Hugo Perezcano Díaz
Consultor Jurídico de Negociaciones

Mexico City, 30 January 2004

V. V Veeder QC
Presiding arbitrator
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3ED
England
Phone: 44 207 813-8000
Fax: 44 207 813-2024

Prof. W. Michael Reisman
Yale Law School
P.O. Box 208215
New Haven
CT 06520-8215
Phone: (203) 432-7247
Fax: (203) 432-7247

William Rowley, Esq
McMillan Binch
Royal Bank Plaza
Suite 3800, South Tower
Toronto, Ontario M5J 2J7
Canada
Phone: (416) 865-7008
Fax: (416) 865-5519

RE: Methanex Corporation v. The United States of America

Pursuant to Article 1128 of the NAFTA, the Government of Mexico makes the following submissions on the interpretation of the NAFTA. Mexico takes no position on the facts of this dispute and the fact that a legal issue arising in the proceeding is not addressed in these submissions should not be taken to constitute Mexico's concurrence with a position taken by either of the disputing parties.

I. THE GOVERNING LAW

1. Article 1131 sets out the law governing the proceeding. Paragraph 1 of that article requires the Tribunal to apply the Agreement and applicable rules of international law. The latter is a reference to any applicable rules of customary international as that law continues to co-exist with the Treaty unless expressly modified by its terms[1]. Paragraph 2 of Article 1131 requires the Tribunal to apply an interpretation of any provision rendered by the Free Trade Commission. Accordingly, the 31 July 2001 Interpretative Note on Article 1105 forms part of the governing law[2].

---

1. See *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America*, ICSID Case No. ARB(AF)/98/3 at paragraph 226: "There is no language in those articles, or anywhere else in the treaty, which deals with the question of whether nationality must continue to the time of resolution of the claim. It is that silence in the Treaty that requires the application of customary international law to resolve the question of the need for continuous national identity."

2. Mexico recalls that when the Tribunal issued its earlier award on jurisdiction, the Claimant urged it to find that the Note of Interpretation was in fact an amendment of Article 1105 and at paragraph 102 the Tribunal found it was unnecessary to decide the disputed interpretation. Since that time, the argument that the Note was an amendment of the Treaty has been rejected by the tribunals in the *Mondev*, *ADF* and *Loewen* awards, all of which

II. PROXIMATE CAUSE

2. Mexico agrees with the United States' Amended Statement of Defense (at paragraphs 218-222) that Chapter Eleven incorporates a standard of proximate cause through the use of the phrase "has incurred loss or damage by reason of, or arising out of" a Party's breach of one of NAFTA provisions listed in Articles 1116 and 1117[3]. In its earlier ruling on jurisdiction, the Tribunal noted, in connection with its interpretation of Article 1101, that there must be a "legally significant connection" between the measure(s) complained of and the loss or damage claimed to have been suffered by the investor[4]. Mexico agrees. Articles 1116 and 1117 further underscore the customary international law requirement of proximate cause between the act complained of and the damage claimed to have been suffered.

III. NAFTA'S DISTINQUISHES BETWEEN THE "INVESTOR" AND ITS "INVESTMENT"

3. The United States submits at paragraphs 250-256 of the Amended Statement of Defense that it is necessary to focus on whether the measure complained of relates to the investor or to its investment in the territory of the Party. The U.S. argues further that claims relating to exports from the Claimant's overseas plants cannot be admitted under Chapter Eleven. Mexico agrees with this submission.

4. When applying each of the Section A obligations in light of the Chapter's scope and coverage, it is of the utmost importance to ascertain whether a particular obligation said to be breached applies to the *investor* or to its *investment*. For example, the obligation set out in Article 1105(1) is owed to the investment only[5], while the obligation contained in Article 1105(2) apply to the investor *and* to its investment.

5. Unfortunately, some early awards failed to distinguish between the objects of particular clauses and have confused them. The *S.D. Myers* tribunal, in particular, in its treatment of Article

---

have readily accepted that NAFTA tribunals are bound by interpretations made by the three sovereign States party to the NAFTA. See the *Mondev* Final Award at paragraphs 120-122 and 139, the *ADF* Award at paragraphs 113 and 176-177, and the *Loewen* Award at paragraph 126.

3. Amended Statement of Defense, paragraph 218.

4. Partial Award of the Tribunal at paragraph 139.

5. Article 1105 states in relevant part:

> 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
>
> 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relation to losses suffered by investments owing to armed conflict or civil strife. [Emphasis added]
>
> NAFTA, Article 1105(1) and (2).

1105(1) repeatedly confused S.D. Myers, Inc. (the investor) with Myers Canada (the investment) and in its reasons lumped the two together[6]. Regardless of whether this is a ground for judicial intervention under the law of the place of arbitration[7], as a matter of treaty interpretation the tribunal was plainly wrong and should not be followed.

IV. THE DEFINITION OF "INVESTMENT" AND ITS ROLE IN THE APPLICATION OF ARTICLE 1110

6. Where it is alleged that an expropriation of an "investment" has occurred, NAFTA tribunals must ensure that the investment at issue is a treaty-protected property right. In applying Article 1110, three conditions must be present: (i) a legal interest extant in domestic law must be held by the Claimant (or its investment if the claim is brought under Article 1117); (ii) that legal interest must fall within the class of property rights protected by Chapter Eleven; and (iii) there must be an act of expropriation of such interest, which act is attributable to the State. If no such interest exists at domestic law, or if the alleged interest is not recognized by the Treaty as an investment, it is not capable of being expropriated for the purposes of the Treaty[8].

7. Mexico observes that the Claimant has alleged that goodwill, market share and its customer base are "investments" that have allegedly been expropriated by the U.S. measures. Mexico agrees with the United States that the definition of "investment" in Article 1139, although broad, is exhaustive[9], and anything excluded from[10], or not listed therein cannot qualify as an investment interest protected by Chapter Eleven.

---

6. The tribunal's finding of a breach of Article 1105(1) was based on Canada's treatment of SDMI (the "U.S. investor"), not Myers Canada (the investment in the territory of Canada).

> At paragraph 258 of the Award and following, the Tribunal states:
>
> 258. SDMI states that CANADA treated it in a manner that was inconsistent with Article 1105(1) of the NAFTA…
>
> ***
>
> 263. The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective…
> 264. In some cases, the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied "fair and equitable treatment"…
>
> ***
>
> 268. By a majority, the Tribunal determines that the issuance of the Interim and Final Orders was a breach of Article 1105 of the NAFTA. The Tribunal's decision in this respect makes it unnecessary to review SDMI's other submissions in relation to Article 1105.
>
> [Emphasis added]
>
> First Partial Award, ¶¶ 258, 263, 264, 268.

7. Canada's application for judicial review was dismissed by the Federal Court of Canada on January13, 2004. As at the date of filing this submission Canada had no taken a decision whether to exercise its right of appeal.

8. This point is made by the *Azinian* tribunal at paragraph 100 of its Final Award.

9. U.S. Amended Statement of Defense at paragraph 392. The definition of "investment" uses the word "means" as opposed "includes", the term employed when the drafters intended the definition to be illustrative rather

8. Since goodwill, market share or customer base are not included within the definition of "investment" they are not treaty-protected property rights for the "purposes of this Chapter [Eleven]", and therefore do not fall within the ambit of Article 1110.

V. ARTICLE 1110 GOVERNS EXPROPRIATIONS, NOT MERE INTERFERENCES WITH PROPERTY RIGHTS

9. In drafting Article 1110, the NAFTA Parties intended to ensure that the article would encompass not only measures that directly expropriated an investor's property right but also those that did so indirectly. However, the Parties did not intend to expand the definition of expropriation beyond those limits so as to reach, for example, mere interferences with property.

10. NAFTA tribunals have accepted that Article 1110 has a narrower scope than, for example, that of the Algiers Accord, which applied not only to expropriations but also to other measures affecting property rights. As George H. Aldrich noted in The Jurisprudence of the Iran-United States Claims Tribunal, the Claims Settlement Declaration governing that tribunal's jurisdiction "explicitly gave the Tribunal jurisdiction over claims that arose out of both 'expropriations' and 'other measures affecting property rights'" and in some awards, "the Tribunal awarded compensation for measures affecting property rights while refusing to find expropriation"[11].

11. The limits on a NAFTA tribunal's jurisdiction imposed by Article 1110 have been accepted by two NAFTA tribunals that have considered the matter. Both agreed that a NAFTA tribunal's jurisdiction does not extend to measures affecting property rights but rather only to expropriation *per se*[12]. Mexico agrees with those specific findings.

12. In this regard, Mexico agrees with the United States' submission that more than a mere negative impact on investment is necessary to establish an expropriation and in this respect, at footnote 628 of the Amended Statement of Defense, refers the Tribunal to the *Feldman* tribunal's discussion of the relationship between regulation that may affect business and expropriation:

> [T]o paraphrase *Azinian*, not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110. Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political,

---

than exhaustive. By contrast, see the non-exhaustive definition of "equity or debt securities" also found in Article 1139.

10. At the end of the definition of investment is a clause that states that…"investment does not mean" certain claims to money that arise solely from commercial contracts or any other claims for money.

11. George H. Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal, Oxford University Press (1996) at p. 173.

12. *Myers* Interim Award at paragraph 287 and *Pope & Talbot* Interim Award at paragraph 104.

> economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.[13]

13. Mexico agrees with this analysis and respectfully submits that it is of relevance to the matter before this Tribunal. Article 1110, which must be interpreted in accordance with the applicable rules of customary international law, incorporates the principle that States generally are not liable to compensate aliens for economic loss resulting from non-discriminatory regulatory measures taken to protect the public interest, including human health.

VI. THE MINIMUM STANDARD OF TREATMENT

14. Mexico observes that one issue that has arisen in this proceeding concerns the relationship between Articles 1102 and 1105. Section A's articles contain separate and distinct legal obligations and it is important that they not be mixed together. Article 1102 contains a relative standard of national treatment whereas Article 1105 contains an absolute standard, the minimum standard of treatment required by international law. This is not to say that a measure might not offend both articles; however, the fact that the measure offended one would not give rise to a presumption that it offended the other. The measure would have to be tested and found wanting under both articles in order to violate both[14].

---

13. *Feldman v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Award 16 December 2002 at paragraph 112. Mexico applied for judicial review of one aspect of the *Feldman* award. This concerned the majority's finding that there was a breach of Article 1102. Mexico believes that the majority erred on this point, but recognizes that the Ontario Superior Court found no reason to intervene to set aside that part of the award. A notice of appeal was filed on January 8, 2004 to protect Mexico's right of appeal while the matter is under review by the relevant authorities. Mexico considers that the award is, generally speaking, otherwise sound and that the tribunal's discussion of regulation is instructive.

14. In this regard, Mexico notes that all three NAFTA Parties, while approving of the *S.D. Myers* tribunal's analysis of the customary international law applicable to Article 1105, have all agreed that the majority of the *S.D. Myers* tribunal erred in applying the law when it found that a breach of Article 1102 also gave rise to a breach of Article 1105. The approach taken by the dissenter, Arbitrator Chiasson, was endorsed in subsequent proceedings by all three NAFTA Parties. It also forms the basis for paragraph B.3. of the 31 July 2001 Interpretative Note.

VII. ARTICLE 1102: NATIONAL TREATMENT

15. Article 1102 requires a comparative analysis. The treatment accorded to the investor/claimant, which is the subject of complaint, must be compared to the treatment accorded by the Party (or in this case, the state of California) to others in like circumstances. The class of those in like circumstances must be identified.

16. When applying the national treatment rule, the *only* relevant issue of status is the investor's nationality. Where a breach of Article 1102 is alleged, it is less favorable treatment based on the Claimant's Canadian nationality *only* that can give rise to a finding of breach of Article 1102, and in this respect, Mexico agrees with the U.S. submissions at paragraphs 300-304 of the Amended Statement of Defense[15]. Discrimination based on other factors will not give rise to a claim of breach of the national treatment rule[16].

All of which is respectfully submitted

Hugo Perezcano Díaz
Counsel and Agent for the United Mexican States

cc. Margrete Stevens.- ICSID
Meg Kinnear.- General Counsel.- Trade Law Division.- Government of Canada.
Barton Legum.- Chief.- NAFTA Arbitration Division.- United States Department of State.
James A. Wilderotter and Christopher F. Dugan.- Counsels for Claimant, Jones Day.

---

15. As the *Loewen* tribunal noted at paragraph 130 of its Final Award: "We agree with Professor Bilder when he says that Article 1102 is direct only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome of the trial."

16. See *In the Matter of Cross-border Trucking Services*, Secretariat File No. USA-MEX-98-2008-01, Final Report of the Panel, February 6, 2001, for an illustration of the operation of NAFTA's national treatment rule and the designation of classes of domestic investors for the purposes of comparative treatment. The case was a State-to-State dispute administered under NAFTA Chapter Twenty.