

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

METHANEX CORPORATION,

*Claimant/Investor,*

*-and-*

UNITED STATES OF AMERICA,

*Respondent/Party.*

**SUBMISSION ON COSTS OF  
RESPONDENT UNITED STATES OF AMERICA**

Mark A. Clodfelter

*Assistant Legal Adviser for International  
Claims and Investment Disputes*

Andrea J. Menaker

*Chief, NAFTA Arbitration Division, Office  
of International Claims and Investment  
Disputes*

CarrieLyn D. Guymon

Mark S. McNeill

David A. Pawlak

Jennifer I. Toole

*Attorney-Advisers, Office of International  
Claims and Investment Disputes*

UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

July 19, 2004

## CONTENTS

I.	COSTS OF ARBITRATION .....	2
II.	COSTS OF LEGAL REPRESENTATION AND ASSISTANCE .....	5
	A. Attorney Time.....	5
	B. Attorney Travel.....	7
	C. Expert Advice .....	8
	D. Outside Vendors and Services .....	9
	CONCLUSION.....	10

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

METHANEX CORPORATION,

*Claimant/Investor,*

*-and-*

UNITED STATES OF AMERICA,

*Respondent/Party.*

**SUBMISSION ON COSTS OF  
RESPONDENT UNITED STATES OF AMERICA**

In accordance with the Tribunal's order at the conclusion of the hearing on June 17, 2004,<sup>1</sup> and pursuant to Articles 38 and 40 of the UNCITRAL Arbitration Rules, respondent United States of America respectfully makes this submission on the quantification of its costs. The United States has already demonstrated that the Tribunal should award the United States costs.<sup>2</sup> In accordance with the Tribunal's instructions, this submission addresses only the quantum of costs incurred by the United States.

Article 38 of the UNCITRAL Arbitration Rules lists six categories of expenses to be included in the "costs" of arbitration: (a) "fees of the arbitral tribunal"; (b) "travel and other expenses incurred by the arbitrators"; (c) "costs of expert advice"; (d) "travel and

---

<sup>1</sup> See Hearing Transcript ("Hrg. Tr.") Vol. 9 (June 17, 2004) at 2186-89.

<sup>2</sup> See Amended Statement of Defense of Respondent United States of America (Dec. 5, 2003) at 186-91; Rejoinder of Respondent United States of America (Apr. 23, 2004) at 89-90; Hrg. Tr. Vol. 2 (June 8, 2004) at 267-68 (Opening Statement of William H. Taft, IV); Hrg. Tr. Vol. 3 (June 9, 2004) at 578-86 (Opening Statement of Ronald J. Bettauer); Hrg. Tr. Vol. 9 (June 17, 2004) at 2177-85 (Closing Statement of Ronald J. Bettauer).

other expenses of witnesses”; (e) reasonable “costs for legal representation”; and (f) “fees and expenses of the appointing authority.” This submission quantifies the expenses of the United States that fit within these categories.<sup>3</sup> The United States has been exceptionally conservative in this regard and has not included costs that could not be ascertained precisely. Accordingly, and because the amount of these costs is fully warranted, the Tribunal should award the United States the full amount requested herein.

## I. COSTS OF ARBITRATION

Article 40 divides the costs enumerated in Article 38 into two categories: Paragraph 1 states that the costs of arbitration “shall in principle be borne by the unsuccessful party” and Paragraph 2 states that, as to the costs of legal representation and assistance, the tribunal “shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.” The United States likewise has divided its discussion into two sections. This section addresses the costs that shall be borne by the unsuccessful party. Section II

---

<sup>3</sup> As provided in this submission, the United States’ costs are as follows:

<b>Category</b>	<b>Cost</b>
Tribunal fees	\$1,050,000.00
Witness travel	\$ 9,385.28
<b>Subtotal (Art. 40(1) costs)</b>	<b>\$1,059,385.28</b>
Attorney time	\$ 942,455.25
Attorney travel	\$ 20,886.85
Expert advice	\$ 943,423.00
Outside vendors/consultants	\$ 23,273.38
<b>Subtotal (Art. 40(2) costs)</b>	<b>\$1,930,038.48</b>
<b>Total</b>	<b><u>\$2,989,423.76</u></b>

quantifies those costs that the Tribunal may apportion and that the United States submits should be borne in their entirety by Methanex.

First, among those costs to be borne by the unsuccessful party are tribunal expenses, referred to in Article 38(a) and (b). In accordance with Article 41, the parties have deposited advances toward the costs of the Tribunal. Upon payment of the June 30, 2004 request for an advance toward Tribunal fees, the United States will have advanced \$1,050,000. The attached Witness Statement of John Rinaldi (“Rinaldi Statement”) includes at Tab 1 a spreadsheet detailing the United States’ expenses in the *Methanex* case by fiscal year. This spreadsheet compiles entries for *Methanex* expenses that were extracted from the database maintained by the Office of the Executive Director in the Legal Adviser’s Office at the United States Department of State. The deposits made by the United States in response to ICSID’s requests for advances for Tribunal costs appear in this spreadsheet at lines 6, 11, 22, 27, and 69. These deposits are to be included in the costs that “shall [] be borne by the unsuccessful party.” Thus, the award on costs should direct that Methanex pay the United States \$1,050,000 to compensate for its deposits advanced toward tribunal costs.

Second, travel and other expenses of witnesses should be included in the costs borne by the unsuccessful party. Article 38(d) includes in the term “costs” the “travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal.” For the reasons discussed below, the travel and travel-related expenses of the United States’ witnesses who appeared at the June 2004 hearing in Washington, D.C. should be included in this category and should be borne by Methanex, as the unsuccessful party.

The Tribunal has already generally approved the need for travel by the United States' witnesses. The Tribunal established a procedure for witness testimony in this case. That procedure invited the disputing parties to designate which of the opposing party's witnesses it chose to cross-examine. The Tribunal required that "upon such notification, unless otherwise ordered by the Tribunal, that witness shall be available as an oral witness at the main hearing."<sup>4</sup> According to that procedure, Methanex notified the United States on May 14, 2004 that it required ten of the United States' witnesses for cross-examination at the hearing.<sup>5</sup> At the May 25, 2004 procedural meeting (via conference call), Methanex withdrew its designation of one of those witnesses, Mr. Caldwell. The parties were subsequently able to agree, with the Tribunal's approval, that two other witnesses need not appear in person, but could testify telephonically or by videoconference.<sup>6</sup> Thus, it was necessary for the United States to incur costs for seven witnesses to travel to appear at the hearing: Mr. Burke, Dr. Fogg, Dr. Happel, Mr. Listenberger, Mr. Simeroth, Mr. Vind, and Dr. Whitelaw.

It remains only for the Tribunal to approve the precise amount of the expenses incurred by these witnesses in traveling to appear at the hearing in accordance with the procedure approved by the Tribunal. These expenses are detailed in the Rinaldi Statement at Tab 1. In the case of travel by expert witnesses, their travel costs were included in recently submitted invoices for all services related to their testimony at the hearing. The portion of those invoiced amounts that covers travel expenses has been shown in a separate column (Column F) in the spreadsheet at Tab 1. The total cost to the

---

<sup>4</sup> Letter from the Tribunal to Messrs. Dugan, Clodfelter, and Legum (June 2, 2003) at 3.

<sup>5</sup> Letter to the Tribunal from Mr. Dugan (First Letter of May 14, 2004).

<sup>6</sup> Joint Letter to the Tribunal from Messrs. Dugan and Legum (June 2, 2004) at 2 ¶ 5.

United States for travel and other expenses for the United States factual and expert witnesses to appear at the June hearing is \$9,385.28. This is a cost that shall be borne by the unsuccessful party under Article 40(1).

## **II. COSTS OF LEGAL REPRESENTATION AND ASSISTANCE**

Under Article 40, the Tribunal is “free to determine” that the unsuccessful party should also bear the costs of legal representation and assistance if such an apportionment is “reasonable.” As the United States has already demonstrated, Methanex should be assessed the entire amount of legal costs, in addition to the costs quantified above. The United States’ costs for legal representation and assistance include four categories, discussed below: (a) costs for attorney time; (b) costs for travel by attorneys; (c) costs of expert advice; and (d) expenses for other outside vendors and services.

### **A. Attorney Time**

Costs for legal representation and assistance as referenced in Article 38(e) are discussed in the attached witness statements of Barton Legum, Mary Reddy, and John Rinaldi. The Tribunal should award the full amount of these costs, which is \$942,455.25. (Rinaldi Statement at Tab 3).

The amount of these costs is not only reasonable, it is quite conservative. Unlike attorneys in the private sector, attorneys for the United States Department of State have only one client and do not bill for their time by matter. Therefore, the United States has made a reasonable estimate of the cost of attorney time devoted to the *Methanex* case in the following manner. Mr. Legum, who supervised the attorneys assigned to the *Methanex* case, estimated the percentage of their time that was devoted to working on the case during each year of these proceedings. (See Witness Statement of Barton Legum

(“Legum Statement”) ¶ 10.) The costs of these attorneys’ salaries and benefits in each of those years were obtained from the Executive Director’s Office in the Legal Adviser’s Office at the Department of State. (*See* Witness Statement of Mary Reddy (“Reddy Statement”) ¶ 4.) Multiplying the appropriate percentage by the cost of salary and benefits for each attorney and then adding the results yields the total estimated cost of legal representation by the United States in this case, \$942,455.25. (*See* Rinaldi Statement at Tab 3.)

This estimate is conservative in many respects, as discussed in Mr. Legum’s Witness Statement. First, the State Department could have retained outside counsel and paid prevailing market rates for attorneys’ time, rather than the salaries and benefits of its employees. Using the hourly billable rate for attorneys in the market with the experience of the attorneys in the NAFTA Arbitration Division would yield a much higher estimate of the costs of legal representation in this case. (*See* Legum Statement ¶ 11; Reddy Statement ¶ 2.)

Second, some attorneys who devoted significant time to this case are excluded from this calculus, including, for example, Deputy Legal Adviser Ronald Bettauer, and Assistant Legal Adviser for International Claims and Investment Disputes, Mark Clodfelter, as well as attorneys in other agencies of the federal and California state governments. These attorneys—at federal agencies including the Department of Commerce, the Department of Justice, the Department of the Treasury, the Environmental Protection Agency, and the U.S. Trade Representative’s Office, and California agencies including the Attorney General’s Office, the State Water Resources

Control Board, and the Air Resources Board—spent many hours reviewing and commenting on the United States’ submissions in this case.

Third, the value of administrative support services has not been included in this calculation, although many hours of secretarial and paralegal time were devoted to this case. Similarly, the value of intern and student law clerk time is not included here. Accordingly, the Tribunal should award the United States the full amount of its costs for attorney time, in the amount of \$942,455.25.

**B. Attorney Travel**

Included in the costs of legal representation and assistance are costs for attorney travel. These travel costs have been quantified separately from costs for witness travel, discussed above. Attorney travel costs are detailed in the Rinaldi Statement at Tab 2. In the early stages of this case, attorneys for the United States traveled to California to meet with officials knowledgeable about the measures at issue. Attorneys later traveled to meet with potential experts in the case. Attorneys traveled in connection with witnesses’ preparation of their written testimony. More recently, attorneys traveled to meet with expert and fact witnesses in preparation for their oral testimony at the June hearing.

These travel expenses are reasonable, especially relative to travel costs that would be incurred by private sector attorneys. Attorneys who traveled in connection with this case did so in economy class at government rates. They stayed at hotels within United States Government guidelines at government rates. Their travel expenses include a modest per diem to cover meals. (*See* Rinaldi Statement ¶ 5.) Accordingly, the amount of these travel expenses, \$20,886.85 in total, is reasonable and should be borne by Methanex.

### C. Expert Advice

In accordance with the agreement of the parties, and with the approval of the Tribunal, expert advice in this case derived solely from experts retained by the parties, as the parties agreed that the Tribunal would not appoint its own experts.<sup>7</sup> Accordingly, the United States retained several experts to respond to Methanex's claims. In particular, Methanex made it necessary for the United States to retain scientific experts to advise the Tribunal regarding the allegations that the measures at issue were a pretext. Arguably, the costs of expert advice could be included in Section I above because Article 38(c) of the UNCITRAL Rules includes costs of expert advice and other assistance required by the arbitral tribunal among those costs that shall be borne by the unsuccessful party. But, out of an abundance of caution, the United States has included these expert expenses in the costs of legal representation and assistance.

The total costs to the United States for expert services in this case are \$943,423.00. These costs are detailed in the Rinaldi Statement at Tab 1. In addition, copies of the individual invoices from the experts for their services have been attached at Tab 4 to the Rinaldi Statement.<sup>8</sup> This total includes amounts already paid to the experts, plus amounts obligated for recently received invoices (for services related to the June 2004 hearing) that are currently being processed and are intended to be paid. For the amounts that have not yet been paid, the column in the spreadsheet entitled "Date Paid" (Column C) has been left blank.

---

<sup>7</sup> Joint letter to the Tribunal from Messrs. Casey and Clodfelter (Aug. 14, 2000) at 2 ¶ 2.

<sup>8</sup> For one expert, Professor Vagts, the cost for one hour of his time has been deducted from the invoiced amount to cover minimal work he performed (reading the Notice of Arbitration) when it was initially anticipated that his expert advice would be used in another matter (*Mondev*) in addition to the *Methanex* case. Professor Vagts' services, however, ultimately were not relied upon in any matter other than *Methanex*.

All of these expenses are also reasonable. Experts billed the United States for their time at hourly rates ranging from \$150 to \$350 per hour, notably reasonable rates for their levels of expertise. Several of the experts also used assistants with lower hourly rates wherever possible to perform the work required in this case. Therefore, in accordance with Articles 38 and 40, this amount, \$943,423.00, should also be borne by Methanex.

**D. Outside Vendors and Services**

The United States contracted with a limited number of additional outside vendors. Their expenses total \$23,273.38, and are shown at lines 29, 71, 72, and 75 of Tab 1 to the Rinaldi Statement. These include charges from an outside vendor for copying services in producing the Second Amended Statement of Defense and Rejoinder, as well as consulting services by an outside attorney with expertise in litigation related to contamination of water supplies.

These limited amounts should also be awarded to the United States as a reasonable portion of its costs of legal representation and assistance. Like others of the United States' enumerated costs, these amounts are very conservative and underinclusive. Unlike a private law firm, the Office of the Legal Adviser does not account for administrative services, such as the cost of in-house copying, telephone charges, facsimile charges, electronic research charges, local travel and overtime meals. Aside from the limited occasions when the United States engaged an outside vendor to perform printing services, the production of its written submissions was performed in-house, consuming significant amounts of secretarial and paralegal time. No charges for these capable employees' time have been included in this quantification of costs.

\* \* \* \* \*

The total measure of the United States' costs for legal representation and assistance is \$1,930,038.48. Adding this to the costs of arbitration detailed in Section I above results in a combined total of \$2,989,423.76. The subtotals for the separate categories of expenses are shown below.

<b>CATEGORY</b>	<b>COST</b>
Tribunal fees	\$1,050,000.00
Witness travel	\$ 9,385.28
<b>Subtotal (Art. 40(1) costs)</b>	<b>\$1,059,385.28</b>
Attorney time	\$ 942,455.25
Attorney travel	\$ 20,886.85
Expert advice	\$ 943,423.00
Outside vendors/consultants	\$ 23,273.38
<b>Subtotal (Art. 40(2) costs)</b>	<b>\$1,930,038.48</b>
<b>Total</b>	<b><u>\$2,989,423.76</u></b>

### CONCLUSION

For the foregoing reasons, and those included in the United States' previous written and oral submissions, the United States respectfully requests that the Tribunal render an award pursuant to Article 40(1) and (2) of the UNCITRAL Arbitration Rules,

ordering that Methanex bear the costs of this arbitration, as well as the United States' costs for legal representation and assistance, in the amount of \$2,989,423.76.

*Respectfully submitted,*

---

Mark A. Clodfelter

*Assistant Legal Adviser for International  
Claims and Investment Disputes*

Andrea J. Menaker

*Chief, NAFTA Arbitration Division, Office  
of International Claims and Investment  
Disputes*

CarrieLyn D. Guymon

Mark S. McNeill

David A. Pawlak

Jennifer I. Toole

*Attorney-Advisers, Office of International  
Claims and Investment Disputes*

UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

July 19, 2004