IN THE ARBITRATION UNDER
CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND UNDER THE UNCITRAL ARBITRATION RULES BETWEEN

METHANEX CORPORATION,

Claimant/Investor,

and

THE UNITED STATES OF AMERICA,

Respondent/Party.

SECOND OPINION OF PROFESSOR SIR ROBERT JENNINGS, Q.C.

THE MEANING OF ARTICLE 1105 (1) OF THE NAFTA AGREEMENT

(Fourth Opinion Of Professor Sir Robert Jennings, Q.C.)

The meaning of this brief paragraph of the NAFTA Agreement has become the subject of wordy debate, and one hesitates to try the patience of the Tribunal by adding more on the subject. But the purpose of this opinion is to try to reduce to its elements what is in truth a relatively simple matter. The question now centers, as does this opinion, upon the Joint Statement of the NAFTA Free Trade Commission, dated July 31, 2001; and particularly upon the three short paragraphs which appear under the heading 'B. Minimum Standard of Treatment in Accordance with International Law'.

This Opinion is in two parts. The first deals with the interpretation question. The second explains why the Claimants could reasonably be suspicious of the timing and seeming purposes of the three-party intervention.

I

The intervention of the Free Trade Commission, unlike the earlier, lengthy and differing separate letters of the three Governments, is expressed in three propositions; and it will be convenient to take those three propositions in the order the Commission itself has taken them; even though this threefold division is doubtless designed to divide the 27 words of the provision into two parts so that the first 17 words, which the Respondent is relatively happy with, can thus be separated from the remaining 10 words, which the Respondent is uneasy about; and even though the 17 words and the 10 words are separated only by a comma in the one short sentence of Article 1105.1, the 10 words being quite clearly intended to qualify in some way the first 17 words. The Commission's proposition number '1' reads:

> '1. 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.'

The trouble with this proposition is just that Article 1105 (1) in fact prescribes nothing of the sort. The Article nowhere mentions 'aliens'; nor indeed does any other article of Chapter 11 of the NAFTA Agreement. Article 1105 is not about aliens but about 'investments of investors of another Party.' (see also Article 1101 on 'Scope and Coverage'). Nor does it use the word 'customary'; not even in the heading of the Article 'Minimum Standard of Treatment'.

This attempt to 'interpret' the paragraph only after first materially changing the text of the paragraph does, however, betray the aim of this so-called interpretation, which is to replace the plainly stated requirements for the treatment of 'investors of another Party', by the former customary international law minimum standard for the treatment of *aliens*.

That so-called 'minimum' standard for the treatment of 'aliens' was the product of the European and North American States wishing to demand a standard for the treatment of their nationals in foreign countries, which they called 'minimum', but was nevertheless thought to be higher than the local *national* standard in some defendant countries, and which national

standard those countries claimed sufficed for the purposes of international law. One of these older cases, the *Neer* case, is cited by the United States Rejoinder as *seminal* (US Rejoinder p. 57, note 64). That was the case where the tribunal rejected a United States claim that the Mexican State was liable to make reparation for its failure to find and punish the bandit who had murdered Mr. Neer in up-country Mexico in 1924; and held that in order to amount to 'an international delinquency', the Respondent's failure to 'act should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable man would readily recognize its insufficiency.' These are the familiar words that strongly attract the United States as a classical statement of a minimum standard for the treatment of aliens, which standard it asks the Tribunal to apply in the present case. But quite apart from the rather startling anachronism of trying to apply to investors and investments in 2001 the standards for the protection of aliens against bandits in 1924, the *Neer* case was not a parallel case to the present one even in 1926. The present case is not a claim based upon a customary law 'international delinquency', but a claim based upon the express terms of the NAFTA Agreement. And it is not a case complaining of an insufficiency of a State's response to actions that were not actions of the State or its agents and so were not directly attributable to the State in international law, but of 'measures adopted or maintained' by the United States (NAFTA Article 1101), which measures are believed to be in breach of the NAFTA Agreement. Thus, the relevance of *Neer* to this case is very doubtful.

In any event it is important in the interests of legal historical accuracy to remember that the very existence of a so-called minimum standard for the treatment of aliens was vigorously contested by Latin American and other defendant States. But that once famous international legal controversy is now forgotten, and in the contemporary law concerning the treatment of aliens, the position has changed much with the advent of an international law of human rights which are irrespective of nationality or of alienage. It is interesting to note that the International Law Commission's latest draft codifying the existing international law of State Responsibility has found no need to mention a minimum international standard for the treatment of aliens in any one of its draft 59 articles.

As to the heading of Article 1105, 'Minimum Standard of Treatment', one might with reason suppose that this heading was intended to refer to the minimum standard required by the NAFTA Agreement for the treatment of 'investments of investors of another Party;' which standard is indeed, in conformity with that meaning of the heading, defined by that Article.

Finally, on this first proposition of the Free Trade Commission, it is an ingenious diversion inviting examination of the complicated area of the general international law concerning the treatment of aliens. But this is not what Article 1105 is about. It is about the minimum treatment of the investments of an investor of another Party to the NAFTA Agreement. Article 1105 does not anywhere mention either the term 'customary' or the term 'alien'. The first proposition of the Free Trade Commission, far from interpreting Article 1105 (1), simply tries to substitute for the express terms of Article 1105 an altogether different standard.

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The Free Trade Commission's paragraph 2 reads:

'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.'

It is well here to remind ourselves of what the last ten words of the Article 1105 (1) actually do say. Those words are: ' . . ., including fair and equitable treatment and full protection and security.'

Yet again the word 'customary' is an interpolation by the Commission, as is also the word 'aliens'. This is a curiously crab-like way of going about an interpretation of a given text. It is as if the Commission's drafters were apprehensive lest there might indeed now be a modern customary law dealing with investors and investments, and it is this that moves them to insist so blatantly that it is the former law about the treatment of aliens that, for obvious reasons, they much prefer.

But the words 'including fair and equitable treatment and full protection and security' are part of the actual text of the Article. One clear and elementary rule of interpretation is that words used in the text to be interpreted are to be assumed to have been used for some purpose and intention. It is not to be assumed, without very clear reasons, that 10 words out of 27 are merely otiose so that presumably the Article would have had the same meaning if they had been omitted and only the first 17 words remained.

The Free Trade Commission does not quite dare to suggest that. Instead they use this other, rather too obviously self-serving formula, that these 10 words 'do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens'. That may or may not be so. But it is not a question that is within the remit of this Tribunal to decide. Article 1105 does not provide a rule for the treatment of aliens, nor is it concerned with the customary international law about the treatment of aliens. It is a treaty provision defining the treatment required by the treaty for investments of investors of another Party. And the only cognate question that could arise concerning the actual text of this Article is whether these last 10 words require treatment of the investments of the investors of another Party in addition to or beyond that which is required by 'treatment in accordance with international law'. After all this is a question of the interpretation of the text of a treaty and one really must stick to the words used in that text, not invent a new text that might more readily yield the meaning desired.

As to this question, whether the last 10 words add to or go beyond what is already required by treatment in accordance with 'international law', the answer will no doubt depend upon what one includes under the term 'international law'. The Claimants should not really mind whether the last 10 words are regarded in theory as concepts already safely included in 'treatment in accordance with international law' or are regarded as an addition. What matters, for the purposes of interpretation, is that these 10 words - ' . . . including fair and equitable treatment and full, protection and security' - are textually part of the Article 1105 (1) and so define obligations of the Parties and must be applied.

There can be no mystery about why these concepts were included in the Article. They are provisions that have been included in virtually all investment treaties, including not scores but hundreds of BITS. And this being a question not about the sources of international law nor even about the nature of customary law, but about the correct interpretation of a given text, it

is surely obvious that the interpretation must take into account that great volume of general law that employs these concepts. The Parties when they concluded the NAFTA Agreement may or may not have thought about the ambiguity of the word 'including' in the English language; but what they clearly did wish to say was that the required treatment must in either case include 'fair and equitable treatment and full protection and security'. They certainly did not expect that this treatment would be diminished by a pretence that it is included in the customary international law about the treatment of aliens. For if that were the net result of Article 1105 (1), what was the point of drafting a treaty undertaking which did no more than require what the general law already required anyway?

The issue, in a nutshell, is this: if the three governments are suggesting that NAFTA (and the hundreds of BITs) does *not* require a State to provide fair and equitable treatment, the suggestion is preposterous. It cannot be reconciled with the text of Article 1105(1), nor with any canon of interpretation of international law. If that is indeed the position of the three governments, then the Tribunal should treat the "interpretation" as an attempted amendment that has no binding effect.

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The Commission's paragraph 3 reads:

> '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).'

This again is a curious statement to find under the Commission's Heading of 'Minimum Standard of Treatment in Accordance with International Law'. A determination that there has been a breach of another provision of NAFTA – presumably a determination by some court or tribunal competent to make the determination – might or might not establish that there has also been a breach of Article 1105 (1). One would need to consult the actual terms of the determination as well as the two provisions in question. And while a breach of another provision of NAFTA or a separate agreement may not be sufficient in all circumstances to *establish* a breach of Article 1105(1), such a breach must surely be relevant evidence concerning whether an investor or an investment has received fair and equitable treatment. The Free Trade Commission does not contend otherwise, and it is thus difficult to understand the utility of this portion of the interpretation.

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II

It would be wrong to discuss these three-Party 'interpretations' of what have become key words of this arbitration, without protesting the impropriety of the three governments making such an intervention well into the process of arbitration, not only after the benefit of seeing the written pleadings of the parties but also virtually prompted by them. In the present case, without even asking for leave, one of the actual Parties to the arbitration has quite evidently organized a démarch intended to apply pressure on the tribunal to find in a certain

direction by amending the treaty to curtail investor protections. This is surely against the most elementary rules of the due process of justice. The phrase due process is itself of United States origin and has become international (see NAFTA Article 1110) because the United States has for so long been regarded as the guardian of due process. It is very sad to see this present betrayal of principles of which the United States has long been the revered author and practitioner.

R.Y. Jennings

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6 Sept. 2001