Court File No.: **C52737**

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE UNITED MEXICAN STATES

Applicant
(Appellant)

- and -

CARGILL, INCORPORATED

Respondent
(Respondent)

- and -

UNITED STATES OF AMERICA,
ATTORNEY GENERAL FOR CANADA and **ADR CHAMBERS INC.**

Intervenors

FACTUM OF THE INTERVENOR
UNITED STATES OF AMERICA

Date: 31 January 2011

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PART I - NATURE OF APPEAL

1. Appellant, The United Mexican States ("Mexico"), appeals from an order of the Honourable Justice Low dated 26 August 2010, in which she denied Mexico's application to set aside an arbitral award ("Award") made in favour of Respondent Cargill, Incorporated ("Cargill"). The Award was rendered following an arbitration conducted by a tribunal pursuant to Chapter 11 of the *North American Free Trade Agreement*, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993) ("NAFTA").

PART II – NATURE OF THE INTERVENTION

2. The Intervenor, United States of America ("United States"), is, along with Mexico and Canada, one of three parties to the NAFTA. The United States intervenes as a friend of the court pursuant to the Order of Associate Chief Justice O'Conner dated 28 January 2011. The United States takes no position on the merits of the appeal.

PART III – ISSUES, LAW, AND ARGUMENT

3. In pursuing its application before Justice Low to set aside the Award, Mexico argued that the tribunal had exceeded its jurisdiction. In particular, Mexico asserted the tribunal had erred in awarding Cargill damages not only for losses incurred in the distribution business operated by Cargill's Mexico-based subsidiary, but also for losses incurred by Cargill's U.S.-based production and export business based on lost sales to the Mexican subsidiary. This was a legal error, Mexico submitted, because Cargill's losses from its U.S.-based activities were incurred in its capacity as a cross-border trader and not in its capacity as an investor in Mexico under NAFTA Chapter 11.

4. In determining the issue, the application judge engaged in an interpretive analysis of the NAFTA respecting the scope of damages that may be awarded for breach of a NAFTA Chapter 11 obligation. She concluded:

> [65] I am not able to accept that the argument that the activities of producing and investing delineate different "capacities" of a person, whether natural or artificial. The claimant has only one legal capacity – that of a corporate person in its own right carrying on commercial activity for economic benefit....
>
> [66] Neither Article 1101 defining scope and coverage, nor Articles 1102, 1105 or 1106 setting out Parties' obligations, nor Articles 1116 and 1117 conferring claim rights set out limits, other than causation, as to the nature and scope of damages recoverable. No provision stipulates areas of activity or lines of business in respect of which compensation is recoverable if Chapter Eleven obligations are breached by a Party.[1]

5. The United States submits that the court below erred in concluding that there are no "limits" on the nature and scope of damages available to a NAFTA Chapter 11 claimant "other than causation." An analysis of the text of NAFTA Chapter 11, guided by the interpretive principles of the *Vienna Convention on the Law of Treaties* ("VCLT")[2], demonstrates that the relief available for claims submitted under Article 1116 is limited to damages incurred by an "investor" for damages incurred in its capacity as an investor -- seeking to make, making, or

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[1] *The United Mexican States v. Cargill, Incorporated*, [2010] O.J. No. 3698 (Ont Sup Ct) (QL) ("*Cargill*"), at ¶¶ 65-66.

[2] *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 *U.N.T.S.* 331, 8 I.L.M. 679 (1969). Canada ratified the VCLT on October 14, 1970, and the treaty entered into force on January 27, 1980. While the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. *See* Letter from Secretary of State Rogers to President Nixon Transmitting the Vienna Convention on the Law of Treaties, Oct. 18, 1971, *reprinted in* 65 DEP'T OF ST. BULL. 684-689 (1971). The International Court of Justice has determined that VCLT Art. 31 is reflective of customary international law. *See, e.g., Kasikili/Sedudu Island (Botswana/Namibia)* Judgment, I.C.J. Reports 1999, p. 1045 (Judgment of 13 December 1999).

having made an "investment" in the territory of another NAFTA Party. Indeed, Canada, Mexico, and the United States have expressed a common view on this approach.[3] Although Mexico informed the court below of this common view of the NAFTA Parties, it was not taken into account by the application judge.[4]

Pertinent NAFTA Provisions

6. The NAFTA provisions of significance to the appeal read, in pertinent part, as follows:

> **Part Five - Investment, Services and Related Matters**
>
> **Chapter Eleven Investment**
>
> **Section A - Investment**
>
> **Article 1101: Scope and Coverage**
>
> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; …
>
> **C - Definitions**
>
> **Article 1139: Definitions**
>
> For purposes of this Chapter:
>
> **investment** means:
>
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

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[3] In a previous case, the United States expressed the principle as follows: "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." Submission of the United States of America, *S.D. Myers, Inc. v. Canada*, 18 September 2001, at ¶8 (Emphasis in original).

[4] Factum of the Applicant, The United States of Mexico, *The United Mexican States v. Cargill, Inc.*, Court File No. CV-09-391935, 26 February 2010, ¶132.

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from:

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party…

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

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

investor of a non-Party means an investor other than an investor of a Party, that seeks to make, is making or has made an investment;

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A …

and that the investor has incurred loss or damage by reason of, or arising out of, that breach. (Emphasis added.)

7. Article 31 of the VCLT states, in pertinent part:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith 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.

> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
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> .....
>
> 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;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended. (Emphasis added.)

I. NAFTA ARTICLES 1101, 1116, AND 1139 LIMIT THE SCOPE OF AVAILABLE RECOVERY IN ARBITRATION TO THOSE LOSSES OR DAMAGE SUFFERED BY AN "INVESTOR" IN SEEKING TO MAKE, MAKING, OR HAVING MADE AN "INVESTMENT" IN ANOTHER NAFTA COUNTRY

8. Under customary international law principles of treaty interpretation, as expressed in Article 31(1) of the VCLT, "[a] treaty shall be interpreted in good faith 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." As demonstrated below, the text of Chapter 11, by its terms in their context within the overall text of the NAFTA and in light of the NAFTA's object and purpose, limits the scope of recoverable losses to a claimant under Article 1116 to loss or damage incurred by the claimant as an investor in seeking to make, making, or having made an "investment" in the territory of another NAFTA Party. The application judge's failure to recognize these limits is unsupported by accepted principles of treaty interpretation.

Terms of the NAFTA

9. Under Article 1116, the NAFTA Parties consented to arbitration only where a claimant is an "investor" of another NAFTA Party alleging that it "has incurred loss or damage by reason of, or arising out of" a breach by the respondent Party of one or more Chapter 11, Section A obligations.[5] "Investor of a Party" is defined in Article 1139 as "a Party or state enterprise thereof, or a national or enterprise of such Party, that seeks to make, is making or has made an investment."[6] Reading Articles 1116 and 1139 together, an "investor" may recover for "loss or damage" incurred in "seek[ing] to make, making, or [having] made an investment." Article 1116 does not provide recovery for claims of loss or damage sustained by a claimant in any capacity other than as an "investor."

10. The focus on the investor and its investment is further confirmed by Article 1101, which clarifies that the investment must be in the territory of the Respondent Party. Article 1101 expressly limits the "scope and coverage" of Chapter 11 to those "measures" adopted or maintained by a Party "relating to" "investors of another Party" (Article 1101(1)(a)) and to "investments of investors of another Party in the territory of the Party" (Article 1101(1)(b)).[7] Given that Article 1139 defines "investor of a Party" as one "that seeks to make, is making or has made an investment," Article 1101 makes clear that the scope and coverage of the protections of NAFTA Chapter 11, including Article 1116, extends to "investors" only to the

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[5] A claim may also be brought by an investor on its own behalf under Chapter 11 with respect to certain Chapter 15 obligations not relevant to this case. *See* Article 1116(1)(b) (permitting claim to be submitted to arbitration for alleged breaches of Article 1503(2) (referring to the manner in which private and state-owned monopolies may exercise regulatory, administrative or other governmental authority) and Article 1502(3)(a) (ensuring that any state-owned enterprises acts in a manner not inconsistent with Chapter 11)).

[6] As discussed below, the definition of "investment" is limited by its definition in Article 1139.

extent that they have made or intend to make "investments" *in the territory of another NAFTA Party*. See *Bayview Irrigation District et al. v. United Mexican States*, ICSID, Case No. ARB(AF)/05/1, Award (on Jurisdiction) 19 June 2007 ("*Bayview*"), at ¶105 ("in order to be an "investor" under Article 1139 one must make an investment in the territory of another NAFTA State, not in one's own.").

11. Article 1101 has been described as the "gateway leading to the dispute resolution provisions of Chapter 11," whose requirements limit the powers of a Chapter 11 arbitral tribunal. *Methanex Corp. v. United States*, First Partial Award, 7 August 2002, at ¶106. See, for example, *Bayview, supra*, at ¶85 (Article 1101 "defines the 'scope and coverage' of the entirety of Chapter 11.").[8]

12. Finally, the definition of "investment" in Article 1139 also establishes limits that can affect the scope of damages available to a NAFTA Chapter 11 claimant. NAFTA Article 1139 sets forth an exhaustive list of categories of assets that constitute "investments" for the purposes of NAFTA Chapter 11. Assets falling outside this exhaustive list do not constitute "investments," and therefore loss or damage incurred with respect to such assets, which are not themselves "investments", or proceeds of "investments," cannot be the basis for an "investor" to bring a claim for "loss or damage" under Article 1116. Furthermore, Article 1139(i) expressly excludes from the definition of "investment" certain kinds of assets. For example, "investment does not mean . . . claims to money that arise solely from commercial contracts for the sale of

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[7] Article 1101 also limits the applicability of NAFTA Chapter 11, solely with respect to Articles 1106 and 1114 (not relevant to this dispute), to "all investments in the territory of the Party."

[8] An application to set aside *Bayview* was denied in *Bayview Irrigation District #11 v. United Mexican States*, [2008] O.J. No. 1585 (Ont Sup Ct) (QL).

goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party."

13. Moreover, Article 1139(h)(ii), which incorporates into the definition of "investment" those "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under... contracts where remuneration depends substantially on the production, revenues or profits of an enterprise," does not treat "revenues or profits" as "investments" in themselves.[9] Instead, "revenues or profits" are elements of the type of contract that may (as an example) give rise to "interests that arise from the commitment of capital or other resources in the territory" of the respondent State – with the "interests," not the "revenues or profits," constituting the "investment" under NAFTA Article 1139. Indeed, without these limitations, any income arising from a claimant's exports to entities located in the respondent State might be characterized as an "investment" under Article 1139, and under such a characterization, all exporters would be free to bring "investment" claims under Chapter 11 regardless of whether they are making, have made, or seek to make an investment in the territory of the respondent Party.

14. In *The Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction, 28 January 2008, the tribunal explained the nexus between "investors" and "investments" as follows:

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[9] In the court below, Mexico challenged the *Cargill* tribunal's finding that lost "business income" that would have flowed from a cross-border export business in the United States constitutes a recoverable "investment" in Mexico. The Superior Court did not review the legal conclusion of the *Cargill* tribunal that "business income," without more, could be considered an "investment" under NAFTA Chapter 11, but nonetheless expressly accepted as a factual finding the tribunal's application of this errant statement of legal principle to the facts of the arbitration. See: *Cargill*, at ¶58.

> 122. Article 1139, the definitions section of Chapter Eleven, does not define "investor" or "investor of another Party." However, it does define "investor of a Party," of which "investor of another Party" would seem to be a simple variant. "Investor of a Party" is defined as a "Party [NAFTA country], or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment" (emphasis added). "Investors of another Party," as used in subparagraph (a) of Article 1101, must be investors of a different Party from the Party enacting the measure at issue, referred to in the lead-in to that Article.
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> 123. The foregoing definition leaves no doubt that "investors" only exist based on "investments." This is further reinforced by the parallel definition of "investor of a non-Party" in Article 1139. As with the definition of "investor of a Party," this definition focuses on a person "that seeks to make, is making or has made an investment" (emphasis added). In other words, both Article 1139 definitions of "investors" make it plain that "investors," whether of a Party or a non-Party, cannot exist without "investments."
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> ...
>
> 126. Returning to Article 1101(1) in light of these definitions provides the first crystallization of the answer. From the fact that Article 1101(b) and (c), which are conjunctively linked with 1101(a), explicitly limit Chapter Eleven's coverage to investments in the territory of the Party whose measure is at issue, it is apparent that the foreign investment, and the investors who engage in such investment activities, are the concern of Chapter Eleven. In other words, "investors" are inextricably linked to "investments," which Article 1101 limits to "foreign investments,"– that is to say, investments of a party in the territory of another Party whose measure is at issue. (Emphasis added.)

15. The United States submits that, taken together, for claims brought on a claimant's own behalf, Articles 1101, 1116, and 1139 limit the damages available in a NAFTA Chapter 11 arbitration to those suffered by a claimant in its capacity as "investor" that has made, is making, or seeks to make an "investment"—as that term is defined by the NAFTA—in the territory of another NAFTA Party.

Context, Object & Purpose

16. The ordinary meaning of Articles 1101, 1116, and 1139 is confirmed by their context and by the object and purpose of the investment Chapter of the treaty. VCLT Article 31 states: "[a] treaty shall be interpreted in good faith 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.*" (Emphasis added.)

17. The NAFTA as a whole indicates the NAFTA Parties' recognition that businesses can and do engage in different types of economic activity, and the NAFTA provides different rights and remedies depending on the type of activity carried out by the person or entity. A company's activities undertaken in its capacity as a cross-border trader of goods or services, for example, are addressed not by Chapter 11 but by other chapters of the NAFTA. Specifically, NAFTA Chapter 3 includes protections for cross-border trade in goods. Similarly, NAFTA Chapter 12 governs the provision of cross-border services. With the exception of the investment provisions of Chapter 11 (and two provisions of Chapter 15), the NAFTA Parties limited remedies for violations of the rights and obligations of most of the treaty to the state-to-state dispute resolution mechanisms delineated in NAFTA Chapter 20. See *United Mexican States v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359 ("If an investor of a party feels aggrieved by the actions of another party in relation to its obligations under the *NAFTA* other than the obligations imposed by Section A of Chapter 11 and the two articles of Chapter 15, the investor would have to prevail upon its country to espouse an arbitration on its behalf against the other Party", at ¶58). Only Chapter 11, which addresses cross-border investments, permits an individual claimant to bring a claim directly against a NAFTA Party, and provides recovery for damages sustained by

the claimant when seeking to make, while making, or after having made a cross-border investment.

18. Finally, NAFTA's objectives recognize that the scope of investment to be promoted and protected is directed at cross-border investment, *i.e.,* investment in the territory of another Party. Article 102(1)(c) states that one of the NAFTA's objects and purposes is to "increase substantially investment opportunities in the territories of the Parties." This is understood to mean that the Parties intend to increase investments by investors of one Party in the territory of another Party. See *Bayview, supra*, at ¶100 (agreeing with the United States that the "clear and ordinary meaning that is borne out by the text of NAFTA Chapter Eleven" is that NAFTA Art. 102(1)(c) "refers to, and can only sensibly be considered as referring to, opportunities for foreign investment in the territory of each Party made by investors of another Party..."); *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, at ¶75 (Article 102(1)(c) evidences the Parties' intent "to promote and increase cross-border investment opportunities").[10]

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[10] That the purpose of NAFTA Chapter 11 is to promote foreign investment is confirmed in the government documents submitted to the U.S. Congress and Canadian Parliament in support of the NAFTA. The United States Statement of Administrative Action confirms that Chapter 11 "applies where such firms or nationals make or seek to make investments in another NAFTA country." NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Sess., at 589 (1993). Likewise, in the Canadian Statement on Implementation of the NAFTA, the Government of Canada explained that Chapter 11 built upon Canada's prior experience with "investments agreements both to protect the interests of Canadian investors abroad and to provide a rules-based approach to the resolution of disputes involving foreign investors in Canada or Canadian investors abroad." Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation, in* CANADA GAZETTE Vol. 128, No. 1, p. 68, (at p. 147) (1 January 1994).

II. SUBSEQUENT PRACTICE OF NAFTA PARTIES CONFIRMS THAT FOR CLAIMS SUBMITTED TO ARBITRATION UNDER ARTICLE 1116, ONLY LOSS OR DAMAGE SUFFERED BY A CLAIMANT IN ITS CAPACITY AS AN "INVESTOR" IS RECOVERABLE

19. Article 31(3)(b) of the VCLT makes clear that in interpreting the provisions of the treaty, the application judge should have "taken into account, together with the context . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." The subsequent practice of the three NAFTA Parties demonstrates their agreement that the recovery available for claims submitted under Article 1116 is limited to loss or damage suffered by the claimant in its capacity as investor. Mexico, Canada, and the United States have consistently expressed the same view on this point to NAFTA arbitral tribunals.

20. In 2001, as the respondent in the Chapter 11 arbitration in *S.D. Myers, Inc. v. Canada*, Canada argued that a disputing investor "cannot receive compensation under Chapter 11 for its cross-border service activities but is limited to compensation for its losses *in its capacity as an investor*."[11] In that same arbitration, the United States made a submission pursuant to NAFTA Article 1128,[12] stating "[w]hen 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."[13] Mexico similarly argued in its Article 1128 submission in *S.D. Myers* that "an investor claiming in its own right under Article 1116 may only claim compensation for loss

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[11] Counter-Memorial (Damages Phase), *S.D. Myers, Inc. v. Canada*, 7 June 2001, at ¶83 (Emphasis added.)
[12] NAFTA Article 1128 authorizes non-disputing Parties to the NAFTA to make submissions on questions of NAFTA interpretation.
[13] Submission of the United States of America, *S.D. Myers, Inc. v. Canada*, 18 September 2001, at ¶8 (Emphasis in original).

damages recoverable," and her related finding that the capacity in which a claimant sustained losses is irrelevant to determining damages, are in error as a matter of interpretation of the NAFTA. A good faith reading of the text in context and in light of the object and purpose of the NAFTA, taking into account subsequent practice of the Parties, makes this clear. For claims submitted under Article 1116, only loss or damage sustained by an "investor" in seeking to make, making, or having made an "investment" in the territory of the respondent Party can be recovered.

Date: 31 January 2011

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Malcolm N. Ruby

or damage suffered *qua* investor in the territory of the host Party, not for loss or damage suffered in its capacity as a cross-border service provider or in its capacity as a trader in goods."[14]

21. The principle that for claims submitted to arbitration under Article 1116, a Chapter 11 tribunal may award damages sustained by a claimant only in its capacity as an "investor," was recognized by the arbitral tribunal in *Archer Daniels Midland and Tate & Lyle v. Mexico,* ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 ("*ADM*"). The tribunal in *ADM* was facing the same issue as the *Cargill* tribunal, *i.e.* whether, in a claim by a U.S.-based HFCS manufacturer against Mexico, the tribunal could award damages for lost exports from the disputing investor's U.S.-based manufacturing operations to its Mexican subsidiary. In *ADM*, after a review of Article 1101 and the NAFTA Parties' views as stated in previous disputes, the tribunal properly held that such damages could not be awarded:

> 274 The Tribunal has jurisdiction only to award compensation for the injury caused to Claimants in their investment made in Mexico (through ALMEX). Therefore, the Claimants are not entitled to recover the lost profits on HFCS they would have produced in the United States and exported to Mexico "but for" the Tax, as these losses were not suffered in their capacity as investors in Mexico.

III. CONCLUSION

22. For these reasons, the United States respectfully submits that the application judge's view that NAFTA Chapter 11 includes no "limits, other than causation, as to the nature and scope of

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[14] Submission of the United Mexican States (Damages Phase), *S.D. Myers, Inc. v. Canada*, 12 September 2001, at ¶45. The tribunal in *S.D. Myers* erroneously awarded damages unrelated to *S.D. Myers'* investment in Canada. While Canada applied to have this award set aside by the Canadian courts, the portion of the award related to damages was not reviewed by the Superior Court in that case. See *Attorney General of Canada v. S.D. Myers*, [2004], 3 F.C.R. 368 (QL).

SCHEDULE A – LIST OF AUTHORITIES

Case Law

1. *The United Mexican States v. Cargill, Incorporated*, [2010] O.J. No. 3698 (Ont Sup Ct) (QL)

2. *Kasikili/Sedudu Island (Botswana/Namibia)* Judgment, I.C.J. Reports 1999, p. 1045 (Judgment of 13 December 1999)

3. *Bayview Irrigation District et al. v. United Mexican States*, ICSID, Case No. ARB(AF)/05/1, Award (on Jurisdiction) 19 June 2007

4. *The Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction, 28 January 2008

5. *Methanex Corp. v. United States*, First Partial Award, 7 August 2002

6. *Bayview Irrigation District #11 v. United Mexican States*, [2008] O.J. No. 1585 (Ont Sup Ct) (QL)

7. *United Mexican States v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359

8. *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000

9. *Archer Daniels Midland and Tate & Lyle v. Mexico*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007

10. *Attorney General of Canada v. S.D. Myers*, [2004], 3 F.C.R. 368 (QL).

Legislation

11. *North American Free Trade Agreement*, December 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993)

12. *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 *U.N.T.S.* 331, 8 I.L.M. 679 (1969).

Secondary Sources

13. Letter from Secretary of State Rogers to President Nixon Transmitting the Vienna Convention on the Law of Treaties, Oct. 18, 1971, *reprinted in* 65 DEP'T OF ST. BULL. 684-689 (1971).

14. North American Free Trade Agreement, Implementation Act, Statement Of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Sess., at 589 (1993).

15. Department of External Affairs, North American Free Trade Agreement: Canadian Statement on Implementation, in Canada Gazette Vol. 128, No. 1, p. 68, (at p. 147) (1 January 1994)

Other Materials

16. Counter-Memorial (Damages Phase), *S.D. Myers, Inc. v. Canada*, 7 June 2001

17. Submission of the United States of America, *S.D. Myers, Inc. v. Canada*, 18 September 2001

18. Submission of the United Mexican States (Damages Phase), *S.D. Myers, Inc. v. Canada*, 12 September 2001

SCHEDULE B – LEGISLATIVE PROVISIONS

North American Free Trade Agreement, December 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993)

Part Five Investment, Services and Related Matters

Chapter Eleven Investment

Section A - Investment

Article 1101: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) investments of investors of another Party in the territory of the Party; and

(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).

4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired,

knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

Section C - Definitions

Article 1139: Definitions

For purposes of this Chapter:

disputing investor means an investor that makes a claim under Section B;

disputing parties means the disputing investor and the disputing Party;

disputing party means the disputing investor or the disputing Party;

disputing Party means a Party against which a claim is made under Section B;

enterprise means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;

enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

equity or debt securities includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants;

G7 Currency means the currency of Canada, France, Germany, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland or the United States;

ICSID means the International Centre for Settlement of Investment Disputes;

ICSID Convention means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965;

Inter-American Convention means the Inter-American Convention on International Commercial Arbitration, done at Panama, January 30, 1975;

investment means:

(a) an enterprise;
(b) an equity security of an enterprise;
(c) a debt security of an enterprise
(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the debt security is at least three years,
but does not include a debt security, regardless of original maturity, of a state enterprise;
(d) a loan to an enterprise
(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the loan is at least three years,
but does not include a loan, regardless of original maturity, to a state enterprise;
(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from
(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
(j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h);

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

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;

investor of a non-Party means an investor other than an investor of a Party, that seeks to make, is making or has made an investment;

New York Convention means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;

Secretary-General means the Secretary-General of ICSID;

transfers means transfers and international payments;

Tribunal means an arbitration tribunal established under Article 1120 or 1126; and

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976.

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 *U.N.T.S.* 331, 8 I.L.M. 679 (1969).

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Court Appeal No.: **C52737**

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COURT OF APPEAL FOR ONTARIO

(PROCEEDING COMMENCED AT TORONTO)

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