

**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

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**SECOND SUBMISSION OF CANADA  
PURSUANT TO NAFTA ARTICLE 1128**

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## **Introduction**

1. Pursuant to Article 1128 of the NAFTA Canada wishes to make further submissions<sup>1</sup> to the Tribunal. These submissions concern certain questions of interpretation of the NAFTA arising in the context of the Tribunal's consideration of issues regarding jurisdiction, admissibility and the Investor's proposed amendment to its Claim.
2. NAFTA Article 1128 entitles a Party to the NAFTA to make submissions on a question of interpretation of the NAFTA. On April 23, 2001, Canada notified the Tribunal and the disputing parties that it intended to make this submission.
3. This submission is not intended to address all interpretative issues that may arise in this proceeding. To the extent that it does not address certain issues, Canada's silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.
4. Canada takes no position on any particular issues of fact or on how the interpretations it submits below apply to the facts of this case.

## **General Principles of Interpretation**

5. NAFTA Article 1131 stipulates that, "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." The applicable rules of international law include the *Vienna Convention on the Law of Treaties*<sup>2</sup> ("*Vienna Convention*"), which is generally accepted as reflecting customary international law on the interpretation of treaties.
6. The first general rule of interpretation in the *Vienna Convention* requires that the language of a treaty be interpreted in good faith, in accordance with its ordinary meaning. It must be interpreted in the context of the object and purpose of the Treaty as a whole, as disclosed by its text and annexes.<sup>3</sup>

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<sup>1</sup> Canada made its first submission to the Tribunal pursuant to NAFTA Article 1128 on November 10, 2001. This submission dealt with questions of interpretation arising in the context of the Tribunal's consideration of requests for *amicus curiae* status.

<sup>2</sup> *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980).

<sup>3</sup> *Vienna Convention*, Article 31(1): General rule of interpretation

"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." (See also the remainder of Article 31 and Articles 32 and 33).

7. Thus, words used in NAFTA Chapter Eleven are to be interpreted according to their ordinary meaning in light of the object and purpose of the NAFTA as a whole. This meaning is found in the text of the NAFTA and there is no need to resort to supplementary means of interpretation.<sup>4</sup>
8. Article 31(3)(b) of the *Vienna Convention* is of particular relevance in the context of interpretations of NAFTA provisions in respect of which all three NAFTA Parties are in agreement. Such agreements on interpretation may be a matter of public record or may be evidenced through submissions pursuant to NAFTA Article 1128. In either case, Canada agrees with the United States that they are authoritative<sup>5</sup> and are subsequent practices, within the meaning of Article 31(3)(b) of the *Vienna Convention*, which establish the agreement of the NAFTA Parties regarding the NAFTA's interpretation.<sup>6</sup>
9. When interpreting the NAFTA, tribunals should recall that the NAFTA is a treaty among three Parties, namely the sovereign states of the United Mexican States, the United States and Canada. The obligations undertaken by the three Parties, including those under NAFTA Chapter Eleven obligations, are owed by the Parties to one another and are subject to the dispute settlement procedures in NAFTA Chapter Twenty. They are not owed directly to individual investors. Nor do investors derive any rights from obligations owed to the Party of which they are nationals. Rather, the disputing investor must prove that the Party claimed against has breached an obligation owed to another Party under Section A<sup>7</sup> and that loss or damage has thereby been incurred.<sup>8</sup>

### **Article 1101**

10. The disputing parties raise a question of interpretation respecting NAFTA Article 1101. It concerns the term "relating to" and arises in the context of whether the measures impugned by Methanex Corporation "relate to" Methanex or its investments.<sup>9</sup>

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<sup>4</sup> *Ibid.* Tribunals arbitrating NAFTA Chapter Eleven claims to date have accepted the *Vienna Convention* as an applicable rule of international law within the meaning of NAFTA Article 1121. See for example, *Pope & Talbot, Inc. v. Government of Canada*, Interim Award dated June 26, 2000 at paras 65-66 and *S.D. Myers v. Government of Canada*, Partial Award dated November 13, 2000 at paras 200-3.

<sup>5</sup> Reply Memorial of the Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment (hereinafter "U.S. Reply Memorial") dated April 12, 2001 at p. 24.

<sup>6</sup> Memorial on Jurisdiction and Admissibility of Respondent United States of America (hereinafter "U.S. Memorial") dated November 13, 2000 at p.13.

<sup>7</sup> *Desona v. United Mexican States*, November 1, 1999, ICSID ARB (AF)/97/2 (NAFTA Arbitral Tribunal), para. 84 where the Tribunal noted that the Claimants were required to "point to a violation of an obligation established in Section A of Chapter Eleven attributable to the Government of Mexico."

<sup>8</sup> NAFTA Articles 1116(1) and 1117(1).

<sup>9</sup> U.S. Memorial at pp. 48-50.

11. Canada disagrees with the Investor's interpretation of "relating to".<sup>10</sup> Canada submits that for a measure to come within the scope and coverage of NAFTA Chapter Eleven, NAFTA Article 1101 requires that the measure must "relate" to an investor or an investment and not merely "affect" it.
12. To interpret "relating to" as "affect" is contrary to the rules of treaty interpretation found in the *Vienna Convention*.
13. The Tribunal must give meaning to the words chosen by the drafters of the NAFTA. As noted by the Appellate Body of the World Trade Organisation in *Reformulated Gasoline*,<sup>11</sup> this is implicit in the *Vienna Convention's* general rule of interpretation:
- One of the corollaries of the "general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.
14. Had the NAFTA Parties intended Chapter Eleven to cover any measure that merely "affects" investors or their investments, they would have expressly said so. The drafters of the NAFTA chose specific language, fully aware of differences reflected in other provisions of NAFTA.
15. For example, the NAFTA includes several articles dealing with the coverage of certain Chapters where the drafters of NAFTA selected the more general term "affect" to denote that a lesser extent of connection was required. These include:
- (a) Article 709 of Section B of NAFTA Chapter Seven which provides, *inter alia* that: "... this Section applies to any [sanitary and phytosanitary] measure of a Party that may, directly or indirectly, affect trade between the Parties"; (emphasis added)
  - (b) Article 901 of NAFTA Chapter Nine which provides, *inter alia*: "This Chapter applies to standard-related measures...that may directly or indirectly, affect trade in goods or services between the Parties...". (emphasis added)
16. It follows that "relating to", when considered in the context of NAFTA as a whole and the specific examples cited above, must be interpreted as having a more direct relationship than something that merely affects an investor or its investment.

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<sup>10</sup> Claimant Methanex Corporation's Counter-Memorial on Jurisdiction (hereinafter "Methanex Counter-Memorial") at pp. 46-52.

<sup>11</sup> *United States – Standards for Reformulated and Conventional Gasoline (Complaint by Brazil and Venezuela)* (1996), WTO Doc. WT/DS2/AB/R AB-1996-1 at page 23 (Appellate Body Report) ("*Reformulated Gasoline*").

17. WTO cases considering the expression “relating to” in Article XX (g) of the GATT, have found that the term imported the need for a “substantial relationship”, more than “merely incidentally or inadvertently aimed at”.<sup>12</sup>

18. Article XX(g) of the *General Agreement on Tariffs and Trade 1947* (“GATT”)<sup>13</sup> states:

Article XX General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

...

19. The Panel in the *Salmon and Herring*<sup>14</sup> case made the following observations about the term “relating to”:

Article XX(g) does not state how the trade measures are to be related to the conservation and how they have to be conjoined with the production restrictions. This raises the question of whether any relationship with conservation and any conjunction with production restrictions are sufficient for a trade measure to fall under Article XX(g) or whether a particular relationship and conjunction are required.

...

The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as “relating to” conservation within the meaning of Article XX(g).

20. Later WTO Appellate Body Reports have confirmed the conclusion in *Salmon and Herring*. In *Reformulated Gasoline*<sup>15</sup> and *United States - Import Prohibition of Certain Shrimp and Shrimp Products*<sup>16</sup>, the Appellate Body reviewed the jurisprudence and found that the term “relating to” was synonymous with “primarily aimed at”.

<sup>12</sup> See *Reformulated Gasoline* at pp. 14-19.

<sup>13</sup> *General Agreement on Tariffs and Trade*, October 30, 1947, 58 U.N.T.S. 187 (entered into force January 1, 1948), as set out in *Reformulated Gasoline*, at page 13.

<sup>14</sup> *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon (Complaint by United States)* (1988), WTO Doc. L/6268-35S/98 at paras 4.5 and 4.6 (Panel Report)

<sup>15</sup> See *Reformulated Gasoline* at pages 14-19.

<sup>16</sup> *United States - Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India et al.)* (1998), WTO Doc. WT/DS58/AB/R at paras 136-37 (Appellate Body Report).

21. This must be contrasted with the use of the word “affecting” as interpreted in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*<sup>17</sup>:

We note that Article I:1 of the GATS provides that “[t]his Agreement applies to measures by Members affecting trade in services”. In our view, the use of the term “affecting” reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word “affecting” implies a measure that has “an effect on”, which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term “affecting” in the context of Article III of the GATT is wider in scope than such terms as “regulating” or “governing” [footnote omitted].

22. The NAFTA Parties clearly did not intend that every regulatory measure of general application which merely affects or has an incidental, minimal, or inadvertent effect on an investor, or its investment, would give rise to a claim under NAFTA Chapter Eleven.

23. Furthermore, Canada agrees with the United States that the term “relating to” requires a “significant connection between the measure at issue and the essential nature of investment.”<sup>18</sup>

24. The award by the tribunal arbitrating *Pope & Talbot, Inc. v. Canada* failed to appreciate that only where a significant connection exists between the measure at issue and the essential nature of investment can a claim be arbitrated under NAFTA Chapter Eleven. Where such a significant connection does not exist and the measure is more significantly connected to a matter addressed elsewhere in the NAFTA, NAFTA Chapter Twenty is the applicable dispute settlement mechanism.

## **Article 1105**

25. The disputing parties raise questions of interpretation respecting NAFTA Article 1105. These include the interpretation of the words “international law”,<sup>19</sup> “fair and equitable treatment”<sup>20</sup> and “full protection and security”.<sup>21</sup>

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<sup>17</sup> *European Communities - Regime for the Importation, Sale and Distribution of Bananas (Complaint by Ecuador et al.)* (1997), WTO Doc. WT/DS27/AB/R at para. 220 (Appellate Body Report).

<sup>18</sup> U.S. Memorial at pp. 48-9 and U.S. Reply Memorial at pp. 43-44.

<sup>19</sup> Draft Amended Claim at pp. 58-65. U.S. Reply Memorial at pp. 30-33.

<sup>20</sup> Methanex’s Counter-Memorial at pp. 8-11. U.S. Reply Memorial at pp. 23-27.

<sup>21</sup> Draft Amended Claim at pp. 65-66. U.S. Reply Memorial at pp. 37-39.

26. Canada agrees with the disputing parties that NAFTA Article 1105 incorporates the international minimum standard of treatment recognized by customary international law. More significantly, it is a matter of public record that the three NAFTA Parties are in agreement on this interpretation.<sup>22</sup>
27. NAFTA Article 1105 sets out the obligation to accord a minimum standard of treatment. NAFTA Article 1105 is not a catch-all for every grievance or disappointment<sup>23</sup> that a foreign investor may raise.
28. At customary international law, a breach of the minimum standard of treatment requires a finding that the conduct in question falls below the standards that are applied by States with reasonably developed legal systems. As its name suggests, the standard is the minimum standard that States have demanded for treatment of their nationals operating abroad, and has been employed as a safety net in cases where the treatment extended by certain States to their nationals has fallen below the international minimum.
29. The *Canadian Statement of Implementation* for NAFTA confirms that Article 1105 incorporated that particular body of customary international law concerning the treatment of foreign investments. It states:
- Article 1105, which provides for treatment in accordance with international law, is intended to assure a minimum standard of treatment of investments of NAFTA investors. National treatment provides a relative standard of treatment, while this article provides for a minimum absolute standard of treatment based on long-standing principles of customary international law.<sup>24</sup>
- “international law”***
30. Canada submits that the expression “international law”, which is a portion of the expression “in accordance with international law” in NAFTA Article 1105, does not incorporate international treaties, such as WTO agreements.
31. The expression “international law” must be interpreted in the context of the NAFTA text. This context clearly indicates that the expression “in accordance with international law” in NAFTA Article 1105 was not intended to include treaty provisions.
32. If “in accordance with international law” were interpreted as incorporating international treaties, then the intent of the NAFTA Parties to restrict the types of claims arbitrable pursuant to NAFTA Chapter Eleven<sup>25</sup> would be frustrated.

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<sup>22</sup> See U.S. Reply Memorial at p. 26.

<sup>23</sup> *Desona v. United Mexican States*, November 1, 1999, ICSID ARB (AF)/97/2 (NAFTA Arbitral Tribunal), para. 83.

<sup>24</sup> *Canadian Statement of Implementation for NAFTA*, Canada Gazette, Part I, January 1, 1994 at p. 149.

<sup>25</sup> See Articles 1116 and 1117.

The NAFTA Parties did not intend for Article 1105 to bring into NAFTA Chapter Eleven dispute settlement claims alleging breaches of NAFTA provisions that incorporate<sup>26</sup> or are based upon<sup>27</sup> GATT/WTO provisions.

**“fair and equitable treatment”**

33. Canada submits that “fair and equitable treatment” is subsumed in the international minimum standard of treatment recognized by customary international law. Article 1105 does not create, as the Investor suggests,<sup>28</sup> a heightened standard of fair and equitable treatment.
34. To suggest that this concept broadens the customary international law definition of minimum standard of treatment is inconsistent with the ordinary wording contrary to the interpretive provision of the *Vienna Convention*.
35. Two leading authorities on bilateral investment treaties, Dolzer and Stevens,<sup>29</sup> affirm this interpretation. As they note, some have suggested that the term “fair and equitable treatment” envisages conduct that goes beyond the minimum standard and affords a greater breadth of protection to investments than does the customary international law minimum standard.
36. However, Dolzer and Stevens recognise that such a debate is irrelevant in the context of NAFTA Chapter Eleven where the express words of Article 1105 make it clear that fair and equitable treatment is but one aspect of the international minimum standard of treatment. They conclude:
- “[I]n NAFTA, the fair and equitable standard is explicitly subsumed under the minimum standard of customary international law.”
37. The three NAFTA Parties agree that “fair and equitable treatment” is explicitly subsumed under the minimum standard of treatment at customary international law.<sup>30</sup> Article 31(3)(b) of the *Vienna Convention* instructs that such agreement of the Parties regarding the interpretation of this provision shall be taken into account.
38. The tribunal arbitrating *Pope & Talbot, Inc. v. Government of Canada* arrived at an incorrect interpretation of “fair and equitable”. It interpreted Article 1105(1) in a manner such that “fair and equitable treatment” was “additive to

<sup>26</sup> See for example Articles 301 and 309.

<sup>27</sup> See for example Section B of Chapter Seven and intellectual property rights in Chapter Seventeen, which were based on drafts of their WTO counterparts.

<sup>28</sup> Methanex’s Counter-memorial at pp. 8-11.

<sup>29</sup> R. Dolzer & M. Stevens, *Bilateral Investment Treaties*, (The Netherlands: Martinus Nijhoff, 1995) p. 60.

<sup>30</sup> See U.S. Reply Memorial at pp. 23-4.



the requirements of international law.”<sup>31</sup> This interpretation ignores the first general rule of interpretation in the *Vienna Convention*.<sup>32</sup> Had it interpreted the word “including” according to its ordinary meaning and the term “fair and equitable treatment” in the context of the NAFTA as opposed to in the context of other investment treaties to which the United States is a party, Canada submits that the tribunal could only have arrived at an interpretation consistent with that of Dolzer and Stevens and the three NAFTA Parties.

**“full protection and security”**

39. For the aforementioned reasons, Canada also submits that “full protection and security” is subsumed in the international minimum standard of treatment recognized by customary international law.

40. Contrary to the Investor’s suggestion,<sup>33</sup> the obligation to provide “full protection and security” does not impose upon a NAFTA Party an obligation to protect a foreign investment from economic harm inflicted by third parties. If “full protection and security” were interpreted in the manner suggested by the Investor, it would constitute an interpretation inconsistent with one derived by resort to the ordinary meaning as prescribed by the *Vienna Convention’s* general rule of interpretation.

41. Canada agrees with the United States that the Investor’s suggestion would broaden the requirement to provide full protection and security to foreign investors beyond that which is contemplated by the international minimum standard of treatment recognized by customary international law.<sup>34</sup> The Investor’s interpretation cannot stand.

**Articles 1116 and 1117**

42. The disputing parties raise questions of interpretation respecting NAFTA Articles 1116 and 1117. One concerns the interpretation of the term “has incurred loss or damage” by reason of a measure where the issue of whether the measure has been adopted is in dispute.<sup>35</sup> Another concerns the interpretation of the term “by reason of, or arising out of” in the context of a dispute respecting whether a measure proximately causes loss or damage.<sup>36</sup>

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<sup>31</sup> *Pope & Talbot, Inc. v. Government of Canada*, Award on the Merits in Phase 2 dated April 10, 2001 at para. 110.

<sup>32</sup> *Vienna Convention*, Article 31(1): General rule of interpretation

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.

<sup>33</sup> Draft Amended Claim at pp. 65-66.

<sup>34</sup> See U.S. Reply Memorial at p. 38.

<sup>35</sup> U.S. Memorial at pp.50-62; Methanex Counter-memorial at pp. 23-31; U.S. Reply Memorial at pp.46-50.

<sup>36</sup> U.S. Memorial at pp. 15-30; Methanex Counter-memorial at pp. 31-38; U.S. Reply Memorial at pp. 6-18.

43. Articles 1116 and 1117 determine which claims may be submitted to arbitration pursuant to NAFTA Chapter Eleven. Only claims by NAFTA investors that have incurred loss or damage by reason of, or arising out of, a breach of Section A of NAFTA Chapter Eleven (and certain articles of Chapter Fifteen) may be submitted to arbitration.

***“has incurred loss or damage”***

44. Canada submits that the term “has incurred loss or damage” operates so as to bar the submission of claims for prospective loss or damage.

45. A claim may be submitted only if the investor incurred some loss or damage before submitting a claim. The claim must crystallize before it can be submitted. Two elements are significant in terms of crystallization: there must be a breach of Section A of NAFTA Chapter Eleven as well as a loss or damage. It follows that an investor cannot submit a claim based on a loss or damage that it will incur for the first time at some point after the date it submitted its claim.

46. The ordinary meaning of the term “has incurred loss or damage” yields an interpretation that the loss or damage occurred in the past. That is, the verb tense indicates that the loss or damage was sustained by an investor prior to such investor submitting a claim to arbitration pursuant to NAFTA Chapter Eleven.

***“by reason of, or arising out of”***

47. The ordinary meaning of the words “by reason of, or arising out of” establishes that there must be a clear and direct nexus between the breach and the loss or damage incurred. In other words, the breach of the obligation must cause the loss or damage.

48. To sustain a claim under Chapter Eleven, an investor must have incurred loss or damage by reason of, or arising out of, the breach.

**Article 1121**

49. The disputing parties raise a question of interpretation respecting NAFTA Article 1121. Specifically, the question concerns the requirements in terms of the waiver an investor must include in the submission of its claim to arbitration

pursuant to NAFTA Chapter Eleven dispute settlement.<sup>37</sup> Canada agrees with the interpretation submitted by the United States.

50. The Tribunal has no jurisdiction to arbitrate a claim where the investor does not comply with the requirements of Section B of Chapter Eleven.
51. Section B, the authority for investor-State arbitration under the NAFTA, sets out several mandatory requirements that must be complied with to bring a claim. The steps to be followed are: initiate a claim by a Notice of Intent setting out the factual basis of the claim (Article 1119 of the NAFTA); submit the claim in the Notice of Arbitration pursuant to the NAFTA and the UNCITRAL Arbitration Rules (Article 1120(1)(c) of the NAFTA and Article 3 of the UNCITRAL Arbitration Rules); make the claim after at least six months have elapsed since the events giving rise to the claim (Article 1120(1) of the NAFTA); and include in the claim written consent and waivers as conditions precedent for submitting a claim to arbitration (Article 1121 of the NAFTA).
52. While the NAFTA Parties agreed to permit claims to be brought against them by investors of another Party, their agreement is confined to the terms they set in negotiating the provisions in Section B. This is made clear in Article 1122, which confirms the NAFTA Parties' consent to investor-State dispute settlement, but specifically "*in accordance with* the procedures set out in this Agreement" (italics added). Failure to observe these requirements means that an investor cannot access the dispute settlement mechanism under Section B of Chapter Eleven.
53. Article 1121 is entitled "*Conditions Precedent to Submission of a Claim to Arbitration*" (italics added). The relevant parts provide:
1. A disputing investor may submit a claim under Article 1116 *only if*:
    - (a) the investor consents to arbitration *in accordance with the procedures set out in this Agreement*; and
    - (b) the investor, and where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

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<sup>37</sup> U.S. Memorial at pp. 70-78; Methanex's Counter-memorial at pp. 52-54; U.S. Reply Memorial at pp. 54-55.

3. ...  
A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party *and shall be included in the submission of a claim to arbitration.* (italics added)

54. Article 1121 of the NAFTA leaves no room for doubt. The requirement to file a consent to arbitration and legally valid waivers of the right to pursue “any proceedings with respect to the measure” in the domestic courts or tribunals of a State Party is a “condition precedent”, and the right to submit a claim to arbitration is available “only if” the investor complies with Article 1121.

55. Article 1121 is designed to protect the integrity of a NAFTA State Party's domestic court system. The State Party must have assurances from the investor that it is committed to a single forum for resolving its claim to monetary damages. This is necessary to avoid forum shopping, procedural harassment and double jeopardy.

### **Article 1139 - definition of “investment”**

56. The disputing parties raise a question of interpretation respecting the definition of “investment” found in NAFTA Article 1139. The Investor argues that the definition includes market share, market access, operations and goodwill (i.e. customers cultivated by the investment).<sup>38</sup> The United States submits that it does not.<sup>39</sup>

57. Article 1139 lists eight legal interests that are to be considered an investment for the purposes of NAFTA Chapter Eleven.

58. Only those legal interests listed in the definition of the word “investment” at Article 1139 are protected through the observance by the NAFTA Parties of their obligations set out in Section A of NAFTA Chapter Eleven.

59. The definition of “investment” in NAFTA Article 1139 provides a list of investments covered by Chapter Eleven and, more particularly, NAFTA Article 1110. This definition is exhaustive, not illustrative. As Antonio Parra, Deputy Secretary General of the International Centre for the Settlement of Investment Disputes (ICSID) notes:

In addition, in contrast to the all-inclusive definitions of covered investments found in most of the other treaties, the NAFTA's definition provides an exhaustive (though admittedly very broad) enumeration, rather than an open-ended, illustrative list, of covered assets or investments that the NAFTA requires be related to an “enterprise,” to “business purposes” or to a “commitment of resources” to “economic activity” in the host State. In addition, the definition in the NAFTA specifically

<sup>38</sup> Draft Amended Claim at p. 68; Methanex's Counter-memorial at p. 17.

<sup>39</sup> U.S. Memorial at pp. 31-38; U.S. Reply Memorial at pp. 39-43.

excludes from the scope of covered investments commercial contracts for the sale of goods or services. More than most of the other treaties, the NAFTA can in other words be seen as providing a definition of covered investments, and hence of covered investment disputes, that attempts clearly to distinguish them from trade and other non-investment assets and disputes.<sup>40</sup>

60. “Market share, market access, operations and goodwill” are obviously not tangible property.
61. The Tribunal must determine whether “market share, market access, operations and goodwill” are recognized as intangible property. Examples of intangible property rights recognised at law include trademarks, copyrights, patents and contract rights. Intangible property is capable of being acquired and owned by a person. An owner of intangible property is able to exclude others from its use.<sup>41</sup>
62. Acquisition, ownership and exclusion of others from use are fundamental characteristics of property, be it tangible or intangible. Canada submits that the tribunal arbitrating *Pope & Talbot, Inc. v. Canada*, by ignoring these fundamental characteristics of property, erred in equating “access to the ... market [of a NAFTA Party]” to intangible property.<sup>42</sup>

All of which is respectfully submitted,

Boris Uléhla  
Counsel for the Government of Canada

April 30, 2001

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<sup>40</sup>Antonio R. Parra, “Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment” (1997) 12 No. 2 ICSID Rev. 287, pp. 355-356.

<sup>41</sup>Bruce Ziff, *Principles of Property Law*, (Ontario: Carswell, 1996), p. 72.

<sup>42</sup>*Pope & Talbot, Inc. v. Canada*, Interim Award dated June 26, 2000 at pp. 32-33.