

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

S.D. MYERS, INC.,

Claimant/Investor,

-and-

THE GOVERNMENT OF CANADA,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to NAFTA Article 1128, the Government of the United States of America makes this submission to address certain questions of interpretation of the NAFTA arising in the case brought by S.D. Myers, Inc. against the Government of Canada. No inference should be drawn from the absence of comment on any issue not addressed below. The United States takes no position on how the interpretive positions it offers below apply to the facts of this case.

Article 1139: Definition of Investment

2. The United States agrees with Canada and Mexico that Article 1139 of the NAFTA provides an exhaustive list of what constitutes an investment for purposes of Chapter Eleven of the NAFTA.

3. A person of one NAFTA Party may operate in the territory of another NAFTA Party through an enterprise, and that enterprise may constitute an “investment” of that person as defined by Article 1139. The term “enterprise” is defined in Article 201 of the NAFTA as “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.” Article 1139’s definition of an “enterprise” for purposes of Chapter Eleven also includes a branch of an enterprise.

4. The United States submits that not every activity of an investor in the territory of another NAFTA country constitutes an investment. Only those things listed in Article 1139's definition can constitute an "investment" for purposes of Chapter Eleven. The mere fact that an investor carries on activity in the territory of another NAFTA country does not mean that an investor has an enterprise. In order to qualify as an "enterprise" for purposes of Chapter Eleven, an entity must be "constituted or organized under applicable law," which necessarily requires more than mere activity. NAFTA art. 201.

5. An investor's share of a market is not an "investment" as that term is defined by the NAFTA. To the extent that the *Pope & Talbot* tribunal's decision can be read to support the view that market share is an investment, the United States respectfully submits that that tribunal was mistaken on this point.

Relationship Between Articles 1116 and 1117

6. Articles 1116 and 1117 of the NAFTA serve distinct purposes. Article 1116 provides recourse for an investor to recover for loss or damage suffered by it. Article 1117 permits an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment.

7. Where the investment is a separate legal entity, such as an enterprise, any damage to the investment will be a derivative loss to the investor and the investor will have standing to bring a claim under Article 1117. Where the investment is not a separate legal entity, any damage to the investment will be a direct loss to the investor and the investor will have standing to bring a claim under Article 1116.

8. When an investor files a claim under Article 1116 for direct losses suffered by it, only those losses that were sustained by that investor *in its capacity as an investor* are recoverable.

9. Examples of direct losses sustained by an investor in its capacity as an investor that would give rise to a claim under Article 1116 are, for example, losses suffered as a result of an investor's stock certificates having been expropriated or losses sustained as a result of the investor having been denied its right to vote its shares in a company incorporated in the territory of another NAFTA Party.

10. However, if, for example, a NAFTA Party adopts a measure prohibiting the export of certain goods (or services), all entities that import those goods (or services) from the NAFTA Party are likely to sustain losses as a result of that measure, whether or not those entities also have an investment (for example, a marketing subsidiary) in the territory of the Party that adopted the export restriction. Accordingly, losses resulting from reduced imports into the territory of the Party would normally be suffered in an entity's capacity as an importer of the goods (or services), and not in the entity's capacity as an investor.

Relationship Between Chapter Eleven and Other NAFTA Chapters

11. The NAFTA addresses a broad range of topics in the relations between Canada, Mexico and the United States. The NAFTA grants the Free Trade Commission established under Chapter Twenty plenary authority to address all issues concerning the interpretation and application of the NAFTA as a whole.

12. By contrast, Chapter Eleven addresses the relatively narrow topic of investment. All of Chapter Eleven's substantive obligations, set forth in Section A of the chapter, relate solely to investment. Article 1102, for example, requires national treatment only with respect to certain aspects of investments; it does not require national treatment with respect to cross-border trade in goods or services. Tribunals established under Chapter Eleven lack authority to address violations of other chapters of the NAFTA. Instead, their task is limited to assessing whether there has been a breach of Section A of Chapter Eleven (or certain articles of Chapter Fifteen not at issue here) and whether the investor or investment has suffered loss or damage proximately caused by such a breach.

13. The United States therefore agrees with Canada and Mexico that the Tribunal's task at this phase is limited to assessing damages flowing from the breach of the NAFTA's provisions with respect to investments, that is, those of Section A of Chapter Eleven. The Tribunal may not assess damages with respect to any decrease in cross-border trade in goods or services as such, for those matters are not addressed by Chapter Eleven.

Dated: Washington, D.C.
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Respectfully submitted,

Mark A. Clodfelter
UNITED STATES DEPARTMENT OF STATE
Office of the Legal Adviser
Office of International Claims &
Investment Disputes
2430 E Street, N.W.
Suite 203, South Building
Washington, D.C. 20037