

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT**

BETWEEN:

METHANEX CORPORATION

Claimant / Investor

and

THE UNITED STATES OF AMERICA

Respondent / Party

THIRD SUBMISSION OF CANADA

PURSUANT TO NAFTA ARTICLE 1128

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Introduction

1. Pursuant to Article 1128 of the NAFTA Canada wishes to make further submissions¹ to the Tribunal. These submissions concern certain questions of interpretation of the NAFTA arising in the context of the Tribunal's consideration of the Notes of Interpretation of Certain Chapter 11 Provisions, issued by the Free Trade Commission on July 31, 2001 ("Commission's Interpretation").
2. This submission is not intended to address all interpretative issues that may arise in this proceeding. To the extent that it does not address certain issues, Canada's silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.
3. Canada takes no position on any particular issues of fact or on how the interpretations it submits below apply to the facts of this case.

Article 1105 (Notes of Interpretation)

4. On July 31, 2001, the Free Trade Commission established under Article 2001 issued a binding interpretation of NAFTA Article 1105(1). The Commission confirmed that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party". It also noted that "the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." In addition the interpretation made clear that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

¹ Canada's first submission to the Tribunal pursuant to NAFTA Article 1128 of November 10, 2001 dealt with questions of interpretation arising in the context of the Tribunal's consideration of requests for *amicus curiae* status. Canada's second submission of April 30, 2001 dealt with questions of interpretation arising in the context of the Tribunal's consideration of issues regarding jurisdiction, admissibility and the Investor's proposed amendment to its Claim.

5. By its own terms, the Commission's Interpretation consists of "interpretations of Chapter Eleven in order to *clarify and reaffirm* the meaning of certain of its provisions." (emphasis added). It states not what the provisions of the NAFTA are to mean in the future, but what they always have meant. It identifies the legal standard established by the NAFTA Parties and applicable to Article 1105 since the NAFTA entered into force on 1 January 1994. There has been no removal of rights. The Commission's Interpretation is not an amendment to the provisions of the NAFTA.
6. The NAFTA is the creature of the States that are party to it. The Parties have assumed obligations *vis-à-vis* one another that protect investors and investments and have established the process that applies to this proceeding. The Parties acting as the Commission have simply carried out a function that they expressly reserved for their Ministers acting collectively: to ensure the correct understanding and application of the governing law through issuance of authoritative interpretations.
7. The Commission, which is established under NAFTA Article 2001, comprises cabinet-level representatives of each Party, specifically, the Ministers of the three Parties responsible for international trade, including investment issues arising under Chapter Eleven. The Commission is the Parties to the NAFTA acting collectively under that Agreement. It is the highest level policy-making organ and administrator for the NAFTA as a whole. In acting through the Commission, the Parties act through a single body vested with decision-making power under the NAFTA.
8. The Commission is vested with the prime and final authority as the interpreter of the NAFTA. Article 1131(2) makes that clear: "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section [i.e., Section B of Chapter Eleven]." Article 1131(2) forms part of the governing law that a tribunal established under Section B of Chapter Eleven, such as this one, is required to apply.
9. The Commission's authority as the prime and final interpreter of the NAFTA reflects the NAFTA Parties' long-term institutional interest in the proper functioning of the NAFTA.

The role of the NAFTA Parties as disputing parties, capital exporters, recipients of investments of other Parties and as sovereign states with a clear interest in the proper operation of the NAFTA transcends the merits of specific cases. In acting in their plenary capacity as the Commission, the Parties act as the guardians of the NAFTA. They have the legal right to clarify the meaning of the obligations that they agreed to undertake and have specified a mechanism for doing so in the NAFTA. This right was not only negotiated in the NAFTA; it was also approved by the legislatures of each Party when the NAFTA was ratified and implemented.

10. The jurisdiction of a tribunal is set out in Section B of Chapter Eleven. This jurisdiction does not extend to assessing the Commission's ability or intention when issuing an interpretation. Moreover, a Chapter Eleven tribunal cannot ignore, selectively or otherwise, any interpretation issued by the Commission; the tribunal is bound by the Commission's Interpretation. It is the Commission, not an individual tribunal, that is the guardian of the Treaty and the rights and obligations contained therein.
11. Nothing in the language of NAFTA Chapter Eleven permits a Chapter Eleven tribunal to import into Article 1105 separate and distinct obligations found in other agreements. Indeed, obligations from within the NAFTA itself, but outside those set out in Articles 1116 and 1117, are beyond the jurisdiction of a Chapter Eleven tribunal. To conclude otherwise would render meaningless the express intent of the NAFTA Parties to limit arbitration claims under Chapter Eleven to breaches of Section A obligations and the two specific provisions of Chapter 15.
12. The appropriate legal standard under Article 1105 is that set out in the Commission's Interpretation. In particular, the latter provides that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."

13. Further, the Commission's Interpretation has clarified that this standard cannot be changed or modified through reference to other provisions of the NAFTA, including Article 1103, or provisions of other agreements. The Commission's Interpretation makes clear that a breach of another provision of the NAFTA or of another international agreement is irrelevant with respect to the application of Article 1105 of the NAFTA: "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."
14. Any attempt to apply a different legal standard under Article 1105 must fail, as it would be contrary to the governing law of this proceeding set out in Article 1131. The task of the Tribunal is to apply the governing law in a manner consistent with the Commission's Interpretation.

The Aguilar Declaration

15. The Declaration of Mr. Guillermo Aguilar Alvarez ("the Aguilar Declaration") should not be considered by this Tribunal. It is not appropriate or necessary for the application of Article 1105, and such consideration would violate the proper approach to treaty interpretation.
16. The Parties, in their capacity as the Free Trade Commission, have specifically clarified and reaffirmed the meaning and legal standard applicable under Article 1105. No further inquiry by any NAFTA Chapter Eleven tribunal is necessary or permitted as the Commission's interpretation is binding on NAFTA Chapter 11 Tribunals.
17. It is settled law that the primacy of the text is the basis for the interpretation of a treaty. To this effect, Article 31(1) of the *Vienna Convention on the Law of Treaties*² ("*Vienna Convention*") states that "the treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Thus, provisions of NAFTA Chapter Eleven are to be interpreted according

²*Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980).

to their ordinary meaning in their context and in light of the object and purpose of the NAFTA.³

18. Article 31(3)(a) of the *Vienna Convention*⁴ requires consideration of any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions. The Parties have expressed their agreement regarding the interpretation of Article 1105 through the Commission's Interpretation; it is a statement that clarifies what the intention of the Parties always was. It is binding, and disposes of any further quest regarding the meaning of Article 1105. There is neither reason nor basis for the Tribunal to look beyond.

19. Pursuant to Article 32 of the *Vienna Convention*, a Tribunal may only resort to supplemental means of interpretation, including preparatory work, to confirm the meaning resulting from the application of Article 31, or to clarify the meaning when the interpretation according to Article 31 leaves a meaning that is ambiguous, obscure, or will lead to an absurd or unreasonable result.⁵ As Brownlie notes:

In general the International Court, and the Permanent Court before it, have refused to resort to preparatory work if the text is sufficiently clear in itself. On a number of occasions the Court has used preparatory work to confirm a conclusion reached by other means. Preparatory work is an aid to be employed with discretion, since its use may detract from the textual approach, and, particularly in the case of multilateral agreements, the records of

³ Tribunals arbitrating NAFTA Chapter Eleven claims to date have accepted the *Vienna Convention* as an applicable rule of international law within the meaning of NAFTA Articles 102 and 1131. See for example, *Pope & Talbot, Inc. v. Government of Canada*, Interim Award dated June 26, 2000, paras 65-66 and *S.D. Myers v. Government of Canada*, Partial Award dated November 13, 2000, paras 200-3.

⁴ *Vienna Convention*, Article 31(3)(a): **General Rule of Interpretation**

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

⁵ *Vienna Convention*, Article 32: **Supplementary Means Of Interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

conference proceedings, treaty drafts, and so on may be confused or inconclusive.⁶

20. The Aguilar Declaration is not preparatory work as described in Article 32 of the *Vienna Convention*. It is neither credible nor relevant. It is an *ex post facto* declaration outlining the recollection of one negotiator and falls far short of careful recordings of conference proceedings which may be considered, if indeed supplementary materials were necessary.

21. Even if the Aguilar Declaration were considered to be the sort of preparatory work that warranted consideration under Article 32 of the *Vienna Convention*, the Tribunal need not resort to supplemental materials to apply the ordinary and binding interpretation of Article 1105, as clarified by the Free Trade Commission. There is nothing “ambiguous or obscure” about NAFTA Article 1105(1) as clarified by the Free Trade Commission, and thus there is no basis for the Tribunal to look beyond the text of Article 1105 and the Commission’s binding interpretation.

All of which is respectfully submitted,

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Of Counsel for the Government of Canada
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⁶ Ian Brownlie, *Principles of Public International Law*, (5th ed.) p.635 (footnotes omitted)