



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

IN RE NAFTA CHAPTER ELEVEN/UNCITRAL CATTLE CASES

V.

THE UNITED STATES OF AMERICA

SUBMISSION OF THE UNITED MEXICAN STATES

1. Pursuant to Article 1128 of the NAFTA, the Government of Mexico makes the following submission on certain issues of interpretation that have arisen in the BSE cases against the United States. Mexico takes no position on the facts of this case and its silence on any issue not addressed herein should not be taken to constitute approval or disapproval with any other submission made by any of the parties.
2. Mexico agrees with the United States that none of the NAFTA Parties undertook any obligation with respect to investments located outside of its territory or with respect to “investors” who are not seeking to make, are not making and have not made investments in its territory.
3. Mexico also agrees with the United States’ comment at pages 11-12 of its Memorial that:

The substantive obligations contained in Section A of NAFTA Chapter Eleven provide context for interpreting Article 1101. While most of those obligations address protections for investments, some of them, like Article 1102(1), provide protection for investors. In each instance where the provision obligates a Party to provide a level of treatment to investors, it

does so only *with respect to* the investor's investments that are in the territory of the State that has adopted or maintained the measure at issue. The NAFTA nowhere obligates a Party to provide a level of treatment to investors that have not made or are not seeking to make investments in another NAFTA Party.

4. Mexico wishes to make the following additional comments.
5. When applying the customary rules of international law for the interpretation of the Treaty, and Chapter Eleven's role therein, it must be borne in mind that Chapter Eleven falls within a broader free trade agreement which provides for the liberalization of trade in goods and services by producers situated in the territories of the signatories.
6. With respect to trade in goods, the NAFTA contemplates that goods produced in the territory of one Party may be exported to the territory of one or the other NAFTA Parties. Chapter Three, National Treatment and Market Access for Goods, establishes the rules that govern the treatment that the importing Party must accord to such goods. Should one NAFTA Party consider that another Party is not complying with its Chapter Three obligations, it may request consultations under Article 2006, and if those fail to resolve the matter, it may proceed to State-to-State dispute settlement under Chapter Twenty. A private party has no right of standing to invoke Chapter Twenty dispute settlement.¹
7. State-to-State dispute settlement is the general rule for NAFTA dispute settlement. There are two exceptions to that rule: (i) investor-State arbitration for an alleged breach of a specified, and exhaustive, list of obligations contained in Section A of Chapter Eleven or two sub-paragraphs of certain obligations in Chapter Fifteen; and (ii) Chapter Nineteen binational panel proceedings for review of national trade remedy measures. Each provides private parties with direct access to international jurisdiction, but only in respect of a circumscribed subject-matter.
8. In other words, Chapter Eleven tribunals do not have authority to address violations of other chapters of the NAFTA, and conversely, a would-be claimant cannot use the right of direct access to international arbitration to complain of a breach of any provision that is not listed in Articles 1116 or 1117.² Nor can a private party employ the right of access to a Chapter Nineteen panel to address anything other than a review of a final antidumping or countervailing duty determination.³
9. The premise of Chapters Three and Seven (as well as other chapters of the Agreement that provide for cross-border movement of goods, services and certain classes of professionals and businesspeople⁴) is that producers of goods need not establish themselves in the territory of another NAFTA Party in order to serve that market. To the contrary, those chapters seek to reduce barriers to trade so that producers situated in one NAFTA Party enjoy better terms of access to the markets of each of the other NAFTA Parties than they enjoyed prior to the Agreement's entry into force.

¹ This is plain from the terms of Articles 2003-2019.

² See the terms of Articles 1116 and 1117, which establish the obligations, an alleged breach of which can be submitted to arbitration under Section B of Chapter Eleven. This has been applied in a number of NAFTA cases. See in particular, *United Parcel Services, Inc. v. Canada*, Decision on Jurisdiction, para.2.13, 21-28, 68-69.

³ See Article 1904 (2).

⁴ See Chapters Six, Nine, Ten, Twelve, Thirteen, Fourteen, and Sixteen.

10. However, while providing for the liberalization of trade in goods, the NAFTA did not go so far as to establish a full customs union or common market with no remaining restrictions on trade between the Parties.⁵ Each NAFTA Party retains the right to restrict imports in accordance with the Treaty's terms, subject always to another NAFTA Party's right to have any such restriction reviewed by a Panel for its NAFTA-consistency and its obligation to bring itself into compliance with any dispute settlement Panel report that may find against it.

11. Chapter Eleven provides for the liberalization of investment flows. While many commercial actors are content to take advantage of NAFTA's trade liberalization by producing goods or services which will then be exported to the territory of another Party, some find it advantageous to produce such goods or services in the territory of another Party by means of an investment. Hence, Chapter Eleven's role in the Treaty is to provide a measure of protection to persons who decide to make an investment in the territory of another Party.

12. Article 1101 establishes the Chapter's scope and coverage. Its meaning indicates that Chapter Eleven applies to measures "relating to" "investors of another Party" and "investments of investors of another Party in the territory of the Party." It is to be noted that the term "investor" is defined in Article 1139 as follows:

Investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;

13. An "Investor of a Party" is a person that seeks to make, is making, or has made an "investment," and Chapter Eleven applies to measures relating only to "investments" of an investor of a Party in the territory of another NAFTA Party that has adopted or maintained the measure. Accordingly, the obligations of Chapter Eleven are owed by a NAFTA Party only to an "investor" of another Party that seeks to make, is making, or has made an investment within its territory. This derives from the fact that the term "investment" is used to define "investor."

14. In contrast to some other investment treaties that protect only established investments, the breadth of the definition of "Investor of a Party", in encompassing the potential lifespan of an investment (from seeking to make an investment through to disposing of one), is to ensure that would-be investors in an investment in the territory of another Party, not just those that have already been able to establish themselves in that territory, benefit from Chapter Eleven's protections. By virtue of that definition, Article 1102(1), for example, requires that a Party must accord national treatment to persons that are seeking to make an investment, as opposed to applying only to those that have already become established in its territory. Since a would-be investor of a NAFTA Party may not even be permitted to make an investment in the territory of another Party, the definition permits a claim to be made by that investor, if its investment plans have been frustrated by the Party in whose territory the investor sought to invest.

15. In Mexico's view, consistent with the NAFTA's territorial basis, which recognizes that each NAFTA Party has exclusive jurisdiction over its own national territory including any areas beyond its territorial seas within which the NAFTA Party, in accordance with international law and its domestic law, may exercise certain rights⁶, the definition of "Investor of a Party" is

⁵ Article 101, Establishment of the Free Trade Area, confirms that the Parties were establishing a lesser form of economic integration than a customs union or common market.

⁶ See the Preamble, Articles 101, Establishment of Free Trade Area, 102, Objectives, 105, extent of Obligations, and Annex 201.1, Country-Specific Definitions, in particular the definition of "territory".

always predicated upon the investor seeking to make, making or having made an investment in the territory of another NAFTA Party.

16. This follows from: (i) the drafting convention of the NAFTA; (ii) the Treaty's territorial basis; (iii) the fact that it establishes a free trade agreement and not a more extensive form of economic integration; and (iv) the plain meaning of Chapter Eleven's terms, having regard to the applicable rules of treaty interpretation. To read Article 1101(1)(a) otherwise, runs the risk of Chapter Eleven tribunals attempting to sort out claims of allegedly competing and conflicting sovereign commands within the territory of each NAFTA Party, an outcome which was plainly not intended by the NAFTA Parties, each of which retained its exclusive jurisdiction over its national territory. The proper approach to the interpretation of the scope and coverage of Chapter Eleven is to employ it for its plain and intended purpose: to provide treaty-based international law protections to defined investors of a Party who seek to make, are making or have made investments in the territory of another Party.

All of which is respectfully submitted,

(Signed in the original)

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