloxifene patent.
10 So let's turn to the second
11 requirement, knowledge of loss or damage arising from
12 the challenged measures. I want to come back to
13 something that we discussed quite a bit during my
14 opening arguments on this issue. We focused on the
15 constructive knowledge arising from the application
16 of the doctrines and what the Claimant should have
17 known. But I think there was evidence that is
18 relevant to that at this hearing.
19 Mr. Armitage testified that as patent
20 laws develop, and to the extent they're material, the
21 Claimant evaluated the risk to its existing patents,
22 and he confirmed that there is an "entire due
23 diligence process within Lilly in all other countries
24 to look at material assets, patents being the most
25 material, and attempting to do regulatory assessment

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1 of risk to the extent they're material to the
2 company."
3 And he went on to confirm in that same
4 statement that this was not limited to matters in
5 which the Claimant was in litigation and that the
6 atomoxetine and olanzapine patents were material to
7 our Canadian businesses and our Canadian affiliates.
8 So I would suggest that the evidence
9 is the Claimant was certainly aware at the time of
10 the Raloxifene decision, at the latest, that its
11 patents for atomoxetine and olanzapine were somehow
12 less valuable than they had been. I would suggest
13 Mr. Armitage confirmed that they had done that
14 assessment and that they should have understood how,
15 properly applied, Canadian law would affect those
16 patents.
17 SIR DANIEL BETHLEHEM: May I ask you
18 is it that the Claimants should have realized that
19 they were somehow, as you put it, less valuable or
20 that they may have been at risk in circumstances in
21 which a litigation arose?
22 MR. SPELLISCY: What I would suggest
23 is that -- and I think we can discuss this in the
24 context of something else that Mr. Armitage
25 testified, because he made clear that in general,

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1 when they would look at the value of patents in the
2 context of a purchase, that if there was a risk of a
3 patent being invalidated at litigation, he would give
4 it a no. Essentially, he would consider it
5 valueless. Unfortunately, I don't have a slide for
6 that here. But he would give it a no. So the
7 Claimant is, in Mr. Armitage's words, capable of
8 assessing the patent law and capable of assessing the
9 value that changes in that patent law have on patents
10 and, in fact, appears to assess a patent that is at
11 risk of being invalidated at litigation of having a
12 value of zero because they wouldn't acquire it, he
13 said.
14 In our submission, that is enough to
15 show that the Claimant had knowledge of a loss.
16 SIR DANIEL BETHLEHEM: Would there
17 have been a cause of action at that stage in respect
18 of those two patents? Let's say 2009.
19 MR. SPELLISCY: I think there would
20 have been, and I think in particular, this is why we
21 find the Raloxifene decision so important, because
22 there would have been a cause of action in relation
23 to Raloxifene.
24 SIR DANIEL BETHLEHEM: Sorry, leaving
25 aside Raloxifene, in respect of the Strattera and

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1 Zyprexa patents.
2 MR. SPELLISCY: I think that what our
3 view is -- and this gets to the question of how broad
4 your decision needs to be -- is that once an investor
5 has knowledge of some laws, if it wants to base a
6 challenge on those doctrines that caused it loss, it
7 must bring its claim, and it must assess and evaluate
8 the loss that it has suffered. It wouldn't
9 necessarily have to be specific to the patents.
10 But if it wants, instead, to bring a
11 claim that the application of the doctrine to its
12 patents was somehow wrongful, that it was a
13 misapplication, a denial of justice, then of course
14 it doesn't have to bring that until the patents are
15 invalidated.
16 But to the extent that you want to
17 reach back and challenge the doctrine itself as
18 opposed to how that doctrine was applied, that you
19 cannot sit on your hands. You must bring a claim as
20 soon as you have knowledge or constructive knowledge
21 of a loss.
22 I do want to talk a little bit
23 about --
24 THE PRESIDENT: Excuse me. How does
25 that work if you look in practice? Put yourself in

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1 the shoes of an investor and you see a doctrine
2 developing. You have here two patents. Are you sure
3 that the patent will be invalidated because of this
4 change of doctrine or say, well, we have to see what
5 happens in the courts? Especially when the doctrine
6 is, as we heard from the investor, it can go this
7 way, can go the other way, we don't know. So is it
8 not better, then, to wait until you have actually an
9 invalidation decision so you can show, you see, this
10 doctrine affects my investment?
11 MR. SPELLISCY: I guess I would have
12 two responses. One, as an investor, the first time I
13 lost a patent I'd bring a claim if it was a doctrine
14 that I was wanting to challenge. If the doctrine was
15 applied -- and we haven't had an answer to this, but
16 I think Sir Daniel asked the question. Could you not
17 have brought this exact same claim with respect to
18 the Raloxifene patent. And the answer was something
19 about a PM(NOC) proceeding, which surprised me
20 because after that we heard that the Claimant doesn't
21 want to draw any distinctions between PM(NOC)
22 proceedings and invalidation proceedings. But I
23 think in that context it doesn't really matter
24 because after that PM(NOC) proceeding there was a
25 loss, a generic competitor was entered into the

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1 market. So at that moment for this Claimant we had
2 an instance of all of the measures applying and a
3 loss. And I would submit that under Article 1116(2),
4 at that point as an investor they had to bring a
5 claim if they wanted to challenge the doctrine.
6 SIR DANIEL BETHLEHEM: So this case,
7 in your view, should have been brought as a
8 Raloxifene challenge case. Does that engage, going
9 back to a question that Mr. Born put to you earlier
10 on, does that engage then questions of estoppel, the
11 fact that the Claimants did not bring the case in
12 2008/2009 but have brought it now in respect of
13 Zyprexa and Strattera? Are they estopped from doing
14 so, or are you just making a time bar argument?
15 MR. SPELLISCY: I don't think they're
16 estopped from doing so in the true classic sense of
17 estoppel because there has been no decision in one
18 way or the other that could be used as a collateral
19 estoppel. There's been no NAFTA Tribunal decision in
20 that regard that might apply in that way, to the
21 extent that even exists at international law. Which
22 is why we rest on time bar. Because once that
23 Raloxifene decision was handed down, in our view the
24 Claimant had everything that it knew as this
25 particular investor under Article 1116(2) to know the

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1 measures and the loss.
2 Let's be clear. After that -- and I
3 think this gets to the second part of your question,
4 Mr. President. After that, if its concern was how
5 the doctrine was applied to it because it said I
6 couldn't understand how the doctrine would be applied
7 or I didn't think it would be applied to invalidate
8 my patent, this was a misapplication of the doctrine
9 and that somehow rises to a breach of international
10 law. They could bring that claim. It would be a
11 denial of justice claim.
12 But the idea is, as is admitted here,
13 the doctrine was appropriately applied, there is no
14 allegation that there is a misapplication of the law,
15 it must be assumed that the Claimant was aware of the
16 law -- it's testified it was -- but it must also be
17 assumed that considering the high quality of Canadian
18 patent agents it had, in its own words, it would be
19 able to understand how appropriately applied, that
20 doctrine would affect its patents. And certainly
21 after the Raloxifene litigation.
22 THE PRESIDENT: Whilst you are at the
23 time bar, are you familiar with the UNCITRAL model
24 law?
25 MR. SPELLISCY: 1985?

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1 THE PRESIDENT: 1985, 2006, it doesn't
2 matter because my understanding is they're still the
3 same. You know the difference between Article 21(3)
4 of the UNCITRAL rules in both versions? I think it
5 is 1985/2010. And the model law, 1985/2006. The
6 difference is that the model law has an additional
7 sentence which says the Arbitral Tribunal may, in
8 either case, admit a later plea if it considers the
9 delay justified. That language does not appear in
10 the UNCITRAL arbitration rules. We are operating
11 here under -- my understanding is the Federal law of
12 the United States arbitration law because we have the
13 place of arbitration here in Washington, D.C. And
14 the Federal arbitration law has not changed since
15 1925. For another day that subject matter.
16 Do you draw a consequence from the
17 distinction between the two?
18 MR. SPELLISCY: In this case I do not.
19 I think, in fact, that in more recent discussions of
20 the amendments to the UNCITRAL arbitration rules,
21 there were questions about the ability to hear or
22 consider late filed claims. I think it falls
23 ultimately to the discretion of the Tribunal to
24 consider generally late filed claims, but I would
25 come back to this. In our view this is not an issue

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1 about whether it can be filed, whether it -- it
2 cannot be waived. This is an issue that goes to the
3 very heart of the consent of the NAFTA parties to
4 jurisdiction. And so you have to assure yourself
5 that you have jurisdiction to hear this claim. But
6 your jurisdiction is limited to hearing claims that
7 have been brought within three years of the measures
8 of knowledge of the measures and knowledge of loss.
9 And so that is a treaty provision in our view.
10 THE PRESIDENT: So that overrides that
11 provision in your submission Article 21(3) of the
12 UNCITRAL rules?
13 MR. SPELLISCY: Absolutely. The
14 UNCITRAL arbitration rules are subject to any
15 contrary provisions in the treaty. The UNCITRAL
16 arbitration rules are only incorporated and used in
17 NAFTA to the extent they are consistent with treaty
18 provisions.
19 MR. BORN: I assume the three-year
20 time bar is for the protection of the individual
21 NAFTA parties. Why is it that it can't be waived?
22 MR. SPELLISCY: In our view, this goes
23 to the very heart of the jurisdiction of the
24 Tribunal, that, in fact, it is a limit on what the
25 parties have consented to arbitrate.

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1 MR. BORN: But if by waiver they were
2 impliedly to consent to the Tribunal doing something
3 else?
4 MR. SPELLISCY: We have to remember,
5 the consent to arbitration is found in the NAFTA, not
6 in the arbitration specifically -- or this isn't a
7 commercial case where the consent is in a contract.
8 The consent is in a treaty that is between state
9 parties, and the consent at that point says and is
10 what it is. And that consent is to arbitrate only
11 disputes within the three-year time limitation.
12 There are other provisions that we can
13 point to on limitations on the Tribunal's consent.
14 You've got the waiver provisions, other things. But
15 there should be no question that the NAFTA parties,
16 in agreeing to the arbitration of investment
17 disputes, have agreed to a tribunal of limited
18 jurisdiction.
19 THE PRESIDENT: Isn't it also your
20 position that this three-year time bar could be
21 invoked as late as -- setting aside proceeding for
22 the courts in DC, the Federal courts, that you can
23 simply wait even to the Court of Appeal or maybe
24 before the Supreme Court?
25 MR. SPELLISCY: I think that would be

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1 obviously as to whether the tribunal was acting
2 within its jurisdiction under set-aside proceedings.
3 Whether a domestic court would hear such a claim
4 would be matter for the domestic procedure.
5 THE PRESIDENT: But assuming that you
6 have not invoked anything about a waiver and only by
7 Court of Appeal level somebody on your side said,
8 hey, wait a moment, we can still invoke the waiver,
9 of the non-compliance with the waiver.
10 MR. SPELLISCY: I think that as a
11 limit to the Tribunal's jurisdiction, then such an
12 argument could be made, that this is not something
13 that simply because it's not brought up, it strikes
14 me more as related to what Mr. Born was talking about
15 with subject matter jurisdiction, which is subject
16 matter jurisdiction is not something that a domestic
17 court can waive. So even if it's not pled, it
18 doesn't matter. The tribunal has to assure itself of
19 its own jurisdiction, and that jurisdiction is
20 limited to claims within three years of knowledge of
21 breach and knowledge of measures and many of laws.
22 THE PRESIDENT: Okay.
23 MR. SPELLISCY: Let me just finish
24 this section by coming back and just to reiterate one
25 point.

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1 I would suggest that, again, this is
2 not a case where you have to concern yourself with
3 the question of whether or not a company like the
4 Claimant had constructive knowledge of the effects of
5 this clear and crystallized judicial doctrine as it
6 affected other companies. We're not asking for a
7 broad decision of that sort. This is a case, in our
8 view, where it is clear the Claimant had actual
9 knowledge of the measures in question and actual
10 knowledge of the loss -- of a loss because they --
11 Raloxifene was their drug. In that decision all of
12 the aspects of the challenged doctrine were, in fact,
13 applied to the Claimant, causing it loss.
14 I would suggest that under NAFTA it
15 would be inconsistent with the language of
16 Article 1116(2) for Claimant to be subjected to a
17 measure to suffer a loss and then to be able to sit
18 on its hands for four years and not bring a claim.
19 And the fact that the state may continue to apply the
20 same measure thereafter does not matter. Once the
21 investor has suffered a loss, it has to bring its
22 claim. The Claimant did not do so here.
23 It waited four years, and for this
24 reason in our view this claim should be dismissed for
25 time bar. With that, let me now hand the floor to my

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<p style="text-align: right;">2242</p> <p>1 colleague, Mr. Johnston, who is going to discuss the 2 third reason why this claim must be dismissed, and 3 that is because it's based on a false factual 4 predicate that there has been change in Canadian law . 5 SIR DANIEL BETHLEHEM: Before you do 6 so, if the Raloxifene decision had not been a 7 decision as opposable to Lilly, would your argument 8 still be the same? 9 MR. SPELLISCY: I think that is a much 10 more difficult question, which is why I say we're not 11 asking the Tribunal for a broad ruling of that sort 12 in this case. Because what we have here is the 13 unique situation where the doctrine was opposed to 14 the Claimant and it did cause them loss. And they 15 could have brought this exact same claim within three 16 years of that decision. 17 In those circumstances, we suggest the 18 claim is time-barred. We're not asking the Tribunal 19 to make a ruling that's really broader than that. 20 SIR DANIEL BETHLEHEM: So it's in the 21 specific circumstances in which it's the same party 22 that lost its application in 2008 in Raloxifene 23 that's now in your view litigating the doctrine by 24 reference to validity decisions in respect of two 25 other patents that the issue arises?</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2243</p> <p>1 MR. SPELLISCY: Well, I would think 2 that the issue would arise even if it hadn't have 3 been Lilly's case, but that's not a ruling that I 4 think you need to make in this case because we have 5 unique circumstances here. So this is not a case -- 6 as I say, we could argue about constructive knowledge 7 dating all the way back to 2002 with the AZT decision 8 in Wellcome and we could argue about what Eli Lilly 9 should have known about that point and what it should 10 have brought by 2005. But we don't need to make 11 those arguments and we don't need to consider those 12 questions in this case because we have a much more 13 simple fact pattern. All of the doctrines were 14 applied causing loss. 15 SIR DANIEL BETHLEHEM: Although -- and 16 I'm not saying this argumentatively just to raise the 17 issue. The question of constructive knowledge of the 18 loss or damage under 1116(2) really only arises in 19 your case because it's the same party. Is that 20 correct? 21 MR. SPELLISCY: Well, I think that 22 would probably be much more of a factual question. 23 It certainly arises in the case where it is a party 24 that was subject to it and is now trying to bring a 25 NAFTA claim four years later.</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2244</p> <p>1 SIR DANIEL BETHLEHEM: Thank you. 2 MR. SPELLISCY: If no other red lights 3 come on, I'll hand the floor to my colleague, 4 Mr. Johnston. 5 MR. JOHNSTON: It is late in the day 6 to be going into Canadian patent law, but once more 7 into the breach, but before I do that, my colleague, 8 Mr. Spelliscy, had mentioned a reference in the 9 cross-examination of Mr. Armitage where he was 10 speaking about the valuation of patents in the 11 context of acquisitions where there might have been a 12 risk to patent validity, and you can find that at 13 page 363 of the transcript at lines 8-23. 14 Canada explained in its opening 15 statement that Claimant's entire claim was based on a 16 false presumption that you can take one legal concept 17 from a patent system and consider it, in abstract, 18 isolation. And the evidence you've heard over the 19 past week has demonstrated the problems with that 20 type of a myopic approach, putting the utility 21 requirement under the microscope. But I think that 22 the evidence you have heard has also shown that the 23 three aspects of Canada's utility requirement that 24 Claimant challenges have, indeed, deep roots in 25 Canadian law. And I will go through each of these</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2245</p> <p>1 elements in turn, and I'm going to be focused 2 squarely on the issue of change in these aspects of 3 Canadian law. 4 Before turning to the historical 5 evidence that you've heard, I want to note some 6 threshold issues concerning Claimant's terminology 7 and Claimant's statistics. One thing that has become 8 quite clear is that the promise utility doctrine, as 9 defined by Claimant, is not a unitary doctrine. As 10 Professor Siebrasse has affirmed, the utility 11 standard set out in AZT is functionally distinct from 12 the promise doctrine, and the disclosure requirement 13 for sound prediction applies whether or not there is 14 a promise in the patent. This is all at the level of 15 theory, but in this case there is a highly practical 16 implication of distinguishing these elements of the 17 promise utility doctrine as three distinct rules. 18 And I need to correct the record on a 19 very important point here, because this morning in 20 Claimant's opening statement it said that all three 21 rules that it challenges were applied to its two 22 patents at issue in this arbitration. And that is 23 not correct. The disclosure requirement for sound 24 prediction played no role in the invalidation of the 25 olanzapine patent, and if I can ask -- there's an</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 additional slide, 274, which is not -- it should be
2 in your hard copies, though it's out of order. 275.
3 I'm sorry.
4 This slide shows you that, in fact,
5 the disclosure requirement for sound prediction, one
6 of the three branches that Claimant challenges, was
7 not applied to invalidate the olanzapine patent.
8 These are excerpts from Professor Siebrasse's first
9 Expert Report in which he summarizes which elements
10 of the doctrine were applied. This is slide 275.
11 SIR DANIEL BETHLEHEM: Which we don't
12 have.
13 MR. JOHNSTON: 274 perhaps in the hard
14 copies?
15 THE PRESIDENT: 273 it stops.
16 MR. JOHNSTON: It's 274. Professor
17 Siebrasse identifies at paragraph 98 which elements
18 of this rule were applied to the olanzapine patent.
19 He identifies two elements, post-filing evidence and
20 the judging utility against the promise of the
21 patent. And for atomoxetine at 104 he identifies
22 three rules that were applied, all three elements of
23 the doctrine. So the point here is that there was no
24 application of the so-called unitary promise utility
25 doctrine, certainly to the olanzapine patent. There

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1 were only two of the three elements actually engaged
2 on the facts of that case.
3 So Claimant's packaging of these rules
4 as a unitary doctrine, it's not merely a theoretical
5 concern in this case.
6 Claimant relies heavily on statistics
7 to persuade you that there has been a dramatic change
8 in Canadian law. But as you saw in the
9 cross-examination of Dr. Levin, Claimant's dataset is
10 fundamentally flawed and is inconsistent with its own
11 theory of the case. Professor Siebrasse testified
12 that the first cases to adopt the promise of the
13 patent standard were the 2005 Federal Court decisions
14 listed in footnote 98 of his First Report,
15 Bristol-Myers Squibb, Pfizer versus Apotex and
16 Aventis Pharma.
17 The first of these decisions, Pfizer
18 Canada versus Apotex, was rendered -- confidential
19 reasons were rendered on September 2, 2005. On
20 Claimant's theory of the case, September 2, 2005 is
21 therefore the origin of the promise standard in
22 Canadian law. And as Dr. Levin told you, it would
23 therefore be logical to conduct the statistical
24 analysis as of that date. But that is not what
25 Claimant did. Instead, it handed Dr. Levin a dataset

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1 that divided pre and post promise standard cases at
2 January 1, 2005, a full nine months before it says
3 the promise standard was even created. And the
4 result was to skew the charts, making it appear that
5 there were zero percent inutility findings in
6 pharmaceutical cases before the promise standard was
7 adopted, when in reality there were 40 percent. You
8 can see this here at slide 86.
9 Once you start counting from the right
10 date, the picture looks very different. And this is
11 not the end of the problem with Claimant's
12 statistical account of change, because Claimant's
13 statistics conflate inutility findings with
14 applications of the promise standard. Claimant
15 counts each and every inutility finding as evidence
16 of the promise utility doctrine at work. You can see
17 that here from the title of this figure in Claimant's
18 Memorial and from the legend. The lines track
19 inutility decisions, and the conclusion drawn is that
20 Canada's promise utility doctrine discriminates
21 against pharmaceutical patents. They showed you the
22 same chart this morning.
23 And, similarly, Dr. Levin's dataset
24 draws no distinction between inutility findings and
25 promise utility findings. But as you heard from

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1 Professor Siebrasse, not every inutility finding can
2 be attributed to the promise utility doctrine. And
3 in fact -- and this is at slide 90 -- there are cases
4 that Dr. Levin counts as inutility findings that
5 Professor Siebrasse has described elsewhere as not
6 reflecting the application of the promise standard.
7 In fact, Professor Siebrasse has
8 elsewhere written that when the patentee is held to a
9 higher standard of utility, this higher standard has
10 been determinative of lack of utility roughly half
11 the time. Claimant's coding of the cases, which is
12 not supported by any expert evidence endorsing its
13 coding decisions, is inherently unreliable.
14 Finally, this self-serving statistical
15 account ignores how other crucial developments have
16 influenced and affected trends and outcomes in
17 litigation. You've heard from numerous witnesses,
18 including Professor Holbrook, Professor Merges, that
19 there are many variables at play when deciding to
20 litigate a patent. In Canada specifically, both
21 Mr. Dimock and Professor Siebrasse have told you that
22 the end of compulsory licensing in 1993 and the
23 introduction of the PM(NOC) regulations led to a
24 significant increase in pharmaceutical litigation.
25 There just weren't the financial incentives to

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<p style="text-align: right;">2250</p> <p>05:07</p> <p>1 litigate before, and the new regime made litigation 2 far more accessible. 3 The causes of rising pharmaceutical 4 litigation are far more complex than Claimant's 5 statistics suggest, and here at slide 93 you see 6 Dr. Brisebois' testimony and witness statements have 7 shown that challenges in invalidity findings on 8 issues other than utility have also peaked. In 9 party-driven pharmaceutical litigation, Claimant's 10 flawed statistics do not establish that there has 11 been any change in the law. 12 So with these preliminary matters out 13 of the way, I'll turn now to the historical evidence 14 on Claimant's first alleged change in the law, which 15 is holding patentees to promises in the disclosure. 16 There can be no doubt, after all the testimony that 17 you've heard, that this legal principle was certainly 18 not new in Canada in 2005 with the three Federal 19 Court decisions identified by the Claimant. Both the 20 case law and the commentary are replete with 21 references to the promise standard. As you'll see at 22 slide 95, Professor Siebrasse told you in his expert 23 reports that the promise standard has no basis in 24 prior law, but in his scholarly writing published 25 before his involvement in this case, he never</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2251</p> <p>05:09</p> <p>1 characterized the history of the promise standard so 2 starkly. He recognized its existence in prior law. 3 And in testimony, Professor Siebrasse also told you 4 that his views on whether the promise standard 5 existed under prior law do not reflect an academic 6 consensus in Canada. You see this at slide 96. 7 Now, we've spent a great deal of time 8 over the past week studying and discussing the famous 9 passage from the Supreme Court's 1981 decision in 10 Consolboard affirming a principle from Halsbury's. 11 And Professor Siebrasse in his testimony recognized 12 several things about this passage. First, that the 13 standard from Halsbury's approved in Consolboard has 14 two parts. The first branch saying that the 15 invention will not operate at all, and the second 16 branch saying more broadly that it will not do what 17 the specification promises that it will do. 18 Second, he testified that the passage 19 from Halsbury's was based, in part, on old English 20 false promise cases that held patentees to statements 21 made in the disclosure. And third, Professor 22 Siebrasse testified that Canadian courts are "not 23 being ridiculous in reading" the passage from 24 Halsbury's as acknowledging the existence of the 25 promise doctrine in prior law. This is at slide 100.</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2252</p> <p>05:11</p> <p>1 We've also seen that courts prior to 2 2005, in cases like Feherguard, Almecon and Goldfarb 3 affirmed this two-part Consolboard standard. And it 4 was also cited in other contexts, including Professor 5 Siebrasse's own writing in 2003. And very tellingly 6 at slide 101, you'll see the testimony that you heard 7 of Mr. Thomas, that in 2001 and 2003, Canada 8 submitted information on its utility standard to WIPO 9 quoting the same wording that is found in Consolboard 10 and noting after the second branch "false promise" in 11 brackets. 12 In the face of this clear historical 13 record, Claimant attempts to divert attention from 14 the second half of the definition of not useful in 15 Consolboard and, tellingly, the evidence of 16 Claimant's expert witnesses in this regard is 17 inconsistent. Professor Siebrasse attempts to read 18 out the second half of the sentence entirely, arguing 19 that despite the bifurcated language, this is not a 20 bifurcated standard. He reads the second half as 21 just referring to the general purpose of the 22 invention, which he recognizes could be found in the 23 disclosure. And -- and I'm now at slide 104 -- 24 Mr. Reddon, on the other hand, does recognize the 25 bifurcated nature of the Consolboard standard, and he</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2253</p> <p>05:12</p> <p>1 admits that even if the second half was never 2 applied, the practitioner has to take those kinds of 3 statements and live with them as if a judge is some 4 day going to apply them, even though it has never 5 happened. But Mr. Reddon put a different spin on the 6 second half of the Consolboard standard and one that 7 diverges from Professor Siebrasse. Mr. Reddon reads 8 the words "unless the specification promises 9 otherwise" as meaning that the promise must be in the 10 claims. Mr. Reddon's attempt to read specification 11 in this way is completely baseless. 12 The only authority relied on by 13 Mr. Reddon is the case of Free World Trust, which was 14 decided 20 years after Consolboard, which was about 15 claims construction, not utility, and which in any 16 case said that the claims must be construed in light 17 of the patent as a whole. It simply isn't relevant 18 to what the Supreme Court meant in Consolboard when 19 it adopted the passage from Halsbury's. 20 Mr. Reddon's position on the meaning 21 of specification in Consolboard is at odds with 22 Professor Siebrasse, who has recognized the term can 23 refer to the disclosure and who never suggested that 24 the reference to specification in Consolboard should 25 be understood as referring exclusively or primarily</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2254</p> <p>05:14</p> <p>1 to the claims. You see this plainly at slide 105. 2 In contrast to the conflicting 3 accounts of Claimant's experts, Mr. Dimock's evidence 4 on this point has been clear and reflects his decades 5 of practice. He explained that the specification 6 means both the claims and the disclosure under the 7 Patent Act but that in practice, it often refers just 8 to the disclosure. It never means just the claims, 9 as Mr. Reddon would have this Tribunal believe. 10 Mr. Reddon's view is also at odds with 11 the leading practitioners writing on the promise 12 standard. All of them draw a distinction between the 13 specification and the claims or speak specifically of 14 promises in the disclosures. You see this at 15 slide 107. 16 In sum, the Tribunal should not accept 17 either Mr. Reddon's testimony or Professor 18 Siebrasse's testimony on the meaning of the passage 19 in Consolboard, both of which in different ways try 20 to explain away the plain implication of the second 21 half of that standard. 22 Prior to being retained in this case, 23 Professor Siebrasse freely acknowledged that there 24 was some prior Canadian case law providing support 25 for the promise doctrine. He identified several</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2255</p> <p>05:15</p> <p>1 cases where a court considered a heightened utility 2 requirement based on the promise of the specification 3 and flagged them as providing the clearest support 4 for the promise of the patent doctrine. (Slide 108). 5 He made no mention of this evidence in 6 his expert reports. In his testimony he attempted to 7 back away from how he interpreted those cases before 8 being retained in this matter. The 1991 Wellcome v 9 Apotex case is highly significant in this regard. 10 The court in that case held the patentee to a promise 11 of utility based on the language of the disclosure, 12 and the Court of Appeal, in affirming, stated, "Since 13 the utility of a patent must ultimately be judged 14 against its promise, the exercise requires that the 15 specification be carefully construed to determine 16 exactly what that promise is." The fact that the 17 court construed the promise modestly and upheld the 18 patent does not make this any less an example of the 19 existence of the promise doctrine in Canadian law. 20 Another one of the cases that 21 Professor Siebrasse previously cited as clearest 22 support for the promise doctrine was the Federal 23 Court's 1984 Corning Glass Works decision. The court 24 uses language that makes it clear that it was open to 25 finding a promise of utility in the disclosure,</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2256</p> <p>05:16</p> <p>1 though it did not find one on the facts. 2 The court would have had no reason to 3 state that neither in the disclosure nor the claims 4 does the patent promise any particular result. If 5 there was no prospect that the patent could be held 6 to the promise of such a result in the disclosure. 7 And as Professor Siebrasse acknowledged on 8 cross-examination, this is exactly why he did cite 9 Corning Glass Works in his earlier papers. Despite 10 these clear statements, Professor Siebrasse adopted 11 for this arbitration a new reading of these cases 12 that better suits Claimant's position. He testified 13 that the Wellcome v Apotex 1991 decision should not 14 be regarded as a promise case because there were a 15 number of statements in the disclosure that arguably 16 could have been considered promises, and to use his 17 words, that today there would have been a debate as 18 to whether or not those were promises that had to be 19 satisfied. 20 Well, that is exactly the debate that 21 happened in Wellcome v Apotex. The patent challenger 22 seized on the word "chemotherapeutic" in the 23 description and argued that this meant that the 24 substance should have high antibacterial activity, 25 low toxicity and appropriate pharmacology and that</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2257</p> <p>05:18</p> <p>1 these properties were the utility against which the 2 patent should be judged. You see this at slide 112. 3 So there was precisely the kind of 4 debate in 1991 that Professor Siebrasse says would be 5 evidence of the existence of the promise utility 6 doctrine. And this is true of other cases decided in 7 the '90s like Mobil Oil, Unilever and TRW v Walbar. 8 There can be no doubt that in each of these cases 9 there was a debate about whether patents should be 10 held to promises in the disclosure. You see this in 11 the quotes at slides 113 and 114. The courts did not 12 reject these arguments as having no basis in Canadian 13 law. The pleadings of counsel, the reaction of the 14 courts and the contemporaneous writings of 15 practitioners all point to one understanding, that it 16 was possible under Canadian law that a patent could 17 be invalidated for failure to meet a promise in the 18 disclosure. And there's evidence of that all the way 19 back to 1961 with the New Process Screw case that I 20 talked about right at the beginning of this 21 arbitration in the opening statement. 22 Professor Siebrasse and Mr. Dimock 23 have both testified regarding this case, and they 24 agree that the disclosure of the patent, not the 25 claims, stated that the invention would produce a</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2258</p> <p>05:19</p> <p>1 commercially good product. They agree that the court 2 held that the failure to achieve a commercially good 3 product would alone have been enough to destroy the 4 patent. 5 Professor Siebrasse's reading of this 6 case as not standing for evidence of the promise 7 doctrine is at odds with the contemporaneous 8 editorial note to the judgment in the Canadian Patent 9 Reporter, which corroborates Mr. Dimock's reading. 10 That note draws a link between that finding of the 11 court and the old English false promise cases and 12 says that if commercial utility was found to be part 13 of the promise, then commercial utility must be 14 delivered. And as Professor Siebrasse testified, 15 there is no doubt that this reference to commercial 16 utility was stated in the disclosure, not in the 17 claims. 18 To sum up on the promise standard 19 where Claimant alleges there has been a change, all 20 of this historical evidence makes one thing very 21 clear. It cannot be said that the promise standard 22 with promises found in the disclosure had no basis in 23 Canadian law until 2005. 24 Claimant's second alleged dramatic 25 change is the requirement that utility be established</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2259</p> <p>05:21</p> <p>1 at the filing and that it cannot be proved with 2 post-filing evidence. 3 MR. BORN: Actually, before you move 4 on, you spent a lot of time on that aspect of the 5 Claimant's case, and then you ended up with the 6 statement that it cannot be said that the promise 7 standard with promise found in the disclosure had no 8 basis in Canadian law. Is that as far as you go? 9 MR. JOHNSTON: We could certainly go 10 much, much further than that. 11 MR. BORN: How far do you go? 12 MR. JOHNSTON: I think the first 13 distinction to draw -- and I include it there with 14 the promise found in the disclosure. I think it's 15 now abundantly clear it's common ground that to the 16 extent a promise is in the claims, that has always 17 been understood in Canadian law to be a basis for 18 invalidation on the ground of utility. So that 19 qualification is simply to be more precise about the 20 change that the Claimant is alleging. 21 There is ample evidence of the 22 existence of this standard in Canadian law, so it is 23 not simply a question of no basis, but there is an 24 abundance of authority which we've really, I think, 25 gone through over the course of this hearing and in</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2260</p> <p>05:22</p> <p>1 our written submissions, and I would say that the 2 sources of that authority are the Supreme Court of 3 Canada's articulation of the meaning of not useful in 4 Canadian patent law in 1981, as well as the many 5 court decisions in which the courts -- first of all, 6 Counsel advanced the argument based on promises in 7 the disclosure, courts entertained those arguments 8 based on promises in the disclosure. Court decisions 9 such as New Process Screw or Corning Glass Works, 10 where language in the court decision makes very clear 11 that the court would have considered a promise in the 12 disclosure sufficient to invalidate the patent, that 13 language is clear in those court decisions. And so I 14 refer to no basis because this is the testimony that 15 Professor Siebrasse provided, that there was no 16 basis. The historical record is, in fact, replete 17 with the basis of this standard. 18 MR. BORN: Thank you. 19 MR. JOHNSTON: So turning to the 20 second alleged change, which is concerning the 21 post-filing evidence rule, Claimant says that this 22 was new in 2002 with the AZT decision, and the 23 testimony you have heard demonstrates that once 24 again, Claimant's allegation is false. Before 25 entering into this, just for the avoidance of doubt</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2261</p> <p>05:24</p> <p>1 in response to a statement in Claimant's closing 2 remarks today, for the avoidance of doubt Canada 3 vigorously contests that any heightened evidentiary 4 burden is being applied under the promise utility 5 doctrine. The primary focus of Claimant's argument 6 in this regard concerns the post-filing evidence 7 rule, to which I will turn now. 8 We heard from both Mr. Reddon and 9 Professor Siebrasse on this rule. Mr. Reddon is 10 simply not credible in claiming that he and other 11 practitioners at the time regarded AZT as a radical 12 change in the law. 13 What practitioners really thought of 14 the AZT decision is evidenced by their publications 15 at the time. You see this at slide 119. In 16 testimony, Mr. Reddon could do nothing more than 17 disagree with an article published by the 18 well-respected law firm Smart & Biggar just months 19 after the AZT decision was released. That article 20 described AZT as reaffirming the doctrine of sound 21 prediction, confirming that after-the-fact validation 22 is not enough and dismissing mere suggestions from 23 the Federal Court of Appeal to the contrary. 24 Even Mr. Reddon's own testimony shows 25 that this supposed major change had no practical</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2262</p> <p>05:25</p> <p>1 impact on pharmaceutical patent litigation at the 2 time. Mr. Reddon testified that the impact of the 3 promise utility doctrine was not felt until after 4 2005 and that in his own practice, it was, in fact, 5 not until the Raloxifene decision in 2008. Only 6 then, in 2008, did cases involving any of the 7 elements of Claimant's alleged promise utility 8 doctrine go from, he said, zero to half of his 9 PM(NOC) caseload. 10 And as you see at slide 121, 11 Claimant's own executives also did not recall any 12 briefing on the AZT decision, despite testifying that 13 they would have been advised of any major changes in 14 Canadian patent law. All of this testimony and 15 evidence points in one direction. AZT was not a 16 major change in the law. 17 Undoubtedly, Canadian litigants have 18 made different arguments about the meaning and 19 history of AZT to suit their needs in litigation. In 20 its opening statement, Claimant made much of a 21 pleading by Apotex in 2010 where it alleged that AZT 22 had changed the law and a trial judgment that 23 appeared to take that argument at face value. You 24 saw this again this morning. 25 But in its opening, Claimant left out</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2263</p> <p>05:26</p> <p>1 the appeal decision where it is very clear that the 2 Federal Court of Appeal did not acknowledge that 3 there had been a change in the law in AZT. It stated 4 that if it was the case that AZT had changed the law, 5 Apotex could have addressed such a change much 6 sooner, which it did not. 7 The Tribunal should attach 8 significance to the fact that the AZT decision was a 9 unanimous decision of the Supreme Court of Canada 10 penned by Justice Ian Binnie, an esteemed jurist with 11 extensive patent law expertise. The court did not 12 say that it was changing the law. It interpreted the 13 requirements of the Patent Act and relied on 14 longstanding jurisprudence on the concept of 15 inventorship and on utility. 16 You see at slide 124 that Mr. Reddon 17 acknowledges that in AZT there was not a single 18 dissent or a word of concurring opinion expressing 19 any concern that the judgment would depart from the 20 letter or purpose of the Patent Act, that it would 21 disrupt settled patent law or that it would intrude 22 on the turf of the legislature. There were no such 23 doubts expressed by any of the nine judges of the 24 Supreme Court of Canada because this was not a major 25 change in the law.</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2264</p> <p>05:28</p> <p>1 It's also important to recognize that 2 there is agreement between Professor Siebrasse and 3 Mr. Dimock that the policy objective in AZT of 4 preventing patenting too far upstream was certainly 5 not new. Professor Siebrasse told you that 6 preventing speculative patenting has been a function 7 of the utility requirement since at least the 1940s 8 in the Supreme Court's Wandscheer versus Sicard 9 decision. In his academic writing, which you see at 10 slide 125, he has described the language in 11 Wandscheer and AZT as strikingly similar. Professor 12 Siebrasse also testified that the rule in AZT 13 excluding post-filing evidence is rationally 14 connected to that longstanding policy objective of 15 preventing patenting too far upstream. You see this 16 at slide 126. 17 Not only was the policy objective 18 underpinning the Supreme Court's decision in AZT 19 longstanding, but also so, too, were the legal 20 concepts that it applied. The court relied on the 21 1979 Proctor & Gamble case, which held that knowing a 22 process without knowing its utility is not knowledge 23 of an invention. And it drew on its 1930 Christiani 24 versus Rice decision, which held that inventorship 25 requires that the invention be reduced to a definite</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2265</p> <p>05:29</p> <p>1 and practical shape. 2 Professor Siebrasse testified that 3 reduction to a definite and practical shape has 4 always meant to exclude the patenting of just a bare 5 idea floating through someone's brain, but he says it 6 never required testing of the invention before 7 filing. Writing down the invention is, in his view, 8 always enough for inventorship. But as the Supreme 9 Court explained in AZT, the case law on inventorship 10 has got to be read keeping the particular factual 11 context in mind. If something was new in AZT, it was 12 a factual context and not the legal standard that was 13 being applied. 14 AZT involved a new use for an old 15 compound, just like atomoxetine. The only inventive 16 contribution was discovering and disclosing the new 17 use. As Professor Siebrasse acknowledged on 18 cross-examination, his understanding of reduction to 19 definite and practical shape means that in the 20 context of a new use patent, inventorship can be 21 satisfied simply by guessing at and writing down a 22 new use for an old compound. Professor Siebrasse 23 recognized that this result is counterintuitive 24 because it permits the patenting of pure 25 speculations. But we can go further and say that it</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2266</p> <p>05:31</p> <p>1 is inconsistent with the very notion of inventorship 2 that is, and always has been, at the heart of the 3 Patent Act. It fails to maintain the longstanding 4 distinction in law between invention and a bare idea 5 that floated through someone's brain, and it is in 6 this context that the court in AZT affirmed that it 7 is not sufficient just to assert a utility in the 8 patent and prove it later. Utility must be 9 established by demonstration or sound prediction at 10 the filing date to say that anything has been 11 invented at all. 12 We've heard considerable discussion 13 over the past week about whether this holding in AZT 14 overturned an established rule permitting the 15 admission of post-filing evidence and whether 16 specifically such a rule was articulated by the 17 Federal Court of Appeal in its 1982 decision in 18 Ciba-Geigy. 19 Mr. Dimock has never contested in his 20 expert testimony that there was language in 21 Ciba-Geigy that could be read as accepting the 22 admission of post-filing evidence to show utility was 23 established at the filing date. This was stated in 24 his first Expert Report. But he has also testified 25 that as a practitioner, he did not consider that</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2267</p> <p>05:32</p> <p>1 Ciba-Geigy stood for this proposition, and he did not 2 consider it to stand for that proposition because he 3 read the decision in its full context. 4 Part of that context that I think has 5 not yet come out in evidence or argument is that when 6 Ciba-Geigy was decided on May 28, 1982, it was 7 actually not even established in Canadian law that 8 new uses for old compounds were patentable subject 9 matter. That was decided by the Supreme Court in the 10 Shell Oil case on November 2, 1982. (R-046) 11 I highlight this just to draw your 12 attention to the fact that when Ciba-Geigy was 13 decided, the very type of patent that ended up being 14 at issue in AZT was not even known in Canadian law to 15 constitute patentable subject matter. And this is 16 simply to highlight that when reading an older 17 precedent such as the Federal Court of Appeal's 18 decision in Ciba-Geigy, the full context of what 19 patent law looked like at that time in Canada must be 20 taken into consideration. 21 But on a more practical level, the 22 court's reference in Ciba-Geigy to post-filing 23 evidence was entirely obiter dicta. The patent did 24 disclose a number of examples and the court expressly 25 commented that even at the time the prediction was</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2268</p> <p>05:33</p> <p>1 made, it is not improbable that it would have been 2 considered well-founded. This passage means that 3 there was a sound prediction at the filing. 4 Consideration of the post-filing evidence was 5 unnecessary and, therefore, purely obiter dicta. And 6 as you see at slide 133, this is how the Supreme 7 Court read Ciba-Geigy when it turned to that decision 8 in AZT. It therefore did not have to reverse or 9 overturn the holding of Ciba-Geigy. It was 10 clarifying its proper interpretation. The court 11 explained that reading Ciba-Geigy as permitting 12 patenting on the basis of speculation would, in fact, 13 have been at odds with the principles that it set 14 down in the Monsanto decision in 1979. And, indeed, 15 Mr. Reddon acknowledges that the Supreme Court in AZT 16 did regard these statements in Ciba-Geigy as purely 17 obiter dicta. 18 All of this places the legal 19 significance of Ciba-Geigy in its proper context. A 20 single decision of the Federal Court of Appeal 21 suggesting that patents can be secured on speculation 22 and backed up later with post-filing evidence when it 23 had no need to make such a finding on the facts 24 before it, cannot be taken as an unequivocal 25 statement of the law.</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2269</p> <p>05:35</p> <p>1 As Professor Siebrasse noted in his 2 testimony, not every obiter dictum can be taken as 3 stating the law. As Mr. Dimock explained at length 4 in his expert reports and testimony, the other cases 5 that Claimant relies upon regarding the admission of 6 post-filing evidence go to a distinct issue of 7 operability, not whether an invention has actually 8 been made at the filing date. It was and still is 9 possible under Canadian law to challenge the 10 operability of a patent with evidence that the 11 invention does not work at the time of challenge. 12 And this evidence can be met with evidence that the 13 invention does work at the time of challenge. These 14 questions are distinct from the inquiry of whether 15 the invention was complete, including establishing 16 utility at the time of filing. 17 This brings me to Claimant's third and 18 final alleged dramatic change in Canadian law, the 19 disclosure requirement for sound prediction. 20 Claimant persists in its untenable 21 position that the requirement to disclose the factual 22 basis for a sound prediction was established in the 23 Raloxifene case. Mr. Reddon testified that he never 24 considered that such a requirement existed before. 25 As you see at slide 139, even Professor Siebrasse</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2270</p> <p>05:36</p> <p>1 recognizes that AZT can be read as recognizing a 2 requirement to disclose the factual basis and line of 3 reasoning supporting a sound prediction. And 4 notably, Claimant's PCT expert, Mr. Erstling, also 5 traced the disclosure requirement back to AZT. 6 So Mr. Reddon's testimony, which you 7 see at slide 141, that he never considered that there 8 was a requirement to disclose the basis for a sound 9 prediction until Raloxifene is not credible in light 10 of the contemporaneous statements of other 11 practitioners. When Mr. Reddon was confronted with 12 law firm newsletters by Claimant's law firm Gowlings 13 and by Smart & Biggar clearly identifying AZT as 14 requiring the disclosure of the basis for a sound 15 prediction, all he could do was disagree with their 16 analysis and retreat to say that this particular 17 statement in his Expert Report was based only on his 18 personal experience and was not purporting to speak 19 for everybody. Mr. Reddon's characterization of 20 Raloxifene as a watershed is not credible. 21 Whatever Mr. Reddon and his clients 22 wanted AZT to say, the mainstream view of 23 practitioners on what it actually did say is clear. 24 There had to be disclosure of the basis for the sound 25 prediction in the patent.</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2271</p> <p>05:38</p> <p>1 After our detailed analysis of the AZT 2 decision over the past week, it is clear why 3 Gowlings, Smart & Biggar and Mr. Dimock and other 4 practitioners read the third part of AZT the way they 5 did. As you see at slide 143, the court identified 6 proper disclosure as the third part of the sound 7 prediction test and stated twice within five 8 paragraphs that the patent in issue disclosed the 9 factual basis and the sound line of reasoning 10 supporting the prediction. 11 At paragraph 95 the court stated that 12 the inventors possessed and disclosed in the patent 13 the factual basis and line of reasoning to enable 14 them to make a sound prediction. Professor Siebrasse 15 quibbles with the Supreme Court's findings on what 16 was or was not disclosed in the patent. He accepts 17 that the court twice stated that the patent disclosed 18 the factual basis and the line of reasoning, but he 19 basically disagrees with that assessment, stating 20 that the court relied upon evidence not disclosed in 21 the patent. This second-guessing of the Supreme 22 Court's assessment is not relevant, given its clear 23 statements that the factual basis and line of 24 reasoning were disclosed in the patent. 25 The Tribunal should accept</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2272</p> <p>05:39</p> <p>1 Mr. Dimock's testimony that the disclosure 2 requirement stretches not only back to AZT but also 3 to the 1979 Monsanto case, which is the foundational 4 sound prediction case in Canadian law. Monsanto, 5 too, must be understood in its factual context. At 6 slide 146 you see that Professor Siebrasse accepted 7 that on the facts of Monsanto, the only evidence 8 considered to support the sound prediction were three 9 examples disclosed in the patent and expert evidence 10 of persons skilled in the art on what could be 11 predicted from those three examples in light of the 12 common general knowledge. And as Professor Siebrasse 13 acknowledged, all of the evidence -- all of that 14 evidence that supported a sound prediction in 15 Monsanto would still be admissible in a Canadian 16 court today to support a sound prediction. 17 This does not suggest any radical 18 change in the law. Monsanto does not expressly state 19 that you cannot use evidence beyond what is in the 20 patent and the common general knowledge, but that 21 does not mean that the rule wasn't there. As 22 Mr. Dimock testified, this was the implied holding of 23 the case given its facts. The scope of what was 24 permissible under the doctrine of sound prediction 25 under Monsanto must be understood in the factual</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2273</p> <p>05:41</p> <p>1 context of that case. A Supreme Court of Canada 2 decision affirming a sound prediction based only on 3 what was in the patent and the common general 4 knowledge cannot be assumed to grant even broader 5 license permitting evidence that falls into neither 6 of these categories. 7 Mr. Dimock's testimony is consistent 8 with that of Dr. Gillen, who told you that prior to 9 AZT, examiners were looking for the same kinds of 10 information in the patent to support a sound 11 prediction. Mr. Dimock was cross-examined not so 12 much on the facts of Monsanto but on the facts of the 13 English case, Olin Mathieson. And it is true that 14 the Supreme Court in Monsanto received the principle 15 of sound prediction from Olin Mathieson, but this 16 doesn't mean that it received into Canadian law the 17 factual context of Olin Mathieson as well. 18 To the extent that the court in 19 Olin Mathieson looked beyond the patent and the 20 common general knowledge to support a sound 21 prediction, that is not relevant, because the Supreme 22 Court of Canada did not do so in Monsanto. So if the 23 disclosure requirement for sound prediction has been 24 there since Monsanto, why do we not see a case 25 striking down a patent for failing to disclose the</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2274</p> <p>05:42</p> <p>1 basis of the prediction until Raloxifene? 2 As Mr. Dimock testified, part of the 3 answer is simply that there were very few sound 4 prediction cases in the early days. But another part 5 of the answer is that patentees were providing, as a 6 matter of course, ample disclosure in the patent to 7 support their sound predictions of utility. There 8 was sufficient support in the patent in Monsanto and 9 in AZT. When a rule is being complied with, there 10 won't be court decisions finding violations of that 11 rule. And for a clear application of the rule to 12 come up, it took cases like Raloxifene and 13 atomoxetine, where Claimant sought to push the bounds 14 of sound prediction further than they had been pushed 15 before. 16 So let's consider, briefly, those two 17 cases. As Mr. Dimock testified, in Raloxifene the 18 patent was challenged for both obviousness and 19 inutility. The patent disclosed rat studies to 20 support the promised utility, but these studies 21 simply mirrored the results of prior art rat studies. 22 One question was whether these prior art rat studies 23 meant that the invention was obvious, and Justice 24 Hughes concluded that they did not. But the logical 25 implication of this was that the disclosed studies</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2275</p> <p>05:44</p> <p>1 could not support a sound prediction of utility. If 2 the disclosed studies did support a sound prediction 3 of utility, then the similar studies that were in the 4 prior art would have made the invention obvious. 5 In short, the patent had not disclosed 6 anything going beyond the prior art to support a 7 sound prediction of utility. The bounds were being 8 pushed. And in atomoxetine, the bounds were pushed 9 even further. You see this at slide 149. Claimant 10 disclosed no factual basis whatsoever in the patent 11 to support a sound prediction of utility. The court 12 in atomoxetine held that the '735 patent offers no 13 information about the nature or sources of the 14 evidence relied upon by the inventors to support the 15 promise of atomoxetine's utility to treat ADHD by 16 demonstration or by sound prediction. 17 As Professor Siebrasse acknowledged on 18 cross-examination, he's unaware of any prior Canadian 19 case where a sound prediction was upheld in the 20 absence of any factual basis being disclosed in the 21 patent. Atomoxetine would have been the first. 22 There was no basis in prior Canadian law for a sound 23 prediction of utility to be upheld on these facts. 24 At the beginning of this hearing I 25 stated that Canada's position was not that there has</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2276</p> <p>05:45</p> <p>1 been absolutely no change or evolution in patent law, 2 but the evidence and testimony you have heard makes 3 clear that each of the rules applied to invalidate 4 Claimant's patents have deep roots that predate the 5 filing of Claimant's patents and predate the entry of 6 force into NAFTA. 7 But as a concluding thought, even on 8 Claimant's own distorted account of the facts, what 9 it describes is an incremental process of common law 10 evolution. It identifies change occurring in three 11 increments over a six-year period. When we delve 12 into these increments, we again see a story of 13 incremental change, a movement from the recognition 14 of broad concepts to the fleshing out of their 15 detailed application in new factual circumstances 16 over time. This is the very definition of common law 17 evolution. 18 That brings me to the end of my 19 submissions on why there has been no dramatic change 20 in Canadian law. Subject to any questions from the 21 Tribunal, I'll introduce my colleague, Ms. Zeman. 22 SIR DANIEL BETHLEHEM: Mr. Johnston, I 23 just have one question, and it's really a question of 24 in the first instance whether I should be putting it 25 to you or one of your colleagues. I think</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2277</p> <p>05:47</p> <p>1 Mr. Spelliscy said that someone -- I thought it was 2 you -- was going to address the issues raised by the 3 United States with Canada that were set out in the 4 documents in the record C-331 and 332 relating to 5 U.S. concerns over the Canadian utility doctrine. Is 6 that you or Mr. Luz? 7 MR. JOHNSTON: I'm afraid it is not 8 me. Mr. Luz, my colleague, will be addressing that 9 shortly. 10 I will introduce now my colleague, 11 Ms. Zeman, who will be explaining why the 12 invalidation of Claimant's patents do not breach 13 Article 1105. 14 MS. ZEMAN: I will spend the next few 15 minutes addressing the Claimant's arguments that it 16 has been denied treatment in accordance with the 17 minimum standard of treatment under customary 18 international law in light of evidence that we have 19 heard this week. 20 Specifically, I will address the 21 Claimant's arguments that Canada's promise utility 22 doctrine is, first, discriminatory; second, 23 arbitrary; and third, inconsistent with its 24 legitimate expectations. As Mr. Spelliscy has 25 already explained this afternoon, the Claimant has</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 failed to prove that these standards form part of the
 2 customary international law minimum standard of
 3 treatment of aliens that applies to judicial
 4 measures, but the Claimant has also failed to
 5 establish that the facts support its allegations. In
 6 other words, even on its own standard, the Claimant
 7 has failed to establish its case on the facts. Its
 8 burden of proof does not shift.
 9 Therefore, if the Tribunal determines
 10 that the Claimant's allegations are relevant to the
 11 legal issues it must consider, it must nonetheless
 12 dismiss the case. I'll turn first to the Claimant's
 13 arguments with respect to discrimination.
 14 As Sir Ronald Fisher popularized
 15 Fisher's Exact Test, Mark Twain popularized a now
 16 famous quote. He said there are three types of lies.
 17 Lies, damned lies and statistics.
 18 Now, this is certainly not to
 19 denigrate the field. The point is that statistics
 20 can often be manipulated to reach a desired outcome.
 21 Math can be made to produce wonderful results,
 22 especially where you know what results you want to
 23 obtain. And what did we see here? The Claimant
 24 brought in Dr. Levin not in support of its Memorial,
 25 but in support of its reply when it had already

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1 argued the point in its Memorial. It knew the result
 2 it wanted. What did Dr. Levin tell us? He did not
 3 check the data given to him. He did not code the
 4 data. He did not create the rule that led to the
 5 coding. The Claimant did. It created a coding rule
 6 that got it the results that it wanted.
 7 As Mr. Johnston described, the
 8 Claimant also created a date division for the data
 9 that was inconsistent with its own theory of the
 10 case. I think Mark Twain would not be surprised.
 11 There is no statistically significant disparate
 12 impact.
 13 This slide shows just two corrections
 14 to the dataset provided to Professor Levin. First,
 15 consistent coding of non-pharmaceutical cases in the
 16 post-2005 period. I'm referring specifically to the
 17 cases of Eurocopter and Uponsor. And second, dividing
 18 the data as of the outset of the promise utility
 19 doctrine as identified by Professor Siebrasse.
 20 All of the other corrections Canada
 21 views as appropriate were laid out in the testimony
 22 of Dr. Brisebois, and in this regard I would refer
 23 the Tribunal to pages 496 to 502 of the transcript
 24 where Dr. Brisebois explains his treatment of
 25 Eurocopter and Uponsor.

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1 MR. BORN: I should probably know the
 2 answer, but can you tell me what the exact date
 3 you've used to divide the data is?
 4 MS. ZEMAN: Yes, September 20, 2005.
 5 Though I note Mr. Johnston said September 2, 2005
 6 earlier. That was the confidential reasons in that
 7 decision. September 20 was the published. Either
 8 way, what you see on the screen does not change.
 9 Applying all of Dr. Brisebois'
 10 corrections, in no instance is there a statistical
 11 significance. But even if there was a statistically
 12 significant impact, what does that mean? Well, the
 13 Claimant's expert, Dr. Levin, recognizes that
 14 statistical significance is distinct from legal
 15 significance, the Claimant itself equates the two.
 16 The Claimant asserts a causal relationship between
 17 statistical significance and its legal hypothesis of
 18 discrimination where there is evidence, at most, of
 19 correlation. As its own expert explained this week,
 20 causality and correlation are not the same.
 21 As Mr. Johnston has touched on
 22 briefly, litigation outcomes cannot possibly tell the
 23 whole story. Only a small fraction of patents are
 24 ultimately litigated. As Professor Lemley wrote in
 25 his article Probabilistic Patents, "Great care must

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1 therefore be taken when interpreting data from any
 2 sample of litigated patent cases." Moreover,
 3 counting litigation outcomes does not account for a
 4 number of factors that inform those outcomes. As
 5 Professor Holbrook explained this week, facts can
 6 differ and reasonable people can disagree about what
 7 those facts are. Professor Holbrook's views are
 8 consistent with the limitations identified by
 9 Professor Lemley in his 1998 study of litigation
 10 outcomes in the United States. I note that Claimant
 11 relies on this study in several instances.
 12 Professional Lemley notes that the
 13 skill of counsel on either side, the particular
 14 experiences of the fact finder, the quantum and
 15 quality of evidence presented, including the
 16 credibility of witnesses, and the quality of the
 17 patents themselves all influence litigation outcomes.
 18 None are accounted for in the data.
 19 All that these numbers can tell you is
 20 that the utility requirement has more relevance in
 21 the field of pharmaceuticals. Why? Because
 22 patentees in the pharmaceutical field are the ones
 23 making the sound predictions of utility. They are
 24 the ones patenting upstream. As Professor Merges
 25 explained, they try to get something in early because

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<p style="text-align: right;">2282</p> <p>05:55</p> <p>1 they know other people are racing for the same 2 result.</p> <p>3 As Professor Holbrook explained in his 4 report, picking up the analysis of Professor Merges, 5 sometimes certain doctrines may be more salient for 6 certain industries. For example, we heard about the 7 holding this week of the U.S. Supreme Court in Alice 8 Industries. This case will have a disproportionate 9 impact on the computer software industry. Does that 10 mean it shows discrimination? It does not. It is a 11 legally irrelevant point.</p> <p>12 In sum, the Claimant's statistics do 13 not show that the promise utility doctrine 14 discriminates against pharmaceutical patents as 15 compared to other types of patents. Nor do they show 16 that the doctrine discriminates on the basis of 17 nationality. The Claimant's claim must be dismissed.</p> <p>18 The Claimant next argues that the 19 promise utility doctrine is arbitrary. On the one 20 hand, it argues that decisions of courts which are 21 unpredictable and incoherent and totally irrational 22 can lead to a breach under the arbitrariness heading 23 of Article 1105. But on the other hand, it 24 recognizes that the courts in this case properly 25 applied existing law. The Claimant alleges that the</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2283</p> <p>05:56</p> <p>1 doctrine as a whole is arbitrary. Before addressing 2 these arguments specifically, I think it is helpful 3 to pause to remember the context in which these 4 arguments are made. As the Claimant's expert 5 Professor Merges agreed this week, thousands of 6 patents are issued every year, and most are never 7 ultimately litigated. This is true in all of the 8 NAFTA parties.</p> <p>9 The rules and policies that we heard 10 about this week apply equally to all patents and 11 patent applications, regardless of whether they are 12 ultimately granted or litigated. The Claimant asks 13 you to conclude that the Canadian courts' 14 interpretations of the Patent Act are arbitrary. 15 However, as you heard this week, the principles 16 elaborated by the courts were not devoid of all 17 reasons. Instead, they resulted from the 18 well-reasoned evolution of Canadian law. They do not 19 rise to the level of a breach of the minimum standard 20 of treatment under customary international law, and 21 they were not applied in an arbitrary manner to the 22 Claimant's patents at issue here.</p> <p>23 The three aspects of the doctrine that 24 Claimant alleges are arbitrary fulfill important 25 policy functions in Canada's patent law system. The</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2284</p> <p>05:58</p> <p>1 Claimant's preference for different policies cannot, 2 and does not, render them arbitrary. I will discuss 3 each aspect in turn. And I note that my order is 4 slightly different than that presented by my 5 colleague, Mr. Johnston. This is purely 6 chronological.</p> <p>7 The Claimant argued in its opening 8 that the rule in AZT excluding post-filing evidence 9 is arbitrary. As Canada has explained throughout 10 this arbitration, it is not. The requirement that 11 utility must be demonstrated or soundly predicted at 12 the time of filing exists to prevent patenting for 13 bare speculation. Determining at which point 14 speculation becomes invention is a difficult question 15 in any patent system. As Professor Siebrasse 16 acknowledged this week, there is no ideal place to 17 draw this line.</p> <p>18 Canada has decided that the time of 19 application is the point at which the bargain must be 20 fulfilled. Patents are granted to the first inventor 21 to file an application. The patent monopoly runs 22 from the date that you, as the presumed first 23 inventor, file your patent application. It is not 24 arbitrary to require the bargain to be met at that 25 time. Tellingly, Claimant's own expert, Professor</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2285</p> <p>05:59</p> <p>1 Siebrasse, agrees that the rule in AZT is rationally 2 connected to the objective of patenting too far 3 upstream.</p> <p>4 The fact that Claimant would prefer 5 the line to be drawn elsewhere does not make the 6 Supreme Court of Canada's pronouncement arbitrary, 7 nor is it the role of this Tribunal to decide where 8 Canada should draw that line.</p> <p>9 The Claimant argued in its opening 10 statement that the court's application of the rule to 11 its patents produced unfair results. These patents, 12 it claims, were not speculative. They were 13 extraordinarily supported by human clinical studies 14 at the date of filing. The Canadian courts 15 disagreed, and they disagreed on the basis of the 16 extensive evidentiary records before them. In 17 olanzapine, the courts determined that there was no 18 evidence that olanzapine was superior to any other 19 compounds in the genus class in respect of the 20 surprising advantages described in the '113 patent.</p> <p>21 It is worth noting here that while 22 there may be disagreement about which doctrinal 23 heading is best suited to deal with advantages in the 24 selection context, it is undisputed that selections 25 must, in fact, have those advantages.</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2286</p> <p>06:01</p> <p>1 These findings of fact made under 2 another heading of patentability would equally have 3 led to invalidity. 4 As the Claimant's expert, Professor 5 Siebrasse, wrote in his blog two weeks after the 6 second infringement decision in olanzapine, "The 7 principle that a patent may not be granted for a 8 speculative invention is sound, and it may be that 9 Lilly patented too soon." 10 In atomoxetine, the court found that 11 the MGH study, whose qualities the Claimant extols 12 here, was not sufficient to demonstrate the claimed 13 utility, nor did the patent disclose a factual basis. 14 The court found that the inventors themselves had 15 reservations about that study. 16 The Claimant's inability to convince 17 the courts that it had established the utility of its 18 inventions at the filing date -- that is at the 19 moment its patent monopolies began to run -- does not 20 render the application of the rule arbitrary. As 21 Professor Siebrasse pointed out this week, the courts 22 had the whole record. We do not. Even if 23 Article 1105 allowed for the kind of review of court 24 decisions the Claimant advocates here -- and it does 25 not -- this Tribunal is in no position to conduct any</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2287</p> <p>06:02</p> <p>1 sort of review of the court's factual findings. 2 The rule in AZT in its application to 3 Claimant's patents is not arbitrary. The Claimant 4 also argued that judges undertake the inherently 5 unpredictable task of identifying the promises in the 6 patent. There are three elements wrapped up in this 7 argument, none of which is arbitrary. 8 First, it is not arbitrary to hold 9 patentees to promises. As Canada has explained 10 throughout this arbitration, the bargain theory of 11 patent law underpins the entire system. The Claimant 12 itself recognizes that holding patentees to promises 13 is a legitimate part of the patent bargain so long as 14 those promises are found in the claims. Patentees 15 know they will be held to their promises, and they 16 know they must be very precise. 17 As the UK House of Lords observed in a 18 passage that Canada reproduced in its rejoinder at 19 paragraph 38, the specification is a unilateral 20 document in the words of the patentee's own choosing. 21 Furthermore, the words will usually have been chosen 22 upon skilled advice. The specification is not a 23 document inter rusticos for which broad allowances 24 must be made. 25 Second, it is not arbitrary to look at</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2288</p> <p>06:04</p> <p>1 promises in the disclosure. Claimant's experts 2 agreed that it is often necessary to go to the 3 disclosure to construe claims. In fact, Professor 4 Siebrasse noted that the utility of compounds is 5 frequently not stated in claims. In those situations 6 he said it may be necessary to look to the 7 disclosure. Mr. Reddon also explained that he 8 sometimes leads the courts to the disclosure for the 9 purposes of overcoming an obviousness challenge. It 10 is no more arbitrary to look to the disclosure for 11 utility as it is for obviousness. 12 With respect to the manner in which 13 judges identify promises, Professor Siebrasse 14 recognizes that courts use sound principles of claims 15 construction or statutory interpretation to identify 16 the promise of a patent. If this exercise is 17 arbitrary, then all statutory interpretation is 18 arbitrary. Such a conclusion is simply untenable. 19 Third, and finally, it is not 20 arbitrary for judges to decide between competing 21 evidence on what the promise of a patent is. As has 22 been made amply clear, private parties drive both the 23 drafting of patent applications and the challenge of 24 those patents later in the courts. As the Claimant's 25 expert, Mr. Reddon, explained, the lawyers put the</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2289</p> <p>06:05</p> <p>1 case together. They present it to the court. They 2 lead the court through the approach that they want, 3 and the court adopts the approach that is the most 4 attractive to it. 5 Remember that a patentee is not 6 required to identify a particular utility. Canada 7 continues to make patents available for inventions 8 with a mere scintilla of utility. So why do 9 patentees make promises of particular utility? As 10 Mr. Dimock explained, in some cases it is necessary 11 to satisfy another concept of patent law. For 12 example, the advantages of a selection over a genus 13 or the specified new use of a known compound forms 14 the basis of these types of inventions. 15 This was evident in both the 16 olanzapine and atomoxetine cases at issue here. 17 Mr. Johnston addressed these proceedings in our 18 opening, so I will not spend time on them here except 19 to note one thing for each. In olanzapine, the 20 promise identified by the judge tracked almost 21 exactly the language that Claimant chose to include 22 in its patent. In atomoxetine, the promise of the 23 patent was found in the claims construed in light of 24 the disclosure from the perspective of the skilled 25 person in light of the common general knowledge.</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2290</p> <p>06:07</p> <p>1 This is a basic principle of claims construction. 2 There is nothing arbitrary about the 3 outcomes in either case. 4 Finally, it is not arbitrary to 5 require applicants to disclose the factual basis and 6 sound line of reasoning of their sound predictions. 7 It is an essential part of the patent bargain. 8 Contrary to what you heard the Claimant's experts say 9 this week, the Supreme Court of Canada was clear 10 about the rationale for this rule. As Justice Binnie 11 explained in AZT, "In this sort of case, however, the 12 sound prediction is to some extent the <i>quid pro quo</i> 13 the applicant offers in exchange for the patent 14 monopoly." 15 Sound prediction is a permissive 16 doctrine that allows patentees to obtain a monopoly 17 for something more than they have already made. The 18 <i>quid pro quo</i> is telling the public what it is that 19 makes its prediction a sound one. A skilled reader 20 cannot discern whether a prediction is sound or 21 whether it is mere speculation unless it knows the 22 factual basis and the sound line of reasoning. 23 The Federal Court of Appeal 24 articulated the same rationale when it upheld the 25 trial court's decision to invalidate the Claimant's</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2291</p> <p>06:08</p> <p>1 atomoxetine patent. It found that it would be 2 difficult to see what Lilly could be said to have 3 given to the public in exchange for the grant of the 4 monopoly that it did not already have. Requiring the 5 basis for a sound prediction of utility to be 6 disclosed in the patent is not arbitrary. The 7 Claimant's allegations that the promise utility 8 doctrine is arbitrary are simply unsupported by the 9 facts. It has not shown that all aspects together 10 are arbitrary or that the doctrine's applications to 11 its own patents was arbitrary. The Tribunal must be 12 careful not to engage in a second-guessing of the 13 policy rationale for the court's interpretation of 14 domestic law or of Canadian patent law's evolution. 15 It must not act as an appellate court for the 16 Canadian court's decisions under the guise of 17 considering whether the doctrine is arbitrary. The 18 Claimant's argument must be dismissed. 19 Finally, the Claimant has argued that 20 Canada's promise utility doctrine is inconsistent 21 with its legitimate expectations. The Claimant 22 argued that it could not have expected that Canada's 23 law on utility would change radically. As 24 Mr. Johnston has explained, the Claimant has failed 25 to show that such a sea change in the law of utility,</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2292</p> <p>06:10</p> <p>1 in fact, occurred. But even if it had, Mr. Spelliscy 2 has explained that the common law evolves over time. 3 Any sophisticated investor expects developments in 4 the law, particularly in the ever-evolving area of 5 patent law. It cannot be that every time a court 6 overrules a precedent, it violates customary 7 international law. This point underscores why the 8 Tribunal should be very cautious to consider 9 legitimate expectations regarding Canadian patent law 10 as a relevant element here. 11 But even on the facts, the Claimant 12 has not established that it had legitimate 13 expectations for at least three reasons. First, 14 there has been no specific representation. We heard 15 the Claimant argue last week and again this morning 16 that a patent grant in Canada is a specific 17 representation upon which investors ground their 18 expectations. But as we heard from numerous 19 witnesses and experts, the Patent Office's grant of a 20 patent and a court's assessment of its validity are 21 distinct exercises. As the Claimant's expert, 22 Professor Merages, explains, the grant of a patent 23 does not provide a guarantee of validity. This is 24 because the Patent Office and the courts play 25 distinct roles. The Patent Office grants patents.</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2293</p> <p>06:11</p> <p>1 The courts determine their validity. 2 As Dr. Gillen explained, examiners 3 rely on what the applicant has put in the application 4 to carry out their examination. Both Dr. Gillen and 5 Mr. Wilson agree that examiners accept credible 6 assertions of utility when reviewing patent 7 applications. This is necessarily the case. The 8 Patent Office is not equipped to conduct experiments 9 to test the applicant's assertions. 10 On the other hand, courts have the 11 benefit of competing expert and fact evidence. 12 Courts spend weeks hearing evidence adduced and 13 arguments made by the parties. It should not come as 14 a surprise, then, that accepting an assertion as 15 credible, on the one hand, and testing its veracity 16 on the basis of evidence adduced in an adversarial 17 process on the other may lead to different results. 18 A patent grant is not a specific representation of 19 validity. 20 Second, even on the Claimant's broader 21 view that it need not have a specific representation, 22 the Claimant has not shown that it had legitimate 23 expectations. Indeed, while the Claimant argued on 24 Day 1 of this hearing that its fact witnesses 25 provided uncontroverted evidence of Lilly's robust</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 processes for identifying patent-related risk, the
2 evidence this week revealed the opposite. The
3 Claimant's witnesses testified that they would have
4 received legal advice about Canadian law when they
5 filed their patents and that they would expect their
6 legal teams to be familiar with Canadian law. And,
7 yet, when confronted with questions about specific
8 and relevant cases such as the 1981 Consolboard
9 decision, the 1995 Federal Court of Appeal decision
10 in *Apotex v Wellcome*, Mr. Stringer, the individual
11 responsible for deciding where in the world to file
12 patent applications, admitted that he had never seen
13 those decisions.

14 The record is full of Canadian patent
15 law scholars and practitioners, like Fox and
16 Hayhurst, warning about including promises in your
17 patent and of disclosing a sufficient basis for a
18 sound prediction. These publications are consistent
19 with Mr. Dimock's recollections of his understanding
20 and practice at the time. Based on the Claimant's
21 representations about its robust processes for
22 identifying patent-related risk, it is only
23 reasonable to assume that at least its Canadian legal
24 counsel were aware. That Lilly was not briefed is no
25 fault of Canada's.

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1 Moreover, as Mr. Reddon explained in
2 the context of the Consolboard decision,
3 practitioners must take statements of law and live
4 with them as if a judge is some day going to apply
5 them, even if it has not yet happened. If legitimate
6 expectations were at all applicable in this context,
7 this is the only reasonable expectation an investor
8 could hold.

9 Finally, the Claimant argues that its
10 expectations, at least with respect to its patent for
11 atomoxetine, were grounded in the PCT's form and
12 contents requirements. However, as the Claimant's
13 expert, Mr. Erstling, testified, WIPO warned
14 applicants to take due account of national practice
15 when drafting their disclosures. As he later
16 explained, it's up to the examiner to determine
17 whether statements included in a disclosure meet the
18 substantive conditions of patentability.

19 The Claimant's fact witness,
20 Mr. Stringer, who was responsible for deciding where
21 to file applications, admitted that he was not making
22 efforts to address country-specific concerns about
23 validity. Instead, he was only concerned about what
24 was allowable or what was patentable subject matter.
25 The Foreign Patent Committee, making decisions about

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1 where to file patent applications, did not include
2 any patent lawyers from Canada. But more telling
3 than anything on the PCT is Mr. Erstling's position
4 that Canada's rule for sound prediction was in breach
5 of a fundamental aspect of the PCT. His recollection
6 was that this requirement arose in 2002 in *AZT*.

7 Yet, he admitted that none of Canada's
8 treaty partners had ever brought a claim against
9 Canada, and he couldn't even recall an informal
10 complaint by any of Canada's treaty partners in this
11 regard. As Claimant's counsel told you this morning,
12 these treaty partners are many and include the U.S.
13 and Mexico.

14 The Claimant, therefore, has not shown
15 that it had legitimate expectations that could be
16 interfered with by the Canadian court's determination
17 of its patents' validity. Its argument has neither
18 legal basis nor factual support and must be
19 dismissed.

20 Subject to questions, I will turn the
21 floor to my colleague, Mr. Luz, who will discuss the
22 application of Article 1110 and Chapter 17.

23 THE PRESIDENT: No questions,
24 Ms. Zeman.

25 MR. SPELLISCY: I suggest, despite the

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1 number of slides, I think Mr. Luz needs about half an
2 hour, but I would suggest for the court reporter five
3 minutes.

4 THE PRESIDENT: Much appreciated.
5 Five minutes break.

6 *(Recess taken)*

7 THE PRESIDENT: Mr. Luz, before you
8 continue, I think we have received rather voluminous
9 decks. Would it be possible that each side prepare a
10 table of contents tonight simply to make these decks
11 more accessible when we have our deliberations
12 tomorrow. I know I make myself immensely popular
13 with the paralegals at this time. But it would be
14 much appreciated if we had them tomorrow morning.

15 MS. CHEEK: Very good. We will
16 coordinate with the secretary to get you the table of
17 contents.

18 MR. SPELLISCY: We'll arrange to have
19 it.

20 THE PRESIDENT: With the apologies
21 from the Tribunal.

22 Mr. Luz, please proceed.

23 MR. LUZ: Thank you, Mr. President.
24 Obviously with the late hour, I will try and speak
25 loudly and vigorously to try and keep everyone awake.

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<p>2298</p> <p>06:27</p> <p>1 I will just focus on some of the key 2 points that have come up that we've had over the 3 course of the day and I think particularly with 4 respect to the question of property and invalidation 5 of patents and expropriation analysis. Article 6 1709(1) I think is the key provision that is at issue 7 that Canada wants to address at this point. I'll 8 just very quickly end off with the final stage of the 9 analysis if the Tribunal gets through all of the 10 other hurdles in substantial deprivation of the 11 investment. 12 I'll just very briefly deal with 13 question of property because it has come up. We 14 heard this week about the nature of patent rights, 15 and that provides a key insight into the 16 expropriation analysis. What we heard from 17 Mr. Reddon and Professor Merges confirms what Canada 18 has argued from the very beginning. A finding by a 19 court that a patent is invalid pursuant to domestic 20 law under which the patent was granted is not an 21 expropriation as recognized under international law. 22 Patents are created and granted in 23 accordance with domestic law and an invalidation, as 24 Mr. Reddon testified, is a declaration that the 25 property right was void ab initio. And we saw</p> <p>www.dianaburden.com</p>	<p>2299</p> <p>06:28</p> <p>1 earlier over the course of the week that Professor 2 Merges confirmed that even if a patent has issued, if 3 a court later finds that the patent does not meet the 4 various requirements, utility, non-obviousness, 5 written description, enablement, it is invalid. In 6 other words, the patent should not have issued. 7 That's a very different scenario than when a state 8 seizes land or destroys some other uncontested 9 ownership of property rights, in which case an 10 expropriation analysis might come up under 11 international law. But as Professor Merges 12 confirmed, an issued patent is no guarantee of 13 validity. That will be determined by a court if it 14 is later challenged in litigation. And patentees 15 know this. And the fact that a patent may be 16 challenged as invalid years later doesn't change the 17 nature of the right. 18 So again, as Mr. Reddon testified, the 19 patentee is not forced to give back the benefits 20 enjoyed during the time the patent was extant. And 21 not all the other property rights are destroyed as 22 well. But again, as we learned this week, a court 23 cannot simultaneously take property that it 24 determines should not have been issued in the first 25 place, and that is the reason Canada points out that</p> <p>www.dianaburden.com</p>
<p>2300</p> <p>06:30</p> <p>1 in the case of judicial invalidation of a patent, it 2 is not cognizable as an expropriation in 3 international law. 4 Just to put a fine point on that is to 5 think of the implications of what it would mean for 6 patent systems of not just Canada and the United 7 States but the whole world if it were found 8 otherwise. As we learned earlier, half of the 9 litigated patents in the United States are declared 10 invalid. Does that mean that every single one of 11 them will give rise to an expropriation claim? It 12 could very well destroy the entire system upon which 13 the patent bargain is based, which is you get a 14 presumption of validity at the beginning, but it is 15 not a guarantee of validity and that's only 16 determined once a court has the opportunity to rule 17 on that validity. And if it rules that it is 18 invalid, it is not a taking of a property right, it 19 is a declaration that the property right did not 20 exist, that it is void ab initio. 21 I'll move on to Chapter 17 because, 22 again, if the Tribunal finds that a judicial 23 invalidation could constitute an expropriation, the 24 Claimant still has the burden of proving that Canada 25 has acted inconsistently with Chapter 17. Otherwise,</p> <p>www.dianaburden.com</p>	<p>2301</p> <p>06:31</p> <p>1 as per Article 1110(7), the expropriation provision 2 does not even apply. 3 So I will go directly to 4 Article 1709(1). I won't address 1701(1), which is 5 something that we have addressed in our pleadings and 6 can deal further in post-hearing briefs if necessary. 7 I'd just ask you to skip forward to the Tribunal's 8 question 33 at slide 202, which is where the Tribunal 9 asked us to comment on 1701, which is what I'll do 10 now. 11 SIR DANIEL BETHLEHEM: Mr. Luz, can I 12 just come back to your point about property rights? 13 I think if I'm recalling correctly, Mr. Reddon -- 14 perhaps it was Mr. Reddon was saying that even if the 15 patent is invalidated ab initio, that that did not 16 invalidate a range of other associated rights, 17 contractual rights and so on, I mean presumably it's 18 not your contention, is it, that the declaration of 19 invalidity ab initio, as it were, sort of wipes out 20 everything between the original grant of the patent 21 and the claim of invalidity? Presumably there were 22 some, as it were, some value or some actionable 23 rights that may subsist beyond the declaration of 24 invalidity ab initio. 25 MR. LUZ: Yes, and that's actually the</p> <p>www.dianaburden.com</p>

<p>2302</p> <p>06:33</p> <p>1 point that goes to the question of substantial 2 deprivation, which is something that I would come to 3 sort of at the end because, again, in terms of 4 doctrinal ordering, one does not even need to get to 5 that question unless there's been an inconsistency. 6 But yes, the answer is yes, there are extant rights 7 that may continue to exist. It's just you 8 essentially, as Mr. Reddon said, you lose your right 9 to sue on the monopoly. 10 SIR DANIEL BETHLEHEM: In a 11 hypothetical where you have a one-patent company, it 12 registers its patent and then a brand or a generic 13 decides to buy that one-patent company, so we've got 14 a very clear attribution of value to that particular 15 patent, which is then subsequently, years later, 16 declared to be invalid in consequence of litigation, 17 how are we to address the fact that there clearly was 18 value, because there was a transaction, there was 19 sort of a purchase, but all of a sudden we have this 20 declaration of invalidity ab initio? What happens to 21 that value? 22 MR. LUZ: I would think it depends on 23 the circumstance in the purchase of that and whether 24 or not there would be a license agreement and so on. 25 And even the loss of the right to sue to enforce your</p> <p>www.dianaburden.com</p>	<p>2303</p> <p>06:34</p> <p>1 monopoly is one part of the property right, and there 2 are other aspects of a patent right that may continue 3 to exist. And this was actually one of the points I 4 would sort of bring up at the end because it does 5 bring up the question of whether or not the Claimant 6 has even established that there has been a 7 substantial deprivation of its -- in order to 8 constitute an expropriation. That's obviously 9 something that's necessary. 10 But by bringing up the question of -- 11 as Mr. Reddon said, that there are many rights that 12 continue to exist, in order to establish an 13 expropriation, there has to be substantial 14 deprivation. So we would say that the Claimant 15 hasn't established that all of those -- all of the 16 value of its patent right has been substantially 17 deprived. 18 SIR DANIEL BETHLEHEM: Thank you. 19 MR. LUZ: So I'll go to 20 Chapter 1709(1). I think this is really where it 21 comes into focus because this is where the Claimant 22 has spent actually very little time, given the fact 23 that this is where the real source of their complaint 24 is, is that Canada has been violating its obligation 25 on the meaning of useful in 1709(1).</p> <p>www.dianaburden.com</p>
<p>2304</p> <p>06:36</p> <p>1 The Claimant also talked about the 2 Vienna Convention and law of treaties analysis, and 3 their approach to it is really to side step the 4 issue, because what they've packed into the meaning 5 of useful, as set out in 1709(1), contains a 6 multitude of different issues, many of which don't 7 have anything to do with the ordinary meaning in the 8 context of the word "useful." They have to do with 9 evidence, they have to do with timing, they have to 10 do with disclosure and so on. So this is why I think 11 it's important to focus on what is the meaning in a 12 Vienna Convention analysis of 1709(1). 13 The only conclusion really is that 14 Canada's implementation of the useful standard is 15 perfectly credible and perfectly rational under the 16 treaty. It does not render 1709(1) inutile, and 17 there is subsequent practice of the NAFTA parties to 18 take into account to point that out. 19 I would also point out -- and this is 20 something that the Claimant really has avoided -- is 21 the state practice with respect to a treaty in pari 22 materia, the TRIPS. Another state practice one could 23 look to under 31(3)(c) of the Vienna Convention, 24 because of the fact that it is a treaty in pari 25 materia -- and I think that is something that I will</p> <p>www.dianaburden.com</p>	<p>2305</p> <p>06:37</p> <p>1 focus on in terms of a doctrinal analysis of the 2 Vienna Convention interpretation. 3 So let's start off with the ordinary 4 meaning in its context under Article 31(1). The 5 first thing to note is that the NAFTA parties did not 6 include a definition of useful, and it did not 7 include a definition of capable of industrial 8 application. That tells you something immediately, 9 that the NAFTA parties didn't want to have a 10 definition and they wanted to have flexibility on the 11 meaning and the implementation of those obligations. 12 As Professor Gervais testified, there is no 13 obligation in the NAFTA or the TRIPS to use a 14 specific definition or application of any substantive 15 patentability criteria, including utility. 16 As Professor Gervais testified, 17 1709(1) does not require one way of defining that 18 criteria because it is not a harmonized term. That's 19 evident from the text of 1709(1). All it says is 20 "useful." If there was an intention to ascribe a 21 special meaning or content to that word, which is 22 essentially what the Claimant is trying to do, they 23 are trying to establish that it has a special 24 meaning, which is something that is permitted under 25 the Vienna Convention Article 31(4), but they have</p> <p>www.dianaburden.com</p>

<p style="text-align: right;">2306</p> <p>06:39</p> <p>1 not been able to establish that it has the special 2 meaning that they allege. 3 If there was an attempt to do it, we 4 would know it. Especially since the United States 5 Supreme Court described the word "useful" as a term 6 pregnant with ambiguity when used in the context of 7 every-day life. If the NAFTA parties intended useful 8 to mean mere scintilla, those words could have been 9 added. If there was an intention to use the U.S. 10 standard of specific, substantial and credible, those 11 words would have been added. The fact that they do 12 not appear in the NAFTA suggests that there was no 13 intention to impose upon Canada, and patentable upon 14 Mexico as well -- I'll get to that in a second -- the 15 standard as understood in the United States. 16 Nor does NAFTA say that useful is a 17 high standard or a low standard. And this was 18 something that came up during the questions of some 19 of the witnesses with respect to the U.S. and 20 Canadian Patent Acts. So you see that Professor 21 Siebrasse admitted this with respect to the Canadian 22 Patent Act. Says nothing as to whether or not it's a 23 high bar or low bar. Similarly, Professor Merges 24 agreed that the substantial, specific and credible 25 standard that is the legal requirement for utility in</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2307</p> <p>06:40</p> <p>1 the United States doesn't appear in that statute. 2 So if there was an intention to 3 ascribe that kind of a meaning to the NAFTA, it could 4 have been done. Indeed, another way of looking at 5 this is the fact that with respect to capable of 6 industrial application and useful, the NAFTA parties 7 agreed that a party may deem useful and capable of 8 industrial application to be synonymous, even though 9 they're clearly not synonymous. So the NAFTA parties 10 agreed that Mexico could have its ability to 11 implement capable of industrial application in the 12 context of its legal system. How could it be that 13 Canada may not also have similar discretion to 14 interpret useful in the way that its courts have done 15 in the past, just as the United States has? 16 I'll come back to that in a moment, 17 but the one thing I do have to point out is that the 18 NAFTA does not say anything about rules of evidence 19 or how and when utility must be proven. There is no 20 rule in the NAFTA as to the weight of evidence, what 21 evidence is needed to fulfill utility, when that 22 evidence needs to be produced, how much needs to be 23 disclosed in the patent, where that evidence should 24 be disclosed in the claims or the disclosure. None 25 of that is regulated by the NAFTA. And most of which</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2308</p> <p>06:41</p> <p>1 the Claimant complains about are those issues. 2 Now, as we said, certainly the 3 ordinary meaning of useful can be read exactly as the 4 Supreme Court of Canada said in Consolboard, quoting 5 the Halsbury's Laws of England when referring to 6 something that is not useful. We've heard this quote 7 many times. That the "invention will not work either 8 in the sense that it will not operate at all or, more 9 broadly, that it will not do what the specification 10 promises that it will do." 11 Now, because the ordinary meaning of 12 the word "useful" is not very useful, one understands 13 it in its context. And in its context "useful" has 14 been interpreted by the U.S. courts, by the Canadian 15 courts and by many other countries in the context of 16 their own patent laws. And that is the key. The 17 NAFTA parties, just as the parties to the TRIPS -- 18 and I'll come to this in a little bit -- have not 19 been able to describe and agree on the substantive 20 content of the usefulness or capable of industrial 21 application requirements. So they have left them 22 undefined precisely because they will evolve and 23 emerge in the context of legal systems. And we can 24 see that in the testimony of Professor Gervais, if 25 you go to slide 211, where he points out that in the</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2309</p> <p>06:43</p> <p>1 patent bargain it evolves and changes jurisdiction to 2 jurisdiction and in the context of Canada and the 3 United States, in the common law process. And this 4 is something that is inevitable because of the nature 5 of the implementation of the utility and other 6 patentability requirements. 7 Even Professor Merges agreed that 8 common law collaboration on the basic concept is 9 necessary, and that is going to change and evolve. 10 I won't repeat everything that you've 11 heard about what my colleague, Mr. Johnston, and 12 others have said about the way that useful has been 13 interpreted in the context of the Canadian 14 Patent Act, but I would suggest that it is perfectly 15 reasonable in the application of an ordinary meaning 16 in its context. 17 The next part of the Vienna Convention 18 analysis is 31(3)(b), subsequent practice in its 19 application of the treaty which establishes the 20 agreement of the parties regarding its 21 interpretation. I would say that there really is 22 only one true piece of subsequent practice that we 23 have that we can look to that falls clearly within 24 this, and that is the 1128 submission of the United 25 States. If you look at that, that is where it says</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 very clearly that 1709(1) provides each NAFTA party
2 with the flexibility to determine the appropriate
3 method of implementing the requirements of
4 Chapter 17, including the utility requirement in
5 Article 1709(1), within its own legal system and
6 practice.
7 The Claimant has not shown any
8 contrary state practice to this. Instead, what it
9 has attempted to do is derive from American court
10 practice some sort of an indication that there was a
11 special meaning ascribed to "useful" in the NAFTA.
12 SIR DANIEL BETHLEHEM: Can you really
13 say that a party's 1128 submission amounts to
14 subsequent practice for the purposes of
15 Article 31(3)(b)?
16 MR. LUZ: It can in certain
17 circumstances. For example, in past cases, and I
18 think this is case where one -- that NAFTA parties'
19 1128 submissions and pleadings consistently over time
20 have established a common agreement amongst the NAFTA
21 parties in practice -- for example, on time bar,
22 continuing breaches do not extend the time bar.
23 SIR DANIEL BETHLEHEM: But you're not
24 taking us to a consistent statement over time in the
25 multitudes of 1128 submissions. Your submission was

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1 directed to the U.S. 1128 statement here suggesting
2 that that amounted to subsequent practice?
3 MR. LUZ: It's relevant to that.
4 Obviously this is a question of first instance, so
5 it's not the same as multiple pleadings and so on.
6 But I think we will get to actual state practice in
7 the context of WIPO and other relevant state
8 practice. But in the context of trying to establish
9 whether or not there is a view of how the treaty
10 should be interpreted, this is, at the very least,
11 relevant.
12 SIR DANIEL BETHLEHEM: Thank you.
13 MR. LUZ: Particularly because the --
14 and not only is this relevant, but in contrast to
15 what the Claimant has attempted to do is derive some
16 sort of a pattern and description from the United
17 States. But, in fact, what they have done is just
18 proven the opposite, is that not just the utility
19 requirement but other patentability requirements
20 continue to evolve within the NAFTA parties, and that
21 goes to show and support that the requirements of
22 Chapter 17 are allowed to evolve within a context of
23 their legal systems.
24 THE PRESIDENT: To follow up on Sir
25 Daniel's question, for the statement of the United

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1 States in its 1128 submission in paragraph 40, is
2 there a similar statement by Mexico in its 1128
3 submission?
4 MR. LUZ: Mexico's position was that
5 the Tribunal should not even be looking to
6 Chapter 17, so it did not make any comments on the
7 content of Chapter 17.
8 THE PRESIDENT: But is it here not
9 that it takes three to tango for state practice?
10 MR. LUZ: Certainly if there was -- I
11 used the example of the time bar where the consistent
12 practice has come forward. It certainly does not
13 constitute a subsequent agreement between the
14 parties, as would be the case for 31(3)(a).
15 THE PRESIDENT: Does it not establish
16 subsequent state practice?
17 MR. LUZ: I would venture not. Not to
18 go as far as that, but it is a relevant piece of
19 evidence of state practice that needs to be taken
20 into account because it confirms the ordinary meaning
21 in its context and other means of interpretation.
22 THE PRESIDENT: Thank you.
23 MR. LUZ: So I'll briefly go through
24 what we learned about U.S. law, and I won't put the
25 point forward that it was clear that Professor

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1 Holbrook was the one to do the proper comparative
2 analysis. And what he showed -- if we just flip
3 forward to slide 218 to show that as a matter of law
4 in the United States, enablement incorporates
5 utility. And so the fact that there was no
6 examination of the two issues together just goes to
7 show how myopic the Claimant's analysis or
8 comparative analysis -- purported comparative
9 analysis was.
10 So obviously this is establishing case
11 law, and I won't go through all of them. But,
12 rather, I'll just go to again the dynamic and what we
13 learned about the dynamic of the utility requirement.
14 So if we go forward to slide 224. This is something
15 that we saw that at one point in the mid 1990s there
16 was technology that was driving the issue of utility
17 before the U.S. Patent Office, and as Professor
18 Merges described himself, whereas the 1995 guidelines
19 of the Patent Office were seen as -- and I quote from
20 Professor Merges, "a liberalized treatment of
21 biotechnology application," later on his description
22 was that the 2001 guidelines were tightened by
23 introducing two novel aspects of defining specific
24 utility and adding the substantial utility
25 requirement. Indeed, Mr. Kunin wrote in the year

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<p style="text-align: right;">2314</p> <p>1 2000 that there was now "a more stringent test" for 2 utility. And that was being driven by technological 3 advancements before the courts. 4 Now, we got to the point where in 5 2005, the court did adopt this -- or depending on how 6 you look at it, a return to a heightened and more 7 rigorous disclosure requirement, but there is no 8 doubt that there have been developments, including a 9 tightening of the utility requirement, as new issues 10 have come before the U.S. courts. And that is the 11 perfectly normal process by which the common law 12 process works, and we can see the view of at least 13 one author, if we skip forward, that it was -- if we 14 skip forward to slide 230, that it was a more 15 rigorous and heightened utility requirement. 16 The U.S. courts also deal with the 17 same kinds of things, and I do want to just point out 18 very briefly the language of the Rasmusson judgment. 19 If you skip to 233, consider the language in 20 Rasmusson. This was a case where it was a question 21 of whether or not the patentee had evidence of its 22 invention at the time of its filing. And the court 23 pointed out that if mere plausibility were the test 24 for enablement for section 112, which incorporates 25 utility, "Applicants could obtain patent rights for</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2315</p> <p>1 inventions consisting of little more than respectable 2 guesses as to the likelihood of their success. When 3 one of the guesses later proved true, the inventor 4 would be rewarded the spoils instead of the party who 5 demonstrated that the method actually worked. That 6 scenario is not consistent with the statutory 7 requirement that the inventor enable an invention 8 rather than merely proposing an unproved hypothesis." 9 Skip one slide forward, shows that 10 that language was adopted in 318. Then take a look 11 at the language of the AZT judgment of the Supreme 12 Court of Canada, which came three years before. If 13 you skip forward to slide 235, it's exactly -- the 14 language is actually quite striking in terms of its 15 comparison because it says an applicant does not 16 merit a patent on an almost invention where the 17 public receives only a promise that a hypothesis 18 might later prove useful. The language goes on. 19 So there really is a similarity in 20 terms of goals, in terms of trying to police 21 speculative patenting. And that was Professor 22 Holbrook's entire point. 23 So what was this? I won't go through 24 it very much farther because what it does show is 25 what the U.S. 1128 said and what Canada has argued.</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2316</p> <p>1 The definition of useful in the NAFTA is one that 2 allows for different -- not different 3 interpretations, but ones that have substantive 4 content that are determined by the courts and within 5 its own legal jurisdictions. 6 I'll skip forward in the interest of 7 time to go forward to the TRIPS Agreement, because 8 that, I think, provides some useful material for 9 analyzing and confirming the fact that Canada's 10 approach to utility is acceptable and is not the 11 outlier -- the irrational outlier that the Claimant 12 has said. 13 SIR DANIEL BETHLEHEM: What's the 14 basis for us looking at the TRIPS Agreement? 15 MR. LUZ: As we said in our rejoinder, 16 this is something that can be looked at under 17 Article 31(3)(c) as a treaty -- because the TRIPS 18 Article 27 and the NAFTA 1709(1) are in pari materia, 19 and that is a canon of international legal 20 interpretation that allows for treaties that have 21 exactly the same kind of language, the same kind of 22 subject matter, negotiate at the same time, at the 23 very least -- and if we want to be doctrinal buckets, 24 since we've been talking about this kind of thing, at 25 the very least it's an Article 32 supplementary means</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2317</p> <p>1 of interpretation to confirm the ordinary meaning. 2 But Canada has put it in the bucket of 31(3)(c). 3 SIR DANIEL BETHLEHEM: Supplementary 4 means of interpretation -- I'm not going to take you 5 there, but I put a question mark on that. But 6 31(3)(c), other relevant rules of international law, 7 so you're citing it to us for purposes of treaty 8 interpretation, not the application of substantive 9 TRIPS rules. 10 MR. LUZ: That's right. It is "shall 11 be taken into account any relevant rules of 12 international law applicable in the relations between 13 the parties." And treaties in pari materia can be 14 such a source. 15 If you go to slide 252, 16 Professor Gervais has emphasized that there have been 17 attempts to harmonize the substantive patentability 18 criteria, but they have not been able to succeed. 19 Even Mr. Thomas, slide 253, he himself said, "I don't 20 think there is a core agreement on utility, if that 21 means that there's a core agreement on how it should 22 be defined or elaborated in national legislation. In 23 that respect there's no core agreement." 24 Mr. Thomas again confirmed that there 25 is significant variance amongst jurisdictions in the</p> <p style="text-align: center;">www.dianaburden.com</p>

<p style="text-align: right;">2318</p> <p>06:56</p> <p>1 industrial application and utility standards. I'll 2 just bring you to a couple of documents as an 3 example, and then I do want to address Sir Daniel's 4 question about the Exhibit C-331. So going through 5 these next ones will give that the lead-in to that. 6 If you go to slide 255, this is the 7 WIPO document from 2001 where underneath the -- 8 sorry, I believe it's the next slide. Right. 256. 9 Underneath definitions and examples of 10 utility, you have paragraphs 11 and 12 describing the 11 U.S. standard, and then to the next slide, you'll 12 see, lo and behold, Canada's sound prediction 13 doctrine in 2001 in a WIPO document underneath the 14 heading Definition and Example of Utility. Now, this 15 was acknowledged by Mr. Thomas that Canada was 16 telling WIPO what its law was in 2001. In that same 17 document on the next slide you'll see says that 18 utility relates to other substantive requirements of 19 patentability and cannot be considered separately 20 from those other requirements. Again, two years 21 later, in 2003, the unnamed countries, which were 22 already revealed to be Canada and the United States, 23 are there now explicitly. 24 If you look at slide 261, under the 25 heading Utility Requirement, National Laws and</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2319</p> <p>06:57</p> <p>1 Practices, you have the U.S. approach to utility and, 2 lo and behold, at the next paragraph, paragraph 40 3 and 41, the Canadian approach. There's nothing in 4 here, as Mr. Thomas said, no concerns were raised by 5 any state in the WIPO secretariat or in here with 6 Canada's approach to utility. Just as no one ever 7 raised concerns to Mr. Erstling about Canada's 8 implementation of the PCT, no one at WIPO ever 9 complained about it, even though it was well-known 10 and revealed in 2001 and 2003. 11 My final point is that 12 Professor Gervais was taken to several documents from 13 the Tegernsee Group report, 2014. You can see that 14 at slide 265. Then there were some questions about 15 whether or not -- this is in 2014 -- Japan and 16 Germany had any problems with the various approaches 17 to utility. I'm not sure why attention was brought 18 to this because if Japan and Germany, two of Canada's 19 G7 partners and largest trading partners, as well as 20 the United States -- there's no indication of any 21 problems or description of Canada's utility doctrine 22 as irrational and aberrant and an outlier in any of 23 the documents. 24 This brings me to, Sir Daniel, you did 25 ask about Exhibit C-331, which is the special 301</p> <p style="text-align: center;">www.dianaburden.com</p>
<p style="text-align: right;">2320</p> <p>06:59</p> <p>1 report by USTR. I'll just make two points, and I'll 2 read them because I've been careful on how I want to 3 be able to say this. And if there's anything 4 further, Canada will address it in post-hearing 5 submissions. We would note that there has been no 6 challenge by the United States against Canada under 7 Chapter 20 alleging a breach of Chapter 17. 8 Chapter 17 is the exclusive means by which a breach 9 of that chapter, including 1709(1), can be 10 established. 11 Now, with respect to C-331, that is a 12 2014 USTR report based on industry representations, 13 including representations by the Claimant to USTR. 14 And all that document does is express concern with 15 the promise of the patent approach of the courts in 16 Canada. The same promise of the patent approach that 17 was referenced in the 2003 documents we just looked 18 at. In C-331 and the subsequent ones, there is no 19 allegation that Canada is in violation of NAFTA. 20 SIR DANIEL BETHLEHEM: Perhaps I could 21 just put down a marker that it would be helpful for 22 both parties to address this in post-hearing briefs, 23 particularly since this was an issue that Ms. Cheek 24 raised in her submissions. And I think at least the 25 two documents in the record that I'm aware of and</p> <p style="text-align: center;">www.dianaburden.com</p>	<p style="text-align: right;">2321</p> <p>07:00</p> <p>1 have in front of me are 331 and 332, and I don't know 2 whether it's relevant but it's interesting that the 3 language changes from 2014 to 2015. In 2014, the 4 U.S. describes the Canadian doctrine as this 5 amorphous and evolving standard by which courts 6 invalidate a patent, and that language of "amorphous 7 and evolving standard" is noticeably absent from the 8 2015 report. So I make no further observation other 9 than it would be, I think, interesting to hear more 10 about that. 11 MR. LUZ: Thank you. 12 MR. BORN: You said that there had 13 been no challenge under Chapter 20. Can you say 14 whether there have been communications short of a 15 challenge? 16 MR. LUZ: I can't say. Obviously this 17 is an arbitration that has been occurring for some 18 time so I think -- 19 THE PRESIDENT: Are those 20 communications in the record? Any of those 21 communications? 22 MR. LUZ: I couldn't say at this 23 point, but I would say that obviously since the 24 Claimant has brought this NAFTA arbitration, and when 25 it filed its notice of intent and notice of</p> <p style="text-align: center;">www.dianaburden.com</p>

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1 arbitration, the timing of the complaints have been
2 contemporaneous.

3 SIR DANIEL BETHLEHEM: Perhaps while
4 we're on this point -- and again, not for response
5 now, but Professor Erstling mentioned that in the
6 period of his tenure between 2002 and 2007, there
7 were incompatibility complaints, and I think the
8 language that he used was "mostly by applicants." We
9 also had, I think from Mr. Gervais, some discussion
10 about whether in the context both of WIPO and the
11 WTO, these issues have been raised. I suppose the
12 Claimant here would be aware whether it made any
13 complaints to the PCT office in the period 2002-2007,
14 but Canada would be aware whether it was the
15 recipient of any complaints or comments both in PCT,
16 WIPO or WTO context in respect of this. So if there
17 is anything more that we should be informed about, I
18 think that would be helpful.

19 MR. LUZ: I think I would just have to
20 emphasize that none of this really goes to the core
21 issue of whether or not the implementation of 1701
22 is -- whether Canada's implementation of utility is
23 consistent with Chapter 17.

24 SIR DANIEL BETHLEHEM: I think
25 certainly for myself, one of the reasons why I would

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1 be interested to hear more about it is because the
2 dispute between the parties is whether this is a
3 dramatic change. Now, we have in the U.S. documents
4 of 2014 and 2015 language about the clarity and the
5 impact of the heightened utility requirement, so this
6 may -- these questions that we are also probing may
7 go to the wider appreciation of whether there was a
8 significant change or not. It may not have any
9 bearing, but I think that's the reason behind the
10 questions.

11 MR. LUZ: I'll just conclude very
12 briefly. If you'd turn to slide 268, because I think
13 that was Professor Gervais' cap on the description of
14 Chapter 1709. He was quoting Professor Dunwoodie of
15 Oxford University saying that the treaty -- these
16 treaties, TRIPS, NAFTA in particular, they confine,
17 they don't define. That is something that is evident
18 from the ordinary meaning, and the way that the
19 utility requirement and other patentability
20 requirements evolve in their jurisdictions is that it
21 is necessary to allow states to have the discretion
22 to be able to implement this. Not all states
23 start -- and Canada and the United States have --
24 they both have Patent Acts that use the word
25 "useful." And those Patent Acts have been

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1 interpreted in ways that often converge, and
2 sometimes there are differences. But none of that is
3 a violation of 1709(1), and without that and without
4 being able to establish that there was a special
5 meaning intended by the NAFTA parties to be ascribed
6 to "useful" in the context of 1709(1), then there
7 just simply cannot be any basis to be able to find
8 that Canada has been inconsistent with Chapter 17.

9 I will end very briefly with one last
10 point because I think I already did address the
11 substantial deprivation, which was something that I'd
12 intended on addressing last. But it's the last point
13 with respect to 1709(8). Because the Tribunal did
14 ask if it applies to an actual refusal to grant a
15 patent. This is slide 269.

16 If it applies to a refusal to grant a
17 patent or to the situation in which it could have
18 been refused. It's the latter. A patent that has
19 been refused by a Patent Office cannot be revoked.
20 But one last point, because I believe counsel for
21 Claimant pointed out or suggested that this is --
22 that 1709(8)(a) gives you a patent-by-patent basis
23 analysis. That cannot possibly be the proper
24 interpretation of this, because if the provision
25 constrained the ability of domestic courts from

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1 interpreting and elaborating patentability criteria
2 over time, that means every time a new patent is
3 issued, the law is frozen, cannot develop or evolve.
4 Every patent would be subject to a different
5 criteria. It's essentially a stabilization clause
6 and every -- I mean a patent-by-patent analysis.
7 What was the law that existed on the day that it was
8 initiated. That is not the purpose.

9 The simple answer is with respect to
10 the two patents here, the grounds existed at the time
11 they were granted. Utility, usefulness. At the time
12 they were issued on the basis of the utility
13 requirement in the Canadian Patent Act and after
14 litigation they were found by the courts to have been
15 invalid on the basis of that same requirement.
16 That's what the provision is. That's why Canada is
17 not in violation.

18 I will leave it at that unless the
19 Tribunal has any further questions.

20 SIR DANIEL BETHLEHEM: Just one
21 question, and this is not necessarily to you but just
22 to remind both parties that there is at least one of
23 the questions here that neither party has responded
24 to, which is question 40, the relevance, if any, of
25 the practice under the U.S. takings clause of these

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1 proceedings, and the reason why that question is
2 there is because one of the witnesses addressed that
3 specifically and almost drew an analogy in his
4 testimony -- Professor Merges -- between 1110 of
5 NAFTA and the takings clause in the 5th Amendment of
6 the U.S. Constitution. And he went on to say, "It
7 would take a really significant change in the law"
8 that happened for compensation to be awarded, and the
9 question that we put to both parties was does this
10 have any relevance at all because I think it was
11 Claimant's witness that almost drew an analogy there.
12 So I think it would be helpful to have an answer to
13 that, please.

14 MR. LUZ: Sir Daniel, I'll just
15 briefly address it and note that when the question
16 was asked to Professor Merges has there ever been a
17 ruling in the United States that said a judicial
18 invalidation of a patent constituted a taking voided
19 the answer because there is no such case. So
20 Professor Merges' speculation as to what might be a
21 possible argument in theory is very interesting
22 speculation, but the fact is there is no case, and
23 there has been no case, and it would, I dare say, be
24 a massive and radical change in U.S. law to find that
25 the judicial invalidation of a patent constitutes a

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1 taking. 07:09

2 It's a very interesting question, but
3 the question of how it is relevant, it is not
4 relevant in the sense of customary -- well, it's
5 relevant in the sense of customary international law,
6 and this was a point that I made in the opening last
7 week -- if the judicial invalidation of a patent is
8 not even an expropriation in U.S. domestic law, what
9 does that say about the status of international law?

10 The Claimants have shown no state
11 practice, no opinio juris that any state would
12 consider a judicial invalidation by a domestic court
13 of a patent granted under domestic law constitutes an
14 expropriation in international law. So to the extent
15 that the fact that U.S. takings jurisprudence shows
16 that that's not even the law in the United States,
17 Canada would submit that that should tell you
18 something about what the status is in international
19 law.

20 SIR DANIEL BETHLEHEM: Thank you.
21 MR. BORN: In the category of
22 unanswered questions, I'm still wondering about
23 Professor Schreuer's definition of arbitrariness.
24 I'm not sure which of your colleagues is planning to
25 address that.

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1 MR. LUZ: I'm going to defer that to 07:11
2 Mr. Spelliscy and thank the Tribunal for its time.

3 MR. SPELLISCY: Thank you, Mr. Luz. I
4 did want to offer a few concluding remarks, keeping
5 them brief given the hour. I will address the
6 question you have put forward there. My colleague
7 has pulled up for me the language here, "a measure
8 that inflicts damage on the investor without serving
9 an apparent legitimate purpose." I think I would be
10 cautious of this language in thinking about what is
11 arbitrary.

12 I'm not sure, without being able to
13 see the entire case, exactly what Professor Schreuer
14 is talking about here, but in our view it comes back
15 down to more the standard that we were describing in
16 our opening submissions and here that if there is an
17 arbitrary standard at customary international law, if
18 that has been crystallized, if it has been proven by
19 the Claimant here, that what it cannot mean is a
20 reasonableness assessment. And when I come and say
21 "without any apparent legitimate reason," I'm not
22 exactly sure the context of what that is offering.
23 If it means the same as what we have said, which is
24 that there is no possible rational justification for
25 it -- and I can go back to the language that we've

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1 put forward -- then obviously I think it would be 07:12
2 equivalent. But sitting here, I'm not sure that it
3 is. And I think that particularly when it starts
4 saying it inflicts damage without serving a purpose,
5 I'm not sure that that's relevant to an arbitrary
6 analysis at all.

7 MR. BORN: Thank you.
8 MR. SPELLISCY: Now let me take two,
9 three minutes of your time just to sum up.

10 At the very beginning of this case,
11 one of the things that I explained was how in our
12 view it was really no more than yet another appeal of
13 the decisions of the Canadian judicial system, and I
14 would suggest that some of the testimony that you
15 heard from Mr. Armitage and some of the arguments
16 that you have heard today further that concern.
17 Mr. Armitage and the Claimant today seemed to be
18 questioning some of the factual determinations of the
19 Canadian courts. There was even a question today --
20 or an argument raised by counsel that if they were
21 construing the claims of the patent, they did their
22 construing job wrong at Canadian law. I would
23 suggest these are errors of fact and errors of law
24 that have no business being heard again by an
25 international Tribunal in the absence of a denial of

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1 justice, which has not been alleged here.
 2 But I also want to address the
 3 argument of the Claimant that -- and the arguments
 4 they've been making about the origins of the law of
 5 utility in this case. About the identification of
 6 promises, about the evidence needed to establish the
 7 utility of an invention and about the disclosure
 8 required in a patent application.
 9 I would point out these are the same
 10 arguments that have been made by lawyers like
 11 Mr. Reddon, lawyers who make their living
 12 representing brands, for decades in Canadian courts.
 13 And now this Claimant wants you to determine that the
 14 Canadian courts are wrong in how they have understood
 15 their own previous jurisprudence and what it means as
 16 applied to the new cases that come before them.
 17 Let's be clear on something. As I
 18 showed you at the beginning -- and we heard it again
 19 today -- the Claimant has stated that it is not
 20 alleging that the Canadian courts got Canadian law
 21 wrong when they applied it in the atomoxetine and the
 22 olanzapine patents in 2010 and 2011. Fine. But --
 23 this is a huge but -- it seems to me that they are
 24 alleging that the Supreme Court got Canadian law
 25 wrong when it made its decision in 2002 in AZT. They

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1 say the Supreme Court ignored longstanding Canadian
 2 jurisprudence. And it seems to me that they are
 3 alleging that the Federal courts got Canadian law
 4 wrong in cases like Aventis and Pfizer and Bristol
 5 Myers in 2005. They say that the lower courts have
 6 ignored existing and binding precedent on how to find
 7 promises. And it seems to me that they are alleging
 8 that the Federal Court of Appeal and the Federal
 9 Court got Canadian law wrong in the Raloxifene
 10 decision in 2008 and 2009. They say that prior to
 11 that, there was no disclosure requirement.
 12 Now, why do I say they're saying these
 13 courts got Canadian law wrong? Because in each of
 14 these cases the Canadian courts do not claim to be
 15 making new law. In fact, unlike the cases in the
 16 U.S. where we looked at dissents from judges
 17 concerned about the fact that new law was being made
 18 or precedent not being followed, not a single one,
 19 not a single judge in any of the above identified
 20 cases, in those specific cases identified such a
 21 concern. In those cases the Canadian judicial system
 22 was unanimous that the decisions represented the
 23 application of existing principles.
 24 In order to succeed on their claim
 25 here, the Claimant needs you to find that there was a

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1 change in the law. In essence, the Claimant needs to
 2 convince you that all those Canadian judges got
 3 Canadian law wrong. So in the end, while the
 4 Claimant may be working to convince you that this is
 5 not an appeal of the decisions in atomoxetine and
 6 olanzapine, I would suggest that the one thing that
 7 they cannot dispute is that this is an appeal that
 8 the Canadian courts erred in their interpretation and
 9 application of Canadian law in their decisions in
 10 2002, 2005 and 2008. As the NAFTA parties tell you,
 11 and every Tribunal to ever consider that issue has
 12 ruled, a Chapter 11 Tribunal cannot be yet another
 13 level of appeal. I say it again. In order to find a
 14 breach based on judicial decisions in this regard
 15 under 1105 and 1110, there needs to be a denial of
 16 justice. Since the Claimant admits there was none in
 17 this case, it should be dismissed.
 18 Thank you.
 19 THE PRESIDENT: Thank you,
 20 Mr. Spelliscy. That concludes the closing argument
 21 by the Respondent?
 22 MR. SPELLISCY: It does.
 23 THE PRESIDENT: Now each side has
 24 indicated they would like to have a ten-minute
 25 rebuttal?

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1 MS. CHEEK: That's correct.
 2 THE PRESIDENT: Do you need a break at
 3 this point in time for the ten minutes rebuttal?
 4 MS. CHEEK: I'd say we need just three
 5 minutes to consult with my colleagues.
 6 THE PRESIDENT: Okay. Three minutes
 7 recess.
 8 (Pause)
 9 THE PRESIDENT: Ms. Cheek, please
 10 proceed with the rebuttal.
 11 MS. CHEEK: Thank you, Mr. President.
 12 Certainly in light of the hour, Claimant's rebuttal
 13 will be brief. I would like to make five or six very
 14 short and discrete points, and then Ms. Wagner will
 15 make a couple of comments. But we believe all of
 16 these remarks will take no more than ten minutes and
 17 that they're quite discrete.
 18 The first point relates to the meaning
 19 of 1110(7) of NAFTA, and, Mr. President, you asked
 20 me, actually, during our presentation -- I believe it
 21 was around 12:21 in the record this morning, you
 22 stated a reading of 1110(7) that said this article
 23 applies to the revocation of IP rights to the extent
 24 that they are inconsistent with Chapter 17.
 25 THE PRESIDENT: There are two versions

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1 that I read. I said wanted to test to see whether
 2 that was your case, but I added then the word "also."
 3 MS. CHEEK: Yes.
 4 THE PRESIDENT: Which was the second
 5 version.
 6 MS. CHEEK: And my focus in answering
 7 your questions and perhaps some of my confusion
 8 related to the word "applies." And that is because
 9 we want to be clear that Article 1110(7) is not an
 10 entry ticket. It's not giving you permission to
 11 conduct the analysis. In our view, an inconsistency
 12 with Chapter 17 is evidence or an indicia of a
 13 wrongful taking. And so in that regard, under
 14 Article 1110, the Tribunal is called upon to do the
 15 same analysis that they would do in any other type of
 16 case when they're considering the character of the
 17 measure or the bone fide nature of the measure. And
 18 when you're undertaking that analysis, the
 19 substantive obligations of Chapter 17 are relevant to
 20 that general undertaking. So we often, outside of
 21 the 1110(7) context, refer to Saipem. But for this
 22 general proposition that these substantive rules of
 23 international law in Chapter 17 are relevant to your
 24 analysis of whether or not there is an indirect
 25 expropriation here, we also would rely on cases such

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1 as Fireman's Fund, which I think is CL-45, Feldman,
 2 which is CL-109. In other words, we do have some
 3 unusual facts in this case, but we would advocate for
 4 the usual legal analysis that you would undertake in
 5 any indirect expropriation case, and as you consider
 6 the character of the challenged measure here, those
 7 substantive IP obligations in Chapter 17 directly
 8 related to the revocation of pharmaceutical patents
 9 are relevant to your analysis and, indeed, we think
 10 you're required to consider the consistency of the
 11 measures with those provisions.
 12 My next point is a quite discrete one,
 13 but we wanted the record to be clear, and that was
 14 the Tribunal did ask about the PCT violation, and the
 15 PCT violation in Mr. Erstling's testimony also came
 16 up during Respondent's presentation. Claimant stands
 17 behind Mr. Erstling's view that there is a violation
 18 of the PCT here and, indeed, Lilly shares that view.
 19 But as we've discussed, we are not basing our
 20 expropriation claim on that violation per se in its
 21 own right. Rather, we do think that violation is
 22 relevant to Lilly's legitimate expectations with
 23 regards to the patent grant that it received in
 24 Canada.
 25 My fourth discrete point, if you will,

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1 is related to the discriminatory facts as a result of
 2 the application of the promise utility doctrine, and
 3 in that regard we have handed out, once again, figure
 4 3 from Claimant's Memorial, which is titled Utility
 5 Outcomes by Sector in Canadian Courts.
 6 Respondent referred to the fact that
 7 they changed a date on this chart to September 2005
 8 and that as a result, two of the 23 inutility
 9 findings from 2005 to 2014 shifted, and those two
 10 inutility findings would be in the pre-2005 period,
 11 from 1990 to 2004. That same scenario, shifting two
 12 inutility findings from the post-2005 period to the
 13 pre-2005 period, was put to Professor Levin during
 14 his cross-examination, and that is at the transcript
 15 at page 1261, lines 7-8. And his response was, "I
 16 don't see the relevance of that for my primary
 17 findings post-2005." In other words, the issue here
 18 is whether or not post-2005 there is a difference
 19 between the inutility rates for pharmaceutical cases,
 20 which are at the top of the chart, and
 21 non-pharmaceutical cases at the bottom of the chart.
 22 And Professor Levin's testimony is if you happen to
 23 shift two pharmaceutical inutility findings to the
 24 earlier period in time, it does not change his view
 25 that there is still a statistically significant

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1 difference between pharma and non-pharma cases
 2 post-2005.
 3 Respondent also criticized the
 4 dataset -- or at least implicitly so. But they have
 5 not provided any contrary dataset and, indeed, the
 6 dataset to see the discriminatory effects of the
 7 application of the promise utility doctrine is the
 8 universe of all cases that have applied the promise
 9 utility doctrine to patents since 1980. And we've
 10 been working throughout this arbitration from the
 11 same dataset.
 12 While they've tried to poke holes in
 13 the significant discriminatory effects that are
 14 evident, they have provided no other plausible
 15 explanation for why you would suddenly see a
 16 tremendous spike only in the pharmaceutical sector of
 17 inutility rulings where prior to 2004, there were
 18 none. The only real explanation they've provided is
 19 a general uptick in pharmaceutical litigation, to
 20 which we've already responded. I will tick off my
 21 next points in even briefer fashion. Three other
 22 very quick points.
 23 No. 1, it is surprising to Claimant
 24 that Respondent still insists on its creative
 25 argument that there is a time bar to our claims.

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1 Many tribunals have recognized the
2 distinction between a factual predicate to a claim,
3 which is what we have here in the decision related to
4 the Raloxifene patent, which happens to have been a
5 Lilly patent, and the incurrance of a loss related to
6 specific protected investments under the agreement.
7 In that regard I would refer to
8 Tribunal to Grand River, CL-169; Glamis, CL-116;
9 Apotex v US, C-176; Bilcon v Canada, CL-166.
10 Canada's creative argument as to why our claims
11 should be time-barred really would be unprecedented.
12 And with regard to Respondent's new
13 argument that actually there might not be a
14 substantial deprivation, I wish to remind the
15 Tribunal that a patent is a bundle of exclusive
16 rights. What was taken from Lilly in its entirety is
17 that exclusivity. Once you've lost exclusivity, you
18 no longer have -- you no longer have your patent
19 rights that were the patent -- patent rights are not
20 market share. Patent rights are exclusive rights to
21 make, use and sell your product. And those exclusive
22 rights were all extinguished when these patents were
23 invalidated.
24 And lastly, before I hand it to
25 Ms. Wagner, I would say that Claimant did address

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1 U.S. precedent on judicial takings in our submission
2 of April 22nd. At paragraph 22 we discuss the U.S.
3 Supreme Court decision in Stop the Beach versus
4 Florida Department of Environmental Protection, which
5 is RL-046. And in that case the U.S. Supreme Court
6 recognized that judicial measures can qualify as
7 takings. And while we will provide more information
8 in our post-hearing brief, Professor Merges'
9 testimony was both to that, the judicial taking, but
10 I believe specifically he referred to the fact that
11 expropriation of a property right -- of an
12 intellectual property right can constitute a taking,
13 and in that regard he referred to a trade secrets
14 case, unfortunately of which I don't have the cite in
15 front of me. Let me now --
16 THE PRESIDENT: I think that is the
17 beach nourishment case?
18 MS. CHEEK: Stop the Beach
19 Renourishment.
20 THE PRESIDENT: Versus Florida.
21 MS. CHEEK: Yes.
22 MR. BORN: Ms. Cheek, can I ask one
23 question before you hand over? I thought I
24 understood this previously, but now I wonder. Is the
25 discrimination aspect of your claim, in fact,

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1 dependent upon showing that there was a dramatic
2 change in the law?
3 MS. CHEEK: No. The discriminatory
4 effects, the disproportionate discriminatory effects
5 are there as a factual matter. It is our view that
6 they were caused by the change in the promise utility
7 doctrine, but in this regard our discrimination
8 argument is focused on effects, because Canada --
9 because Canada has an obligation not to discriminate
10 as to field of technology, and here a dramatic
11 discrimination is taking place. Whether that's
12 because the doctrine is new or it's because of a
13 fundamental shift in its application, our claim for
14 discrimination would still be quite relevant.
15 MR. BORN: Thank you.
16 THE PRESIDENT: Ms. Wagner.
17 MS. WAGNER: Thank you. Thank you for
18 your patience. It's been a long haul.
19 Mr. Johnston had characterized
20 Claimant's arguments as "myopic," but I'd submit that
21 that's an apt description for Canada's arguments
22 because there is nothing similar to the current
23 utility requirement, and they simply have not shown
24 otherwise. The law did change.
25 With respect to AZT, I'll make a point

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1 on each element that was discussed. We've never
2 characterized AZT as being irrational. And, in fact,
3 in its opening Canada criticized Claimant for not
4 taking enough of an issue with AZT, but it did change
5 the law and it didn't just change the law for new use
6 patents, as we had heard Mr. Johnston suggest. And
7 if AZT did not get the large amount of attention that
8 the current utility requirement is getting, that's
9 because perhaps the impact was not immediate. That
10 bears out from the statistics. And it's interesting
11 that when Mr. Johnston was referring to the promise
12 analysis in prior law or what they've characterized
13 it as being in prior law, he consistently referred to
14 the issue of whether promises were met. And that's
15 because it wasn't until AZT that you had to establish
16 utility, not then by reference to promises, but
17 utility by demonstration or sound prediction at the
18 date of filing. And AZT changed the law in this, and
19 it has a huge impact, especially in the current
20 context, because the requirement is now that these
21 additional promises of utility have to be
22 demonstrated or predicted by evidence available at
23 the date of filing.
24 On the promise, running an argument
25 does not make it the law. And Mr. Johnston was asked

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1 about this, and he could point to no case in prior
2 law where the argument was successfully run or in any
3 manner determinative in any case. And, in fact, the
4 analysis was rejected in several cases. Unilever and
5 Mobil Oil were two you heard of. If it's not
6 claimed, it's not a promise. And that was confirmed
7 by Canada's expert, Mr. Dimock, as well, that there
8 were no invalidations on this basis in prior law.
9 On the sound prediction disclosure
10 rule, Canada had said that Mr. Reddon's testimony
11 that he'd never seen this before was just not
12 credible, and I question whether, then, we are to
13 consider equally not credible Canada's witness,
14 Dr. Gillen, who testified that though the rule was
15 stated or stated in obiter in AZT, at least it would
16 be our position, it was not considered to be the law
17 until the 2008 or 2009 decisions. And Lilly's
18 patents in the Raloxifene case and in the Strattera
19 case didn't disclose proof in the form of clinical
20 studies because that wasn't required, and the
21 Strattera application, as you've heard, was filed on
22 the basis of a PCT application and Lilly reasonably
23 relied on the requirements of that treaty in
24 formulating that patent application. And tellingly,
25 Mr. Johnston has relied on Mr. Dimock's evidence that

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1 the Monsanto case had implied -- it had implied that
2 the rule existed in earlier law. Are patentees
3 really supposed to base their expectations on what
4 they ought to do on an implied rule? And it's
5 strikingly similar to the testimony in relation to
6 the existence of the promise analysis in prior law.
7 Those are my submissions.
8 THE PRESIDENT: Thank you. That
9 concludes the rebuttal by the Claimant?
10 MS. CHEEK: Nothing further.
11 THE PRESIDENT: Thank you.
12 Mr. Spelliscy, for the Respondent?
13 MR. SPELLISCY: Give me two minutes to
14 confer with my colleagues.
15 THE PRESIDENT: Sure.
16 (Pause)
17 THE PRESIDENT: Please proceed,
18 Mr. Spelliscy.
19 MR. SPELLISCY: My response will be
20 short because it will just be to thank the Tribunal
21 for its time this week, and we have nothing further
22 to add. We will rest on our submissions. But I do
23 thank the Tribunal and our diligent court reporter,
24 who has been plugging away late into the night, and
25 of course our colleagues on the other side as well.

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1 We will rest on our submissions so far.
2 THE PRESIDENT: Thank you,
3 Mr. Spelliscy. Actually, you are preempting already
4 what the Tribunal wanted to do. Before that we would
5 like to ask the parties whether there is any further
6 administrative or household matter they'd like to
7 raise at this point of the day?
8 MS. CHEEK: No, we do not. We will
9 continue to confer on whatever deadlines you have
10 assigned us to confer on, but we don't have anything
11 further at this point.
12 MR. SPELLISCY: I guess the only
13 question I would raise would be with respect to
14 post-hearing briefing, which Ms. Cheek had accurately
15 described what we had decided. But I'm wondering if
16 the Tribunal has considered whether it has further
17 questions or when we might expect to know if it does
18 have further written questions so that we know when
19 the six-week period might start running.
20 THE PRESIDENT: Probably after the
21 Tribunal has tomorrow the usual deliberations, which
22 are preliminary because we still have to read your
23 post-hearing briefs, in order to form a definite
24 view, but probably after tomorrow we know whether or
25 not we have further questions. We have already put

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1 to you 40 questions, which I think is, for an
2 Arbitral Tribunal, pretty sizable. But if we have
3 further questions, we will let you know very soon
4 either way. So you will get a communication from us
5 whether we have questions or not.
6 That brings me to also thank the court
7 reporter for the wonderful work. And the court
8 reporters because of the other one, Diana. It's
9 great to get to work with them.
10 I would also like to thank very much
11 the secretary of the Tribunal for all the great work
12 she has done. And it is not to be underestimated
13 also behind the scenes for making this work. Also,
14 we would like to thank, for that matter, ICSID itself
15 for making these fantastic facilities available.
16 This is now called ICSID Plaza, what we have
17 downstairs here.
18 We would also like to thank the
19 parties. First of all, we would like to thank the
20 paralegals. I have to do that with trepidation
21 because I know that by this moment, they have
22 different thoughts about it, but we are very much
23 aware of the all-night work they have done in order
24 to produce all these bundles, papers, to get
25 everything here in order, including also the

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1 technician that did a great job in putting things on
2 the screen. 07:41
3 We would like to thank the counsel,
4 but especially the lead counsel on both sides for the
5 very high degree of professionalism you have
6 presented this case and also in the very collegial
7 atmosphere, which the Tribunal very much appreciates,
8 and it has made for us, as Tribunal, a really
9 enjoyable two weeks to sit with you.
10 I close the hearing and wish you all
11 good travel back home.
12 (The hearing was concluded at 7:42 p.m.)
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<p>MR. JOHNSTON:... [3] 2259/11 2260/18 2277/6 MR. LUZ: [20] 2297/22 2301/24 2302/21 2303/18 2310/15 2311/2 2311/12 2312/3 2312/9 2312/16 2312/22 2316/14 2317/9 2321/10 2321/15 2321/21 2322/18 2323/10</p>	<p>2326/13 2327/25 MR. SPELLISCY: [100] 1986/1 1987/10 1989/9 2140/8 2140/21 2141/4 2142/9 2142/18 2145/1 2152/3 2153/14 2153/24 2154/8 2154/13 2154/18 2155/12 2155/16 2156/5 2156/8 2157/2 2157/17 2158/4 2158/20 2159/16</p>	<p>2160/6 2163/17 2167/17 2168/7 2168/15 2168/25 2171/21 2172/24 2173/15 2174/22 2175/7 2175/21 2176/8 2177/3 2183/18 2184/19 2185/3 2185/12 2186/3 2186/10 2186/17 2191/5 2191/8 2191/23 2192/15 2192/19</p>
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<p>MR. SPELLISCY:... [50] 2193/1 2199/7 2199/19 2200/12 2201/4 2202/10 2202/24 2203/18 2204/5 2205/1 2217/19 2217/22 2218/15 2219/24 2221/20 2222/16 2223/15 2223/21 2224/11 2225/9 2225/17 2226/2 2226/6</p>	<p>2226/9 2227/17 2231/21 2232/18 2233/1 2234/10 2235/14 2236/24 2237/17 2238/12 2238/21 2239/3 2239/24 2240/9 2240/22 2242/8 2242/25 2243/20 2244/1 2296/24 2297/17 2328/2 2329/7 2332/21 2343/12</p>	<p>2343/18 2344/11 MS. CHEEK: [74] 1984/17 1987/7 1989/7 1989/15 1994/9 1994/16 1995/8 1996/4 1997/4 1997/16 1999/13 1999/18 1999/23 2000/6 2007/19 2008/4 2008/6 2010/8 2068/17 2072/9 2072/20 2073/17 2074/17 2075/6</p>
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<p>MS. CHEEK:... [50] 2075/10 2075/16 2076/14 2077/2 2077/10 2078/5 2079/4 2080/22 2084/19 2085/14 2085/19 2092/3 2092/9 2093/6 2093/19 2094/15 2096/9 2098/18 2099/9 2106/13 2107/10 2107/20 2111/14</p>	<p>2112/16 2113/10 2120/11 2122/3 2139/15 2140/1 2140/19 2140/25 2141/15 2142/5 2142/14 2143/5 2143/18 2144/1 2144/7 2144/17 2297/14 2332/25 2333/3 2333/10 2334/2 2334/5 2339/17 2339/20 2340/2 2343/9 2344/7</p>	<p>MS. GASTRELL: [1] 2139/22 MS. LISA GROSH: [5] 1983/6 1983/23 1984/3 1984/6 1984/11 MS. WAGNER: [7] 2033/12 2034/18 2035/18 2036/13 2067/7 2067/22 2340/16 MS. ZEMAN: [2] 2277/13 2280/3 SIR DANIEL BETHLEHEM: [84] 1994/25</p>
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2090/2	2157/15	2183/8
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<p>A</p> <p>action... [13] 2083/21 2168/12 2179/9 2189/20 2189/24 2202/8 2220/21 2220/25 2222/11 2222/18 2224/3 2232/17 2232/22</p> <p>actionable [8] 2218/13 2219/22 2219/23 2221/18 2221/22 2222/2 2222/4 2301/22</p> <p>actions [3]</p>	<p>2166/8 2208/14 2227/11</p> <p>activity [1] 2256/24</p> <p>acts [10] 2019/1 2021/21 2165/25 2205/18 2206/21 2209/19 2220/2 2306/20 2323/24 2323/25</p> <p>actual [17] 2022/1 2119/2 2122/25 2152/13 2152/24 2153/8 2158/12 2204/11</p>	<p>2221/2 2222/21 2224/3 2227/4 2227/5 2241/8 2241/9 2311/6 2324/14</p> <p>actually [62] 1983/16 2007/5 2017/14 2020/25 2023/25 2047/22 2050/20 2050/22 2051/21 2052/17 2053/2 2054/7 2056/4 2056/23 2074/23 2077/1 2088/6 2097/12 2101/9</p>
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<p>A</p> <p>actually... [43]</p> <p>2109/10</p> <p>2113/23</p> <p>2117/5</p> <p>2125/10</p> <p>2125/18</p> <p>2128/18</p> <p>2128/24</p> <p>2139/5 2148/4</p> <p>2155/2 2157/9</p> <p>2158/19</p> <p>2159/5</p> <p>2168/10</p> <p>2183/25</p> <p>2183/25</p> <p>2185/15</p> <p>2185/18</p> <p>2186/12</p> <p>2186/15</p> <p>2197/17</p> <p>2201/8 2203/7</p> <p>2207/2 2211/3</p> <p>2211/3 2222/1</p>	<p>2225/12</p> <p>2227/25</p> <p>2234/8 2247/1</p> <p>2259/3 2267/7</p> <p>2269/7</p> <p>2270/23</p> <p>2301/25</p> <p>2303/3</p> <p>2303/22</p> <p>2315/5</p> <p>2315/14</p> <p>2333/20</p> <p>2338/13</p> <p>2344/3</p> <p>adapted [1]</p> <p>2130/21</p> <p>add [1]</p> <p>2343/22</p> <p>added [5]</p> <p>2148/17</p> <p>2148/22</p> <p>2306/9</p> <p>2306/11</p> <p>2334/2</p>	<p>addendum [1]</p> <p>1999/20</p> <p>adding [2]</p> <p>2031/22</p> <p>2313/24</p> <p>addition [3]</p> <p>2055/1</p> <p>2060/17</p> <p>2146/11</p> <p>additional [40]</p> <p>1992/5</p> <p>2001/3 2001/6</p> <p>2003/3</p> <p>2009/22</p> <p>2014/8</p> <p>2029/25</p> <p>2041/20</p> <p>2043/6 2045/5</p> <p>2047/7</p> <p>2048/20</p> <p>2051/7 2052/4</p> <p>2053/18</p> <p>2056/7 2057/1</p> <p>2058/13</p>
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A	2007/21	2149/25
additional...	2007/23	2151/9 2153/2
[22] 2059/8	2007/25	2162/19
2060/6 2061/1	2013/13	2163/11
2061/18	2016/8	2166/7
2061/25	2016/13	2166/20
2063/1 2064/2	2022/11	2168/18
2064/11	2024/13	2169/16
2064/15	2025/2	2172/4
2064/19	2030/19	2177/19
2065/7	2030/22	2193/17
2066/18	2031/3	2202/3
2086/13	2033/17	2204/25
2103/10	2053/8	2277/2
2104/19	2068/19	2277/20
2109/10	2068/21	2295/22
2123/14	2068/22	2298/7 2301/4
2123/16	2069/13	2302/17
2190/3 2237/6	2075/1 2079/5	2318/3 2320/4
2246/1	2081/2	2320/22
2341/21	2086/22	2324/10
address [56]	2099/18	2326/15
1984/21	2107/24	2327/25
2006/4	2149/13	2328/5 2330/2

<p>A</p> <p>address... [1] 2338/25</p> <p>addressed [16] 2003/12 2003/13 2010/1 2024/20 2031/10 2059/5 2062/9 2084/16 2119/22 2119/23 2135/21 2136/4 2263/5 2289/17 2301/5 2326/2</p> <p>addresses [2] 2122/5 2204/23</p> <p>addressing [8] 2159/13 2177/24 2178/17</p>	<p>2205/3 2277/8 2277/15 2283/1 2324/12</p> <p>adduced [2] 2293/12 2293/16</p> <p>adequate [1] 2221/1</p> <p>ADF [1] 1986/14</p> <p>ADHD [6] 1998/15 2000/14 2001/1 2001/23 2006/19 2275/15</p> <p>adjudication [3] 2028/17 2209/5 2209/9</p> <p>adjudicative [1] 2020/5</p> <p>administrative [1] 2344/6</p>	<p>admissibility [3] 2156/5 2157/12 2226/21</p> <p>admissible [1] 2272/15</p> <p>admission [3] 2266/15 2266/22 2269/5</p> <p>admissions [1] 2151/23</p> <p>admit [1] 2237/8</p> <p>admits [2] 2253/1 2332/16</p> <p>admitted [11] 2146/7 2146/11 2146/20 2164/14 2211/15 2217/1</p>
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<p>A</p> <p>admitted... [5] 2236/12 2294/12 2295/21 2296/7 2306/21</p> <p>admittedly [1] 2124/20</p> <p>adopt [5] 2011/15 2052/10 2113/5 2247/12 2314/5</p> <p>adopted [7] 2087/22 2182/22 2201/14 2248/7 2253/19 2256/10 2315/10</p> <p>adopting [3]</p>	<p>2075/9 2086/3 2199/17</p> <p>adopts [1] 2289/3</p> <p>ADRIAN [1] 1981/5</p> <p>advance [3] 1990/5 1998/14 2044/6</p> <p>advanced [4] 2037/4 2062/12 2065/11 2260/6</p> <p>advancement s [1] 2314/3</p> <p>advantage [1] 2134/2</p> <p>advantages [10] 1990/14 1990/18 1990/22 2004/1</p>	<p>2060/11 2065/14 2285/20 2285/23 2285/25 2289/12</p> <p>advent [1] 2058/3</p> <p>adversarial [1] 2293/16</p> <p>adverse [2] 2116/8 2119/16</p> <p>advice [4] 2137/3 2137/6 2287/22 2294/4</p> <p>advised [1] 2262/13</p> <p>advocacy [1] 2145/12</p> <p>advocate [1] 2335/3</p> <p>advocated [1]</p>
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A		
advocated... [1] 2020/14	2231/7 affirmative [1] 2144/4	2036/4 2037/15 2041/1 2049/6
advocates [2] 2020/13 2286/24	affirmed [4] 2049/12 2245/10 2252/3 2266/6	2054/17 2054/22 2055/12 2055/13
affairs [2] 1981/11 2023/1	affirming [4] 2069/1 2251/10 2255/12 2273/2	2055/17 2056/6 2058/10 2058/17 2069/12
affect [3] 2195/9 2231/15 2236/20	afforded [6] 2152/7 2182/21 2187/1 2209/14 2212/3 2222/23	2074/10 2101/8 2103/10 2106/15 2106/18 2141/23 2141/25
affected [6] 2060/2 2181/9 2229/13 2229/17 2241/6 2249/16	afraid [2] 2075/12 2277/7	2142/23 2146/3 2147/12
affects [1] 2234/10	after [47] 1984/15	2149/20 2160/16
affidavit [1] 2041/14		
affiliates [1]		

<p>A</p> <p>after... [21] 2160/22 2160/25 2161/9 2167/7 2228/1 2234/20 2234/24 2236/2 2236/4 2236/21 2250/16 2252/10 2253/14 2261/19 2261/21 2262/3 2271/1 2286/5 2325/13 2344/20 2344/24</p> <p>after-the-fact [2] 2037/15 2261/21</p> <p>afternoon [5]</p>	<p>2145/2 2162/15 2164/8 2166/16 2277/25</p> <p>afterwards [2] 2042/5 2217/22</p> <p>again [61] 1998/15 1998/19 1999/2 1999/4 2000/10 2001/14 2001/24 2002/5 2019/17 2022/15 2023/23 2024/12 2034/2 2034/19 2035/19 2036/2</p>	<p>2044/21 2054/3 2060/25 2061/12 2061/23 2063/4 2078/20 2089/1 2110/1 2117/24 2131/21 2148/8 2151/3 2155/20 2169/20 2179/23 2183/5 2188/16 2188/19 2191/9 2192/2 2196/12 2197/23 2201/5 2202/12 2220/13 2220/17</p>
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<p>A</p> <hr/> <p>again... [18]</p> <p>2221/24</p> <p>2241/1</p> <p>2260/24</p> <p>2262/24</p> <p>2276/12</p> <p>2292/15</p> <p>2299/18</p> <p>2299/22</p> <p>2300/22</p> <p>2302/3</p> <p>2313/12</p> <p>2317/24</p> <p>2318/20</p> <p>2322/4</p> <p>2329/24</p> <p>2330/18</p> <p>2332/13</p> <p>2336/3</p> <p>against [21]</p> <p>2012/11</p> <p>2019/12</p> <p>2108/12</p>	<p>2133/12</p> <p>2133/17</p> <p>2135/24</p> <p>2138/7</p> <p>2159/15</p> <p>2186/23</p> <p>2187/4</p> <p>2189/10</p> <p>2189/16</p> <p>2190/20</p> <p>2222/4</p> <p>2246/20</p> <p>2248/21</p> <p>2255/14</p> <p>2257/1</p> <p>2282/14</p> <p>2296/8 2320/6</p> <p>agencies [1]</p> <p>2070/7</p> <p>agents [3]</p> <p>2039/15</p> <p>2229/8</p> <p>2236/18</p> <p>ago [4]</p>	<p>1987/14</p> <p>2164/3</p> <p>2186/21</p> <p>2189/22</p> <p>agree [21]</p> <p>2004/11</p> <p>2007/16</p> <p>2007/19</p> <p>2016/7</p> <p>2032/10</p> <p>2069/14</p> <p>2091/18</p> <p>2111/22</p> <p>2120/7 2142/7</p> <p>2143/25</p> <p>2145/4</p> <p>2149/11</p> <p>2185/10</p> <p>2197/7</p> <p>2209/15</p> <p>2227/7</p> <p>2257/24</p> <p>2258/1 2293/5</p> <p>2308/19</p>
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<p>A</p> <p>agreed [21] 2039/13 2049/8 2055/9 2081/17 2090/1 2111/18 2112/3 2150/21 2185/11 2185/14 2193/8 2200/10 2206/13 2227/21 2239/17 2283/5 2288/2 2306/24 2307/7 2307/10 2309/7</p> <p>agreeing [1] 2239/16</p> <p>agreement [33] 1978/3</p>	1986/7 2008/3 2077/21 2088/10 2101/4 2101/8 2102/4 2102/4 2102/5 2102/9 2106/19 2106/25 2107/3 2107/9 2107/13 2170/16 2170/19 2173/8 2173/11 2205/17 2227/19 2264/2 2302/24 2309/20 2310/20 2312/13 2316/7 2316/14 2317/20	2317/21 2317/23 2338/6
		<p>agreements [6] 2101/15 2125/6 2129/8 2173/8 2173/9 2173/10</p>
		<p>agrees [1] 2285/1</p>
		<p>ahead [3] 2069/13 2117/14 2205/9</p>
		<p>AIDS [2] 2051/4 2051/18</p>
		<p>aisle [1] 2145/5</p>
		<p>ajvandenbergh [1] 1979/8</p>
		<p>akin [1] 2135/8</p>
		<p>ALBERT [1]</p>

A	1985/6	2026/11
ALBERT... [1]	1988/16	2037/18
1979/5	1990/21	2041/24
ALEXANDER	1991/4	2045/4
[2] 1980/5	1991/14	2045/16
1980/9	1991/16	2053/5 2059/3
Alice [3]	1994/8	2059/17
2217/1 2217/1	1994/12	2060/16
2282/7	1994/23	2061/7 2066/9
alien [1]	1996/18	2070/15
2018/11	1997/1 1998/1	2071/25
aliens [11]	2003/12	2074/23
2030/16	2003/13	2075/3
2127/16	2003/15	2085/18
2175/25	2003/19	2092/11
2177/15	2005/21	2099/25
2179/7	2007/15	2103/11
2180/24	2007/17	2106/21
2186/25	2012/14	2109/12
2187/4	2012/18	2110/13
2200/17	2012/19	2110/15
2202/23	2012/24	2111/18
2278/3	2017/21	2111/21
all [136]	2024/7	2112/5

A	2205/24	2268/18
all... [85]	2206/1 2211/7	2270/15
2113/17	2211/24	2272/13
2117/15	2217/7 2227/6	2272/13
2118/20	2228/11	2279/20
2125/13	2229/23	2280/9
2126/8 2127/3	2230/6	2281/17
2140/4	2230/23	2281/19
2140/17	2235/2	2283/7
2144/4 2146/7	2241/11	2283/10
2153/4	2243/7	2283/16
2157/21	2243/13	2288/17
2163/12	2245/14	2291/9 2295/6
2168/5	2245/20	2298/9
2176/18	2246/22	2299/21
2182/2	2250/16	2302/19
2182/14	2251/15	2303/15
2184/9	2254/12	2303/15
2185/17	2257/15	2305/19
2187/14	2257/18	2308/8
2190/13	2258/19	2313/11
2196/2	2260/5	2320/14
2196/24	2262/14	2323/22
2197/11	2266/11	2326/10

<p>A</p> <p>all..... [10] 2329/6 2332/2 2333/15 2337/8 2338/22 2345/11 2345/19 2345/23 2345/24 2346/10</p> <p>all-night [1] 2345/23</p> <p>allegation [28] 2073/21 2073/22 2130/3 2149/23 2153/16 2156/2 2157/24 2159/7 2188/21 2196/22</p>	<p>2211/8 2211/10 2211/13 2211/20 2211/24 2212/1 2213/8 2213/9 2215/13 2217/13 2217/16 2223/4 2225/13 2228/22 2228/24 2236/14 2260/24 2320/19</p> <p>allegations [12] 2021/2 2058/10 2080/6 2081/15 2156/18 2164/9</p>	<p>2164/10 2164/21 2164/23 2278/5 2278/10 2291/7</p> <p>allege [4] 2017/1 2154/1 2207/16 2306/2</p> <p>alleged [36] 2016/3 2019/5 2020/25 2021/13 2021/14 2023/2 2023/3 2073/24 2078/24 2079/1 2080/21 2089/3 2089/12 2098/11 2098/15</p>
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<p>A</p> <p>alleged... [21] 2145/17 2146/13 2147/10 2150/16 2151/18 2154/2 2161/9 2189/9 2190/8 2193/14 2205/12 2205/19 2221/18 2229/24 2250/14 2258/24 2260/20 2262/7 2262/21 2269/18 2330/1</p> <p>allegedly [1] 2229/25</p> <p>alleges [8]</p>	2017/19 2180/22 2187/17 2217/15 2228/12 2258/19 2282/25 2283/24	2181/5 2196/19 2224/19 2323/21
	<p>alleging [11] 2016/6 2019/4 2151/2 2151/6 2152/13 2259/20 2320/7 2330/20 2330/24 2331/3 2331/7</p>	<p>allowable [1] 2295/24</p> <p>allowances [1] 2287/23</p> <p>allowed [4] 2042/2 2057/11 2286/23 2311/22</p> <p>allowing [1] 2227/9</p> <p>allows [6] 2086/21 2090/11 2143/1 2290/16 2316/2 2316/20</p> <p>Almecon [1] 2252/2</p>
	<p>allow [10] 2049/20 2050/6 2098/16 2146/16 2165/3 2180/13</p>	

A	2203/15	1980/19
almost [7]	already [23]	1981/16
1994/14	1983/20	1983/11
2165/3	1984/3	1985/5
2212/17	1985/22	1986/18
2289/20	1986/19	1986/20
2315/16	1989/1 2005/4	1987/2
2326/3	2010/21	1990/13
2326/11	2046/25	1990/24
alone [13]	2048/1 2059/5	1991/9 1992/4
2008/22	2131/4	1992/7
2051/9	2131/10	1992/13
2051/19	2136/4	1993/25
2105/22	2147/14	1997/3
2119/17	2277/25	2000/22
2130/6	2278/25	2001/5 2004/3
2132/17	2290/17	2005/8
2139/10	2291/4	2005/12
2150/20	2318/22	2006/6
2164/20	2324/10	2009/13
2165/19	2337/20	2009/17
2212/2 2258/3	2344/3	2009/21
along [2]	2344/25	2013/20
2113/13	also [134]	2015/4

A	2079/20	2135/22
also... [108]	2079/24	2137/4
2015/18	2080/7	2139/19
2016/17	2080/10	2143/12
2023/17	2085/1 2086/8	2147/18
2028/2 2028/6	2093/16	2151/9
2028/21	2093/23	2165/16
2030/19	2097/24	2166/7 2170/4
2030/25	2099/5	2171/1
2031/4	2103/18	2175/20
2031/16	2104/18	2175/22
2035/23	2104/24	2180/2
2040/4 2040/6	2107/17	2180/11
2042/15	2110/21	2180/13
2043/4	2112/14	2187/22
2044/20	2116/13	2190/8
2048/24	2116/16	2213/23
2055/4	2119/1	2220/20
2062/21	2125/14	2225/7
2065/9	2130/11	2229/11
2066/12	2130/24	2229/19
2068/22	2130/25	2236/16
2075/5	2132/16	2239/19
2076/13	2134/13	2244/22

<p>A</p> <p>also..... [34]</p> <p>2250/8 2251/3 2252/1 2252/4 2254/10 2262/11 2264/1 2264/12 2264/19 2266/24 2270/4 2272/2 2278/4 2279/8 2287/4 2288/7 2304/1 2304/19 2307/13 2314/16 2322/9 2323/6 2330/2 2334/2 2334/25 2335/15 2337/3 2345/6 2345/10 2345/13</p>	<p>2345/13 2345/18 2345/25 2346/6</p> <p>alternative [4]</p> <p>2092/2 2099/5 2158/24 2168/6</p> <p>although [15]</p> <p>2013/23 2035/20 2041/7 2051/11 2057/3 2060/1 2067/24 2072/14 2110/21 2116/18 2139/19 2140/3 2156/23 2219/9 2243/15</p> <p>always [16]</p>	<p>2016/24 2042/25 2046/9 2053/4 2057/11 2136/3 2178/21 2183/20 2208/17 2208/22 2215/6 2224/15 2259/16 2265/4 2265/8 2266/2</p> <p>am [3]</p> <p>2089/21 2093/15 2143/9</p> <p>ambiguity [1]</p> <p>2306/6</p> <p>ambit [1]</p> <p>2063/23</p> <p>amenable [1]</p> <p>2142/15</p>
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<p>A</p> <p>amend [5] 2049/5 2049/8 2049/20 2049/22 2098/20</p> <p>Amendment [1] 2326/5</p> <p>amendments [3] 2148/6 2148/25 2237/20</p> <p>AMERICAN [3] 1978/3 2216/23 2310/9</p> <p>Americans [1] 2022/24</p> <p>amicus [2] 1985/6 2097/19</p> <p>among [4] 1999/8 2028/2 2107/18</p>	<p>2132/24</p> <p>amongst [3] 2141/14 2310/20 2317/25</p> <p>amorphous [2] 2321/5 2321/6</p> <p>amount [15] 2097/15 2164/23 2168/1 2190/20 2195/3 2207/21 2209/22 2213/5 2216/11 2219/15 2221/19 2221/23 2222/24 2223/25 2341/7</p>	<p>amounted [3] 2023/22 2166/24 2311/2</p> <p>amounts [4] 2022/2 2215/10 2215/19 2310/13</p> <p>ample [3] 2112/10 2259/21 2274/6</p> <p>amply [1] 2288/22</p> <p>analogy [2] 2326/3 2326/11</p> <p>analysis [73] 1997/8 1997/10 2002/19 2013/20 2024/15</p>
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A	2163/3	2313/2 2313/7
analysis... [68]	2164/11	2313/8 2313/9
2031/3	2166/13	2324/23
2041/7 2047/1	2182/19	2325/6 2329/6
2047/16	2184/8	2334/11
2047/22	2184/11	2334/15
2052/17	2185/5	2334/18
2053/20	2185/24	2334/24
2062/13	2189/14	2335/4 2335/9
2063/17	2192/4	2341/12
2073/13	2193/10	2342/4 2343/6
2078/11	2201/23	analytical [1]
2079/8	2202/17	2128/11
2089/10	2203/5 2203/9	analyze [6]
2100/10	2247/24	2023/21
2101/19	2270/16	2025/5 2032/7
2109/8 2117/7	2271/1 2282/4	2033/8 2127/4
2118/18	2298/5 2298/9	2129/7
2118/19	2298/16	analyzed [3]
2120/2	2299/10	2025/22
2126/11	2304/2	2027/19
2129/16	2304/12	2028/1
2135/11	2305/1	analyzing [1]
2138/6 2159/2	2309/18	2316/9

A	2180/15	2086/17
Anderson [1]	2197/18	2092/13
1980/20	2198/2 2198/9	2110/19
ANDRE [1]	2198/11	2126/24
1981/8	2198/14	2127/10
Annex [1]	2200/20	2128/6 2130/4
1984/25	2237/15	2155/18
announced [1]	2255/20	2159/3 2159/6
1983/5	2274/4 2286/2	2170/7 2171/4
another [32]	2289/11	2171/17
2002/11	2304/22	2196/9
2021/12	2307/4	2205/14
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2158/18	2238/14	2319/5
2158/19	2249/12	2319/16
2159/8	2250/11	2319/20
2161/11	2253/15	2319/22
2161/13	2255/18	2321/20
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2165/19	2262/11	2323/8 2324/7
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2191/18	2275/20	2331/19
2193/10	2276/20	2334/15
2196/10	2281/1	2335/5 2337/5
2202/20	2284/15	2342/2 2342/3
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<p>A</p> <p>anymore... [1] 2070/15</p> <p>anything [18] 2006/14 2052/23 2071/6 2079/23 2141/2 2156/3 2171/19 2192/10 2206/11 2240/6 2266/10 2275/6 2296/3 2304/7 2307/18 2320/3 2322/17 2344/10</p> <p>anywhere [3] 2001/13 2037/3 2052/24</p>	<p>apart [9] 2004/22 2008/2 2019/9 2020/22 2025/8 2079/14 2092/8 2144/12 2218/10</p> <p>apologies [2] 1996/22 2297/20</p> <p>apologize [1] 2108/6</p> <p>Apotex [13] 2049/5 2049/9 2049/20 2049/21 2247/15 2247/18 2255/9 2256/13 2256/21 2262/21</p>	<p>2263/5 2294/10 2338/9</p> <p>Apotex's [1] 2049/8</p> <p>apparent [7] 1990/9 2039/19 2065/9 2133/1 2145/21 2328/9 2328/21</p> <p>apparently [2] 2146/24 2181/18</p> <p>appeal [29] 2021/11 2049/16 2049/19 2049/24 2054/20 2068/3 2210/17 2214/24</p>
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<p>A</p> <p>appeal... [21] 2215/5 2216/3 2216/8 2217/10 2228/15 2228/16 2239/23 2240/7 2255/12 2261/23 2263/1 2263/2 2266/17 2268/20 2290/23 2294/9 2329/12 2331/8 2332/5 2332/7 2332/13</p> <p>Appeal's [2] 2214/25 2267/17</p> <p>appealed [1]</p>	<p>2049/15</p> <p>appeals [1] 2190/5</p> <p>appear [8] 2024/23 2073/6 2098/10 2141/2 2237/9 2248/4 2306/12 2307/1</p> <p>appeared [2] 2031/12 2262/23</p> <p>appears [4] 2054/3 2210/7 2210/8 2232/10</p> <p>appellate [1] 2291/15</p> <p>applicability [4] 2044/23 2112/5 2124/4 2138/24</p>	<p>applicable [34] 2075/23 2075/25 2076/3 2076/16 2077/4 2077/21 2077/24 2078/3 2078/4 2079/3 2094/13 2110/18 2110/24 2111/7 2126/5 2127/4 2127/16 2156/24 2167/4 2170/9 2170/16 2170/19 2171/20 2172/10 2174/8 2175/5 2175/20</p>
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A	1984/16	2063/15
applicable...	1985/24	2066/22
[7] 2176/13	1986/22	2067/9 2100/3
2179/24	1987/9	2100/4
2179/25	1987/16	2100/16
2190/16	1987/18	2101/3
2219/13	1987/24	2102/16
2295/6	1988/11	2102/18
2317/12	1988/22	2103/25
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<p>A</p> <p>application...</p> <p>[44] 2150/11</p> <p>2150/12</p> <p>2152/12</p> <p>2152/23</p> <p>2154/22</p> <p>2158/12</p> <p>2173/15</p> <p>2214/4 2228/4</p> <p>2230/15</p> <p>2233/11</p> <p>2242/22</p> <p>2246/24</p> <p>2249/6</p> <p>2274/11</p> <p>2276/15</p> <p>2284/19</p> <p>2284/21</p> <p>2284/23</p> <p>2285/10</p> <p>2286/20</p> <p>2287/2 2293/3</p> <p>2296/22</p>	<p>2305/8</p> <p>2305/14</p> <p>2307/6 2307/8</p> <p>2307/11</p> <p>2308/21</p> <p>2309/15</p> <p>2309/19</p> <p>2313/21</p> <p>2317/8 2318/1</p> <p>2330/8</p> <p>2331/23</p> <p>2332/9 2336/2</p> <p>2337/7</p> <p>2340/13</p> <p>2342/21</p> <p>2342/22</p> <p>2342/24</p> <p>applications</p> <p>[11] 2003/25</p> <p>2004/9</p> <p>2065/20</p> <p>2248/14</p> <p>2283/11</p> <p>2288/23</p>	<p>2291/10</p> <p>2293/7</p> <p>2294/12</p> <p>2295/21</p> <p>2296/1</p> <p>applied [93]</p> <p>1993/18</p> <p>1993/21</p> <p>1993/23</p> <p>1994/20</p> <p>1994/22</p> <p>1995/10</p> <p>1996/14</p> <p>1996/17</p> <p>1996/18</p> <p>2001/6 2003/4</p> <p>2004/20</p> <p>2011/19</p> <p>2012/1 2012/7</p> <p>2012/11</p> <p>2022/24</p> <p>2032/14</p> <p>2032/15</p> <p>2033/23</p>
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A	2060/21	2234/15
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2034/22	2062/15	2236/13
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2036/18	2103/7 2105/7	2245/21
2036/20	2108/21	2246/7
2036/25	2121/12	2246/10
2037/24	2122/2	2246/18
2038/10	2123/11	2246/22
2038/25	2126/7	2253/2 2261/4
2042/10	2128/16	2264/20
2043/13	2138/13	2265/13
2047/17	2153/6 2205/8	2276/3
2047/19	2210/18	2282/25
2050/20	2213/14	2283/21
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2052/17	2218/19	2330/21
2052/21	2220/6 2220/9	2337/8
2054/11	2229/1	applies [19]
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2059/14	2233/18	2093/4

A	2022/20	2203/6 2211/7
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2093/10	2033/9	2214/2
2093/16	2041/18	2214/19
2093/24	2045/25	2229/1
2096/23	2046/24	2235/20
2122/24	2084/2 2084/7	2241/19
2123/9	2087/13	2253/4
2169/15	2087/22	2283/10
2173/22	2088/17	2295/4 2301/2
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2278/3	2127/12	2103/14
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2324/16	2169/25	2117/8 2117/8
2333/23	2170/3	2121/5
2334/8	2170/15	2121/16
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1994/11	2175/13	2184/6
1994/12	2196/16	2184/25
2011/24	2196/17	2185/2
2018/14	2201/15	2185/20

A	2143/13	2083/11
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1995/20	2169/6	2100/21
appreciated	2211/19	2101/19
[2] 2297/4	2227/9	2106/1
2297/14	2244/20	2111/20
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2043/6	2320/15	2149/11
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2045/8	approaches	2256/25
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A	arbitral [19]	2132/24
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2211/4	2172/8	arbitrary [41]
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	2131/5 2131/9	2164/6
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A	2018/9	2051/25
are... [355]	2018/25	2053/8 2059/4
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1995/2 1995/6	2020/24	2060/3
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1997/10	2025/14	2063/5
1997/14	2026/19	2065/19
2000/17	2027/15	2066/7
2002/19	2028/21	2066/18
2003/16	2029/24	2069/2 2069/4
2005/9 2005/9	2031/1 2031/6	2069/14
2006/16	2031/6	2069/15
2006/17	2031/24	2069/17
2008/3 2008/5	2033/3 2033/4	2069/19
2011/2	2036/15	2070/17
2011/22	2037/16	2072/4
2012/2	2039/12	2072/25
2012/15	2039/20	2074/16
2013/4	2040/17	2075/16
2014/18	2041/13	2075/17
2016/15	2041/17	2075/23
2016/15	2041/19	2075/24
2016/25	2048/21	2075/25
2017/24	2050/19	2076/25

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2079/21	2099/10	2117/2
2080/3 2081/6	2099/15	2117/23
2082/15	2100/1 2100/2	2120/9
2085/22	2101/11	2120/23
2085/24	2103/4 2104/3	2121/5
2086/15	2104/4 2106/7	2122/13
2087/19	2106/23	2123/15
2087/22	2109/1 2109/3	2124/8 2125/2
2087/23	2109/6 2109/9	2126/11
2088/13	2109/20	2127/14
2089/24	2109/22	2127/19
2089/25	2109/24	2127/21
2090/5 2090/9	2110/4	2127/22
2091/19	2110/15	2127/24
2092/18	2110/17	2128/3 2128/5
2092/19	2111/11	2129/5
2093/6	2111/15	2129/14
2093/11	2112/1	2129/19
2094/16	2112/23	2130/1 2130/4
2094/17	2113/10	2130/13
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2138/15	2165/25	2176/18
2138/16	2167/22	2176/18
2138/17	2168/14	2176/20
2139/19	2170/15	2180/11
2141/10	2170/18	2181/12
2141/17	2170/23	2182/9
2142/12	2171/7	2182/16
2144/4	2171/18	2183/14
2144/18	2171/19	2183/16
2150/21	2171/23	2184/9
2152/11	2172/13	2184/17
2152/12	2172/23	2185/18
2156/12	2173/10	2185/24
2156/18	2173/19	2186/6
2157/8	2173/21	2188/15
2157/22	2174/1	2189/4 2189/5
2158/1 2158/3	2174/18	2193/8 2193/9
2158/5	2174/19	2193/24
	2174/25	2194/1 2194/2
	2175/14	2195/7

A		
are.....		
[119] 2196/13	2221/17	2250/4
2196/20	2224/20	2250/20
2199/16	2224/20	2251/22
2200/5	2224/21	2260/2
2203/20	2224/22	2269/14
2203/25	2225/12	2278/10
2205/16	2225/23	2278/16
2205/19	2226/6 2226/7	2280/20
2206/13	2226/17	2280/23
2206/22	2226/18	2281/7 2281/7
2208/11	2227/21	2281/18
2209/24	2233/14	2281/22
2210/16	2234/2	2281/23
2210/24	2235/13	2282/1
2211/13	2235/14	2282/20
2211/16	2236/22	2283/4 2283/6
2217/7	2236/23	2283/6
2217/10	2237/10	2283/11
2218/25	2238/14	2283/14
2219/13	2238/16	2283/24
2219/19	2238/17	2284/20
2220/2 2220/9	2239/12	2287/6
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<p>A</p> <p>are.....</p> <p>[44] 2291/10</p> <p>2292/20</p> <p>2294/18</p> <p>2296/12</p> <p>2298/22</p> <p>2299/21</p> <p>2300/9 2302/6</p> <p>2302/17</p> <p>2303/2</p> <p>2303/11</p> <p>2305/23</p> <p>2308/1</p> <p>2311/22</p> <p>2316/4</p> <p>2316/18</p> <p>2318/23</p> <p>2321/1</p> <p>2321/19</p> <p>2323/6 2324/2</p> <p>2329/23</p> <p>2330/9</p> <p>2330/14</p>	<p>2330/23</p> <p>2331/2 2331/7</p> <p>2333/24</p> <p>2333/25</p> <p>2334/19</p> <p>2334/23</p> <p>2335/9</p> <p>2335/19</p> <p>2336/20</p> <p>2337/13</p> <p>2338/19</p> <p>2338/20</p> <p>2340/5</p> <p>2342/12</p> <p>2343/2 2343/7</p> <p>2344/3</p> <p>2344/22</p> <p>2345/22</p> <p>area [4]</p> <p>2108/25</p> <p>2213/24</p> <p>2216/22</p> <p>2292/4</p> <p>Arechaga's [1]</p> <p>2018/24</p>	<p>aren't [1]</p> <p>2175/20</p> <p>arguably [4]</p> <p>2019/15</p> <p>2029/4</p> <p>2082/13</p> <p>2256/15</p> <p>argue [10]</p> <p>2017/15</p> <p>2046/4 2069/4</p> <p>2071/13</p> <p>2184/18</p> <p>2187/2</p> <p>2222/24</p> <p>2243/6 2243/8</p> <p>2292/15</p> <p>argued [24]</p> <p>2009/3</p> <p>2010/21</p> <p>2026/4</p> <p>2032/18</p> <p>2062/4 2132/3</p> <p>2133/4</p> <p>2133/18</p>
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<p>A</p> <p>argued... [16] 2136/1 2136/9 2137/18 2148/23 2163/6 2195/15 2256/23 2279/1 2284/7 2285/9 2287/4 2291/19 2291/22 2293/23 2298/18 2315/25</p> <p>argues [5] 2001/19 2007/14 2282/18 2282/20 2295/9</p> <p>arguing [6] 2026/10 2026/21</p>	<p>2069/8 2134/25 2186/6 2252/18</p> <p>argument [57] 1998/4 2004/21 2011/6 2017/12 2026/5 2036/14 2042/14 2058/19 2067/16 2094/22 2105/10 2130/2 2130/5 2130/14 2130/16 2130/17 2132/8 2134/22 2134/25 2136/13</p>	<p>2137/25 2145/8 2151/4 2151/9 2154/6 2158/24 2158/24 2163/14 2188/18 2199/17 2199/21 2220/15 2222/6 2222/9 2222/10 2226/24 2228/22 2235/14 2240/12 2242/7 2260/6 2261/5 2262/23 2267/5 2287/7 2291/18 2296/17 2326/21 2329/20</p>
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2332/20	2172/9	arisen [2]
2337/25	2195/24	1995/25
2338/10	2197/14	1996/3
2338/13	2218/7	arises [6]
2340/8	2226/12	2053/25
2341/24	2230/14	2152/11
2342/2	2243/11	2153/9
argumentative	2257/12	2242/25
ly [1] 2243/16	2260/7	2243/18
arguments	2262/18	2243/23
[36] 2004/19	2277/15	arising [4]
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2058/23	2283/2 2283/4	2230/11
2113/4 2116/1	2293/13	2230/15
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2135/23	2330/3	1981/24
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2143/1	2340/20	2072/12
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became... [1]	2032/19	2062/16
2145/21	2033/22	2063/6
because [224]	2034/3	2063/12
1990/7 1991/5	2035/20	2065/12
1991/11	2037/18	2066/7
1993/17	2037/23	2067/25
1994/10	2038/20	2072/23
1996/12	2039/4	2072/24
1996/23	2041/23	2074/14
1997/10	2043/15	2074/25
1998/16	2043/24	2076/10
1999/16	2046/9 2047/4	2077/7 2077/8
2000/17	2047/12	2078/21
2003/10	2048/20	2079/16
2003/11	2049/3	2079/22
2004/7	2049/21	2080/3 2080/9
2005/20	2050/19	2081/8
2006/7 2009/5	2053/12	2082/19
2013/18	2056/22	2082/23
2015/3	2059/3	2084/23
2017/16	2060/20	2085/1
2025/2	2061/4	2091/23
2029/13	2061/13	2092/13

B	2137/20	2172/22
because...	2138/6 2141/9	2172/22
[151] 2093/9	2142/12	2173/18
2095/2	2143/24	2174/14
2095/11	2149/15	2174/19
2097/9	2149/23	2182/23
2097/16	2150/20	2188/16
2097/24	2151/14	2192/12
2098/9 2102/3	2152/5	2195/24
2104/15	2152/11	2203/5
2105/13	2152/19	2204/18
2110/3 2110/6	2153/13	2206/12
2116/9 2118/3	2153/20	2210/13
2119/2	2155/4 2156/1	2212/5 2212/8
2120/10	2156/20	2215/25
2120/24	2157/23	2216/12
2121/4	2160/3	2218/4 2220/7
2121/22	2160/11	2220/22
2125/25	2160/17	2221/19
2128/9	2160/19	2223/17
2132/11	2161/17	2225/19
2132/12	2162/8 2163/2	2226/12
2136/2	2163/7	2226/19
2136/11	2167/15	2227/25

B	2265/24	2319/18
because.....	2267/2	2320/2 2323/1
[73] 2231/25	2273/21	2323/12
2232/12	2281/21	2324/10
2232/21	2281/25	2324/13
2234/3	2292/24	2324/20
2234/20	2298/13	2324/24
2234/24	2300/21	2326/2
2235/17	2302/3	2326/10
2235/22	2302/18	2326/19
2236/5 2237/2	2303/4	2331/13
2237/12	2303/21	2334/8 2340/8
2240/13	2304/4	2340/9
2241/10	2304/24	2340/12
2242/3	2305/18	2340/12
2242/12	2308/11	2340/22
2243/4	2308/22	2341/9
2243/12	2309/4	2341/15
2243/19	2311/13	2341/20
2245/19	2312/20	2342/20
2248/12	2315/15	2343/20
2256/14	2315/24	2344/22
2260/14	2316/7	2345/8
2263/24	2316/17	2345/21

B	1992/25	2071/3
become [7]	2010/24	2073/14
2036/7	2012/16	2074/2 2080/5
2048/19	2012/16	2082/20
2050/19	2018/15	2082/24
2124/23	2032/14	2089/7
2184/20	2032/15	2089/12
2190/4 2245/7	2034/17	2092/23
becomes [3]	2034/25	2095/25
2043/12	2038/15	2096/2 2096/9
2150/15	2038/18	2097/2 2099/3
2284/14	2042/25	2104/25
becoming [1]	2049/15	2107/19
2095/14	2051/10	2108/18
been [199]	2056/15	2110/5
1983/9	2058/17	2110/10
1983/10	2059/6	2110/12
1985/7	2059/14	2110/14
1985/19	2059/17	2116/15
1987/21	2061/10	2124/11
1988/15	2063/18	2128/11
1988/15	2064/25	2128/16
1988/16	2065/24	2131/4
1991/13	2068/6 2068/7	2131/11

B	2172/20	2211/6 2215/6
been... [138]	2172/21	2219/3
2131/13	2177/16	2220/24
2137/6	2180/7	2222/25
2146/16	2180/19	2223/19
2146/17	2180/22	2225/13
2147/16	2181/9	2228/21
2149/15	2181/10	2229/12
2149/23	2183/20	2229/16
2156/1	2188/9	2231/12
2156/17	2191/10	2231/20
2157/9 2158/3	2193/11	2232/17
2160/15	2193/14	2232/20
2160/21	2193/19	2232/22
2160/24	2193/23	2235/7
2161/2	2194/14	2235/17
2161/12	2195/16	2235/19
2162/8	2198/14	2238/7 2242/4
2162/10	2199/3 2203/7	2242/6 2243/3
2162/23	2206/9 2208/3	2244/11
2169/8 2170/3	2208/12	2247/7
2171/3	2208/15	2249/10
2171/10	2208/17	2250/11
2172/19	2209/14	2254/4

B	2302/5 2303/6	2326/16
been..... [61]	2303/16	2326/23
2256/16	2303/24	2328/18
2256/17	2306/1 2306/8	2328/18
2258/3	2306/11	2330/1 2330/4
2258/19	2307/4	2330/10
2259/17	2308/14	2337/10
2262/13	2308/19	2338/4
2263/3 2264/6	2309/12	2340/18
2266/2	2314/8	2343/24
2266/10	2316/24	before [82]
2268/1	2317/16	1990/24
2268/13	2317/18	1994/19
2269/8	2320/2 2320/5	1995/12
2273/23	2321/13	2005/1
2274/14	2321/14	2005/23
2275/21	2321/17	2011/16
2276/1	2322/1	2013/12
2276/19	2322/11	2016/12
2277/16	2323/25	2016/13
2287/21	2324/8	2020/16
2288/22	2324/18	2022/18
2292/14	2324/19	2031/25
2299/24	2325/14	2036/1

B	2150/11	2269/24
before... [69]	2155/12	2274/15
2036/16	2160/19	2283/1
2037/2	2160/19	2285/16
2037/17	2170/7	2297/7
2038/11	2193/15	2313/17
2042/9	2195/7	2314/3
2045/24	2195/13	2314/10
2050/5	2208/15	2315/12
2052/23	2212/7 2216/3	2330/16
2054/17	2218/4 2218/8	2338/24
2056/3 2057/4	2221/12	2339/23
2061/24	2224/7	2342/11
2066/22	2225/14	2344/4
2067/2	2227/14	began [3]
2067/10	2239/24	2035/24
2068/8	2242/5 2244/7	2114/18
2102/22	2245/4 2248/2	2286/19
2102/24	2248/6 2250/1	begin [4]
2106/6 2112/7	2250/25	2026/1
2121/11	2255/7 2259/3	2068/25
2122/4	2260/24	2162/16
2140/16	2265/6	2170/7
2146/1 2146/1	2268/24	beginning [10]
		2009/18

<p>B</p> <p>beginning... [9] 2151/11 2160/13 2205/16 2257/20 2275/24 2298/18 2300/14 2329/10 2330/18</p> <p>begs [3] 2128/20 2192/14 2192/18</p> <p>behalf [6] 1980/3 1981/3 1982/18 1989/15 2145/1 2147/17</p> <p>behavior [1] 2026/5</p> <p>behind [3]</p>	<p>2323/9 2335/17 2345/13</p> <p>behold [2] 2318/12 2319/2</p> <p>being [42] 1991/10 1991/10 1999/1 2003/9 2037/16 2058/24 2069/20 2077/16 2085/9 2121/12 2125/11 2126/20 2138/13 2142/1 2146/4 2150/23 2151/22 2159/14 2177/2 2177/2</p>	<p>2209/20 2227/23 2230/24 2232/3 2232/11 2251/23 2254/22 2255/8 2261/4 2265/13 2267/13 2274/9 2275/7 2275/20 2314/2 2324/4 2328/12 2329/24 2331/17 2331/18 2341/2 2341/13</p> <p>belated [1] 2008/8</p> <p>belatedly [1] 2069/12</p> <p>Belgium [1]</p>
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B	2097/25	2022/9
Belgium... [1]	2100/15	beneficiary [1]
1979/8	2107/15	2131/15
belief [1]	2108/3	benefit [2]
2178/12	2110/22	2146/9
believe [44]	2111/23	2293/11
2004/5	2112/24	benefits [1]
2007/16	2118/11	2299/19
2010/9	2121/20	bereft [2]
2010/13	2122/16	2210/7
2032/22	2123/2 2123/8	2210/25
2071/24	2144/20	BERENGAUT
2072/12	2146/3	[15] 1980/5
2072/21	2167/19	2007/23
2075/21	2168/18	2008/10
2078/6 2078/9	2197/10	2013/10
2079/10	2254/9 2318/8	2014/19
2079/13	2324/20	2030/5
2082/4	2333/15	2068/19
2083/11	2333/20	2068/21
2086/12	2339/10	2094/20
2091/1 2094/1	believed [1]	2112/18
2094/5 2097/3	2104/15	2122/5
2097/18	belong [1]	2123/22

<p>B</p> <hr/> <p>BERENGAUT.. [3] 2161/20 2205/22 2218/9</p> <p>Berengaut..... 20</p> <p>13 [1] 1982/6</p> <p>Berengaut..... 21</p> <p>23 [1] 1982/9</p> <p>BERG [3] 1979/5 1979/6 2145/3</p> <p>besides [1] 2006/4</p> <p>best [2] 2068/22 2285/23</p> <p>BETHLEHEM [3] 1979/15 2033/18 2145/3</p> <p>Bethlehem's [1] 2155/18</p>	<p>better [5] 1992/2 2029/19 2180/8 2234/8 2256/12</p> <p>between [63] 1991/22 2005/7 2022/24 2025/12 2026/23 2033/2 2038/19 2039/8 2052/7 2074/10 2074/13 2076/1 2081/19 2082/6 2084/1 2084/5 2084/18 2085/4 2091/1 2091/3 2095/9 2096/17</p>	<p>2105/6 2110/18 2117/16 2118/10 2124/9 2135/9 2160/5 2173/7 2174/1 2174/6 2174/17 2177/1 2189/25 2198/16 2198/19 2201/15 2202/19 2203/23 2204/4 2205/4 2219/19 2234/21 2237/3 2237/17 2239/8 2248/24 2254/12 2258/10</p>
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<p>B</p> <p>between... [13]</p> <p>2264/2</p> <p>2266/4</p> <p>2280/16</p> <p>2288/20</p> <p>2301/20</p> <p>2312/13</p> <p>2317/12</p> <p>2322/6 2323/2</p> <p>2326/4</p> <p>2336/19</p> <p>2337/1 2338/2</p> <p>beyond [23]</p> <p>2038/3 2045/6</p> <p>2047/7 2056/8</p> <p>2060/7</p> <p>2076/10</p> <p>2078/23</p> <p>2082/22</p> <p>2098/15</p> <p>2109/7 2153/1</p> <p>2171/8 2172/2</p> <p>2174/10</p>	<p>2192/11</p> <p>2205/5</p> <p>2225/24</p> <p>2226/18</p> <p>2226/19</p> <p>2272/19</p> <p>2273/19</p> <p>2275/6</p> <p>2301/23</p> <p>bias [1]</p> <p>2146/10</p> <p>bifurcated [7]</p> <p>2045/3 2045/8</p> <p>2045/13</p> <p>2045/23</p> <p>2252/19</p> <p>2252/20</p> <p>2252/25</p> <p>Biggar [3]</p> <p>2261/18</p> <p>2270/13</p> <p>2271/3</p> <p>bilateral [2]</p> <p>2181/20</p>	<p>2182/5</p> <p>Bilcon [2]</p> <p>2130/19</p> <p>2338/9</p> <p>billing [1]</p> <p>2019/17</p> <p>binary [1]</p> <p>2138/4</p> <p>binding [3]</p> <p>2040/9</p> <p>2124/21</p> <p>2331/6</p> <p>bingo [1]</p> <p>2144/1</p> <p>Binnie [3]</p> <p>2034/15</p> <p>2263/10</p> <p>2290/10</p> <p>biotechnology [1] 2313/21</p> <p>bit [13]</p> <p>2153/18</p> <p>2153/19</p> <p>2158/10</p>
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B	2216/20	1986/16
bit... [10]	body [4]	2004/11
2176/10	2028/21	2013/23
2183/18	2127/12	2013/25
2185/16	2128/13	2014/17
2204/7	2214/1	2075/22
2209/11	bold [1]	2100/22
2212/9	2157/21	2111/3
2227/24	bona [1]	2116/15
2230/13	2086/1	2118/5
2233/22	bonding [2]	2118/21
2308/18	2021/7	2119/10
BITs [7]	2021/10	2119/14
2124/11	bone [1]	2142/1
2125/2 2125/3	2334/17	2150/22
2125/8	book [2]	2151/21
2125/20	2017/6	2205/15
2129/7	2214/10	2237/4
2181/10	BORN [5]	2249/20
blanket [1]	1979/11	2250/19
2207/22	1997/14	2254/6
blog [1]	2145/3 2235/9	2254/19
2286/5	2240/14	2257/23
Board [1]	both [36]	2261/8

<p>B</p> <p>both... [12] 2274/18 2288/22 2289/15 2293/4 2320/22 2322/10 2322/15 2323/24 2325/22 2326/9 2339/9 2346/4</p> <p>bothering [1] 2157/2</p> <p>bottom [5] 2025/8 2066/6 2119/25 2144/3 2336/21</p> <p>bound [4] 2018/20 2089/10 2106/20</p>	<p>2113/13</p> <p>bounds [4] 2084/14 2274/13 2275/7 2275/8</p> <p>Box [1] 1979/7</p> <p>brackets [1] 2252/11</p> <p>Brad [1] 1981/19</p> <p>brain [2] 2265/5 2266/5</p> <p>branch [6] 2027/2 2028/25 2033/11 2251/14 2251/16 2252/10</p> <p>branches [1] 2246/6</p> <p>brand [1] 2302/12</p>	<p>brands [1] 2330/12</p> <p>breach [89] 1993/13 1995/4 1996/2 2011/5 2023/9 2027/21 2031/21 2031/23 2032/2 2033/20 2034/17 2035/12 2035/18 2074/12 2074/15 2079/1 2080/16 2080/21 2081/16 2083/13 2088/22 2088/25 2095/19</p>
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B	2180/18	2207/19
breach... [66]	2180/20	2215/11
2095/25	2181/6 2181/6	2217/16
2096/2 2096/3	2190/11	2218/11
2096/17	2197/21	2221/18
2096/25	2198/8	2236/9
2096/25	2198/10	2240/21
2097/21	2198/20	2244/7
2097/23	2198/20	2277/12
2098/18	2198/21	2282/22
2098/25	2198/22	2283/19
2128/12	2199/2 2199/5	2296/4 2320/7
2130/3	2200/1 2200/1	2320/8
2151/18	2200/7 2200/9	2332/14
2153/16	2200/20	breach-of-con
2156/18	2200/21	tract [1]
2159/5	2201/9	2023/9
2159/25	2201/16	breached [10]
2168/5	2201/18	2023/13
2175/16	2203/22	2023/16
2179/10	2204/11	2164/5
2180/14	2204/14	2180/22
2180/14	2206/10	2198/2
2180/17	2207/9	2198/14

B	2140/10	2229/12
breached... [4]	2162/15	2294/24
2201/21	2162/17	briefefer [1]
2205/19	2183/10	2337/21
2208/7 2230/1	2217/19	briefing [5]
breaches [7]	2217/24	2009/20
2033/20	2218/4 2297/5	2009/22
2078/24	2333/2	2026/21
2080/6	brief [5]	2262/12
2097/14	2131/6	2344/14
2098/11	2199/18	briefly [18]
2098/15	2328/5	1996/24
2310/22	2333/13	2007/22
breaching [1]	2339/8	2008/8
2097/8	briefed [11]	2013/14
breadth [1]	2136/15	2101/6 2133/3
2108/2	2136/17	2151/9
break [15]	2136/20	2166/20
2066/25	2136/23	2206/5
2067/2	2161/12	2226/12
2068/14	2161/13	2274/16
2112/24	2161/14	2280/22
2112/25	2161/19	2298/12
2113/3	2162/8	2312/23

<p>B</p> <p>briefly... [4] 2314/18 2323/12 2324/9 2326/15</p> <p>briefs [9] 1989/4 2021/25 2098/6 2141/12 2141/13 2141/23 2301/6 2320/22 2344/23</p> <p>bring [33] 2010/19 2012/3 2012/11 2068/6 2073/9 2073/9 2074/24 2152/17</p>	<p>2152/19 2163/24 2163/25 2170/13 2196/10 2213/3 2221/2 2223/4 2225/1 2225/3 2227/2 2233/7 2233/10 2233/14 2233/19 2234/13 2235/4 2235/11 2236/10 2241/18 2241/21 2243/24 2303/4 2303/5 2318/2</p> <p>bringing [3] 2008/9 2224/16</p>	<p>2303/10</p> <p>brings [8] 2052/8 2075/18 2078/3 2125/22 2269/17 2276/18 2319/24 2345/6</p> <p>Brisebois [9] 2005/2 2005/5 2005/12 2005/20 2116/5 2116/13 2117/6 2279/22 2279/24</p> <p>Brisebois' [2] 2250/6 2280/9</p> <p>Bristol [2] 2247/15 2331/4</p>
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<p>B</p> <p>Bristol-Myers [1] 2247/15</p> <p>broad [12] 2078/13 2082/7 2082/13 2108/14 2108/15 2108/18 2109/6 2233/3 2241/7 2242/11 2276/14 2287/23</p> <p>broader [8] 2030/12 2082/13 2084/23 2105/13 2219/7 2242/19 2273/4 2293/20</p>	<p>broadest [1] 2111/10</p> <p>broadly [4] 2045/16 2046/5 2251/16 2308/9</p> <p>brought [23] 2008/19 2010/11 2012/18 2012/18 2042/6 2107/1 2145/19 2173/2 2175/25 2176/5 2208/15 2218/18 2234/17 2235/7 2235/12 2238/7 2240/13</p>	<p>2242/15 2243/10 2278/24 2296/8 2319/17 2321/24</p> <p>Brown [1] 2216/20</p> <p>Brussels [1] 1979/7</p> <p>bucket [11] 2020/24 2021/1 2021/3 2021/18 2021/21 2022/6 2023/6 2027/19 2032/23 2074/21 2317/2</p> <p>buckets [2] 2020/24 2316/23</p> <p>budge [1]</p>
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<p>B</p> <p>budge... [1] 2116/20</p> <p>Building [1] 1981/12</p> <p>bundle [4] 1999/20 2070/15 2082/23 2338/15</p> <p>bundles [1] 2345/24</p> <p>burden [23] 1979/22 1992/8 2000/20 2056/17 2061/8 2061/22 2061/23 2061/24 2061/25 2064/20 2126/19</p>	<p>2126/20 2126/20 2184/18 2184/21 2186/20 2187/9 2187/15 2187/24 2188/7 2261/4 2278/8 2300/24</p> <p>BUREAU [1] 1981/10</p> <p>BURLING [1] 1980/11</p> <p>business [2] 2136/16 2329/24</p> <p>businesses [1] 2231/7</p> <p>buy [1] 2302/13</p> <p>by-product [1] 2063/25</p>	<p>C</p> <p>C-118 [1] 2045/7</p> <p>C-130 [1] 2135/19</p> <p>C-146 [2] 1992/19 2060/14</p> <p>C-156 [1] 2135/19</p> <p>C-160 [3] 2001/18 2054/12 2063/6</p> <p>C-176 [1] 2338/9</p> <p>C-181 [1] 2125/6</p> <p>C-194 [1] 2040/13</p> <p>C-197 [1] 2064/10</p> <p>C-215 [1] 2054/20</p>
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C	C-55 [1]	2125/19
C-331 [6]	2039/21	called [8]
2204/22	C-59 [1]	2002/23
2277/4 2318/4	2040/20	2002/23
2319/25	C-60 [1]	2155/4 2207/5
2320/11	2040/20	2216/14
2320/18	C-63 [1]	2246/24
C-36 [1]	2061/19	2334/14
1990/23	C-64 [1]	2345/16
C-46 [1]	1990/23	calls [1]
2060/14	C-65 [1]	2022/18
C-48 [2]	1990/23	Caltrider [1]
2038/10	C-67 [1]	1980/19
2064/14	2063/5	came [14]
C-491 [1]	C-68 [1]	1994/13
2055/8	2055/8	1995/15
C-499 [1]	calculation [1]	2061/23
2055/24	2140/1	2066/11
C-532 [1]	calculus [1]	2067/10
2049/10	2117/1	2102/2
C-533 [1]	call [4]	2155/12
2049/10	2102/25	2163/2
C-54 [1]	2118/21	2174/11
2039/21	2125/12	2219/5 2229/4

C		
came... [3]	2069/18	2144/10
2306/18	2071/16	2144/23
2315/12	2072/16	2145/4 2155/1
2335/15	2078/7	2155/19
can [124]	2078/14	2157/20
1986/21	2091/4 2095/9	2162/15
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2230/5 2231/9	2048/7	2224/20
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2165/25	2042/16	2190/20
2206/15	2048/13	2212/24
2224/6	2049/12	2213/4 2213/7
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2272/18	2050/7	2229/12
2276/1	2058/10	2229/13
2276/10	2058/23	2229/16
2276/13	2059/2 2059/2	2232/9
2276/19	2117/11	2262/13
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2340/24	2117/15	2031/23
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2080/20	2089/23	2095/11
2081/4	2089/25	2095/13
2083/23	2090/2 2090/9	2095/18
2084/6 2084/9	2090/10	2095/23
2086/13	2090/12	2096/8
2086/21	2090/13	2096/12
2086/22	2090/19	2096/13
2086/25	2090/20	2096/25
2087/4	2090/23	2097/5
2087/18	2091/1 2091/5	2097/15
2087/20	2091/11	2097/21
2087/21	2091/18	2098/10
2087/23	2091/20	2098/12
2088/7	2091/22	2098/16
2088/14	2092/3 2092/8	2098/23
2088/20	2093/6	2099/4
2088/21	2093/12	2099/12
2088/25	2093/19	2099/13
2089/5	2094/1 2094/4	2099/15
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correctly [6]	2001/25	2073/21
1986/14	2010/5	2073/23
2034/9	2010/19	2074/18
2193/11	2014/20	2079/5 2092/8
2211/22	2017/15	2099/14
2214/17	2018/18	2113/13
2301/13	2022/20	2120/7
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2280/19	2023/15	2133/19
2280/20	2026/16	2136/1
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2143/14	2038/1	2156/17
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2009/24	2055/16	2159/18
2143/3	2056/4	2161/20

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2166/21	2256/5	2236/6 2296/9
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2182/12	2261/16	2023/12
2182/22	2263/5	2023/16
2184/6 2190/4	2266/21	counsel [15]
2193/17	2270/15	2020/15
2193/21	2272/10	2049/15
2204/25	2275/1 2291/2	2136/13
2207/10	2291/22	2161/2
2207/12	2295/8	2211/18
2211/2 2213/2	2296/15	2229/7
2221/2	2300/12	2257/13
2222/24	2300/23	2260/6
2225/3	2304/22	2281/13
2234/16	2306/8 2307/3	2294/24
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2014/13	2209/15	2018/21
2014/25	2224/6 2227/8	2022/11
2015/9	2233/13	2023/18
2025/15	2259/25	2024/8
2045/11	2274/6 2298/3	2026/16
2046/21	2299/1	2026/24
2050/9 2053/9	2343/25	2027/3 2027/7
2065/4 2068/9	court [201]	2031/12
2071/21	1979/21	2031/21
2080/10	1991/18	2032/6 2033/4
2086/8	1992/4	2038/15
2086/17	1992/16	2039/2 2043/6
2086/23	1992/19	2048/12
2096/23	1992/21	2049/16
2100/24	1993/4	2049/18
2100/25	1993/25	2049/23
2112/21	1998/22	2050/5
2124/6	1998/24	2050/20
2125/16	1999/4	2051/6
2126/15	2000/21	2051/15
2136/16	2001/6	2053/12
2139/19	2001/17	2054/6 2054/8

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2054/14	2169/16	2216/22
2054/20	2169/21	2218/12
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2056/16	2182/12	2218/20
2057/4	2190/3 2195/5	2220/14
2060/10	2195/12	2221/13
2063/1 2063/7	2208/2 2208/7	2221/14
2064/10	2209/2	2221/21
2064/14	2209/14	2222/16
2065/12	2210/1 2210/2	2223/15
2068/3 2069/5	2210/18	2223/19
2070/5	2211/18	2224/22
2112/11	2212/4	2225/20
2113/1 2119/3	2214/20	2228/14
2119/6 2119/7	2214/23	2228/16
2119/10	2214/24	2239/23
2121/5 2132/9	2215/4 2215/5	2239/24
2133/6 2135/1	2215/7 2215/9	2240/3 2240/7
2136/15	2215/19	2240/17
2147/1	2215/24	2247/13
2148/12	2216/1 2216/2	2250/19
2167/25	2216/7 2216/8	2253/18
	2216/13	2255/1
	2216/17	2255/10

<p>C</p> <p>court..... [74]</p> <p>2255/12</p> <p>2255/17</p> <p>2255/23</p> <p>2256/2 2258/1</p> <p>2258/11</p> <p>2260/2 2260/5</p> <p>2260/8</p> <p>2260/10</p> <p>2260/11</p> <p>2260/13</p> <p>2261/23</p> <p>2263/2 2263/9</p> <p>2263/11</p> <p>2263/24</p> <p>2264/20</p> <p>2265/9 2266/6</p> <p>2266/17</p> <p>2267/9</p> <p>2267/17</p> <p>2267/24</p> <p>2268/7</p> <p>2268/10</p>	<p>2268/15</p> <p>2268/20</p> <p>2271/5</p> <p>2271/11</p> <p>2271/17</p> <p>2271/20</p> <p>2272/16</p> <p>2273/1</p> <p>2273/14</p> <p>2273/18</p> <p>2273/22</p> <p>2274/10</p> <p>2275/11</p> <p>2282/7 2285/6</p> <p>2286/10</p> <p>2286/14</p> <p>2286/23</p> <p>2289/1 2289/2</p> <p>2289/3 2290/9</p> <p>2290/23</p> <p>2291/15</p> <p>2292/5 2294/9</p> <p>2297/2</p> <p>2298/19</p>	<p>2299/3</p> <p>2299/13</p> <p>2299/22</p> <p>2300/16</p> <p>2306/5 2308/4</p> <p>2310/9 2314/5</p> <p>2314/22</p> <p>2315/12</p> <p>2327/12</p> <p>2330/24</p> <p>2331/1 2331/8</p> <p>2331/9 2339/3</p> <p>2339/5</p> <p>2343/23</p> <p>2345/6 2345/7</p> <p>court's [18]</p> <p>2025/3</p> <p>2034/16</p> <p>2039/24</p> <p>2063/17</p> <p>2251/9</p> <p>2255/23</p> <p>2264/8</p> <p>2264/18</p>
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C	2022/2 2022/9	2135/4 2135/6
court's... [10]	2028/17	2159/21
2267/22	2028/18	2164/25
2271/15	2028/19	2190/5
2271/22	2036/17	2206/17
2285/10	2038/2 2038/7	2207/7
2287/1	2038/11	2207/10
2290/25	2042/10	2207/12
2291/13	2045/2 2045/5	2208/4
2291/16	2046/1	2210/16
2292/20	2054/16	2211/13
2296/16	2056/3 2056/7	2213/6
courts [119]	2061/24	2213/12
1991/3	2062/10	2213/18
1994/11	2062/12	2214/6
1994/16	2064/9	2214/13
2002/18	2064/13	2214/17
2002/22	2067/11	2214/18
2006/24	2068/8	2214/21
2016/7 2017/7	2069/23	2215/10
2017/13	2109/1 2109/3	2215/17
2017/23	2109/5	2215/25
2018/10	2121/16	2216/1
2018/19	2134/23	2217/10

<p>C</p> <hr/> <p>courts... [53]</p> <p>2217/10</p> <p>2220/22</p> <p>2224/7</p> <p>2224/24</p> <p>2224/25</p> <p>2225/8</p> <p>2225/23</p> <p>2228/23</p> <p>2228/25</p> <p>2234/5</p> <p>2239/22</p> <p>2239/22</p> <p>2251/22</p> <p>2252/1</p> <p>2257/11</p> <p>2257/14</p> <p>2260/5 2260/7</p> <p>2282/20</p> <p>2282/24</p> <p>2283/16</p> <p>2285/14</p> <p>2285/17</p>	<p>2286/17</p> <p>2286/21</p> <p>2288/8</p> <p>2288/14</p> <p>2288/24</p> <p>2292/24</p> <p>2293/1</p> <p>2293/10</p> <p>2293/12</p> <p>2307/14</p> <p>2308/14</p> <p>2308/15</p> <p>2314/3</p> <p>2314/10</p> <p>2314/16</p> <p>2316/4</p> <p>2320/15</p> <p>2321/5</p> <p>2324/25</p> <p>2325/14</p> <p>2329/19</p> <p>2330/12</p> <p>2330/14</p> <p>2330/20</p>	<p>2331/3 2331/5</p> <p>2331/13</p> <p>2331/14</p> <p>2332/8 2336/5</p> <p>courts' [1]</p> <p>2283/13</p> <p>cover [1]</p> <p>2169/13</p> <p>coverage [1]</p> <p>2087/21</p> <p>covered [8]</p> <p>2023/2</p> <p>2087/23</p> <p>2089/23</p> <p>2089/25</p> <p>2108/15</p> <p>2155/25</p> <p>2175/23</p> <p>2206/5</p> <p>covers [1]</p> <p>2003/18</p> <p>COVINGTON</p> <p>[1] 1980/11</p> <p>create [5]</p>
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<p>C</p> <p>create... [5] 2029/20 2033/2 2135/6 2138/11 2279/4</p> <p>created [4] 2248/3 2279/5 2279/8 2298/22</p> <p>creates [2] 2198/18 2226/25</p> <p>creating [2] 2009/21 2028/21</p> <p>creative [2] 2337/24 2338/10</p> <p>credibility [2] 2149/9 2281/16</p> <p>credible [16] 1990/8</p>	<p>1998/17 2101/17 2146/5 2148/2 2148/20 2261/10 2270/9 2270/20 2293/5 2293/15 2304/15 2306/10 2306/24 2342/12 2342/13</p> <p>criteria [7] 2037/18 2037/20 2305/15 2305/18 2317/18 2325/1 2325/5</p> <p>critical [1] 2116/18</p> <p>critically [1]</p>	<p>2133/18</p> <p>criticism [2] 2079/22 2210/23</p> <p>criticized [2] 2337/3 2341/3</p> <p>criticizes [1] 2020/12</p> <p>criticizing [1] 2028/5</p> <p>cross [13] 2049/14 2054/23 2137/22 2145/22 2212/15 2228/7 2244/9 2247/9 2256/8 2265/18 2273/11 2275/18 2336/14</p> <p>cross-examination [12]</p>
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<p>C</p> <p>cross-examination... [12] 2049/14 2054/23 2137/22 2145/22 2212/15 2228/7 2244/9 2247/9 2256/8 2265/18 2275/18 2336/14</p> <p>cross-examined [1] 2273/11</p> <p>Crown [1] 2135/9</p> <p>crucial [1] 2249/15</p> <p>crystallization [1] 2181/22</p> <p>crystallize [4] 1995/19 2004/10</p>	<p>2189/18 2202/20</p> <p>crystallized [12] 1995/3 1995/7 1995/11 1996/3 2153/5 2153/6 2179/6 2189/17 2192/5 2229/3 2241/5 2328/18</p> <p>cure [1] 2202/2</p> <p>current [16] 2030/14 2039/10 2043/15 2048/14 2048/18 2052/19 2053/14 2053/14 2065/21</p>	<p>2065/25 2066/19 2121/10 2177/19 2340/22 2341/8 2341/19</p> <p>custom [10] 2076/18 2178/5 2178/7 2181/17 2182/24 2183/15 2187/19 2187/20 2187/23 2189/17</p> <p>customarily [1] 2061/9</p> <p>customary [84] 2016/8 2018/4 2018/7 2020/21 2030/15</p>
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C		
customary...	2178/1	2187/16
[79] 2076/4	2178/16	2188/9
2076/17	2178/22	2188/12
2077/5 2077/9	2179/1 2179/6	2188/25
2077/13	2179/12	2189/6
2079/17	2179/25	2190/14
2079/18	2180/20	2191/14
2082/12	2180/23	2192/11
2084/22	2180/24	2200/16
2124/2 2124/6	2181/14	2200/21
2127/18	2181/23	2201/9
2128/4 2128/5	2182/6	2201/12
2128/15	2182/10	2201/18
2129/1 2129/4	2182/18	2201/22
2129/13	2183/4 2183/6	2202/14
2129/13	2183/12	2202/16
2133/4	2183/17	2202/21
2170/25	2183/20	2202/22
2175/21	2184/3 2184/6	2277/17
2175/24	2185/6	2278/2
2176/3 2176/4	2185/21	2283/20
2177/14	2186/22	2292/6 2327/4
2177/20	2186/24	2327/5
	2187/3	2328/17

C	2137/23	dataset [11]
Czech [2]	2187/22	2164/12
2020/11	2197/14	2164/15
2020/15	2218/2	2164/17
D	2226/14	2247/9
D.C [2]	2234/16	2247/25
1978/18	2319/24	2248/23
2237/13	2326/14	2279/14
damage [5]	Daniel's [4]	2337/4 2337/5
2132/25	2013/14	2337/6
2230/11	2171/5	2337/11
2243/18	2311/25	date [28]
2328/8 2329/4	2318/3	1984/24
damages [5]	dare [1]	1985/2 1993/2
2070/15	2326/23	2040/17
2119/6	data [10]	2043/24
2119/10	2125/4 2147/4	2048/7
2224/20	2147/7 2279/3	2051/11
2224/21	2279/4 2279/8	2053/19
damned [1]	2279/18	2055/17
2278/17	2280/3 2281/1	2061/6 2070/2
DANIEL [9]	2281/18	2107/2 2142/7
1979/15	database [1]	2142/17
	2147/5	2229/1

<p>D</p> <p>date... [13] 2247/24 2248/10 2266/10 2266/23 2269/8 2279/8 2280/2 2284/22 2285/14 2286/18 2336/7 2341/18 2341/23</p> <p>dates [3] 2048/3 2141/10 2141/15</p> <p>dating [1] 2243/7</p> <p>day [17] 1983/2 2006/22 2014/25</p>	<p>2141/10 2162/2 2209/14 2210/1 2210/2 2237/15 2244/5 2253/4 2293/24 2295/4 2298/3 2306/7 2325/7 2344/7</p> <p>Day 1 [1] 2293/24</p> <p>days [3] 2085/7 2189/22 2274/4</p> <p>DC [2] 1980/12 2239/22</p> <p>deadlines [1] 2344/9</p> <p>deal [7] 2143/12 2143/18</p>	<p>2251/7 2285/23 2298/12 2301/6 2314/16</p> <p>dealing [1] 2034/3</p> <p>DEARDEN [1] 1980/14</p> <p>debate [6] 2066/5 2066/7 2256/17 2256/20 2257/4 2257/9</p> <p>decade [3] 2106/15 2106/18 2107/12</p> <p>decades [3] 2005/17 2254/4 2330/12</p> <p>decide [11] 2007/14</p>
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D	deciding [6]	2023/18
decide... [10]	2089/7	2023/23
2077/20	2170/22	2025/3
2083/4	2208/14	2026/24
2118/17	2249/19	2027/6 2027/8
2128/11	2294/11	2031/12
2170/18	2295/20	2031/18
2188/23	decision [172]	2032/6 2032/8
2214/12	1992/14	2032/15
2216/6 2285/7	1992/16	2034/9
2288/20	1993/25	2034/16
decided [10]	1995/4	2034/25
2028/5 2075/8	1995/12	2041/9 2045/7
2108/14	1995/13	2045/22
2253/14	1995/25	2046/15
2257/6 2267/6	2000/18	2048/12
2267/9	2001/18	2048/16
2267/13	2001/25	2049/6
2284/18	2007/19	2049/11
2344/15	2013/15	2049/14
decides [4]	2014/3 2014/9	2049/17
2005/24	2014/21	2049/19
2118/1 2126/1	2018/21	2050/10
2302/13	2018/21	2050/14

D	2123/3 2123/5	2185/15
decision...	2132/9	2185/17
[128] 2050/15	2132/22	2185/19
2054/8 2054/9	2136/21	2186/1
2054/12	2141/20	2186/15
2054/12	2143/15	2192/8
2054/13	2143/20	2209/10
2054/21	2144/3	2210/7 2210/7
2055/7	2144/17	2210/25
2055/14	2147/1	2214/25
2055/23	2149/16	2215/2 2216/8
2056/16	2149/17	2219/15
2058/15	2149/18	2219/22
2062/19	2150/3 2151/6	2220/19
2065/9 2067/7	2152/5 2153/3	2221/5
2068/10	2153/16	2221/17
2072/20	2157/10	2221/22
2072/22	2158/22	2222/12
2073/5	2161/23	2222/18
2073/17	2161/25	2223/5 2223/6
2074/8 2075/2	2162/1 2163/9	2223/7
2106/11	2184/1 2184/6	2224/10
2117/21	2184/10	2224/10
2117/22	2185/11	2228/15

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decision.....	2264/18	2192/8
[47] 2229/21	2264/24	decisions [74]
2231/10	2266/17	1995/5
2232/21	2267/3	1995/12
2233/4 2234/9	2267/18	1996/4
2235/17	2268/7	2002/19
2235/19	2268/14	2004/16
2235/23	2268/20	2007/7 2013/5
2241/7	2271/2 2273/2	2017/23
2241/11	2280/7 2286/6	2033/5
2242/6 2242/7	2290/25	2041/13
2242/16	2294/9 2294/9	2047/5 2055/8
2243/7 2251/9	2295/2	2055/13
2255/23	2330/25	2063/5 2110/4
2256/13	2331/10	2114/20
2260/10	2338/3 2339/3	2114/22
2260/22	decision-mak	2120/22
2261/14	er [2] 2185/11	2121/5
2261/19	2185/15	2136/16
2262/5	decision-mak	2150/8 2152/8
2262/12	ers [1]	2152/19
2263/1 2263/8	2185/17	2161/25
2263/9 2264/9	decision-maki	2162/2 2162/4
	ng [2] 2014/3	2162/9

<p>D</p> <p>decisions...</p> <p>[47] 2164/25</p> <p>2165/9</p> <p>2169/16</p> <p>2169/21</p> <p>2170/1 2171/5</p> <p>2180/3</p> <p>2180/11</p> <p>2190/3 2190/6</p> <p>2195/5</p> <p>2206/17</p> <p>2207/6</p> <p>2207/12</p> <p>2209/2</p> <p>2211/10</p> <p>2211/19</p> <p>2211/21</p> <p>2211/24</p> <p>2212/14</p> <p>2212/16</p> <p>2213/21</p> <p>2214/23</p> <p>2217/7</p>	<p>2217/14</p> <p>2228/6</p> <p>2242/24</p> <p>2247/13</p> <p>2247/17</p> <p>2248/19</p> <p>2249/13</p> <p>2250/19</p> <p>2260/5 2260/8</p> <p>2260/13</p> <p>2274/10</p> <p>2282/20</p> <p>2286/24</p> <p>2291/16</p> <p>2294/13</p> <p>2295/25</p> <p>2329/13</p> <p>2331/22</p> <p>2332/5 2332/9</p> <p>2332/14</p> <p>2342/17</p> <p>deck [1]</p> <p>2121/10</p> <p>decks [2]</p>	<p>2297/9</p> <p>2297/10</p> <p>declaration [8]</p> <p>2069/24</p> <p>2070/18</p> <p>2071/1</p> <p>2298/24</p> <p>2300/19</p> <p>2301/18</p> <p>2301/23</p> <p>2302/20</p> <p>declared [5]</p> <p>2163/8 2163/8</p> <p>2206/23</p> <p>2300/9</p> <p>2302/16</p> <p>decline [1]</p> <p>1985/23</p> <p>declined [1]</p> <p>2008/14</p> <p>declining [1]</p> <p>2103/5</p> <p>deduce [1]</p> <p>2183/15</p>
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<p>D</p> <p>deem [1] 2307/7</p> <p>deep [2] 2244/24 2276/4</p> <p>deeper [2] 2168/24 2168/25</p> <p>defeat [1] 2013/7</p> <p>Defects [1] 2210/22</p> <p>defended [1] 2131/11</p> <p>defense [11] 2009/2 2009/7 2009/11 2056/13 2069/12 2091/10 2091/20 2168/17 2196/22</p>	<p>2197/9 2199/11</p> <p>Defense will [1] 2009/7</p> <p>defer [2] 1996/10 2328/1</p> <p>deference [1] 2209/7</p> <p>deferential [1] 2209/4</p> <p>deficit [1] 1998/18</p> <p>deficit/hyperactivity [1] 1998/18</p> <p>define [2] 2042/22 2323/17</p> <p>defined [6] 2042/21 2046/14 2056/5 2056/5 2245/9</p>	<p>2317/22</p> <p>defining [3] 2122/11 2305/17 2313/23</p> <p>definite [4] 2264/25 2265/3 2265/19 2344/23</p> <p>definition [19] 2016/23 2078/13 2110/25 2111/1 2111/14 2112/4 2131/24 2132/24 2133/10 2191/20 2252/14 2276/16 2305/6 2305/7</p>
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<p>D</p> <p>definition... [5] 2305/10 2305/14 2316/1 2318/14 2327/23</p> <p>definitions [2] 2192/1 2318/9</p> <p>definitive [1] 2141/20</p> <p>definitively [1] 2177/11</p> <p>degree [1] 2346/5</p> <p>delay [2] 2009/13 2237/9</p> <p>delete [1] 1999/16</p> <p>deliberation [1] 1988/9</p> <p>deliberations [2] 2297/11</p>	<p>2344/21</p> <p>delictual [1] 2020/6</p> <p>delivered [1] 2258/14</p> <p>delve [1] 2276/11</p> <p>demonstrate [6] 2000/22 2039/3 2043/18 2057/4 2063/8 2286/12</p> <p>demonstrated [13] 1993/1 2001/2 2001/9 2038/16 2038/18 2041/15 2041/22 2057/5 2057/17 2244/19 2284/11</p>	<p>2315/5 2341/22</p> <p>demonstrates [1] 2260/23</p> <p>demonstrating [3] 2015/19 2056/23 2136/4</p> <p>demonstration [5] 2038/19 2041/11 2266/9 2275/16 2341/17</p> <p>demonstratives [1] 2108/4</p> <p>den [3] 1979/5 1979/6 2145/3</p> <p>denial [132] 2007/8 2007/22 2008/11 2013/11 2015/24</p>
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D	2023/23	2150/5
denial... [127]	2024/4	2150/16
2015/25	2024/14	2150/24
2016/3 2016/9	2024/16	2151/3 2151/7
2016/16	2025/15	2152/6 2152/9
2016/19	2026/2 2026/7	2152/15
2016/23	2027/4	2152/18
2016/24	2027/15	2153/12
2017/4	2027/25	2153/13
2017/11	2028/1 2028/9	2153/17
2017/17	2028/11	2154/2 2154/2
2017/20	2029/13	2155/21
2018/7 2018/8	2030/1	2155/25
2018/15	2030/13	2156/6
2018/24	2030/16	2156/20
2019/2 2019/9	2031/8	2157/23
2019/25	2031/17	2159/22
2020/19	2031/25	2159/23
2020/25	2032/12	2160/3
2021/13	2073/7	2162/20
2021/20	2073/20	2166/1
2022/13	2073/24	2167/23
2022/16	2074/3 2132/9	2169/4 2170/3
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does... [81]		
2150/6 2152/3	2196/19	2278/8 2280/8
2154/9	2197/5	2280/12
2158/17	2197/12	2281/3 2282/9
2158/18	2198/23	2282/10
2165/2	2200/3	2284/2 2285/5
2167/15	2200/20	2286/19
2172/10	2202/20	2286/24
2179/14	2203/6 2210/3	2292/23
2179/15	2210/14	2299/3
2180/2	2211/7 2213/5	2300/10
2180/13	2213/6	2301/2 2302/4
2180/25	2233/24	2303/4
2181/5 2182/2	2235/8	2304/16
2184/8	2235/10	2305/17
2185/11	2237/9	2306/16
2185/24	2241/20	2307/18
2187/25	2252/24	2312/12
2194/14	2255/18	2312/15
2196/1	2256/4	2315/15
2196/10	2269/11	2315/24
2196/16	2269/13	2320/14
2196/16	2272/17	2326/9 2327/9
	2272/18	2332/22
	2272/21	2336/24

D	2299/16	2023/3 2024/2
does..... [2]	2307/1	2073/2 2190/5
2341/25	doing [19]	2193/16
2344/17	2002/10	2193/21
doesn't [26]	2047/4	2206/17
1992/6 1998/4	2089/10	2208/6 2209/2
2005/7 2023/5	2105/14	2210/18
2053/15	2109/1 2109/4	2210/19
2059/1 2070/6	2132/17	2220/18
2071/18	2158/1 2158/7	2223/6 2224/7
2091/8	2167/19	2224/7 2240/3
2105/12	2172/11	2240/4
2123/3 2128/6	2185/15	2240/16
2128/10	2185/18	2291/14
2148/4 2154/6	2187/24	2298/19
2173/12	2197/17	2298/23
2196/12	2209/3	2324/25
2202/12	2235/13	2327/8
2233/14	2235/16	2327/12
2234/20	2239/2	2327/13
2234/23	domestic [29]	don't [62]
2237/1	2017/2 2017/4	1987/18
2240/18	2020/5	2000/3 2004/5
2273/16	2021/23	2010/13

D		
don't... [58]	2118/11	2321/1
2011/23	2121/3 2121/9	2323/17
2012/10	2123/8 2140/3	2336/16
2013/24	2141/6	2339/14
2029/8	2141/19	2344/10
2034/24	2142/20	done [22]
2036/4	2153/23	2042/6
2062/10	2154/12	2043/17
2065/2	2154/17	2048/22
2072/14	2159/1	2054/22
2073/3 2074/3	2160/18	2069/22
2074/7	2161/24	2073/23
2078/18	2167/18	2097/3
2089/1 2095/6	2175/16	2115/23
2097/17	2184/1 2193/3	2126/8
2098/3	2220/22	2142/24
2101/13	2222/3 2232/5	2146/14
2101/15	2234/7	2158/3
2101/24	2235/15	2184/11
2108/6 2109/5	2243/10	2192/3 2213/8
2109/8	2243/11	2228/23
2109/11	2246/11	2231/13
2113/24	2304/6	2307/4
	2317/19	2307/14

<p>D</p> <p>done... [3] 2311/17 2345/12 2345/23</p> <p>door [1] 2018/5</p> <p>dosed [1] 2065/15</p> <p>dots [1] 2098/8</p> <p>double [2] 2118/8 2178/15</p> <p>double-counte d [1] 2118/8</p> <p>doubt [9] 2004/15 2051/5 2069/1 2250/16 2257/8 2258/15 2260/25 2261/2 2314/8</p>	<p>doubts [1] 2263/23</p> <p>Douglas [5] 2020/10 2020/13 2020/18 2028/4 2208/24</p> <p>Douglas' [2] 2019/16 2025/9</p> <p>down [17] 2062/9 2068/5 2113/25 2144/3 2158/22 2160/8 2175/9 2176/14 2192/9 2201/6 2235/23 2265/7 2265/21 2268/14 2273/25</p>	<p>2320/21 2328/15</p> <p>downstairs [1] 2345/17</p> <p>Dr. [20] 2050/2 2055/9 2164/14 2213/13 2247/9 2247/22 2247/25 2248/23 2249/4 2250/6 2273/8 2278/24 2279/2 2279/22 2279/24 2280/9 2280/13 2293/2 2293/4 2342/14</p> <p>Dr. Brisebois [2] 2279/22</p>
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D	2248/23	2162/4
Dr.	drafted [2]	2162/23
Brisebois...	2091/8 2094/6	2212/24
[1] 2279/24	drafters [1]	2213/4
Dr. Brisebois'	2148/9	2228/12
[2] 2250/6	drafting [2]	2247/7
2280/9	2288/23	2258/24
Dr. Gervais [1]	2295/15	2269/18
2213/13	dramatic [27]	2276/19
Dr. Gillen [6]	2004/18	2323/3 2340/1
2050/2 2055/9	2007/11	2340/10
2273/8 2293/2	2007/24	dramatically
2293/4	2015/20	[8] 2002/24
2342/14	2037/5	2058/11
Dr. Levin [8]	2040/15	2066/1 2066/2
2164/14	2048/13	2120/15
2247/9	2056/1	2121/7
2247/22	2057/22	2123/14
2247/25	2060/20	2213/9
2249/4	2121/17	draw [10]
2278/24	2121/25	2176/22
2279/2	2160/15	2177/5
2280/13	2160/21	2195/24
Dr. Levin's [1]	2161/18	2234/21

D	2250/9 2314/2	2120/16
draw... [6]	driving [1]	2120/17
2237/16	2313/16	2121/21
2254/12	dropped [1]	2131/25
2259/13	2188/21	2138/1
2267/11	drug [3]	2141/23
2284/17	2005/5 2052/2	2152/7
2285/8	2241/11	2209/24
drawn [3]	drugs [3]	2209/25
2133/15	2005/9	2210/10
2248/19	2005/25	2230/22
2285/5	2029/8	2295/14
draws [3]	DS350 [1]	dumping [2]
2025/11	2101/23	2102/4 2102/5
2248/24	DS362 [1]	Dunwoodie [1]
2258/10	2101/22	2323/14
drew [3]	due [19]	during [29]
2264/23	2016/6	1988/5
2326/3	2027/10	2003/15
2326/11	2057/14	2004/7 2005/1
drive [2]	2071/22	2022/6
1981/12	2115/17	2039/13
2288/22	2115/20	2045/11
driven [2]	2120/16	2046/21

<p>D</p> <p>during... [21] 2049/13 2050/9 2061/13 2086/22 2096/16 2106/17 2136/5 2137/6 2137/22 2138/9 2138/25 2140/25 2149/4 2214/22 2224/13 2230/13 2299/20 2306/18 2333/20 2335/16 2336/13</p> <p>dust [1] 2214/8</p>	<p>dusting [1] 2047/3</p> <p>dusting-off [1] 2047/3</p> <p>duty [1] 2026/16</p> <p>dynamic [2] 2313/12 2313/13</p> <hr/> <p>E</p> <p>each [37] 1996/1 1997/6 2019/11 2033/19 2035/11 2036/11 2036/22 2036/24 2036/24 2036/25 2038/11 2042/15 2055/25 2057/20</p>	<p>2072/8 2099/24 2126/13 2126/22 2128/22 2130/5 2130/17 2130/22 2135/25 2144/7 2144/9 2201/15 2244/25 2248/15 2257/8 2276/3 2284/3 2289/19 2297/9 2310/1 2331/13 2332/23 2341/1</p> <p>eagerly [1] 2074/16</p> <p>earlier [25] 2002/21</p>
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<p>E</p> <p>earlier... [24] 2045/9 2074/9 2094/11 2094/14 2100/25 2129/6 2129/8 2129/10 2132/18 2137/24 2141/7 2148/14 2161/19 2162/16 2171/5 2200/14 2212/9 2235/9 2256/9 2280/6 2299/1 2300/8 2336/24 2343/2</p> <p>early [2] 2274/4 2281/25</p>	<p>easily [2] 2168/19 2190/4</p> <p>easy [1] 2187/23</p> <p>economic [1] 2181/24</p> <p>EDF [1] 2191/22</p> <p>editorial [1] 2258/8</p> <p>Education [1] 2216/20</p> <p>effect [12] 2039/9 2070/12 2082/14 2095/8 2115/1 2115/5 2115/22 2115/25 2117/10 2121/14 2121/24</p>	<p>2194/8</p> <p>effective [2] 2006/20 2063/3</p> <p>effectively [1] 2021/10</p> <p>effectiveness [5] 1992/6 2043/22 2048/21 2052/2 2066/21</p> <p>effects [10] 1992/2 1992/25 2114/14 2119/16 2241/4 2337/6 2337/13 2340/4 2340/4 2340/8</p> <p>efficacy [3] 1992/12 2051/7</p>
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E	2109/3 2126/3	elegant [1]
efficacy... [1]	2141/20	2158/6
2051/22	2144/1 2165/9	element [26]
efficiency [1]	2200/8	1997/6
2009/24	2210/23	2033/19
efforts [2]	2237/8	2034/12
2147/19	2254/17	2035/2 2035/3
2295/22	2280/7	2035/11
egregious [4]	2281/13	2036/8
2017/10	2290/3 2308/7	2036/22
2026/4 2179/1	2345/4	2036/25
2179/4	elaborate [1]	2038/25
eight [2]	2086/19	2042/15
2118/5	elaborated [2]	2042/17
2148/13	2283/16	2042/19
Eileen [1]	2317/22	2043/13
1980/20	elaborating [1]	2048/10
either [22]	2325/1	2052/19
1987/4 1987/5	elaboration [1]	2054/2
1987/10	2214/3	2055/25
2023/6	Electric [1]	2056/3 2072/1
2045/15	2039/23	2178/8
2078/18	electronic [2]	2178/11
2095/1 2098/5	2000/5 2000/7	2197/3 2200/8

E	2052/8 2178/8	elides [1]
element... [2]	2245/1	2026/25
2292/10	2245/16	eliding [1]
2341/1	2246/9	2138/12
elements [31]	2246/17	eliminating [1]
1994/12	2246/19	2165/7
1994/23	2246/22	else [8]
1996/2	2247/1 2262/7	2007/4
1996/12	2287/6	2030/18
1996/13	Electronica [2]	2037/3
1996/18	2131/24	2120/17
1997/2 1997/3	2132/12	2156/3
2033/25	elevate [1]	2209/23
2034/10	2038/4	2231/24
2035/1	elevated [3]	2239/3
2035/16	2036/9	else's [1]
2035/17	2056/25	2194/1
2035/17	2109/13	elsewhere [7]
2035/21	ELEVEN [1]	2018/2
2036/7	1978/3	2059/10
2036/11	Elgin [1]	2065/24
2043/14	1980/16	2134/11
2048/19	ELI [2] 1978/8	2249/5 2249/8
2050/17	2243/8	2285/5

<p>E</p> <p>embarked [1] 2215/17</p> <p>embedded [1] 2089/20</p> <p>embodied [5] 2024/24 2078/8 2089/5 2114/5 2124/2</p> <p>embodiment [1] 2119/5</p> <p>embody [1] 2081/18</p> <p>embraced [2] 2016/12 2124/15</p> <p>emerge [1] 2308/23</p> <p>emerged [1] 2184/3</p> <p>emphasize [1] 2322/20</p> <p>emphasized [2] 2196/25</p>	<p>2317/16</p> <p>enable [3] 2065/8 2271/13 2315/7</p> <p>enablement [19] 2037/14 2064/18 2065/16 2105/16 2106/3 2107/21 2107/24 2108/1 2108/17 2108/17 2108/22 2109/4 2109/17 2109/19 2110/6 2110/10 2299/5 2313/4 2314/24</p>	<p>enablement-sufficient [1] 2065/16</p> <p>encompass [1] 2013/23</p> <p>end [11] 1991/1 2142/11 2167/10 2248/11 2249/22 2276/18 2298/8 2302/3 2303/4 2324/9 2332/3</p> <p>ended [3] 2144/1 2259/5 2267/13</p> <p>endorsing [1] 2249/12</p> <p>enforce [2] 2009/12 2302/25</p> <p>enforceable [1] 2070/2</p>
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E	2251/19	enshrine [1]
engage [7]	2258/11	2202/20
2031/17	2273/13	ensure [3]
2086/25	enhanced [2]	1985/5 2037/8
2090/16	2065/7	2214/15
2092/20	2065/20	ensured [1]
2235/8	enjoyable [3]	2164/13
2235/10	2114/12	entail [1]
2291/12	2120/20	2179/23
engaged [6]	2346/9	entails [1]
2031/22	enjoyed [1]	2189/22
2088/14	2299/20	entered [7]
2101/11	enough [12]	2023/10
2102/12	2001/2	2101/8
2229/9 2247/1	2017/15	2103/11
engages [1]	2043/17	2106/16
2024/8	2075/15	2106/18
engaging [1]	2092/23	2181/10
2144/19	2210/20	2234/25
England [2]	2210/24	entering [1]
2143/11	2232/14	2260/25
2308/5	2258/3	entertain [1]
English [4]	2261/22	2112/23
2052/20	2265/8 2341/4	entertained [2]
		2153/13

<p>E</p> <p>entertained... [1] 2260/7</p> <p>entire [10] 2042/21 2149/4 2212/17 2215/22 2230/22 2244/15 2287/11 2300/12 2315/22 2328/13</p> <p>entirely [6] 2019/8 2024/5 2109/15 2223/10 2252/18 2267/23</p> <p>entirety [2] 2228/11 2338/16</p> <p>entities [1]</p>	<p>2175/15</p> <p>entitled [6] 2018/11 2068/6 2138/17 2190/22 2209/24 2209/25</p> <p>entitlement [1] 2112/12</p> <p>entry [2] 2276/5 2334/10</p> <p>environment [1] 2110/3</p> <p>Environmenta I [1] 2339/4</p> <p>EPS [1] 1992/24</p> <p>equally [6] 2083/11 2099/14 2182/13 2283/10</p>	<p>2286/2 2342/13</p> <p>equates [1] 2280/15</p> <p>equipped [1] 2293/8</p> <p>equitable [14] 2018/3 2025/21 2027/11 2027/14 2027/22 2124/13 2125/9 2125/14 2177/10 2179/17 2179/19 2181/19 2182/15 2183/1</p> <p>equivalent [1] 2329/2</p> <p>erase [1]</p>
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<p>E</p> <p>erase... [1] 2115/24</p> <p>erased [1] 2070/17</p> <p>errata [2] 2000/9 2058/12</p> <p>erred [1] 2332/8</p> <p>error [2] 2023/20 2148/20</p> <p>errors [3] 2017/8 2329/23 2329/23</p> <p>Erstling [8] 2080/14 2081/13 2111/3 2147/9 2270/4 2295/13 2319/7 2322/5</p>	<p>Erstling's [3] 2296/3 2335/15 2335/17</p> <p>escalated [1] 2137/14</p> <p>escrow [1] 2022/22</p> <p>especially [12] 2030/13 2052/3 2059/20 2143/11 2216/1 2216/13 2228/1 2234/5 2278/22 2306/4 2341/19 2346/4</p> <p>essence [3] 2022/1 2160/5 2332/1</p> <p>essential [2]</p>	<p>2052/18 2290/7</p> <p>essentially [8] 2088/10 2101/14 2156/3 2199/21 2232/4 2302/8 2305/22 2325/5</p> <p>Essex [1] 1979/15</p> <p>establish [33] 2041/10 2043/23 2061/6 2067/17 2096/1 2097/2 2097/23 2107/13 2115/2 2166/23 2173/23 2179/11</p>
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<p>E</p> <p>establish... [21] 2182/6 2182/17 2187/20 2187/24 2188/4 2198/23 2200/3 2200/21 2206/24 2207/13 2250/10 2278/5 2278/7 2303/12 2305/23 2306/1 2311/8 2312/15 2324/4 2330/6 2341/15</p> <p>established [20] 1994/19 2040/16 2040/23</p>	<p>2043/16 2053/19 2077/19 2178/5 2179/10 2258/25 2266/9 2266/14 2266/23 2267/7 2269/22 2286/17 2292/12 2303/6 2303/15 2310/20 2320/10</p> <p>establishes [8] 2077/18 2086/24 2101/4 2106/25 2107/3 2107/9 2124/21</p>	<p>2309/19</p> <p>establishing [3] 2165/11 2269/15 2313/10</p> <p>esteemed [1] 2263/10</p> <p>estimate [1] 2167/11</p> <p>estopped [2] 2235/13 2235/16</p> <p>estoppel [6] 2175/6 2176/7 2176/12 2235/10 2235/17 2235/19</p> <p>et [1] 2117/4</p> <p>et cetera [1] 2117/4</p> <p>eternally [1] 2128/23</p> <p>Eurocopter [4] 2117/21</p>
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E	2037/24	2156/18
Eurocopter...	2039/1 2042/7	2159/18
[3] 2119/3	2043/7	2160/9
2279/17	2044/16	2162/19
2279/25	2045/9 2048/8	2162/21
evaluate [2]	2051/21	2162/22
2090/25	2052/16	2162/25
2233/7	2052/19	2163/12
evaluated [1]	2056/9 2056/9	2163/16
2230/21	2063/13	2165/23
evaluating [2]	2063/14	2166/11
2084/9 2089/3	2063/17	2166/21
even [101]	2070/4	2167/2
1988/16	2080/13	2180/10
1995/12	2084/23	2180/25
2000/24	2116/19	2181/25
2003/14	2117/1 2117/8	2183/2 2189/5
2010/25	2117/8	2195/9 2208/5
2014/15	2118/12	2211/25
2015/11	2126/10	2216/4
2018/19	2133/21	2222/15
2029/9	2135/20	2223/9
2029/22	2145/16	2235/21
2032/14	2151/11	2239/23

<p>E</p> <p>even... [36]</p> <p>2240/17</p> <p>2243/2 2248/3</p> <p>2253/1 2253/4</p> <p>2261/24</p> <p>2267/7</p> <p>2267/14</p> <p>2267/25</p> <p>2269/25</p> <p>2273/4 2275/9</p> <p>2276/7 2278/6</p> <p>2280/11</p> <p>2286/22</p> <p>2292/1</p> <p>2292/11</p> <p>2293/20</p> <p>2295/5 2296/9</p> <p>2299/2 2301/2</p> <p>2301/14</p> <p>2302/4</p> <p>2302/25</p> <p>2303/6 2307/8</p> <p>2309/7 2312/5</p>	<p>2317/19</p> <p>2319/9 2327/8</p> <p>2327/16</p> <p>2329/19</p> <p>2337/21</p> <p>evening [1]</p> <p>1987/20</p> <p>event [1]</p> <p>2173/7</p> <p>ever [9]</p> <p>2031/14</p> <p>2147/16</p> <p>2161/1 2292/4</p> <p>2296/8 2319/6</p> <p>2319/8</p> <p>2326/16</p> <p>2332/11</p> <p>ever-evolving [1] 2292/4</p> <p>every [29]</p> <p>2046/1 2056/2</p> <p>2061/2</p> <p>2062/15</p> <p>2067/10</p>	<p>2088/23</p> <p>2088/25</p> <p>2097/21</p> <p>2100/11</p> <p>2133/24</p> <p>2136/21</p> <p>2161/8</p> <p>2161/23</p> <p>2162/2</p> <p>2177/16</p> <p>2215/23</p> <p>2216/1 2216/7</p> <p>2248/15</p> <p>2249/1 2269/2</p> <p>2283/6 2292/5</p> <p>2300/10</p> <p>2306/7 2325/2</p> <p>2325/4 2325/6</p> <p>2332/11</p> <p>every-day [2]</p> <p>2162/2 2306/7</p> <p>everybody [2]</p> <p>2226/5</p> <p>2270/19</p>
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E	2015/19	2063/11
everyone [2]	2027/9 2038/5	2103/3 2103/5
2112/12	2038/5	2103/21
2297/25	2040/19	2103/23
everything [9]	2041/14	2115/9
2067/4	2041/24	2119/15
2067/17	2045/21	2128/17
2071/18	2048/11	2133/23
2095/16	2049/2 2049/3	2135/12
2146/2	2050/7	2135/21
2235/24	2051/13	2135/25
2301/20	2051/19	2136/5 2137/5
2309/10	2051/23	2149/1 2149/7
2345/25	2052/3 2052/5	2149/7
evidence [138]	2054/3 2055/5	2151/19
1991/20	2055/20	2161/11
1992/10	2056/11	2161/14
1996/8 1999/6	2057/2 2057/6	2162/11
1999/7	2060/22	2164/18
2000/20	2060/24	2166/16
2000/23	2061/14	2166/22
2001/8 2003/1	2061/21	2181/15
2003/5 2003/7	2061/22	2185/9 2186/2
2005/22	2063/5	2186/4 2186/5

E		
evidence...	2262/15	2285/18
[68] 2199/10	2264/13	2288/21
2210/9 2211/2	2266/15	2293/11
2212/3	2266/22	2293/12
2230/17	2267/5	2293/16
2231/8	2267/23	2293/25
2244/18	2268/4	2294/2 2304/9
2244/22	2268/22	2307/18
2245/5	2269/6	2307/20
2246/19	2269/10	2307/21
2248/15	2269/12	2307/22
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2310/21	excerpt [1]	2024/5
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	exclusive [10]	2222/1 2222/7

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<p>E</p> <p>existed... [14] 2063/14 2069/6 2070/16 2136/3 2153/5 2160/20 2202/10 2211/23 2216/9 2251/5 2269/24 2325/7 2325/10 2343/2</p> <p>existence [9] 2037/25 2187/15 2229/5 2251/2 2251/24 2255/19 2257/5 2259/22 2343/6</p> <p>existing [7]</p>	<p>2047/1 2071/11 2138/3 2230/21 2282/25 2331/6 2331/23</p> <p>exists [7] 2040/21 2068/9 2178/16 2182/11 2187/7 2235/21 2284/12</p> <p>exorbitant [1] 2021/7</p> <p>expand [2] 2128/18 2172/11</p> <p>expect [8] 2043/11 2139/11 2139/12</p>	<p>2161/21 2165/20 2190/22 2294/5 2344/17</p> <p>expectation [4] 2057/12 2138/11 2194/16 2295/7</p> <p>expectations [40] 2028/3 2065/19 2094/21 2110/22 2129/23 2130/9 2131/1 2131/8 2134/6 2134/7 2134/19 2135/10 2135/13 2135/16 2135/24</p>
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<p>E</p> <p>expectations..</p> <p>. [25] 2136/2</p> <p>2164/7</p> <p>2165/14</p> <p>2165/15</p> <p>2165/19</p> <p>2187/7 2190/8</p> <p>2190/9</p> <p>2190/15</p> <p>2191/1</p> <p>2191/14</p> <p>2194/12</p> <p>2194/13</p> <p>2202/10</p> <p>2277/24</p> <p>2291/21</p> <p>2292/9</p> <p>2292/13</p> <p>2292/18</p> <p>2293/23</p> <p>2295/6</p> <p>2295/10</p> <p>2296/15</p>	<p>2335/22</p> <p>2343/3</p> <p>expected [2]</p> <p>2137/16</p> <p>2291/22</p> <p>expects [1]</p> <p>2292/3</p> <p>experience [3]</p> <p>2146/12</p> <p>2149/9</p> <p>2270/18</p> <p>experiences</p> <p>[1] 2281/14</p> <p>experiencing</p> <p>[1] 2120/25</p> <p>experiments</p> <p>[1] 2293/8</p> <p>expert [46]</p> <p>2006/2</p> <p>2038/24</p> <p>2044/12</p> <p>2046/23</p> <p>2049/13</p> <p>2050/4</p>	<p>2054/23</p> <p>2055/9</p> <p>2057/25</p> <p>2058/13</p> <p>2062/3 2062/9</p> <p>2062/21</p> <p>2062/22</p> <p>2066/11</p> <p>2071/5 2135/5</p> <p>2145/13</p> <p>2145/15</p> <p>2146/6</p> <p>2146/19</p> <p>2147/3</p> <p>2147/10</p> <p>2164/14</p> <p>2214/9 2246/9</p> <p>2249/12</p> <p>2250/22</p> <p>2252/16</p> <p>2255/6</p> <p>2266/20</p> <p>2266/24</p> <p>2269/4 2270/4</p>
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2272/9	2058/20	2135/16
2280/13	2087/1	2137/22
2280/19	2149/13	2147/5
2283/4	2150/20	2147/11
2284/25	2160/9	2150/11
2286/4	2160/17	2151/15
2288/25	2165/13	2170/21
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2022/3	2089/12	2300/11
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2025/25	2092/15	2301/1 2303/8
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2029/9	2092/22	2327/8
2029/12	2166/3 2168/1	2327/14
2078/12	2193/11	2334/25
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2082/3 2082/4	2194/2	2339/11
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2302/6	2087/23	2233/16
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1989/22	2093/5	2273/18
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1985/5	2093/13	2327/14
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2285/16	2171/2	extraordinaril
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2147/23	2037/19	2129/5
2183/10	2038/23	2130/13
2252/12	2049/9	2130/23
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1991/18	2061/11	2155/25
1996/13	2061/20	2157/11
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2201/16	2260/16	2331/15
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2215/13	2292/1	2194/10
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2235/11	2303/22	facts [28]
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2273/12	2271/23	2150/18
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2278/7 2281/5	2273/17	2162/24
2281/7 2291/9	2275/10	2166/12
2292/11	2275/20	2167/4 2188/6
2335/3 2336/1	2276/15	2202/2
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fails [7]	2124/13	2058/21
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2151/13	2125/14	2127/8 2191/4
2153/19	2132/10	2220/16
2154/3	2150/10	2225/7
2163/14	2177/10	fallen [1]
2188/4 2266/3	2179/17	2004/21
failure [10]	2179/19	falling [1]
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2149/22	2182/15	falls [6]
2150/15	2183/1	2098/25
2157/4 2190/9	2209/16	2126/18
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2211/25	2211/3	2237/22
2223/13	2211/12	2273/5
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2052/25	2152/25	2058/25
2053/1 2053/4	2156/1 2158/6	2071/4
2053/16	2250/2 2250/4	Federal [23]
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2242/3	2264/4	2214/23
2244/16	2264/15	2214/24
2251/20	2285/2	2215/5
2252/10	2312/18	2228/16
2258/11	2344/1	2237/11
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familiar [3]	2113/25	2239/22
2079/21	2315/24	2247/13
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2294/6	1992/2	2255/22
famous [2]	2337/21	2261/23
2251/8	fatal [1]	2263/2
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2268/20	2075/20	2120/20
2290/23	2086/18	2120/23
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2295/21	2005/13	2053/20
2296/1	filing [59]	2056/11
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2034/23	1992/11	2061/21
2036/19	1993/2 1999/6	2061/21
2037/19	1999/7	2063/4 2103/3
2039/10	2000/20	2103/21
2040/4	2000/23	2246/19
2042/11	2000/25	2259/1 2259/2
2048/5	2001/8	2260/21
2054/23	2008/13	2261/6
2054/25	2038/4	2264/13
2062/2	2040/17	2265/7
2063/14	2043/17	2266/10
2066/22	2043/24	2266/15
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2269/16	2181/5 2190/7	2142/25
2276/5 2284/8	2207/15	2156/23
2284/12	2249/14	2156/24
2285/14	2288/19	2180/14
2286/18	2290/4	2181/6 2202/9
2314/22	2291/19	2202/13
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2341/23	financial [3]	2207/9
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2096/11	2268/23	2100/4 2299/3
2096/21	2274/10	2300/22
2098/1	2298/18	fine [5]
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2114/21	2117/17	2223/12
2114/23	2118/7	2300/4
2114/25	2210/24	2330/22
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2106/21	2161/2	2259/7
2118/7	2172/18	2261/25
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2026/9	2065/7 2069/3	2115/23
2026/20	2069/8	2119/12
2028/10	2069/23	2119/16
2028/21	2071/3 2071/7	2120/18
2032/14	2071/15	2124/11
2035/3 2035/4	2071/20	2124/12
2038/6	2077/8 2080/7	2126/16
2038/20	2081/23	2126/24
2038/22	2085/5	2127/6
2041/24	2085/16	2127/25
2048/15	2085/24	2128/16
2048/19	2087/9	2131/10
2053/20	2095/25	2131/11

H	2160/21	2195/16
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2131/13	2162/24	2197/5 2197/6
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2132/20	2165/8	2199/18
2133/4	2166/22	2203/7 2204/2
2133/18	2166/24	2205/4
2134/4 2135/5	2169/8 2170/3	2205/11
2135/20	2177/16	2206/9
2135/23	2177/18	2206/13
2136/4 2136/5	2178/8	2206/20
2140/20	2180/19	2207/17
2140/22	2181/9	2208/3
2141/3	2183/20	2208/12
2147/15	2184/16	2208/16
2149/23	2188/6	2208/18
2150/5	2189/17	2208/25
2150/16	2189/18	2210/18
2150/17	2190/8	2211/5 2212/5
2153/11	2193/11	2212/10
2155/8 2156/1	2193/19	2212/13
2156/17	2193/23	2217/17
2157/9 2159/4	2194/6	2218/2
2159/7	2194/14	2223/25

H	2253/2 2253/4	2284/18
has..... [118]	2253/22	2287/9
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2227/19	2258/19	2291/9
2227/20	2259/16	2291/19
2228/21	2264/6	2291/24
2228/21	2264/10	2291/24
2233/5 2233/8	2265/3	2292/2
2235/17	2265/10	2292/12
2237/6	2266/2	2292/14
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2240/18	2266/19	2293/22
2241/21	2266/24	2295/5
2241/21	2267/4 2269/7	2296/14
2242/4	2273/23	2296/17
2244/19	2275/25	2298/13
2244/22	2276/19	2298/18
2245/7	2277/16	2299/2
2245/10	2277/24	2300/16
2247/7 2249/5	2277/25	2300/24
2249/7 2249/9	2278/4 2278/7	2300/25
2250/10	2280/21	2303/6 2303/6
2250/23	2281/20	2303/13
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<p>H</p> <p>has..... [41] 2303/22 2303/24 2304/20 2305/23 2306/1 2307/15 2308/13 2309/12 2310/7 2310/9 2311/15 2312/12 2315/25 2316/12 2317/2 2317/16 2320/5 2321/17 2321/24 2324/8 2324/18 2325/19 2325/23</p>	<p>2326/16 2326/23 2328/7 2328/18 2328/18 2330/1 2330/19 2332/11 2332/23 2340/9 2341/19 2342/25 2343/24 2344/16 2344/16 2344/21 2345/12 2346/8 hasn't [1] 2303/15 haul [1] 2340/18 have [467] haven't [1]</p>	<p>2234/15 having [11] 1995/25 2046/25 2064/25 2070/20 2075/8 2075/14 2100/19 2160/15 2184/15 2232/11 2257/12 Hayhurst [1] 2294/16 he [145] 1992/16 2000/12 2004/4 2004/25 2005/8 2005/15 2005/15 2005/16</p>
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he... [137]	2117/14	2147/5 2147/7
2005/22	2119/23	2147/11
2005/23	2119/24	2147/11
2005/24	2120/1 2120/2	2147/12
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2020/14	2120/13	2147/15
2020/15	2120/14	2147/19
2039/1	2120/17	2147/22
2044/16	2137/2 2137/4	2147/23
2044/17	2145/16	2149/5 2149/6
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2050/4	2145/25	2192/25
2055/13	2146/1 2146/2	2202/4 2209/3
2055/17	2146/3 2146/3	2217/1 2226/5
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2095/15	2146/12	2229/11
2095/16	2146/13	2229/16
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2103/4	2146/20	2231/3
2103/18	2146/20	2231/25
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he..... [54]	2269/23	he'd [2]
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2246/19	2271/18	2275/18
2246/21	2278/16	head [2]
2250/25	2279/2 2279/3	2157/1 2193/4
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2252/20	2294/12	2285/23
2252/22	2295/15	2286/2
2252/25	2295/21	2318/14
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2256/12	2317/19	2130/2 2130/5
2261/10	2322/8	2130/13
2262/8	2323/14	2130/16
2264/10	2326/6	2130/17
2265/5	2339/10	hear [11]
2266/24	2339/13	2007/4
2266/25	2341/13	2010/16

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2076/13	2160/25	2290/8
2172/8	2167/9	2292/14
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2321/9 2323/1	2188/16	2298/16
heard [62]	2189/3	2308/6
1989/17	2190/12	2309/11
1989/18	2208/24	2329/15
1989/20	2234/6	2329/16
1989/22	2234/20	2329/24
2034/8	2244/18	2330/18
2039/12	2244/22	2341/6 2342/5
2042/20	2245/5	2342/21
2045/1 2050/9	2248/25	hearing [48]
2052/14	2249/17	1983/2 1983/6
2053/7 2066/4	2250/17	1985/12
2071/6 2106/3	2252/6	1985/15
2111/23	2260/23	1985/16
2117/2 2117/2	2261/8	1985/20
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<p>H</p> <p>hearing... [40]</p> <p>1989/4</p> <p>1993/11</p> <p>2009/9</p> <p>2014/14</p> <p>2015/9</p> <p>2045/12</p> <p>2069/4 2096/6</p> <p>2098/5</p> <p>2135/22</p> <p>2136/5</p> <p>2140/15</p> <p>2141/12</p> <p>2141/13</p> <p>2141/22</p> <p>2150/25</p> <p>2151/4</p> <p>2151/11</p> <p>2151/20</p> <p>2160/14</p> <p>2166/17</p> <p>2178/23</p> <p>2189/4 2211/3</p>	<p>2212/13</p> <p>2228/9</p> <p>2230/18</p> <p>2238/6</p> <p>2259/25</p> <p>2275/24</p> <p>2293/12</p> <p>2293/24</p> <p>2301/6 2320/4</p> <p>2320/22</p> <p>2339/8</p> <p>2344/14</p> <p>2344/23</p> <p>2346/10</p> <p>2346/12</p> <p>hearings [1]</p> <p>1985/10</p> <p>heart [4]</p> <p>2010/17</p> <p>2238/3</p> <p>2238/23</p> <p>2266/2</p> <p>heavily [2]</p> <p>2023/7 2247/6</p>	<p>heightened</p> <p>[23] 1991/23</p> <p>1992/8</p> <p>1992/10</p> <p>2000/12</p> <p>2000/19</p> <p>2000/21</p> <p>2000/24</p> <p>2002/4 2038/8</p> <p>2038/21</p> <p>2048/25</p> <p>2051/13</p> <p>2053/22</p> <p>2054/4 2064/3</p> <p>2064/15</p> <p>2065/6 2114/2</p> <p>2255/1 2261/3</p> <p>2314/6</p> <p>2314/15</p> <p>2323/5</p> <p>held [24]</p> <p>2023/14</p> <p>2027/21</p> <p>2042/5</p>
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<p>H</p> <p>held... [21] 2047/12 2051/10 2054/11 2059/18 2060/10 2081/14 2127/8 2188/8 2206/10 2222/16 2229/22 2249/8 2251/20 2255/10 2256/5 2257/10 2258/2 2264/21 2264/24 2275/12 2287/15 help [4] 1998/5</p>	<p>2151/25 2169/6 2197/19 helpful [9] 2142/22 2142/25 2174/14 2204/19 2204/25 2283/2 2320/21 2322/18 2326/12 helping [1] 2139/5 HENDERSON [1] 1980/15 her [8] 2075/14 2075/14 2121/21 2148/5 2148/14 2148/15</p>	<p>2148/19 2320/24 here [137] 1985/19 1988/7 2002/20 2015/18 2019/4 2021/7 2021/14 2021/23 2030/10 2033/6 2040/7 2040/24 2041/6 2043/2 2046/13 2047/4 2058/6 2070/11 2071/11 2073/1 2074/15 2076/8 2076/22 2077/9 2077/10</p>
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H	2133/16	2188/23
here... [112]	2134/8	2194/13
2081/13	2134/12	2195/4
2083/6	2134/19	2195/24
2083/11	2135/8 2137/4	2208/22
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2084/10	2138/14	2212/25
2084/16	2144/12	2213/8 2213/9
2088/8	2146/10	2215/16
2089/23	2149/4 2149/5	2219/2
2091/25	2149/15	2225/11
2094/22	2150/5 2150/6	2225/12
2104/17	2151/10	2226/24
2105/23	2156/24	2227/23
2110/19	2158/7 2158/8	2232/6 2234/2
2112/13	2158/12	2236/12
2114/7 2120/8	2159/8 2163/1	2237/11
2124/9 2125/7	2169/7 2169/8	2237/13
2126/17	2170/13	2241/22
2127/19	2171/13	2242/12
2129/19	2173/19	2243/5
2129/25	2175/13	2245/19
2131/6	2188/7	2246/23
2132/23	2188/16	2248/8

<p>H</p> <p>here..... [32]</p> <p>2248/17</p> <p>2250/5</p> <p>2278/23</p> <p>2283/22</p> <p>2285/21</p> <p>2286/12</p> <p>2286/24</p> <p>2289/16</p> <p>2289/18</p> <p>2292/10</p> <p>2311/1 2312/8</p> <p>2319/4 2319/5</p> <p>2322/12</p> <p>2325/10</p> <p>2325/23</p> <p>2328/7</p> <p>2328/14</p> <p>2328/16</p> <p>2328/19</p> <p>2329/2 2330/1</p> <p>2331/25</p> <p>2334/25</p>	<p>2335/6</p> <p>2335/18</p> <p>2336/17</p> <p>2338/3</p> <p>2340/10</p> <p>2345/17</p> <p>2345/25</p> <p>herring [1]</p> <p>2207/23</p> <p>hesitant [1]</p> <p>2095/14</p> <p>hey [1] 2240/8</p> <p>high [10]</p> <p>2048/20</p> <p>2061/8</p> <p>2066/20</p> <p>2179/10</p> <p>2221/15</p> <p>2236/17</p> <p>2256/24</p> <p>2306/17</p> <p>2306/23</p> <p>2346/5</p> <p>higher [8]</p>	<p>2037/2 2037/2</p> <p>2051/19</p> <p>2063/2 2063/7</p> <p>2133/20</p> <p>2249/9 2249/9</p> <p>highlight [3]</p> <p>1992/7</p> <p>2267/11</p> <p>2267/16</p> <p>highly [2]</p> <p>2245/15</p> <p>2255/9</p> <p>Hilda [1]</p> <p>1980/21</p> <p>him [4] 2125/1</p> <p>2146/16</p> <p>2147/15</p> <p>2279/3</p> <p>himself [2]</p> <p>2313/18</p> <p>2317/19</p> <p>his [69]</p> <p>2004/4 2004/6</p> <p>2004/7 2005/1</p>
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2017/6	2161/23	2286/5
2020/16	2213/19	2294/19
2044/17	2214/9	2296/5
2049/18	2247/14	2313/21
2062/22	2250/22	2322/6 2326/3
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2071/5	2250/25	2336/15
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2120/10	2255/6 2256/9	2250/13
2120/13	2256/16	2252/12
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2315/22	holes [1]	2297/2
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2156/19	holistic [1]	2328/5
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2215/19	2346/11	2164/3

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2287/17	2081/22	2166/7 2169/5
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1989/25	2098/13	2172/12
1990/6	2107/7	2174/7 2178/4
1997/18	2108/21	2181/9
1997/19	2112/13	2183/11
1998/15	2112/14	2210/3 2211/7
2003/17	2112/18	2213/13
2005/24	2126/1 2128/7	2224/19
2012/21	2131/10	2225/16
2016/18	2139/22	2229/13
2027/18	2143/2	2229/16
2038/10	2143/24	2231/14
2039/11	2146/19	2233/3
2041/18	2146/25	2233/18
2042/24	2147/11	2233/24
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2048/15	2149/16	2236/19
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2302/17	Hughes [2]	2035/13
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however [9]	1979/8	hypotheticals
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2130/14	2120/6	1994/14
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2095/10	2298/7	2067/16
2096/4 2101/5	2298/12	2075/12
2105/17	2300/21	2076/15
2114/10	2301/9	2076/20
2218/23	2303/19	2077/15
2219/5	2306/14	2077/15
2234/13	2307/16	2080/18
2301/7	2308/18	2092/11
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2340/20	2316/6 2318/1	2101/24
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2174/6	2329/2 2329/5	2265/5 2266/4
2176/21	2344/15	ideal [1]
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2219/1	i.e [1] 2087/6	[1] 2330/5
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2301/13	2345/14	2193/19
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2276/10	2131/2 2331/1	2029/21
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2007/22	2095/18	2186/5
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2235/3 2236/1	1991/13	2256/25
2238/8	2012/13	2306/17
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<p>M</p> <p>mark [4] 1981/6 2278/15 2279/10 2317/5</p> <p>marked [4] 2050/2 2060/16 2061/6 2063/20</p> <p>markedly [1] 1992/1</p> <p>marker [1] 2320/21</p> <p>market [4] 2005/25 2097/11 2235/1 2338/20</p> <p>markets [1] 2229/14</p> <p>marks [1] 2056/1</p>	<p>MARNEY [1] 1980/5</p> <p>Martel [1] 1981/18</p> <p>Massachusetts [3] 2000/25 2025/3 2207/6</p> <p>massive [1] 2326/24</p> <p>materia [4] 2304/22 2304/25 2316/18 2317/13</p> <p>material [9] 2052/25 2053/8 2190/22 2230/20 2230/24 2230/25 2231/1 2231/6 2316/8</p> <p>materiality [1]</p>	<p>2053/21</p> <p>materials [1] 2057/11</p> <p>Math [1] 2278/21</p> <p>mathematical [1] 2164/13</p> <p>Mathieson [4] 2273/13 2273/15 2273/17 2273/19</p> <p>matter [53] 1978/3 1996/13 2010/6 2010/18 2013/20 2014/15 2014/16 2015/10 2015/12 2015/13 2032/20</p>
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M		
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2044/22	2217/17	1983/4
2060/19	2234/23	1984/24
2063/18	2237/2	1985/10
2063/23	2237/15	1985/10
2064/14	2240/4	1985/15
2068/25	2240/15	1986/6
2073/2	2240/16	1989/13
2073/22	2240/18	1993/10
2104/2	2241/20	1996/24
2105/12	2255/8 2267/9	2007/18
2149/22	2267/15	2012/6 2012/6
2150/1	2274/6	2015/7
2150/18	2295/24	2030/25
2153/20	2313/3	2031/4 2031/7
2154/3 2155/6	2316/22	2031/10
2155/11	2340/5 2344/6	2031/16
2155/16	2345/14	2032/4
2169/11	matters [6]	2037/25
2172/24	1989/5	2043/6
2187/23	2041/23	2043/23
2204/15	2173/19	2043/25
2209/23	2196/1 2231/4	2050/25
	2250/12	2051/17
	may [83]	2051/22

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may... [57]	2141/9	2323/6 2323/6
2052/3 2062/7	2141/18	2323/8 2332/4
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2073/11	2171/16	2267/6
2076/1	2172/13	maybe [9]
2076/15	2181/22	2010/17
2076/21	2197/19	2033/20
2079/15	2198/1	2074/10
2079/20	2198/25	2093/15
2082/13	2219/22	2140/10
2083/7	2231/17	2143/11
2084/15	2231/20	2143/23
2084/23	2237/7	2184/23
2085/2	2241/19	2239/23
2085/21	2267/6 2282/5	me [64]
2086/25	2285/22	1999/10
2091/10	2286/7 2286/8	2004/18
2091/17	2288/6	2007/3
2095/6 2096/3	2293/17	2010/17
2122/7	2299/15	2030/9 2032/3
2122/20	2301/23	2080/12
2125/12	2302/7 2303/2	2080/18
2125/19	2307/7	2087/1

M	2188/16	2339/15
me... [55]	2191/25	2339/15
2092/13	2197/15	2343/13
2092/24	2197/18	2345/6
2093/1	2205/14	mean [42]
2100/11	2208/20	1988/3
2101/9	2209/11	1988/18
2102/23	2212/25	2009/4
2110/16	2226/13	2015/14
2112/17	2226/23	2018/15
2122/6	2233/24	2043/25
2123/24	2234/19	2046/7 2067/5
2125/23	2240/14	2067/19
2127/24	2240/23	2087/1
2129/25	2241/25	2087/16
2149/12	2269/17	2088/24
2149/13	2276/18	2089/2
2149/25	2277/8 2280/2	2095/10
2151/25	2319/24	2095/14
2157/2 2169/4	2321/1 2328/7	2107/4 2107/7
2169/5 2178/1	2329/8	2108/23
2178/17	2330/23	2113/15
2183/7	2331/2 2331/7	2130/14
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M	2046/20	2253/20
mean... [21]	2087/10	2254/18
2147/25	2099/17	2260/3
2154/8	2100/13	2262/18
2163/24	2100/17	2303/25
2173/12	2100/17	2304/4 2304/7
2175/9	2101/16	2304/11
2194/14	2102/13	2305/4
2196/12	2102/17	2305/11
2199/9	2150/21	2305/21
2199/25	2151/13	2305/24
2203/5	2166/13	2306/2 2307/3
2210/14	2166/15	2308/3
2272/21	2168/24	2308/11
2273/16	2168/25	2309/15
2280/12	2169/1	2310/11
2282/10	2169/23	2312/20
2300/5	2170/9	2317/1
2300/10	2170/14	2323/18
2301/17	2171/20	2324/5
2306/8 2325/6	2179/18	2333/18
2328/19	2179/21	meaningful [2]
meaning [48]	2181/13	2112/15
2045/20	2253/9	2210/10

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2009/5	2317/4	2073/1
2040/15	2317/21	2075/18
2045/14	2320/8 2325/2	2078/16
2048/23	2328/23	2081/7
2069/7 2073/4	2330/15	2083/12
2087/14	meant [7]	2083/14
2098/24	2063/9	2084/1 2084/4
2101/20	2063/10	2084/9 2086/1
2113/20	2148/1	2086/4 2086/8
2122/17	2253/18	2088/22
2125/16	2256/23	2089/8 2090/6
2163/15	2265/4	2090/22
2179/9 2180/8	2274/23	2090/25
2192/10	Meanwhile [1]	2091/17
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2205/18	measure [55]	2094/24
2209/11	1992/19	2095/3
2209/25	2026/11	2096/15
2210/1 2254/6	2026/12	2098/2
2254/8	2026/15	2098/22
2265/19	2027/21	2119/19

M	2016/11	2092/16
measure...	2020/21	2130/8
[21] 2132/19	2023/25	2130/23
2132/25	2025/12	2151/21
2150/24	2025/13	2160/18
2151/18	2025/18	2160/19
2194/5 2194/8	2025/22	2164/6 2169/3
2194/11	2026/9	2189/10
2194/21	2027/19	2189/25
2194/22	2028/7	2195/8
2195/1 2202/5	2028/12	2195/12
2202/6	2029/14	2196/13
2205/13	2030/2 2033/8	2196/20
2207/18	2082/3 2082/9	2205/8
2207/20	2082/17	2206/10
2241/17	2083/5	2206/15
2241/20	2083/17	2227/5 2230/6
2328/7	2085/23	2230/12
2334/17	2086/14	2235/2 2236/1
2334/17	2086/25	2238/7 2238/8
2335/6	2087/22	2240/21
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1993/22	Merges [22]	2339/8
2001/15	1990/20	merit [2]
2001/20	2006/11	2073/23
2013/6	2107/22	2315/16
2023/20	2146/18	merits [6]
2045/4	2213/23	2075/2
2102/25	2214/9	2142/23
2103/6 2133/7	2214/18	2152/18
2201/16	2216/25	2157/11
2210/19	2249/18	2157/13
2215/17	2281/24	2164/25
2261/22	2282/4 2283/5	Mesa [2]
2289/8	2292/22	2130/20
2290/21	2298/17	2180/4
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2314/23	2299/11	1990/14
merely [8]	2306/23	1990/25
1992/22	2309/7	1991/21
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2115/20	2313/20	1993/22
	2326/4	1997/19

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2046/18	2023/14	2104/21
2056/24	2104/6	2104/24
2057/12	2104/11	2105/6 2105/8
2060/13	2148/4 2207/9	2107/7
2061/10	MEXICO [35]	2111/17
2061/22	1981/23	2148/11
2061/23	1984/23	2151/12
2113/21	1985/1	2197/4
2113/21	1986/16	2206/20
2113/23	1986/18	2227/20
2269/12	1987/23	2296/13
2284/24	1987/23	2306/14
2341/14	1987/25	2307/10
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MGH... [5]	2108/18	2338/13
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2063/9	2137/21	2344/19
2064/24	2142/11	mind [5]
2065/3	2163/24	2019/10
2286/11	2175/15	2094/4 2160/3
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middle [1]	2211/5 2212/2	2011/21
1994/3	2217/2	2011/24
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1992/24	2225/2	minimum [46]
1993/10	2225/21	2025/21
1996/10	2235/20	2027/12
2011/24	2244/11	2027/14
2022/12	2299/10	2027/23
2046/7	2315/18	2028/5

M	2181/13	2212/25
minimum...	2182/17	2332/24
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2095/23	2185/11	1983/25
2096/22	2185/20	1984/1
2124/3	2187/12	2068/13
2124/10	2189/12	2086/18
2126/12	2191/7	2112/9 2112/9
2127/16	2192/25	2112/20
2129/7	2200/16	2113/1 2113/4
2129/19	2201/1	2113/6 2113/7
2129/22	2201/10	2139/22
2130/20	2202/22	2139/24
2131/21	2277/17	2139/24
2175/24	2278/2	2139/25
2177/14	2283/19	2140/11
2177/21	mining [4]	2151/8
2177/24	2011/18	2162/12
2178/18	2011/18	2165/21
2179/2 2179/8	2011/24	2167/1
2179/11	2012/1	2167/11
2180/23	minute [3]	2180/10
2181/9	2100/11	2190/2

M	misapplied [1]	2257/7 2342/5
minutes... [10]	2017/13	mode [1]
2217/24	misapply [2]	2024/15
2277/15	2017/7	model [3]
2297/3 2297/5	2017/24	2236/23
2329/9 2333/3	misconducted	2237/5 2237/6
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2343/13	2076/21	2053/5 2129/7
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misapplicatio	misspoken [1]	2255/17
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2017/3 2021/2	mistake [1]	[1] 2005/4
2021/22	2148/21	Moldova [1]
2022/2 2023/3	mistreatment	2021/23
2024/2 2032/9	[1] 2011/10	Moldovan [1]
2152/14	misunderstan	2022/2
2210/13	ding [1]	molecule [1]
2210/19	2076/21	2065/2
2212/1	Mobil [5]	molecules [1]
2233/13	2127/1	2005/10
2236/8	2134/14	moment [21]
2236/14	2190/18	1988/2 1988/4

M	2024/12	2272/15
moment... [19]	2024/21	2272/18
1999/14	2025/1 2025/3	2272/25
2010/2	2124/15	2273/12
2012/20	2207/3	2273/14
2066/25	2215/14	2273/22
2072/15	monopolies	2273/24
2079/6 2079/9	[1] 2286/19	2274/8 2343/1
2112/17	monopoly [9]	months [3]
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2117/22	1989/24	2248/2
2200/25	2198/4	2261/18
2204/18	2284/21	MONTPLAISIR
2217/19	2290/14	[1] 1981/7
2228/24	2290/16	moot [1]
2235/1 2240/8	2291/4 2302/9	2073/11
2286/19	2303/1	MOPOP [7]
2307/16	Monsanto [16]	2003/9
2345/21	2034/11	2003/17
moments [1]	2056/16	2004/12
2177/23	2213/22	2039/13
Monday [1]	2268/14	2039/16
1987/20	2272/3 2272/4	2039/22
Mondev [7]	2272/7	2041/2

M	2137/2	2243/12
MOPOPs [1]	2143/10	2243/22
2040/15	2151/21	2244/6 2250/2
more [73]	2153/2	2250/4
1985/20	2156/10	2251/16
1993/10	2164/23	2259/19
1996/7	2167/21	2261/16
1996/10	2168/2	2267/21
2008/11	2171/20	2281/20
2027/18	2177/14	2282/5
2035/8	2177/24	2288/10
2035/10	2180/10	2290/17
2045/16	2184/20	2296/2
2046/5	2190/1	2297/11
2050/19	2193/18	2308/8 2314/1
2057/11	2194/3	2314/6
2062/8	2195/11	2314/14
2080/13	2204/13	2315/1 2321/9
2082/22	2209/11	2322/17
2102/6	2224/8 2225/1	2323/1
2114/17	2225/19	2328/15
2114/17	2237/19	2329/12
2125/2 2125/4	2240/14	2333/16
2134/15	2242/10	2339/7

M	2262/24	motion [6]
Moreover [3]	2292/15	2006/5 2010/7
2148/14	2296/11	2049/8
2281/2 2295/1	2297/14	2049/17
morning [27]	2333/21	2049/19
1983/1 1983/6	most [18]	2139/2
1983/7	1984/1	move [5]
1987/10	1999/17	2113/25
1987/16	2019/23	2193/6 2205/5
1988/18	2046/4	2259/3
2007/4	2047/25	2300/21
2033/13	2061/20	moved [1]
2145/6 2151/5	2123/2 2169/2	2082/21
2153/2 2178/4	2171/4 2189/3	movement [1]
2181/11	2213/8	2276/13
2181/17	2216/15	moves [1]
2188/16	2218/22	2116/7
2190/12	2230/24	moving [2]
2208/25	2280/18	2066/17
2228/1	2283/6 2289/3	2212/7
2228/17	2307/25	MR [31]
2229/2	mostly [2]	1979/11
2245/19	2213/17	1980/5 1980/6
2248/22	2322/8	1980/6 1980/7

M	1983/8	2046/23
MR... [26]	1984/18	2047/5
1980/8 1980/9	1986/1 1986/3	2047/22
1980/14	1989/16	2047/24
1980/19	1990/15	2048/3
1980/20	1997/14	2049/13
1981/5 1981/5	2003/14	2049/16
1981/6 1981/8	2003/14	2050/4
1981/17	2003/17	2054/24
1981/18	2003/22	2055/21
1981/19	2004/3 2004/7	2058/1
1981/24	2004/11	2058/14
1982/6 1982/9	2005/2 2005/5	2062/3
1982/12	2005/12	2062/10
1982/13	2005/20	2062/22
1982/15	2007/23	2068/19
1982/16	2008/10	2068/21
2004/11	2013/10	2069/16
2111/3 2111/4	2014/19	2069/23
2294/19	2030/5	2070/3
2297/7	2033/14	2070/11
2297/23	2038/24	2070/23
2301/11	2041/8	2071/5 2071/7
Mr. [228]	2044/13	2072/12

M	2146/6 2147/3	2212/16
Mr.... [176]	2147/9	2212/23
2072/17	2147/18	2213/19
2081/13	2149/3 2152/1	2213/23
2094/20	2160/9	2214/18
2100/24	2160/20	2214/22
2103/3	2161/20	2215/3
2104/17	2161/21	2217/18
2112/14	2162/12	2218/1 2218/7
2112/18	2162/18	2218/9
2116/5	2165/22	2220/23
2116/13	2166/7	2228/8 2229/6
2117/6 2122/5	2166/15	2229/15
2123/22	2166/20	2229/19
2127/10	2166/25	2230/4
2136/17	2167/1 2167/7	2230/19
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2137/1	2168/20	2231/24
2137/11	2171/16	2232/7 2235/9
2137/12	2193/17	2236/4
2137/21	2205/3	2240/14
2138/3	2205/22	2242/1 2244/4
2144/22	2211/15	2244/8 2244/9
2145/3 2145/3	2211/17	2249/21

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2253/5 2253/7	2272/22	2297/22
2253/10	2273/7	2298/17
2253/13	2273/11	2298/24
2253/20	2274/2	2299/18
2254/3 2254/9	2274/17	2301/13
2254/10	2276/22	2301/14
2254/17	2277/1 2277/6	2302/8
2257/22	2277/8	2303/11
2258/9 2261/8	2277/24	2309/11
2261/9	2279/7 2280/5	2313/25
2261/16	2280/21	2317/19
2261/24	2284/5 2288/7	2317/24
2262/2	2288/25	2318/15
2263/16	2289/10	2319/4 2319/7
2264/3	2289/17	2322/9 2328/2
2266/19	2291/24	2328/3
2268/15	2292/1 2293/5	2329/15
2269/3	2294/10	2329/17
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<p>N</p> <p>noted... [12] 2116/14 2133/11 2133/24 2134/22 2160/13 2182/9 2182/19 2184/5 2190/18 2228/7 2269/1 2288/4</p> <p>notes [4] 1984/6 1984/6 2124/5 2281/12</p> <p>nothing [15] 2065/7 2091/6 2144/1 2147/8 2157/17 2164/23 2207/23 2215/21</p>	<p>2261/16 2290/2 2306/22 2319/3 2340/22 2343/10 2343/21</p> <p>notice [17] 1987/5 1987/9 1987/10 1987/12 1988/13 1988/15 1988/16 2009/17 2009/19 2058/3 2095/22 2095/23 2188/19 2224/13 2224/17 2321/25 2321/25</p>	<p>noticeably [1] 2321/7</p> <p>noting [7] 1991/9 1998/24 2001/10 2022/8 2026/15 2252/10 2285/21</p> <p>notion [4] 2045/13 2056/12 2108/17 2266/1</p> <p>nourishment [1] 2339/17</p> <p>novel [1] 2313/23</p> <p>novelty [1] 1999/2</p> <p>November [1] 2267/10</p> <p>November 2 [1] 2267/10</p>
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N	2045/1	2130/20
now [103]	2048/23	2135/12
1989/13	2056/25	2140/6
1989/14	2058/22	2140/11
1990/12	2060/19	2142/9
1998/12	2061/5	2143/24
2004/18	2068/19	2146/3
2007/3 2016/5	2080/17	2153/23
2016/24	2085/17	2178/17
2019/18	2086/12	2181/18
2022/14	2090/22	2181/21
2023/5	2091/18	2183/7 2184/5
2024/11	2092/6	2193/10
2025/14	2099/11	2196/5 2196/9
2026/9 2029/6	2103/10	2196/19
2032/13	2104/5	2204/18
2032/21	2110/16	2205/22
2037/16	2111/23	2218/5 2221/4
2038/11	2112/25	2226/6
2040/15	2114/10	2226/23
2040/21	2118/2 2118/4	2235/12
2041/14	2118/7 2118/9	2241/25
2041/19	2120/9	2242/23
2042/13	2125/10	2243/24

<p>N</p> <p>now... [26]</p> <p>2250/13</p> <p>2251/7</p> <p>2252/23</p> <p>2259/15</p> <p>2261/7</p> <p>2277/10</p> <p>2278/15</p> <p>2278/18</p> <p>2301/10</p> <p>2308/2</p> <p>2308/11</p> <p>2314/1 2314/4</p> <p>2318/14</p> <p>2318/23</p> <p>2320/11</p> <p>2322/5 2323/3</p> <p>2329/8</p> <p>2330/13</p> <p>2331/12</p> <p>2332/23</p> <p>2339/15</p> <p>2339/24</p>	<p>2341/20</p> <p>2345/16</p> <p>null [1] 2120/5</p> <p>nullified [1]</p> <p>2105/1</p> <p>nullity [1]</p> <p>2206/23</p> <p>number [19]</p> <p>1986/21</p> <p>2019/21</p> <p>2047/24</p> <p>2080/2</p> <p>2116/11</p> <p>2118/3</p> <p>2118/22</p> <p>2118/23</p> <p>2125/4</p> <p>2148/18</p> <p>2172/17</p> <p>2189/11</p> <p>2189/22</p> <p>2196/7</p> <p>2205/23</p> <p>2256/15</p>	<p>2267/24</p> <p>2281/4 2297/1</p> <p>numbering [1]</p> <p>2167/16</p> <p>numbers [5]</p> <p>2115/18</p> <p>2116/7</p> <p>2116/19</p> <p>2120/16</p> <p>2281/19</p> <p>numerous [5]</p> <p>2025/20</p> <p>2145/9 2145/9</p> <p>2249/17</p> <p>2292/18</p> <p>NW [1]</p> <p>1980/12</p> <hr/> <p>O</p> <hr/> <p>obiter [6]</p> <p>2054/14</p> <p>2267/23</p> <p>2268/5</p> <p>2268/17</p> <p>2269/2</p>
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O	2163/20	2191/2 2191/3
obiter... [1]	objective [6]	2191/13
2342/15	2050/11	2191/18
object [6]	2122/11	2195/19
2008/15	2264/3	2198/2 2208/8
2100/14	2264/14	2303/24
2102/14	2264/17	2305/13
2141/6 2141/7	2285/2	2340/9
2193/12	objectives [1]	obligations
objected [1]	2195/2	[47] 2077/1
2042/3	obligates [1]	2077/18
objection [13]	2177/7	2081/6 2081/8
2008/9	obligation [22]	2081/19
2008/20	2039/20	2084/13
2008/22	2060/7	2085/23
2009/14	2064/16	2085/24
2009/19	2094/2	2086/7
2010/19	2104/21	2089/19
2011/4	2105/23	2090/2 2090/5
2069/11	2113/16	2090/20
2074/4	2120/19	2091/11
2074/20	2123/9 2177/3	2091/22
2074/22	2190/14	2096/14
2157/6	2190/16	2097/8

<p>O</p> <p>obligations... [30] 2104/16 2105/10 2105/22 2164/5 2166/14 2166/19 2170/23 2171/8 2171/10 2173/1 2173/2 2173/21 2174/2 2178/3 2188/15 2196/11 2197/22 2198/5 2198/8 2201/2 2202/19 2203/22 2205/6 2205/7 2220/5 2220/8 2230/1</p>	<p>2305/11 2334/19 2335/7 obscure [1] 2115/24 observation [3] 2101/9 2174/14 2321/8 observations [2] 1988/25 2100/12 observe [1] 2054/8 observed [3] 1986/14 2115/15 2287/17 obstruction [1] 2021/14 obtain [3] 2278/23 2290/16 2314/25</p>	<p>obvious [9] 1989/20 1990/19 1991/10 1991/11 2064/21 2112/1 2113/18 2274/23 2275/4 obviously [14] 2021/19 2118/21 2141/6 2173/18 2175/25 2209/13 2240/1 2297/24 2303/8 2311/4 2313/10 2321/16 2321/23 2329/1</p>
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<p>O</p> <p>obviousness [16] 1990/15 1990/22 1990/25 1999/1 2037/13 2059/23 2060/10 2060/12 2060/23 2061/15 2061/23 2062/4 2274/18 2288/9 2288/11 2299/4</p> <p>Occidental [1] 2132/15</p> <p>occurred [5] 1995/5 2146/14 2216/16</p>	<p>2230/2 2292/1</p> <p>occurring [2] 2276/10 2321/17</p> <p>occurs [2] 2066/5 2066/7</p> <p>October [1] 2228/14</p> <p>October 22nd [1] 2228/14</p> <p>odds [4] 2253/21 2254/10 2258/7 2268/13</p> <p>off [11] 2019/24 2047/3 2066/5 2066/6 2115/17 2193/4 2213/25 2214/8 2298/8 2305/3</p>	<p>2337/20</p> <p>offer [6] 2158/10 2167/8 2170/4 2220/22 2222/7 2328/4</p> <p>offered [18] 2120/4 2147/3 2147/20 2148/3 2148/5 2149/2 2149/10 2161/8 2165/8 2219/3 2221/2 2221/9 2221/25 2222/1 2223/3 2223/12 2223/14 2223/25</p> <p>offering [3] 2146/25 2220/21 2328/22</p>
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<p>O</p> <p>offers [2] 2275/12 2290/13</p> <p>office [26] 1990/11 1990/24 2036/17 2039/8 2039/12 2040/25 2041/2 2041/7 2041/18 2050/1 2055/4 2055/10 2061/14 2061/17 2136/19 2142/13 2147/4 2161/22 2208/4 2292/24 2292/25</p>	<p>2293/8 2313/17 2313/19 2322/13 2324/19</p> <p>Office's [1] 2292/19</p> <p>often [9] 2017/10 2048/23 2057/14 2182/10 2254/7 2278/20 2288/2 2324/1 2334/20</p> <p>OG2 [1] 1981/13</p> <p>Oil [3] 2257/7 2267/10 2342/5</p> <p>okay [8] 2093/1 2097/11</p>	<p>2141/4 2186/17 2202/24 2226/9 2240/22 2333/6</p> <p>olanzapine [23] 1991/25 2005/18 2006/16 2150/8 2152/8 2165/10 2211/22 2212/12 2228/6 2230/8 2231/6 2231/11 2245/25 2246/7 2246/18 2246/25 2285/17 2285/18 2286/6</p>
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O	2273/13	2244/6 2248/9
olanzapine...	2273/15	2260/23
[4] 2289/16	2273/17	2300/16
2289/19	2273/19	2336/3
2330/22	Olin	2338/17
2332/6	Mathieson [4]	one [148]
old [11]	2273/13	1987/22
2047/3	2273/15	1991/5
2052/20	2273/17	1991/15
2052/25	2273/19	1997/3
2152/25	on-reservatio	1997/17
2214/8	n [1] 2022/21	1997/21
2214/10	once [18]	1999/14
2251/19	1999/4	2003/6
2258/11	2001/14	2004/23
2265/14	2002/5	2011/7
2265/22	2024/19	2011/20
2267/8	2069/5	2012/23
older [4]	2121/16	2014/8
2146/15	2122/2	2019/15
2158/11	2193/19	2020/2
2214/18	2208/3 2233/4	2020/10
2267/16	2235/22	2020/18
Olin [4]	2241/20	2022/18

O	2102/6 2103/9	2176/4
one... [130]	2105/8 2108/3	2178/20
2023/5	2108/4 2110/2	2179/12
2024/11	2111/24	2183/5
2025/18	2112/11	2183/15
2028/18	2112/17	2184/2
2031/8	2116/1 2116/1	2185/22
2035/10	2120/8	2190/25
2035/15	2121/21	2191/24
2035/17	2127/15	2194/18
2035/21	2128/23	2195/13
2047/6	2128/24	2196/24
2047/18	2129/5	2197/1 2200/7
2048/17	2130/18	2200/24
2050/20	2130/21	2202/3
2057/22	2132/13	2203/10
2061/21	2141/10	2204/7 2204/8
2076/12	2144/7 2145/5	2204/12
2080/4 2080/9	2159/19	2208/4
2080/11	2159/25	2209/15
2080/14	2164/13	2212/2
2088/6 2092/6	2167/12	2213/22
2093/15	2168/6	2218/21
2101/22	2174/14	2226/22

<p>O</p> <p>one..... [51]</p> <p>2234/12</p> <p>2235/17</p> <p>2240/24</p> <p>2244/16</p> <p>2245/7 2246/5</p> <p>2253/6</p> <p>2255/20</p> <p>2256/1</p> <p>2257/15</p> <p>2258/20</p> <p>2262/15</p> <p>2274/22</p> <p>2276/23</p> <p>2276/25</p> <p>2282/19</p> <p>2289/19</p> <p>2290/19</p> <p>2293/15</p> <p>2300/10</p> <p>2302/4</p> <p>2302/11</p> <p>2302/13</p>	<p>2303/1 2303/3</p> <p>2304/22</p> <p>2305/17</p> <p>2307/17</p> <p>2308/12</p> <p>2309/22</p> <p>2310/18</p> <p>2313/1</p> <p>2313/15</p> <p>2314/13</p> <p>2315/3 2315/9</p> <p>2316/1 2319/6</p> <p>2319/8</p> <p>2322/25</p> <p>2324/9</p> <p>2324/20</p> <p>2325/20</p> <p>2325/22</p> <p>2326/2</p> <p>2329/11</p> <p>2331/18</p> <p>2332/6</p> <p>2335/12</p> <p>2339/22</p>	<p>2345/8</p> <p>one-patent [2]</p> <p>2302/11</p> <p>2302/13</p> <p>onerous [4]</p> <p>2040/22</p> <p>2057/15</p> <p>2060/20</p> <p>2061/1</p> <p>ones [7]</p> <p>2091/5</p> <p>2165/20</p> <p>2281/22</p> <p>2281/24</p> <p>2316/3 2318/5</p> <p>2320/18</p> <p>only [123]</p> <p>1988/17</p> <p>1996/1</p> <p>1997/25</p> <p>2000/23</p> <p>2001/20</p> <p>2001/21</p> <p>2002/20</p>
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O	2052/2 2054/1	2125/10
only... [116]	2055/10	2130/24
2009/7 2010/4	2055/17	2132/14
2016/10	2056/14	2138/23
2017/3	2059/13	2139/8
2017/16	2059/15	2144/11
2018/9	2060/1 2063/4	2146/10
2019/15	2070/14	2146/12
2020/2 2020/9	2077/25	2147/6
2021/20	2085/21	2147/11
2023/24	2087/13	2149/3
2024/17	2091/4 2091/4	2150/22
2025/6	2095/16	2154/19
2025/16	2096/23	2155/24
2028/10	2102/1	2159/22
2028/11	2108/12	2164/13
2028/18	2112/10	2166/6
2030/1 2031/9	2120/22	2167/15
2032/11	2121/15	2169/7 2170/3
2037/21	2121/25	2172/14
2041/14	2122/8	2172/22
2042/14	2122/20	2175/18
2043/15	2123/5	2178/20
2048/22	2124/22	2196/25

<p>O</p> <p>only..... [39]</p> <p>2199/9</p> <p>2203/12</p> <p>2206/22</p> <p>2207/4 2207/9</p> <p>2207/12</p> <p>2209/1</p> <p>2209/16</p> <p>2209/20</p> <p>2218/14</p> <p>2220/11</p> <p>2223/13</p> <p>2225/8</p> <p>2225/11</p> <p>2238/16</p> <p>2239/10</p> <p>2240/6</p> <p>2243/18</p> <p>2247/1</p> <p>2253/12</p> <p>2262/5</p> <p>2264/17</p> <p>2265/15</p>	<p>2270/17</p> <p>2272/2 2272/7</p> <p>2273/2</p> <p>2280/23</p> <p>2294/22</p> <p>2295/7</p> <p>2295/23</p> <p>2300/15</p> <p>2304/13</p> <p>2309/22</p> <p>2311/14</p> <p>2315/17</p> <p>2337/16</p> <p>2337/18</p> <p>2344/12</p> <p>Ontario [2]</p> <p>1980/16</p> <p>1981/13</p> <p>onwards [1]</p> <p>2004/17</p> <p>open [5]</p> <p>1983/2</p> <p>2080/25</p> <p>2196/1</p>	<p>2210/23</p> <p>2255/24</p> <p>opening [63]</p> <p>1989/13</p> <p>1993/8</p> <p>1995/15</p> <p>1997/24</p> <p>1998/13</p> <p>2007/6 2009/3</p> <p>2012/9</p> <p>2014/12</p> <p>2018/23</p> <p>2019/14</p> <p>2019/18</p> <p>2019/18</p> <p>2020/12</p> <p>2022/6</p> <p>2024/20</p> <p>2026/21</p> <p>2027/16</p> <p>2028/16</p> <p>2033/18</p> <p>2044/2 2067/8</p> <p>2073/19</p>
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O	2197/14	2269/10
opening... [40]	2197/20	operable [7]
2096/16	2206/6	2040/1
2124/14	2212/10	2040/11
2129/20	2226/13	2043/1 2046/3
2131/18	2227/3	2046/8 2048/7
2131/22	2230/14	2066/16
2132/3	2244/14	operate [3]
2133/24	2245/20	2045/16
2134/21	2257/21	2251/15
2134/24	2262/20	2308/8
2135/16	2262/25	operated [1]
2135/22	2284/7 2285/9	2010/22
2138/10	2289/18	operates [1]
2149/20	2327/6	2050/16
2150/25	2328/16	operating [1]
2151/15	2341/3	2237/10
2163/6	opens [3]	operations [1]
2163/18	2018/5	2189/2
2163/20	2079/22	operative [1]
2166/4	2089/1	2046/13
2170/21	operability [3]	opinio [18]
2189/21	2040/15	2124/7
2195/15	2269/7	2126/21

<p>O</p> <p>opinio... [16] 2128/6 2178/13 2183/23 2184/5 2184/9 2184/12 2185/6 2185/25 2189/15 2192/5 2192/15 2192/19 2192/21 2192/24 2202/17 2327/11</p> <p>opinio juris [18] 2124/7 2126/21 2128/6 2178/13 2183/23 2184/5 2184/9</p>	<p>2184/12 2185/6 2185/25 2189/15 2192/5 2192/15 2192/19 2192/21 2192/24 2202/17 2327/11</p> <p>opinion [7] 2120/5 2120/14 2120/15 2145/13 2146/25 2147/20 2263/18</p> <p>opportunity [6] 1984/14 1985/2 1986/19 1987/2</p>	<p>1987/21 2300/16</p> <p>opposable [1] 2242/7</p> <p>opposed [4] 2033/10 2064/25 2233/18 2242/13</p> <p>opposite [2] 2294/2 2311/18</p> <p>oral [14] 1983/10 1983/23 1985/10 1985/19 1986/12 1986/17 1987/5 1987/10 1987/17 1988/16 1988/21</p>
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<p>O</p> <p>oral... [3] 2009/8 2151/4 2219/10</p> <p>order [27] 1984/20 1984/23 1985/8 1985/11 1985/12 1985/14 1990/18 2007/15 2012/11 2044/3 2060/12 2073/9 2154/11 2155/7 2167/14 2169/6 2179/23 2214/12 2246/2 2284/3</p>	<p>2303/7 2303/12 2331/24 2332/13 2344/23 2345/23 2345/25</p> <p>ordering [1] 2302/4</p> <p>orders [5] 1984/19 1985/17 1985/22 1985/23 1986/3</p> <p>ordinary [11] 2100/13 2102/17 2179/21 2304/7 2305/3 2308/3 2308/11 2309/15 2312/20</p>	<p>2317/1 2323/18</p> <p>organ [2] 2017/25 2024/10</p> <p>Organisation [1] 2101/22</p> <p>organization [1] 2147/22</p> <p>organizational [1] 1989/6</p> <p>organize [1] 2149/18</p> <p>organs [1] 2029/19</p> <p>origin [1] 2247/21</p> <p>original [1] 2301/20</p> <p>originalist [1] 2095/15</p> <p>Originally [1] 2074/19</p> <p>originate [1]</p>
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O	2029/19	2071/15
originate... [1]	2029/20	2071/17
2033/10	2030/20	2075/10
origins [1]	2030/22	2077/25
2330/4	2034/23	2078/7
ostensibly [1]	2035/1	2078/24
2050/11	2035/16	2079/1 2079/3
other [167]	2035/17	2079/21
1989/5 1991/4	2036/10	2087/18
1992/3 1998/6	2037/12	2090/19
1998/6 1998/8	2039/19	2094/10
1998/10	2043/14	2096/7
1998/22	2044/1	2097/14
2002/7	2045/22	2098/16
2002/10	2047/11	2101/23
2011/24	2048/18	2103/8
2017/25	2059/5 2060/2	2105/25
2018/9	2060/17	2112/12
2024/10	2061/7 2062/4	2114/3
2024/11	2063/24	2116/23
2026/19	2066/3 2066/4	2120/7 2120/8
2027/18	2069/3	2120/24
2028/2	2070/15	2121/2
2028/13	2070/19	2124/24

O		
other... [95]		
2125/13	2175/12	2241/6
2128/22	2175/19	2242/25
2131/22	2176/2	2244/2
2132/7	2176/16	2249/15
2132/25	2177/8 2180/8	2250/8 2252/4
2133/14	2181/7 2181/7	2252/24
2133/20	2182/23	2257/6
2141/9	2187/4	2261/10
2141/13	2194/21	2269/4
2142/24	2195/13	2270/10
2143/12	2196/3	2271/3 2278/6
2143/17	2198/18	2279/20
2145/23	2199/2	2282/1
2146/23	2201/15	2282/15
2149/7 2159/8	2206/11	2282/23
2171/10	2216/4 2225/4	2285/18
2172/23	2227/20	2293/10
2173/8 2173/9	2228/9	2293/17
2173/9	2229/21	2298/10
2173/14	2230/23	2299/6 2299/8
2173/25	2234/7	2299/21
2174/2 2175/5	2235/18	2301/16
	2239/12	2303/2
	2239/14	2308/15

O	2038/23	1995/17
other..... [16]	2057/13	1996/17
2309/5 2311/7	2144/16	1996/18
2311/19	2192/12	1997/5 1997/7
2312/21	2217/8 2253/9	1997/15
2317/6	2300/8	1997/24
2318/18	2300/25	1999/16
2318/20	2340/24	2010/24
2321/8	Ottawa [2]	2010/25
2323/19	1980/16	2011/1 2013/1
2334/15	1981/13	2013/4
2335/2	ought [4]	2013/15
2336/17	2056/5 2062/5	2013/16
2337/14	2221/13	2014/18
2337/21	2343/4	2015/19
2343/25	our [203]	2017/15
2345/8	1983/13	2018/23
others [2]	1983/18	2019/14
2161/21	1986/10	2020/12
2309/12	1986/22	2025/8
otherwise [12]	1988/6	2030/23
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2081/13	2283/15	2103/6 2105/3
2084/3 2087/2	2288/14	2146/13
2097/20	2331/23	2151/22
2098/14	prior [50]	2154/20
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2185/21	1997/21	2252/1
2188/12	2008/13	2254/22
2201/10	2009/8	2254/24
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2341/12	2075/5	2319/21
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<p>P</p> <p>process... [18] 2209/24 2209/25 2210/3 2210/10 2211/25 2212/3 2213/17 2224/6 2224/8 2230/23 2257/19 2260/9 2264/22 2276/9 2293/17 2309/3 2314/11 2314/12</p> <p>processes [2] 2294/1 2294/21</p> <p>Proctor [1] 2264/21</p>	<p>produce [3] 2257/25 2278/21 2345/24</p> <p>produced [3] 2040/25 2285/11 2307/22</p> <p>produces [1] 2209/7</p> <p>product [5] 2048/11 2063/25 2258/1 2258/3 2338/21</p> <p>products [2] 2050/22 2229/17</p> <p>PROF [1] 1979/5</p> <p>Professional [1] 2281/12</p> <p>professionalism [1] 2346/5</p>	<p>Professor [127] 1990/19 1990/20 2006/11 2016/22 2017/5 2017/22 2019/16 2020/10 2020/13 2020/17 2023/8 2024/6 2025/9 2025/11 2028/4 2029/3 2032/10 2052/24 2058/12 2080/14 2097/6 2101/12 2101/21 2103/17 2107/22</p>
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[102] 2108/5	2249/18	2265/2
2115/9	2249/18	2265/17
2115/12	2249/21	2265/22
2115/19	2250/22	2269/1
2117/13	2251/3	2269/25
2118/15	2251/11	2271/14
2119/12	2251/21	2272/6
2119/21	2252/4	2272/12
2132/23	2252/17	2275/17
2145/3	2253/7	2279/14
2145/14	2253/22	2279/19
2146/18	2254/17	2280/24
2191/21	2254/23	2281/5 2281/7
2192/21	2255/21	2281/9
2192/23	2256/7	2281/24
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2216/25	2257/4	2283/5
2245/10	2257/22	2284/15
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[167] 1992/17	2014/14	2052/17
1993/5	2015/9	2052/19
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2166/3 2178/4	2273/14	2124/22
2188/19	2273/16	recognition
2211/8	2294/4 2297/8	[3] 2207/18
2262/11	2335/23	2220/10
2296/9	receives [1]	2276/13
recalling [2]	2315/17	recognize [4]
2034/9	recent [5]	1986/15
2301/13	1999/17	2172/1
recap [1]	2041/12	2252/24
2134/6	2064/9 2125/4	2264/1
receipt [1]	2237/19	recognized
2141/23	recently [2]	[19] 2027/13
receive [2]	2125/11	2066/12
1987/5	2190/18	2089/17
2009/20	recess [8]	2129/22
received [13]	2068/15	2130/20
1987/8	2113/6 2113/8	2131/13
1988/15	2140/12	2134/11
1988/16	2140/14	2177/16
1993/7	2217/25	2178/15

<p>R</p> <p>recognized... [10] 2186/24 2187/22 2194/25 2251/2 2251/11 2253/22 2265/23 2298/21 2338/1 2339/6</p> <p>recognizes [8] 2020/19 2179/1 2252/22 2270/1 2280/13 2282/24 2287/12 2288/14</p> <p>recognizing [1] 2270/1</p> <p>recollection [2] 2072/15</p>	<p>2296/5</p> <p>recollections [3] 2135/17 2136/10 2294/19</p> <p>record [33] 1990/16 1990/23 1990/23 2003/5 2003/8 2005/23 2031/12 2099/8 2099/9 2101/25 2113/10 2147/21 2147/22 2148/8 2148/9 2161/4 2161/5 2161/6 2184/15 2204/1 2204/7 2204/21 2226/4</p>	<p>2245/18 2252/13 2260/16 2277/4 2286/22 2294/14 2320/25 2321/20 2333/21 2335/13</p> <p>records [1] 2285/16</p> <p>recourse [2] 2203/13 2203/18</p> <p>recover [1] 2113/1</p> <p>recreate [1] 2218/6</p> <p>red [2] 2207/23 2244/2</p> <p>Reddon [32] 2062/10</p>
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R	2299/18	reduced [1]
Reddon... [31]	2301/13	2264/25
2069/23	2301/14	reduction [2]
2070/3	2302/8	2265/3
2070/11	2303/11	2265/18
2071/7 2146/6	2330/11	Reed [1]
2211/17	Reddon's [11]	2111/4
2252/24	2055/21	refer [18]
2253/5 2253/7	2070/23	2009/10
2253/13	2071/5	2032/23
2254/9 2261/8	2253/10	2047/15
2261/9	2253/20	2056/21
2261/16	2254/10	2076/4
2262/2	2254/17	2076/17
2263/16	2261/24	2077/4 2077/7
2268/15	2270/6	2096/22
2269/23	2270/19	2098/22
2270/11	2342/10	2122/14
2270/21	redefined [1]	2172/21
2288/7	2114/2	2184/10
2288/25	redirect [1]	2253/23
2295/1	2049/15	2260/14
2298/17	reds [1]	2279/22
2298/24	2118/6	2334/21

<p>R</p> <p>refer... [1] 2338/7</p> <p>reference [19] 2018/4 2044/15 2044/19 2047/7 2094/13 2147/20 2163/21 2173/17 2177/22 2183/15 2185/10 2204/18 2219/13 2242/24 2244/8 2253/24 2258/15 2267/22 2341/16</p> <p>referenced [2]</p>	<p>2034/10 2320/17</p> <p>references [6] 2076/2 2077/3 2088/6 2204/20 2214/23 2250/21</p> <p>referencing [1] 2089/18</p> <p>referred [15] 2017/10 2038/7 2044/1 2075/24 2095/22 2095/23 2097/6 2100/24 2170/10 2171/23 2178/13 2336/6 2339/10 2339/13</p>	<p>2341/13</p> <p>referring [11] 2015/18 2034/20 2062/25 2087/3 2128/24 2219/9 2252/21 2253/25 2279/16 2308/5 2341/11</p> <p>refers [10] 2028/15 2028/18 2076/11 2076/13 2082/2 2125/3 2173/9 2178/11 2200/17 2254/7</p> <p>reflect [5]</p>
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R	refusal [5]	2008/24
reflect... [5]	2122/9	2014/9
1990/3	2122/21	2035/15
2004/17	2122/25	2072/17
2128/17	2324/14	2073/3
2190/21	2324/16	2078/19
2251/5	refused [8]	2080/1 2081/5
reflected [4]	1991/20	2081/24
2039/16	1999/5 1999/7	2083/7
2072/6	2104/14	2089/16
2100/12	2123/2	2095/19
2135/17	2228/14	2096/19
reflecting [1]	2324/18	2098/19
2249/6	2324/19	2099/4
reflection [1]	refusing [3]	2100/20
2128/15	2001/7 2021/8	2107/21
reflective [2]	2026/17	2108/4
2186/9	refuted [2]	2126/22
2186/12	2134/4	2130/1 2131/5
reflects [4]	2135/20	2131/9
2004/12	regard [49]	2133/13
2039/14	1993/12	2161/19
2192/25	1995/24	2166/10
2254/4	2002/9	2168/10

<p>R</p> <p>regard... [20] 2169/17 2178/21 2179/13 2180/15 2184/15 2210/5 2235/20 2252/16 2255/9 2261/6 2268/16 2279/22 2296/11 2332/14 2334/13 2336/3 2338/7 2338/12 2339/13 2340/7</p> <p>regarded [2] 2256/14 2261/11</p> <p>regarding [24] 1990/10</p>	2011/9 2073/20 2076/6 2076/23 2076/25 2081/9 2083/25 2085/14 2088/2 2090/14 2090/21 2096/12 2101/5 2101/10 2107/17 2117/15 2124/1 2133/4 2170/23 2257/23 2269/5 2292/9 2309/20 <p>regardless [2] 2045/20 2283/11</p>	<p>regards [6] 2010/10 2056/11 2064/3 2110/23 2224/10 2335/23</p> <p>regime [2] 2088/1 2250/1</p> <p>registers [1] 2302/12</p> <p>regulated [1] 2307/25</p> <p>regulation [5] 2011/18 2011/19 2011/24 2012/1 2012/6</p> <p>regulations [4] 2058/4 2121/23 2148/2 2249/23</p> <p>regulatory [6]</p>
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<p>R</p> <p>regulatory... [6] 2070/7 2085/11 2190/17 2190/20 2190/23 2230/25</p> <p>reinforce [1] 2130/18</p> <p>reiterate [2] 1996/11 2240/24</p> <p>reject [2] 2029/25 2257/12</p> <p>rejected [9] 2047/22 2053/12 2056/4 2063/7 2065/12 2108/16 2179/20 2215/14</p>	<p>2342/4</p> <p>rejection [1] 2120/5</p> <p>rejoinder [8] 2008/14 2008/18 2009/15 2010/4 2024/20 2126/17 2287/18 2316/15</p> <p>relate [2] 2053/4 2096/14</p> <p>related [31] 2008/9 2050/11 2051/12 2068/24 2070/8 2071/18 2081/7 2085/24</p>	<p>2089/11 2090/3 2090/5 2094/21 2095/2 2100/18 2100/22 2101/6 2102/8 2119/4 2119/8 2136/25 2137/3 2227/11 2230/6 2240/14 2294/1 2294/22 2334/8 2335/8 2336/1 2338/3 2338/5</p> <p>relates [8] 1992/22 2011/4 2016/19 2087/5 2156/9 2169/24</p>
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R	2168/19	2089/6
relates... [2]	2226/11	2092/19
2318/18	released [1]	2098/7
2333/18	2261/19	2100/23
relating [5]	relevance [6]	2110/17
2061/18	2079/7	2110/22
2078/22	2110/19	2127/8
2107/9 2125/9	2281/20	2127/12
2277/4	2325/24	2130/16
relation [2]	2326/10	2131/3
2232/22	2336/16	2170/22
2343/5	relevant [69]	2172/19
relations [3]	2003/15	2172/19
2110/18	2014/18	2172/21
2174/6	2020/3	2172/23
2317/12	2050/12	2173/14
relationship	2056/14	2180/19
[5] 2062/16	2059/16	2181/13
2082/6	2073/3 2078/2	2191/17
2084/18	2078/4 2078/7	2194/19
2198/19	2078/15	2200/7
2280/16	2081/5 2087/3	2200/11
relatively [3]	2087/7	2201/3
1992/24	2088/21	2201/16

<p>R</p> <p>relevant... [30]</p> <p>2201/17</p> <p>2202/7 2202/8</p> <p>2203/1 2203/4</p> <p>2229/10</p> <p>2230/18</p> <p>2253/17</p> <p>2271/22</p> <p>2273/21</p> <p>2278/10</p> <p>2292/10</p> <p>2294/8 2311/3</p> <p>2311/7</p> <p>2311/11</p> <p>2311/14</p> <p>2312/18</p> <p>2317/6</p> <p>2317/11</p> <p>2321/2 2327/3</p> <p>2327/4 2327/5</p> <p>2329/5</p> <p>2334/19</p> <p>2334/23</p>	<p>2335/9</p> <p>2335/22</p> <p>2340/14</p> <p>reliable [2]</p> <p>2137/2</p> <p>2164/17</p> <p>reliance [7]</p> <p>2070/24</p> <p>2071/3</p> <p>2126/18</p> <p>2127/7 2135/7</p> <p>2137/20</p> <p>2138/5</p> <p>relied [14]</p> <p>2047/24</p> <p>2051/14</p> <p>2057/13</p> <p>2070/6</p> <p>2071/20</p> <p>2103/21</p> <p>2205/25</p> <p>2253/12</p> <p>2263/13</p> <p>2264/20</p>	<p>2271/20</p> <p>2275/14</p> <p>2342/23</p> <p>2342/25</p> <p>relies [5]</p> <p>2023/6 2127/1</p> <p>2247/6 2269/5</p> <p>2281/11</p> <p>reluctant [1]</p> <p>2174/7</p> <p>rely [14]</p> <p>2018/11</p> <p>2029/19</p> <p>2045/2</p> <p>2048/23</p> <p>2050/6</p> <p>2056/25</p> <p>2078/10</p> <p>2127/3</p> <p>2136/10</p> <p>2138/1</p> <p>2164/11</p> <p>2185/25</p> <p>2293/3</p>
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<p>R</p> <p>rely... [1] 2334/25</p> <p>relying [1] 2092/11</p> <p>remain [1] 2139/12</p> <p>remainder [1] 2149/14</p> <p>remaining [3] 2112/19 2140/3 2140/4</p> <p>remains [2] 2044/24 2063/25</p> <p>remarks [10] 2098/20 2149/20 2150/25 2151/15 2158/10 2197/20 2205/16 2261/2 2328/4</p>	<p>2333/16</p> <p>remedy [1] 2011/5</p> <p>remember [10] 2164/3 2173/25 2193/4 2201/25 2209/17 2221/24 2224/15 2239/4 2283/3 2289/5</p> <p>remembered [1] 2124/23</p> <p>remind [2] 2325/22 2338/14</p> <p>reminder [1] 2226/24</p> <p>remit [1] 2098/24</p> <p>remove [1] 2116/25</p>	<p>render [4] 2227/9 2284/2 2286/20 2304/16</p> <p>rendered [2] 2247/18 2247/19</p> <p>rendering [1] 2186/14</p> <p>renewed [1] 2227/7</p> <p>Renourishment [1] 2339/19</p> <p>reordering [2] 2144/16 2144/19</p> <p>reorganized [1] 2144/13</p> <p>repeat [2] 2131/6 2309/10</p> <p>repeated [1] 2134/24</p> <p>repeating [1]</p>
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<p>R</p> <p>repeating... [1] 2081/21</p> <p>replacing [1] 2104/13</p> <p>replete [2] 2250/20 2260/16</p> <p>replicate [1] 2065/3</p> <p>replies [2] 2142/1 2142/2</p> <p>reply [6] 2011/1 2025/8 2100/9 2141/13 2151/2 2278/25</p> <p>report [13] 2062/22 2062/25 2071/5 2104/20 2246/9</p>	<p>2247/14 2266/24 2270/17 2282/4 2319/13 2320/1 2320/12 2321/8</p> <p>reporter [6] 2112/11 2113/1 2258/9 2297/2 2343/23 2345/7</p> <p>reporters [2] 1979/21 2345/8</p> <p>Reporting [1] 1979/22</p> <p>reports [5] 2107/15 2145/24 2250/23 2255/6 2269/4</p>	<p>represent [1] 2212/24</p> <p>representatio n [7] 2134/15 2134/18 2191/12 2292/14 2292/17 2293/18 2293/21</p> <p>representatio ns [7] 2049/4 2053/8 2134/23 2135/3 2294/21 2320/12 2320/13</p> <p>representative [2] 1983/4 1987/23</p> <p>represented [4] 2136/7 2148/23</p>
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R	2284/24	1995/18
represented...	2290/5	2001/4 2002/5
[2] 2211/24	2305/17	2003/3 2003/9
2331/22	required [18]	2006/3 2021/7
representing	2000/22	2021/10
[2] 2014/21	2045/5	2035/22
2330/12	2052/25	2036/18
represents [1]	2059/16	2037/13
2203/8	2061/9	2037/14
reproduced	2066/15	2038/8 2039/9
[1] 2287/18	2126/19	2039/10
Republic [2]	2127/9	2040/3 2040/5
2020/11	2134/14	2040/21
2020/16	2178/12	2041/10
request [1]	2182/24	2042/10
2147/17	2183/6	2043/15
require [10]	2214/21	2043/21
2000/16	2265/6 2289/6	2044/21
2097/13	2330/8	2046/18
2134/17	2335/10	2047/6 2048/6
2154/7	2342/20	2048/8
2180/25	requirement	2048/15
2193/25	[142] 1990/22	2048/18
2224/19	1993/17	2048/25

R		
requirement...	2060/6	2105/25
[110]	2060/13	2106/21
2050/12	2061/1 2062/5	2108/1
2050/15	2062/6	2108/22
2050/16	2062/17	2108/23
2050/25	2063/14	2109/20
2051/13	2063/15	2114/3
2052/1 2052/4	2064/3 2064/5	2123/12
2053/2	2064/6 2064/8	2123/15
2053/17	2064/11	2123/17
2053/21	2064/19	2134/10
2053/22	2065/6 2065/7	2134/20
2053/25	2065/8	2135/15
2054/4 2054/9	2065/16	2137/9
2054/15	2065/21	2138/21
2055/5	2065/22	2178/15
2055/10	2065/22	2186/24
2055/15	2066/1	2190/21
2055/18	2100/18	2227/12
2055/22	2101/7	2230/11
2055/23	2102/25	2244/21
2056/24	2103/1	2244/23
2057/2 2059/9	2103/13	2245/12
2059/23	2104/6	2245/23

<p>R</p> <p>requirement....</p> <p>.. [33] 2246/5</p> <p>2255/2</p> <p>2258/25</p> <p>2264/7</p> <p>2269/19</p> <p>2269/21</p> <p>2269/24</p> <p>2270/2 2270/5</p> <p>2270/8 2272/2</p> <p>2273/23</p> <p>2281/20</p> <p>2284/10</p> <p>2296/6</p> <p>2306/25</p> <p>2310/4</p> <p>2311/19</p> <p>2313/13</p> <p>2313/25</p> <p>2314/7 2314/9</p> <p>2314/15</p> <p>2315/7</p> <p>2318/25</p>	<p>2323/5</p> <p>2323/19</p> <p>2325/13</p> <p>2325/15</p> <p>2331/11</p> <p>2340/23</p> <p>2341/8</p> <p>2341/20</p> <p>requirements</p> <p>[24] 1989/19</p> <p>2003/24</p> <p>2037/12</p> <p>2041/3</p> <p>2041/20</p> <p>2044/1 2059/6</p> <p>2060/21</p> <p>2106/1</p> <p>2108/24</p> <p>2112/1 2112/2</p> <p>2263/13</p> <p>2295/12</p> <p>2299/4</p> <p>2308/21</p> <p>2309/6 2310/3</p>	<p>2311/19</p> <p>2311/21</p> <p>2318/18</p> <p>2318/20</p> <p>2323/20</p> <p>2342/23</p> <p>requires [11]</p> <p>1988/12</p> <p>2053/18</p> <p>2086/21</p> <p>2090/12</p> <p>2090/18</p> <p>2156/15</p> <p>2178/9 2187/6</p> <p>2207/20</p> <p>2255/14</p> <p>2264/25</p> <p>requiring [9]</p> <p>2029/5</p> <p>2054/18</p> <p>2060/16</p> <p>2063/3</p> <p>2066/20</p> <p>2177/13</p>
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R		
requiring... [3]	reserve [3]	2067/11
2189/6	2139/18	2067/21
2270/14	2140/2	2067/22
2291/4	2167/10	2098/11
requisite [3]	resolve [4]	2127/19
2185/5	2021/16	2127/24
2185/24	2028/19	2154/17
2192/4	2185/10	2157/19
research [4]	2203/20	2157/25
2005/16	resolved [1]	2158/15
2005/18	2203/23	2164/21
2006/17	resort [1]	2165/9
2146/15	2063/22	2165/11
resemblance	resorting [1]	2165/14
[1] 2053/15	2180/8	2172/16
resembles [1]	respect [61]	2173/6
2109/18	1987/11	2173/24
reservation [1]	1988/22	2174/2
2022/21	1995/6	2174/20
reservations	2012/19	2188/10
[3] 2088/4	2013/8	2189/9 2190/7
2088/5	2015/17	2190/10
2286/15	2059/20	2191/13
	2067/6	2199/7

R	2322/16	2337/20
respect... [28]	2324/13	Respondent
2200/13	2325/9	[24] 1978/13
2200/23	2340/25	1981/3 1986/1
2206/21	2344/13	1987/7
2211/21	respectable	1989/11
2217/14	[1] 2315/1	2009/8
2228/5 2230/7	respected [1]	2009/19
2232/17	2261/18	2018/18
2232/25	respecting [1]	2031/11
2234/17	2209/5	2031/11
2235/12	respects [1]	2076/2
2242/24	2030/20	2080/10
2278/13	respond [6]	2096/15
2285/19	1987/2	2113/5
2288/12	1996/21	2140/17
2295/10	2123/25	2140/22
2298/4	2123/25	2144/24
2304/21	2129/25	2145/1
2306/19	2140/8	2167/13
2306/21	responded [4]	2332/21
2307/5	2061/19	2336/6 2337/3
2317/23	2074/25	2337/24
2320/11	2325/23	2343/12

<p>R</p> <p>Respondent's [2] 2335/16 2338/12</p> <p>Respondents [1] 2015/4</p> <p>responding [1] 2168/11</p> <p>response [20] 1994/4 1998/2 1999/12 2000/3 2002/9 2013/15 2014/11 2026/7 2049/18 2061/20 2067/20 2085/21 2134/22 2145/25 2147/24 2185/13 2261/1 2322/4</p>	<p>2336/15 2343/19</p> <p>responses [2] 2068/23 2234/12</p> <p>responsibility [12] 2017/8 2018/25 2019/1 2020/7 2026/14 2171/2 2175/5 2175/13 2176/25 2177/1 2219/11 2219/17</p> <p>responsible [3] 2175/15 2294/11 2295/20</p> <p>responsive [1] 2137/24</p> <p>rest [6] 2078/4</p>	<p>2081/15 2098/4 2235/22 2343/22 2344/1</p> <p>restating [1] 2168/14</p> <p>resting [1] 2184/17</p> <p>restrained [1] 2025/5</p> <p>restricted [1] 2106/8</p> <p>restrictive [1] 2134/16</p> <p>rests [1] 2187/16</p> <p>result [29] 2037/1 2046/8 2050/22 2050/24 2051/9 2057/20 2091/23</p>
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<p>R</p> <p>result... [22] 2094/5 2100/2 2112/3 2114/21 2114/23 2119/19 2121/8 2138/4 2151/5 2151/23 2164/14 2165/20 2205/13 2212/4 2248/4 2256/4 2256/6 2265/23 2279/1 2282/2 2336/1 2336/8</p> <p>resulted [4] 2037/8 2194/6 2211/10 2283/17</p> <p>results [8] 2143/1 2143/2</p>	<p>2274/21 2278/21 2278/22 2279/6 2285/11 2293/17</p> <p>resume [2] 2140/7 2140/15</p> <p>resurrected [1] 2046/25</p> <p>retained [4] 2146/4 2147/13 2254/22 2255/8</p> <p>retire [1] 1984/15</p> <p>retired [1] 1988/8</p> <p>retreat [1] 2270/16</p> <p>retroactively [2] 2026/17</p>	<p>2042/10</p> <p>return [5] 2048/1 2053/23 2075/14 2162/17 2314/6</p> <p>revealed [3] 2294/2 2318/22 2319/10</p> <p>reversal [3] 2036/24 2056/2 2057/21</p> <p>reverse [1] 2268/8</p> <p>reverses [1] 2216/8</p> <p>review [12] 2021/6 2040/9 2075/6 2145/10 2149/10</p>
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R	2069/22	2122/18
review... [7]	2070/10	2123/10
2156/16	2081/9	2333/23
2164/24	2081/25	2335/8
2166/16	2083/3	revocations
2190/5	2083/20	[1] 2083/5
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2182/2	2131/18	2066/19
serious [2]	2141/10	2172/17
2063/6	2164/16	2202/18
2204/23	2172/22	setting [2]
serve [1]	2175/16	2032/13
2037/7	2182/23	2239/21
served [3]	2188/10	settings [1]
2020/15	2188/15	2143/12
2059/4 2180/8	2199/18	settle [1]
services [2]	2200/9	2216/3
2087/24	2203/20	settled [3]
2088/2	2223/5	2063/21
serving [4]	2224/18	2159/16
2133/1	2224/23	2263/21
2249/14	2226/12	settlement [1]
2328/8 2329/4	2240/2	2087/25
session [1]	2245/11	several [15]
2042/5	2268/13	2020/19
set [25]	2277/3 2304/5	2047/9
2027/23	set-aside [1]	2047/21
2063/2	2240/2	2060/3
2065/16	sets [6]	2086/16

<p>S</p> <p>several... [10] 2088/5 2172/4 2187/14 2193/22 2194/3 2251/12 2254/25 2281/11 2319/12 2342/4</p> <p>shall [15] 2009/1 2077/20 2099/24 2101/2 2111/6 2111/9 2113/16 2114/11 2115/11 2142/8 2173/11 2174/5 2208/2 2218/20</p>	<p>2317/10</p> <p>SHANE [1] 1981/5</p> <p>shape [3] 2265/1 2265/3 2265/19</p> <p>shaped [2] 2124/11 2125/20</p> <p>share [1] 2338/20</p> <p>shares [1] 2335/18</p> <p>sharing [1] 1984/9</p> <p>SHAWNA [1] 1981/7</p> <p>she [7] 1983/5 2148/15 2148/22 2165/16 2204/20 2226/5 2345/12</p>	<p>Shearson [1] 2216/23</p> <p>sheet [1] 2072/5</p> <p>Shell [1] 2267/10</p> <p>shield [4] 2196/17 2196/25 2198/18 2203/6</p> <p>shift [3] 2278/8 2336/23 2340/13</p> <p>shifted [1] 2336/9</p> <p>shifting [1] 2336/11</p> <p>shocked [1] 2137/5</p> <p>shocking [2] 2179/4 2214/5</p> <p>shocks [1]</p>
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S	2005/25	2158/2 2159/3
shocks... [1]	2008/23	2165/1
2132/1	2012/3	2167/20
shoes [1]	2013/18	2168/12
2234/1	2018/13	2182/3
short [13]	2028/23	2182/20
2022/25	2033/7 2074/9	2184/5 2188/3
2099/1	2074/12	2188/8 2197/3
2126/18	2074/15	2199/11
2127/8	2082/14	2209/1 2214/5
2138/19	2093/3 2113/5	2221/16
2141/25	2116/2	2222/8
2142/2	2116/14	2222/25
2147/13	2116/24	2229/4
2165/18	2116/25	2229/23
2275/5	2117/7	2230/16
2321/14	2127/12	2231/14
2333/14	2128/8	2231/18
2343/20	2130/10	2235/7
shortly [2]	2131/2 2140/6	2239/15
2041/1 2277/9	2149/9	2241/24
should [80]	2151/17	2243/9 2243/9
1986/25	2153/13	2246/1
1993/7	2157/15	2253/24

S	show [30]	2282/15
should... [22]	1999/17	2291/25
2254/16	2001/20	2311/21
2256/13	2048/22	2313/3 2313/7
2256/24	2051/17	2315/24
2257/2 2257/9	2051/22	showed [8]
2263/7	2052/1	2000/3 2022/7
2271/25	2056/17	2027/16
2276/24	2057/11	2117/16
2280/1 2285/8	2061/9 2107/8	2137/15
2292/8	2158/10	2248/21
2293/13	2160/20	2313/2
2299/6	2161/17	2330/18
2299/24	2163/5	showing [5]
2307/23	2164/22	1992/12
2311/10	2167/2	2001/1
2312/5	2178/20	2066/21
2317/21	2182/10	2161/11
2322/17	2182/13	2340/1
2327/17	2192/5	shown [15]
2332/17	2232/15	2001/22
2338/11	2234/9	2038/23
shouldn't [1]	2266/22	2058/6
2158/25	2282/13	2060/18

<p>S</p> <p>shown... [11] 2165/19 2189/2 2212/13 2244/22 2250/7 2291/9 2293/22 2296/14 2310/7 2327/10 2340/23</p> <p>shows [10] 2039/11 2041/1 2148/9 2166/17 2246/4 2261/24 2279/13 2282/10 2315/9 2327/15</p> <p>Sicard [1] 2264/8</p>	<p>Sicula [1] 2131/24</p> <p>side [14] 1991/5 1991/15 1992/2 1992/25 1994/15 2019/11 2075/10 2128/22 2240/7 2281/13 2297/9 2304/3 2332/23 2343/25</p> <p>sides [1] 2346/4</p> <p>Siebrasse [48] 1990/19 2052/24 2145/14 2211/15 2213/19</p>	2245/10 2246/17 2247/11 2249/1 2249/5 2249/7 2249/21 2250/22 2251/3 2251/11 2251/22 2252/17 2253/7 2253/22 2254/23 2255/21 2256/7 2256/10 2257/4 2257/22 2258/14 2260/15 2261/9 2264/2 2264/5 2264/12
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<p>S</p> <p>Siebrasse... [17] 2265/2 2265/17 2265/22 2269/1 2269/25 2271/14 2272/6 2272/12 2275/17 2279/19 2284/15 2285/1 2286/5 2286/21 2288/4 2288/13 2306/21</p> <p>Siebrasse's [4] 2246/8 2252/5 2254/18 2258/5</p> <p>signed [2]</p>	<p>2106/22 2111/17</p> <p>significance [9] 2088/11 2115/13 2117/15 2263/8 2268/19 2280/11 2280/14 2280/15 2280/17</p> <p>significant [32] 2001/1 2003/10 2003/10 2003/11 2043/13 2048/13 2057/21 2115/10 2115/12 2115/15 2115/21</p>	<p>2116/8 2116/20 2117/9 2117/18 2118/10 2120/3 2148/7 2148/18 2148/24 2160/23 2161/2 2182/20 2249/24 2255/9 2279/11 2280/12 2317/25 2323/8 2326/7 2336/25 2337/13</p> <p>significantly [4] 2036/12 2061/4 2063/2 2217/3</p> <p>signing [1]</p>
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S	2088/3 2119/7	2010/24
signing... [1]	2229/15	2012/21
2205/5	2248/23	2013/3
similar [16]	2306/23	2023/15
1987/24	simple [10]	2034/24
2013/5	2038/13	2044/8
2047/16	2039/16	2046/25
2047/23	2039/25	2047/15
2052/11	2047/10	2064/18
2105/2 2110/8	2070/10	2073/12
2124/24	2156/16	2073/16
2124/25	2167/13	2076/25
2227/11	2208/20	2087/19
2264/11	2243/13	2087/21
2275/3	2325/9	2088/9
2307/13	simply [63]	2088/11
2312/2	1997/14	2089/2 2093/9
2340/22	1998/7	2098/15
2343/5	1999/16	2099/9 2103/7
similarity [2]	1999/23	2122/17
2052/21	2004/20	2155/5
2315/19	2004/21	2156/21
similarly [6]	2005/10	2164/15
1985/11	2010/5	2167/25

S	2274/21	2228/21
simply... [29]	2288/18	2228/23
2168/23	2291/8	2228/24
2172/12	2297/10	2237/14
2179/16	2324/7	2255/12
2183/17	2340/23	2264/7
2184/17	simultaneous	2273/24
2192/12	[1] 2142/1	2306/4
2194/18	simultaneousl	2316/24
2195/3 2195/8	y [1] 2299/23	2320/23
2198/18	since [30]	2321/23
2209/15	2013/24	2332/16
2224/16	2035/13	2337/9
2226/4	2037/6 2055/1	single [24]
2228/25	2073/5 2084/3	1991/6
2239/23	2114/18	1997/11
2240/13	2114/19	2002/7 2012/7
2253/17	2135/3 2137/7	2033/23
2259/19	2147/16	2033/24
2259/23	2151/6	2036/16
2261/10	2153/11	2050/5
2265/21	2169/8	2058/15
2267/16	2177/17	2101/15
2274/3	2193/3 2205/4	2103/12

<p>S</p> <p>single... [13] 2108/12 2127/7 2130/2 2135/21 2161/10 2205/25 2213/24 2214/1 2263/17 2268/20 2300/10 2331/18 2331/19</p> <p>SIR [16] 1979/15 2013/14 2033/17 2137/22 2155/18 2171/5 2187/21 2197/14 2218/2</p>	2226/14 2234/16 2278/14 2311/24 2318/3 2319/24 2326/14 sit [5] 2160/8 2210/17 2233/19 2241/17 2346/9 sitting [1] 2329/2 situated [1] 2064/11 situation [7] 2027/12 2044/2 2056/20 2123/1 2168/19 2242/13 2324/17	situations [3] 2009/6 2214/3 2288/5 six [4] 2141/23 2276/11 2333/13 2344/19 six-week [1] 2344/19 six-year [1] 2276/11 sizable [1] 2345/2 skew [1] 2248/4 skill [1] 2281/13 skilled [5] 2000/15 2272/10 2287/22 2289/24 2290/19
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S	2022/6	2134/12
skip [8]	2026/14	2134/12
2205/9 2301/7	2027/16	2134/25
2314/13	2045/14	2135/19
2314/14	2074/7 2074/8	2137/13
2314/19	2074/17	2143/20
2315/9	2074/19	2143/25
2315/13	2075/9	2148/15
2316/6	2075/16	2153/18
slew [1]	2075/17	2184/1
1998/6	2099/9	2191/22
slide [100]	2099/10	2193/3
1999/10	2099/11	2205/10
1999/12	2099/13	2226/6 2226/8
2000/2 2000/3	2100/6	2232/5 2246/1
2000/10	2104/18	2246/4
2003/7	2108/6 2111/1	2246/10
2004/12	2113/10	2248/8 2249/3
2006/8 2007/5	2114/10	2250/5
2007/5	2118/17	2250/22
2008/24	2121/10	2251/6
2011/18	2121/10	2251/25
2013/16	2132/16	2252/6
2014/21	2132/23	2252/23

<p>S</p> <p>slide... [33]</p> <p>2254/1</p> <p>2254/15</p> <p>2255/4 2257/2</p> <p>2261/15</p> <p>2262/10</p> <p>2263/16</p> <p>2264/10</p> <p>2264/16</p> <p>2268/6</p> <p>2269/25</p> <p>2270/7 2271/5</p> <p>2272/6 2275/9</p> <p>2279/13</p> <p>2301/8</p> <p>2308/25</p> <p>2313/3</p> <p>2313/14</p> <p>2314/14</p> <p>2315/9</p> <p>2315/13</p> <p>2317/15</p> <p>2317/19</p>	<p>2318/6 2318/8</p> <p>2318/11</p> <p>2318/17</p> <p>2318/24</p> <p>2319/14</p> <p>2323/12</p> <p>2324/15</p> <p>slide 100 [1]</p> <p>2251/25</p> <p>slide 101 [1]</p> <p>2252/6</p> <p>slide 102 [2]</p> <p>2099/9</p> <p>2099/10</p> <p>slide 104 [2]</p> <p>2099/11</p> <p>2252/23</p> <p>slide 105 [1]</p> <p>2254/1</p> <p>Slide 106 [1]</p> <p>2100/6</p> <p>slide 107 [1]</p> <p>2254/15</p> <p>Slide 108 [1]</p>	<p>2255/4</p> <p>slide 112 [2]</p> <p>2104/18</p> <p>2257/2</p> <p>slide 114 [1]</p> <p>2111/1</p> <p>slide 115 [2]</p> <p>2113/10</p> <p>2114/10</p> <p>slide 119 [1]</p> <p>2261/15</p> <p>slide 121 [2]</p> <p>2118/17</p> <p>2262/10</p> <p>slide 124 [1]</p> <p>2263/16</p> <p>slide 125 [1]</p> <p>2264/10</p> <p>slide 126 [1]</p> <p>2264/16</p> <p>slide 129 [1]</p> <p>2191/22</p> <p>slide 131 [1]</p> <p>2134/12</p>
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<p>S</p> <p>slide 133 [1] 2268/6</p> <p>slide 137 [1] 2137/13</p> <p>slide 139 [1] 2269/25</p> <p>slide 140 [1] 2143/20</p> <p>slide 141 [1] 2270/7</p> <p>slide 143 [1] 2271/5</p> <p>slide 146 [1] 2272/6</p> <p>slide 149 [1] 2275/9</p> <p>slide 18 [4] 2007/5 2013/16 2014/21 2074/7</p> <p>slide 20 [1] 2008/24</p>	<p>slide 202 [1] 2301/8</p> <p>slide 211 [1] 2308/25</p> <p>slide 218 [1] 2313/3</p> <p>Slide 22 [1] 2011/18</p> <p>slide 224 [1] 2313/14</p> <p>slide 230 [1] 2314/14</p> <p>slide 235 [1] 2315/13</p> <p>slide 252 [1] 2317/15</p> <p>slide 255 [1] 2318/6</p> <p>slide 261 [1] 2318/24</p> <p>slide 265 [1] 2319/14</p> <p>slide 268 [1] 2323/12</p>	<p>slide 269 [1] 2324/15</p> <p>slide 275 [1] 2246/10</p> <p>slide 4 [1] 2000/3</p> <p>slide 41 [1] 2205/10</p> <p>slide 65 [1] 2226/6</p> <p>slide 66 [1] 2226/8</p> <p>slide 78 [1] 2022/6</p> <p>slide 86 [1] 2248/8</p> <p>slide 90 [1] 2249/3</p> <p>slide 92 [1] 2135/19</p> <p>slide 93 [1] 2250/5</p> <p>slide 95 [1] 2250/22</p>
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<p>S</p> <p>slide 96 [1] 2251/6</p> <p>slide 98 [2] 2075/16 2075/17</p> <p>slides [8] 1999/16 2003/6 2044/3 2078/22 2121/21 2166/12 2257/11 2297/1</p> <p>slightly [4] 2093/8 2159/9 2225/5 2284/4</p> <p>slow [1] 2077/16</p> <p>small [4] 1992/17 2115/18 2115/18 2280/23</p>	<p>Smart [3] 2261/18 2270/13 2271/3</p> <p>SMITH [2] 1980/6 2104/17</p> <p>snippets [4] 2006/7 2006/7 2006/9 2006/17</p> <p>so-called [1] 2246/24</p> <p>society [2] 2064/23 2065/1</p> <p>software [1] 2282/9</p> <p>sole [2] 2015/25 2022/16</p> <p>solely [9] 1993/19 1999/3</p>	<p>2027/24 2074/4 2121/19 2146/8 2180/14 2198/21 2200/1</p> <p>solicitor [1] 2176/19</p> <p>solicitor/client [1] 2176/19</p> <p>solid [1] 2058/25</p> <p>some [76] 1984/8 1990/17 1993/9 1998/22 1999/20 2011/19 2012/16 2017/9 2047/14 2052/9</p>
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S	2139/18	2301/22
some... [66]	2144/12	2301/22
2052/12	2173/19	2301/22
2052/20	2173/24	2306/18
2055/16	2176/11	2310/10
2056/15	2176/12	2311/15
2059/22	2179/13	2316/8
2062/16	2185/16	2319/14
2066/20	2186/18	2321/17
2069/4	2199/1	2322/9
2070/20	2202/13	2329/14
2071/21	2206/5	2329/15
2072/1 2072/9	2207/19	2329/18
2073/10	2207/22	2334/7 2335/2
2073/14	2216/9	somebody [2]
2078/23	2216/15	2030/18
2087/9 2096/7	2220/21	2240/7
2097/18	2233/5 2245/5	somehow [9]
2101/14	2253/3	2011/8
2125/11	2254/24	2071/13
2129/7 2129/8	2289/10	2071/14
2129/9	2290/12	2148/1
2130/15	2295/4 2298/1	2154/23
2134/13	2299/8	2231/11

<p>S</p> <p>somehow... [3] 2231/19 2233/12 2236/9</p> <p>someone [2] 2194/1 2277/1</p> <p>someone's [2] 2265/5 2266/5</p> <p>something [45] 1996/24 2006/7 2010/4 2010/12 2095/8 2120/16 2128/1 2143/4 2149/25 2159/4 2163/1 2182/13 2183/24 2184/3 2197/17 2209/23</p>	<p>2209/25 2210/1 2212/8 2228/23 2230/13 2231/24 2234/18 2239/2 2240/12 2240/16 2265/11 2281/25 2290/17 2301/5 2302/2 2303/9 2304/20 2304/25 2305/8 2305/24 2306/18 2308/6 2309/4 2313/14 2316/16 2323/17 2324/11</p>	<p>2327/18 2330/17</p> <p>sometimes [13] 2085/6 2142/25 2213/12 2214/7 2214/7 2214/18 2214/20 2215/9 2216/2 2216/12 2282/5 2288/8 2324/2</p> <p>somewhat [5] 2001/22 2030/12 2140/10 2174/7 2178/4</p> <p>somewhere [1] 2085/1</p> <p>soon [3] 2233/20 2286/9 2345/3</p> <p>sooner [1]</p>
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<p>S</p> <p>sooner... [1] 2263/6</p> <p>sophisticated [3] 2137/19 2138/2 2292/3</p> <p>sorry [14] 2076/15 2076/20 2077/15 2101/13 2101/24 2103/14 2139/24 2154/16 2171/15 2183/9 2192/16 2232/24 2246/3 2318/8</p> <p>sort [26] 2031/17 2148/11 2155/11</p>	<p>2157/4 2158/22 2162/6 2162/9 2171/18 2183/17 2183/18 2207/19 2207/22 2211/9 2219/20 2220/21 2221/18 2241/7 2242/11 2287/1 2290/11 2301/19 2302/3 2302/19 2303/4 2310/10 2311/16</p> <p>sorts [1] 2195/7</p>	<p>sought [2] 2068/3 2274/13</p> <p>sound [64] 2001/7 2001/12 2041/16 2054/4 2054/16 2055/11 2056/13 2056/20 2056/21 2057/1 2057/13 2103/5 2213/21 2245/13 2245/23 2246/5 2261/20 2266/9 2268/3 2269/19 2269/22</p>
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S	2281/23	Sounds [1]
sound... [43]	2286/8	1997/16
2270/3 2270/8	2288/14	source [11]
2270/14	2290/6 2290/6	2019/15
2270/24	2290/12	2030/14
2271/6 2271/9	2290/15	2031/1
2271/14	2290/19	2128/14
2272/4 2272/8	2290/20	2128/19
2272/14	2290/22	2128/25
2272/16	2291/5	2169/17
2272/24	2294/18	2178/2 2198/9
2273/2	2296/4	2303/23
2273/10	2318/12	2317/14
2273/15	2341/17	sources [12]
2273/20	2342/9	2030/19
2273/23	sounded [1]	2124/1
2274/3 2274/7	2188/17	2127/18
2274/14	soundly [6]	2127/19
2275/1 2275/2	2001/4	2127/22
2275/7	2038/16	2127/25
2275/11	2051/10	2128/3 2128/4
2275/16	2051/18	2177/19
2275/19	2063/10	2181/8 2260/2
2275/22	2284/11	2275/13

S	specific [59]	2129/18
space [3]	1990/8	2133/14
2085/11	1998/17	2134/15
2179/18	2013/8	2134/17
2219/19	2019/22	2136/15
speak [4]	2024/11	2165/9
2008/7	2024/13	2169/15
2254/13	2078/15	2171/13
2270/18	2085/17	2189/7 2191/3
2297/24	2086/10	2191/4
speaking [1]	2089/4	2191/11
2244/10	2089/18	2194/16
special [9]	2089/18	2200/17
2028/16	2089/22	2204/10
2029/21	2090/13	2205/19
2033/9	2090/20	2207/25
2305/21	2098/21	2214/2 2214/2
2305/23	2099/3	2218/19
2306/1	2100/20	2223/5 2233/9
2310/11	2102/3 2102/5	2242/21
2319/25	2109/8	2292/14
2324/4	2116/17	2292/16
specialis [1]	2121/6	2293/18
2171/4	2127/19	2293/21

<p>S</p> <p>specific... [8] 2294/7 2295/22 2305/14 2306/10 2306/24 2313/23 2331/20 2338/6</p> <p>specifically [26] 1984/20 1984/21 2002/9 2016/17 2046/10 2080/1 2090/2 2095/3 2099/24 2100/3 2170/1 2173/17 2195/11 2201/13 2204/21</p>	<p>2204/23 2205/8 2239/6 2249/20 2254/13 2266/16 2277/20 2279/16 2283/2 2326/3 2339/10</p> <p>specification [17] 2042/20 2045/17 2046/6 2046/14 2052/15 2251/17 2253/8 2253/10 2253/21 2253/24 2254/5 2254/13 2255/2 2255/15</p>	<p>2287/19 2287/22 2308/9</p> <p>specified [1] 2289/13</p> <p>speculation [11] 2004/21 2005/22 2006/2 2050/13 2268/12 2268/21 2284/13 2284/14 2290/21 2326/20 2326/22</p> <p>speculations [1] 2265/25</p> <p>speculative [7] 2004/24 2005/13 2148/11 2264/6</p>
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<p>S</p> <p>states... [23]</p> <p>2227/19</p> <p>2237/12</p> <p>2277/3</p> <p>2281/10</p> <p>2300/7 2300/9</p> <p>2306/4</p> <p>2306/15</p> <p>2307/1</p> <p>2307/15</p> <p>2309/3</p> <p>2309/25</p> <p>2311/17</p> <p>2312/1 2313/4</p> <p>2318/22</p> <p>2319/20</p> <p>2320/6</p> <p>2323/21</p> <p>2323/22</p> <p>2323/23</p> <p>2326/17</p> <p>2327/16</p> <p>States' [3]</p>	<p>1987/6 1987/9</p> <p>1987/17</p> <p>stating [2]</p> <p>2269/3</p> <p>2271/19</p> <p>statistical [12]</p> <p>2015/19</p> <p>2115/13</p> <p>2117/14</p> <p>2120/4</p> <p>2164/11</p> <p>2164/14</p> <p>2247/23</p> <p>2248/12</p> <p>2249/14</p> <p>2280/10</p> <p>2280/14</p> <p>2280/17</p> <p>statistically [9]</p> <p>2115/12</p> <p>2115/21</p> <p>2117/18</p> <p>2118/24</p> <p>2119/13</p>	<p>2120/3</p> <p>2279/11</p> <p>2280/11</p> <p>2336/25</p> <p>statistics [10]</p> <p>2058/10</p> <p>2245/7 2247/6</p> <p>2248/13</p> <p>2250/5</p> <p>2250/10</p> <p>2278/17</p> <p>2278/19</p> <p>2282/12</p> <p>2341/10</p> <p>status [4]</p> <p>2073/2</p> <p>2125/24</p> <p>2327/9</p> <p>2327/18</p> <p>statute [8]</p> <p>2104/8 2132/5</p> <p>2148/22</p> <p>2178/7 2213/7</p> <p>2213/10</p>
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<p>S</p> <p>subjected... [1] 2241/16 subjective [1] 2179/22 submission [21] 1983/18 1983/23 1988/14 2009/8 2045/19 2062/7 2096/10 2129/20 2140/18 2140/19 2140/21 2141/7 2197/1 2232/14 2238/11 2309/24 2310/13 2310/25 2312/1 2312/3</p>	<p>2339/1</p> <p>submissions [42] 1984/24 1985/2 1985/3 1985/6 1985/18 1986/6 1986/9 1986/12 1986/17 1986/19 1986/21 1987/14 1987/15 1993/11 2009/9 2013/1 2078/21 2085/2 2097/19 2098/4 2107/4 2107/5 2131/19 2131/21 2142/2 2142/18</p>	<p>2142/23 2172/5 2206/6 2206/7 2219/10 2227/20 2260/1 2276/19 2310/19 2310/25 2320/5 2320/24 2328/16 2343/7 2343/22 2344/1 submit [24] 1989/2 2003/1 2004/6 2013/17 2013/20 2013/23 2037/4 2037/17 2041/4 2047/2</p>
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<p>S</p> <p>submit... [14]</p> <p>2049/23</p> <p>2050/13</p> <p>2055/25</p> <p>2064/3</p> <p>2088/16</p> <p>2101/18</p> <p>2114/8</p> <p>2125/25</p> <p>2198/1 2212/5</p> <p>2213/16</p> <p>2235/3</p> <p>2327/17</p> <p>2340/20</p> <p>submits [1]</p> <p>2088/15</p> <p>submitted [6]</p> <p>2014/13</p> <p>2061/22</p> <p>2125/1 2161/7</p> <p>2166/22</p> <p>2252/8</p> <p>subsequent [24] 2023/18</p>	<p>2055/7</p> <p>2100/22</p> <p>2101/3</p> <p>2103/16</p> <p>2105/11</p> <p>2105/21</p> <p>2106/6 2106/8</p> <p>2106/9</p> <p>2106/12</p> <p>2106/24</p> <p>2107/1 2107/8</p> <p>2109/24</p> <p>2222/12</p> <p>2304/17</p> <p>2309/18</p> <p>2309/22</p> <p>2310/14</p> <p>2311/2</p> <p>2312/13</p> <p>2312/16</p> <p>2320/18</p> <p>subsequently [2] 1996/3</p> <p>2302/15</p>	<p>subsist [1]</p> <p>2301/23</p> <p>substance [5]</p> <p>2015/8</p> <p>2016/13</p> <p>2069/7</p> <p>2226/23</p> <p>2256/24</p> <p>substantial [23] 2034/1</p> <p>2082/21</p> <p>2082/22</p> <p>2082/25</p> <p>2086/7</p> <p>2092/23</p> <p>2097/2 2097/5</p> <p>2097/13</p> <p>2097/17</p> <p>2097/24</p> <p>2097/25</p> <p>2107/15</p> <p>2195/16</p> <p>2298/10</p> <p>2302/1 2303/7</p>
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2195/9	2083/17	2175/9
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2075/4	2092/18	2201/2
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<p>S</p> <p>substantive... [10] 2295/18 2305/14 2308/19 2316/3 2317/8 2317/17 2318/18 2334/19 2334/22 2335/7</p> <p>substantively [1] 2154/7</p> <p>succeed [6] 2144/7 2144/9 2207/12 2222/3 2317/18 2331/24</p> <p>success [3] 1992/12 2051/24 2315/2</p> <p>successful [2] 2071/10</p>	<p>2114/17</p> <p>successfully [2] 2057/16 2342/2</p> <p>such [63] 1988/14 2018/5 2019/3 2037/12 2041/4 2041/5 2043/18 2043/24 2051/23 2073/21 2100/1 2101/1 2124/12 2126/18 2127/1 2134/14 2135/13 2137/13 2138/5 2138/11 2160/21 2161/18</p>	<p>2164/12 2169/8 2171/2 2173/8 2173/9 2173/10 2178/12 2182/9 2182/22 2184/10 2187/4 2187/7 2188/1 2188/3 2194/13 2195/18 2202/9 2208/10 2210/8 2210/15 2212/21 2213/22 2222/2 2227/9 2240/3 2240/11 2256/6 2260/9 2263/5 2263/22</p>
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2334/25	sufficient [18]	2145/10
sudden [2]	2037/14	2147/25
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2302/19	2064/16	2162/14
suddenly [2]	2065/16	2165/5
2118/6	2082/20	2166/11
2337/15	2097/22	2193/22
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2070/14	2107/12	2207/1 2215/8
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2069/23	2265/2	2066/11
2070/3 2103/4	2266/24	2072/17
2115/19	2269/23	2078/24
2117/14	2272/22	2101/12
2118/16	2274/2	2115/20
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2161/16	2294/3	2120/10
2162/10	2295/13	2120/13
2165/17	2298/24	2148/6
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2326/4	2030/12	2177/14
2329/14	2036/18	2182/23
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2339/9	2063/2	2215/21
2342/10	2071/14	2218/8 2224/8
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2036/13	2329/7	1995/17
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2015/16	2094/14	2151/10
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2035/13	2094/24	2155/23
2035/19	2096/5 2103/8	2157/16
2035/22	2104/20	2159/12
2036/9	2106/19	2160/5
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2050/12	2113/5 2114/4	2176/21
2050/23	2117/21	2176/24
2054/6	2120/13	2177/4 2197/8
2055/23	2123/9	2206/12
2059/16	2123/17	2218/13
2066/10	2123/18	2218/23
2079/11	2125/6	2223/7
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2305/18	2029/22	2166/12
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2323/9	2064/7	2171/11
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2325/16	2070/7	2184/21
2327/16	2071/24	2200/6
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2340/21	2078/24	2213/10
2341/8	2096/18	2213/11
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2010/14	2127/4	2262/19
2012/18	2133/17	2270/15
2012/19	2138/17	2274/7
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2295/15	2093/14	2289/18
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1994/8	2206/5	2181/2 2185/9
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2029/12	2092/2 2092/3	2138/21
2031/6	2092/8	2139/2 2140/5
2031/19	2092/11	2141/24
2031/22	2092/19	2142/4 2144/3
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2168/14	2234/8	2094/18
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2185/7	2259/5 2262/6	2016/10
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2197/11	2288/17	2017/16
2200/2 2201/8	2293/14	2021/20
2202/17	2302/12	2022/16
2204/21	2302/15	2023/24
2208/5	2315/10	2024/17
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1995/10	2052/16	2123/17
1996/2 1998/5	2054/6	2123/20
2002/11	2057/20	2124/23
2003/6	2058/1	2125/8
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these... [80]	2205/1 2205/7	2283/2 2283/3
2130/1	2206/5	2285/11
2130/13	2211/24	2286/1
2130/17	2217/7	2289/14
2131/7 2134/1	2228/11	2289/17
2141/15	2244/25	2294/18
2142/1 2144/9	2245/2	2296/12
2145/25	2245/16	2297/10
2156/11	2246/8 2247/3	2318/5
2156/12	2247/17	2322/11
2162/3 2162/8	2250/12	2323/6
2162/21	2256/10	2323/15
2164/9 2167/3	2256/11	2325/25
2171/5 2171/6	2257/1 2257/8	2329/23
2172/19	2257/12	2330/9
2173/24	2268/16	2331/12
2176/5	2269/13	2331/14
2176/18	2273/6	2333/16
2176/20	2274/20	2334/22
2181/12	2274/22	2338/22
2182/24	2275/23	2341/20
2189/13	2276/12	2345/15
2199/22	2278/1	2345/24

T	2006/21	2050/19
thesis [1]	2006/24	2056/25
2181/16	2007/5 2007/6	2059/24
they [272]	2010/15	2063/13
1983/17	2011/15	2063/14
1984/5 1984/6	2012/2 2017/9	2065/4
1984/7 1985/4	2017/24	2065/19
1985/5	2023/17	2066/9
1985/10	2023/21	2067/12
1986/10	2028/21	2067/13
1992/7	2033/6 2033/9	2068/5 2069/6
1994/12	2036/11	2087/23
1994/13	2037/16	2093/5
1994/20	2037/19	2093/11
2000/24	2037/19	2096/16
2002/10	2037/20	2097/9
2002/16	2037/25	2103/13
2003/25	2037/25	2104/4 2104/4
2005/9	2038/1	2104/20
2006/12	2039/11	2105/13
2006/13	2040/6 2040/6	2105/24
2006/14	2040/10	2106/20
2006/17	2041/22	2106/21
2006/20	2043/16	2107/4 2107/5

T	2147/3 2147/9	2162/11
they... [195]	2147/18	2162/18
2108/16	2148/3 2152/6	2163/8 2163/8
2109/1 2109/4	2152/11	2163/9
2109/7 2109/8	2152/12	2163/22
2109/11	2152/13	2163/25
2113/16	2152/21	2165/17
2113/22	2152/22	2165/18
2116/17	2153/4	2165/19
2125/14	2153/11	2166/1 2166/9
2126/2	2153/20	2166/12
2127/21	2154/2 2155/2	2167/4 2170/3
2127/22	2155/2 2155/5	2171/1
2128/17	2156/20	2172/22
2128/22	2156/21	2172/23
2128/25	2158/1	2172/25
2129/2 2129/5	2160/24	2173/3 2173/4
2130/4	2161/1 2161/8	2175/15
2136/15	2161/12	2181/2 2182/3
2138/7	2161/14	2182/23
2139/14	2161/15	2184/11
2145/14	2161/16	2185/5 2185/7
2146/6	2162/10	2185/8
2146/18	2162/11	2188/20

T		
they..... [111]		
2193/8 2195/9	2229/17	2282/1
2195/20	2231/12	2282/15
2198/11	2231/13	2283/11
2198/14	2231/14	2283/17
2198/15	2231/19	2283/18
2210/17	2231/20	2283/21
2213/7 2213/8	2232/1	2285/12
2213/9 2214/6	2232/12	2285/15
2214/6 2214/7	2235/4 2235/5	2287/15
2214/7	2235/13	2287/15
2214/10	2236/10	2287/16
2215/5	2238/17	2289/1 2289/1
2215/10	2239/1	2289/2
2215/18	2241/10	2290/17
2215/24	2242/14	2294/3 2294/4
2216/2 2216/3	2248/21	2294/5 2304/8
2216/4 2219/9	2257/23	2304/9 2304/9
2220/18	2258/1	2305/10
2220/23	2262/13	2305/22
2224/2	2271/4	2305/25
2226/19	2274/14	2306/2
2229/1	2274/24	2306/11
	2281/23	2308/21
	2281/25	2308/22

T		
they..... [30]		
2311/17	2337/14	2230/20
2317/18	2340/6	2231/1
2323/16	2340/23	2235/15
2323/17	2343/4	2237/2 2307/9
2323/24	2345/21	2331/12
2325/11	2345/23	2333/17
2325/12	they'd [1]	2334/16
2325/14	2344/6	they've [7]
2329/20	they're [25]	2145/5
2329/21	1983/24	2207/21
2330/14	1984/10	2304/4 2330/4
2330/21	2006/19	2337/12
2330/23	2011/17	2337/18
2330/25	2011/22	2341/12
2331/2 2331/5	2041/25	thing [21]
2331/7	2072/6 2091/5	2002/11
2331/10	2108/24	2002/22
2332/7	2109/10	2002/24
2332/24	2110/3 2117/3	2074/16
2333/24	2120/17	2103/8
2334/15	2144/20	2112/12
2336/7 2337/4	2158/1	2140/17
	2160/19	2142/19
	2175/14	2144/11

T	2176/13	2033/4
thing... [12]	2176/15	2033/18
2145/5	2179/14	2034/9
2155/24	2200/5 2213/1	2034/13
2207/3	2239/14	2034/19
2210/15	2251/12	2035/10
2229/19	2314/17	2035/19
2245/7	2329/11	2036/6
2258/20	2346/1	2071/16
2289/19	think [178]	2074/19
2305/5	1983/17	2076/9
2307/17	1987/18	2076/12
2316/24	1995/22	2078/18
2332/6	1996/6	2079/16
things [21]	1996/25	2085/1
2028/2 2036/5	1999/23	2085/16
2047/4	1999/24	2086/5
2112/11	2000/1 2006/5	2087/14
2127/14	2015/4	2088/24
2132/25	2015/16	2089/1 2089/2
2141/9	2031/14	2092/2
2143/17	2031/19	2092/14
2158/11	2032/6	2092/21
2170/2 2171/3	2032/24	2093/7 2095/7

T	2160/1	2200/13
think... [137]	2167/20	2200/25
2097/6	2168/8 2169/2	2201/25
2097/13	2171/24	2202/11
2098/6	2172/7	2203/4 2204/8
2098/12	2173/16	2204/18
2098/23	2173/18	2204/22
2099/11	2173/24	2205/2
2100/20	2174/3	2215/25
2107/17	2174/14	2218/2 2218/3
2119/25	2175/4	2220/13
2120/12	2175/10	2220/20
2121/3	2176/4 2176/9	2221/21
2125/22	2178/3	2222/2 2222/3
2137/23	2184/15	2222/10
2142/12	2189/3	2222/17
2142/20	2191/23	2223/6
2143/17	2191/25	2223/22
2144/22	2192/6	2225/18
2149/1	2194/22	2225/25
2149/11	2196/4	2226/12
2156/9	2196/14	2227/16
2158/21	2197/19	2227/18
2159/18	2198/16	2227/24

T		
think..... [62]		
2230/17	2276/25	2326/12
2231/23	2279/10	2328/9 2329/1
2232/19	2283/2 2297/1	2329/3 2335/1
2232/20	2297/8 2298/3	2335/9
2233/2	2298/6 2300/5	2335/21
2234/16	2301/13	2339/16
2234/23	2302/22	2345/1
2235/15	2303/20	thinking [1]
2236/3 2236/7	2304/10	2328/10
2237/4	2304/25	third [18]
2237/19	2310/18	2005/19
2237/22	2311/6 2316/8	2007/11
2239/25	2317/20	2031/19
2240/10	2320/24	2032/21
2242/9 2243/1	2321/9	2032/23
2243/4	2321/18	2037/3 2054/2
2243/21	2322/7 2322/9	2058/18
2244/21	2322/18	2096/24
2259/12	2322/19	2137/18
2259/14	2322/24	2194/20
2259/24	2323/9	2242/2
2267/4	2323/12	2251/21
	2324/10	2269/17
	2326/10	2271/4 2271/6

T	1997/24	2092/20
third... [2]	2006/14	2094/16
2277/23	2006/21	2094/17
2288/19	2006/22	2095/1
this [723]	2011/21	2097/18
THOMAS [7]	2012/15	2099/15
1980/10	2013/11	2101/25
2147/18	2014/17	2105/7
2252/7	2015/17	2105/22
2317/19	2025/14	2109/20
2317/24	2029/22	2109/21
2318/15	2031/24	2112/6 2117/1
2319/4	2033/8 2033/8	2117/2 2117/7
those [121]	2038/17	2120/21
1983/16	2048/5	2120/21
1985/3	2067/25	2121/22
1985/23	2076/25	2131/2
1991/14	2077/3	2138/13
1991/16	2078/14	2142/2 2143/2
1993/19	2083/17	2144/19
1994/12	2086/22	2152/19
1996/13	2089/6 2090/3	2157/10
1997/3	2090/4	2160/10
1997/10	2090/15	2170/12

T	2243/11	2331/21
those... [58]	2243/11	2332/2 2335/6
2172/18	2253/2 2255/7	2335/11
2172/20	2256/18	2336/9
2173/1	2260/7	2338/21
2179/21	2260/13	2343/7
2185/23	2272/11	though [20]
2188/14	2274/16	2003/14
2198/16	2281/4 2281/7	2034/7
2200/4 2206/2	2285/25	2040/23
2208/13	2287/14	2052/16
2212/14	2288/5	2053/17
2212/16	2288/24	2062/12
2212/20	2294/13	2063/13
2212/22	2303/15	2063/14
2212/23	2305/11	2117/1
2221/14	2306/8	2162/15
2228/9 2229/4	2306/10	2166/11
2229/13	2308/1	2192/23
2230/2 2230/6	2318/20	2201/25
2231/15	2321/19	2246/2 2253/4
2232/18	2321/20	2256/1 2280/5
2233/6	2323/25	2307/8 2319/9
2242/17	2331/20	2342/14

T	1997/1	2225/1 2227/2
thought [10]	1997/10	2228/10
2041/15	2010/11	2238/7
2041/22	2011/20	2238/19
2057/5	2031/7	2239/11
2074/20	2031/24	2239/20
2116/17	2035/15	2240/20
2155/11	2042/2 2042/3	2242/15
2261/13	2042/4	2244/23
2276/7 2277/1	2103/11	2245/17
2339/23	2129/21	2245/20
thoughts [2]	2135/23	2246/6
2167/8	2141/9	2246/22
2345/22	2141/10	2246/22
thousands [1]	2151/16	2247/1
2283/5	2151/22	2250/18
three [63]	2152/20	2272/8
1989/13	2153/4 2164/4	2272/11
1989/18	2166/3	2276/10
1994/5	2169/10	2278/16
1994/12	2182/14	2283/23
1994/23	2196/24	2287/6
1996/2	2224/8	2292/13
1996/18	2224/13	2312/9

<p>T</p>	<p>2137/8</p>	<p>2127/12</p>
<p>three... [5]</p>	<p>2179/10</p>	<p>2150/18</p>
<p>2315/12</p>	<p>2245/6</p>	<p>2151/1 2158/9</p>
<p>2329/9 2333/4</p>	<p>through [44]</p>	<p>2161/6 2164/8</p>
<p>2333/6</p>	<p>2003/24</p>	<p>2169/11</p>
<p>2337/21</p>	<p>2028/23</p>	<p>2178/20</p>
<p>three-year [7]</p>	<p>2029/6</p>	<p>2205/23</p>
<p>2010/11</p>	<p>2029/11</p>	<p>2206/4</p>
<p>2151/16</p>	<p>2029/18</p>	<p>2208/16</p>
<p>2152/20</p>	<p>2029/22</p>	<p>2209/1</p>
<p>2224/13</p>	<p>2036/7</p>	<p>2213/20</p>
<p>2238/19</p>	<p>2067/15</p>	<p>2244/25</p>
<p>2239/11</p>	<p>2067/16</p>	<p>2259/25</p>
<p>2239/20</p>	<p>2069/23</p>	<p>2265/5 2266/5</p>
<p>threshold [12]</p>	<p>2079/10</p>	<p>2289/2 2298/9</p>
<p>1997/20</p>	<p>2079/11</p>	<p>2312/23</p>
<p>2066/13</p>	<p>2080/24</p>	<p>2313/11</p>
<p>2068/25</p>	<p>2087/12</p>	<p>2315/23</p>
<p>2075/20</p>	<p>2095/2 2095/4</p>	<p>2318/4</p>
<p>2102/18</p>	<p>2106/10</p>	<p>throughout [7]</p>
<p>2102/21</p>	<p>2115/9</p>	<p>2158/10</p>
<p>2103/12</p>	<p>2115/23</p>	<p>2172/5</p>
<p>2103/12</p>	<p>2116/13</p>	<p>2199/22</p>
<p>2106/21</p>	<p>2124/24</p>	<p>2228/8 2284/9</p>

T	1985/5 1989/9	2029/6 2029/8
throughout...	1989/11	2039/22
[2] 2287/10	1994/8	2048/5
2337/10	1994/19	2055/21
thrust [1]	1995/25	2058/9
1996/25	1996/11	2069/10
Thunderbird	1996/23	2074/7 2075/1
[1] 2134/11	1997/15	2085/8
thus [3]	1997/15	2091/21
2024/3	2001/16	2112/10
2122/14	2002/2 2002/3	2112/18
2166/9	2003/15	2112/21
tick [1]	2003/18	2122/14
2337/20	2003/20	2122/15
ticket [1]	2007/11	2122/18
2334/10	2007/21	2129/11
tied [1] 2054/7	2008/19	2129/14
ties [1] 2055/5	2008/20	2137/7
tightened [1]	2009/15	2137/16
2313/22	2009/25	2139/17
tightening [1]	2010/11	2139/18
2314/9	2011/3 2011/8	2140/3 2140/4
time [146]	2012/13	2140/6 2140/7
1984/11	2013/18	2140/24

T	2183/18	2261/11
time... [90]	2193/1 2212/7	2261/15
2141/1 2141/6	2212/17	2262/2
2145/19	2212/22	2267/19
2149/4 2150/2	2213/3	2267/25
2150/4	2213/16	2269/11
2150/10	2216/5 2216/7	2269/13
2151/10	2216/10	2269/16
2151/14	2224/9	2276/16
2151/17	2224/14	2284/12
2151/24	2226/3	2284/18
2152/1	2226/10	2284/25
2152/10	2231/9	2289/18
2152/10	2234/12	2292/2 2292/5
2152/17	2235/14	2294/20
2153/9	2235/22	2297/13
2154/17	2236/23	2299/20
2155/14	2238/20	2303/22
2155/22	2239/11	2310/19
2158/24	2239/20	2310/21
2159/17	2241/25	2310/22
2162/22	2242/18	2310/24
2167/10	2249/11	2312/11
2177/24	2251/7 2259/4	2314/22

T	2224/14	2042/7 2045/2
time..... [14]	2242/18	2045/12
2316/7	2338/11	2045/24
2316/22	timeline [1]	2047/2
2321/18	2048/1	2052/21
2325/2 2325/2	Timely [1]	2056/18
2325/10	2015/3	2056/20
2325/11	times [2]	2057/13
2328/2 2329/9	2214/13	2059/7 2062/7
2333/3	2308/7	2066/17
2336/24	timing [5]	2068/9
2337/25	2008/9	2112/15
2338/11	2010/10	2149/14
2343/21	2112/8 2304/9	2161/19
time in [1]	2322/1	2164/22
2310/24	TINA [1]	2169/6
time-barred	1980/10	2197/23
[11] 2007/11	title [1]	2212/11
2150/10	2248/17	2256/17
2151/14	titled [1]	2261/2
2151/24	2336/4	2272/16
2162/22	today [31]	2329/16
2212/22	1989/2 1989/4	2329/17
2213/3 2224/9	2015/2 2040/6	2329/19

T	tomorrow [4]	2286/9
today... [1]	2297/12	took [4]
2330/19	2297/14	2002/18
today's [3]	2344/21	2201/20
2040/20	2344/24	2224/8
2047/23	tonight [1]	2274/12
2050/25	2297/10	toolkit [1]
together [6]	too [18]	2128/11
1996/1 1997/2	1988/19	top [5]
2036/25	1998/22	2019/17
2289/1 2291/9	2031/3	2099/13
2313/6	2040/10	2144/2 2193/4
told [12]	2049/21	2336/20
2006/1	2108/14	topic [3]
2145/24	2108/15	2013/13
2162/10	2108/18	2169/4 2225/6
2215/5	2109/6	total [3]
2215/18	2221/12	2118/22
2247/22	2221/15	2194/7 2194/7
2249/21	2222/20	totality [3]
2250/22	2264/4	2086/3
2251/3 2264/5	2264/15	2089/11
2273/8	2264/19	2090/16
2296/11	2272/5 2285/2	totally [4]

T	trade [12]	transcript [31]
totally... [4]	1978/3	1990/19
2032/16	1981/10	1991/22
2039/17	1981/11	1992/14
2066/12	2101/15	1998/24
2282/21	2101/21	2000/11
touch [1]	2107/14	2001/10
1983/17	2129/8	2003/23
touched [1]	2177/13	2006/12
2280/21	2180/12	2019/19
towards [2]	2200/18	2026/22
2020/7	2200/19	2044/14
2156/10	2339/13	2055/19
Tower [1]	trademark [1]	2069/17
1979/6	2097/12	2070/4
toxicity [1]	trading [1]	2070/12
2256/25	2319/19	2071/24
traced [2]	traditional [4]	2076/22
1993/15	2003/23	2104/18
2270/5	2006/3	2107/23
track [1]	2053/25	2108/8 2116/6
2248/18	2066/14	2117/6
tracked [1]	transaction [1]	2117/23
2289/20	2302/18	2117/24

T	2043/2	2173/25
transcript...	2062/11	2175/12
[7] 2118/16	2133/19	2175/19
2137/23	2152/1 2152/4	2177/3 2181/7
2141/11	2177/8	2181/12
2142/5	2275/15	2181/20
2244/13	treated [2]	2181/22
2279/23	2028/24	2182/2 2182/2
2336/14	2077/9	2182/6
transcription	treaties [32]	2182/15
[1] 2148/19	2076/6	2183/1 2304/2
transcripts [1]	2076/23	2316/20
2145/11	2077/7	2317/13
transgression	2078/25	2323/16
[1] 2020/4	2079/2	treating [3]
transpired [1]	2079/21	2001/23
2050/23	2079/24	2029/14
travel [1]	2080/3 2125/5	2168/24
2346/11	2125/14	treatment [62]
treasure [1]	2129/9	1990/5
2214/10	2129/10	1998/14
treat [9]	2172/18	1998/18
2006/19	2172/19	2000/14
2029/17	2172/20	2000/15

T	2177/15	2225/6
treatment...	2177/21	2277/16
[57] 2000/16	2177/25	2277/17
2001/1	2178/18	2278/3
2006/21	2179/3	2279/24
2011/7 2018/3	2179/12	2283/20
2025/21	2179/19	2313/20
2027/11	2179/24	treats [2]
2027/14	2180/24	1991/25
2027/22	2181/14	2167/14
2030/16	2181/20	treaty [77]
2051/4	2182/16	1986/25
2051/18	2182/18	1987/1 2010/2
2063/3 2088/7	2183/1 2183/4	2018/14
2095/24	2184/7	2040/7
2096/23	2185/20	2040/10
2124/13	2187/3	2065/18
2125/10	2187/12	2069/10
2125/15	2188/14	2076/18
2133/6 2133/8	2189/13	2077/8
2164/10	2191/7	2077/13
2164/20	2200/17	2077/17
2175/25	2201/10	2078/1 2080/5
2177/10	2201/22	2080/6

T	2107/10	2239/8 2296/8
treaty... [62]	2110/20	2296/10
2081/11	2110/24	2296/12
2081/17	2111/4	2304/16
2083/13	2111/24	2304/21
2084/14	2124/13	2304/24
2086/9	2150/21	2309/19
2086/10	2151/13	2311/9
2089/5	2170/24	2316/17
2093/16	2171/6 2174/1	2317/7
2099/21	2176/11	2323/15
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2101/1 2101/4	2182/1	treaty's [1]
2101/20	2183/14	2101/16
2102/7	2183/24	treaty-based
2102/13	2201/12	[2] 2010/2
2104/16	2201/13	2124/13
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2105/20	2202/19	2007/19
2105/22	2205/17	2013/15
2106/7	2224/24	2014/3 2014/9
2106/10	2238/9	2014/21
2106/13	2238/15	2072/20
2107/9	2238/17	2072/22

T	trial [6]	1989/1
tree... [16]	2000/24	1989/17
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2073/17	2049/24	1993/12
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2143/21	2262/22	2006/1 2007/7
2144/3	2290/25	2007/14
2144/17	tribunal [245]	2008/23
2149/16	1979/3 1983/8	2008/25
2149/17	1983/12	2009/23
2149/18	1983/15	2010/6
2150/1 2150/3	1984/15	2010/14
2151/6 2152/5	1984/24	2011/15
2153/16	1985/12	2012/7
2158/18	1985/21	2013/13
2158/23	1986/6 1986/9	2014/15
trees [1]	1986/14	2015/11
2075/13	1987/19	2016/12
tremendous	1988/8	2016/17
[1] 2337/16	1988/10	2018/6
trends [1]	1988/12	2018/14
2249/16	1988/18	2018/17
trepidation [1]	1988/19	2018/18
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T	2075/21	2095/9 2096/5
tribunal...	2075/22	2098/10
[201] 2019/20	2077/19	2098/10
2020/17	2078/7	2099/16
2021/25	2078/10	2102/9
2022/7	2079/2	2112/22
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2022/19	2079/12	2122/23
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2023/16	2081/2	2125/15
2023/19	2081/23	2126/1 2126/4
2024/21	2082/5	2127/11
2025/1	2082/16	2128/7
2026/14	2083/4 2083/7	2129/25
2027/5 2027/7	2083/23	2130/7
2027/20	2084/16	2130/10
2027/25	2085/16	2130/11
2028/6	2086/3	2134/17
2030/10	2086/16	2138/19
2033/7	2090/8	2139/22
2033/14	2091/18	2141/18
2035/14	2091/21	2141/24
2036/23	2094/19	2143/8
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2169/16	2182/25	2205/11
2171/7	2183/25	2207/3 2207/8
2171/25	2184/6	2207/15
2172/1 2172/2	2184/16	2208/18
2172/8 2172/8	2186/7 2186/7	2210/3 2210/5
2172/11	2186/14	2210/11
2172/12	2187/9	2210/22
2174/9 2174/9	2187/19	2211/1 2211/5
2174/9	2187/22	2217/12
2174/20	2188/1 2188/2	2222/21
2174/22	2188/3	2223/1
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2177/17	2193/13	2226/17
2177/18	2193/20	2226/18
2178/22	2194/5	2226/22
2179/16	2194/23	2227/8
2179/18	2196/7 2197/5	2235/19
2179/24	2198/11	2237/7

T	2301/8 2312/5	2026/6 2030/7
tribunal.....	2324/13	2031/22
[43] 2237/23	2325/19	2068/23
2238/24	2328/2	2083/9
2239/2	2329/25	2088/21
2239/17	2332/11	2090/10
2240/1	2332/12	2095/12
2240/18	2334/14	2098/9
2242/11	2335/14	2098/23
2242/18	2338/8	2170/8
2254/9	2338/15	2174/12
2254/16	2343/20	2183/7
2263/7	2343/23	2239/13
2271/25	2344/4	2240/11
2276/21	2344/16	2301/7
2278/9	2344/21	tribunals [23]
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2285/7	2345/11	2009/12
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T	2200/25	2178/17
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2049/21	2225/15	2190/4
2058/20	2243/24	2195/11
2059/24	2305/22	2230/10
2143/13	2305/23	2245/1
2156/24	2311/8	2250/13
2170/4 2196/8	2315/20	2261/7
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2254/19	turn [26]	2296/20
2281/25	1998/12	2323/12
2297/24	2086/11	turned [1]
2297/25	2099/16	2268/7
trying [18]	2104/5	turning [11]
1995/23	2110/16	2015/23
2034/13	2114/10	2042/13
2067/16	2117/22	2048/10
2157/21	2129/5 2131/8	2054/2 2057/9
2158/6 2158/8	2161/15	2129/18
2176/21	2169/4	2133/3 2134/5
2177/5	2169/19	2202/18
2183/15	2169/25	2245/4
2195/24	2171/14	2260/19

T	2033/25	2145/8
turns [1]	2035/16	2160/10
2011/25	2035/17	2169/12
Twain [2]	2084/4	2170/2 2178/8
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2279/10	2094/17	2198/16
tweak [1]	2095/1	2205/19
2117/8	2101/20	2213/1
tweaks [1]	2109/20	2225/12
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twice [4]	2112/11	2232/18
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1997/3	2118/8	2245/21
2002/11	2118/13	2246/19
2002/19	2119/13	2247/1
2011/10	2119/18	2251/14
2011/24	2124/8	2252/3
2016/25	2127/14	2274/16
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two-part [1]	U	2306/9
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type [6]	2022/8	2308/14
2006/2	2044/12	2311/1
2059/13	2066/11	2312/24
2194/22	2103/1	2313/17
2244/20	2103/19	2314/10
2267/13	2107/7	2314/16

<p>U</p> <p>U.S... [14] 2315/25 2318/11 2319/1 2321/4 2323/3 2325/25 2326/6 2326/24 2327/8 2327/15 2331/16 2339/1 2339/2 2339/5</p> <p>UK [8] 2047/19 2047/20 2052/12 2052/22 2052/25 2053/4 2053/15 2287/17</p> <p>ultimately [7]</p>	<p>2124/6 2129/3 2237/23 2255/13 2280/24 2283/7 2283/12</p> <p>unable [1] 2050/4</p> <p>unanimous [2] 2263/9 2331/22</p> <p>unanswered [1] 2327/22</p> <p>unanticipated [1] 2048/25</p> <p>unaware [2] 2137/2 2275/18</p> <p>unbalance [1] 2165/6</p> <p>uncertain [2] 2040/22 2067/10</p> <p>uncertainty [2] 2071/21</p>	<p>2072/1</p> <p>UNCITRAL [10] 1978/4 2008/23 2009/16 2236/23 2237/4 2237/10 2237/20 2238/12 2238/14 2238/15</p> <p>uncontested [1] 2299/8</p> <p>uncontradicted [1] 2054/3</p> <p>uncontroversial [2] 2042/25 2066/17</p> <p>uncontroverted [2] 1990/4 2293/25</p> <p>UNCT [1] 1978/6</p>
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U	2029/7 2029/9	2079/19
UNCT/14/2 [1]	2029/10	2082/12
1978/6	2030/2	2082/18
undefined [1]	2032/18	2086/15
2308/22	2033/6 2033/8	2087/8
under [178]	2037/24	2090/17
1978/3 1985/4	2040/9 2043/5	2091/11
1986/23	2051/24	2091/15
1991/7 1993/4	2059/18	2091/24
2001/9	2063/16	2094/5
2003/23	2068/20	2096/22
2004/16	2069/2 2069/8	2100/10
2007/1	2069/10	2100/25
2007/13	2069/15	2101/2
2009/16	2070/16	2101/14
2010/13	2070/22	2102/3
2012/12	2073/1	2105/11
2012/15	2073/23	2105/14
2012/17	2074/21	2105/15
2016/1 2016/8	2077/19	2105/18
2020/21	2078/11	2109/17
2021/16	2078/12	2110/10
2028/5	2078/14	2120/18
2028/19	2079/2	2121/1 2122/1

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under... [104]	2166/10	2201/3
2122/5	2166/21	2203/21
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2123/15	2167/22	2206/1 2206/2
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2131/20	2175/19	2208/2
2132/7	2175/21	2215/15
2132/13	2175/23	2216/24
2132/19	2176/1	2218/16
2133/25	2178/24	2218/21
2135/10	2182/25	2220/17
2138/3	2188/8	2222/21
2150/22	2190/14	2223/6
2154/12	2191/5	2223/24
2154/23	2191/14	2230/1 2235/3
2155/24	2192/12	2235/25
2156/25	2194/25	2237/11
2159/12	2197/4 2197/9	2240/2
2159/20	2197/13	2241/14
2159/24	2198/1 2198/3	2243/18
2163/12	2198/6	2244/21
2163/25	2199/12	2251/5 2254/6

<p>U</p> <p>under..... [26] 2257/16 2261/4 2269/9 2272/24 2272/25 2277/17 2282/22 2283/20 2286/1 2291/16 2298/20 2298/21 2299/10 2304/15 2304/23 2305/4 2305/24 2316/16 2318/24 2320/6 2321/13 2325/25 2327/13</p>	<p>2332/15 2334/13 2338/6 under the [1] 2191/5 undercut [1] 2025/10 underestimate d [1] 2345/12 underlying [6] 2070/5 2081/1 2099/12 2128/15 2129/13 2152/24 underneath [3] 2318/7 2318/9 2318/13 underpinning [1] 2264/18 underpinning s [1] 2059/1 underpins [1]</p>	<p>2287/11 underscores [2] 2102/20 2292/7 understand [24] 2000/15 2011/14 2016/18 2067/14 2077/6 2126/4 2127/11 2153/25 2155/7 2155/8 2155/20 2161/24 2162/6 2169/7 2172/13 2174/18 2195/25 2196/5 2200/4 2200/6 2223/17 2225/15 2236/6</p>
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<p>U</p> <p>understand... [1] 2236/19</p> <p>understandin g [11] 2039/24 2044/20 2136/11 2141/17 2195/23 2228/17 2237/2 2237/11 2257/15 2265/18 2294/19</p> <p>understandin gs [1] 2040/5</p> <p>understands [1] 2308/12</p> <p>understood [20] 2015/6 2016/10 2045/23 2102/20</p>	<p>2111/9 2112/2 2129/14 2134/10 2137/8 2148/4 2186/15 2214/16 2231/14 2253/25 2259/17 2272/5 2272/25 2306/15 2330/14 2339/24</p> <p>undertake [2] 2287/4 2335/4</p> <p>undertaken [1] 2189/14</p> <p>undertaking [4] 2091/24 2191/3 2334/18 2334/20</p> <p>undisputed [2] 1991/5</p>	<p>2285/24</p> <p>undo [2] 2070/5 2071/18</p> <p>Undoubtedly [1] 2262/17</p> <p>unduly [2] 2134/16 2157/1</p> <p>unequivocal [1] 2268/24</p> <p>unethical [1] 2131/14</p> <p>unfair [1] 2285/11</p> <p>unfettered [1] 2165/3</p> <p>unfortunately [2] 2232/5 2339/14</p> <p>unified [1] 2050/16</p> <p>uniform [1] 2178/10</p>
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Unilever [2] 2257/7 2342/4	1983/4 1983/8	2103/22
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2063/25	1985/24	2105/6
2064/8	1986/8	2105/14
2087/25	1986/18	2110/7
2089/16	1986/23	2110/11
2089/17	1987/6 1987/9	2110/13
2090/4	1987/13	2110/14
2242/13	1987/17	2111/17
2243/5	1987/24	2140/18
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unitary [3] 2245/9	1988/22	2197/2
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	2002/12	2204/9
	2066/15	2204/22
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	2077/10	2216/21
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		2237/12

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United... [19]	2079/23	2253/8
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2311/16	2133/14	2318/21
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	2262/3 2262/5	2098/8 2102/2
	2270/9 2274/1	2107/2
	2341/15	2114/19
	2342/17	2118/5 2118/6
	untimely [2] 2008/22	2126/21
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		2148/15
		2149/19
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up... [37]	2295/16	2018/19
2163/2	2298/2	upon [23]
2163/13	2298/13	2071/20
2166/11	2299/10	2103/22
2167/7	2303/4 2303/5	2130/6
2170/13	2303/10	2133/14
2191/25	2306/18	2161/19
2193/3 2193/5	2311/24	2162/8
2196/14	2328/7 2329/9	2186/12
2197/23	2335/16	2198/22
2203/20	up/reading [1]	2200/1
2205/1	2062/8	2203/10
2214/11	updated [1]	2205/25
2218/18	2058/11	2209/8
2220/4	upheld [8]	2216/14
2224/18	1991/15	2269/5
2224/23	2050/24	2271/20
2240/13	2110/13	2275/14
2258/18	2110/14	2287/22
2259/5	2255/17	2292/17
2267/13	2275/19	2300/12
2268/22	2275/23	2306/13
2274/12	2290/24	2306/13

<p>U</p> <p>upon... [2] 2334/14 2340/1</p> <p>Uponor [5] 2117/22 2117/24 2119/7 2279/17 2279/25</p> <p>UPS [3] 2183/25 2227/16 2227/21</p> <p>upstream [5] 2066/8 2264/4 2264/15 2281/24 2285/3</p> <p>uptick [3] 2121/17 2121/22 2337/19</p> <p>urge [1]</p>	<p>2161/6</p> <p>urged [1] 2019/19</p> <p>us [34] 2000/5 2007/4 2014/20 2031/25 2052/8 2052/12 2075/14 2075/18 2080/17 2085/19 2086/19 2098/16 2113/11 2122/23 2141/18 2142/12 2143/1 2143/15 2143/16 2151/5 2154/11</p>	<p>2160/10 2171/19 2184/25 2189/18 2279/2 2301/9 2310/24 2316/14 2317/7 2338/9 2344/10 2345/4 2346/8</p> <p>use [44] 1989/25 1990/9 1994/14 1998/17 2006/8 2006/18 2007/1 2016/16 2038/3 2041/21 2042/24 2043/3 2044/10</p>
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2058/7	1995/21	2001/22
2059/11	2004/3 2004/5	2006/19
2065/2 2066/9	2031/15	2038/14
2066/16	2039/15	2043/2
2075/8	2041/16	2047/10
2099/23	2047/15	2087/15
2100/19	2047/20	2098/7 2100/4
2159/18	2095/7	2100/16
2160/3 2177/1	2100/16	2112/1 2178/4
2196/6	2103/9	2213/25
2256/16	2103/20	2252/14
2265/14	2103/23	2260/3
2265/17	2104/1 2104/4	2303/25
2265/20	2111/8 2112/8	2304/5 2304/8
2265/22	2123/17	2304/14
2272/19	2125/3	2305/6
2288/14	2139/23	2305/20
2289/13	2235/18	2306/5 2306/7

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2306/16	2043/6	1992/21
2307/6 2307/7	2058/23	1992/21
2307/14	2255/24	1992/25
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2337/17	2006/6	2047/2
2338/19	2006/14	2049/23
2338/22	2006/14	2050/23
2338/22	2007/3 2009/4	2051/16
2340/6	2011/2 2012/5	2057/25
2341/14	2015/8	2060/7 2061/8
2342/5 2342/8	2015/15	2066/18
weren't [2]	2015/18	2071/20
2037/17	2016/15	2075/23
2249/25	2016/15	2076/24
what [282]	2019/4	2079/25
1986/4	2020/22	2080/20
1986/25	2034/13	2081/22
1987/1 1988/3	2034/20	2082/15
1991/7	2034/24	2084/22
1993/20	2035/22	2087/1
1994/5	2035/23	2087/10

W	2109/1 2109/3	2147/14
what... [221]	2109/16	2147/23
2087/11	2111/11	2149/10
2087/14	2111/15	2150/4 2150/6
2087/17	2113/15	2150/23
2088/8 2089/2	2113/20	2152/22
2093/20	2114/7	2154/7
2094/11	2115/23	2154/25
2094/14	2119/14	2155/1 2155/4
2095/10	2121/11	2155/7
2096/18	2121/13	2156/11
2098/13	2122/17	2156/19
2098/14	2125/10	2156/23
2099/18	2125/15	2157/7 2157/9
2101/20	2125/21	2158/1 2158/3
2102/11	2126/18	2158/5 2158/7
2102/25	2127/18	2159/3
2103/15	2127/24	2159/12
2104/5	2140/6 2143/1	2160/4 2162/6
2104/10	2143/15	2167/9
2105/14	2143/19	2167/20
2106/2 2106/3	2145/11	2169/22
2106/9	2145/24	2170/5
2106/11	2146/1	2171/20

W	2200/14	2220/15
what..... [141]	2201/8	2220/15
2172/2 2173/4	2201/21	2222/2 2222/4
2174/17	2203/11	2222/24
2175/9	2204/9	2223/12
2175/10	2204/19	2226/17
2175/14	2205/4	2226/24
2175/16	2205/17	2227/22
2176/10	2205/23	2227/22
2178/19	2207/4	2227/23
2178/22	2208/13	2228/1
2179/16	2208/19	2228/12
2181/3	2209/11	2228/21
2183/11	2209/17	2230/16
2184/4	2210/11	2231/22
2185/23	2212/20	2233/2 2234/4
2186/5	2213/12	2238/24
2188/17	2214/6 2215/2	2239/10
2189/18	2218/8	2240/14
2191/2 2192/1	2218/23	2242/12
2192/7	2218/24	2243/8 2243/9
2194/21	2219/8	2247/24
2194/24	2219/19	2251/16
2196/15	2220/4 2220/4	2253/18

W	2298/17	2327/18
what..... [64]	2300/5 2301/9	2328/10
2255/16	2302/20	2328/13
2261/13	2304/4	2328/19
2267/18	2304/11	2328/22
2270/23	2305/22	2328/23
2271/15	2307/20	2330/15
2272/10	2308/9	2338/3
2272/19	2309/11	2338/16
2272/23	2310/8	2341/12
2273/3 2276/8	2311/15	2343/3 2344/4
2278/22	2311/17	2344/15
2278/23	2312/24	2345/16
2279/2 2280/2	2313/2	what's [9]
2280/8	2313/12	2021/3 2043/5
2280/12	2315/23	2044/4 2071/9
2281/6	2315/24	2109/22
2288/21	2315/25	2109/23
2290/8	2315/25	2168/23
2290/18	2318/16	2201/11
2291/2 2293/3	2325/7	2316/13
2295/23	2325/16	whatever [4]
2295/24	2326/20	2107/2
2298/16	2327/8	2167/10

W	2016/16	2065/19
whatever... [2]	2020/15	2067/10
2270/21	2023/25	2069/21
2344/9	2024/8	2070/1 2070/4
whatsoever	2028/14	2071/1
[1] 2275/10	2034/22	2071/21
when [165]	2036/5	2072/1
1987/14	2036/18	2074/20
1993/23	2037/19	2076/7
1993/25	2037/20	2076/22
1994/11	2037/23	2078/15
1994/15	2039/9 2040/3	2079/6
1996/1	2042/7	2083/12
1996/18	2042/11	2084/9
1997/15	2043/13	2085/18
2000/20	2046/16	2086/3
2003/15	2046/19	2087/15
2005/14	2048/14	2089/7
2005/22	2049/5 2052/3	2089/10
2006/24	2056/24	2091/14
2010/7	2057/4	2100/25
2011/23	2058/22	2102/16
2014/24	2061/23	2102/24
2015/12	2062/2	2103/4

W	2150/14	2220/6
when... [97]	2152/21	2224/20
2106/22	2154/25	2226/5
2109/1 2109/4	2162/17	2228/13
2110/3	2164/17	2229/4 2230/2
2113/22	2172/7	2230/8 2232/1
2113/24	2173/20	2234/5 2248/7
2117/3 2119/1	2175/10	2249/8
2122/8	2176/14	2249/19
2122/11	2180/10	2253/18
2122/12	2183/12	2267/5
2122/20	2183/21	2267/12
2123/20	2193/2	2267/16
2132/20	2196/21	2268/7
2138/9	2198/7	2268/22
2138/15	2198/17	2270/11
2138/17	2201/11	2274/9
2139/3 2139/4	2204/25	2276/11
2139/8	2205/18	2278/25
2147/13	2206/22	2281/1
2147/22	2208/13	2290/24
2147/24	2209/18	2293/6 2294/4
2149/1 2149/6	2213/17	2294/7
2149/10	2216/16	2295/15

W	2021/13	2186/19
when..... [19]	2021/21	2187/8 2189/4
2297/11	2024/1	2195/5 2198/4
2299/7 2306/6	2024/21	2198/11
2307/19	2040/17	2204/20
2307/21	2041/14	2204/22
2308/5 2315/2	2042/10	2220/7
2321/24	2050/5 2054/1	2223/17
2326/15	2056/15	2227/24
2328/20	2057/13	2239/7 2241/2
2329/3	2071/17	2241/8
2330/21	2072/19	2242/13
2330/25	2090/4	2243/23
2334/16	2092/21	2244/9
2334/18	2096/16	2244/11
2338/22	2118/6	2255/1
2341/11	2128/21	2258/19
2344/17	2128/21	2260/10
2344/18	2129/1	2262/21
whenever [1]	2135/25	2263/1
2112/24	2139/6 2139/9	2274/13
where [78]	2153/4 2153/9	2275/19
2009/6	2163/3	2278/22
2020/24	2184/12	2279/24

W	2144/14	2034/14
where... [22]	2174/20	2034/16
2280/18	2313/18	2038/15
2285/7	whereby [1]	2038/17
2294/11	2181/17	2040/10
2295/20	wherever [1]	2044/22
2296/1 2301/8	2034/13	2049/16
2302/11	wherewithal	2055/14
2303/20	[1] 2184/16	2055/16
2303/21	whether [172]	2066/9
2303/23	1993/13	2067/13
2307/23	1993/14	2067/17
2308/25	1995/23	2071/22
2309/25	1996/1	2072/6
2310/18	1996/15	2073/15
2312/11	2007/8	2074/23
2314/4	2007/10	2076/13
2314/20	2007/11	2076/24
2315/16	2007/12	2078/15
2318/7	2010/10	2078/25
2331/16	2023/21	2079/20
2337/17	2028/6 2031/1	2080/7
2342/2	2032/13	2080/19
whereas [3]	2034/7	2082/16

W	2120/15	2182/5 2184/2
whether...	2122/24	2185/14
[133] 2083/2	2122/25	2186/12
2083/7	2124/10	2186/14
2083/14	2126/2	2189/16
2083/17	2128/11	2192/15
2084/9	2130/1	2192/19
2086/14	2130/11	2192/23
2086/20	2136/14	2192/24
2087/8	2138/5	2193/10
2088/22	2146/17	2193/23
2089/7	2154/22	2194/6 2194/8
2089/10	2155/1 2155/2	2194/15
2089/14	2155/8	2196/13
2090/8	2156/16	2196/20
2090/10	2157/9	2197/6
2090/12	2159/11	2198/13
2090/25	2171/9	2201/6 2201/8
2092/15	2174/16	2201/16
2094/3 2096/4	2178/9	2201/17
2096/6	2178/16	2202/8 2203/1
2096/11	2178/23	2203/3 2203/6
2098/24	2180/6	2204/10
2099/2 2109/5	2180/19	2205/12

W	2290/20	2344/5
whether.....	2290/21	2344/16
[55] 2208/11	2291/17	2344/24
2209/16	2295/17	2345/5
2210/6 2210/7	2302/23	which [268]
2210/9	2303/5	1984/15
2210/17	2306/22	1985/11
2211/2 2219/3	2311/9	1985/18
2219/6	2314/21	1987/24
2220/19	2319/15	1991/4
2238/1 2238/1	2321/2	1992/18
2240/1 2240/3	2321/14	1992/19
2241/3	2322/10	1994/20
2245/13	2322/12	1995/15
2251/4	2322/14	1996/3
2256/18	2322/21	1998/23
2257/9	2322/22	1999/11
2266/13	2323/2 2323/7	2000/3
2266/15	2334/1	2000/14
2269/7	2334/24	2002/21
2269/14	2336/18	2002/22
2274/22	2340/11	2003/18
2276/24	2341/14	2005/24
2283/11	2342/12	2006/5

W	2028/5	2065/15
which... [249]	2031/10	2068/20
2006/18	2033/3	2068/21
2007/21	2033/16	2069/17
2007/23	2037/9 2038/7	2070/11
2007/24	2038/14	2070/12
2008/24	2039/9 2040/1	2072/13
2009/22	2046/14	2074/24
2010/18	2046/23	2074/25
2011/5 2012/6	2047/19	2075/18
2013/21	2048/24	2075/23
2013/22	2052/3	2076/7
2016/23	2052/11	2076/18
2017/10	2053/7	2078/3
2019/7	2057/14	2079/11
2019/22	2058/15	2080/4 2080/7
2020/1 2020/3	2059/14	2081/2 2085/3
2020/12	2059/15	2085/5
2021/6 2023/1	2059/16	2085/21
2023/6 2023/7	2060/22	2086/10
2023/18	2060/25	2086/12
2024/4 2026/1	2061/3	2086/17
2026/6 2026/8	2061/11	2086/19
2027/24	2064/17	2087/3 2088/6

W	2114/11	2143/20
which.....	2115/4	2146/15
[168] 2090/13	2117/22	2151/1
2091/16	2117/23	2156/25
2094/22	2119/12	2157/1
2094/24	2120/5	2157/16
2096/22	2122/15	2158/19
2097/3 2097/8	2123/1	2163/11
2098/23	2123/12	2167/10
2099/16	2123/15	2168/16
2100/6	2125/1	2172/10
2100/24	2125/24	2172/13
2101/4	2127/1 2127/2	2173/10
2101/10	2127/7	2174/11
2101/21	2127/25	2176/1
2106/21	2128/24	2190/23
2106/24	2130/6 2132/1	2194/11
2107/3 2107/9	2132/16	2196/8
2109/23	2132/23	2199/25
2111/5	2132/24	2200/9
2111/17	2133/11	2204/20
2111/21	2133/14	2209/1
2112/22	2134/11	2210/23
2114/10	2137/3 2141/3	2218/17

W	2246/17	2288/12
which.....	2249/11	2292/17
[93] 2219/12	2250/14	2298/20
2219/16	2252/22	2299/9
2219/21	2253/13	2300/12
2220/4	2253/14	2300/13
2220/15	2253/15	2301/4 2301/8
2221/8	2254/19	2301/9 2302/2
2221/10	2257/1 2258/9	2302/15
2223/5	2259/24	2304/6
2223/14	2260/5	2305/21
2226/18	2260/20	2305/24
2227/16	2261/7 2263/6	2307/25
2231/5	2264/9	2309/19
2231/21	2264/21	2314/11
2234/19	2264/24	2314/24
2235/21	2270/6 2272/3	2315/12
2237/7	2282/20	2318/21
2240/15	2283/3	2319/25
2242/10	2284/13	2320/8 2321/5
2242/21	2284/19	2324/11
2246/1 2246/9	2285/22	2324/17
2246/9	2287/7	2325/24
2246/11	2287/23	2327/24

W	2211/17	2253/22
which.....	2216/6	2253/23
[16] 2328/23	2285/21	2273/8
2330/1 2334/4	2293/23	2277/11
2335/1 2335/2	2322/3 2332/3	2295/20
2336/4	2337/12	2296/21
2336/20	2339/7	2315/4
2337/20	Whilst [1]	2330/11
2338/3 2338/4	2236/22	2342/14
2339/4	White [1]	2343/24
2339/14	2027/25	whole [16]
2344/14	who [25]	1993/14
2344/21	1998/1	1993/17
2345/1 2346/7	2006/11	1994/5 1994/9
while [17]	2042/9	1995/22
1991/3	2062/10	1996/12
2038/23	2111/17	1996/13
2054/13	2146/7 2146/9	2019/24
2081/13	2148/4 2149/3	2060/21
2115/8	2149/4	2079/23
2119/23	2161/12	2158/2
2160/9	2208/24	2253/17
2163/24	2223/18	2280/23
2193/5	2229/8 2242/1	2283/1

W	2155/23	2235/22
whole... [2]	2157/3 2160/9	2238/21
2286/22	2161/17	2242/2
2300/7	2164/4	2242/10
wholly [1]	2165/14	2256/8 2271/2
2057/8	2166/4	2273/24
whom [1]	2167/13	2276/19
2052/9	2168/2	2277/11
whose [2]	2168/16	2281/21
2149/8	2169/7	2289/8 2292/7
2286/11	2171/24	2304/10
why [61]	2173/18	2319/17
2028/22	2173/22	2322/25
2032/7	2174/6	2325/16
2037/15	2174/11	2326/1
2039/4	2174/15	2331/12
2058/20	2175/3 2185/8	2337/15
2062/8	2195/25	2338/10
2094/18	2196/1 2200/8	wide [2]
2107/7 2114/7	2201/1 2202/6	2046/22
2126/9	2208/25	2108/11
2128/12	2212/21	wider [1]
2150/14	2218/17	2323/7
2152/1	2232/20	Wilko [1]

W	2043/19	2113/2
Wilko... [1]	2043/25	2117/22
2216/24	2045/15	2123/21
will [175]	2045/16	2131/6 2131/6
1984/15	2045/17	2131/8
1985/4 1993/8	2045/18	2138/11
1995/14	2046/5 2046/6	2139/17
1997/8	2066/13	2140/4
1999/19	2068/2	2149/11
2000/8 2006/5	2068/19	2149/13
2007/20	2068/20	2149/14
2007/21	2068/21	2149/20
2007/22	2071/23	2150/17
2007/23	2075/7 2076/7	2150/20
2007/23	2081/22	2151/9 2160/9
2007/25	2084/17	2160/20
2007/25	2085/17	2161/17
2008/10	2086/11	2162/12
2009/7 2013/9	2094/20	2162/18
2014/12	2099/11	2162/18
2030/19	2099/11	2163/5 2164/2
2031/2 2036/6	2099/16	2164/8
2041/22	2099/18	2164/22
2043/4	2103/24	2165/13

W	2190/1	2251/15
will... [98]	2191/24	2251/16
2165/16	2193/17	2251/17
2165/21	2202/3 2204/8	2261/7 2277/8
2165/22	2204/12	2277/10
2165/23	2205/3	2277/11
2166/3 2166/7	2208/21	2277/14
2166/15	2209/22	2277/20
2166/20	2210/20	2282/8 2284/2
2166/25	2212/20	2287/15
2167/2 2167/7	2212/23	2287/21
2167/9 2168/1	2213/14	2289/18
2169/16	2214/13	2296/20
2169/19	2214/15	2296/21
2169/21	2214/17	2297/15
2169/25	2214/20	2297/24
2170/2 2170/2	2215/3	2298/1
2170/4	2216/13	2299/13
2176/15	2217/21	2300/11
2177/23	2217/23	2301/3
2178/19	2223/15	2304/25
2178/20	2226/11	2308/7 2308/8
2181/4	2234/3	2308/9
2184/20	2244/25	2308/10

<p>W</p> <p>will..... [20] 2308/22 2311/6 2318/5 2320/4 2324/9 2325/18 2328/5 2333/13 2333/14 2333/16 2335/25 2337/20 2339/7 2343/19 2343/20 2343/22 2344/1 2344/8 2345/3 2345/4</p> <p>WILLARD [1] 1980/9</p> <p>willful [1] 2131/25</p> <p>willfully [1] 2053/9</p>	<p>WILMER [1] 1979/12</p> <p>wilmerhale.co m [1] 1979/13</p> <p>Wilson [3] 2003/22 2004/11 2293/5</p> <p>win [2] 2067/13 2118/2</p> <p>window [1] 2010/12</p> <p>wins [2] 2118/5 2119/14</p> <p>wipes [1] 2301/19</p> <p>WIPO [12] 2006/9 2147/19 2252/8 2295/13 2311/7 2318/7</p>	<p>2318/13 2318/16 2319/5 2319/8 2322/10 2322/16</p> <p>wisdom [1] 2221/14</p> <p>wish [3] 1989/7 2338/14 2346/10</p> <p>wishes [2] 1988/25 2022/15</p> <p>withheld [1] 2114/5</p> <p>withhold [1] 2114/1</p> <p>within [28] 2010/11 2020/4 2032/10 2054/5 2055/12</p>
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W	1990/9	2044/12
within... [23]	2040/12	2049/13
2064/12	2044/9	2050/1 2058/1
2064/16	2114/12	2058/14
2065/15	2120/20	2160/22
2098/23	2125/15	2160/22
2106/8 2142/8	2133/1	2160/25
2152/20	2133/13	2160/25
2190/23	2147/20	2250/6
2208/1 2219/5	2169/14	2295/19
2225/7	2169/20	2326/11
2230/23	2202/18	2342/13
2238/7	2217/13	witnesses [25]
2239/11	2264/22	2006/2
2240/2	2324/3 2324/3	2039/12
2240/20	2328/8	2078/23
2242/15	2328/12	2080/14
2271/7	2328/21	2080/21
2309/23	2329/4	2104/11
2310/5	withstand [1]	2106/3
2311/20	2138/12	2111/23
2311/22	witness [15]	2135/18
2316/4	2004/23	2136/10
without [20]	2041/8	2136/14

W	wonder [2]	2306/5
witnesses...	2125/21	2308/12
[14] 2145/9	2339/24	2323/24
2145/11	wonderful [2]	2334/2 2334/8
2149/2 2149/8	2278/21	worded [2]
2162/9	2345/7	2128/10
2165/17	wondering [2]	2153/22
2249/17	2327/22	wording [3]
2252/16	2344/15	1986/5
2281/16	word [20]	2082/14
2292/19	1994/14	2252/9
2293/24	1994/15	words [32]
2294/3	2004/4 2004/5	2001/25
2306/19	2004/18	2029/20
2326/2	2047/14	2048/2
won't [8]	2104/13	2070/19
2100/10	2107/16	2090/19
2142/13	2148/21	2093/13
2274/10	2213/24	2095/12
2301/4	2214/1	2114/3
2309/10	2256/22	2122/13
2312/24	2263/18	2132/7
2313/11	2304/8	2144/20
2315/23	2305/21	2148/18

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