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

FOURTH SUBMISSION OF THE GOVERNMENT OF CANADA PURSUANT TO NAFTA ARTICLE 1128

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Introduction

1. Pursuant to Article 1128 of the NAFTA and the Tribunal's order of 30 June 2003, Canada wishes to make submissions to the Tribunal. These submissions concern issues of interpretation respecting Articles 1102 and 1110. Specifically, Canada will comment on the meaning of the phrase "like circumstances" in Article 1102, and on the meaning of the term "expropriation" as it is used in Article 1110.

2. This submission is not intended to address all interpretive issues that may arise in this proceeding. To the extent that Canada does not address certain issues, its 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 should apply to the facts of the case.

Article 1102 (National Treatment)

4. The relevant part of Article 1102 reads:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
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> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

5. The "national treatment" provision in Article 1102 therefore requires a NAFTA Party to accord treatment to an investment of another NAFTA Party which is no less

favourable than the treatment it accords domestic investments. It prohibits treatment which discriminates on the basis of the foreign investment's nationality.[1]

6. The starting point for interpreting any provision of the NAFTA is Article 31 of the *Vienna Convention on the Law of Treaties*[2], according to which the words are to be given their ordinary meaning in their context and in the light of the object and purpose of the NAFTA as a whole. While it is clear from the text that there are several elements to be established in order to demonstrate a violation of Article 1102, in this submission Canada intends to comment only on the meaning of "in like circumstances".

7. Canada disagrees with any interpretation that relies largely on authorities relating to Article III (national treatment) of the *General Agreement on Tariffs and Trade*. The GATT "like products" test is not the same as the "in like circumstances" test in Article 1102. While apparently similar expressions can be found both in GATT Article III and in the *General Agreement on Trade in Services* at Article XVII (where it appears as "like services" and "like service suppliers"), the criteria are different in the three agreements, as is evident from the different wording. Article 1102 has its own standard of what

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[1] See *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America*, (June 26, 2003), (Award), para. 139 (Tab 2), where the Tribunal said:

> The effect of these provisions [paras. 1-3 of Article 1102], as Respondent's expert Professor Bilder states, is that a Mississippi court shall not conduct itself less favourably to Loewen, by reason of its Canadian nationality, than it would to an investor involved in similar activities and in a similar lawsuit from another state in the United States or from another location in Mississippi itself. We agree also with Professor Bilder when he says that Article 1102 is direct [*sic*] 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.

[2] *Vienna Convention on the Law of Treaties,* May 23, 1969, Can. T.S. 1980 No. 37 (also published at 1155 U.N.T.S. 331, (1969) 8 ILM 679), Article 31. (Tab 3)

constitutes national treatment with respect to investments[3]. In light of this, the main interpretative instrument for Article 1102 should be its terms, taken in their context and in light of its objectives, as stated above.

8. A determination that investors or investments compete for the same business may be one of several relevant factors in determining whether the treatment accorded by a NAFTA Party is "in like circumstances". However, it cannot be the sole or determining factor. If the determination of whether treatment is accorded in "like circumstances" were to be based on a single criterion, it would expand the scope of Article 1102 in manifestly unreasonable ways and conflict with the ordinary meaning of the provision.[4] To give a single example, well-established foreign-owned companies would be entitled to the privileges granted to start-up businesses offering similar products or services in the same sector – privileges granted specifically because they are start-ups.

9. Following the Vienna Convention approach to interpretation, the ordinary meaning of the word "circumstances" must be considered. According to the *New Shorter Oxford English Dictionary*[5], the term "circumstance" includes "that which stands around or surrounds; surroundings" or "the material, logical or other environmental conditions of

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[3] Article 1102 is derived from completely different sources than GATT Article III and GATS Article XVII. Its origin can be traced to the Model Bilateral Investment Treaty developed by the United States. Given these different antecedents, the decisions respecting Article III of the GATT 1994 and its predecessor have, at best, very limited application to the provisions of Chapter Eleven and certainly cannot be applied *mutatis mutandi*s.

[4] See Article 32 of the *Vienna Convention on the Law of Treaties*, Tab 3.

[5] Lesley Brown, ed., *The New Shorter Oxford English Dictionary,* vol. 1 (New York: Oxford University Press, 1993) at 405. (Tab 4)

an act or event". The *Webster's Dictionary*[6] definition of "circumstance" includes "a condition, fact, or event accompanying, conditioning, or determining another".

10. The Tribunal must therefore take into consideration other elements such as the activities and operations of the respective investments or investors, and the nature of the goods involved and the services provided. Put another way, the Tribunal must look to the circumstances in which the treatment is accorded, as indicated by the plain words of Article 1102.

11. The expression "in like circumstances" is in Article 1102 to make it clear that all treatment accorded in unlike circumstances is to be disregarded. Application of Article 1102 begins by considering the treatment accorded by a Party to the foreign investor or investment. Consideration is then given to the treatment that is accorded by that Party to an investor or investment where *all* the circumstances of the according of the treatment are "like", *except* that the investor or investment is domestic. There is a breach of Article 1102 if, and only if, the foreign investor or investment receives the less favourable of the treatments compared.

Article 1110 (Expropriation)

12. Paragraph 1 of Article 1110 reads:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
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> (a) for a public purpose;

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[6] *Merriam-Webster's Collegiate Dictionary*, 10th ed. (Ontario: Thomas Allen & Son Ltd., 1993) at 208. (Tab 5)

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6.

13. The ordinary meaning of Article 1110(1) is that where a NAFTA Party expropriates an investment, or takes a measure tantamount to expropriation, it must meet the requirements set out in sub-paragraphs (a) through (d). Thus, the threshold requirement for finding a breach of Article 1110 is that there has been expropriation at international law, or a measure tantamount thereto. Where this requirement has not been satisfied, there is no need to proceed to the secondary question of whether the expropriation meets the requirements of Article 1110(1)(a) to (d).

14. A key aspect of the international law of expropriation is the exclusion of a state's regulatory or "police power" from the scope of expropriation. At international law, expropriation does not result from *bona fide* regulation: a state is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure protecting legitimate public welfare objectives. This principle provides governments the necessary freedom to regulate without having to pay compensation for every effect of regulation. Otherwise, governments would be unable to carry on the regulatory functions that citizens expect from governments.

15. The existence of the regulatory or "police" power was recognised by a previous Chapter 11 tribunal. In *Marvin Feldman* v. *Mexico*[7], the Tribunal said:

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[7] *Marvin Feldman* v. *Mexico*, (December 16, 2002), (Award), paras. 102, 103. (Tab. 6). While Canada has expressed its disagreement with certain portions of the *Feldman* decision, in this respect the Tribunal has accurately outlined the applicable law.

> Ultimately, decisions as to when regulatory action becomes compensable under article 1110 and similar provisions in other agreements appear to be made based on the facts of specific cases. This Tribunal must necessarily take the same approach.
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> The Tribunal notes that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this (see *infra* para. 105).

16. The Preamble of NAFTA states that NAFTA Parties have preserved "their flexibility to safeguard the public welfare". It is clear from this statement that the Parties had no intention of diminishing the scope of the police power that exists under international law. Furthermore, Article 1131(1) specifically provides that applicable customary international law is part of the governing law of NAFTA Chapter 11.

All of which is respectfully submitted,

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30 January 2004

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